COURT OF APPEALS
DECISION
DATED AND FILED

October 2, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2708 **Cir. Ct. No. 2000CF1684**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ELLIOT D. RAY,

DEFENDANT-APPELLANT.

APPEAL from order of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed*.

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

¶1 PER CURIAM. Elliot D. Ray, *pro se*, appeals from an order denying a WIS. STAT. § 974.06 (2005-06)[1] motion for postconviction relief. In his

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

motion, Ray argued that postconviction counsel was ineffective for not challenging the effectiveness of Ray's trial counsel, particularly trial counsel's failure to object when a detective testified about statements made by Ray's co-actors. In his motion, Ray relied on ***Crawford v. Washington***, 541 U.S. 36 (2004). The trial court declined to apply ***Crawford*** retroactively, and denied Ray's motion. We affirm, albeit on slightly different grounds.

¶2 A jury found Ray guilty of 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. At trial, the detective who had interrogated Ray related Ray's entire statement, including those portions in which Ray responded to the detective's disclosure of statements made by Ray's co-actors.

¶3 Ray appealed, and argued that his confrontation rights were violated by the admission of statements of non-testifying co-actors. ***State v. Ray***, No. 2002AP791-CR, unpublished slip op. ¶1 (WI App Jan. 28, 2003). Because Ray's trial counsel did not object to the admission of the statement, this court examined Ray's argument through the lens of "plain error." ***Id.***, ¶4.

¶4 This court addressed Ray's argument as follows:

> 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. § 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."). 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).
>
> ….
>
> 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.

Ray, No. 2002AP791-CR, unpublished slip op. ¶¶5, 7 (paragraph numbering and footnote omitted).

¶5 In his postconviction motion, and in the context of an ineffective assistance of counsel argument, Ray contended that the references to statements made by his co-actors violated his federal and state constitutional confrontation rights.[2] As the above excerpt from this court's previous opinion plainly shows, the admissibility of the co-actors' statements was litigated in Ray's direct appeal.

[2] The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him[.]" Article I, Section 7 of the Wisconsin Constitution states that "[i]n all criminal prosecutions the accused shall enjoy the right … to meet the witnesses face to face[.]"

This court held that the Confrontation Clause was not implicated because the statements were not offered to prove the truth of the statements, 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." ***Id.***, ¶7.

¶6 An issue "once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). The question of whether the co-actors' statements were hearsay was litigated on direct appeal. Raising the same issue in a WIS. STAT. § 974.06 motion in the context of ineffective assistance of counsel is not permitted.

¶7 Moreover, this court's prior decision constitutes law of the case which should be followed in all subsequent proceedings. *See* ***State v. Moeck***, 2005 WI 57, ¶18, 280 Wis. 2d 277, 695 N.W.2d 783. Although the law of the case doctrine "is not an absolute rule that must be inexorably followed in every case" in this case, there is no "cogent, substantial, and proper reason[ ] … [to] disregard the doctrine and reconsider" our prior ruling. *See* ***id.***, ¶25 (footnote and internal quotation marks omitted). Whether judged against the standard of plain error, as on direct appeal, or ineffectiveness of counsel, as now, the answer remains the same—the co-actors' statements were not offered for the "truth of the matter asserted," and therefore, were not hearsay. *See* WIS. STAT. § 908.01(3). The circuit court properly denied Ray's postconviction motion.[3]

[3] Although we need not address whether ***Crawford v. Washington***, 541 U.S. 36 (2004) may be applied retroactively, we note that the United States Supreme Court recently held that ***Crawford*** did not apply retroactively in a collateral proceeding. ***Whorton v. Bockting***, 127 S. Ct. 1173, 1183-84 (2007).

By the Court.—Order affirmed.

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