COURT OF APPEALS DECISION DATED AND FILED

December 16, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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 Nos. 02-1214, 03-0344

Cir. Ct. No. 01-CI-0001

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

IN RE THE COMMITMENT OF ERIC J. HENDRICKSON:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ERIC J. HENDRICKSON,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Marathon County: RAYMOND F. THUMS, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PETERSON, J. Eric Hendrickson appeals an order committing him under WIS. STAT. ch. 980[1] after a jury found him to be a sexually violent person.

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[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

He also appeals orders denying his post-commitment motions. He argues (1) the jury was improperly instructed on how it could use his past offenses in determining whether he was a sexually violent person; (2) the court erroneously instructed the jury the case was criminal rather than civil; (3) the court erroneously told the jury panel before voir dire that it did not have to listen to expert testimony; and (4) the court erroneously admitted portions of testimony of one of the State's expert witnesses. We disagree and affirm the orders.

BACKGROUND

¶2 Hendrickson was convicted in January 1994 of one count of second-degree sexual assault. At the same time, he was convicted of one count of false imprisonment. Hendrickson has also previously been convicted of indecent exposure and possession of marijuana. The sexual assault conviction gave rise, on January 16, 2001, to the State filing a petition alleging Hendrickson was a sexually violent person under WIS. STAT. § 980.01(7).

¶3 A jury trial took place on February 12 and 13, 2002. Two experts testified on behalf of the State. Dr. Sheila Fields testified that Hendrickson suffered from exhibitionism, polysubstance abuse, and anti-social personality disorder. She concluded the anti-social personality disorder created a substantial probability that Hendrickson would reoffend sexually. She also stated that actuarial tests placed Hendrickson in the high risk category for reoffending.

¶4 Dr. Anthony Jurek testified that Hendrickson suffered from exhibitionism and anti-social personality disorder, and that both predisposed Hendrickson to engage in acts of sexual violence. Dr. Jurek concluded that Hendrickson was more likely than not to reoffend sexually.

¶5 Two experts testified for Hendrickson. Dr. Charles Lodl testified that Hendrickson suffered from exhibitionism and a personality disorder, but that neither predisposed him to acts of sexual violence. Dr. Lynn Maskel testified that Hendrickson had, in the past, suffered from a substance abuse problem. She stated he also suffers from a personality disorder and exhibitionism. Like Dr. Lodl, she concluded that none of these predisposed Hendrickson to acts of sexual violence.

¶6 The jury determined that Hendrickson was a sexually violent person and the court committed him to the Department of Health and Family Services. Hendrickson filed post-commitment motions on August 8, 2002, and October 18, 2002. The motions were denied. Hendrickson appeals.

DISCUSSION

1. Jury Instructions

¶7 Hendrickson argues that the court erroneously instructed the jury on how it could use his past offenses in determining whether he was a sexually violent person. Our review is limited to whether the trial court acted within its discretion and we will reverse only if the instructions, taken as a whole, communicated an incorrect statement of the law or otherwise probably misled the jury. ***State v. Randall***, 222 Wis. 2d 53, 59-60, 586 N.W.2d 318 (Ct. App. 1998). However, the issue of whether a jury instruction fully and fairly explained the law is a question of law that we review independently. ***County of Kenosha v. C & S Mgmt., Inc.***, 223 Wis. 2d 373, 395, 588 N.W.2d 236 (1999).

¶8 While the trial court was reading WIS JI—CRIMINAL 2502 to the jury, the following exchange occurred:

> THE COURT: Evidence has been submitted that Eric J. Hendrickson committed other sexually violent offenses before committing the second-degree sexual assault. This –
>
> [HENDRICKSON'S ATTORNEY]: Your Honor, I'm objecting to this instruction.
>
> THE COURT: That's wrong.
>
> [HENDRICKSON'S ATTORNEY]: It's not accurate.
>
> THE COURT: That's wrong. I'll back up. Evidence has been submitted that Eric J. Hendrickson committed other violent – other offenses, we should say. One more time.
>
> Evidence has been submitted that Eric J. Hendrickson committed other offenses before committing the second-degree sexual assault. This evidence alone is not sufficient to establish that Eric J. Hendrickson is a sexually violent person. Before you may find that Eric J. Hendrickson has a mental disorder, you must be so satisfied beyond a reasonable doubt from all the evidence in this case.

After the jury retired to deliberate, the parties concluded that WIS JI—CRIMINAL 2502 was the only instruction the court would physically give to the jury. The court noted that it would have to be corrected, however, to remove "other sexually violent offenses" because Hendrickson committed no other acts of sexual violence. After a break, the court indicated it would give the corrected instruction, along with an amended verdict form, to the bailiff to give to the jury. The court then recessed.

¶9 Hendrickson's post-commitment motion argued that the court erroneously instructed the jury that Hendrickson had committed prior sexually violent offenses, when in fact he had only committed the predicate sexual assault. The trial court denied the motion, stating: "At closing, the Court did stumble in reading the jury instruction regarding the elements the State was required to prove, but that alone does not suggest that the jury was somehow misled, particularly when the instruction refers to evidence that was previously submitted."

¶10 On appeal, Hendrickson first argues the jury was improperly led to believe he had prior sexual offenses. However, the court corrected itself after Hendrickson objected, so the jury was not left with that impression. Hendrickson also argues there is no proof that the corrected written instruction was in fact sent to the jury. However, the court stated it was giving the instruction to the bailiff and there is no indication that the bailiff failed to pass it on to the jury.

¶11 Second, Hendrickson argues that while a jury may consider prior sexually violent offenses, it cannot consider prior non-sexual offenses. He contends that the court's instruction allowed the jury to consider his previous non-sexual offenses. This argument was never raised in the trial court. We generally do not consider issues that are raised for the first time on appeal. ***Hopper v. City of Madison***, 79 Wis. 2d 120, 137, 256 N.W.2d 139 (1977). Nevertheless, we conclude that the court's instruction was not erroneous. Hendrickson claims consideration of other, non-sexual crimes violates WIS. STAT. § 904.04(2), which states: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith."

¶12 However, in ***State v. Wolfe***, 2001 WI App 136, ¶37, 246 Wis. 2d 233, 631 N.W.2d 240, we determined that "[d]iagnoses of a mental disorder and dangerousness are directly foretold through past conduct." This includes consideration of prior non-sexually violent crimes:

> A personality disorder is exhibited by a pervasive pattern of disregard for the rights of others, failure to comply with rules, irresponsibility and lack of remorse. The arson adjudication and institutional misconduct were presented to establish Wolfe's diagnosed mental disorder, his dangerousness, and his risk of reoffending. This evidence had the tendency to make the statutory elements of a

> Wis. Stat. ch. 980 commitment more probable than not and thus was relevant.

Id., ¶40 (citations omitted). Further,

> the probative value of this evidence was not substantially outweighed by the risk of unfair prejudice. The evidence was highly probative of the elements of a mental disorder and dangerousness, the establishment of which are required for a Wis. Stat. ch. 980 commitment.

Id., ¶41. We therefore conclude the court did not err when it instructed the jury that it could consider Hendrickson's prior non-sexually violent offenses when determining whether Hendrickson was a sexually violent person.

2. The Court's Reference to the Proceeding as Criminal

¶13 WISCONSIN STAT. ch. 980 cases are civil in nature. *See* ***State v. Rachel***, 224 Wis. 2d 571, 573, 591 N.W.2d 920 (Ct. App. 1999). However, the court instructed the jury: "This is a criminal, not a civil case; therefore, before the jury may return a verdict which may legally be received, such verdict must be reached unanimously. In a criminal case, all twelve jurors must agree in order to arrive at a verdict." The court also referred to Hendrickson as "the defendant," rather than "the respondent."

¶14 Hendrickson's post-commitment motion claimed this was error, allowing the jury to believe that it was to determine Hendrickson's guilt or innocence and not simply whether Hendrickson was a sexually violent person. The trial court disagreed: "Neither the reference to the respondent as 'defendant' nor the reference to the trial as a criminal proceeding are likely to have produced any confusion in the jury, nor are they likely to have had any impact on the outcome of the trial."

¶15 We agree with the trial court that the error was harmless. The test for harmless error is "whether there is a reasonable possibility that the error contributed to the [result]. A reasonable possibility is a possibility sufficient to undermine our confidence in the [result]." ***State v. Williams***, 2002 WI 58, ¶50, 253 Wis. 2d 99, 644 N.W.2d 919 (citations omitted).

¶16 Our review of the record shows the jury was sufficiently advised throughout the proceeding that it was not determining Hendrickson's guilt or innocence. The court properly advised the jury of the elements necessary under WIS. STAT. ch. 980 in order to find Hendrickson a sexually violent person, and that it must find those elements beyond a reasonable doubt.

¶17 Also, there was a special verdict question which asked:

> Does Eric Hendrickson have a mental disorder which impairs his volitional control to a degree that he has a serious difficulty controlling his behavior and predisposes him to engage in acts of sexual violence and that this mental disorder creates a substantial probability that Eric Hendrickson will engage in future acts of sexual violence?

In order to find Hendrickson a sexually violent person, the jury had to answer "yes" to this question. The question clearly states that the issue is Hendrickson's mental disorder and dangerousness.

¶18 Finally, both parties emphasized during the proceedings the difference between a commitment proceeding and a criminal trial. In its opening statement, the State commented: "I am going to remind you again, this is not a sexual assault trial. We're not here looking for a conviction or a finding of guilt. We're here under the Wisconsin law. We have to prove the four elements that I explained to you." Then, in Hendrickson's opening statement, his attorney stated:

> This case isn't about whether Eric Hendrickson is guilty or not guilty of what he did in the past. That issue was decided many years ago, and he told the police and he told the courts what he had done.
>
> What this case is about and what the evidence will show is that Eric Hendrickson is not a sexually violent person as defined by the law of this state.

In the face of the emphasis placed on the jury's role, we conclude it is highly unlikely that the court's misstatement caused the jury to believe it was deciding Hendrickson's guilt or innocence. We therefore conclude the error was harmless. There is no reasonable possibility that the error was sufficient to undermine our confidence in the outcome.

3. The Trial Court's Remark that the Jury Does Not Have to Listen to Expert Witnesses

¶19 Prior to jury selection, the court gave the potential jurors an overall view of the case. Within these remarks, the court stated:

> The type of evidence that we're going to hear in this hearing will be basically pretty much experts. They will be psychologists and psychiatrists, and they will, I'm sure, come to different conclusions based upon whether they're prosecution or defense. And based on their expert opinions, you will be expected – and of course, you don't have to listen to expert opinions. We know that. And make the decision as to whether or not the person is a sexually violent person or not.

Hendrickson argues: "It is reasonable to assume that the jurors took the court's directive literally, and may have well refrained from listening to and therefore considering the testimony of the expert witnesses." Hendrickson maintains that he was deprived of his right to a fair trial as a result of the court's instruction.

¶20 Hendrickson raised the issue in his post-commitment motions. At that time the court stated:

> While the Court did use the word "listen" in its opening instructions, no jury would have taken that instruction literally; rather, it was clear that the instruction meant that the jury did not need to accept the testimony of any particular expert.

We note that Hendrickson did not object to the court's statement at the time it was made. That was the proper time to raise the issue, so the court could have then corrected its statement. Generally, when a party fails to object to an instruction at trial, it precludes our review. *See* ***State v. Schumacher***, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988).

¶21 At any rate, we conclude that the jury instructions as a whole were correct and did not affect Hendrickson's right to a fair trial. "If an appellate court can determine that the overall meaning communicated by the instruction as a whole was a correct statement of the law, and the instruction comported with the facts of the case at hand, no ground[] for reversal exists." ***White v. Leeder***, 149 Wis. 2d 948, 954-55, 440 N.W.2d 557 (1989). Accordingly, "an erroneous jury instruction is not fatal unless we are satisfied that it is probable—not merely possible—that the error affected the jury's determination." ***Muskevitsch-Otto ex rel. Toney v. Otto***, 2001 WI App 242, ¶6, 248 Wis. 2d 1, 635 N.W.2d 611. Further, we will reject an erroneously narrow interpretation of the words taken out of context of the jury instruction. *See* ***State v. McCoy***, 143 Wis. 2d 274, 293, 421 N.W.2d 107 (1988).

¶22 Here, the jury was properly instructed during the court's introductory statements that, "You should pay careful attention to all the testimony." Further, the court instructed the jury that:

> It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the

> credibility, that is, the believability of the witnesses and of the weight to be given to their testimony.

Then, at the end of the proceeding, the court again instructed the jury as to its role in determining the weight to give to expert testimony: "Opinion evidence was received to help you reach a conclusion. However, you are not bound by any expert's opinion."

¶23 We conclude it is highly unlikely that, based on the court's isolated statement about not having to listen to experts, the jury would have ignored all testimony by expert witnesses. The overall meaning of the court's instructions was correct and we cannot conclude that there is any possibility that the jury's decision was affected by the isolated statement.

4. Expert Witness Testimony

¶24 Hendrickson argues that the trial court erroneously admitted portions of Dr. Fields' testimony. Whether to admit a witness's testimony is a matter of trial court discretion, and will not be reversed as long as the trial court considered the pertinent facts, applied the correct law, and reached a reasonable conclusion. ***Steinbach v. Gustafson***, 177 Wis. 2d 178, 185, 502 N.W.2d 156 (Ct. App. 1993). Appellate courts generally look to the record for reasons to sustain discretionary determinations. ***Id.***

¶25 During Dr. Fields' testimony, the State asked how many of her previous evaluations led to an opinion that the subject's disorder qualified the subject for commitment under WIS. STAT. ch. 980. Hendrickson objected, arguing the testimony was irrelevant. The State responded that the testimony went to Dr. Fields' credibility and the court overruled the objection. Dr. Fields responded

that in about sixty percent of her evaluations she concluded the subject qualified under ch. 980.

¶26 Hendrickson argues this testimony was not relevant, or, if it was relevant, it was unfairly prejudicial. He also contends the testimony violated his right to confrontation of witnesses because he was not able to cross examine Dr. Fields regarding the specifics of her prior evaluations. However, Hendrickson's only objection at trial was that the testimony was not relevant. Hendrickson did not argue at trial that the testimony was unfairly prejudicial or that it violated his right to confrontation. Therefore the court did not have the opportunity to address these issues. As we have already noted, generally, we do not consider issues that are raised for the first time on appeal. ***Hopper***, 79 Wis. 2d at 137. Nevertheless, we conclude the testimony was not only relevant, but that there was no unfair prejudice, nor did the testimony violate Hendrickson's right to confrontation.

¶27 "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." WIS. STAT. § 904.01. Here, the evidence was relevant to show that Dr. Fields was not biased toward the State, and therefore her testimony was credible. *See* ***State v. Long***, 2002 WI App 114, ¶17, 255 Wis. 2d 729, 647 N.W.2d 884 (proof of bias is always relevant).

¶28 As the trial court noted in its post-commitment decision: "Evidence regarding the track record of the State's expert was proper and, certainly, if that evidence had shown that the expert was one-sided or biased, the Respondent would have wanted it in." Hendrickson simply states that that the testimony "did

not go to credibility" with no further argument or support. In fact, Hendrickson seems to acknowledge that the testimony was relevant, stating that the questioning gave Dr. Fields "heightened reliability because of the perceived non-discriminatory approach to § 980 evaluations." It is exactly for this reason that we conclude that the trial court correctly determined the testimony was relevant.

¶29 Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice. WIS. STAT. § 904.03. "Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." ***State v. Sullivan***, 216 Wis. 2d 768, 789-90, 576 N.W.2d 30 (1998). Hendrickson argues that Dr. Fields' testimony was "significantly damaging to [his] case." However, our review of the record does not show any tendency for Dr. Fields' testimony to influence the outcome by improper means or for the jury to base its decision on anything other than the established law. The testimony was therefore not unfairly prejudicial.

¶30 Hendrickson also argues the testimony affected his right to confront witnesses because he could not question Dr. Fields regarding specific aspects of her prior evaluations. He contends there was therefore no way to evaluate whether prior subjects who qualified under WIS. STAT. ch. 980 were similarly situated to Hendrickson. However, Hendrickson was not precluded from questioning Dr. Fields in a generic fashion. For example, he could have asked what percentage of prior subjects had the same disorders as Hendrickson, or how many only had one prior sexual offense. He did not attempt to ask these questions. We therefore conclude the court correctly admitted the testimony.

By the Court.—Orders affirmed.

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