COURT OF APPEALS
DECISION
DATED AND FILED

July 3, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1979 **Cir. Ct. No. 2008CI1**

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

IN RE THE COMMITMENT OF MONTGOMERY L. CLARK:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MONTGOMERY L. CLARK,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dunn County: WILLIAM C. STEWART, Judge. *Reversed and cause remanded.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Montgomery Clark appeals a judgment committing him as a sexually violent person and an order denying his postcommitment motion

for a new trial. He argues: (1) allowing the jury to hear comments made at a sentencing hearing by the same judge who conducted the WIS. STAT. CH. 980[1] trial constituted plain error; (2) the court erred by submitting a report to the deliberating jury that contained prejudicial hearsay; and (3) Clark is entitled to a new trial in the interest of justice because these errors caused the real controversy not to be fully and fairly tried. We reverse the judgment and the order and remand the matter for a new trial based on each of these arguments.

¶2 The index offense consisted of Clark's 2003 conviction for second-degree sexual assault of his aunt. While on supervision, Clark left the state and was subsequently sentenced for escape and for spitting at his probation agent. As Clark approached completion of those sentences, the State commenced the present action alleging that Clark is a sexually violent person.

¶3 The State presented two expert witnesses, Dr. Sheila Fields and Dr. Janet Page Hill, both of whom opined that Clark was likely to reoffend. The defense presented two expert witnesses, Dr. James Peterson and Dr. Diane Lytton, who scored the actuarial instruments in a different way and concluded that Clark was not likely to reoffend. During Hill's direct examination, the State asked Hill to read from the sentencing transcript in Clark's escape case. Hill read the court's comments made by the same judge who conducted the WIS. STAT. CH. 980 trial:

> I hope we don't have to meet here again because I'm tired of sentencing you, didn't like it the last time, don't like it this time either. But I gave you an opportunity last time, I thought, an opportunity to prove yourself to get the therapy, to say "how could I figure out how to operate and behave within the norms that are accepted by society?" and you can't.

[1] All references to the Wisconsin Statutes are to the 2009-10 version.

Clark then responded "I will never take your therapy. … ever." The State began its closing argument by reiterating the court's sentencing remarks, telling the jury that the exchange gave a "very clear glimpse into the mind of Montgomery Clark."

¶4 Because there was no contemporaneous objection to introducing the court's sentencing remarks, we analyze the issue under the plain error doctrine. ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77. A plain error is an error "so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time. ***Id.*** If the error is shown to be fundamental, obvious and substantial, the burden then shifts to the State to show the error was harmless. ***Id.***, ¶23. The State must prove beyond a reasonable doubt that a rational jury would have made the same finding absent the error. ***Id.***

¶5 We conclude that allowing the jury to hear the court's sentencing remarks constituted plain error. The jury was required to determine whether Clark's mental disorder affected his emotional or volitional capacity and caused serious difficulty in controlling his behavior. WIS JI—CRIMINAL 2502 (2012). The court's sentencing comments suggest that the judge had already determined that Clark could not "operate and behave within the norms that are expected by society." These comments are comparable to the comments in ***Jorgensen***, where the court read for the jury the transcript of an earlier proceeding, including the court's observations that ***Jorgensen*** had trouble following simple instructions and had apparently violated the conditions of his bail. ***Id.***, ¶10. In ***Jorgensen***, the supreme court concluded that it was plain error because the trial court "seemingly testified against the defendant." ***Id.***, ¶34.

¶6 The State contends that it proved beyond a reasonable doubt that the error was harmless. In ***Jorgensen***, the court identified several factors to assist in

determining whether an error is harmless: (1) the frequency of the error; (2) the importance of the erroneously admitted evidence; (3) the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence; (4) whether the erroneously admitted evidence duplicates untainted evidence; (5) the nature of the defense; (6) the nature of the State's case; and (7) the overall strength of the State's case. ***Id.***, ¶23. The State argues that the sentencing dialog was not admitted as direct proof of Clark's mental state and likelihood to reoffend, but instead as one of the pieces of information the experts relied on and that the dialog was "filtered through Dr. Hill."

¶7 We reject the State's argument because the court's comments on Clark's recalcitrance and failure to accept therapy are closely related to the questions the jury had to answer in this case. Although the sentence was for escape, not a sex crime, the discussion about therapy obviously related to the sex crime. By directly reading the transcript to the jury, the judge's comments were not in any way filtered by Hill. This case was essentially a battle of the experts who divided two against two. In that context, the judge's remarks likely bolstered the conclusions drawn by the State's experts and undermined the defense experts' opinions.

¶8 The error was compounded by the State's closing argument. Although it mentioned the sentencing transcript only once, it opened its closing arguments with the judge's sentencing remarks and they set the tone for the argument that followed.[2] Upon review of the applicable factors set out in

[2] The State argues that the sentencing transcript is admissible over a hearsay objection because it is material routinely relied upon by experts. Our decision is based on the prejudicial effect of the jury hearing the judge's comments, not whether the statements constituted hearsay.

Jorgenson, we cannot conclude that the jury's knowledge of the judge's comments did not contribute to the verdict. *See* ***State v. Harrell***, 2008 WI App 37, ¶37, 308 Wis. 2d 166, 747 N.W.2d 770.

¶9 We also conclude that the court erred by sending Hill's Third Addendum Report to the deliberating jury over defense objection. The addendum contained numerous allegations that the jury had not previously heard and that Clark had no opportunity to explain or challenge by cross-examination. These allegations included a discussion about killing a judge, threatening another patient, yelling profanities at the staff and threatening to sue them, Clark's disruptive behavior in a barber shop and his threat to "start group resistance" by convincing others not to comply with procedures. These allegations are highly inflammatory, and Clark had no opportunity to respond, leaving the jury no way of determining the truth of the allegations. The trial court briefly mentioned the possibility of redacting portions of the report, but did not remove any of the prejudicial statements. The court also stated that it did not believe there was anything in the report that Hill did not testify to, but that is not the case. Because the information contained in the report was highly prejudicial and subject to improper use by the jury, the court improperly exercised its discretion when it allowed the jury to review the document. *See* ***State v. Hines***, 173 Wis. 2d 850, 858, 860, 496 N.W.2d 720 (Ct. App. 1993).

¶10 Finally, we conclude that a new trial is required in the interest of justice because the real controversy was not fully and fairly tried. ***Vollmer v. Luety***, 156 Wis. 2d 1, 20, 456 N.W.2d 797 (1990). The jurors were instructed to consider the background information as a basis for evaluating the experts' testimony. Because the "background information" included the judge's assessment of Clark's ability to control his behavior and allegations of other

serious misconduct contained in Hill's addendum, we conclude that the jury's assessment of which experts to believe was tainted by this prejudicial information.

By the Court.—Judgment and order reversed and cause remanded.

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