COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1737-CR **Cir. Ct. No. 2005CF63**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLEVELAND LEE, SR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Cleveland Lee, Sr. appeals from the trial court's denial of his postconviction motion for a new trial: (1) based on ineffective assistance of trial counsel (for failing to object to a statement made by one of the State's witnesses which Lee asserts improperly invaded the province of the jury);

(2) based upon the trial court's refusal to permit Lee to use a "business plan" document (which had not previously been disclosed to the State as required by the discovery statute); and (3) because of plain error and in the interest of justice.

¶2 In January 2005, Lee was charged with fifteen felonies, comprised of two counts of theft of more than $2500 from a business (occurring from January 1, 1998 to March 30, 2002), in violation of WIS. STAT. § 943.20(1)(b);[1] ten counts of forgery and uttering (occurring from September 21, 1999 through January 24, 2002) in violation of WIS. STAT. § 943.38(2); and three counts of filing false and fraudulent tax returns, as a party to a crime (involving the Wisconsin income tax returns for 1999, 2000, and 2001), in violation of WIS. STAT. §§ 71.83(2)(b)1. and 939.05. We affirm.

BACKGROUND

¶3 This is the unfortunate saga of a nonprofit organization, Harambee Community School (the "School"), that trusted too much in the person it relied upon for many years to manage its money and business affairs, resulting in the embezzlement of approximately six hundred forty thousand dollars ($640,000.00) for which the jury found Lee was responsible.

¶4 Lee, a long-time volunteer member of the School board, became the treasurer during the 1984-85 school year, then business manager during the 1985-86 school year, and later officer of operations, chairman of the finance committee, and the chief financial officer of the School. In 1991, Lee moved to Houston,

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Texas and commuted to Milwaukee approximately twice a month. His involvement with the School continued. Between approximately January 1998 and March 2002, Lee controlled two Harambee Community School bank accounts:[2] the "hot lunch" account and the "child care" account. Lee shared signing authority on the School "general" account with Dorene Cotton-Woods,[3] the assistant business manager at the School. The accountant who prepared financial statements for the board was hired by Lee, after the board president approved Lee's hiring of an accountant. Lee's involvement with the School ended in January 2002.

¶5 The "general" account received money from School tuition, private donors, public school voucher funds and public school lunch funds. The "general" account was used to pay "everything you would take to run a school," and to pay for the "day care operation" at the School. In addition, payments were made from the "general" account to Lee personally, to three corporations owned by Lee and to the "hot lunch" account.

¶6 The "hot lunch" account received tuition money for computer training in the technology center at the School. Tuition was paid by private individuals who wanted computer training and by corporations that wanted their employees trained. The "hot lunch" account made payments to Lee personally and to three corporations owned by Lee.

[2] All bank accounts are identified in the record by specific account number, as well as by name. We will use only the names by which the accounts were described.

[3] At the time of trial, Cotton-Woods had married and changed her name to Taylor. We refer to her in this opinion only as Cotton-Woods.

¶7 The School "child care" account received payments from W-2 and from private-pay clients for the child care program at the School. The School "child care" account made payments to Lee personally and to the three corporations owned by Lee.

¶8 During Lee's tenure as treasurer/chief financial officer, neither the School's "child care" account nor the "hot lunch" account appeared on the financial statements prepared by accountants for the board. The "general" account paid for both the School operations and the child care operations. The Harambee Child Care, Inc. account made no payments that appeared to be for the staff or supplies one would normally expect for a child care operation. Cotton-Woods testified that Lee maintained those two accounts and gave her a directive that he would handle the "child care" account. Lee also maintained the "hot lunch" account records, which Cotton-Woods believed was an account that had been closed.

¶9 The corporations and their bank accounts, which were subject to Lee's sole control, were: Pull Together Publishing, often referred to as "PT Publishing," (which had two accounts, one in Wisconsin and one in Texas); Metropest, later known as Metroserve ("MP/MS") (which also had two accounts, one in Wisconsin and one in Texas); and "Harambee Child Care, Inc." (which appears to have had only one Wisconsin account). Lee acknowledged that he was the sole owner of PT Publishing and MP/MS. Although he disputed that Harambee Child Care, Inc. was his corporation, Lee agreed that he had incorporated it, and records establish that he is the only person identified with the corporation on the reports he filed on behalf of Harambee Child Care, Inc. with the Wisconsin Department of Financial Institutions. Lee is the only person authorized to access the funds in the bank accounts for PT Publishing, MP/MS or Harambee

Child Care, Inc., and Lee was the maker of all checks paid out of the Harambee Child Care, Inc. account.

¶10 The State's theory of the case was that Lee kept the school "child care" and "hot lunch" accounts a secret from others involved in the School, and that he secretly moved over ninety percent of the School's money paid into those two accounts into his solely-owned corporations or to himself directly. This theory was based in part on documents and in part on expert testimony. Sandra Matthews, a certified public accountant, was hired by one of the School's benefactors to reconstruct School financial records after the auditor advised that the records were in such a condition that an audit could not be done. Patrick Brady, a specialist in forensic accounting investigations, and a former federal and state prosecutor, was hired by the School's board of directors to review all three School accounts and the significant, undocumented payments from those accounts. Vern Barnes, a special agent with the Wisconsin Department of Revenue, and a certified public accountant, was assigned to the review of Lee's 1999, 2000 and 2001 income tax returns, which review had been requested by the Milwaukee County District Attorney.

¶11 Matthews explained that when she started working at the School in April 2002, the condition of the School financial records made them unauditable. Matthews focused her attention on the records for 2001 and the first half of 2002. She testified that she saw no indications that the business office had been broken into. She explained that for the "hot lunch" account and the "child care" account, she was unable to find any bank statements, bank reconciliations or copies of cancelled checks, although her search included the School's business office, all file cabinets, the various storage areas in the School, previous year boxes of records, and a nearby house that the School rented. The only record found for the

"hot lunch" account was a checkbook with blank checks and stubs from prior checks which were also blank, and one or two returned checks in the bottom of a file cabinet drawer. On the School computer, Matthews found a check register for Harambee Child Care, Inc.

¶12 Matthews obtained copies of the bank statements for all of the School accounts for a period of twelve to eighteen months. Noticing large amounts on many checks reported on the statements, she next obtained copies of the bank microfiche records of those large-amount checks. The checks totaled approximately $160,000 to $200,000, for the period of time Matthews was examining. There were some invoices regarding payments made from the School's "general" account to PT Publishing and MP/MS; however, Matthews was unable to find any back-up documentation of any sort for any of the checks made payable to Lee, PT Publishing, MP/MS or Harambee Child Care, Inc. from either the School's "child care" account or "hot lunch" account.

¶13 Matthews testified that the School's financial statements for 2000 and 2001 show no income to the School from its child care operations or from its adult computer classes. Further, while the financial statements disclose the School's "general" account, the statements do not disclose either the School's "hot lunch" account or the School's "child care" account.

¶14 Barnes described his detailed review of the records of all three of the School bank accounts, and all of the bank accounts (Wisconsin and Texas) for MP/MS, PT Publishing and Harambee Child Care, Inc., as well as Lee's personal bank account. Barnes described the School's "general" account as paying "everything you would take to run a school" and also paying for "the day care operation that was also held there." Barnes acknowledged that payments were

made from the "general" account, with supporting invoices, to PT Publishing for books and other materials, and to MP/MS for bug extermination. Barnes described two categories of recurring invoices from MP/MS. Each month an invoice for "management services and food management services," totaling $1800, was paid. In addition, starting at the end of 1999 or in early 2000 through the end of 2001, an invoice totaling $8300 was paid each quarter for School projects that Lee was supervising.

¶15 Barnes explained that the technology center income went directly into the "hot lunch" account, then was paid out almost in total to PT Publishing, MP/MS, Harambee Child Care, Inc. or to Lee personally. From January 2000 through March 2002, payments totaling $85,494 for computer training were deposited in the School's "hot lunch" account. During that same time, a total of $77,103 was paid out of the account as follows to: Lee personally ($11,750), PT Publishing ($28,076), MP/MS ($12,352), and Harambee Child Care, Inc. ($24,925).

¶16 Barnes described a similar pattern, based upon his review of the checks, with the School's "child care" account. This account received all the funds for child care services from W-2 and private-pay clients. The funds were then paid to PT Publishing, MP/MS, Harambee Child Care, Inc. or Lee personally. Between January 2000 and March 2002, the School's "child care" account paid out a total of $410,627. Of that amount, Lee and corporations he controlled were paid $387,667, with Lee personally receiving $22,821, PT Publishing receiving $66,758, MP/MS receiving $32,360, and Harambee Child Care, Inc. receiving $265,728.

¶17 Barnes described Harambee Child Care, Inc. as being used to funnel money out of both the school "child care" account and the "hot lunch" account. However, Barnes indicated that none of the checks paid by Harambee Child Care, Inc. were consistent with a "real child care business." He observed that there was no payroll for child care staff and no payments for supplies that one might expect with a day-care operation, such as for diapers or snacks. Rather, Barnes found that the Harambee Child Care, Inc. account was used to pay bills at Hooters in Houston, Texas; at Solid Gold Jewelry, in Houston, Texas; at gas stations in Houston and Palmer, Texas; as well as MSN on-line billing and Price Line. He provided other examples of Harambee Child Care, Inc. checks, signed by Lee, which included monthly payments to GMAC of $567.90 and to Ford Credit of $286.65. In addition, there were payments from Harambee Child Care, Inc. to Fleet Mortgage and Midland Mortgage, although there is no evidence that Harambee Child Care, Inc. owned any property likely to be the security for a mortgage. Barnes concluded that Harambee Child Care, Inc. "is basically the alter ego of Cleveland Lee. It's the same as Cleveland Lee.… The corporation is nothing more than a shell or a conduit to funnel money embezzled from Harambee school accounts and into particular accounts controlled by Cleveland Lee."

¶18 Barnes, based upon his experience as a certified public accountant and as an agent of the Wisconsin Department of Revenue, calculated the total amount taken by Lee to be $644,000.[4] Barnes explained that the questioned checks were "taxable income and they were not reported." He elaborated:

[4] This figure was after removing two checks that Cotton-Woods testified she actually signed, but which had originally been attributed to Lee signing her name on the checks.

> I came to the inescapable conclusion that Mr. Lee transferred huge sums of money—hundreds of thousands of dollars from these two school accounts, the hot lunch account and the child care account into either his own personal account or to other bank accounts that he controlled in the names of Metro Pest or PT Publications [sic].
>
> Sure PT Publications [sic] and Metro Pest were real companies, provided real services and issued real invoices for either books or brochures or for bug extermination, but they were paid real money—separate money for these services or products[. T]hat left the rest of the money, hundreds of thousands of dollars, for which there were no invoices and for which there were no apparent products or services rendered.
>
> ….
>
> At the point that Mr. Lee took control of that money he had what we call unfettered use, total dominion, complete control over that money. At that point he can direct it to wherever he wants to … and that's the point that we would say is taxable income to him.

¶19 For the years involved in the complaint, Barnes described in considerable detail[5] various entries on each of the income tax returns Lee filed personally and on behalf of the corporations he controlled. Barnes calculated the amount of income he believed was actually received, and the amount of tax that would have been due on that income for each of the years in question. Barnes summarized his conclusions:

> I reached a conclusion that Mr. Lee embezzled substantial amount of monies from the two school accounts at Harambee Community School, the hot lunch account and the child care account.
>
> Concluded also that he filed Wisconsin income tax returns for the 1999, 2000 and 2001 years that did not

[5] Barnes's testimony regarding the tax returns totals forty-four pages in the record.

> include embezzled funds nor did it include the money received from Metro Pest or Metroserv [sic].
>
> Therefore I concluded that he's filed false and fraudulent Wisconsin income tax returns for those years with the intent to evade the taxes due.

¶20 Lee testified in his own behalf. He explained that he decided to use the technology center income and the child care income to implement the new African Center curriculum the board had decided to establish. His theory of defense was that he was authorized by Tommy Alexander, the board president, to use all of the money that he moved into the Harambee Child Care, Inc. account, or that he paid from the "general" account to himself, or to the other corporations he controlled, because the payments were for "goods or services," or repayment of loans Lee made to the School, or a reimbursement to Lee of his travel and related expenses between his home in Houston and the School in Milwaukee. Lee explained that because the School operated "like a family," there was no requirement for invoices, bills, notes for the debts or other similar records. He also explained that the board did not require advance approval of specific expenditures once general directions had been given by, or general authority received from, Alexander. Lee testified that he had been given authority to reimburse himself for his travel expenses when he felt the School could afford it.

¶21 Cotton-Woods became the School's business manager when Lee moved to Texas. Lee testified that he and Cotton-Woods had adopted the practice of signing the other's name to checks as a convenience since he was often not in Milwaukee, and she was occasionally not available. Lee agreed that he never signed Cotton-Woods's name on a "general" account check. He agreed that the only time he signed Cotton-Woods's name was when he wrote checks from the "hot lunch" account or the "child care" account, to Harambee Child Care, Inc., and

that on two specific days when he signed her name to one of those accounts, she was in the office and signed her own name on "general" account checks.

¶22 Lee explained that he had formed Harambee Child Care, Inc. in 1997 as a corporation because he had been told the School needed to separate the child care operation from the School. He agreed that he signed every check written on the Harambee Child Care, Inc. account. Lee claimed that both Alexander and Cotton-Woods knew about Harambee Child Care, Inc. because they were officers of the corporation. Alexander testified that Lee never mentioned Harambee Child Care, Inc. at any board meeting. The State produced copies of the reports Lee filed with the Wisconsin Department of Financial Institutions for Harambee Child Care, Inc. which named only Lee as involved with the corporation.

¶23 To corroborate his testimony and refute the testimony of Alexander and Cotton-Woods, Lee sought to introduce a Harambee Child Care, Inc. Business Plan[6] which Lee claimed Cotton-Woods had typed and which identified Alexander and Cotton-Woods as officers of Harambee Child Care, Inc. The trial court refused Lee's request because the business plan was not disclosed in a timely manner as required by the State's discovery request and was first provided to the State on the fourth day of trial, well after both Cotton-Woods and Alexander had testified. The trial court also noted that the proffered document contained nothing to identify when it was created and nothing tending to show that either Cotton-Woods or Alexander knew the document existed.

[6] This business plan was rejected by the trial court because it had not previously been produced in response to discovery demands. It will be discussed at greater length below.

¶24 Lee explained that a break-in to his office at the School occurred shortly after he left in January 2002, but that he did not disclose it to anyone because he considered it related to some ongoing internal disputes. He claimed that during the break-in, the records involved in the accounts in question during the time involved in the criminal complaint appear to have been taken. Lee's general explanation for the large transfers of funds, documented by the checks produced by the State, was that the money was needed for goods and services related to development of the African Center curriculum or for the "capital campaign" which Lee was assigned to head in October 1998. Lee did not provide third-party corroboration for any specific expenses for curriculum development or the capital campaign. Nor was there documentation of travel expenses incurred, loans made or specific amounts and times when all or part of such items were repaid.

¶25 The jury convicted Lee on all counts. He was sentenced to a combination of concurrent sentences, the net impact of which totaled seven years of initial confinement followed by six years of extended supervision. His postconviction motion for a new trial, based upon several different claims, was denied. This appeal followed.

DISCUSSION

¶26 On appeal, Lee argues that: (1) his trial counsel was ineffective for not objecting to a specific item of testimony; (2) the trial court erred in refusing to admit the business plan Lee offered to impeach two witnesses; and (3) the postconviction court improperly denied his request for a new trial based upon plain error, and in the interests of justice. We discuss the claims separately.

Ineffective assistance of counsel

¶27 Lee complains that his trial counsel was ineffective when he did not object when Barnes improperly invaded the province of the jury by stating his opinion that Lee intended to evade income taxes by not reporting the money taken from the School. The statement of which Lee complains was made on the second day of Barnes's testimony, at the conclusion of his direct examination by the State. The challenged statement is: "Therefore I concluded that he's filed false and fraudulent Wisconsin income tax returns for those years *with the intent to evade the taxes due*." (Emphasis added.) Lee argues that by including the phrase emphasized above, Barnes improperly stated his opinion that Lee was guilty of one of the elements of the crime of filing a false and fraudulent tax return, and that this so prejudiced the jury against Lee as to require a new trial.

¶28 During the cross-examination that followed the challenged statement, in a colloquy with Lee's counsel, Barnes agreed that the jury's opinion is the one that counts.

> [COUNSEL]: You also recognize that, really, it's not your opinion that counts but the opinion of the jurors, am I right?
>
> [BARNES]: That's absolutely correct.

This admission is followed later by one of the trial court's instructions to the jury:

> Usually a witness can testify only to facts they know, but a witness with expertise in a specialty may give an opinion in that specialty. In determining the weight to be given an opinion, you should consider the qualifications and credibility of the expert and whether reasons for the opinion are based upon facts in this case.

> Opinion evidence was admitted in this case to help you reach a conclusion. *You are not bound by an expert's opinion.*

(Emphasis added.)

¶29 The tests for analyzing ineffective assistance of counsel under the United States Constitution, set out in ***Strickland v. Washington***, 466 U.S. 668 (1984), were adopted in Wisconsin and are described in ***State v. Pitsch***, 124 Wis. 2d 628, 632-34, 369 N.W.2d 711 (1985), and ***State v. Johnson***, 133 Wis. 2d 207, 215-17, 395 N.W.2d 176 (1986). Whether counsel's actions amount to ineffective assistance of counsel is a mixed question of law and fact. ***Strickland***, 466 U.S. at 698. The trial court's determination of what counsel did or did not do will be upheld unless clearly erroneous. *See* ***Pitsch***, 124 Wis. 2d at 634. Whether that conduct is a violation of the right to effective assistance of counsel is a question of law as to which we do not defer to the trial court. ***State v. Ludwig***, 124 Wis. 2d 600, 607, 369 N.W.2d 722 (1985).

¶30 In ***Johnson***, our supreme court described the ***Strickland*** requirements for establishing ineffective assistance of counsel. ***Johnson***, 133 Wis. 2d at 216-17. A defendant must show the following:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction … resulted from a breakdown in the adversary process that renders the result unreliable.

Id. (citations and internal quotation marks omitted); *see also* ***Strickland***, 466 U.S. at 694 ("[D]efendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."). We are to apply those tests in the context of the particular case. ***Johnson***, 133 Wis. 2d at 217. Because a defendant must establish both prongs of the ***Strickland*** test, if we determine that the defendant was not prejudiced by the conduct, we need not determine whether counsel's performance was deficient. ***Id.***, 466 U.S. at 697.

¶31 The Wisconsin Rules of Evidence specifically permit expert testimony in the form of opinion on ultimate issues to be decided by the jury. WIS. STAT. § 907.02. Section 907.02 specifically states that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." WISCONSIN STAT. § 907.04 provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

¶32 However, when the opinion being presented relates to a legal issue of domestic law, that person may not give his or her opinion on that legal issue. *See, e.g.*, ***Roe v. State***, 95 Wis. 2d 226, 248, 290 N.W.2d 291 (1980) (Psychiatrists "are not competent to give an opinion as to the guilt or innocence of" a defendant regarding an element of the offense charged.). It is not the role of the expert "to be a 'super juror' whose opinion is cloaked in the 'seeming scientific knowledge of an expert,'" when "[t]he jury has before it the same facts relied upon by the

[expert] in forming his opinion" and the opinion lies outside the expert's field of expertise. ***State v. Repp***, 117 Wis. 2d 143, 149, 342 N.W.2d 771 (Ct. App. 1983) (citing ***State v. Dalton***, 98 Wis. 2d 725, 730-31, 298 N.W.2d 398 (Ct. App. 1980)).

¶33 Here, Barnes testified that it was his opinion that Lee "filed false and fraudulent Wisconsin income tax returns … with the intent to evade the taxes due." This is an impermissible legal conclusion, and Lee's counsel should have objected to this statement. This does not end the inquiry, however. Even if counsel's performance was deficient, Lee did not receive ineffective assistance of counsel unless "counsel's errors were so serious as to deprive [Lee] of a fair trial, a trial whose result is reliable." *See* ***Johnson***, 133 Wis. 2d at 216-17.

¶34 The offending remark occurred in the final portion of Barnes's testimony about a complex series of financial maneuvers, culminating in Lee filing tax returns that did not reflect any of the substantial payments Lee and his companies received from the School accounts. Barnes was reciting his conclusions based on his review of the records and used the word "intent" only once. Neither Barnes's use of the word "intent," nor the phrase on which Lee focuses in this appeal was mentioned in the State's closing argument. Lee's counsel properly obtained Barnes's admission, on cross-examination, that the jury's opinion was the only opinion that mattered. The trial court reinforced that truism by instructing the jury that it was not bound by an expert's opinion. *See* ***State v. Delgado***, 2002 WI App 38, ¶17, 250 Wis. 2d 689, 641 N.W.2d 490 ("Juries are presumed to follow the court's instructions."). Based upon the record, we conclude that Lee was not prejudiced by counsel's failure to object because in light of the substantial evidence of significant unreported income, the error was not "so serious as to deprive [him] of … a trial whose result is reliable." *See* ***Johnson***, 133 Wis. 2d at 216-17.

New trial

¶35 Lee next argues that he should receive a new trial because: (1) the trial court erroneously exercised its discretion in refusing to admit certain evidence not previously produced as required in discovery; and (2) plain error, or the cumulative effect of all errors, require a new trial in the interest of justice.

¶36 Whether the trial court properly exercised its discretion is a question of law. ***Seep v. Personnel Comm'n***, 140 Wis. 2d 32, 38, 409 N.W.2d 142 (Ct. App. 1987). "An appellate court will sustain a discretionary act if it finds that the trial court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Luciani v. Montemurro-Luciani***, 199 Wis. 2d 280, 294, 544 N.W.2d 561 (1996) (citations omitted). Whether to grant a new trial for the other reasons asserted by Lee are questions we review *de novo*. *See* ***State v. Mayo***, 2007 WI 78, ¶28, __ Wis. 2d __, 734 N.W.2d 115 (This court must "review the record to determine if a new trial is warranted in the interest of justice or due to plain error.").

A. Refusal to admit evidence not produced in discovery

¶37 The statutes governing criminal procedure require the defendant, upon demand from the State, to produce certain discovery "within a reasonable time before trial," including specifically "any physical evidence" the defendant intends to offer at trial.[7] The trial court certainly has the authority to require

[7] WISCONSIN STAT. § 971.23, entitled "Discovery and inspection," states in pertinent part:

(continued)

compliance with discovery, and to exercise its discretion in enforcing discovery statutes and orders. *See, e.g.*, ***Anderson v. Circuit Court***, 219 Wis. 2d 1, 578 N.W.2d 633 (1998).

¶38 Generally the question of whether to admit evidence is a matter within the trial court's discretion. ***Mayo***, 734 N.W.2d 115, ¶31. The appellate court "reviews evidentiary rulings with deference to the circuit court as to whether it properly exercised its discretion, in accordance with the facts and accepted legal standards" and upholds a circuit court's decision "if the circuit court examined the relevant facts, applied a proper legal standard, and reached a reasonable conclusion using a demonstrated rational process." ***Id.***

¶39 During the fourth day of trial, Lee's counsel disclosed to the State a business plan for Harambee Child Care, Inc., which counsel stated he had received within the previous half hour. Lee represented that the business plan had been typed by Cotton-Woods, and that it was offered as rebuttal to, and impeachment of, the testimony of Cotton-Woods and Alexander that they were unaware of the existence of Harambee Child Care, Inc. There is no claim that the business plan had been previously disclosed to the State. No dates appear in the text or as other

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> **(2m)** WHAT A DEFENDANT MUST DISCLOSE TO THE DISTRICT ATTORNEY. Upon demand, the defendant or his or her attorney shall, within a reasonable time before trial, disclose to the district attorney and permit the district attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the defendant:
>
> ….
>
> (c) Any physical evidence that the defendant intends to offer in evidence at the trial.

identifying information anywhere on the document. The business plan refers to Cotton-Woods and Alexander as officers of Harambee Child Care, Inc. The State objected to the document because it had not been produced as required by discovery. Neither at the time the business plan was presented to the State during trial, nor after the trial court's ruling on its admissibility, did either the State, or Lee, move for an adjournment. The trial court refused to allow the business plan as evidence holding:

> [COURT TO DEFENSE COUNSEL]: You have a right to present your case, but we don't have trial by ambush …. The state made its discovery demand. This was just handed to you by your client. I don't know if he had it earlier. I don't know when this was typed up or how long it's been around or where it's been. He has a right to testify as to anything he wants, but I'm not gonna have him testify that he had this plan and then introduce the plan ….
>
> I think it would prejudice the state. They would have to get this document to their witnesses who have to look at it and then they might have to call them in rebuttal. It will delay the trial also because all the witnesses will have to be contacted …. The state would be prejudiced, the court would be prejudiced in the sense of the economic efficiency of trying cases. That's why we have discovery motions. This document will not be introduced.

Except for prohibiting reference to the business plan, the trial court did not otherwise limit Lee's testimony as to why he believed Cotton-Woods and Alexander were aware of the existence of Harambee Child Care, Inc.

¶40 We conclude that the trial court applied the proper standard of law when it considered the prejudice created by the failure to properly comply with discovery requests, examined the relevant facts including what the proffered "new evidence" did and did not establish in relation to why the defendant wanted to use the information, and demonstrated a rational process by which the court reached a

conclusion that a reasonable court could reach. *See* ***Seep***, 140 Wis. 2d at 38. The trial court did not err in refusing to permit use of the business plan.

B. Plain error or the interests of justice

¶41 In examining a claim for a new trial either because of plain error or in the interest of justice, our supreme court recently considered whether a trial had been "so infect[ed] … with unfairness" that either the real controversy had not been fully tried, or that there was a miscarriage of justice. ***Mayo***, 734 N.W.2d 115, ¶65. This court must "review the record to determine if a new trial is warranted in the interest of justice or due to plain error." ***Id.***, ¶28. The plain error doctrine is recognized in WIS. STAT. § 901.03(4), which states: "Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge." Accordingly, under the plain error doctrine, we "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." ***Mayo***, 734 N.W.2d 115, ¶29. There is no bright line rule; "[r]ather, the existence of plain error will turn on the facts of the particular case[, with] particular importance [placed on] the quantum of evidence properly admitted and the seriousness of the error involved." ***Id.*** It is the State's burden "to prove that the plain error is harmless beyond a reasonable doubt." ***Id.*** If the court concludes that plain error occurred, but that the error when viewed in the "context of the entire trial," was harmless beyond a reasonable doubt, ***id.***, ¶¶42-43, we then consider whether a new trial was warranted in the interest of justice, ***id.***, ¶30.

¶42 WISCONSIN STAT. § 752.35[8] provides that an appellate court may grant a new trial in the interest of justice "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." *See* ***State v. Williams***, 2000 WI App 123, ¶17, 237 Wis. 2d 591, 614 N.W.2d 11. Accordingly, we independently review the record to determine if a new trial is warranted in the interest of justice. ***State v. Williams***, 2006 WI App 212, ¶12, 296 Wis. 2d 834, 723 N.W.2d 719. In order to conclude that justice has miscarried, we must first determine that there is a substantial probability of a different result on retrial. ***Mayo***, 734 N.W.2d 115, ¶30 (citing ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990)).

¶43 We review evidentiary rulings with deference, limiting our analysis to whether the trial court properly exercised its discretion based upon the facts and accepted legal standards. ***Id.***, 734 N.W.2d 115, ¶31. We will uphold a trial court's decision to admit or exclude evidence if the court "examined the relevant facts, applied a proper legal standard, and reached a reasonable conclusion using a demonstrated rational process." ***Id.*** Like the situation in ***Williams***, we also need to "consider whether trial counsel rendered ineffective assistance." ***Id.***, ¶32. In

[8] WISCONSIN STAT. § 752.35, entitled "Discretionary reversal," states:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

determining whether a constitutional error was harmless, our inquiry is: "'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?'" ***Id.***, ¶47 (citing ***State v. Harvey***, 2002 WI 93, ¶46, 254 Wis. 2d 442, 647 N.W.2d 189). The harmless error test has also been described in ***State v. Anderson***, 2006 WI 77, ¶114, 291 Wis. 2d 673, 717 N.W.2d 74, as: "the error is harmless if the beneficiary of the error proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (Citation omitted.)

¶44 In ***Mayo***, the supreme court determined that several improper prosecutorial arguments[9] "did not so infect the trial with unfairness as to constitute a denial of [defendant's] due process rights, thus warranting a new trial, either due to plain error or in the interest of justice." ***Id.***, 734 N.W.2d 115, ¶65. The ***Mayo*** court also considered whether trial counsel rendered ineffective assistance of counsel and concluded that while it was "satisfied that defense counsel's failure … amounted to deficient performance under the circumstances … Mayo failed to show that there was a reasonable probability that the result of the proceeding would have been different," and accordingly, there was no showing of prejudice. ***Id.***, ¶59. Based on this determination, the court went on to conclude that the errors, individually and cumulatively, did not rise to the level that Mayo was deprived of a fair trial. ***Id.***, ¶64.

[9] The comments in the State's closing argument were described by Mayo as unfairly referring to matters not in evidence, improperly referencing the attorney's opinion, and referencing Mayo's pretrial silence. ***State v. Mayo***, 2007 WI 78, ¶¶35-36, __ Wis. 2d __, 734 N.W.2d 115.

¶45 While we concluded that Lee's counsel's failure to object was deficient, we also determined that Lee was not prejudiced by the error. Barnes used the word "intent" only once, and in the context of testifying to his conclusions based upon his review of the School's financial records and Lee's records relating to the various accounts. Lee's counsel properly obtained Barnes's admission that the jury's opinion was the only opinion that mattered, and the trial court reinforced that truism by instructing the jury that it was not bound by an expert's opinion. Neither Barnes's use of the word "intent," nor the phrase on which Lee focuses in this appeal was mentioned in the State's closing argument. Additionally, there was substantial testimony and evidence produced at trial, excluding the improper reference to Lee's intent, from which a jury could have found that Lee was guilty of all of the charged counts beyond a reasonable doubt. We conclude that the State has proven beyond a reasonable doubt that there is not a substantial probability that a different result would be obtained at retrial without Barnes's reference to Lee's "intent."

¶46 Addressing Lee's second claim that the trial court erred in refusing to permit the use of the business plan, for the reasons we have explained, the trial court's decision was a proper exercise of discretion. We independently conclude that there is not a substantial probability that use of the business plan would have altered the outcome of the trial because the document contained nothing suggesting that either Cotton-Woods or Alexander knew the business plan existed. They did not sign it. It was not dated. It made no internal reference to any date or action by any person which would tend to corroborate their knowledge either of the business plan or of Harambee Child Care, Inc.

¶47 For all the foregoing reasons, we affirm the trial court and the postconviction court in all respects.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.