COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2578 **Cir. Ct. No. 01-CI-1**

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

IN RE THE COMMITMENT OF RAY LEE WIMER:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

RAY LEE WIMER,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rusk County: FREDERICK A. HENDERSON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Ray Lee Wimer appeals a judgment and an order determining him to be a sexually violent person within the meaning of WIS. STAT. § 980.01(7) and committing him to institutional care in a secure mental health facility. Wimer argues that WIS. STAT. ch. 980 violates due process because it

does not require a finding that he suffers from a mental disorder that makes it seriously difficult for him to control his behavior. Wimer further contends that the jury instructions violate his due process rights; that use of actuarial instruments is reversible error; and changes to ch. 980 violate his rights to equal protection, substantive due process and protections from double jeopardy and ex post facto laws. We affirm the judgment and order.

¶2 Wimer argues WIS. STAT. ch. 980 violates due process because it does not require a separate finding that the person being committed has substantial difficulty controlling his or her behavior. He argues the United States Supreme Court's decision in ***Kansas v. Crane***, 534 U.S. 407, 412-13 (2002), concluded due process requires this finding. Wimer makes no showing this claim was raised at the trial court. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (appellate courts generally do not address issues raised for the first time on appeal). In any event, we conclude the Wisconsin Supreme Court's decision in ***State v. Laxton***, 2002 WI 82, 254 Wis. 2d 185, 647 N.W.2d 784, resolves Wimer's argument.

¶3 In ***Laxton***, the court concluded that WIS. STAT. ch. 980's requirement of proving a nexus between the mental disorder and an individual's dangerousness implicitly involves proof that the person has serious difficulty controlling his or her behavior. ***Id.*** at ¶¶22-23. The court rejected the notion that due process requires more. ***Id.*** at ¶2. Consequently, we reject Wimer's argument.

¶4 Wimer claims, nonetheless, that ***Laxton*** does not address his argument and therefore is not controlling. He relies on the following quote from ***Laxton***: "Laxton does not argue that a jury is required to make a separate finding regarding the individual's lack of volitional control …." ***Id.*** at ¶18. Because

Wimer's quotation is lifted out of context, his attempt to distinguish ***Laxton*** fails. The paragraph from which Wimer quotes states:

> Although Laxton does not argue that a jury is required to make a separate factual finding regarding the individual's lack of volitional control, he asserts that the statutory definitions of "mental disorder" and "sexually violent person" in Wis. Stat. ch. 980 fail to contain the requisite link to an individual's serious difficulty in controlling behavior. … Moreover, even if substantial probability and serious difficulty could be equated, Laxton asserts that nothing in the statute requires a link between the danger of re-offending to the person's serious difficulty in controlling behavior.

Id.

¶5 We are satisfied that the issue Wimer raises was addressed and resolved in ***Laxton***, which states: "Civil commitment under Wis. Stat. ch. 980 does not require a separate factual finding regarding the individual's serious difficulty in controlling behavior." ***Id.*** at ¶21. It further states: "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." ***Id.*** at ¶22. Because ***Laxton*** specifically determined that under ch. 980, due process does not require a separate finding of a person's inability to control his or her behavior, we reject Wimer's argument.

¶6 Wimer further contends that ***Laxton*** failed to address the distinction between emotion and volitional control.[1] He argues that "[t]o the extent that 'emotional or volitional' capacity as disparate concepts are both alleged as to a [WIS. STAT.] ch. 980 committee and the application of both is not explained, the appellant has been denied due process." We disagree. Wimer was diagnosed with two mental disorders as defined by ch. 980. One was pedophilia and the other was a personality disorder not otherwise specified with antisocial or borderline features. Expert testimony explained that an impairment of volitional capacity was an impairment of self-control and Wimer's mental disorders affected his volitional capacity, thus predisposing him to acts of sexual violence. Expert testimony established that "You have to look at that individual and see if that's what predisposes him." The record establishes that Wimer's mental disorder was diagnosed and explained within the context of WIS. STAT. § 980.01(2) and, consequently, he was not denied due process.

¶7 Next, Wimer claims that the "standard pre-Crane jury instructions on mental disorder and substantial probability misstate the law under Crane, mislead the jury and violate due process." Wimer argues that the jury instructions did not include the terms "serious inability to control behavior" or include that element. In ***Laxton***, as here, the circuit court used WIS JI—CRIMINAL 2502. Our supreme court rejected this argument in ***Laxton***, concluding that the instructions "virtually

[1] The definition of a sexually violent person includes "a person who has been convicted of a sexually violent offense ... and who is dangerous because he ... suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence." WIS. STAT. § 980.01(7). A mental disorder is "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." *See* WIS. STAT. § 980.01(2).

All statutory references are to the 1999-2000 version unless otherwise noted.

tracked the definitions of 'mental disorder' and 'sexually violent person' in WIS. STAT. § 980.01." ***Laxton***, 2002 WI 82 at ¶27. Because the court held that the statute did not violate due process, it follows that the jury was properly instructed and that the jury instructions did not violate substantive due process. ***Id.***

¶8 Wimer nevertheless claims: "The Wisconsin Supreme Court in … ***Laxton*** misapplied … ***Crane*** to the jury instructions." He further contends that the Wisconsin Supreme Court essentially adopted ***Crane***'s dissent and that "This is not the law and cannot justify the failure to give proper instructions on serious difficulty in controlling behavior mandated in … ***Crane***." Because this argument is more appropriately addressed to the Wisconsin Supreme Court, it is rejected. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

¶9 Next, Wimer claims that he is entitled to a new trial in the interest of justice because the "real issue of the predictive reliability of the actuarial instrument [the MnSOST-R] crucial to the state's case was not fully tried." He also argues, nonetheless, that "The defense theory at trial was that the MnSOST-R was flawed" and "A reasonable juror considering the defense evidence could fairly conclude that the MnSOST-R actuarial instrument was flawed." He contends "there was no testimony from Dr. [Lynn] Maskal that the instrument was not statistically predictive of sexually violent reoffense and therefore opinion evidence based thereon would not fairly assist the trier of fact."

¶10 We are not persuaded. Discretionary reversal is a formidable power that should be used sparingly. *See* ***State v. Watkins,*** 2002 WI 101, ¶79, 255 Wis. 2d 265, 647 N.W.2d 244. To establish that the real controversy was not fully tried, Wimer must convince us either that the jury was precluded from considering testimony that bore on an important issue or that certain evidence was improperly

received and clouded a critical issue. *See* ***State v. Cleveland***, 2000 WI App 142, ¶21, 237 Wis. 2d 558, 614 N.W.2d 543.

¶11 Wimer fails both these tests. Wimer does not point to any evidence that the jury was precluded from considering. Also, there is no showing that proofs of the actuarial instruments were improperly received and obscured the critical issue. The fact that ability to predict future dangerousness is disputed in the scientific community goes to the weight, not the admissibility, of expert opinion. ***State v. Zanelli***, 212 Wis. 2d 358, 379, 569 N.W.2d 301 (Ct. App. 1997). "Once the relevancy of the testimony is established and the witness is qualified as an expert, the reliability of the evidence is a weight and credibility issue for the fact finder and any reliability challenges must be made through cross-examination or other means of impeachment." ***Green v. Smith & Nephew AHP, Inc.***, 2000 WI App 192, ¶21, 238 Wis. 2d 477, 617 N.W.2d 881 (citation omitted).

¶12 Wimer also contends that we should reconsider our gatekeeper function regarding expert testimony because we recently certified ***Conley Pub. Group, Ltd. v. Journal Communs.***, No. 01-3128, *cert. granted*, Sept. 26, 2002, where we asked the supreme court to rule on the gatekeeper function regarding expert testimony in an antitrust case. Because the certified case involves the Wisconsin courts' role with respect to federal antitrust issues not applicable here, Wimer's invitation to reconsider it in the context of this WIS. STAT. ch. 980 proceeding is rejected.

¶13 Finally, we reject Wimer's argument that changes to WIS. STAT. ch. 980 by 1999 Wis. Act 9 violate his rights to equal protection, substantive due process and protections from double jeopardy and ex post facto laws. Wimer states that his argument is designed to parallel those we rejected in ***State v.***

Williams, 2001 WI App 263, 249 Wis. 2d 1, 637 N.W.2d 791, *petition for review denied*, 2002 WI 111, 250 Wis. 2d 557, 650 N.W.2d 840, that was pending before the supreme court on a petition for review. However, since Wimer has filed his brief, our supreme court has denied the petition. Consequently, we reject Wimer's constitutional arguments.

By the Court.—Judgment and order affirmed.

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