

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 7, 2012

Diane M. Fremgen
Clerk of Court of Appeals

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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. 2011AP1625

Cir. Ct. No. 2009CI1

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE COMMITMENT OF SCOTT R. SCHMIDT:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

SCOTT R. SCHMIDT,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Scott R. Schmidt appeals from a judgment committing him as a sexually violent person under WIS. STAT. ch. 980 (2009-10)¹

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

and an order denying his motion for postcommitment relief. Schmidt contends that he is entitled to a new trial in the interest of justice because the real controversy was not fully tried. We reject Schmidt's claim and affirm the judgment and order.

¶2 In 1990, Schmidt was convicted of four counts of first-degree sexual assault in Walworth County Case No. 1990CR338, along with counts of burglary, false imprisonment, and witness intimidation. Schmidt had forced his way into the apartment of a woman named B.M.D., whom he bound, forcibly sexually assaulted, and threatened with a knife. Schmidt was paroled for these offenses in 2003, and revoked from parole in 2008.

¶3 In July 2009, as Schmidt neared his mandatory release date, the State filed a petition alleging that he is a sexually violent person. At the trial on the petition, the parties stipulated to the facts of the 1990 sexual assault, and the stipulation was read to the jury. The remainder of the State's case consisted of two witnesses: Douglas Geske, who had been Schmidt's parole agent, and Christopher Snyder, a forensic psychologist.

¶4 During the questioning of Snyder, the State elicited a summary of Schmidt's "issues regarding his sexual development and sexual behavior prior to" the 1990 sexual assault. Snyder included in this summary a series of incidents that Schmidt had admitted to in the course of his sex offender treatment at Oshkosh Correctional Institution in the mid-1990s. Snyder related that Schmidt had engaged in frottage:²

² Snyder defined frottage as "rubbing against people that are unsuspecting for purposes of sexual gratification."

ten times with female victims between the ages of ten and twenty-seven. He reported fondling their breasts, buttocks and vaginas with his hands and without consent. He also reported that he had raped five females between the ages of fourteen and forty-two who were friends, neighbors and strangers.... During the course of these rapes he reported vaginally and orally raping the women by forcing penis to vagina intercourse or him performing oral sex on the victim. He also disclosed that he had engaged in voyeurism, window peeping, with twenty to thirty victims between the ages of sixteen and forty-two sometimes looking with binoculars through their windows, watching them undress and things of that nature. And he also said that he involved himself in exhibitionism with four females in the same age group and that he would either be completely naked or wearing light colored shorts with no underwear so the victims could see his penis.

Snyder later repeated some of this information during both his direct and redirect examinations.

¶5 During cross-examination, defense counsel questioned Snyder regarding trial exhibit 21, which was a disclosure statement that Schmidt had made in counseling. The specific issue was how or whether Schmidt's score on the Static-99 actuarial instrument should be affected by a sexual incident that took place when he was a juvenile. On redirect examination, the State again turned Snyder's attention to Exhibit 21 and focused on a series of statements Schmidt had made regarding his sexual assaults.

[Prosecutor]: If you'd take a look at that. I'll be fairly brief. But since [defense counsel] quoted from it I'm going to ask you to do the same a little bit. When I refer to page numbers, I'm referring to the bate stamp numbers.

[Snyder]: All right.

[Prosecutor]: Would you go to 861, please.

[Snyder]: I have it.

[Prosecutor]: And these are Mr. Schmidt's statements?

[Snyder]: Yes.

[Prosecutor]: Would you read the paragraph—second full paragraph starting with, I will ask, please.

[Snyder]: I will ask my victims if they ever had an orgasm. To kiss me, touch my penis and/or tell me to speed up or slow down. I feel a sense of relief if I ejaculated. I will untie the victim's hands as a phoney act of caring thinking I've done enough and I wonder if she will tell. I will look around her apartment for a purse or checkbook to steal hoping she fears I know her name, address and phone number therefore she'll be too scared to report me. I will threaten to hurt her or her family if she does.

[Prosecutor]: Page 862, please, last paragraph, if you would read the same starting with, I expect.

[Snyder]: I expect my victims to enjoy being raped, to be submissive, to tell me how great I am and invite me back over after I rape them. I commit rape to feel powerful, superior, and in control. To degrade and humiliate my victims. To get even for all the perceived wrongs inflicted on me. For what I perceive, as teasing me and/or rejecting me. I tell myself females are property and sex objects for my own sexual gratification.

[Prosecutor]: 871, please.

[Snyder]: Yes.

[Prosecutor]: Second full paragraph, watching remove her tops. Same, please.

[Snyder]: Watching her remove her tops, I smile to myself. Lick my lips in anticipation and swallow hard. I feel aroused, controlling, powerful, and superior. I see a faint look of disgust on [B.M.D.'s] face. I think, that's right, bitch, you're here for my pleasure now. You're getting what you deserve, my penis. I'm the boss now, you'll do as I say, and you don't want me to get pissed and start beating you, pulling your hair, and slapping you.

[Prosecutor]: Page 873, please.

[Snyder]: Yes.

[Prosecutor]: Last paragraph, [B.M.D.] kicks—

[Snyder]: [B.M.D.] kicks me hard in the chest then runs for the door. I fell off the back of her bed. Feeling angry I think, I got to get this bitch, and if she gets to the street, I'm screwed. Then I hear [B.M.D.] scream. I get up quickly and violently grab [B.M.D.'s] throat. Clutching it very tightly and crushingly cutting off her air supply. Feeling nervous I think, someone will hear her scream and rescue her and I got to shut her up. With [B.M.D.] holding onto the screen door as tight she can, I grabbed her arm forcibly and pull until she let's go. Then I drag her by her arm and throw her brutally back on the bed. Realizing [B.M.D.] was willing to run out of her apartment naked to escape I think, she's not good enough to get away from me. I feel powerful, controlling, superior and unique.

¶6 At the conclusion of Snyder's testimony, the State rested its case. Schmidt then presented his defense and called several witnesses. Upon completion of their testimony, the State called Geske as a rebuttal witness. Geske read the following statement by Schmidt from exhibit 21 regarding his 1990 sexual assault:

Three weeks before raping [B.M.D.] I watched her walk into her apartment from the store parking lot from across the street. I rape fantasized her—about her for three weeks prior to brutally raping her. I got into her apartment at 8:00 PM on April 9, 1990. I lied to her and asked her to use her phone so I could call a friend who lived in the same apartment complex as she did. I bought a knife and change of clothes to wear that night, put the knife in my back pocket before going into [B.M.D.'s] apartment. I went there to violently rape[] her. [B.M.D.] was alone and trusted me to make a phone call and leave. While in her apartment I faked a phone call and attacked her on the bed. I raped her orally with my mouth and penis, vaginally with my mouth, penis and fingers and cruelly rubbed her breasts. I tied [B.M.D.'s] hands up when she tried to escape and viciously grabbed her throat and choked her—and choked her when she would scream. I terrified her by intimidating her and threatening her with a knife. The rape lasted ninety minutes. About three weeks later I was arrested after calling [B.M.D.'s] apartment.

¶7 In its closing argument, the State repeated the list of Schmidt's admissions: “[frottage], the rubbing against women without their permission or

consent ten times who were family friends, strangers, babysitters. Rape, five female victims between the ages of 14 and 42. Voyeurism, 20 to 30 victims between the ages of 16 and 42. Exhibitionism, four victims throughout the course of his life.”

¶8 The State also re-read to the jury some of the paragraphs that Snyder had read from exhibit 21. The State explained that this material was important because it needed the jury “to have an insight into [Schmidt’s] mindset when he committed these assaults as to what type of victim he looks for, how he behaves, how he thinks, how he feels, the things he said and did.” The State also explained that Schmidt’s statements regarding the rape of B.M.D. mattered “because much like his sexual offense history has continued throughout his life, you have to look at his treatment history.”

¶9 The jury ultimately found Schmidt to be a sexually violent person, and the circuit court entered a judgment to that effect. Schmidt subsequently filed a motion for postcommitment relief, requesting a new trial in the interest of justice. The circuit court denied Schmidt’s motion. This appeal follows.

¶10 On appeal, Schmidt renews his request for a new trial in the interest of justice. Specifically, he contends that the admission of his account of his 1990 sexual assault in addition to other inflammatory disclosures made by him in sex offender treatment in the mid-1990s prevented the real controversy from being

fully tried. According to Schmidt, such evidence had low probative value and was substantially outweighed by its prejudicial effect. *See* WIS. STAT. § 904.03.³

¶11 As an appellate court, we have the authority under WIS. STAT. § 752.35 to grant a discretionary reversal of a conviction in the interest of justice if the real controversy was not fully tried. *State v. Hubanks*, 173 Wis. 2d 1, 28-29, 496 N.W.2d 96 (Ct. App. 1992). We are to exercise this discretionary power of reversal only in exceptional cases. *State v. Cuyler*, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983). Under the “real controversy not tried” standard, discretionary reversal arises either when the jury erroneously was not given the opportunity to hear important testimony bearing on an important issue of the case or 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. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

¶12 Here, we are not persuaded that the evidence Schmidt complains of so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried. To the contrary, Schmidt’s history of nonconsensual aggressive sexual behavior was highly probative to the elements of a mental disorder and dangerousness, the establishment of which are required for a WIS. STAT. ch. 980 commitment. WIS. STAT. § 980.02(2)(b), (c). *See also State v Wolfe*, 2001 WI App 136, ¶¶40-41, 246 Wis. 2d 233, 631 N.W.2d 240. Because the evidence was

³ Because Schmidt did not object to the admission of the evidence, the State urges us to review Schmidt’s claim as one of ineffective assistance of counsel. This court has previously concluded “that an argument that can be framed under ineffective assistance of counsel may also support a motion for a new trial because the real controversy was not fully tried.” *State v. Williams*, 2006 WI App 212, ¶17, 296 Wis. 2d 834, 723 N.W.2d 719. Accordingly, we address Schmidt’s argument in the manner that he presents it.

admissible on that basis, we do not view this as an exceptional case warranting discretionary reversal.

¶13 For the reasons stated, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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

