COURT OF APPEALS
DECISION
DATED AND FILED

December 2, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2161

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

IN THE MATTER OF THE MENTAL COMMITMENT OF TERRY R.H.

MARATHON COUNTY,

PETITIONER-RESPONDENT,

V.

TERRY R.H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Affirmed.*

HOOVER, J. A jury determined that the appellant, Terry R.H. was an appropriate subject for recommitment under ch. 51. STATS.[1] This is an

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[1] *See* §§ 51.20(1)(a) and (am) and 51.20(13)(g)3, STATS.

appeal of the recommitment order. Terry contends that he was entitled to a mistrial when Marathon County's attorney informed the jury in rebuttal argument that a previous jury had found Terry to be dangerous. This court concludes that Terry has not sufficiently developed an appellate argument and that, in any event, the statement at issue did not prejudice him. The order for recommitment is therefore affirmed.

An initial mental illness commitment requires proof of mental illness and some form of dangerousness to oneself or others.[2] In a recommitment proceeding, the prosecuting authority must prove mental illness[3] and a substantial likelihood, based on the subject individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn. *See note **1***. The only evidence the jury heard regarding the latter element was the testimony of two physicians who testified on behalf of the County. Both opined that Terry would likely relapse if treatment were withdrawn and he would again be a proper subject for commitment. Dr. John Coates also testified that Terry was a danger to himself and others and that after release from a previous commitment he relapsed, assaulted his mother and was again committed. Dr. Randal Wojciehoski testified that Terry presented a risk of assaulting his mother again if treatment were withdrawn.

Terry's position at trial was that the doctors' opinions should be disregarded because they had no firsthand knowledge of his behavior when not in treatment. During closing argument, Terry's counsel told the jury that "the central

[2] Sections 51.20(1)(a)1 and 2, STATS.

[3] This element is not at issue in this appeal.

issue in this case is whether there would be dangerous activity if treatment was withdrawn or if the commitment order is withdrawn." He then challenged the value of the doctors' opinions, which were based exclusively on treatment police records:

> When I questioned Dr. Coates about what he had called a physical assault, he really wasn't very sure of what he was referring to. And when I pulled out the police report that he had admitted he got it from, he indicated that he didn't even know if the person who was supposedly assaulted suffered pain. He didn't even know that. He had not spoken to that person. He had not spoken to anyone who had investigated it.
>
> There are some brief references in the record concerning this supposed physical assault that are referred to by each of the doctors. These doctors, as they are instructed to and typically happens, had reviewed records. And they review the records and they make their conclusions about the case.
>
> There is other evidence that, if there was serious physical harm that occurred from this alleged assault, and it wasn't termed a physical assault by the police reports that [were] referred to, that the doctors confirmed. If there was evidence that someone was placed in danger of serious physical harm or there was homicidal behavior, anything like, that it should have come into evidence and it did not.
>
> I propose to you that you can't rely on the testimony of doctors who have done a review of records, perhaps at the most for two hours concerning all of these years, who are not able to independently refer to what happened in a certain incident that they are trying to put in as a basis for danger, who have never talked to anyone who was present at that incident and who did not even know if the person that they say was physically assaulted even suffered pain. And if they can't say that they suffered pain, well, then how could they possibly say that there was any serious physical harm that resulted from that incident or that could have happened.

In rebuttal the County addressed Terry's argument by informing the jury that no witnesses to the subject's prior dangerous acts testified because the issue of initial dangerousness had been decided as part of the underlying commitment. She then

stated: "A jury decided at the time the incident occurred that that was sufficiently dangerous in those circumstances …."

The County's reference to a prior jury's determination on the issue of dangerousness drew an immediate but unsuccessful objection and motion to strike. Later Terry moved for a mistrial. He appeals the trial court's order denying this latter motion.

A motion for a mistrial is addressed to the sound discretion of the trial court. The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial. ***State v. Bunch***, 191 Wis.2d 501, 506, 529 N.W.2d 923, 925 (Ct. App.1995).

Terry contends that:

> There was no principled basis for informing the jury that a previous jury had found the appellant's prior act to be dangerous enough to warrant his commitment. … [I]t severely prejudiced the appellant's attempts to have his jury independently determine whether the County had met its burden of proving his future dangerousness.

Terry further complains that the County's argument reached beyond the evidence admitted in the trial.

Although Terry presents an incipient argument of error that implies that the County's argument invited the jury to rely on a previous jury's determination, he does not present a fully developed legal argument. He states but does not support his contention. The briefs do not disclose the precise principle or principles of law upon which the contention of error rests. No references to authority are provided. The only citation Terry offers is for the proposition that it is improper to argue matters not in evidence. He does not attempt to address the

critical issue of why the trial court erred by determining that any prejudice arising from counsel's rebuttal was insufficient to warrant a mistrial. *See* ***id.*** We decline to develop his argument for him. ***State v. Gulrud***, 140 Wis.2d 721, 730, 412 N.W.2d 139, 142 (Ct. App. 1987).[4]

The foregoing is sufficient to dispose of the appeal. However, this court alternatively agrees with the County that application for mistrial was properly denied because Terry was not prejudiced by the County's remarks. The sentence in question was only one amid a discussion of both the standard for commitment versus recommitment, and the evidence in support of the latter standard. The expert opinions that Terry would be a proper subject for recommitment if treatment was withdrawn was not controverted by other evidence. The jury was instructed that counsels' remarks had no evidentiary value and that it should confine its deliberations to the evidence and the inferences it supported.[5] Danger of prejudice is cured when admonitory instructions are given because juries are presumed to follow the instructions given. *See* ***State v. Grande***, 169 Wis.2d 422, 436, 485 N.W.2d 282, 286-87 (Ct. App. 1992). This court concludes that the trial court properly determined that if the complained of comment was improper, it was also harmless.

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[4] Section 809.19(1)(e), STATS., requires that the argument contain the contention of the party, the reasons therefor, with citation of authorities, statutes and that part of the record relied on; inadequate argument will not be considered. *See* ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980).

[5] The court instructed the jury as follows: "You should consider carefully the closing arguments of the attorneys, but their arguments and conclusions and opinion are not evidence. Draw your own conclusions and … your own inferences from the evidence and decide upon your verdict according to the evidence and my instructions on the law."

By the Court.—Order affirmed.

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