

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 18, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP279

Cir. Ct. No. 2006CI1

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN THE MATTER OF THE MENTAL COMMITMENT OF JAMES A. GOOD:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

JAMES A. GOOD,

RESPONDENT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Door County: D. TODD EHLERS, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. James Good appeals a judgment and order for commitment as a sexually violent person under WIS. STAT. ch. 980.¹ Good requests that we reverse the judgment and order in the interest of justice, contending that expert testimony about actuarial instruments, among other things, was irrelevant and prejudicial. We affirm the judgment and order.

BACKGROUND

¶2 On February 15, 2006, the State filed a petition alleging Good was a sexually violent person and requesting that he be committed pursuant to WIS. STAT. ch. 980.² At the time, Good was serving a sentence after being convicted of child enticement–sexual contact, contrary to WIS. STAT. § 948.07(1).

¶3 At the jury trial, the State relied upon testimony from its expert, Dr. Cynthia Marsh. Marsh diagnosed Good with paraphilia Not Otherwise Specified (NOS) and personality disorder NOS with antisocial and borderline features. Marsh’s diagnoses were based on numerous aspects of Good’s behavior. Good’s child enticement conviction resulted from an incident in the waiting room of a doctor’s office. Good handed a note to a fourteen-year-old boy that included

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² A “sexually violent person” under WIS. STAT. ch. 980

means a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect, or illness, and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence.

WIS. STAT. § 980.01(7)

Good's address and a note stating, "Come to this address for a BJ." In another incident, Good met a man at a bar, and they went home together. The man initially agreed to sexual contact with Good, but changed his mind. When denied sex, Good stabbed the man. Good also had sexual behavior problems in prison. Good engaged in manipulative behaviors to proposition uninterested prisoners for sex, such as offering to buy them candy or other items. Marsh characterized Good as being "out of control sexually[,]" and, in her opinion, Good's mental disorders affected his emotional and volitional capacity and predisposed him to engage in acts of sexual violence.

¶4 In assessing Good's risk of reoffending, Marsh considered a number of other factors. Marsh noted that when taking a questionnaire as part of his sex offender treatment assessment, Good indicated that he strongly agreed with statements such as, "I believe that sex with children can make the child feel closer to adults." Marsh was particularly concerned with the attitudes reflected in Good's answers because Good did not complete sex offender treatment. Good was terminated from sex offender treatment because he sexually propositioned other prisoners.

¶5 Marsh's risk assessment also relied upon actuarial instruments, which produce numerical scores with a corresponding risk of reoffending, based upon factors associated with the offender and historical data about other offenders. The three actuarial instruments she relied upon included the Rapid Risk Assessment of Sex Offender Recidivism (RRASOR), the Static 99, and the Minnesota Sex Offender Screening Tool–Revised (MnSOST-R). Marsh explained the data each actuarial instrument is based upon, how the instruments are different, and what factors she used to obtain risk scores for Good. Considering the information available to her, including the actuarial instruments, Marsh opined

that Good's mental disorders made it more likely than not that he would commit future acts of sexual violence.

¶6 Also relevant to this appeal are three independent statements in Marsh's testimony. Two of these statements relate to the WIS. STAT. ch. 980 referral process. First, when asked how she was appointed to evaluate Good, Marsh stated:

Our – our work load comes to us from the end of confinement review board. They review about 25 percent of the sex offenders that are going to be released from the prisons and then they refer on to us about half of those and then our – my work unit supervisor assigns cases at random. So we see about 17 percent of all sex offenders that are going to be released and then refer on about five percent for potential commitment.

The second statement came on rebuttal, when Marsh stated:

I diagnosed paraphilia because I thought it was the best way to encapsulate the subject's overall behavior pattern. The – one of the other witnesses classified paraphilia NOS as a very rare disorder, but in fact it's rare that we're here. This is – the respondent is one of five percent of all sex offenders in the State of Wisconsin. The behaviors that we see in these kinds of cases by the very fact that we're here in the courtroom makes it so that they are rare occurrences.

Aside from her statements about the referral process, Marsh also made the following statement when asked whether Good would still be a sexually violent person absent the diagnosis of paraphilia: "Yes, I believe so. There are – there are cases where just personality disorder has been diagnosed and that person has been found to be a sexually violent person, yes." No objection was made to any of the above statements, nor was there an objection to Marsh's discussion of actuarial instruments.

¶7 Good called two experts at trial, Dr. Sheila Fields and Dr. Dianne Lytton. Fields agreed with Marsh's diagnosis of personality disorder NOS, but disagreed with Marsh's diagnoses of paraphilia NOS. Fields concluded that Good's personality disorder NOS predisposed him to acts of sexual violence. However, Fields did not believe Good's risk to reoffend rose to the level of more likely than not. Fields relied upon two of the three actuarial instruments used by Marsh, the RRASOR and the Static 99. Using those instruments, she obtained lower risk percentages than Marsh because she did not score Good's stabbing incident as a sexual offense. Fields did not use the MnSOST-R because she "felt that the research wasn't keeping up."

¶8 Good's other expert, Lytton, opined that while Good was developmentally disabled, he was not afflicted with a mental disorder that would predispose him to commit sex offenses. Lytton stated that she does not utilize the risk percentages produced by actuarial instruments. However, she uses a similar process of utilizing factors to calculate risk.

¶9 The jury found Good to be a sexually violent person. The court entered judgment on the verdict and ordered Good committed to a secure mental facility.

DISCUSSION

¶10 Good challenges Marsh's testimony about the actuarial instruments, the ch. 980 referral process, and personality disorder being a basis for commitment in other cases. Because he did not object to any of this testimony at trial, he asks that we exercise our discretionary power of reversal pursuant to WIS. STAT. § 752.35. Specifically, he contends the challenged testimony resulted in the real controversy not being fully tried.

¶11 Pursuant to WIS. STAT. § 752.35, we may reverse a judgment or order, regardless of whether a proper motion or objection exists in the record, “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....” WIS. STAT. § 752.35. One situation in which a case is not fully tried is “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.” *State v. Wyss*, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985).

¶12 We first address Good’s challenge to Marsh’s testimony about actuarial instruments. Good contends this testimony was irrelevant because actuarial instruments only measure general recidivism, not recidivism specific to any mental disorder. In a WIS. STAT. ch. 980 proceeding, the respondent’s propensity to reoffend must be due to a mental disorder. *See* WIS JI—CRIMINAL 2502 (2006).

¶13 We conclude that the testimony regarding the actuarial instruments was relevant and admissible and therefore did not prevent the real controversy from being fully tried. We recently addressed the relevancy of actuarial instruments to WIS. STAT. ch. 980 proceedings in *State v. Smalley*, 2007 WI App 219, 741 N.W.2d 286. In *Smalley*, the appellant argued that expert testimony about actuarial instruments was irrelevant because those instruments predict dangerousness without regard to a particular person’s mental disorder. *Id.*, ¶2. We rejected this argument. *Id.*, ¶20. Under *Smalley*, even if actuarial instruments predict dangerousness regardless of mental disorder, they are still relevant to the specific issue of dangerousness. *Id.*

¶14 We next address whether the case was fully tried because of the other challenged aspects of Marsh's testimony. This testimony consists of Marsh's two references to the WIS. STAT. ch. 980 referral process and her statement that personality disorder, by itself, has supported commitments in other ch. 980 proceedings. Good contends this testimony were irrelevant and prejudicial.

¶15 We conclude that, even if the testimony was irrelevant and prejudicial, it did not so cloud a crucial issue as to preclude the case from being fully tried. Compared to the vast body of other testimony presented at trial, these three isolated statements were relatively subtle and innocuous. Most of the testimony from Marsh, Fields, and Lytton discussed their views of Good's history, his mental disorders, the actuarial instruments, and how Good's mental disorders affected his propensity to reoffend. The challenged statements, by contrast, were not focal points in the case. The attorneys did not discuss them in closing arguments. Viewed in context, they did not so cloud a crucial issue as to prevent the real controversy from being fully tried.

By the Court.—Judgment and order affirmed.

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

