COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3454

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

IN RE THE COMMITMENT OF:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

THOMAS H. BUSH,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: GREGORY A. PETERSON, Judge. *Reversed and cause remanded.*

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

PER CURIAM. Thomas Bush appeals a judgment determining that he is a sexually violent person under § 980.05, STATS., and committing him to the custody of the Wisconsin Department of Health and Family Services for control, care and treatment. Bush raises seven issues: (1) the trial court erroneously

instructed the jury; (2) the trial court made erroneous evidentiary rulings; (3) newly discovered evidence requires a new trial; (4) the prosecutor made improper argument; (5) Bush should not have been committed but granted supervised release; (6) he was denied due process by operation of § 980.04(2), STATS., and ch. 980 is unconstitutional; and (7) his request for a closed hearing was improperly denied. Because the trial court erroneously instructed the jury and the error was not harmless, we reverse the judgment and remand for a new trial.

Bush argues that the trial court erroneously instructed the jury. The standard jury instruction requires proof that the person "is dangerous to others because the mental disorder creates a substantial probability that he will engage in acts of sexual violence." *See* WIS J I—CRIMINAL 2502. Bush requested that the term, "substantial probability" be defined as a probability more than a possibility. He suggested that in order to be substantially probable, a result must be "highly likely" to happen. The trial court rejected this request, stating:

> The committee notes of the legislative history of this statute show that likely was the original word used in the draft. The term substantial probability was substituted to use a term that is more commonly used in the Wisconsin Statutes and was intended to be the equivalent of the word likely.

The court ultimately instructed that: "In order to be substantially probable, a result must be likely to happen."

Subsequent to trial, we published ***State v. Kienitz***, 221 Wis.2d 275, 585 N.W.2d 609 (Ct. App. 1998), in which we concluded that "'substantially probable" means "considerably more likely to occur than not to occur." Because the trial court's instruction was incomplete in light of ***Kienitz***, it was erroneous.

When the circuit court has given an erroneous instruction, a new trial is not warranted unless the error is prejudicial. ***Nowatske v. Osterloh***, 198 Wis.2d 419, 429, 543 N.W.2d 265, 268 (1996). "[A]n error relating to the giving or refusing to give an instruction is not prejudicial if it appears that the result would not be different had the error not occurred." Here, there was evidence in the form of expert opinion testimony that the risk of Bush reoffending was moderate. As a result, we are unable to conclude beyond a reasonable doubt that the instructional error is harmless. *See* ***State v. Nye***, 100 Wis.2d 398, 403-05, 302 N.W.2d 83, 86-87 Ct. App. 1981).

Because the instruction is dispositive, we need not address others on appeal. ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938). We nonetheless briefly consider those issues that may arise at Bush's new trial. We found no merit to any of Bush's other contentions. Bush asserts that the trial court committed error in other instructions to the jury. We reject Bush's contention that the trial court erroneously omitted the word, "mental," before the term "condition" in the following instruction: "Mental disorder means a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." We agree with the State that the omitted term is redundant, and the context of the instructions conform to the law. *See* § 980.01(2), STATS.

We also find no merit to Bush's claim that the trial court erroneously used the term "prone" instead of "predisposes." The trial court instructed the jury: "Rather, the focus here is on whether Thomas Bush has a current diagnosis of a present disorder that makes him prone to commit sexually violent acts in the future." Bush claims the term "prone" is unconstitutionally vague. In ***State v. Post***, 197 Wis.2d 279, 307, 541 N.W.2d 115, 124 (1995), however, our supreme court stated that "the focal point of commitment is not on past acts but on current

diagnosis of a present disorder suffered by an individual that specifically causes that person to be *prone* to commit sexually violent acts in the future." (Emphasis added.) Prone is defined to mean: "having a tendency, propensity, or inclination **:** DISPOSED, PREDISPOSED …." WEBSTER'S THIRD NEW INT'L DICTIONARY 1816 (unabr. 1993). Because prone is synonymous with predispose within the context used here, we reject his argument.

Bush further argues that the trial court erroneously deleted a portion of the pattern jury instruction that the court found "nearly incomprehensible." The court rejected the following portion of WIS J I—CRIMINAL 2502:

> The condition must be a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and must be associated with a current state of distress or impaired functioning, or with a significant risk of pain, death or loss of freedom. Disorders do not include merely deviant behaviors that conflict with prevailing societal mores.

This language was derived from ***Post***, 197 Wis.2d at 306, 541 N.W.2d at 123-24, and quotes the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS-IV at xxi-xxii.

Each instruction must be viewed in the context of the overall charge to the jury. ***Buel v. La Crosse Transit Co.***, 77 Wis.2d 480, 493, 253 N.W.2d 232, 238 (1977). If the instructions adequately cover the law applicable to the facts, we will not find error in refusal of specific instructions even though the refused instruction itself would not be erroneous. ***Nashban Barrel & Container v. G.G. Parsons Trucking***, 49 Wis.2d 591, 606, 182 N.W.2d 448, 456 (1971). We conclude that the omission of this language does not constitute reversible error. As the trial court pointed out, this language is not found in the statute and is an

elaboration of the meaning of "mental disorder." The court's instructions adequately defined this term. The record reflects a reasonable exercise of discretion, and we thus reject Bush's claim of error.

Next, Bush contends that the trial court erroneously exercised its discretion when it committed him instead of granting supervised release. He claims that the trial court applied an incorrect legal standard under § 980.06(2)(b), STATS., because it failed to consider the least restrictive alternative before institutionalization. We disagree.

Bush relies on § 980.06(2)(b), STATS.:[1]

> An order for commitment under this section shall specify either institutional care in a secure mental health unit or facility, as provided under s. 980.065, or other facility or supervised release. In determining whether commitment shall be for institutional care in a secure mental health unit or facility or other facility or for supervised release, the court may consider, without limitation because of enumeration, the nature and circumstances of the behavior that was the basis of the allegation in the petition under s. 980.02 (2) (a), the person's mental history and present mental condition, where the person will live, how the person will support himself or herself, and what arrangements are available to ensure that the person has access to and will participate in necessary treatment. *The department shall arrange for control, care and treatment of the person in the least restrictive manner* consistent with the requirements of the person and in accordance with the court's commitment order. (Emphasis added.)

This statutory language requires the court, in its order for commitment, to "specify either institutional care in a secure mental health unit or facility, as provided under s. 980.065, or other facility or supervised release." ***Id***.

[1] Bush relies on the quoted language found in § 980.06(2)(b), STATS., but mistakenly cites the section as § 980.06(1)(b), STATS.

It is not the court's statutory duty to arrange for treatment in the least restrictive manner; rather, "it is the *department's* statutory duty to 'arrange for control, care and treatment of the person in the least restrictive manner consistent with the requirements of the person and in accordance with the court's commitment order.'" ***State v. Keding***, 214 Wis.2d 362, 369-70, 571 N.W.2d 450, 453 (1997) (quoting § 980.06(2)(b), STATS.) (emphasis in the original).

The record discloses that the trial court correctly discharged its statutory duties. The trial court stated that in reaching its decision, it considered not only the testimony presented at the dispositional hearing, but also the testimony at trial. The trial court considered Bush's history of sexual offenses, his previous mental history, his past treatment, his present mental condition, and the risk of re-offending. The court also considered protection of public safety. In light of these factors, it concluded that at this time placement on supervised release was inappropriate. The court reasonably exercised its discretionary function of considering interrelated statutory factors and provided a rational basis for its decision. *See* ***id***. at 366, 571 N.W.2d at 452. As a result, we do not disturb it on appeal.[2]

---

[2] In a one-sentence argument, Bush challenges the constitutionality of § 980.06(2)(b), STATS. His entire argument is as follows:

> If, in fact, it is the interpretation of this court that the least restrictive alternative analysis is not proper for rendering a commitment decision, the respondent maintains that the failure to so require denies him equal protection and due process of law when §980 is compared to Chap. 51 and 55 of the Wisconsin statutes.

He cites the "Fifth, Fourteenth, Sixth Amendments to the United States Constitution and Article 1, section 8 of the Wisconsin Constitution." Bush's argument is more of a heading to an argument rather than a reasoned analysis. Because it is not sufficiently developed, this court declines to address it. ***State v. Pettit***, 171 Wis.2d 627, 646-47, 492 N.W.2d 633, 642 (Ct. App. 1992).

Next, Bush argues that § 980.04(2), STATS., is an unconstitutional deprivation of due process because it required the court to hold a probable cause hearing within seventy-two hours. Ironically, the statutory time limit is for the benefit of an accused held in custody.[3] Nonetheless, Bush claims he needed a longer time frame to obtain defense expert testimony. We reject his due process claim for two independently dispositive reasons. Bush fails to demonstrate that he preserved any claim of error by requesting waiver of the seventy-two-hour time limit. Moreover, we perceive the probable cause hearing under § 980.04(2), STATS., to be a summary proceeding[4] in the nature of a preliminary examination under § 970.03, STATS. Thus, if there is evidence at the hearing that plausibly demonstrates the respondent is probably a sexually violent person, the ch. 980 matter must proceed, even in the face of equally plausible evidence to the contrary. *Cf.* ***State v. Dunn***, 121 Wis.2d 389, 398, 359 N.W.2d 151, 155 (1984) (probable cause at a preliminary hearing is satisfied when there exists a believable or plausible account of the alleged charge).

Bush further argues that ch. 980, STATS., is unconstitutional because it (1) is an ex post facto law; (2) denies due process because it permits mental commitment without a showing that the individual is mentally ill or amenable to

---

[3] Section 980.04(2), STATS., provides:

> Whenever a petition is filed under s. 980.02, the court shall hold a hearing to determine whether there is probable cause to believe that the person named in the petition is a sexually violent person. If the person named in the petition is in custody, the court shall hold the probable cause hearing within 72 hours after the petition is filed, excluding Saturdays, Sundays and legal holidays. If the person named in the petition is not in custody, the court shall hold the probable cause hearing within a reasonable time after the filing of the petition.

[4] *See* ***State v. Richer***, 174 Wis.2d 231, 243, 496 N.W.2d 66, 70 (1993).

treatment; (3) permits publication of his past medical records; (3) is arbitrary and capricious; (4) is void for vagueness; (5) violates double jeopardy protections; (5) violates equal protection rights; and (6) it is a prohibited bill of attainder.

Bush concedes that "[i]n large measure these arguments have been previously addressed and rejected in State v. Carpenter, 197 W2d 252 (1995) and State v. Post, 197 W2d 279 (1995)," but nevertheless raises the issues to preserve for further appeal. In lieu of his concession and because he fails to distinguish his arguments from the holdings in ***Carpenter*** and ***Post***, we decline to address them. We are bound by supreme court precedent. ***McCaffrey v. Shanks***, 124 Wis.2d 216, 221, 369 N.W.2d 743, 747 (Ct. App. 1985).

Next, Bush argues that the trial court improperly denied his request for a closed hearing in violation of his equal protection, due process and privacy rights as guaranteed by the First, Fifth, and Fourteenth Amendments to the United States Constitution and art. I, §§ 1 and 8 of the Wisconsin Constitution. Bush concedes that ch. 980, STATS., is silent with respect to a request for a closed hearing. Nonetheless, he contends that the trial court erroneously exercised its discretion to close the hearing under its inherent powers. He argues that the trial court was required to hold a fact-finding hearing on the issue of closure.

Prior to trial, Bush requested that the hearing be closed by analogizing to a civil commitment hearing under § 51.20(5), STATS. The trial court explained that because there is no statutory right under ch 980, STATS., to close the hearing, the requester must show some reason beyond that it is a mental commitment that may contain embarrassing information.

The trial court was correct. ***State ex rel. Wisconsin State Journal v. Circuit Court***, 131 Wis.2d 515, 522, 389 N.W.2d 73, 76 (1986), discussed the

presumption that proceedings be open and observed that the circumstances justifying closure must be "unusually compelling. A courtroom should be closed only when not to do so would defeat the very purpose of the proceedings or would subvert the 'overwhelming public values connected with the administration of justice.'" Bush offered no special compelling reason to warrant closure. We therefore reject his argument.

Finally, we do not believe it would be of assistance to the trial court for us to address Bush's challenges to evidentiary rulings because these issues are generally addressed to the trial court's discretion, and the scope of our review is limited to the context in which the evidence is offered and objection raised. *See* ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983); *see also* § 901.03(1), STATS.

By the Court.—Judgment reversed and cause remanded for a new trial.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.