COURT OF APPEALS
DECISION
DATED AND RELEASED

February 13, 1997

No. 95-2159-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY STANKUS,

Defendant-Appellant.

APPEAL from judgments of the circuit court for Crawford County: GEORGE S. CURRY, Judge. *Affirmed*.

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. Anthony Stankus appeals from three judgments of conviction.[1] We affirm.

[1] In a previous order, we stated that denial of his postconviction motion is not before us in this appeal.

A jury convicted Stankus of three felonies. He raises four issues on appeal.

Stankus first argues that it was plain error under § 901.03(4), STATS., for the circuit court to prohibit recross examination of most witnesses at the trial. To be plain error, the error must be so fundamental that a new trial or other relief must be granted. ***State v. Vinson***, 183 Wis.2d 297, 303, 515 N.W.2d 314, 317 (Ct. App. 1994). The error must be both obvious and substantial, or grave, and the rule is reserved for cases where there is the likelihood that the error has denied a defendant a basic constitutional right. ***Id.*** We reject the argument. Stankus has not shown how the lack of recross examination prejudiced him. He does not identify specific questions he would have asked of any witness, or how the answers would have helped his case.

Stankus next argues that the court erred by allowing certain testimony by Leslie Charlton, a lay witness, that should have been given only by an expert witness. He also characterizes certain testimony as inadmissible hearsay. However, Stankus did not object to any of this testimony at the time; and therefore, he waived those claims of error. Section 901.03(1)(a), STATS. He does not argue that these were plain errors.

The third issue he raises is whether the circuit court erred by admitting a certain photograph into evidence. One of the counts on which Stankus was convicted was exposing a child to harmful material, contrary to § 948.11(2)(a), STATS. Stankus argued to the circuit court that the photograph does not meet the statutory definition of nudity provided in § 948.11(1)(d), STATS. As relevant to this photograph, the definition states that nudity is the showing of the female breast with less than a fully opaque covering of "any portion ... below the top of the nipple." The photograph shows a woman with shirt and jacket open to the waist, without exposing her nipples. Stankus argues that because the entirety of the breast below the top of the nipple is not exposed, it does not meet the definition. We disagree. As we read the definition, it includes any part of the breast which is below a horizonal line drawn parallel to the top of the nipple. The photograph comes within the meaning of § 948.11(1)(d).

Finally, Stankus argues that the circuit court committed prejudicial error when it made a comment to the jury about the prosecutor's impending wedding. Specifically, near the close of testimony, when dismissing the jurors for dinner, the court made comments to the effect that the case had to be completed that day, in part because the prosecutor was getting married the following day. Stankus's attorney apparently expressed a concern about this comment. After instructions, but before deliberation, the court advised the jury that its comment did not mean they had to "rush to get a judgment tonight," that they should not rush to judgment, and should deliberate as long as reasonably necessary to reach a fair and just verdict.

Stankus argues the court's comment was prejudicial in two ways. First, by suggesting that the jury was obligated to deliberate quickly and finish that night. We conclude that any potential prejudice was cured by the judge's additional instruction before deliberation. Stankus also argues the comments were prejudicial because they suggest that completing the case with a conviction would be "a nice wedding gift to the prosecutor." We reject the argument. Any potential concerns raised by the trial court's attempt at levity, were cured by its instruction.

By the Court.—Judgments affirmed.

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