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DISTRICT IV

March 19, 2013

To:

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

2012AP1255 In re the Commitment of Joseph Mitchell: State v. Joseph Mitchell (L.C. #2010CI2)

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

Joseph Mitchell was committed as a sexually violent person under WIS. STAT. ch. 980 (2011-12),[1] based on a jury's verdict finding that Mitchell was a sexually violent person. Mitchell appeals the judgment of commitment, and an order denying his postcommitment motion for a new trial in the interest of justice, on the ground that the real controversy was not fully tried. *See* WIS. STAT. § 752.35. After reviewing the briefs and record at conference, we

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

The State filed a petition seeking to commit Mitchell as a sexually violent person under WIS. STAT. § 980.02(1)(a). The court instructed the jury at the close of testimony that, to find Mitchell to be a sexually violent person, it must find that: (1) Mitchell was convicted of a sexually violent offense; (2) Mitchell has a mental disorder that predisposes him to engage in acts of sexual violence; and (3) Mitchell is dangerous because he has a mental disorder which makes it more likely than not that he will engage in future acts of sexual violence. During deliberations, the jury submitted a note to the court seeking the definition of "predispose." After consulting with the prosecutor and defense counsel, and based on counsels' stipulation, the court provided a supplemental instruction to the jury stating that they "should rely on [their] collective memories of the testimony on this point." The issue on appeal focuses on the court's supplemental instruction regarding the meaning of "predispose."

For purposes of this decision, we assume, as Mitchell does, that the jury would have focused on the testimony of Dr. Cynthia Marsh, who was the only expert at trial that provided a full explanation of what "predispose" means. Specifically, Dr. Marsh explained that "predispose" in this context means that a mental disorder "causes you or makes you more likely to commit an act of sexual violence" and that "likely" in this context means "more likely than not."

Mitchell contends that Dr. Marsh's definition of "predispose" prevented the real controversy from being fully tried by misinforming the jury of the second element that the State was required to prove to establish that Mitchell was a sexually violent person. We disagree.

If anything, Dr. Marsh's testimony regarding the meaning of "predispose" raised the bar with respect to what the jury was required to find in order to find that Mitchell has a disorder that predisposes him to engage in acts of sexual violence. Stated differently, Dr. Marsh's testimony made it, if anything, *more* difficult for the State to prove that Mitchell has a mental disorder that predisposes him to engage in acts of sexual violence. This is because the "more likely than not" burden of proof appears to be a higher burden of proof than that which is required to show that a person has a mental disorder that predisposes him or her to engage in acts of sexual violence.

To the extent that Mitchell argues that the real controversy had not been fully tried because Dr. Marsh's definition of "predispose" merged the second and third elements, that argument is unavailing. Even assuming that Dr. Marsh's definition merged the two elements, Mitchell has not provided any hypothetical or practical reason to think that the testimony regarding the definition of "predispose" would have affected the verdict in this or any other case. In other words, Mitchell has failed to explain to us why a jury hearing an instruction that does not include a definition of "predispose" would have found Mitchell, or any person, to be sexually violent, but that a jury hearing an instruction that included a definition of "predispose" would have found the person not to be sexually violent. We do not discern any reason why the jury's assumed reliance on Dr. Marsh's testimony regarding the meaning of "predispose" prevented the real controversy from being fully tried.

Therefore,

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

Diane M. Fremgen
Clerk of Court of Appeals