COURT OF APPEALS
DECISION
DATED AND FILED

January 15, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0140-CR **Cir. Ct. No. 99-CF-101**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GEORGE F. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. George Johnson appeals a judgment convicting him of two counts of incest with his adult daughter, M.J. Johnson's defense asserted that she was not his daughter or that he did not know she was his daughter. The State proved those elements by her testimony, statements he made to the police, a birth certificate and the results of a DNA test. Johnson argues that

(1) the DNA test was not admissible because the State failed to give written notice of its intent to introduce that evidence at least forty-five days before the trial date as required by WIS. STAT. § 972.11(5);[1] (2) the State's expert witness did not establish sufficient foundation for his expertise; (3) Johnson's trial counsel was ineffective for failing to cross-examine the State's expert regarding his credentials and the validity of the DNA test for Native Americans; and (4) admission of the DNA test results was plain error and grounds for a new trial in the interest of justice. We reject these arguments and affirm the judgment.

¶2 Although the State did not give written notice of its intent to introduce DNA evidence at trial, the defense was aware that the test was performed and defense counsel received a copy of the test results. Upon sending the defense the test results, the prosecutor invited plea negotiations, strongly suggesting that the State would use the test results. At trial, the State's expert witness, Lars Jorgensen, testified that he was the supervisor of a paternity testing lab and has been involved with DNA testing for nineteen years. He identified a lab report that was introduced into evidence, concluding that the likelihood Johnson was M.J.'s father was 98.49%, that is, the DNA test would exclude 98.49% of falsely accused men. Jorgensen testified that the probability Johnson was the father was 99.8%.

¶3 Johnson has not established any prejudice from the State's failure to give written notice of its intent to introduce DNA evidence. The record does not establish that Johnson was surprised by the introduction of the DNA evidence or

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

lacked sufficient opportunity to prepare his defense. The purpose of the notice is to allow opposing parties an opportunity to review the test results and hire their own expert. The trial court may grant a continuance to facilitate that process. In this case, Johnson did not require a continuance because he had actual notice of the State's intent and the result of the DNA test. Had the trial court granted a continuance and compelled the State to provide forty-five days written notice, the conduct of the trial would have been the same. Because the failure to provide forty-five days written notice did not affect Johnson's substantial rights, there is no basis for setting aside the judgment. *See* WIS. STAT. § 805.18(2).

¶4 Johnson waived his right to challenge Jorgensen's credentials as an expert witness by his failure to raise that issue at trial. *See* ***State v. Damon***, 140 Wis. 2d 297, 300, 409 N.W.2d 444 (Ct. App. 1987). He also failed to challenge the validity of the data base for DNA testing of Native Americans, and therefore waived that issue. Johnson attempts to circumvent his waivers by alleging ineffective assistance of trial counsel, by invoking the "plain error" rule, and by requesting a new trial in the interest of justice.

¶5 Johnson's claim of ineffective assistance of counsel is not properly preserved for appeal because he did not first present the issue to the trial court by postconviction motion. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). At the postconviction hearing, to establish prejudice from his counsel's performance, Johnson would have to show that Jorgensen lacked sufficient credentials to give expert testimony on the DNA test or that the database excluded Native Americans, thus rendering the test invalid or unpersuasive. Because he failed to make such a showing at a postconviction hearing, the record contains no affirmative proof that Johnson was prejudiced by his counsel's

performance. *See* ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993).

¶6 The plain error rule cannot be utilized to avoid the consequences of Johnson's waivers. Plain error is error so fundamental or substantial that a new trial or other relief must be ordered even though the error was not brought to the trial court's attention. *See* ***State v. Sonnenberg***, 117 Wis. 2d 159, 176, 344 N.W.2d 95 (1984). The plain error exception to the waiver rule is to be used sparingly, and only when the accused has been denied a basic constitutional right. ***Id.*** at 177. Nothing in the record suggests that Jorgensen lacked sufficient credentials to serve as an expert witness or to identify the laboratory report that established Johnson's paternity. The record also fails to show any deficiencies in the database. On this record, we cannot conclude that Johnson was denied any fundamental, substantial or basic constitutional right.

¶7 Finally, there is no basis for ordering a new trial in the interest of justice. Our authority to grant a new trial in the interest of justice under WIS. STAT. § 752.35 is limited to circumstances where the real controversy was not fully tried or it is probable that justice has for any reason miscarried. To establish that the real controversy was not fully tried, Johnson must show that the jury was precluded from considering important testimony that bore on an important issue. *See* ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). Johnson has not established the importance of any testimony his trial attorney failed to adduce because he has not shown what the answers to the questions would have been. To prevail on the ground that justice has miscarried, Johnson must show a reasonable probability that a new trial would produce a different result. *See* ***State v. Caban***, 210 Wis. 2d 598, 611, 563 N.W.2d 501 (1997). Again, Johnson posits only questions not asked, not the answers to those questions. There is no basis for

concluding that a new trial that included those questions would produce a different result.

By the Court.—Judgment affirmed.

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