

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 17, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-1176-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARL P. FIKE,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Buffalo County: DANE F. MOREY, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

MYSE, J. Carl P. Fike appeals a judgment of conviction for criminal damage to property in excess of \$1,000 contrary to § 943.01(2), STATS., and an order denying his motion for postconviction relief. Fike contends that he is entitled to a new trial because the trial court erred: (1) by instructing the jury that it was required to find him guilty of criminal damage to property because of defense counsel's admissions during opening statements; and (2) by failing to submit a verdict form to the jury that would have permitted it to reach a finding of not guilty of criminal damage to property. Because we conclude that Fike waived his objections to the instructions and verdict form and that the

interests of justice do not warrant a new trial, we affirm the judgment and order.

Fike was charged with criminal damage to property in excess of \$1,000. During the defense counsel's opening statement, counsel stated that Fike admitted to causing criminal damage to property, but denied that the damage was valued at more than \$1,000.¹ Immediately following opening statements, the court conducted a side bar conference at which Fike's attorney and the prosecuting attorney were both present. At the conclusion of the unrecorded conference, the judge advised the jury that he would be instructing it to find the defendant guilty of criminal damage to property and that the only question it would have to decide was whether the damage caused was in excess of \$1,000. Neither Fike nor his attorney objected to the court's instruction to the jury. After the State had called its first witness and asked the witness to identify Fike, the court advised the prosecuting attorney that Fike had admitted he did criminal damage, and that "we don't have to go through those hoops today." Again neither Fike nor his attorney objected.

At the conclusion of the evidentiary portion of the trial and after a jury instruction conference, the trial court properly instructed the jury on the burden of proof and on each of the elements of the offense charged. The court then stated: "Now the instruction goes into a lengthy explanation of what has to be done to prove each one of those elements. But because they are admitted, I'm not going to take the time to read through each one of those."

After finishing the instructions, the court submitted a verdict form to the jury which stated: "We the jury find the defendant, Carl P. Fike, guilty of criminal damage to property." The verdict form then requested the jury to insert yes or no on the question of whether the property was reduced in value by more than \$1,000. The court did not submit a verdict form allowing the jury to find Fike not guilty of criminal damage to property.

The jury instructions and the verdict form were consistent with the court's instructions following the side bar conference and were submitted to the

¹ Fike attempted to show that the total property damaged was reduced in value by \$1,000 or less, because that would reduce the offense from a felony to a misdemeanor. Section 943.01, STATS.

jury without objection by Fike or his attorney. The jury returned the verdict finding Fike guilty of criminal damage to property and found that the property was reduced in value by more than \$1,000.

Fike contends that the court's instructions and the single verdict form improperly directed a verdict against him and deprived him of his constitutional right to a trial by jury. We conclude that this is a claim of instructional error. While *State v. Villarreal*, 153 Wis.2d 323, 331, 450 N.W.2d 519, 523 (Ct. App. 1989), indicated, in a harmless error analysis, that this is not an instructional error but an error of the wrong fact-finding entity adjudicating guilt, other case law supports the position that this is a claim of instructional error. See *State v. Curtis*, 144 Wis.2d 691, 694, 424 N.W.2d 719, 720 (Ct. App. 1988) (treating defendant's challenge that trial court directed a verdict against him on an element of the crime as an instructional error). While Fike is contending that the court directed a verdict against him, this claim is based upon the alleged improper jury instructions and verdict form. Further, in *Villarreal*, the jury was not instructed on the dangerous weapon element and the dangerous weapon element was not submitted to the jury for its consideration. *Id.* at 325, 450 N.W.2d at 520. In this case, the jury was instructed on the elements of criminal damage to property, the verdict form submitted to the jury included criminal damage to property, and the jury signed the verdict declaring the defendant's guilt. Therefore, *Villarreal* is inapposite.

Failure to object to a jury instruction or verdict waives any error in them. *State v. Schumacher*, 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988); § 805.13(3), STATS. This waiver rule operates even when a constitutional right is at stake. *Schumacher*, 144 Wis.2d at 397, 424 N.W.2d at 675. Because Fike failed to object to the instructions or verdict form, we cannot review the claimed error unless we conclude that discretionary reversal is warranted under § 752.35 STATS. *Id.* at 409, 424 N.W.2d at 680. We may order a discretionary reversal in the interest of justice if the real controversy has not been fully tried or if there has been a miscarriage of justice. Section 752.35, STATS.

We conclude that a reversal would not be in the interests of justice in this case. The claimed error was the result of a strategic decision by Fike and his attorney. Fike and his attorney knew that the State had four witnesses who were prepared to testify that they saw Fike commit the damage to the property. Faced with this overwhelming evidence, Fike attempted to bolster his credibility on the issue of value by stipulating to the act of damaging property.

The strategy was to try to get the offense reduced from a felony to a misdemeanor by showing that the reduction in value was \$1,000 or less. Pursuant to that strategy, Fike's attorney admitted in his opening statement the commission of the offense but denied the State's allegations of value. Following the side bar conference and with the apparent concurrence of Fike and his attorney, the court so instructed the jury.

Because this was a strategic decision made consistent with what Fike and his lawyer believed to be sound trial tactics, the interests of justice do not require reversal. Fike strategically presented the case in the precise way he desired. "It is contrary to fundamental principles of justice and orderly procedure to permit a party to assume a certain position in the course of litigation which may be advantageous, and then after the court maintains that position, argue on appeal that the action was error." *State v. Gove*, 148 Wis.2d 936, 944, 437 N.W.2d 218, 221 (1989). Because the claimed error was the result of a strategic decision by Fike, we conclude that we may not exercise our discretionary power of reversal.

Fike further argues that there is insufficient evidence to support the jury's finding of guilt. Fike argues that the jury's finding cannot be supported by the evidence tendered to the jury because the jury did not receive proof on all the essential elements of the crime. We disagree. Fike's judicial admission, in opening statements, is sufficient evidence to support the jury's finding of guilt. See *State v. Aldazabal*, 146 Wis.2d 267, 430 N.W.2d 614 (Ct. App. 1988).

Because we conclude that Fike waived any objection to the instructions and verdict form and that a new trial is not warranted in the interests of justice, we affirm the judgment and order.

By the Court. – Judgment and order affirmed.

Not recommended for publication in the official reports.