COURT OF APPEALS
DECISION
DATED AND FILED

November 18, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP781 **Cir. Ct. No. 2008CI1**

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

IN RE THE COMMITMENT OF JESSE D. WILLIAMS:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JESSE D. WILLIAMS,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Outagamie County: NANCY J. KRUEGER, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Jesse D. Williams appeals an order committing him to a secure mental health facility on a jury finding that he is a sexually violent

person under WIS. STAT. ch. 980 (2007-08).[1] He also appeals an order denying his postcommitment motion. Williams contends that the standard jury instruction used in his case was misleading and resulted in the real controversy not being fully tried. He concedes that the jury instruction issue was not preserved at trial, but explicitly declines to argue ineffective assistance of counsel, explaining that the jury instruction issue is novel. *See* ***State v. McMahon***, 186 Wis. 2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994) ("[I]neffective assistance of counsel cases should be limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue.").

¶2 The State contends that Williams' proper avenue of relief is a claim of ineffective assistance of counsel rather than whether the real controversy was fully tried. The State also contends that the jury instruction as a whole is not misleading and that the real controversy was fully tried.

¶3 While we agree with Williams that the jury instruction is internally inconsistent, we conclude that the instruction, as a whole, properly states the requirements for a finding that a person is a sexually violent person. Thus, under either of the parties' proposed approaches, we would affirm. Because Williams declines to argue ineffective assistance of counsel, and the parties' arguments are framed in terms of the interest of justice, we will address whether a new trial is required in the interest of justice rather than based on ineffective assistance of counsel. We reject Williams' contention that the real controversy was not fully tried. We affirm.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Background

¶4 In August 2008, the State filed a petition alleging that Williams is a sexually violent person. At the jury trial on the petition, the State presented two expert witnesses who testified that they diagnosed Williams with pedophilia. One of the State's experts also diagnosed Williams with a personality disorder with antisocial features. Both experts testified that Williams has serious difficulty controlling his behavior and that he is predisposed to engage in sexual violence based on his diagnoses. Williams' expert testified that he diagnosed Williams with pedophilia, but that he did not believe Williams was more likely than not to reoffend. The court instructed the jury that it could find Williams to be a "sexually violent person" only if it found, according to the standard jury instruction, that the State had proven the following beyond a reasonable doubt:

> Number one, that Jesse D. Williams has been convicted of a sexually violent offense. First-degree sexual assault of a child is a sexually violent offense.
>
> Number two, that Jesse D. Williams currently has a mental disorder. *A mental disorder means a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence and causes serious difficulty in controlling behavior*. Mental disorders do not include merely deviant behaviors that conflict with prevailing societal standards. Not all persons who commit sexually violent offenses can be diagnosed as suffering from a mental disorder. *Not all persons with a mental disorder are predisposed to commit sexually violent offenses or have serious difficulty in controlling behavior*.
>
> You are not bound by medical opinions, labels or definitions.
>
> Number three, that Jesse D. Williams is dangerous to others because he has a mental disorder which makes it more likely than not that he will engage in one or more future acts of sexual violence.

(Emphasis added.) *See* WIS JI—CRIMINAL 2502.

¶5 The jury found that Williams is a sexually violent person, and the circuit court entered an order committing Williams to a secure mental health facility. Williams filed a postcommitment motion contending that the jury instruction on "sexually violent person" misled the jury and resulted in the real controversy not being fully tried. After a hearing, the court denied the motion. Williams appeals.

Standard Of Review

¶6 We review *de novo* whether a jury instruction is a correct statement of the law. ***State v. Wille***, 2007 WI App 27, ¶23, 299 Wis. 2d 531, 728 N.W.2d 343. "We will reverse and order a new trial only if the jury instructions, taken as a whole, misled the jury or communicated an incorrect statement of the law." ***Id.*** It is within our discretion to grant a new trial in the interest of justice if our independent review of the record reveals that the real controversy was not fully tried. ***State v. Williams***, 2006 WI App 212, ¶12, 296 Wis. 2d 834, 723 N.W.2d 719.

Discussion

¶7 Under ***Kansas v. Crane***, 534 U.S. 407, 410-13 (2002), due process requires that civil commitment proceedings for sexually violent persons include proof that the person has serious difficulty in controlling his or her behavior. The Wisconsin Supreme Court has held that civil commitment of sexually violent persons under WIS. STAT. ch. 980 satisfies due process under ***Crane*** because ch. 980's requirement of evidence of a "mental disorder" and "dangerousness" establishes "the required proof of lack of control." ***State v. Laxton***, 2002 WI 82,

¶¶17-21, 254 Wis. 2d 185, 647 N.W.2d 784. The court explicitly held that "[c]ivil commitment under WIS. STAT. ch. 980 does not require a separate factual finding regarding the individual's serious difficulty in controlling behavior." ***Id.***, ¶21.

¶8 Although not required under ***Crane*** and ***Laxton***, the standard Wisconsin jury instruction for ch. 980 cases, WIS JI—CRIMINAL 2502, contains language on serious difficulty in controlling behavior. Williams argues that the standard jury instruction, which was used in this case, is materially misleading as to the proof necessary for a finding of "sexually violent person."[2] Williams contends that one of the sentences in the jury instruction on the element of "mental disorder"—"Not all persons with a mental disorder are predisposed to commit sexually violent offenses or have serious difficulty in controlling behavior"—misled the jury into believing that Williams could be found to be a sexually violent person even if he did not have a mental disorder that caused him serious difficulty in controlling his behavior. Williams contends that the State's experts' testimony at trial further misled the jury as to the required proof. Williams points to testimony that assessed Williams' serious difficulty in controlling his behavior in terms of the consequences to Williams based on his actions, and other testimony relying on Williams' past offenses.

¶9 We recognize, as Williams posits, that the jury instruction contains inconsistent sentences: it first explains that a "mental disorder" is a condition that

[2] In ***State v. Laxton***, 2002 WI 82, 254 Wis. 2d 185, 647 N.W.2d 784, the court noted that WIS JI—CRIMINAL 2502 was amended after ***Kansas v. Crane***, 534 U.S. 407 (2002), to include the language at issue in this case. ***Laxton***, 254 Wis. 2d 185, ¶24 n.14. The court said that, because "[t]he revised language was not used in Laxton's trial," it would "not discuss the impact of the revised language, nor … comment with either approval or disapproval of the revised language." ***Id.***

causes a serious difficulty in controlling behavior, and then states that not all persons with a "mental disorder" have serious difficulty in controlling behavior. Williams focuses his attention on the statement that "[n]ot all persons with a mental disorder are predisposed to commit sexually violent offenses or have serious difficulty in controlling behavior." He argues that this sentence could mislead a jury into believing that it could find Williams had the required "mental disorder" even absent evidence of difficulty in controlling his behavior. That possible misinterpretation, however, is negated by the remainder of the jury instruction.

¶10 Significantly, the clear instruction on the dangerousness element required the jury to find "that Jesse D. Williams is dangerous to others because he has a mental disorder which makes it more likely than not that he will engage in one or more future acts of sexual violence." The instruction on this element reinforces the initial explanation of the "mental disorder" element: that a mental disorder for purposes of the statute is one that causes serious difficulty in controlling behavior.

¶11 Moreover, the instruction on the dangerousness element not only clarifies the instruction on the "mental disorder" element, but also stands alone as a separate requirement that the jury find that Williams has serious difficulty in controlling his behavior. That is, even if the "mental disorder" element misled the jury to believe that it could find the mental disorder element was met absent a connection between his mental disorder and difficulty controlling his behavior, the instruction on dangerousness independently required a jury finding that Williams has a mental disorder that makes it more likely than not that he will reoffend. Thus, as a whole, the jury instruction makes clear that a jury finding that Williams is a sexually violent person requires a connection between Williams' mental

disorder and his ability to control his behavior. *See* ***Laxton***, 254 Wis. 2d 185, ¶¶20-21.

¶12 Additionally, it is clear from the transcript that the central issue at trial was whether Williams has a mental disorder that makes it more likely than not that he will reoffend. First, both of the State's experts testified that they believed Williams has serious difficulty controlling his behavior based on his diagnosis of pedophilia, and is therefore more likely than not to reoffend. Thus, we reject Williams' contention that the expert testimony further led the jury to believe that it could find Williams to be a sexually violent person based on a finding that Williams had a mental disorder unrelated to a serious difficulty controlling his behavior. Moreover, in closing arguments, the prosecutor argued that the question of the "mental disorder" element was: "[D]oes the respondent have a mental disorder that predisposes him to engage in acts of sexual violence?" The prosecutor went on to state that the required "mental disorder" "is something that affects the emotional and volitional capacity, difficulty in controlling behavior predisposes them to engage in acts of sexual violence." Both the prosecutor and the defense argued that the dispute in this case was whether the expert testimony established that Williams was more likely than not to reoffend. Thus, the record establishes that the real controversy was fully tried.

¶13 We conclude that the jury instruction, as a whole, properly conveyed the required elements to the jury. Additionally, the evidence presented at trial and the closing arguments fully presented the central issue: whether Williams is a sexually violent person because he has a mental disorder that makes it more likely than not that he will commit future acts of sexual violence. We therefore reject Williams' argument that a new trial is required in the interest of justice. Accordingly, we affirm.

By the Court.—Orders affirmed.

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