COURT OF APPEALS
DECISION
DATED AND RELEASED

September 19, 1996

No. 95-2413-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN KLOPOTOWSKI,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Clark County: MICHAEL W. BRENNAN, Judge. *Affirmed*.

Before Eich, C.J., Dykman, P.J., and Paul C. Gartzke, Reserve Judge.

PER CURIAM. John Klopotowski appeals from a judgment of conviction and an order denying his postconviction motion. He argues the trial court erred by admitting certain evidence. We affirm.

Klopotowski was charged with two counts of nonconsensual intercourse[1] with the same victim. One count was alleged to have occurred on July 7, 1994, the other on July 16, 1994. The jury acquitted him on the first count but convicted him on the second.

Klopotowski argues the trial court erred by admitting testimony by Officer Robert Powell about certain statements made by the victim during the investigation. The State argues that he waived this issue by failing to object. Klopotowski responds that his trial counsel objected to all of the statements by the victim, no matter on what date they were made by her or through what witness the prosecution had them admitted. However, the record citation he relies on does not support the argument. That objection went solely to the testimony of another witness. Because Klopotowski did not object to admission of Powell's testimony, the issue was waived. ***State v. Smith***, 170 Wis.2d 701, 717-18, 490 N.W.2d 40, 47 (Ct. App. 1992), *cert. denied*, 507 U.S. 1035 (1993).

Klopotowski argues, for the first time in his reply brief, that we should address the issue using our discretionary reversal authority under § 752.35, STATS., or by use of the plain error rule, § 901.03(4), STATS. We decline to consider new arguments made in the reply brief. *See* ***State v. Foley***, 142 Wis.2d 331, 345 n.7, 417 N.W.2d 920, 927 (Ct. App. 1987).

Klopotowski argues the court erred by admitting testimony of Joseph Tomczak about certain statements by Caroline Nicpon, a neighbor of the victim, in a telephone call to Tomczak. Tomczak testified that Nicpon said the victim called her and said Klopotowski was having sex with her. Klopotowski argues the testimony was inadmissible hearsay. Klopotowski objected at trial on hearsay grounds. The prosecutor responded that the statement was not being offered for the truth of the matter asserted, but to show why Tomczak then contacted police, which caused an investigation. The court overruled the objection.

Klopotowski argues that the testimony was not admitted for the purpose expressed by the prosecutor, but was actually admitted for the truth of

[1] § 940.225(3), STATS.

the statements. He asserts that this is shown by the fact that the prosecution could have explained how the investigation began without using the actual statements that were made to Tomczak. We reject the argument. Klopotowski does not dispute that the jury was entitled to hear how the investigation began. To do so, the State would have to elicit, at a minimum, that Tomczak was given some kind of indication that a crime may have occurred. Even if it is true that the State could have done so without Tomczak stating precisely what he was told, Klopotowski did not request such a limitation or offer any other argument in support of his objection.

Klopotowski argues the court erred by admitting testimony by Nicpon about two telephone calls from the victim. Nicpon testified that the first call was July 10, 1994, in which the victim said she had been assaulted by Klopotowski on July 7, 1994. However, any error in admitting this testimony was harmless because he was acquitted on the July 7 charge. The second call was on July 17, 1994, reporting an assault the previous day. Klopotowski did not object to this statement, and therefore waived any further argument. ***Smith,*** 170 Wis.2d at 717-18, 490 N.W.2d at 47.

By the Court.—Judgment and order affirmed.

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