COURT OF APPEALS
DECISION
DATED AND RELEASED

January 24, 1996

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

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2501

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

In the Interest of Sara V.,
A Person Under the Age of 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

SARA V.,

Respondent-Appellant.

APPEAL from orders of the circuit court for Racine County: RICHARD G. HARVEY, JR., Reserve Judge, and NANCY E. WHEELER, Judge. *Orders reversed*.

BROWN, J. In this CHIPS case, Sara V. alleges that the trial court erred when it made comments to the jury suggesting how her case should be decided. After reviewing the record, we agree that these statements interfered with the jury's deliberations and thus reverse the verdict finding Sara in need of protective services and the trial court's dispositional order.

In March 1994, the State filed a petition alleging that Sara was in need of protective services. It relied on information from the Racine Unified School District that Sara had been excessively truant from school during the 1993-94 academic year and that her mother "seems to encourage her seclusion by not sending her to school." The State sought a dispositional order with hopes that Sara would return to class.

At trial, Sara and her parents attempted to show how Sara was harassed by other students. They claimed that Sara suffered from depression and a bladder infection which created an unfortunate odor problem. Sara and her parents contended that the school district had failed to control the other students and make school a less hostile environment for Sara.

The evidence at trial consisted of testimony from Sara's mother and various school officials about how each side had responded to her situation. Sara was emotionally unable to appear in open court, but her testimony was taken in chambers and read to the jury. She explained how she was continually harassed at school and that she believed that the administration had not taken any steps towards improving her situation.

Sara's testimony was followed by closing arguments. But before formally instructing the jury, Reserve Judge Richard G. Harvey, Jr., presiding, made the following comments:

> I'll tell you, members of the jury, I've been a judge for 26 years and this is in a lot of ways an unusual case from my point of view. ... And I had a brief enough conversation with [Sara] in Chambers when we were doing the step to, I'm very confident that she has a good mind

> and that she will, with the proper guidance, she'll take advantage of it. And she's going to be very much sought after, I'm sure, because she physically is quite attractive. And particularly when you're up close to her, she is very nice looking.

> The function of the Court is to give some instructions. I think that the district attorney, what she is asking for that outcome for is because she feels that's a necessary tool so that we can achieve the educational path that we want. And that we need with this young lady. So, this is not to be taken as a reprimand to the parents or to Sara. … It is simply a finding of a situation that she's in need of help on—legally speaking so that the powers available. And for that reason, not because her parents are wicked or bad or don't know what they are doing … but simply because this thing would be helpful—that outcome would be helpful and that was the point of view of the district attorney in asking you for that.

> I must say, of course, that the comments made by the defense attorney are fair and decent and he's done a nice job and he had a good motive in mind for doing the defense that he's done and he deserves commendation ….

> My own instruction and my—I don't want you to feel that I have some special merit or power to make you make a verdict, that's your job. And I want you to do it the way you feel it's sincere. I do feel that—that a yes verdict would be—would be helpful toward the final outcome, but you make the decision and you do what you feel is right and just and proper. So I thank you for your attention.

The jury returned with a verdict finding Sara in need of protective services and the trial court entered an appropriate dispositional order.

In a postverdict hearing, the court[1] focused on the additional cautionary instruction that was read to the jury; it stated:

> If during the trial you gained any impression that I have a feeling one way or the other on this case, you should completely disregard any such impression because you jurors are the sole judges of the evidence and the credibility of the witnesses in the case. My feelings are … immaterial and that's important. I've already told you that also.

The trial court reasoned that the above instruction remedied any problem resulting from the earlier comments to the jury and denied Sara's motion for a new trial.

On appeal, Sara nonetheless renews her contention that these remarks interfered with the jury's deliberative process. She relies on ***Breunig v. American Family Ins.***, 45 Wis.2d 536, 173 N.W.2d 619 (1970), where the supreme court warned that trial judges bear the responsibility of maintaining an atmosphere of impartiality. *See* ***id.*** at 547, 173 N.W.2d at 626. Sara contends that the trial court breached its duty when it made these comments. We agree.

The message sent by the trial court could not be any clearer. It wanted the jurors to know that the best thing they could do for Sara would be to find her in need of protective services. These remarks were not casual, made

[1] Judge Nancy E. Wheeler presided at this hearing.

in passing, or a simple misstatement. *Compare* ***State v. Vinson***, 183 Wis.2d 297, 302-04, 515 N.W.2d 314, 316-17 (Ct. App. 1994) (trial court's use of the term *credible*, instead of *competent*, not reversible error). The trial court set aside time to make these statements. And because the jury was so "instructed," we are not confident that its verdict was premised on an impartial review of the evidence. The trial court twice informed the jury that it was ultimately responsible for the verdict, but it also informed them that both sides had done a very good job of presenting their respective sides of the story. In such a close case, the jury was likely looking for something to base its decision on—and here it could rely on the trial judge's personal conclusions that were backed up with twenty-six years of experience.

We set aside the State's concern, raised during the postverdict hearing, that Sara waived her right to raise this error because an objection was not made until after the jury was sent to deliberate. Under the plain error rule, this court may review issues not squarely presented to the trial court when a substantial right is affected. *See* ***Virgil v. State***, 84 Wis.2d 166, 192-93, 267 N.W.2d 852, 865 (1978); *see also* § 901.03(4), STATS. While certain elements of the trial court's remarks pertained to Sara as a witness, and reviewing such commentary may not fall within the scope of the plain error rule, *see* ***Vinson***, 183 Wis.2d at 303, 515 N.W.2d at 317, the trial court's error also impeded Sara's right to an impartial jury. We thus conclude that the only proper remedy is to grant her a new trial.

By the Court.—Orders reversed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.