COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2052 **Cir. Ct. No. 96CF966220**

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

IN RE THE COMMITMENT OF
TERRY L. JORDAN:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

TERRY L. JORDAN,

RESPONDENT-APPELLANT.

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

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

¶1 PER CURIAM. Terry L. Jordan appeals from a Chapter 980 commitment order entered after a jury found him to be a sexually violent person, an order denying post-verdict motions, and an order denying his postcommitment

motion. Jordan contends that: (1) he should be granted a new trial because "the trial court crossed the line between maintaining control of the trial and assuming the prosecutor's role, thereby denying him his right to a trial before an impartial and unbiased judge"; (2) the trial court erred in failing to define the phrase "substantial probability" for the jury, or, in the alternative, counsel was ineffective for failing to request a definition; (3) the trial court erroneously denied his request for a new trial because the State failed to prove that he has serious difficulty controlling his behavior; (4) the trial court lacked jurisdiction because the petition was not filed within ninety days of his release from a sentence convicting him of a sexually violent offense; and (5) the evidence was insufficient to support a finding that he is a sexually violent person, because a diagnosis of either antisocial personality disorder or personality disorder (not otherwise specified) is an inadequate basis for commitment. Because Jordan was not deprived of his right to a trial before an impartial and unbiased judge, trial counsel was not ineffective, the trial court properly denied Jordan's motion for a new trial, the petition was timely filed, and a diagnosis of antisocial personality disorder or personality disorder (not otherwise specified) is sufficient, we affirm.

I. BACKGROUND.

¶2 On June 14, 1990, Jordan was convicted of first-degree sexual assault of a child, in violation of WIS. STAT. § 948.02(1) (1989-90). He was sentenced to five years in prison. He reached his mandatory release date and was paroled in October 1993, but was returned to prison in March 1995, and his parole was revoked in May 1995.[1] At that time, he was serving a new sentence for

[1] It appears that Jordan was in custody prior to the time his parole was actually revoked.

substantial battery concurrently with the remainder of his sexual assault sentence. The mandatory release date for the sexual assault sentence was in June 1996, but the maximum discharge and mandatory release date for the concurrent battery sentence was December 19, 1996. On December 16, 1996, the State filed a petition that sought to commit Jordan as a sexually violent person, pursuant to WIS. STAT. ch. 980, listing December 17, 1996, as Jordan's mandatory release date. *See* WIS. STAT. § 980.02(2) (1995-96).[2]

¶3 A jury trial was held in July 1997. Jordan's counsel moved for a mistrial twice, alleging that his right to a trial before a fair and impartial judge had been violated; both motions were denied. At the conclusion of the trial, the jury found Jordan to be a sexually violent person, and he was committed to a secure institution. Jordan filed several post-verdict motions, all of which were denied.

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[2] WISCONSIN STAT. § 980.02(2) (1995-96) provides, in relevant part:

> A petition filed under this section shall allege that all of the following apply to the person alleged to be a sexually violent person:
>
> (a) The person satisfies any of the following criteria:
>
> 1. The person has been convicted of a sexually violent offense.
>
> ….
>
> (ag) The person is within 90 days of discharge or release, on parole or otherwise, from a sentence that was imposed for a conviction for a sexually violent offense, from a secured correctional facility …
>
> (b) The person has a mental disorder.
>
> (c) The person is dangerous to others because the person's mental disorder creates a substantial probability that he or she will engage in acts of sexual violence.

¶4 Jordan subsequently filed a notice of appeal and this court stayed the appellate proceedings and remanded the case to allow Jordan to file a postcommitment motion. His postcommitment motion alleged that trial counsel was ineffective for failing to preserve and argue the timeliness of the Chapter 980 petition and failing to request a jury instruction defining "substantially probable," among other things; it was denied without a hearing. Jordan appealed, and in ***State v. Jordan***, No. 98-1086, unpublished slip op. (WI App Sept. 13, 2001), we affirmed in part and reversed in part, and remanded the case to the trial court for an evidentiary hearing on the issue of whether the State satisfied its burden of proving that Jordan's petition was filed within ninety days of discharge or release.

¶5 After the appeal, and prior to the hearing on remand, Jordan filed a motion requesting, *inter alia*, a new trial on the issue of whether he has serious difficulty controlling his behavior, alleging that proof of such is required before he could be committed as a sexually violent person. That motion was denied.

¶6 Jordan also filed a motion to dismiss the petition, alleging that its untimely filing deprived the trial court of jurisdiction to proceed and that the evidence was insufficient to prove that the petition was timely filed. The motion also requested his immediate release from custody. After a hearing on the matter, the trial court initially granted the motion, but stayed its execution pending appeal. This court subsequently released ***State v. Treadway***, 2002 WI App 195, ¶18, 257 Wis. 2d 467, 651 N.W.2d 334 (holding "because the State's petition was filed within ninety days of Treadway's release from a sentence for an offense that had not been deemed a sexually violent offense, which was being served concurrently with a shorter sentence imposed for a sexually violent offense, the petition was timely"), and, as a result, the trial court *sua sponte* vacated its order granting the

motion to dismiss the petition, as well as the order staying its execution, and denied the motion.

¶7 On May 27, 2003, the issue of whether the petition had been filed within ninety days of release was finally tried before a jury. The trial court instructed the jury, in relevant part:

> The State must prove that at the time the petition was filed, Terry Jordan was within 90 days of release from a sentence that was imposed for a conviction for a sexually violent offense.
>
> ….
>
> The phrase "A sentence that was imposed for a conviction for a sexually violent offense" includes a sentence imposed concurrently to any sentence for a sexually violent offense regardless of which sentence is longer.

The jury found that the petition was filed within ninety days, and the trial court entered its final judgment. Jordan again filed a post-verdict motion, which was denied. He now appeals.

II. ANALYSIS.

A. Jordan was not deprived of his right to a trial before an impartial and unbiased judge.

¶8 Jordan insists that he should be granted a new trial "because the trial court crossed the line between maintaining control of the trial and assuming the prosecutor's role and thereby denied him his right to a trial before an impartial and unbiased judge." He argues that the net effect of the trial court's interruptions, interjections, and allegedly sarcastic remarks, with and without the jury present, was to convey to the jury that anyone who questioned the State's experts' testimony, i.e., defense counsel, was trying to trick or mislead them. He contends

that the trial court's actions deprived him of his due process right to an impartial and unbiased judge. We are not persuaded.

¶9 "A person's right to be tried by an impartial judge stems from his/her fundamental right to a fair trial guaranteed by the due process clause of the [F]ifth [A]mendment of the United States Constitution." ***State v. Hollingsworth***, 160 Wis. 2d 883, 893, 467 N.W.2d 555 (Ct. App. 1991). The trial court's statements are a matter of record, but whether Jordan's due process rights were violated by any alleged partiality presents a legal issue reviewed *de novo* by this court. *See* ***id.***

¶10 "A litigant is denied due process only if the judge, in fact, treats him or her unfairly." ***Id.*** at 894. "While, at an optimum, a trial judge should abstain from all comments or questions that would give the appearance of a prejudgment of guilt or hostility toward the defendant or his counsel," a trial judge "'may question a witness called by the parties in order to clarify received testimony, *providing the court does not overtly express his view of the matters in issue*.'" ***Flowers v. State***, 43 Wis. 2d 352, 364-65, 168 N.W.2d 843 (1969) (citation omitted). The trial court may take "'necessary steps to aid in the discovery of truth.'" ***Id.*** at 365 (citation omitted). As the supreme court explained in ***State v. Asfoor***, 75 Wis. 2d 411, 249 N.W.2d 529 (1977):

> [T]he trial judge is more than a mere referee. The judge does have a right to clarify questions and answers and make inquiries where obvious important evidentiary matters are ignored or inadequately covered on behalf of the defendant and the [S]tate. A judge does have some obligation to see to it that justice is done but must do so carefully and in an impartial manner.

Id. at 437.

¶11 In regard to the alleged bias, it is not enough that there be an appearance of or speculation in regard to impartiality on the trial court's behalf. ***Hollingsworth***, 160 Wis. 2d at 894. "A litigant is denied due process if he is *in fact* treated unfairly." ***Margoles v. Johns***, 660 F.2d 291, 296 (7th Cir. 1981) (emphasis added). "Thus, in the final analysis, this court must be convinced that the cumulative effect of the trial court's questioning of witnesses and its general direction of the course of the trial had a substantial prejudicial effect upon the jurors." ***Schultz v. State***, 82 Wis. 2d 737, 742, 264 N.W.2d 245 (1978).

¶12 Judge Kremers admitted that he "did take a more active role in this case than in 95 percent of the other cases" that he has presided over, but explained that he did so in order to protect the record and maintain a fair trial that remained "within shouting distance of the rules of evidence." To the contrary, Jordan points to several interruptions, interjections, and allegedly sarcastic remarks by Judge Kremers that he asserts to be examples of Judge Kremers' bias and impartiality. However, the "cumulative effect" of the remarks, interruptions, or interjections highlighted by Jordan does not appear to carry any indication of Judge Kremers' opinion regarding the credibility of the witnesses or Jordan's "guilt," so to speak. Much of the activity was focused on the relevance of the evidence, the clarification of questions and answers, and the orderly procession of the trial, and many of the comments complained of were made outside the presence of the jury.

¶13 As the jury was the fact finder in this case, our analysis is essentially concerned with the effect of the trial court's comments and actions on the jury. After a review of the record, Jordan's argument has not convinced us that the trial court's actions in the jury's presence had a substantial prejudicial effect upon the jurors. Jordan has failed to persuade us that Judge Kremers' comments or actions clearly indicated to the jury that he was impartial or communicated his opinion on

the merits of the case to the jury. Moreover, we cannot conclude that Jordan was, in fact, treated unfairly.

B. Trial counsel was not ineffective for failing to request the trial court to define "substantial probability."

¶14 Jordan contends that in order to commit someone under Chapter 980, the State must prove that it is "substantially probable" that the individual will engage in acts of sexual violence. As such, Jordan insists that the trial court erred in failing to define "substantial probability" for the jury. He argues, in the alternative, that trial counsel was ineffective for failing to request as much. We disagree.

¶15 Failure to object to jury instructions at the trial court level constitutes a waiver of the defendant's right to claim error. WIS. STAT. § 805.13(3) (2001-02) ("Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict."); ***State v. Schumacher***, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988). As such, this claim can only be reviewed under the rubric of ineffective assistance of counsel—Jordan's alternate argument.

¶16 Under ***Strickland v. Washington***, 466 U.S. 668 (1984), in order to prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the defendant was prejudiced as a result of this deficient conduct. *See* ***id.*** at 687; *see also* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). To prove deficient performance, the defendant must identify specific acts or omissions of counsel that fall "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To show prejudice, the defendant must demonstrate that the errors were so serious that the result of the proceeding was unreliable. ***Id.*** at 687.

¶17 Both prongs of the ***Strickland*** test involve mixed questions of law and fact. ***Pitsch***, 124 Wis. 2d at 633-34. We will not disturb the trial court's findings of fact unless they are clearly erroneous. ***Id.*** at 634. However, "[t]he questions of whether counsel's behavior was deficient and whether it was prejudicial to the defendant are questions of law, and we do not give deference to the decision of the [trial] court." ***Id.*** Finally, if the defendant fails to meet either prong—deficient performance or prejudice—the ineffective assistance of counsel claim fails. ***Strickland***, 466 U.S. at 697.

¶18 In ***State v. Zanelli***, 212 Wis. 2d 358, 569 N.W.2d 301 (Ct. App. 1997), we held that the failure to define "substantial probability" was not a due process violation.[3] ***Id.*** at 376. Although the trial court had the discretion to give an instruction defining "substantial probability," we concluded that the failure to do so was not a violation of due process. ***Id.*** Moreover, in ***State v. Matthew A.B.***, 231 Wis. 2d 688, 605 N.W.2d 598 (Ct. App. 1999), Matthew A.B. argued that his due process rights were violated during his Chapter 980 commitment trial because the standard jury instruction failed to define "substantial probability" as used in WIS. STAT. § 980.02(2)(c). He argued that "the failure to define 'substantial probability' forces people of common intelligence to guess at its meaning and differ as to its applicability, rendering the statute void for vagueness." 231

[3] Although Jordan contends that ***State v. Zanelli***, 212 Wis. 2d 358, 569 N.W.2d 301 (Ct. App. 1997) was "effectively overruled" by ***State v. Curiel***, 227 Wis. 2d 389, 597 N.W.2d 697 (1999) and ***State v. Kienitz***, 227 Wis. 2d 423, 597 N.W.2d 712 (1999), we are unable to identify any basis for that contention. Neither ***Curiel***, nor ***Kienitz*** involved jury trials and neither case mentions ***Zanelli***. In ***Curiel***, the supreme court concluded that the term "substantial probability" is not unconstitutionally vague and means "much more likely than not," per common dictionary definitions. 227 Wis. 2d at 406. In ***Kienitz***, the court recognized ***Curiel***'s conclusion that "substantial probability" means "much more likely than not." 227 Wis. 2d at 442. Neither held that the failure to define "substantial probability" was a due process violation.

Wis. 2d at 716. As his argument had been "addressed and soundly rejected in recent decisions by this court as well as the Wisconsin Supreme Court[,]" we rejected his contention. ***Id.*** at 716-17 (citing ***State v. Curiel***, 227 Wis. 2d 389, 597 N.W.2d 697 (1999); ***State v. Kienitz***, 221 Wis. 2d 275, 585 N.W.2d 423 (Ct. App. 1998), *aff'd*, 227 Wis. 2d 423, 597 N.W.2d 712 (1999); and ***Zanelli***, 212 Wis. 2d 358) (all three cases concluding or recognizing that "substantial probability" is not unconstitutionally vague)). Accordingly, while the trial court may have defined "substantial probability" if it so chose, it was not required to do so, and we cannot conclude that Jordan's trial counsel was deficient for failing to request a jury instruction defining the term.[4]

¶19 Moreover, as the relevant case law makes apparent, the exact definition of "substantial probability" was unsettled at the time of Jordan's trial.[5] As it has been said that "ineffective 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[,]" ***State v. McMahon***, 186 Wis. 2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994), we have difficulty concluding that the law was

[4] Although the relevant jury instruction now defines "substantial probability" as "much more likely than not," that does not render the earlier version of the jury instruction inadequate, especially considering the case law rejecting the claim that "substantial probability" is unconstitutionally vague.

[5] Jordan contends that a testifying expert gave the "wrong" definition of "substantial probability" when he indicated that it meant, in the words of defense counsel, "somewhere between 51 percent and a hundred percent." He also seems to have indicated that his working definition was "much more likely than not." As noted, however, the exact definition of "substantial probability" was not settled at the time of Jordan's trial, and, it does not appear that there was any considerable focus placed on the expert's "definition." The jury was instructed to determine, in part, whether the State established that "Jordan is dangerous to others because he has a mental disorder which creates a substantial probability that he will engage in acts of sexual violence."

sufficiently clear to warrant a determination that trial counsel's performance was deficient.

C. The trial court properly denied Jordan's request for a new trial.

¶20 Jordan contends that the trial court erroneously denied his motion requesting a new trial "because the State failed to prove that [he] had serious difficulty controlling his behavior such that he was distinguishable from an ordinary, dangerous recidivist." Jordan recognizes that this argument was rejected in ***State v. Laxton***, 2002 WI 82, 254 Wis. 2d 185, 647 N.W.2d 784, but presents it to "preserve the issue." He argues that in ***Kansas v. Crane***, 534 U.S. 407 (2002), the United States Supreme Court held that the Constitution does not allow the commitment of a dangerous sexual offender without proof that he or she has serious difficulty in controlling behavior. As such, he insists that if none of the jury's findings concerning Crane were adequate, then none of the jury's findings in the instant case were sufficient to satisfy this requirement, since he asserts that the relevant Kansas and Wisconsin statutes are nearly identical.

¶21 ***Laxton*** speaks for itself:

> Civil commitment under Wis. Stat. ch. 980 does not require a separate factual finding regarding the individual's serious difficulty in controlling behavior. In ***Crane,*** the United States Supreme Court rejected an absolutist approach, stating that "the Constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules." ***Crane*** holds that there must be proof of a mental disorder and a link between the mental disorder and the individual's lack of control. Significantly, however, the Court recognized that lack of control is not "demonstrable with mathematical precision." "It is enough to say that there must be proof of serious difficulty in controlling behavior." We conclude that the required proof of lack of control, therefore, 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.
>
> Wisconsin ch. 980 satisfies this due process requirement because the statute requires a nexus between the mental disorder and the individual's dangerousness. Proof of this nexus necessarily and implicitly involves proof that the person's mental disorder involves serious difficulty for the person to control his or her behavior. The definition of a sexually violent person requires, in part, that the individual is "dangerous *because* he or she suffers from a *mental disorder* that *makes it substantially probable that the person will engage in acts of sexual violence.*" As we recognized in [***State v.***] ***Post***, [197 Wis. 2d 279, 541 N.W.2d 115 (1995),] these statutory requirements do not sweep too broadly. The nexus—linking a mental disorder with dangerousness by requiring that the mental disorder predispose the individual to engage in acts of sexual violence—narrowly tailors the scope of ch. 980 to those most dangerous sexual offenders whose mental condition predisposes them to re-offend.
>
> We conclude that the same nexus between the mental disorder and the substantial probability that the person will engage in acts of sexual violence, necessarily and implicitly requires proof that the person's mental disorder involves serious difficulty for such person in controlling his or her behavior.

254 Wis. 2d 185, ¶¶21-23 (citations and footnote omitted). The trial court came to a similar conclusion and properly denied Jordan's request for a new trial.

D. The petition was timely filed.

¶22 Jordan contends that although ***Treadway*** holds otherwise, because the petition was not filed within ninety days of his release from a sentence that was imposed for a sexually violent offense, the trial court lacked jurisdiction over the petition. He asserts that the only sentence he was serving in December 1996 was a sentence for substantial battery, which is not a predicate offense upon which

a Chapter 980 petition can properly be based.[6] Jordan insists that WIS. STAT. § 980.02(2)(ag) is ambiguous in regard to what the term "from a sentence that was imposed for a conviction for a sexually violent offense" means. He argues that, unlike in ***State v. Keith***, 216 Wis. 2d 61, 573 N.W.2d 888 (Ct. App. 1997), where we held that for purposes of determining when to file a Chapter 980 petition, consecutive sentences are treated as one continuous sentence, and based our conclusion in part on WIS. STAT. § 302.11(3) (1997-98), ***id.*** at 71-72, here there is no statute upon which to base a conclusion that concurrent sentences are to be treated as one continuous sentence.[7] As such, Jordan contends that the trial court lacked jurisdiction over the petition since it was not filed within ninety days of his release from a sentence that was imposed for a sexually violent offense. As noted, however, ***Treadway*** comes to a different conclusion.

¶23 In ***Treadway***, we concluded:

> Although portions of our discussion in ***Keith*** were linked to the specific nature of *consecutive* sentences, our essential reasoning, springing from consideration of the statute's legislative history, encompasses *concurrent* sentences as well. To conclude otherwise would make no sense. After all, if the State were required to file its WIS. STAT. ch. 980 petition within ninety days of the conclusion of a sentence for a sexually violent offense, despite the fact that the subject of the petition still could be serving additional time in an unbroken string of sentences, the petition could not accurately address the defendant's circumstances, mental condition, and treatment needs at the time of scheduled release. Discharge or release could be many months or, as in this case, many years away.

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[6] Jordan also acknowledges that the supreme court denied Treadway's petition for review, but presents the argument "to preserve the issue."

[7] WISCONSIN STAT. § 302.11(3) (1997-98) provides: "All consecutive sentences shall be computed as one continuous sentence."

> Moreover, in some cases, concurrent sentences, or concurrent and consecutive sentences, interlace, and some are further complicated by sentences after revocation. In such circumstances, the State easily could miscalculate the discharge or release date for the last sexually violent offense among the offenses not deemed sexually violent and miss the opportunity to seek WIS. STAT. ch. 980 commitment. Under such circumstances, both of ch. 980's "twin objectives"—the protection of the public and the treatment needs of the offender—would be disserved by precluding a court's consideration of commitment. Thus, we conclude that because the State's petition was filed within ninety days of Treadway's release from a sentence for an offense that had not been deemed a sexually violent offense, which was being served concurrently with a shorter sentence imposed for a sexually violent offense, the petition was timely.

257 Wis. 2d 467, ¶¶ 17-18 (citations omitted). As such, the petition was timely filed and the trial court had jurisdiction. And, furthermore, it is well settled that "only the supreme court, the highest court in the state, has the power to overrule, modify or withdraw language from a published opinion of the court of appeals." ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

¶24 Jordan also presents two additional, interrelated contentions that are inherently dependent upon his previous argument. First, he argues that, based on his argument above, because the State could not prove the petition was filed within ninety days of his release from a sentence *that was imposed for a sexually violent offense*, there was insufficient evidence to support a finding that he is a sexually violent person. He also contends that the trial court erred in instructing the jury that "'[a] sentence that was imposed for a conviction for a sexually violent offense' includes a sentence imposed concurrently to any sentence for a sexually violent offense regardless of which sentence is longer." As we have rejected his argument above, it follows that these contentions fail as well.

E. A diagnosis of antisocial personality disorder is sufficient to satisfy the mental disorder requirement for commitment under Chapter 980.

¶25 Finally, Jordan contends that there was insufficient evidence to support a finding that he is a sexually violent person "because a diagnosis of either antisocial personality disorder or personality disorder (not otherwise specified) is an insufficient basis for a Chapter 980 commitment." He concedes that ***State v. Adams***, 223 Wis. 2d 60, 588 N.W.2d 336 (Ct. App. 1998), held that "antisocial personality disorder" is sufficient to satisfy the mental disorder requirement for commitment under Chapter 980, and that a mental disorder that generally predisposes its sufferers to engage in acts of sexual violence is not required. Yet, he again presents the argument to preserve the issue, and contends that "[c]onsidering antisocial personality disorder and personality disorder (not otherwise specified) as mental abnormalities for purposes of Chapter 980 commitment creates too imprecise a category."

¶26 As recognized by Jordan, ***Adams*** held otherwise: "under ch. 980, a person who has the mental disorder of 'antisocial personality disorder,' uncoupled with any other mental disorder, may be found to be a 'sexually violent person.'" 223 Wis. 2d at 68-69. Furthermore, in regard to the constitutional dimensions of the "precision" argument, ***Adams*** explained:

> Adams offers nothing to suggest that "antisocial personality disorder," in and of itself, is so imprecise as to defy definition. On the contrary, he concedes that it is a legitimate, psychiatrically defined condition, but he brings his challenges in large part because the disorder affects so many who are not sexually violent. But, even assuming that the diagnosis of "antisocial personality disorder" is relatively common, the countless citizens who suffer from it are not *ipso facto* vulnerable to commitment under ch. 980, STATS. Only the relatively few who *also* satisfy the remaining criteria of § 980.01(7), STATS., may be found to be "sexually violent persons." It is that additional coupling that, Justice Kennedy's words, "offer[s] a solid basis for

> concluding that civil detention is justified." Therefore, we conclude that "antisocial personality disorder" is sufficiently precise to satisfy the criterion of "mental disorder" under § 980.01(7), STATS.

Id. at 71 (citation omitted).

¶27 As Jordan's argument is squarely governed by ***Adams***, and he does not otherwise address the sufficiency of the evidence presented at trial, our analysis it at an end. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

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