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DISTRICT IV

August 18, 2015

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You are hereby notified that the Court has entered the following opinion and order:

2014AP1225 In re the commitment of Alfred F. Hanko, Jr.: State of Wisconsin v. Alfred F. Hanko, Jr. (L.C. # 2005CI5)

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

Alfred Hanko appeals an order denying Hanko's petition for discharge from commitment under WIS. STAT. ch. 980 (2013-14).[1] Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

In June 2006, Hanko was committed as a sexually violent person under WIS. STAT. ch. 980. In February 2011, Hanko was granted supervised release.

In March 2013, Hanko petitioned for discharge. Prior to the discharge trial, Hanko moved to exclude evidence offered by the State as insufficient under WIS. STAT. § 907.02(1), which codified the rule in ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579, 597 (1993), that expert testimony must be reliable and relevant to be admissible. Hanko also argued that, if § 907.02(1) did not apply to his discharge trial, the statute was unconstitutional because it denied him equal protection. The circuit court denied the motion, determining that the newly enacted § 907.02(1) did not apply to Hanko's discharge trial because the original WIS. STAT. ch. 980 commitment action was commenced before the statute's effective date, and that the statute is constitutional.

During the discharge trial, Hanko moved for a mistrial on grounds the State introduced inadmissible evidence that Hanko would not be supervised if discharged from commitment. The court found that that the evidence was inadmissible, but that a mistrial was not warranted because it was not prejudicial. The jury found that Hanko is a sexually violent person, and the circuit court denied the discharge petition.

The decision whether to grant a mistrial is committed to the circuit court's discretion. ***Haskins v. State***, 97 Wis. 2d 408, 419, 294 N.W.2d 25 (1980). When deciding whether to grant a mistrial, a court "must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant" a new trial. ***State v. Grady***, 93 Wis. 2d 1, 13, 286 N.W.2d 607 (Ct. App. 1979).

Hanko argues that the circuit court erroneously exercised its discretion by denying Hanko's motion for a mistrial after the State offered evidence that Hanko would be more likely than not to reoffend if he were discharged and no longer under supervision and subject to sex offender treatment. Hanko points to cases holding that evidence as to future supervision is irrelevant to the jury's determination of whether the criteria for a WIS. STAT. ch. 980 commitment have been met. *See* ***State v. Mark***, 2006 WI 78, ¶2, 292 Wis. 2d 1, 718 N.W.2d 90 (holding that the conditions of Mark's probation were "irrelevant to the determination of whether or not he is a sexually violent person pursuant to WIS. STAT § 980.01(7) and were therefore properly excluded by the circuit court"); ***State v. Sugden***, 2010 WI App 166, ¶¶34-35, 330 Wis. 2d 628, 795 N.W.2d 456 (holding that the court properly excluded evidence that Sugden would be on parole in the community if not committed under WIS. STAT. ch. 980, because "[s]tatements about supervision are irrelevant to the issues the jury must decide in determining if a person is sexually violent within the meaning of WIS. STAT. § 980.01(7)"). Hanko contends that, if the presence of the protective factor of supervision is irrelevant to a jury's determination of whether a person is sexually violent, then the absence of that protective factor must be irrelevant as well. Hanko argues that the evidence was prejudicial because it gave the jury an incentive to find that Hanko is a sexually violent person even if the relevant statutory criteria were not satisfied.

The State responds that the circuit court properly exercised its discretion by denying Hanko's motion for a mistrial because: (1) the court offered to give the jury a curative instruction; (2) evidence of Hanko's future supervision was admissible; and (3) even if the evidence was inadmissible, its introduction was harmless because the fact that Hanko would no longer be supervised if discharged would have been obvious to the jury in any event, and the

State presented a strong case. Hanko replies that the evidence was inadmissible and prejudicial, and that he did not seek a curative instruction because he believed the jury was beyond rehabilitation after hearing the evidence.

We conclude that, assuming without deciding that evidence as to Hanko's future supervision was improperly admitted, the error was harmless. *See* ***State v. Mayo***, 2007 WI 78, ¶47, 301 Wis. 2d 642, 734 N.W.2d 115 (an error is harmless if the State proves beyond a reasonable doubt that the error did not contribute to the jury's decision). Here, as the State points out, the jury knew that Hanko had been committed as a sexually violent person; that he was on supervised release; and that he had petitioned for discharge. Thus, it would have been reasonable for the jury to infer that, if Hanko were discharged, he would no longer be under supervision and subject to treatment. *See* ***State v. Rhodes***, 2011 WI 73, ¶33, 336 Wis. 2d 64, 799 N.W.2d 850 (in deciding whether an error is harmless, courts look to factors including the importance of the evidence; whether it was cumulative; and whether other evidence corroborated or contradicted the evidence).

Additionally, as the State points out, the court found that the evidence had been improperly admitted but that a curative instruction would be an adequate remedy. *See* ***State v. Moeck***, 2005 WI 57, ¶¶71-72, 280 Wis. 2d 277, 695 N.W.2d 783 (a circuit court should always look to alternatives short of declaring a mistrial, including the use of cautionary instructions). Hanko asserts that the evidence so infected the jury that it could not be rehabilitated. We disagree. "Potential prejudice is presumptively erased when admonitory instructions are properly given by a [circuit] court." ***State v. Collier***, 220 Wis. 2d 825, 837, 584 N.W.2d 689 (Ct. App. 1998). Hanko does not explain why a curative instruction would not have been adequate to

cure the prejudice he complains of. Accordingly, we are not persuaded that the circuit court erroneously exercised its discretion by denying Hanko's motion for a mistrial.

Next, Hanko contends that the circuit court erred by denying Hanko's motion to exclude evidence under WIS. STAT. § 907.02(1). Hanko contends that the new evidentiary standard under § 907.02(1) applied to his discharge trial because the discharge petition commenced a new action. *See* 2011 Wis. Act 2, § 45(5) (providing that the new evidentiary standard would first apply to actions or special proceedings that are commenced on February 1, 2011). Hanko contends that, if the new evidentiary standard did not apply to his discharge trial, the statute violates his right to equal protection.

Both of Hanko's arguments have now been resolved by ***State v. Alger***, 2015 WI 3, ¶¶2-4, 360 Wis. 2d 193, 858 N.W.2d 346. In ***Alger***, the supreme court determined that the evidentiary standard set forth in WIS. STAT. § 907.02(1) does not apply in WIS. STAT. ch. 980 discharge trials when the original commitment proceedings commenced prior to February 1, 2011. The court also determined that "the legislature had a rational basis for not applying the ***Daubert*** evidentiary standard to expert testimony in post-***Daubert*** Chapter 980 discharge petitions that seek relief from pre-***Daubert*** Chapter 980 commitments," and thus there was no equal protection violation. ***Id.***, ¶4. Accordingly, we reject Hanko's evidentiary and constitutional challenges to the State's case.

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals