COURT OF APPEALS
DECISION
DATED AND FILED

December 1, 2005

Cornelia G. Clark
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. 2003AP3252 **Cir. Ct. No. 1998CI14**

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

IN RE THE COMMITMENT OF BRUCE N. BROWN:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

BRUCE N. BROWN,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Bruce Brown appeals from a judgment finding him to be a sexually violent person under Chapter 980 of the Wisconsin Statutes and

ordering him committed to the custody of the Department of Health and Family Services. He challenges evidentiary rulings relating to the testimony of an expert witness, the denial of a requested special verdict and jury instructions, and the lack of evidence showing that he was presently dangerous as evidenced by a recent overt act. We reject each of Brown's arguments and affirm. For convenience, we will discuss the facts necessary to decide each issue along with that issue.

Testimony About Actuarial Instruments

¶2 The State's expert psychologist, Dennis Doren, employed a series of actuarial instruments to assist him in assessing the probability that Brown would commit future acts of sexual violence. These included the Rapid Risk Assessment For Sex Offender's Recidivism (RRASOR), the Static-99, and the Minnesota Sex Offender Screening Tool Revised (MnSOST-R). Brown contends that Doren should not have been allowed to testify about the results of the actuarial instruments because: (1) the instruments were not the type of data reasonably relied upon by experts diagnosing mental disorders causing a substantial probability of sexual violence under WIS. STAT. § 907.03 (2003-04)[1]; (2) the actuarial evidence was insufficiently probative; (3) the instruments were insufficiently reliable to satisfy due process; and (4) the actuarial evidence unduly prejudiced Brown.

¶3 We first note that Brown's argument regarding WIS. STAT. § 907.03 is misplaced. That statute provides:

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Actuarial instruments are not themselves "facts or data." Rather, they are a method for evaluating data. While some of the historical information about Brown to which the actuarial instruments were applied might fall within this statute, Brown has not identified any specific fact used in the administration of the instruments to which he objected as otherwise inadmissible.

¶4 Brown's challenge to the reliability of the actuarial instruments also misses the point. Brown contends that he has a due process right to have his commitment based upon reliable evidence, even though Wisconsin has elected not to follow the federal rule set forth in ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993), which gives trial courts a broad gatekeeper role over the admission of scientific evidence. However, "Wisconsin, unlike the federal courts, considers the reliability of scientific evidence a question of weight and credibility for the trier of fact to decide." ***City of West Bend v. Wilkens***, 2005 WI App 36, ¶23, 278 Wis. 2d 643, 693 N.W.2d 324. In other words, the Wisconsin rule is *not* that individuals may be committed based upon unreliable evidence, but that in this state it is the jury's function to determine what evidence is reliable. If the jury determines that evidence offered by an expert is reliable, there is no due process violation. The test for admissibility remains simply whether: the evidence is relevant; the witness offering it is qualified as an expert; and the evidence will

assist the jury in determining an issue of fact. ***State v. Peters***, 192 Wis. 2d 674, 687, 534 N.W.2d 867 (Ct. App 1995).[2]

¶5 Finally, we also reject Brown's second and fourth contentions that the trial court should have barred Doren's testimony on the results of the actuarial instruments because it was not probative and was unduly prejudicial. The crux of both these arguments appears to be that, because the instruments only measure *general* recidivism rates, they are not probative as to the probability that an individual will commit a future *sexually violent offense because of mental illness*, and were thus likely to mislead the jury. We agree that, to be admissible, evidence must be relevant under WIS. STAT. §§ 904.01 and 904.02, in that it relates to a fact or proposition of consequence to the determination of the action, and its probative value must not be substantially outweighed by the danger of unfair prejudice or confusion of issues under WIS. STAT. § 904.03. We are satisfied, however, that the trial court reasonably exercised its discretion here in determining that the probative value of the actuarial testimony was not substantially outweighed by its prejudicial effect. While the specific measure of recidivism used in the instruments is not precisely the same as the future risk which needs to be determined, the instruments could nonetheless help a jury draw a conclusion as to that future risk. *See* ***State v. Tainter***, 2002 WI App 296, ¶20, 259 Wis. 2d 387, 655 N.W.2d 538 (holding that the trial court properly found actuarial instruments relevant because they assist in assessing an offender's future risk).

[2] We note that, in affirming the admission of Doren's testimony regarding the results of the actuarial instruments he employed, we do not thereby affirm the validity of his testimony or his methods. Under Wisconsin law governing the admissibility of expert testimony, that determination is to be made by the jury, not by this court or the circuit court.

Reference to American Psychiatric Association

¶6 Doren diagnosed Brown as suffering from "Paraphilia Not Otherwise Specified—Nonconsent." He admitted that he created the "nonconsent" portion of the diagnosis himself, because he believed there to be a gap in the DSM-IV-TR. When asked whether the "not otherwise specified category is a lesser category of diagnosis," Doren responded, over a sustained objection, "I'm quite sure it's not a lesser category. I checked with the American Psychiatric Association." Brown claims this reference to the American Psychiatric Association was hearsay which improperly buttressed the validity of Doren's diagnosis and therefore entitles him to a new trial.

¶7 An evidentiary error does not require a new trial unless it "has affected the substantial rights of the party seeking to reverse or set aside the judgment." WIS. STAT. RULE 805.18(2). The test for whether an error was prejudicial, as opposed to harmless error, is "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ***Hannemann v. Boyson***, 2005 WI 94, ¶57, 282 Wis. 2d 664, 698 N.W.2d 714 (citations omitted). An error cannot be said to have contributed to the verdict if it is clear that a rational jury would have reached the same result absent the error. ***Id.***

¶8 Brown has not convinced us that Doren's reference to the American Psychiatric Association was prejudicial. First of all, his testimony that he "checked" with the association does not reveal the substance of what the association told him. Moreover, even inferring that someone at the association agreed with Doren that the "not otherwise specified" designation is not a lesser category of a paraphilia diagnosis, that does not mean that the association agreed

that "nonconsent" was a proper designation. In short, it is clear from the transcripts that the issue of whether Doren's diagnosis was valid was fully tried, and the absence of Doren's isolated reference to having checked with the association would not have led the jury to reach a different result.

Special Verdict

¶9 Brown requested that the trial court give the jury a special verdict form "to reflect the four different elements … because of the sort of difficult nature of the testimony, because of the discrete nature of the inquiries, and because [counsel] thought it would prevent any problem in depriving the … respondent of a unanimous jury verdict."[3] The trial court denied the motion, analogizing the case to criminal matters and reasoning that since a single verdict is sufficient for a first-degree murder charge, it is adequate for a Chapter 980 case.

¶10 Brown contends that the trial court erroneously exercised its discretion in denying his special verdict request because the general verdict form used in a first-degree homicide trial was an improper factor to consider. We disagree. Brown himself had argued that the "difficult nature of the testimony" warranted a special verdict form. We see no reason why the trial court could not then compare the difficulty or complexity of the issues in a Chapter 980 case to those in a homicide case in deciding whether a special verdict form was necessary.

[3] The State claims that one of the four questions Brown asked the court to include on the special verdict misstated the law. We cannot evaluate that claim because the jury instruction conference was not recorded, and counsel's subsequent offer of proof only asked that each element be listed individually on the verdict, without restating what those elements were. *See* ***Air Wisconsin, Inc. v. North Central Airlines, Inc.***, 98 Wis. 2d 301, 311, 296 N.W.2d 749 (1980).

Nor, for that matter, do we see what prejudice Brown would have suffered, since the verdict actually given to the jury was itself proper.

Absence of a Recent Overt Act

¶11 This case arose in a somewhat different posture than the usual Chapter 980 case in that the State did not petition to commit Brown until he was approaching his second release from prison on the underlying sexually violent offense, following the revocation of his earlier parole. Brown contends that, once an offender has been released from custody for a sexually violent act, substantive due process requires a showing that he or she has committed a recent overt act before proceeding on a commitment. In ***State v. Carpenter***, 197 Wis. 2d 252, 275, 541 N.W.2d 105 (1995), however, the Wisconsin Supreme Court explicitly rejected a contention "that the State must establish an overt act in order to establish probable cause of dangerousness because he had been released from custody prior to the filing of the petition."

¶12 Brown attempts to distinguish the holding in ***Carpenter*** from the present case on the grounds that the court there did not mention substantive due process in its analysis. That argument ignores the fact that the ***Carpenter*** court did expressly distinguish the facts before it from those in a substantive due process case from Washington—specifically ***In re Young***, 857 P.2d 989 (Wash. 1993). Indeed, ***Young*** is one of the cases which Brown now cites in support of his position. We are therefore persuaded that ***Carpenter*** did implicitly reject the same substantive due process argument presented here, and we are bound by that decision. *See* ***State v. Clark***, 179 Wis. 2d 484, 493, 507 N.W.2d 172 (Ct. App. 1993).

By the Court.—Judgment affirmed.

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