COURT OF APPEALS
DECISION
DATED AND FILED

May 26, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP460 **Cir. Ct. No. 2007CI2**

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

IN RE THE COMMITMENT OF SCOTT MAHER:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

SCOTT MAHER,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Columbia County: JAMES MILLER, Judge. *Affirmed*.

Before Vergeront, P.J., Higginbotham and Sherman, JJ.

¶1 SHERMAN, J. Scott Maher appeals a judgment entered on a jury verdict determining that he is a sexually violent person and committing him

pursuant to WIS. STAT. ch. 980 (2009-10).[1] He also appeals an order of the circuit court denying his motion for a new trial. Maher requests that we exercise our discretionary authority under WIS. STAT. § 752.35 and reverse the judgment and order of the circuit court on the basis that testimony regarding the ch. 980 screening process and postcommitment treatment were irrelevant and so clouded the trial that the real controversy was not fully tried. We agree with Maher that the testimony was not relevant and should not have been admitted at trial. However, we do not agree that it so tainted the trial process that the real controversy was not fully tried. We consequently affirm the judgment of commitment and decline to order a new trial.

BACKGROUND

¶2 After a three-day jury trial, Scott Maher was found to be a "sexually violent person" as that term is defined in WIS. STAT. § 980.01(7), and committed to the care and custody of the Department of Health Services. Maher's offense history includes three separate convictions for sexual offenses: in 1989, when he was eighteen, Maher was convicted of misdemeanor fornication for sexual intercourse with a thirteen-year-old girl; in 1990, he was convicted of fourth-

[1] All references to the Wisconsin Statures are to the 2009-10 version unless otherwise noted.

WISCONSIN STAT. § 980.06 provides:

> If a court or jury determines that the person who is the subject of a petition under s. 980.02 is a sexually violent person, the court shall order the person to be committed to the custody of the department for control, care and treatment until such time as the person is no longer a sexually violent person. A commitment order under this section shall specify that the person be placed in institutional care.

degree sexual assault for fondling the breast and genital area of a fourteen-year-old girl; and in 1997, he was convicted following an ***Alford*** plea[2] of two counts of first-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(1). Maher's 1997 conviction stemmed from allegations that he had sexual contact with his six-year-old niece and five-year-old nephew on multiple occasions. Maher continues to deny those allegations. In exchange for Maher's plea, four other counts of first-degree sexual assault of a child were dismissed. Maher's 1997 conviction forms the basis for the State's claim that Maher was a sexually violent person. *See* WIS. STAT. § 980.01(6).

¶3 At the trial on the WIS. STAT. ch. 980 petition, the State offered testimony from two psychologists: Dr. Dale Bespalec and Dr. William Schmitt. Dr. Bespalec diagnosed Maher with two predisposing mental disorders, paraphilia not otherwise specified (NOS) and antisocial personality disorder. Dr. Schmitt also diagnosed Maher with paraphilia NOS (although on a slightly different basis) and antisocial personality disorder. Dr. Schmitt testified that he had considered pedophilia, but that there was not a sufficient basis to give a clear-cut diagnosis. Both Dr. Bespalec and Dr. Schmidt concluded on the basis of several factors, including but not limited to actuarial instruments, that Maher was more likely than not to reoffend.

¶4 Maher's expert, Dr. Luis Rosell, testified about the process of evaluating whether Maher was more likely than not to reoffend. Most of his testimony focused on the limitations of the actuarial instruments utilized by the

[2] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970). An ***Alford*** plea is a plea wherein a defendant pleads guilty but maintains his or her innocence.

State's witnesses. He offered no separate evaluation on Maher's behalf and gave no opinion on whether Maher was more likely than not to reoffend.

¶5 The jury found Maher to be a sexually violent person. A judgment and commitment order were subsequently entered by the circuit court. Maher filed a motion for a new trial, which the court denied. Maher appeals. Additional facts will be set forth as necessary in the discussion.

DISCUSSION

¶6 Maher asks this court to exercise its discretionary power of reversal under WIS. STAT. § 752.35,[3] and reverse the judgment and order of the circuit court on the basis that the jury heard testimony not properly before it that so clouded the issues that the real controversy was not fully tried. The testimony which Maher claims was improperly admitted includes the following: (1) testimony by Dr. Bespalec regarding the pre-commitment screening process; and (2) testimony by Dr. Rosell regarding treatment programs available to persons committed under WIS. STAT. ch. 980. Maher also objects to statements made by

[3] WISCONSIN STAT. § 752.35 provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

the State during its closing arguments regarding Dr. Rosell's testimony about treatment programs available to Maher in the event that he is committed.

¶7 WISCONSIN STAT. § 752.35 gives this court the discretion to grant a new trial in the interest of justice when it appears that the real controversy has not been fully tried. ***State v. Williams***, 2006 WI App 212, ¶12, 296 Wis. 2d 834, 723 N.W.2d 719. If we conclude that the real controversy has not been tried, we may exercise the power of discretionary reversal without finding the probability of a different result on retrial. ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). We may exercise our discretion and order a new trial "when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." ***Id.***

¶8 We will first address whether the jury heard testimony that was not properly admitted. We will then consider whether such testimony "so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." ***Id.***

I. ADMISSIBILITY OF TESTIMONY

A. Testimony About the Pre-petition Screening Process

¶9 Dr. Bespalec testified:

> [T]he process for Chapter 980 is that there is a funnel, screening process, that occurs. Individuals are identified as being eligible by means of particular criminal behaviors that occur on their record.
>
> An individual who is the coordinator looks at those, sorts through them, and then identifies those which in this case he believes maybe meet the criteria for Chapter 980. At that point they assign the case to an individual from the Department of Corrections who is part of the End of Confinement Review Board, ECRB board.

> ECRB board looks at each of the cases, basically file review comes back after which then they decide whether that person should be moved forward in the process or whether they should then be eliminated from the 980 process.
>
> If they move forward, they are assigned to the Chapter 980 forensic unit which is a group of psychologists who are centered in Milwaukee and then those cases are then assigned for what is called a special purpose evaluation.
>
> That special purpose evaluation is conducted by a licensed psychologist who then sees the individual and reviews the records, then writes a report. They may either recommend that the individual be moved forward again as recommended to the Department of Justice under Chapter 980 or that they not be moved forward in which case they would continue to process through the correctional system.

¶10 Maher argues that Dr. Bespalec's testimony describing the WIS. STAT. ch. 980 screening process was not relevant and should not have been presented to the jury. The State counters that this testimony was relevant to "explain to the jury Dr. Bespalec's experience in conducting this type of psychological exam and to give the jury some frame of reference on how Dr. Bespalec came to perform his evaluation of Maher." Evidence is relevant if it tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." WIS. STAT. § 904.01.

¶11 We addressed the issue of the admissibility of this same type of evidence in ***State v. Sugden***, 2010 WI App 166, 330 Wis 2d 628, 795 N.W.2d 456. As in the present case, ***Sugden*** addressed whether testimony regarding the pre-petition screening process in a WIS. STAT. ch. 980 proceeding was relevant. In ***Sugden***, we concluded that, although the witness's "experience in doing evaluations under WIS. STAT. ch 980 is relevant to [his or] her expertise, [] the existence of a screening process before a referral is made to [him or] her or the

relative size of the group selected for evaluations is not." ***Id.***, ¶58. The testimony in the present case discusses the screening process in greater detail than the testimony in ***Sugden*** and we hold, as we did in ***Sugden***, that this is not relevant testimony and should not have come before the jury.

B. Testimony About Treatment Available After Commitment

¶12 Maher argues that the testimony on cross-examination of his expert witness, Dr. Rosell, regarding postcommitment treatment available to Maher if he were committed under ch. 980 was improper and that statements made by the State during its closing arguments regarding this testimony was likewise improper.

¶13 Maher points to the following exchange between the State and Dr. Rosell:

> Q. Do you agree that completion of intensive sex offender program can reduce recidivism risk for a sex offender?
>
> A. Yes. There is research to show that treatment can reduce the risk.
>
> Q. Are you familiar with treatment programs that are available at Wisconsin Resource Center or Sand Ridge?
>
> A. I'm familiar with. I don't know if WRC has a program, but Sand Ridge does have a program for people who are, have been found to be SVP.
>
> Q. And treatment that's available there can be utilized by an individual there even if they deny committing some of their sexual offenses for which they have been convicted; correct?
>
> A. At which place, WRC or?
>
> Q. Sand Ridge for sure.
>
> A. Yeah. I'm not sure if they have. People who denied they ever committed offenses usually don't even go into the program. My understanding WRC does have a program that's—I don't know how specific it is to offender

> treatment. It's called MRT. I think it's Moral Reconation (sic) Treatment, I'm not sure. Basically what it addresses, it's for some individuals after they have been in Sand Ridge, sometimes if they are not getting along well, they send them to WRC to do treatment there.
>
> Q. So there is something available at WRC even for an individual who denied engaging in some of the conduct they may have been convicted of?
>
> A. Correct.
>
> Q. Do you know if Mr. Maher is at Wisconsin Resource Center?
>
> A. I assume he's at WRC because that's where most of the individuals are who are waiting trial.
>
> Q. WRC and Sand Ridge are both places where individuals who may be committed will be housed?
>
> A. Correct. The individuals who refuse treatment or become problematic in their behavior get sent to WRC. But most of the individuals do their treatment the whole time they're at Sand Ridge.

¶14 Maher argues that it is improper for either the court or counsel to inform the jury of the effect of its verdict. In support of this argument, he cites civil cases involving special verdicts. However, he never directly addresses the reason given by those courts for that conclusion, or how it might apply to WIS. STAT. ch. 980 commitment proceeding. Regardless, this court has recently ruled that testimony regarding postcommitment treatment in a ch. 980 proceeding is not relevant testimony. *See* ***Sugden***, 330 Wis. 2d 628, ¶58. In concluding that such testimony was not relevant, we explained that "[i]t does not bear on [the witness's] credentials or expertise and we can identify no other fact of consequence that this evidence makes more or less probable." ***Id.***, ¶51.

¶15 We conclude that the same is true of the testimony regarding postcommitment treatment in this case. The consequences of the jury's verdict are

not relevant to any of the three elements of whether Maher is a sexually violent person and, therefore, should not have been placed before the jury.

¶16 The State's experts' opinions that Maher was more likely than not to reoffend were based in part on his failure to complete offered treatment while serving his prison sentence. The State's theory was that such treatment decreases the risk that a person with Maher's history will commit future sexually violent acts. We agree that testimony that Maher had failed to complete treatment while incarcerated was relevant to whether Maher was more likely than not to reoffend. However, testimony that similar treatment would be offered after commitment was not. The prosecutor's conflation of Maher's failure to complete treatment during incarceration with the availability of postcommitment treatment did not render the otherwise irrelevant testimony admissible.

II. REAL CONTROVERSY WAS FULLY TRIED

¶17 As we explained, we may grant a new trial in the interest of justice when our independent review of the record shows that the real controversy has not been fully tried. ***Williams***, 296 Wis. 2d 834, ¶¶12, 36. It need not be shown that a new trial would result in a different outcome. ***Id.***, ¶36. The power of discretionary reversal is powerful and is "exercised sparingly and with great caution." ***Id.*** Discretionary reversals because the real controversy has not been fully tried have been granted for a number of reasons. ***Id.*** In this case, we are asked to exercise this discretion because the jury had before it information that it should not have.

¶18 Although it is not necessary to show that a new trial would not result in a different outcome, it does need to be shown that the evidence improperly before the jury "so clouded a crucial issue that it may be fairly said that the real

controversy was not fully tried." ***Hicks***, 202 Wis. 2d at 160. Thus, we will review the evidence inappropriately before the jury in the context of the elements required to be proven in order to determine if the improper evidence clouded the issue of any of those elements. *See* ***Sugden***, 330 Wis. 2d 628, ¶68.

¶19 In order for a person to be determined to be a sexually violent person within the meaning of WIS. STAT. § 980.06, the following three factors must be found beyond a reasonable doubt:

> 1. The person has been found guilty, adjudged delinquent or found not guilty by reason of mental disease or defect, of a sexually violent offense.[4]
>
> 2. The person has a mental disorder.[5]
>
> 3. The person is dangerous to others because the mental disorder makes it more likely than not that he or she will engage in one or more future acts of sexual violence.

WIS. STAT. § 980.02(1)(b)1. and WIS JI—CRIMINAL 2502.

¶20 Of these three elements only the third element, whether Maher is likely to reoffend, was seriously in dispute. There was no dispute that he had been convicted of one of the listed offenses, although he had entered an ***Alford*** plea and continued to deny the charges. There was also no serious dispute that Maher has a "mental disorder." Maher's trial counsel cross-examined the experts on the basis of their diagnoses, which differed slightly from each other, though not

[4] Those offenses that are considered "sexually violent" are listed in WIS. STAT. § 980.01(6).

[5] "'Mental disorder' means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." WIS. STAT. § 980.01(2).

significantly.[6] However, Maher's own expert did not offer any testimony to dispute those diagnoses, although Maher did argue the issue in closing.

¶21 The "real controversy" before the jury, therefore, was whether Maher was more likely than not to commit one or more acts of sexual violence in the future. Both of the State's experts, Drs. Bespalec and Schmitt, testified that Maher was more likely than not to reoffend, basing their conclusions on Maher's history of the offense, Maher's failure to complete treatment, and the application of three actuarial instruments. Maher's expert, Dr. Rosell, testified primarily about the limitations of the actuarial instruments, although he also affirmed other parts of the methodology used by the State's experts. He did not offer any opinion about whether Maher suffered from a mental disorder or whether he was more likely than not to reoffend.

¶22 The testimony of these three experts took up most of the three-day trial and focused primarily on whether Maher was more likely than not to reoffend. The entire process of evaluating whether Maher was more likely than not to reoffend was examined in detail, with extensive inquiry into the historical and scientific bases for the current manner in which that determination is made. Through cross-examination and the testimony of Dr. Rosell, Maher's trial counsel presented the jury with an in-depth, critical review of these evaluation methods and their shortcomings. In the face of this extensive examination of the appropriate evidence, the real controversy was not only fully tried, but exceeded

[6] Neither diagnosed Maher with pedophilia though both considered and rejected the diagnosis based upon Maher's denial and ***Alford*** plea, which did not result in a jury finding that the incident had actually occurred.

any minimum standard in that regard. We consider the inadmissible testimony in that context.

¶23 Dr. Bespalec's testimony on the pre-petition screening process is similar to that discussed in previous cases. *See, e.g.,* ***Sugden,*** 330 Wis. 2d 628; ***State v. Budd***, 2007 WI App 245, 306 Wis. 2d 167, 742 N.W.2d 887. In ***Sugden***, we concluded:

> The harm in this type of testimony is that it could potentially convey that a person must be or probably is a sexually violent person because only a small number of sex offenders are even referred for a special WIS. STAT. ch 980 evaluation. However, we conclude that this single reference in this case was not sufficient to deflect the jury's attention from a proper focus on the instructions defining a sexually violent person and the evidence relevant to that definition.

Sugden, 330 Wis. 2d 628, ¶70. Similar to ***Sugden***, the description of the pre-petition review in this case is relatively brief, understated and was not likely to distract the jury from its examination of the evidence and application of the legal standard.

¶24 The testimony on postcommitment treatment was conflated with testimony on Maher's failure to complete treatment offered in prison. For instance, the first question in the objectionable line of testimony was "Do you agree that completion of intensive sex offender program can reduce recidivism risk for a sex offender?" This question could refer just as well to perfectly valid testimony regarding Maher's failure to complete sex offender treatment in prison, which was part of the testimony of both Dr. Bespalec and Dr. Schmitt.

¶25 In ***Sugden***, we discussed the same problem and concluded that even "without any specific reference to postcommitment treatment, a jury could

reasonably infer from the evidence properly before it that Sugden would be offered treatment if he were committed." ***Id.***, ¶67. Here, the properly admitted testimony on Maher's failure to complete the treatment offered in prison and the reason for that failure (that Maher continued to deny committing the crime), could lead to the same inference.

¶26 As to the reference to postcommitment treatment in the prosecutor's closing argument, we see no basis for distinguishing this argument from that in our holding on the same issue in ***Sugden.*** Just as we stated there, "we conclude they cannot reasonably be viewed as a suggestion to the jury that they disregard the instructions defining a sexually violent person." ***Id.***, ¶69.

CONCLUSION

¶27 In conclusion, we decline to exercise our discretionary power of reversal. We conclude that neither testimony describing the pre-screening selection process for WIS. STAT. ch. 980 commitment, nor testimony regarding the postcommitment sex offender treatment or training available to a respondent is relevant in a ch. 980 hearing. None of this testimony should have been presented to the jury. However, we further conclude that the presentation of non-relevant testimony in this case did not "so cloud[] a crucial issue … that the real controversy was not fully tried." ***Hicks***, 202 Wis. 2d at 160.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.