

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 11, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2006AP2577-CR

Cir. Ct. No. 2005CF1357

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PHILLIP M. TRULL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM W. BRASH and JEFFREY A. KREMERS, Judges. *Affirmed.*

Before Dykman, Vergeront and Bridge, JJ.

¶1 PER CURIAM. Phillip Trull appeals from a judgment of conviction and an order denying his motion for postconviction relief. The issues relate to admission at Trull's trial of a co-defendant's guilty plea. We affirm.

¶2 Trull and his mother Diane Trull were both charged with possession of a short-barreled shotgun, keeping a drug house, and other charges, all connected with a given address on one day. At Trull’s trial, on cross-examination of his mother, the prosecutor asked how many times she had been convicted of a crime, to which she answered “three.” This exchange then occurred:

Q. You have already pled out to your portion of this case, have you not?

A. Yes.

¶3 On appeal, Trull argues that the court erred by allowing this last answer to be admitted without first holding a hearing as provided in WIS. STAT. § 906.09(3) (2005-06).¹ Trull further argues that the court erred by not giving the jury an adequate curative instruction on this evidence. In response, the State argues that Trull waived these issues because he did not object to the admission of the evidence or request a specific instruction. In reply, Trull appears to concede that the State’s waiver argument is accurate, but he argues that we should address these issues under the “plain error” doctrine, as authorized by WIS. STAT. § 901.03(4), which allows the “taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge.”

¶4 Under that doctrine, the error must be so fundamental that a new trial or other relief must be granted, and the error must be obvious and substantial, or grave. *State v. Street*, 202 Wis. 2d 533, 552, 551 N.W.2d 830 (Ct. App. 1996). The plain-error rule is reserved for cases in which it is likely that the error denied the defendant a basic constitutional right. *Id.* In the present case, we do not agree

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

that the asserted errors were obvious. In addition, we note that the plain-error doctrine would not reach the instructional issue, but only the evidentiary one. *See State v. Schumacher*, 144 Wis.2d 388, 402, 424 N.W.2d 672 (1988) (plain-error doctrine was superseded in respect to claimed instructional errors by WIS. STAT. § 805.13(3), and is restricted to evidentiary questions).

¶5 Trull also argues that we should exercise our power of discretionary reversal under WIS. STAT. § 752.35, on the theory that these asserted errors prevented the real controversy from being fully tried. Under that theory, we need not conclude that the outcome would be different on retrial. *Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). However, we do not agree that admission of this one piece of evidence prevented the real controversy from being tried. The jury heard significant evidence relating more directly to the charges, and there has been no argument about the accuracy of the substantive instructions on those charges. The question to Diane Trull was vague as to the specifics of the charges she pleaded to, and how they related to the charges against Trull, and therefore its impact on jury consideration of Trull's charges would be minimal. In addition, even while being aware of Diane Trull's plea, the jury appears to have applied some discernment in its review of the evidence, because it acquitted Trull on some charges, while convicting on others.

¶6 Nor did the asserted error of failing to give an additional curative instruction prevent the real controversy from being tried. The court did give the standard instruction stating that evidence of witness convictions was received solely for credibility purposes, and cannot be used for any other purpose. Trull's argument is that a further, and more immediate, curative instruction should have been given relating to the specific nature of Diane Trull's convictions and their connection to his own case. Given the non-specific nature of the question and

answer, we do not agree that the absence of an additional curative instruction on this tangential matter would play a significant role in this case.

By the Court.—Judgment and order affirmed.

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

