COURT OF APPEALS
DECISION
DATED AND FILED

May 28, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1524-CR **Cir. Ct. No. 2005CF164**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS E. REIMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH D. MCCORMACK, Judge. *Affirmed*.

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Dennis Reimer appeals from a judgment of conviction of first-degree reckless injury. He argues that plain error occurred when the prosecutor misused evidence of other bad acts during closing argument, that the trial court erred in rejecting evidence supporting his theory of an

alternative perpetrator of the crime, and that he was entitled to an in camera inspection of the mental health records of the infant victim's mother.[1] We reject his claims and affirm the judgment.

¶2 Reimer was charged with injuring six and one-half month old baby Jacob, the son of his girlfriend, Carrie Ives. The injury occurred July 30, 2005. Jacob had spent all day in the care of Ives except for a period of time when Reimer watched him while Ives was outside with her two older children. When Ives came back inside she found what appeared to be a rash on Jacob's forehead and that he was breathing abnormally. Medical examination that evening diagnosed "petechiae," tiny hemorrhages, on Jacob's forehead as the result of shaken baby syndrome.

¶3 Evidence at trial revealed that Jacob had been taken to the emergency room on March 16, 2005, because he was bleeding from his mouth. Jacob's doctor observed a scratch on the roof of Jacob's mouth as if someone had thrust something into the infant's mouth with significant force. The doctor thought it looked like a thumb had caused the scratch. Jacob had been in Reimer's care just before the bleeding occurred.

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[1] The appellant's brief lists four arguments in its table of contents but only two issues are stated in the "issues on appeal" section of the brief. The inconsistency in the definition of the issues is exacerbated by the tendency of the appellant's argument to segue into an entirely different issue than that originally defined in the captions of the argument section of the brief. In short, it has been difficult for the court to pinpoint the appellant's arguments. Appellate counsel would be well-served to review WIS. STAT. RULE 809.19(1)(e) (2005-06), and the excellent explanation of the function and necessary contents of appellate briefs provided by Judge William Eich, *Writing the Persuasive Brief*, Wisconsin Lawyer Magazine, Vol. 76, No. 2 (Feb. 2003).

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

¶4 On the morning of July 27, 2005, Ives noticed bruising or marks around Jacob's genitals. Jacob had been in the care of his grandmother for a few hours the day before and she reported that Jacob had only cried out once during that time while in his bouncy chair and when his grandmother was not in the room. Reimer had stayed overnight with Ives on July 27. On Friday, July 29, 2005, Jacob's grandparents observed some marks on his ankles and bruising on at least one foot.

¶5 Dr. Jordan Greenbaum, who evaluated Jacob's circumstances on July 31, 2005, rejected Ives suggestion that the bruising on Jacob's foot could have been caused by kicking the crib. She indicated that a six-month-old baby does not have the strength to create that type of injury by kicking. She indicated that the clustered petechiae on Jacob's abdomen would have been caused by direct pressure or impact. She noted that Jacob suffered considerable retinal bleeding. Dr. Greenbaum also explained that x-rays showed that Jacob had "healing fractures" on both sides of his ribs and right lower leg. She thought the fractures were at least a week old, but could be four weeks old. She concluded Jacob had been abused on more than one occasion.

¶6 Reimer contends that plain error occurred when during closing argument the prosecutor implied that Reimer had caused Jacob's prior injuries and overtly accused Reimer of having caused the rib and ankle injury. He argues that the prosecutor's reliance on the prior injuries was for the impermissible purpose of characterizing him as a child abuser and encouraging the jury to conclude that

because he had abused Jacob in the past, he had committed the charged abuse.[2] His characterization of the prosecutor's closing argument largely focuses on the following portion:

> Isn't it ironic that every unexplained injury that occurs on the child that we can document, Dennis, the defendant, is in the picture. And that time when they're not seeing each other, nothing happens to the child. You can even think about the rib injury and the ankle, the ankle fracture and the rib fractures; doctor told you that they were in the hand, she can date them at least a week to ten days old. But in going back a week to ten days, who was involved in the existence of the eye, the defendant.
>
> This is a child that's been battered before. Who battered the child, the defendant.

¶7 We first observe that there was no objection at this point in the prosecutor's closing argument. The potential error is waived. ***State v. Seeley***, 212 Wis. 2d 75, 81, 567 N.W.2d 897 (Ct. App. 1997). Reimer's reliance on the plain error rule as permitting review despite waiver is misplaced. The plain error doctrine only applies to evidentiary error. ***Id.***, n.2.

¶8 Despite waiver, we are not persuaded that the prosecutor's closing argument was improper. Generally, counsel is allowed considerable latitude in closing argument. ***State v. Wolff***, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992). We consider whether the prosecutor's conduct affected the fairness of the trial by examining the prosecutor's argument in context. ***Id.*** at 168.

[2] Reimer's argument on this issue illustrates the inappropriate segue referenced in footnote one. In this argument Reimer discusses in detail the three-part test for the admission of other acts evidence under WIS. STAT. § 904.04(2). The argument appears to be a belated claim that medical evidence of other injuries Jacob suffered should not have been admitted. There was no objection to that testimony and Reimer did not file a postconviction motion to preserve the issue in the absence of an objection. Any claim that evidence of other injuries was inadmissible is waived. ***State v. Edelburg***, 129 Wis. 2d 394, 400, 384 N.W.2d 724 (Ct. App. 1986).

¶9 The line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury arrive at a verdict by considering factors other than the evidence. *See* ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). This is what Reimer claims occurred here—that the prosecutor argued, without proof, that Reimer had caused Jacob's prior injuries. We do not agree. The prosecutor's argument was focused on all the circumstantial evidence pointing to Reimer's guilt. The evidence suggested Reimer's involvement with Jacob at the time the other injuries occurred.[3] There was evidence that Reimer harbored animosity toward the infant for interfering with his relationship with Ives. The prosecutor did not ask the jury to draw conclusions from facts outside the evidence.[4]

¶10 At trial Reimer sought to introduce the testimony of two of Ives's former employers to establish Ives's inappropriate conduct toward children and outbursts of anger towards children. The offer of proof made at the beginning of the trial was that Brooke San Felippo had employed Ives in a daycare center from November 2002 to June 2003, and observed Ives burst into tears in the midst of her work. San Felippo saw Ives grab her older child by the arm and whip him to the floor. The other witness, Kim Behrens, also employed Ives in a daycare center

[3] Ives testified she first met Reimer in August 2004, when she was already pregnant with Jacob. Her relationship with Reimer terminated at the end of March 2005, after Jacob's mouth injury, but resumed again in June 2005. She indicated that on nights when Reimer would sleep at her house, it was their routine to have Reimer watch Jacob while she got her two older children to bed or took a shower.

[4] For the first time in his reply brief, Reimer points to the prosecutor's statement in closing argument that according to Dr. Greenbaum's testimony petechiae appears immediately as a misrepresentation of Dr. Greenbaum's testimony. We will not, as a general rule, consider arguments raised for the first time in a reply brief. ***Schaeffer v. State Personnel Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989). The prosecutor's reliance on Dr. Greenbaum's testimony that petechiae occurs rapidly was not improper.

and would testify that she would never employ Ives in that capacity again. Reimer described that in general the two witnesses would indicate that Ives acted out by weeping or being very angry on occasion and was unreliable. The trial court concluded the evidence was not relevant and that it was just an attack on the character of a witness.

¶11 Reimer argues that the evidence from these two witnesses was relevant to his theory that Ives abused Jacob and caused his injury. He suggests it was not evidence of character but of actual conduct similar to the circumstances of the alleged crime and therefore admissible under WIS. STAT. § 904.04(2), to show Ives's motive and intent to falsely accuse Reimer and the absence of accident in her having caused Jacob's injury.

¶12 The proposed testimony from Ives's former employers was nothing more than character evidence. Reimer acknowledges that he sought to use their testimony to demonstrate Ives's motive to accuse him to divert suspicion from herself. Only on cross-examination of a witness are specific instances of conduct for the purpose of attacking the credibility of the witness admissible. WIS. STAT. § 906.08(2).

¶13 Even accepting Reimer's broad assertion that the testimony was admissible for other purposes, relevancy is still the primary concern. The trial court has broad discretion in determining the relevance of proffered evidence. ***State v. Brecht***, 143 Wis. 2d 297, 320, 421 N.W.2d 96 (1988). If a reasonable basis exists for the trial court's exercise of discretion, the discretionary decision will be upheld. ***State v. Fishnick***, 127 Wis. 2d 247, 257, 378 N.W.2d 272 (1985). "The determination of relevancy can never be an exact science because it necessarily involves the trial court's considered judgment whether a particular

piece of evidence tends to establish a fact of consequence in a given set of circumstances." ***State v. Pharr***, 115 Wis. 2d 334, 344, 340 N.W.2d 498 (1983).

> There is no precise point at which a prior act is considered too remote, and remoteness must be considered on a case-by-case basis. Even when evidence may be considered too remote, the evidence is not necessarily rendered irrelevant if the remoteness is balanced by the similarity in the two incidents.

State v. Hammer, 2000 WI 92, ¶33, 236 Wis. 2d 686, 613 N.W.2d 629 (citations omitted).

¶14 Reimer wanted to offer evidence of Ives's conduct more than two years before Jacob was injured, and in fact, before Jacob was even born. Not only was the evidence remote in time, but there is no similarity between the proffered testimony and the circumstances of the charged crime. The trial court properly exercised its discretion in concluding the evidence from the former employers was not relevant.

¶15 Reimer argues that he was entitled to an in camera review of Ives's mental health records under ***State v. Green***, 2002 WI 68, ¶34, 253 Wis. 2d 356, 646 N.W.2d 298 and ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993).[5] Reimer's motion for such an inspection was based largely on an emergency psychiatric hospitalization of Ives in 2000, something Ives had acknowledged to several people. He also pointed to the general statements of unnamed persons that Ives was "crazy" and "a whack job," that Ives told someone

[5] Reimer confines his appellate argument to the inspection of the record of Ives. Despite his request in the final paragraph of his brief that an inspection be made of the social service records of Jacob's siblings, we do not address any claim regarding records of Jacob's siblings and deem it waived by failure to argue it on appeal. *See* ***State v. Brown***, 2003 WI App 34, ¶21 n.8, 260 Wis. 2d 125, 659 N.W.2d 110.

that she had a history of bipolar disorder and took medication for it, and the observations of former employers that Ives would weep or be angry at work.

¶16 To be entitled to an in camera inspection of a witness's psychological records, a defendant must "set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available to the defendant."[6] ***Green***, 253 Wis. 2d 356, ¶34. Additionally, it is the defendant's burden to "clearly articulate how the information sought corresponds to his or her theory of defense." ***Id.***, ¶35. Whether a sufficient preliminary showing was made is a question of law that we review de novo. ***Id.***, ¶20.

¶17 We deem remoteness in time fatal to Reimer's claim that an in camera inspection should have been conducted of Ives's mental health records. He was trying to discover information from a hospitalization that occurred five years before the crime, when Ives was only eighteen or nineteen years old, and at a time when Ives did not even have children. Her hospitalization was also removed in time from the observations of weeping and anger in the workplace. Even assuming she engaged in bizarre behavior long ago in the past, it has no direct

[6] Reimer captions one of his arguments as: "The proper focus in a ***Shiffra/Green*** analysis is not on the person who suffered the injury, as such, but on the accuser, in order to evaluate the reliability of the accusation." We need not address Reimer's argument that ***State v. Green***, 2002 WI 68, ¶34, 253 Wis. 2d 356, 646 N.W.2d 298, and ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), which dealt with the records of the victim, apply with equal force to the records of a non-victim witness. Although the trial court pondered whether those cases define the entitlement to the inspection of the records of a witness, it did not deny Reimer's motion on that ground. We assume, without deciding, that access to the record of a witness may be obtained upon the proper showing. *See* ***State v. Richard A.P.***, 223 Wis. 2d 777, 783-789, 589 N.W.2d 674 (Ct. App. 1998) (discussing the right to in camera inspection of a witness's mental health records under ***Pennsylvania v. Ritchie***, 480 U.S. 39 (1987)).

bearing on her conduct at the time of the crime, her credibility, or the likelihood that she would have injured Jacob. We agree with the trial court that Reimer did not make a sufficient preliminary showing to entitle him to an in camera inspection of Ives's mental health records.

¶18 In his reply brief, Reimer for the first time suggests that the real controversy was not fully tried because the prosecution was allowed to redirect the jury's focus to Jacob's prior injuries. He requests a new trial in the interests of justice. WIS. STAT. § 752.35. We will not, as a general rule, consider arguments raised for the first time in a reply brief. ***Schaeffer v. State Personnel Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989). We exercise our discretionary power to grant a new trial infrequently and judiciously. *See* ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). We have concluded there were no errors at trial and have no basis to conclude that the real controversy was not fully tried. We reject Reimer's request for discretionary reversal.

By the Court.—Judgment affirmed.

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