

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 26, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2010AP1490

Cir. Ct. No. 2007CI1

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE COMMITMENT OF JONATHAN PHILLIPS:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

JONATHAN PHILLIPS,

RESPONDENT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Columbia County: DANIEL GEORGE, Judge. *Affirmed.*

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

¶1 HIGGINBOTHAM, J. Jonathan Phillips appeals the circuit court's judgment and commitment order, entered on a jury verdict, finding him a sexually

violent person pursuant to WIS. STAT. § 980.01 (2009-10)¹ and committing him to state custody. He also appeals a circuit court order denying his motion for post-commitment relief. Phillips seeks a new trial in the interest of justice on the ground that the real controversy was not fully tried because: (1) the pattern jury instruction given to the jury provided an inconsistent definition of mental disorder, thereby confusing the jury as to the proper legal standard they must apply; and (2) the expert testimony at trial exacerbated this confusion. We disagree and affirm.

Background

¶2 Phillips' sexual misconduct began at approximately age ten and continued periodically until his conviction and incarceration at age seventeen for first-degree sexual assault of a child in 1999. Nearing release upon completion of his sentence, the State filed a petition in circuit court alleging Phillips was a sexually violent person, pursuant to WIS. STAT. ch. 980. The petition was tried to a jury.

¶3 At trial, the State offered testimony of two expert psychologists, Richard Elwood and Christopher Tyre. Both experts had prepared written evaluations, and Dr. Tyre had interviewed Phillips twice. Both experts diagnosed Phillips with "pedophilia and paraphilia, not otherwise specified." Tyre diagnosed Phillips with a personality disorder, not otherwise specified, with antisocial features. Elwood diagnosed Phillips with an antisocial personality disorder. As to Phillips' cognitive abilities, Tyre diagnosed borderline intellectual functioning and

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Elwood diagnosed a learning disorder, not otherwise specified. Using actuarial instruments, both experts concluded Phillips was more likely than not to reoffend. The experts' testimony at trial was consistent with their evaluations.

¶4 Phillips cross-examined both witnesses as to their diagnosis and their methods for determining Phillips' risk of reoffending. Phillips presented the testimony of an expert, Luis Rosell. Rosell did not evaluate Phillips but, rather, testified regarding the limitations of the actuarial instruments used to estimate the risk of reoffending.

¶5 The court instructed the jury on the meaning of "mental disorder" using pattern jury instruction, WIS JI—CRIMINAL 2502. The jury instruction provides, in pertinent part:

"Mental disorder" means a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence and causes serious difficulty in controlling behavior. Mental disorders do not include merely deviant behaviors that conflict with prevailing societal standards. Not all persons who commit sexually violent offenses can be diagnosed as suffering from a mental disorder. Not all persons with a mental disorder are predisposed to commit sexually violent offenses or have serious difficulty in controlling behavior. You are not bound by medical opinions, labels, or definitions.

WIS JI—CRIMINAL 2502 (State's Burden of Proof 2) (emphasis added). The jury found Phillips to be a sexually violent person and the circuit court entered an order committing Phillips to a secure mental health facility.

¶6 Phillips filed a motion for post-commitment relief requesting a new trial in the interest of justice. Phillips argued that the real controversy was not fully tried because: (1) the jury was not properly instructed about that part of the statutory element relating to mental disorder that provides that the mental disorder

causes a serious difficulty in controlling behavior; and (2) that the evidence presented by the State's experts further clouded that issue. The circuit court denied the motion following a hearing. Phillips appeals. Additional facts, as necessary, are set forth in the discussion section.

Standard of Review

¶7 We review de novo whether a jury instruction is a correct statement of the law. *State v. Wille*, 2007 WI App 27, ¶23, 299 Wis. 2d 531, 728 N.W.2d 343. “We will reverse and order a new trial only if the jury instructions, taken as a whole, misled the jury or communicated an incorrect statement of the law.” *Id.* It is within our discretion to grant a new trial in the interest of justice if our independent review of the record reveals that the real controversy was not fully tried. *State v. Williams*, 2006 WI App 212, ¶12, 296 Wis. 2d 834, 723 N.W.2d 719; *see also* WIS. STAT. § 752.35.

Discussion

¶8 Under *Kansas v. Crane*, 534 U.S. 407 (2002), due process requires that civil commitment proceedings for sexually violent persons include proof that the person has serious difficulty in controlling his or her behavior. *Id.* at 410-13. The Wisconsin Supreme Court has held that civil commitment of sexually violent persons under WIS. STAT. ch. 980 satisfies due process under *Crane* because ch. 980's requirement of evidence of a “mental disorder” and “dangerousness” establishes “the required proof of lack of control.” *State v. Laxton*, 2002 WI 82, ¶¶17-21, 254 Wis. 2d 185, 647 N.W.2d 784. The court explicitly held that “[c]ivil commitment under WIS. STAT. ch. 980 does not require a separate factual finding regarding the individual's serious difficulty in controlling behavior.” *Id.*, ¶21. In so finding, the *Laxton* court noted that “proof that a person is sexually violent

necessarily and implicitly includes proof that the person’s mental disorder involves serious difficulty in controlling his or her behavior.” *Id.*, ¶27. It found support for this position in that “the jury instructions virtually tracked the definitions of ‘mental disorder’ and ‘sexually violent person’ in WIS. STAT. § 980.01, such that by the jury finding that the defendant had “a mental disorder and that his mental disorder creates a substantial probability that he will engage in acts of sexual violence, [it] had to conclude that [the defendant’s] mental disorder involved serious difficulty for him in controlling his behavior.” *Id.* Because this nexus provided the jury with a means to distinguish a “dangerous sexual offender who has serious difficulty controlling his behavior, from the dangerous but typical recidivist,” the court concluded that the jury was properly instructed. *Id.*

¶9 Although not required under *Crane* and *Laxton*, WIS JI—CRIMINAL 2502, the standard Wisconsin jury instruction for WIS. STAT. ch. 980 cases, contains language on “serious difficulty in controlling behavior.” Phillips argues that this pattern jury instruction is misleading because it is self-contradictory. Phillips argues that because the first definitional sentence tells jurors that a mental disorder “means a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence and causes serious difficulty in controlling behavior,” while the fourth sentence states “[n]ot all persons with a mental disorder are predisposed to commit sexually violent offenses or have serious difficulty in controlling behavior,” the jury could have been misled and found Phillips to be a sexually violent person without finding that he had a mental disorder that caused him to have a “serious difficulty in controlling behavior.”

¶10 The State argues that Phillips is not entitled to a new trial because: (1) the jury was properly instructed on all three elements required for commitment

as a sexually violent person; and (2) the real controversy—“whether it is more likely than not that Phillips will reoffend”—was fully and fairly tried. The trial court held that “the jury was appropriately instructed by the pattern jury instruction” which addressed the appropriate standards.

¶11 We recognize that the jury instruction contains inconsistent sentences. It first defines “mental disorder” as a condition that causes serious difficulty for a person in controlling behavior. Three sentences later, it then states that not all persons with a “mental disorder” have serious difficulty in controlling behavior. Phillips focuses his argument on the interplay of these two sentences, arguing that they are misleading to the jury and could result in the second sentence negating the remainder of the jury instruction and the jury improperly finding him a sexually violent person.

¶12 To determine whether the deficiencies in the challenged jury instruction could mislead a jury, as Phillips posits, the jury instruction must be read as a whole. *Wille*, 299 Wis. 2d 531, ¶23. We agree with the circuit court that all three elements of WIS. STAT. § 980.01 were present in the jury instruction provided to the jury in this case.² Significantly, the instruction on the

² The following jury instruction was provided at trial:

1. That Jonathan Phillips has been convicted of a sexually violent offense. First Degree Sexual Assault of a Child is a sexually violent offense. WIS. STAT. § 948.02(1).

2. That Jonathan Phillips currently has a mental disorder.

“Mental disorder” means a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence and causes serious difficulty in controlling behavior. Mental disorders do not include merely deviant behaviors that conflict with

(continued)

dangerousness element required the jury to find that Phillips is “dangerous to others because he has a mental disorder which makes it more likely than not that he will engage in one or more future acts of sexual violence.” Accordingly, the instruction on “dangerousness” reinforces the initial explanation of “mental disorder” in the previous element; i.e., that under WIS. STAT. § 980.01, a mental disorder is one that causes serious difficulty in controlling behavior. *See Laxton*, 254 Wis. 2d 185, ¶¶17-21. As the *Laxton* court noted, reading the instruction as a whole creates the nexus between the mental disorder and the likelihood of reoffending. *Id.*, ¶27. It provides the means by which the jury can distinguish “a dangerous sexual offender who has serious difficulty controlling his behavior, from the dangerous but typical recidivist.” *Id.*

¶13 Furthermore, the dangerousness instruction not only clarifies the instruction on the “mental disorder” element, it also stands alone as a separate requirement that the jury find that Phillips has serious difficulty in controlling his behavior. In other words, even if the wording of the “mental disorder” instruction, viewed in isolation, has the potential to mislead a jury, the instruction on the dangerousness element unequivocally requires a finding that the person has a

prevailing societal standards. Not all persons who commit sexually violent offenses can be diagnosed as suffering from a mental disorder. Not all persons with a mental disorder are predisposed to commit sexually violent offenses or have serious difficulty in controlling behavior. You are not bound by medical opinions, labels, or definitions.

3. That Jonathan Phillips is dangerous to others because he has a mental disorder which makes it more likely that [sic] not that he will engage in one or more future acts of sexual violence.

mental disorder that makes it more likely than not that he will reoffend. Accordingly, when read as a whole, we conclude that WIS JI—CRIMINAL 2502 makes clear that for a jury to find that Phillips is a sexually violent person, it must have made the required connection between Phillips’ mental disorder and his ability to control his behavior. *See Laxton*, 254 Wis. 2d 185, ¶¶20-21.

¶14 Phillips argues that the inconsistency in the jury instruction, coupled with the expert testimony at trial, led to the real controversy not being fully tried. He argues that the testimony of the State’s experts focused on the “predisposition” to more likely than not reoffend, rather than on “serious difficulty in controlling behavior,” and that coupled with the defective jury instruction, the jury had no guidance to resolve the inconsistency in the jury instruction. Specifically, Phillips argues that neither expert’s testimony discussed “whether Phillips’ diagnoses caused him serious difficulty in controlling his behavior.” Phillips argues that the inconsistent instruction and the lack of testimony on the concept of “serious difficulty [in] controlling behavior joined to obscure the central issue in the case and, as a result, the real controversy was not tried.”

¶15 The State counters that the prosecutor in the opening statement “succinctly framed” the real controversy at trial—Phillips’ dangerousness and whether Phillips is dangerous “in that it is more likely than not he will engage in future acts of sexual violence.” Further, the prosecutor specifically noted that “not everyone who has a mental disorder has this risk of reoffen[ding].” Additionally, the State argues that the trial testimony focused on the risk of reoffending and not on whether Phillips had a mental disorder.

¶16 The problem with Phillips’ argument is that he relies on prevailing on his argument that the challenged jury instruction is internally inconsistent and

therefore misled the jury. That is, his argument that he is entitled to a new trial because the real controversy has not been fully tried rests on the assumption that we would agree with his contention that the jury instruction is defective. We have rejected this argument and Phillips does not make a separate argument regarding the testimony of the State's expert psychologists that does not rely on a ruling in his favor that the jury instruction is defective. We therefore do not consider his argument any further.

¶17 Both Phillips and the State propose revisions to the portion of the pattern instruction defining “mental disorder.” Although we conclude that the suggested revisions by both parties are problematic for different reasons, we comment only on the State's proposal.

¶18 The State would insert one “clarifying sentence ... inserted immediately after the first sentence,” so that the new instruction would read:

“Mental disorder” means a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence and causes the person serious difficulty in controlling behavior. *Not all mental disorders predispose a person to engage in acts of sexual violence or cause the person serious difficulty in controlling behavior.* ... Not all persons with a mental disorder are predisposed to commit sexually violent offenses or have serious difficulty in controlling behavior.

This proposal does not eliminate the inconsistency that Phillips has identified because it adds nothing to the last sentence. That is, the inserted sentence (not all mental disorders “predispose” a person) is simply a reformulation of the existing last sentence (not all persons with a mental disorder are “predisposed.”).³

³ As we have concluded, the jury instruction, read as a whole, meets the statutory and constitutional requirements. See *Kansas v. Crane*, 534 U.S. 407 (2002); *State v. Laxton*, 2002 (continued)

Conclusion

¶19 As set forth above, when read as a whole, WIS JI—CRIMINAL 2502 provides an accurate recitation of the law regarding finding an individual to be a sexually violent person under WIS. STAT. § 980.01. Accordingly, Phillips is not entitled to a new trial in the interest of justice.

By the Court.—Judgment and orders affirmed.

Recommended for publication in the official reports.

WI 82, ¶¶17-21, 254 Wis. 2d 185, 647 N.W.2d 784. However, we recognize the possible inconsistency in the “mental disorder” instruction when read in isolation. The jury instruction committee may be well-advised to amend the instruction to delete this inconsistency so that the instruction clearly sets forth the requirements under WIS. STAT. § 980.01 and relevant case law.

