COURT OF APPEALS DECISION DATED AND FILED

February 4, 2003

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. 01-1032

Cir. Ct. No. 99 CI 5

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

IN RE THE COMMITMENT OF RICKEY GRAY:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

RICKEY GRAY,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Rickey Gray appeals from a judgment and an order for commitment in a ch. 980 case, after a jury found that he was a sexually violent

person, pursuant to WIS. STAT. § 980.05 (1999-2000),[1] and the trial court ordered him committed pursuant to WIS. STAT. § 980.065. He claims that: (1) he had a right to be present when the decision to strike the alternate juror was made; (2) a new trial is required in the interest of justice because the issue of whether he was a sexual sadist was not fully tried; (3) a new trial is needed in the interest of justice because the primary actuarial instrument used to show him to be a high risk has been shown not to be predictive of sexually violent reoffending; (4) the State failed to prove that his inability to exercise volitional control makes it difficult, if not impossible, for him to control his sexually violent behavior; (5) the trial court committed reversible error in failing to instruct the jury that it had to make a specific finding that he lacks volitional control; (6) a new trial in the interest of justice is required because the real controversy of whether he lacks volitional control was not fully tried; and (7) ch. 980 is unconstitutional if it does not require a finding of lack of volitional control. Because we resolve each issue in favor of upholding the judgment and order, we affirm.

BACKGROUND

¶2 In 1975, Gray was convicted of one count of rape of a minor. In 1987, he was convicted of two counts of sexual assault. In both instances, he had sexual intercourse with the victims and burned them with a cigarette. He was sentenced to eighteen years on the 1987 assaults and was due for mandatory release on December 27, 1999.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶3 On December 14, 1999, the State filed a ch. 980 petition alleging that Gray was a sexually violent person. A probable cause hearing was held on December 16, 1999, during which a licensed psychologist indicated that Gray had agreed to speak with him. After talking to him, reviewing his records, and administering a test, the psychologist concluded to a reasonable degree of psychological certainty that Gray suffered from sexual sadism and a personality disorder, not otherwise specified, with antisocial features.

¶4 On March 2, 2000, a jury demand was made and in November 2000, Gray filed a *pro se* motion to dismiss, challenging the constitutionality of WIS. STAT. ch. 980 in light of ***Kansas v. Hendricks***, 521 U.S. 346 (1997). Gray also made a request for new counsel.

¶5 On March 26, 2001, a jury trial commenced and the trial court denied Gray's request for new counsel as well as his motion to dismiss. At trial, the facts of the 1975 and 1987 convictions were provided by a probation and parole agent and the psychologist from the probable cause hearing. In addition, another psychologist testified that Gray suffered from sexual sadism and a personality disorder and, based on consultations and tests, it was substantially probable that Gray would commit further acts of sexual violence.

¶6 On March 27, 2001, the trial court brought to the attention of the lawyers that one of the jurors was having difficulty keeping her eyes open and suggested that she be designated as an alternate juror. The lawyers agreed and, to avoid embarrassing the juror, announced that they had picked her name at lot to be

the alternate juror.[2] Later that afternoon, the jury returned a verdict that Gray was a sexually violent person. The court granted judgment on the verdict and ordered Gray committed to the Department of Health and Family Services.

¶7 On August 13, 2001, Gray filed a postcommitment motion in the trial court alleging ineffective assistance of counsel for allowing the juror to be dismissed as the alternate. Gray contended that this decision should not have been made without his input as that juror was the only African-American juror. The trial court issued an order denying postcommitment relief on October 8, 2001. Gray now appeals.

DISCUSSION

A. Striking of African-American Juror.

¶8 Gray first contends that his constitutional rights were violated by the dismissal of the only African-American juror on the panel at a sidebar conference out of his presence. He further contends that his lawyer was deficient for agreeing to the removal of the juror without consulting him. He also argues that, pursuant to WIS. STAT. § 805.08(2), the alternate juror is to be selected by lot. Gray contends that the juror removed was the only African-American member of the jury, that she came from his community, and that having her on the jury would help him receive a fair trial. We are not convinced by Gray's arguments.

¶9 Gray claims that the court violated his constitutional rights when it failed to obtain a personal waiver of the statutory provision which requires the

[2] We appreciate the trial court's concern over embarrassing a sleepy juror, but we caution that lying conflicts with a judge's duties. *See* S.C.R. 60.02

alternate juror to be selected by lot. *See* WIS. STAT. § 805.08(2). Although Gray treats this issue as an alleged trial court error, the only way this court can review the decision to designate the juror as the alternate juror is within the framework of a claim of ineffective assistance. *See generally* ***State v. Brunette***, 220 Wis. 2d 431, 583 N.W.2d 174 (Ct. App. 1998); ***State v. Erickson***, 227 Wis. 2d 758, 596 N.W.2d 749 (1999). This is so because his trial counsel agreed to the procedure utilized.

¶10 Gray cannot make either showing required by ***Strickland***[3] for an ineffective assistance of counsel claim. The first showing required is that counsel's performance was deficient. ***Strickland v. Washington***, 466 U.S. 668, 689 (1984). Here, counsel's agreement to waive the statutory provision stating that an alternate juror be selected by lot was not deficient performance, for the record reflects that counsel shared the trial court's concern that the juror was not sufficiently alert to inspire confidence that she would make a decision based on the evidence. This is clearly within the "wide range of professionally competent assistance." ***Id.*** To have a valid claim for ineffective assistance of counsel, both showings required by ***Strickland*** must be made; however, because the deficient performance showing is lacking, it is not necessary for us to discuss whether Gray was prejudiced by the decision. Nevertheless, this court concludes that he was not prejudiced by the decision of counsel in such a way that, but for counsel's conduct, there was a reasonable probability that the results of the trial would have been different. ***Id.***, 466 U.S. at 694.

[3] ***Strickland v. Washington***, 466 U.S. 668 (1984).

¶11 In ***Brunette***, this court held that "the ultimate decision whether to move to strike a potential juror for cause is for counsel to make, and counsel's failure to so move is a waiver of the defendant's right to object to that person sitting on the jury." ***Id.*** at 445. Brunette's claim that he had to personally waive any objection to a potential juror's bias was rejected. We considered whether Brunette's attorney was ineffective in failing to object to a juror's presence on the jury and not whether Brunette's constitutional right to an impartial jury was violated when the juror remained on the jury. ***Id.*** at 445-49.

¶12 ***Brunette*** is consistent with the supreme court's decision in ***Erickson*** when it determined that the correct method for analyzing defense attorney's failed objection to the incorrect number of preemptory strikes was ineffective assistance of counsel. ***Erickson***, 227 Wis. 2d at 766. Gray mistakenly relies on ***State v. Lehman***, 108 Wis. 2d 291, 321 N.W.2d 212 (1982). ***Lehman*** presents a question of the power of the trial court to discharge a regular juror during deliberations, and also presents a fact pattern where neither defense nor the state was given the opportunity to be present when the juror was discharged. ***Id.*** at 300. The reasoning set forth in ***Brunette*** and ***Erickson*** applies to Gray's case as well. Thus, Gray's only challenge to the dismissal of the juror is on the basis of ineffective assistance.

¶13 We have concluded that Gray failed to demonstrate that his counsel provided ineffective assistance. The decision to have the juror removed as a result of her failure to pay attention during the trial was reasonable. Moreover, Gray was not unfairly prejudiced by the decision to dismiss the inattentive juror. The record reflects that Gray's case was decided by fair and impartial jurors. There is nothing

to suggest that if the inattentive juror had remained on the panel, the outcome of the case would have been different. Accordingly, we reject his claim.[4]

B. Sexual Sadist Issue.

¶14 Gray next contends that he should be given a new trial in the interest of justice because the issue of whether he is a sexual sadist was not fully tried. We are not persuaded.

¶15 The real controversy in this case is whether Gray is a sexually violent person. To establish that Gray was a sexually violent person, the State had to prove that: (1) Gray was previously convicted of a sexually violent offense; (2) he was within ninety days of release from a sentence for a sexually violent offense; (3) Gray suffers from a mental disorder; and (4) this mental disorder creates a substantial probability that he will engage in future acts of sexual violence. WIS. STAT. § 980.02(2).

¶16 Gray's attorney did not argue that there was insufficient proof that Gray suffers from a mental disorder which predisposes him to engage in acts of sexual violence. However, even if the sexual sadist diagnosis was not fully tried, it was not solely relied on by the two psychologists who testified at the trial, and was not the real issue in the case.

[4] Gray also claims that the juror was removed solely because she was the only African-American juror on the panel, in violation of ***Batson***. *See* ***Batson v. Kentucky***, 476 U.S. 79 (1986). For the State to have to defend this issue, Gray must establish a *prima facie* case of racial bias. Based on our review, we summarily reject Gray's ***Batson*** challenge because the record reflects numerous race-neutral reasons for removing the juror and, therefore, there is no need to discuss this argument in more depth.

¶17 Because the real controversy was whether Gray was a sexually violent person, and not whether he was a sexual sadist, he is not entitled to a new trial in the interest of justice.

C. MnSOST-R Shown to be Inaccurate.

¶18 Gray's third argument is that he should receive a new trial in the interest of justice because, he says, the Minnesota Sex Offender Screening Tool Revised (the "MnSOST-R"), the actuarial device on which he scored the highest for the risk of sexually violent reoffense, has been shown "not to be predictive of sexually violent reoffense."

¶19 This court's power of discretionary reversal is governed by WIS. STAT. § 752.35. We will exercise our reversal power under this statute in two situations: "(1) whenever the real controversy has not been fully tried; or (2) whenever it is probable that justice has for any reason miscarried." ***State v. Hicks***, 202 Wis. 2d 150, 159-60, 549 N.W.2d 435 (1996). The supreme court has found that the real controversy has not been fully tried when the jury was erroneously deprived of hearing pertinent testimony bearing on an important issue in the case or when the jury had before it improperly admitted evidence. ***State v. Wyss***, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985) *overruled on other grounds by* ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). Because Gray asserts that "the real issue of risk of future dangerousness was not fully tried," it can be assumed that he is proceeding under the first prong of § 752.35.

¶20 Gray is neither alleging erroneous exclusion of evidence or improper admission of evidence. Rather, he cites two articles, both of which appeared after his trial, to support his claim that the issue of risk of future dangerousness was not fully tried. Because the articles were published after the trial, the only way he

could get relief based upon them would be if they were newly discovered evidence under WIS. STAT. § 806.01(1)(b). However, it is doubtful these articles would so qualify because a new expert opinion, obtained post-trial but based on facts available to the trial experts, is not "newly discovered evidence." *See* ***State v. Fosnow***, 2001 WI App 2, ¶26, 240 Wis. 2d 699, 624 N.W.2d 883.

¶21 The recent articles do not satisfy the standards required for a new trial pursuant to WIS. STAT. § 752.35, and would not be considered newly discovered evidence. Therefore, we reject this claim.

D. Volitional Control.

¶22 Gray's last four issues all relate to volitional control; therefore, we address the four interrelated issues together. Gray claims: (1) the State failed to prove that his inability to exercise volitional control makes it difficult for him to control his sexually violent behavior; (2) the jury should have been instructed to make a specific finding that Gray lacks volitional control; (3) he is entitled to a new trial because the real controversy of whether he lacks volitional control was not fully tried; and (4) ch. 980 is unconstitutional if it does not require a finding on lack of volitional control.

¶23 These issues are all controlled by the Wisconsin Supreme Court's recent decision in ***State v. Laxton***, 2002 WI 82, 254 Wis. 2d 185, 647 N.W.2d 784, which applies the principles of the United States Supreme Court's decision in ***Kansas v. Crane***, 534 U.S. 407 (2002). Based on ***Laxton***, we reject all four of Gray's claims.

¶24 In ***Laxton***, our supreme court specifically held that a ch. 980 "civil commitment does not require a separate finding that the individual's mental

disorder involves serious difficulty for such person to control his or her behavior." ***Laxton***, 2002 WI 82 at ¶2. Moreover, the supreme court found that Wisconsin's sexual predator law does not violate the due process requirement because it "requires a nexus between the mental disorder and the individual's dangerousness." ***Id.*** at ¶22. Thus, a specific lack of volitional control finding is not required because proving the nexus "necessarily and implicitly involves proof that the person's mental disorder involves serious difficulty for the person to control his or her behavior." ***Id.***

¶25 Based on the foregoing, Gray's contentions that the State failed to prove lack of volitional control and that the trial court should have instructed the jury on this issue so the jury could make a specific finding are without merit. Moreover, Gray waived the jury instruction issue by failing to raise it during the instruction conference. *See* ***State v. Schumacher***, 144 Wis. 2d 388, 416, 424 N.W.2d 672 (1988) ("the court of appeals does not have the power to review unobjected-to jury instructions").

¶26 Similarly, the ***Laxton*** decision controls Gray's third issue related to volitional control. He contends the real controversy was not tried because of the State's failure to prove lack of volitional control and because the jury failed to conduct proper fact-finding as to lack of volitional control. Again, his argument lacks merit. There is no legal requirement that the State prove lack of volitional control in a ch. 980 case. Rather, the State must establish that the person has serious difficulty controlling his behavior. *See* ***Kansas***, 534 U.S. at 412. The lack of control "may be established by evidence of the individual's mental disorder and requisite level of dangerousness, which together distinguish a dangerous sexual offender who has serious difficulty controlling his or her behavior from a dangerous but typical recidivist." ***Laxton***, 2002 WI 82 at ¶21.

¶27 Here, the State presented evidence from two experts who testified that Gray has two mental disorders which affect his emotional or volitional capacity and predispose him to commit future acts of sexual violence. Both experts testified that the disorders create a substantial probability that Gray will reoffend. Thus, the nexus requirement was satisfied, the real controversy was tried, and there is no reason to order a new trial.

¶28 Gray attempts to distinguish ***Laxton*** by citing cases from other jurisdictions which have issued different opinions. We are not bound by that case law, and must abide by ***Laxton***'s holdings regardless of how other courts have interpreted ***Kansas***. *See* ***State v. Lossman***, 118 Wis. 2d 526, 533, 348 N.W.2d 159 (1984) (the court of appeals is required to adhere to precedent).

By the Court.—Judgment and order affirmed.

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