COURT OF APPEALS
DECISION
DATED AND FILED

December 18, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP372-CR **Cir. Ct. No. 2009CF418**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL S. THORNTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR and JON M. THEISEN Judges. *Reversed and cause remanded*.

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Paul Thornton appeals a judgment, entered upon a jury verdict, convicting him of attempted first-degree sexual assault of a child, and

an order denying his postconviction motion. On appeal, the State concedes the trial court erroneously excluded the testimony of two of Thornton's character witnesses. We conclude the mistake adversely affected Thornton's right to present a defense and constitutes plain error under WIS. STAT. § 901.03(4).[1] We reverse and remand for a new trial on that basis.

BACKGROUND

¶2 Thornton was charged with attempted sexual assault of a child. At trial, Rebecca, A.R.'s mother, testified that she and her husband had some friends over for a house party, including Thornton and his wife. In the evening, Rebecca left A.R. and her son in the living room to watch a movie and fall asleep as the adults gathered outside. At some point, Rebecca, from outside the house, saw Thornton in the kitchen speaking with her husband. She later observed Thornton standing in the living room. Based on his position, she was concerned he was going to urinate inside the house.[2] Rebecca entered the living room, grabbed Thornton's arm, and pulled him outside. Thornton was not near A.R. at the time Rebecca entered the living room.

¶3 Rebecca discovered A.R. awake a short time later. A.R. was a deep sleeper and wore a "pull-up" diaper to bed. When Rebecca took a blanket off A.R., she discovered A.R. did not have any bottoms on. A.R.'s pajama pants and pull-up were on a tote a few feet away from her. When asked how they got there,

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] At trial, Rebecca simulated Thornton's position when she observed him. Thornton's counsel stated for the record that Rebecca "appeared to have her elbows out a little bit to the sides and her hand somewhere in the vicinity of her waist."

A.R. responded that Thornton had taken them off, but A.R. could not recall much else. Rebecca asked whether Thornton had touched A.R.'s bottom; A.R. responded that he had not.

¶4 Rebecca called Thornton's wife, who had left earlier, to pick him up. A.R. returned to bed, but Rebecca decided to take her to the hospital "just to get her checked out." The examining doctor found no evidence of trauma or sexual assault, and Rebecca declined to have a separate sexual assault examination performed. Nonetheless, as a mandatory reporter, the examining doctor contacted the police.

¶5 Thornton testified that he was contacted by police the next day. He told them he had been drinking and could not recall what happened. However, a day after the interview, Thornton removed a tick from himself and remembered that A.R. had asked for his help because she felt something crawling on her. Thornton was aware ticks were common at A.R.'s home and attempted to examine her. He removed her pajama pants, explaining that A.R.'s pull-up unintentionally came off with them. He found nothing, and A.R. covered herself with a blanket without putting her clothes back on.

¶6 A.R. stated she could not really remember what happened, and, though she could not exactly see, Thornton pulled down his pants a little while he was across the room. A.R. provided conflicting pretrial statements about whether she saw Thornton's penis.

¶7 At a status conference, the State objected to two of Thornton's character witnesses because the prosecutor did not "think that there is an exception that allows them to testify about the defendant's truthfulness if I'm not alleging a pattern or character trait of lying." The State cited WIS. STAT. § 906.08(1)(b),

which the court interpreted to mean that "if the defendant in this case testifies, then there can be testimony of his truthful character only if his character for truthfulness has been attacked." Although the parties engaged in a lengthy discussion about the propriety of admitting the evidence, Thornton concedes he did not object to the court's ultimate conclusion that the evidence would not be permitted.

¶8 Thornton was convicted and filed a postconviction motion, which was heard on February 10, 2012. The State stipulated that WIS. STAT. § 906.08(1)(b) permits evidence of a testifying defendant's truthful character even if his or her truthfulness is not first attacked. The court found that the two character witnesses were "very credible" and their testimony "would have been helpful" to Thornton. Nonetheless, the court denied the motion. Thornton appeals.

DISCUSSION

¶9 We begin with what is not in dispute: the trial court erroneously excluded relevant evidence of Thornton's character. The pertinent statute, WIS. STAT. § 906.08(1)(b), provides that reputation or opinion evidence supporting the truthful character of a witness is generally admissible only after the character of the witness has been attacked. However, this limitation does not apply to an accused testifying on his own behalf. ***Id.*** As a result, the statute did not bar Thornton from offering evidence of his truthful character to bolster his credibility. The State concedes the trial court erred by concluding otherwise. Because the trial was essentially a credibility contest, this evidence was vital to Thornton's defense. *See* ***Edgington v. United States***, 164 U.S. 361, 366 (1896) (evidence of a good character, standing alone, may be sufficient to create a reasonable doubt).

¶10 Thornton argues the mistake entitles him to a new trial under three theories: ineffective assistance of trial counsel, plain error, and in the interests of justice. He concedes his trial counsel failed to object to the wrongful exclusion of the evidence or to make an offer of proof regarding the excluded testimony. The State contends that this makes ineffective assistance of counsel, rather than plain error review, the "appropriate framework for analyzing Thornton's claim." As support, the State cites ***State v. Carprue***, 2004 WI 111, 274 Wis. 2d 656, 683 N.W.2d 31, and ***State v. Jones***, 2010 WI App 133, 329 Wis. 2d 498, 791 N.W.2d 390, *review denied*, 2011 WI 15, 331 Wis. 2d 47, 794 N.W.2d 901.

¶11 The plain error doctrine is well-established in Wisconsin jurisprudence. It is codified in WIS. STAT. § 901.03, which describes the effect of an erroneous evidentiary ruling but states that "[n]othing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge." Plain error is error so fundamental, obvious, and substantial that a new trial or other relief must be granted even though the action was not objected to at the time. ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77. Plain error is ipso facto prejudicial because it affects a substantial right. ***Virgil v. State***, 84 Wis. 2d 166, 190, 267 N.W.2d 852 (1978) (plurality). Accordingly, if a defendant establishes plain error, the burden shifts to the State to prove beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. ***Jorgensen***, 310 Wis. 2d 138, ¶23.

¶12 Lack of a contemporaneous objection is no bar to application of the plain error doctrine. The doctrine's statutory basis proclaims that such errors may entitle a defendant to relief even if not brought to the attention of the judge. *See* WIS. STAT. § 901.03(4). Wisconsin courts have repeatedly analyzed unobjected to

error using the plain error doctrine. *See* ***Jorgensen***, 310 Wis. 2d 138, ¶24 n.7 (citing ***State v. Gustafson***, 119 Wis. 2d 676, 350 N.W.2d 653 (1984), *modified*, 121 Wis. 2d 459, 359 N.W.2d 920 (1985); ***State v. Sonnenberg***, 117 Wis. 2d 159, 344 N.W.2d 95 (1984); ***Virgil***, 84 Wis. 2d 166; ***State v. King***, 205 Wis. 2d 81, 555 N.W.2d 189 (Ct. App. 1996)). "Under the doctrine of plain error, an appellate court may review error that was otherwise waived by a party's failure to object properly or preserve the error for review as a matter of right." ***State v. Mayo***, 2007 WI 78, ¶29, 301 Wis. 2d 642, 734 N.W.2d 115.

¶13 Neither ***Carprue*** nor ***Jones*** states that clear, but unchallenged, evidentiary error must be analyzed under the ineffective assistance of counsel framework. Indeed, neither case even mentions the plain error doctrine. In ***Carprue***, 274 Wis. 2d 270, ¶29, the judge, without objection, called and questioned a witness on its own initiative and questioned the defendant about a letter he wrote to another judge. In the course of rejecting the defendant's abuse of judicial authority argument, the supreme court, emphasizing the importance of a contemporaneous objection, observed that the normal procedure is to evaluate such waived error within the rubric of ineffective assistance of counsel. ***Id***, ¶¶45-46. The ***Jones*** court simply parroted ***Carprue***'s language in holding that the defendant forfeited his right to direct review of potentially erroneous testimony. ***Jones***, 329 Wis. 2d 498, ¶25. Neither case held that the plain error doctrine is inapplicable to waived evidentiary error.

¶14 In any event, as the proponent of the evidence, Thornton had no duty to object to the court's erroneous conclusion. Therefore, we need not treat the court's erroneous evidentiary determination as unpreserved error. This does not preclude application of the plain error doctrine. Wisconsin courts are specifically empowered to take notice of plain errors affecting substantial rights. *See* WIS.

STAT. § 901.03(4). The last dependent clause of that statute states that such errors are reviewable "although they were not brought to the attention of the judge." ***Id.*** This clause permits review of unpreserved error, but does not require forfeiture as a condition precedent to application of the doctrine.

¶15 Accordingly, we proceed to consider whether the erroneous exclusion of Thornton's character witnesses affected Thornton's substantial rights. *See* WIS. STAT. § 901.03(4). Thornton must show that the error was one of constitutional dimension. *See* ***Jorgensen***, 310 Wis. 2d 138, ¶21. The plain error doctrine should be used sparingly, where, for example, "'a basic constitutional right has not been extended to the accused.'" ***Id.*** (quoting ***King***, 205 Wis. 2d at 91).

¶16 Thornton argues that the exclusion of the character evidence violated his constitutional rights to due process and to present a defense. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, … or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, … the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" ***Crane v. Kentucky***, 476 U.S. 683 (1986) (quoting ***California v. Trombetta***, 467 U.S. 479 (1984)). "The right … to call witnesses in one's own behalf ha[s] long been recognized as essential to due process." ***Chambers v. Mississippi***, 410 U.S. 284, 294 (1973). Indeed, few rights are more fundamental. ***Id.*** at 302.

¶17 Here, the character evidence was critical because the trial was a credibility contest. The only firsthand witnesses to the events in the living room were both readily subject to attack; Thornton was intoxicated at the time of the alleged assault and A.R. was a young child who provided inconsistent statements.

The circuit court found both of Thornton's character witnesses were "very credible" and would have provided helpful testimony. Accordingly, the State has failed to prove beyond a reasonable doubt that a rational jury would have found Thornton guilty in light of this critical testimony from credible witnesses.

¶18 In presenting a defense, an accused must comply with established rules of procedure and evidence to "assure both fairness and reliability in the ascertainment of guilt and innocence." ***Id.*** at 302. This is equally true of the State. *See* ***id.*** The State concedes it lacked a legitimate basis in law to object to evidence of Thornton's truthful character. Thus, there was no valid state interest to balance against Thornton's interest in presenting the evidence. *See* ***Holmes v. South Carolina***, 547 U.S. 319, 324-25 (2006). We conclude the trial court's plain error entitles Thornton to a new trial.[3] The right to present a defense "would be an empty one if the State were permitted to exclude competent, reliable evidence" bearing on a defendant's credibility. *See* ***Crane***, 476 U.S. at 690-91.

By the Court.—Judgment and order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[3] Thus, we have no need to address Thornton's arguments regarding ineffective assistance of counsel and reversal in the interests of justice.