COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0791-CR **Cir. Ct. No. 00 CF 1684**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ELLIOTT D. RAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: KITTY K. BRENNAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Elliott D. Ray appeals from a judgment of conviction, following his jury trial, for first-degree reckless homicide, party to a crime, two counts of first-degree recklessly endangering safety, party to a crime, and possession of a firearm by felon. He argues that: (1) his confrontation rights were violated by the admission of statements of non-testifying co-actors; (2) the

court erred in denying his mistrial motion based on the State's reference to his felony record; and (3) he was sentenced based on inaccurate information. We affirm.

I. BACKGROUND

¶2 Ray was one of several gunmen involved in a March 25, 2000 retaliation shoot-out on North 29th Street, which injured Tenifa Jones and Jermaine Savage and killed eleven-year-old Rita Martinez. Trial evidence established that on the night before the deadly shoot-out, Ray and his friends were involved in another shooting outside Alex's Tavern on 30th and Brown Streets. Ray told police that he and a group of friends exchanged gunfire with another group of men after Ray's friend, Jonathan Booth, had an altercation with a patron from the tavern. Ray testified that the next day, he and several of his friends were at Sylvester Townsend's residence discussing the incident when they decided to "'F' them niggers . . . and go down there on 29th and get them . . . ." The men then gathered their guns and headed toward North Avenue. Ray testified that when he arrived at North Avenue, he "just turned around like, Fuck it, I ain't going." He noted that as he turned around, two of the other men he was with called him names, implying that he was afraid. Ray said he returned to Townsend's house and, shortly thereafter, learned from a television news report that a child had been shot in the vicinity of 29th Street.

¶3 At trial, Ray claimed that he had withdrawn from the conspiracy to seek revenge and, therefore, was not guilty. To rebut his claim, the State introduced his statement to police, in which Ray, reacting to his co-actors' statements implicating him in the shooting, offered to tell the police everything if

they first told him which gun killed Martinez. The jury rejected Ray's defense and found him guilty of the charges.

II. ANALYSIS

¶4 Ray first argues that his constitutional rights were violated when a police detective, testifying at his trial, referred to confessions of non-testifying co-actors. Ray concedes that he is not entitled to have his challenge reviewed as a matter of right, given that he did not object at trial. He argues, however, that the admission of such consequential hearsay constituted plain error requiring reversal of his convictions. *See* WIS. STAT. § 901.03(4).[1] We disagree.

¶5 To obtain relief under the plain error doctrine, a defendant must first establish that a constitutional error occurred at trial and that the error was clear or obvious. ***State v. Frank***, 2002 WI App 31, ¶25, 250 Wis. 2d 95, 640 N.W.2d 198. A defendant's constitutional right to confrontation may be violated if a co-actor's confession is admitted at trial as substantive evidence of the defendant's guilt, the co-actor does not testify at trial, and the co-actor's confession is not sufficiently reliable to warrant its uncross-examined admission into evidence against the defendant. ***Lee v. Illinois***, 476 U.S. 530, 539-46 (1986). No violation occurs, however, if the co-actor's statement was not introduced as substantive evidence to prove the truth of the co-actor's assertions. ***Tennessee v. Street***, 471 U.S. 409, 413-14 (1985). Further, an out-of-court statement is hearsay only if it is offered to show the truth of the matters asserted in the statement. *See* WIS. STAT.

[1] WISCONSIN STAT. § 901.03(4) (1999-2000), provides: "PLAIN ERROR. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge. A plain error is one that is both obvious and substantial or grave, and the rule is reserved for cases where there is the likelihood that the error has denied a defendant a basic constitutional right. ***State v. Vinson***, 183 Wis. 2d 297, 303, 515 N.W.2d 314 (Ct. App. 1994).

§ 908.01(3) (1999-2000) ("'Hearsay' is a statement, other than one made by the declarant while testifying . . . offered in evidence to prove the truth of the matter asserted.").[2] If the statement is offered only to prove that the statement was made, a confrontation issue does not arise. *See* ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 426-27, 430, 351 N.W.2d 758 (Ct. App. 1984). A statement is not hearsay, and does not implicate the Confrontation Clause, if it is offered, not for its truth, but to explain the prior, concurrent or subsequent conduct of another person. *See* ***id.*** at 430; *see also* ***State v. Adams***, 221 Wis. 2d 1, 14-15, 584 N.W.2d 695 (Ct. App. 1998).

¶6 The State elicited testimony from Detective Daniel Phillips who related Ray's entire statement, including those portions in which he responded to what Phillips told him were two of his co-conspirators' statements implicating him in the shooting. Detective Phillips testified that, during the police interview, Ray said he took a gun and started walking toward 29th Street with the others to shoot at a rival group, but that he turned back before they reached their destination; that he was not present and did not participate when the shoot-out occurred. Detective Phillips then read from Ray's statement:

> Ray was then confronted with numerous statements made by co-actors that they were present [at the] shooting on 29th Street and so was Ray.
>
> Ray then stated "those stupid niggers shouldn't be talking and they can't talk for me."
>
> When confronted with statements by Black (Miriam Myles, black male, 5/7/80) that Ray was shooting a nine-millimeter on 29th Street in a statement by Sylvester Townsend, black male 9/20/73, that Ray had a .45-caliber

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

> pistol[,] Ray then said "tell me which gun killed the girls and I'll tell you everything."
>
> When told by detectives that this information could not be given to him at this time, Ray said he was afraid of "fucking himself" and Ray said he needed some time to think and then would talk to the detectives again.

¶7 Ray maintains that the inclusion of his co-actors' statements constituted plain error. We disagree. Here, the detective's references to the co-actors' statements were not offered to prove the "truth of the matter" contained in the statements, *see* WIS. STAT. § 908.01(3), but rather, to show Ray's reaction to his co-actors' statements placing him at the scene, shooting a gun—a reaction implicating him in the revenge-seeking conspiracy. Clearly, therefore, the statements were not hearsay and Ray is not entitled to reversal based on plain error.

¶8 Ray next argues that the court erred in denying his motion for a mistrial after the State inadvertently referred to him as a felon in possession of a firearm during its closing argument. We disagree.

¶9 The decision to declare a mistrial is within the sound discretion of the trial court. ***State v. Copening***, 100 Wis. 2d 700, 710, 303 N.W.2d 821 (1981). Our review is limited to whether the trial court erroneously exercised discretion in refusing to declare a mistrial. ***State v. Pankow***, 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988). A trial court properly exercises discretion when it examines the relevant facts, applies the proper standard of law, and engages in a rational decision-making process. ***Schultz v. Darlington Mut. Ins. Co.***, 181 Wis. 2d 646, 656, 511 N.W.2d 879 (1994). A misstatement in a prosecutor's closing argument does not justify relief unless the misstatement, viewed in the context of the entire case, so infected the trial with unfairness that the defendant was denied the right to

a fair trial. ***State v. Wolff***, 171 Wis. 2d 161, 166-68, 491 N.W.2d 498 (Ct. App. 1992).

¶10 Prior to trial, the parties agreed that the State would refer to Ray as a "prohibited person," rather than a "felon," for purposes of prosecuting the felon-in-possession-of-firearm charge. Ray stipulated to the status element of the offense and, pursuant to the parties' agreement, the jury was instructed: "The defendant had been prohibited from possessing a firearm on March 24, 2000. The parties have agreed that the defendant was prohibited from possessing a firearm on March 24, 2000, and you must accept this as conclusively proven."

¶11 During closing argument, the prosecutor, explaining his perception of Ray's trial strategy, stated that Ray was trying to establish that the police were "pin[ning] this on [him]" and that, as part of his strategy, Ray was admitting to possessing a gun, hoping that the jury would compromise and convict him of that charge but not the others. While commenting on this strategy the prosecutor misspoke, stating: "[I]t's a good strategy. It's a good bill of goods, if you will, to admit to that felon in possession—the prohibited person in possession of a firearm charge." The defense immediately requested a sidebar and subsequently requested a mistrial. Denying Ray's request, the court commented that it was not even sure the jurors had heard the slip-of-the-tongue, and concluded that any error was insignificant in light of the entire proceeding. We agree.

¶12 Even if the jury did hear the comment, the content of the slip was inconsequential. Ray's trial lasted several days. The prosecutor's inadvertent use of "felon" instead of "prohibited person," which was immediately corrected, consisted of one word in a lengthy closing argument. It involved the one crime for which Ray admitted guilt.

¶13 Moreover, notwithstanding the stipulation, a defendant's felony status may be revealed to the jury. *See* ***State v. Nicholson***, 160 Wis. 2d 803, 807, 467 N.W.2d 139 (Ct. App. 1991) (It is not reversible error for the "trial court to permit the revelation to the jury of the defendant's felon status. Reversible error would only arise when the nature of that felony were revealed to the jury despite the offer to stipulate.") Indeed, under the jury instructions, the jury is informed that "the parties have agreed that the defendant was convicted of a felony…." WIS JI—CRIMINAL 1342 (2000). The trial court did not err in denying Ray's request for a mistrial.

¶14 Finally, Ray argues that he was sentenced based on inaccurate information—that all the other witnesses and defendants placed him at the scene as one of the shooters. We need not address the merits of his argument, however, because Ray failed to move the trial court for resentencing. *See* ***State v. Chambers***, 173 Wis. 2d 237, 261, 496 N.W.2d 191 (Ct. App. 1989) (This court will not review a sentence on appeal if the defendant failed to move for sentence modification under WIS. STAT. RULE 809.30).

By the Court.—Judgment affirmed.

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