COURT OF APPEALS
DECISION
DATED AND FILED

November 2,1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0104

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

IN RE THE COMMITMENT OF RICKY D. LORET:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

RICKY D. LORET,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: RICHARD J. DIETZ, Judge. *Affirmed.*

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

¶1 PETERSON, J. Ricky D. Loret appeals from an order committing him as a sexually violent person under ch. 980, STATS., following a jury trial. Loret raises two arguments on appeal. First, he claims that the trial court erred

when it refused to strike a prospective juror for cause. Second, he claims that the State did not satisfy its burden of proving all the elements necessary for his commitment because it failed to prove he was within ninety days of release from his sentence. We reject both claims and therefore affirm the circuit court's order.

FACTS

¶2 For purposes of this review, the facts are not disputed. On November 25, 1996, the State filed a petition for the commitment of Loret as a sexually violent person. The petition alleged that: (1) Loret was convicted on two separate occasions of two counts of first degree sexual assault of a child, contrary to § 940.225(1)(d), STATS., arising out of incidents in March of 1986, and January of 1989; (2) Loret was scheduled for release on about November 27, 1996; (3) Loret suffers from both pedophilia and anti-social personality disorder; and (4) Loret's mental disorders create a substantial probability that he would reoffend.

¶3 During jury selection, defense counsel asked the prospective jurors whether any close friend or family member had ever been sexually assaulted. Prospective juror Coles indicated that her nephew was sexually assaulted by his step-father five years earlier. The trial court ultimately denied defense counsel's motion to strike Coles for cause, and defense counsel later exercised one of his four peremptory strikes to exclude her.

¶4 At trial, the State offered evidence to prove that Loret was a sexually violent person, but did not offer any proof that he was within ninety days of release from his sentence. At the conclusion of the trial, the jury returned a verdict for the State, finding that Loret was a sexually violent person. Accordingly, the

court committed Loret to the Wisconsin Resource Center, and this appeal followed.

I. PROSPECTIVE JUROR

¶5 Loret claims that the trial court erred when it refused to strike prospective juror Coles for cause. Loret's right to receive a fair trial by a panel of impartial jurors is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, *see* ***State v. Faucher***, 227 Wis.2d 700, 715, 596 N.W.2d 770, 777 (1999), and codified in § 805.08(1), STATS.[1] We review the court's decision to deny defense counsel's motion to strike Coles under the supreme court's newly announced framework in ***Faucher***.[2] There, the court explained that three types of bias preclude a juror from serving on an impartial

[1] Although a ch. 980, STATS., proceeding is civil, the legislature has afforded subjects of these proceedings all constitutional rights afforded to a defendant in a criminal proceeding. *See* § 980.05(1m), STATS.

[2] Because the briefs were filed in this case prior to ***State v. Faucher*** 227 Wis.2d 700, 596 N.W.2d 770 (1999), Loret articulated his appellate argument under the standard for jury bias announced in ***State v. Ferron***, 219 Wis.2d 481, 579 N.W.2d 654 (1998). In ***Ferron***, our supreme court held that reviewing courts should overturn a circuit court's determination only where the juror's bias is manifest. *See* ***id***. at 485, 579 N.W.2d at 655-56. The ***Ferron*** court explained that a juror's bias is manifest whenever:

> (1) The record does not support a finding that the prospective juror is a reasonable person who is sincerely willing to put aside an opinion or prior knowledge; or (2) the record does not support a finding that a reasonable person in the juror's position could set aside the opinion or prior knowledge.

Id.

In ***Faucher***, the supreme court explained that ***Ferron***'s two prong analysis of manifest bias fit under its newly announced juror-bias framework; ***Ferron's*** first prong probed for subjective bias, and ***Ferron's*** second prong identified objective bias. *See* ***Faucher***, 227 Wis.2d at 725, 596 N.W.2d at 781. In this regard, ***Faucher*** did not alter our existing jurisprudence, *see* ***id***. at 725-27, 596 N.W.2d at 781-83, and we therefore interpret Loret's arguments under the supreme court's most recently adopted framework.

panel; these are statutory, subjective and objective bias. *See* ***id***. at 725-27, 596 N.W.2d at 781-83.[3]

A. Subjective Bias

¶6 Subjective bias refers to the prospective juror's state of mind. It is the "bias that is revealed through the words and the demeanor of the prospective juror." ***Id***. at 717, 596 N.W.2d at 778. Because subjective bias is most readily identified from the honesty and credibility of the prospective juror's responses on voir dire, we uphold a circuit court's factual finding that a prospective juror is or is not subjectively biased unless it is clearly erroneous. *See* ***id***. at 718, 596 N.W.2d at 778.

¶7 During voir dire, the following discussion occurred between defense counsel and Coles:

> [DEFENSE COUNSEL]: How long ago did that allegation take place?
>
> MS. COLES: About five years ago.
>
> [DEFENSE COUNSEL]: And did you take sides in that particular matter at all?
>
> MS. COLES: I have to admit, I did.
>
> [DEFENSE COUNSEL]: And would you care to say which side you took?
>
> MS. COLES: My sister's side, its really torn her family apart.
>
> [DEFENSE COUNSEL]: And was there anything about the facts of that particular case or event, that would pre-dispose you in this case to finding against either the State or my client in this case?

[3] Section 805.08, STATS., identifies persons statutorily biased. The legislature has concluded that such persons are so "inherently prone to partiality that an individual case-by-case inquiry is not worth the time or effort." ***State v. Kiernan***, 227 Wis.2d 736, 744, 596 N.W.2d 760, 764 (1999). There is no claim of statutory bias in this case.

> MS. COLES: To be honest, I think it would be hard to divorce the feelings that—I have really intense feelings about that because it was a he [sic] fact that it was a child involved and also ….
>
> MS. COLES: It's hard to know if it would make it hard. And you're having me talk about it, I'm getting, I get really nervous. I think it's a pretty intense feeling. I think I could divorce myself from it, but maybe not.
>
> [DEFENSE COUNSEL]: Do you think you may not under the circumstances.
>
> MS. COLES: Maybe not.

¶8 At this point, defense counsel moved that Coles be excused. Before ruling, the court questioned Coles further:

> THE COURT: Ms. Coles, every juror brings with them their experience in the affairs of life. And you couched this in terms of intense feelings. Intense feelings, emotions about an issue, is not necessarily bad.
>
> But what we need to know is whether you believe that having gone through that experience in your family, that it might interfere with your ability to decide this case solely on the – what you heard in the courtroom. And to expand upon that a little bit, you're going to hear different sides of a story. You always do in a trial, that is why we are here. If there are some possible doubts raised in your mind, would that tend to sway you one way or another, simply because you had that experience, or would you be able to legitimately set that aside and decide the difficult decisions that sometimes have to be made by a jury, solely based upon the testimony of this case?
>
> MS. COLES: I think I could do that.

The court then denied the motion to excuse Coles.

¶9 Loret relies heavily on Coles's answer of "I think I could do that" to the question of whether she would be able to fairly and impartially weigh the evidence. He characterizes her answer as expressing uncertainty and argues that Coles should have been disqualified because her responses do not confidentally

indicate that she believed she could set aside any bias. Loret contends that Coles's answers are equivalent to those made by the prospective juror in ***State v. Ferron***, 219 Wis.2d 481, 489, 579 N.W.2d 654, 657 (1998). There, the prospective juror's potential bias involved the defendant's Fifth Amendment right to remain silent. The prospective juror had repeatedly and adamantly expressed a belief that he would hold a bias against the defendant if the defendant did not testify at trial. *See* ***id***. The court held that the prospective juror's final answer of "probably" to the question of whether he could set aside his beliefs against the defendant was insufficient to indicate a sincere willingness to do so. *See* ***id***. at 503, 579 N.W.2d at 663.

¶10 In discussing the responses from the prospective juror in ***Ferron***, the court declined to set forth a definitive line between acceptable and unacceptable answers that indicates subjective bias. *See* ***id***. at 502 n.9, 579 N.W.2d at 662 n.9. The court simply concluded that the prospective juror's responses in that case did not indicate a sincere willingness to set aside his bias. ***Id***. at 503, 579 N.W.2d at 663. Here, however, Loret candidly admits in his brief that Coles "appeared sincere in her desire to be fair." Her sincerity distinguishes this case from ***Ferron***, where the prospective juror's final response indicated insincerity.

¶11 Moreover, our supreme court has more recently reiterated that "a prospective juror need not respond to voir dire questions with unequivocal declarations of impartiality." *See* ***State v. Erickson***, 227 Wis.2d 758, 776, 596 N.W.2d 749, 759 (1999) (citation omitted). The court stated that it expected "a circuit court to use voir dire to explore a prospective juror's fears, biases, and predilections and fully expect[ed] a juror's honest answers at times to be less than unequivocal." *See* ***id***. This is exactly what happened here. The trial court implicitly found that Coles was sincere. Loret does not challenge her sincerity and

our review of this record provides no support for a contrary conclusion. Therefore, the trial court's finding that Coles was subjectively unbiased was not clearly erroneous.[4]

B. Objective Bias

¶12 A determination of whether a prospective juror is objectively biased focuses on whether a reasonable person in the individual prospective juror's position could be impartial. *See* ***Faucher***, 227 Wis.2d at 718, 596 N.W.2d at 778-79.

> The circuit court is particularly well-positioned to make a determination of objective bias, and it has special competence in this area. It is intimately familiar with the voir dire proceeding, and is best situated to reflect upon the prospective juror's subjective state of mind which is relevant to the determination of objective bias.

Id. at 720, 596 N.W.2d at 779. We review the circuit court's determination on this issue under a deferential standard. *See* ***id***. We will only reverse the court's determination if we conclude, as a matter of law, that no reasonable judge could have determined that Coles was objectively impartial. *See* ***id***. at 720-21, 596 N.W.2d at 779-80.

[4] Loret also relies on ***State v. Zurfluh***, 134 Wis.2d 436, 438-39, 397 N.W.2d 154, 155 (Ct. App. 1986), where we held that the circuit court erroneously exercised its discretion when it failed to clarify a prospective juror's final answer that she did not know if she could decide the case fairly and impartially. Our conclusion in that case turned on our determination that the prospective juror apparently "did not share the [circuit] court's confidence in her ability to decide the case fairly and impartially." ***Id***. at 439, 397 N.W.2d at 155. ***Zurfluh*** is inapposite because Coles appeared sincere and answered affirmatively that she thought she could decide the case fairly and impartially. Her answer expressed a positive assurance unlike that given in ***Zurfluh***.

¶13 Loret claims that it was objectively unreasonable to expect Coles to be able to "set aside her admittedly intense feelings regarding the assault on her nephew, and fairly decide the case …." We begin by reiterating our conclusion that Coles's answers to the voir dire questions were sincere and indicated that she believed she could set aside her experience, be objective and decide the case solely on the evidence. Coles's unbiased subjective state of mind is relevant to our determination of whether it was objectively unreasonable to expect her to do so. *See* ***id.*** at 720, 596 N.W.2d at 779 (citing ***State v. Delgado***, 223 Wis.2d 270, 285, 588 N.W.2d 1, 7 (1999) ("[A] juror's honesty is an important factor in determining inferred bias ….")).

¶14 Honest prospective jurors routinely express many of the kinds of concerns expressed by Coles in almost every serious felony case. *See* ***Ferron***, 219 Wis.2d at 507, 579 N.W.2d at 664 (Geske, J., dissenting). Indeed, it is quite natural for a victim or family member to retain intense feelings concerning a sexual assault, and we have no doubt that a family member or victim of a sexual assault will harbor these feelings regardless of their ability to express themselves freely and openly to unfamiliar people in court. Our supreme court has recently determined that being a victim of a sexual assault does not categorically exclude a prospective juror as being objectively biased. *See* ***Erickson***, 227 Wis.2d at 776-77, 596 N.W.2d at 759. This was true in ***Erickson*** even though the prospective juror was herself sexually abused as a child and Erickson was being tried for similar charges. *See* ***id***. The ***Erickson*** court concluded that nothing in the voir dire transcript or court's findings would suggest that the prospective juror "was

anything other than a person both willing and able to act as an impartial juror." ***Id***. at 777, 596 N.W.2d at 759.[5]

¶15 Therefore, regardless of whether a prospective juror openly reveals or attempts to hide her feelings during voir dire, the trial court is in the best position to consider the inflection and demeanor the prospective juror displays. This evidence provides the important facts and circumstances that allow the trial court to determine whether it is objectively reasonable to expect the prospective juror to serve impartially. *See* ***State v. Kiernan***, 227 Wis.2d 736, 744, 596 N.W.2d 760, 764 (1999).

¶16 Here, Coles was not the person actually sexually assaulted. Admittedly, she maintained intense feelings about the incident involving her nephew. But we do not agree with Loret that such a person could not reasonably be expected to serve impartially.

¶17 Due process requires that Loret be judged solely on the evidence adduced at trial. *See* ***Irvin v. Dowd***, 366 U.S. 717, 722 (1961). Here, the trial court was faced with the task of determining whether prospective juror Coles reasonably could be expected to serve impartially. The critical evidence for making this determination came from Cole's inflection and demeanor, which not only indicated sincerity but also indicated that it would be reasonable to expect her to serve impartially. It is not categorically unreasonable to expect even victims of sexual assaults to be able to weigh evidence impartially in cases involving sexual assaults. *See* ***Erickson***, 227 Wis.2d at 776-77, 596 N.W.2d at 759. On this record

[5] The circuit court made factual findings that the prospective juror spoke without emotion and free of stress when she discussed the sexual assault. *See* ***Erickson***, 227 Wis.2d at 776, 596 N.W.2d at 759.

we cannot say, given our deferential standard of review, that no reasonable court could have reached such a conclusion about prospective juror Coles. *See* ***Faucher***, 227 Wis.2d at 721, 596 N.W.2d at 779-80.

II. NINETY-DAY REQUIREMENT IN A CHAPTER 980, STATS., PROCEEDING

¶18 Loret contends that his commitment must be reversed because the State failed to prove at trial that he was within ninety days of discharge from his sentence. He does not dispute that the State sufficiently proved that he was a sexually violent person, as that term is defined in § 980.01(7), STATS. Nor does he claim that he was not, in fact, within ninety days of being discharged from his sentence. Instead, he urges this court to reverse his commitment because the State failed to offer proof at trial of this fact.

¶19 Loret bases his argument on § 980.05, STATS., which establishes the requirements for trials on ch. 980 commitments. Section 980.05(3)(a), requires the State to prove the allegations in the petition.[6] Section 980.02(2), STATS., requires the petition to allege that each of the following apply:

> (1) The person has been convicted of a sexually violent offense.
>
> ….
>
> (ag) The person is within 90 days of discharge or release.
>
> ….
>
> (b) The person has a mental disorder.
>
> (c) The person is dangerous ….

[6] Section 980.05(3)(a), STATS., states: "At a trial on a petition under this chapter, the petitioner has the burden of proving the allegations in the petition beyond a reasonable doubt."

Accordingly, Loret concludes that the State must prove at trial that he was within ninety days of discharge or release. We disagree.

¶20 Loret's argument requires our determination of what statutory requirements must be proved at a trial under § 980.05, STATS. The interpretation of a statute is a question of law. *See* ***State v. Setagord***, 211 Wis.2d 397, 406, 565 N.W.2d 506, 509 (1997). We use a two-step process for interpreting statutes:

> The ultimate goal of statutory interpretation is to ascertain the intent of the legislature. The first step of this process is to look at the language of the statute. If the plain meaning of the statute is clear, a court need not look to rules of statutory construction or other extrinsic aids. Instead, a court should simply apply the clear meaning of the statute to the facts before it. If, however, the statute is ambiguous, this court must look beyond the statute's language and examine the scope, history, context, subject matter, and purpose of the statute.

UFE Inc. v. LIRC, 201 Wis.2d 274, 281-82, 548 N.W.2d 57, 60 (1996) (citations omitted).

¶21 The first step is to determine whether the statute is ambiguous. "[A] statutory provision is ambiguous if reasonable minds could differ as to its meaning." ***Id***. at 283, 548 N.W.2d at 61 (quoting ***Harnischfeger Corp. v. LIRC***, 196 Wis.2d 650, 662, 539 N.W.2d 98, 103 (1995)). When construing a statutory provision, the entire section and related sections of the statute should be considered. *See* ***In re D.M.M.***, 137 Wis.2d 375, 386, 404 N.W.2d 530, 535 (1987).

¶22 Loret's argument appears logical when reading only the two statutory sections he cites. However, ambiguity can be found in the words of the statutory provision itself, or by the words of the provision as they interact with and

relate to other provisions in the statute or other statutes. *See* ***id***. After viewing the framework of the broader statutory scheme, we conclude there is an ambiguity in § 980.05(3)(a), STATS.

¶23 A sexually violent person is defined in § 980.01(7), STATS., as:

> a person who has been convicted of a sexually violent offense … and who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence.

This definition includes all the substantive elements that must be contained in a petition under § 980.02(2), STATS. The only requirement that must be included in a petition but is not part of the definition for a sexually violent person is the requirement that the subject be within ninety days of release from a sentence.

¶24 The term "sexually violent person" is used throughout ch. 980., STATS. Significantly, subsection (5) under § 980.05, STATS., states:

> If the court or jury determines that the person who is the subject of a petition under s. 980.02 is a *sexually violent person*, the court shall enter a judgment on that finding and shall commit the person as provided under s. 980.06. If the court or jury is not satisfied beyond a reasonable doubt that the person is a *sexually violent person*, the court shall dismiss the petition and direct that the person be released unless he or she is under some other lawful restriction. (Emphasis added.)

This subsection directs the court to commit a person based on a finding that the subject is a "sexually violent person." It directs the court to release a person who is not found to be a "sexually violent person." Yet, a sexually violent person, as defined in § 980.01(7), STATS., does not require a finding as to whether the person is within ninety days of discharge or release. Subsection (5) thereby apparently

conflicts with subsection (3)(a). We address apparently conflicting provisions of law by harmonizing them with the entire statutory scheme and giving effect to the leading idea behind the law. *See* ***State v. Sweat***, 208 Wis.2d 409, 422, 561 N.W.2d 695, 700 (1997).

¶25 First, we note that the entire statutory framework of ch. 980, STATS., is designed around the definition of a "sexually violent person." In the petition, the State must articulate "with particularity essential facts to establish probable cause to believe the person is a *sexually violent person*." Section 980.02(3), STATS. (emphasis added). Similarly, § 980.04(2), STATS., requires that "[w]henever 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*." (Emphasis added.) As already noted, § 980.05(5), STATS., mandates commitment of a person found at trial to be a *sexually violent person*. In fact, the requirement that the petition allege the person is within ninety days of release is the only place in all of ch. 980 where the ninety days requirement appears. *See* § 980.02(2), STATS.

¶26 Next, we acknowledge the clearly expressed purpose and policy behind ch. 980, STATS. Our supreme court has recognized that the state has a "compelling interest in protecting society by preventing future acts of sexual violence through the commitment and treatment of those identified as most likely to commit such acts." ***State v. Post***, 197 Wis.2d 279, 294, 541 N.W.2d 115, 118 (1995). The court has also acknowledged that "the principal purposes of ch. 980 are the protection of the public and the treatment of convicted sex offenders who are at a high risk to reoffend in order to reduce the likelihood that they will engage in such conduct in the future." ***State v. Carpenter***, 197 Wis.2d 252, 271, 541 N.W.2d 105, 112 (1995).

¶27 We cannot discern how the legislative purposes and policies behind ch. 980, STATS., would be served by requiring the State to prove at trial that a person is within ninety days of release. The focus of the legislature's concern is directed at sexually violent persons—protecting the public from them and treating them. This is demonstrated by the repeated reference throughout ch. 980 to sexually violent persons, a term whose definition does not include the ninety-day requirement.

¶28 Loret contends the ninety-day requirement substantively affects his dangerousness because the date of his release provides the only context for evaluating his present dangerousness. Loret's premise, however, does not lead to his conclusion. Certainly the test for dangerousness focuses on Loret's likely conduct if he is released in society. This means the focus for determining dangerousness is his release date, not ninety days before. The ninety-day requirement is not substantively related to the test for dangerousness.

¶29 Instead, the ninety-day requirement is the procedural mechanism the legislature chose to ensure that a determination of dangerousness is relevant by prescribing the timing for proving that Loret was a sexually violent person. Certainly no purpose would have been served by bringing a petition early in Loret's sentence, since he would not have been released from prison for treatment. Rather, a finding at or near the end of his sentence enables him to be committed for treatment near the time he was found to be sexually violent. Thus, we resolve the statutory ambiguity by concluding that § 980.05(5), STATS., does not require the state to prove at trial that a sexually violent person is within ninety days of release.

¶30 Our construction is consistent with this court's opinion in ***State v. Zanelli***, 212 Wis.2d 358, 569 N.W.2d 301(Ct. App. 1997). In that case, a sexually violent person claimed that he was not yet within ninety days of release from his sentence when a petition was filed. There, we observed that the ninety days is a procedural time requirement for filing a petition. *See* ***id***. at 365-66, 569 N.W.2d at 304. We further explained that had the State failed to file a petition within the ninety-day time frame, the circuit court would have lost its competency to proceed. *See* ***id***. We distinguished the loss of the circuit court's competency from the loss of subject matter jurisdiction because of the nature of the ninety-day time limitation. *See* ***id***.

¶31 The Wisconsin Jury Instruction Committee has also concluded that the ninety-day requirement does not have to be proved at trial. We have clearly recognized that jury instructions provide persuasive authority. *See* ***State v. Olson***, 175 Wis.2d 628, 642 n. 10, 498 N.W.2d 661, 667 n.10 (1993). WIS JI—CRIMINAL 2502 (1998), requires the State to prove that a person is sexually violent. The instruction sets forth three elements to be satisfied at trial: (1) the person has been convicted of a sexually violent offense; (2) the person has a mental disorder; and (3) the person is dangerous. In its comment, the committee concluded "that [the ninety-day requirement] need not be submitted to the jury, though it certainly must be established before the trial can go forward." ***Id***. at 5 n.1. Here, the petition alleged that Loret was within ninety days of release. Loret has never claimed otherwise.

¶32 Loret points to two supreme court footnotes and a Legislative Reference Bureau analysis that he claims indicate that the State must prove all the elements contained in the petition at trial. The supreme court footnotes appear in ***State v. Curiel***, 227 Wis.2d 389, 396 n.4, 597 N.W.2d 697, 700 n.4 (1999), and

State v. Kienitz, 227 Wis.2d 423, 429 n.6, 597 N.W.2d 712, 715 n.6 (1999). However this language was dicta in both cases; it was not relevant to the rationale of the holdings. This court need not follow or give weight to dicta. *See* ***State v. Koput***, 142 Wis.2d 370, 386 n.12, 418 N.W.2d 804, 811 n.12 (1988).[7]

¶33 The analysis by the Legislative Reference Bureau cited by Loret contains one sentence: "The state must prove each of the 4 elements in the petition beyond a reasonable doubt." 1993 WIS. ACT 479, ***Analysis by the Legislative Reference Bureau***. This is a conclusion unsupported by any analysis. In light of the other considerations we have reviewed in this opinion, we are not persuaded by this statement.

¶34 Loret's ch. 980, STATS., proceeding went to trial without a challenge to the trial court's competency to proceed. Loret does not challenge the court's competency because he does not claim that the petition was filed outside the ninety-day procedural time frame. We conclude that he may not now challenge his commitment on the basis that the State failed to offer proof at trial that the procedural time frame was followed.

[7] The court has also used dicta consistent with our conclusion here. In ***State v. Carpenter***, 197 Wis.2d 252, 259-60, 541 N.W.2d 105, 108 (1995), the court stated: "If a court or jury determines that the person is sexually violent as defined by the statute, the person is committed …."

By the Court.—Order affirmed.

Recommended for publication in the official reports.