COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 99-3220 **Cir. Ct. No. 98 CI 2**

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

IN RE THE COMMITMENT OF
BILLY W. GLADNEY:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

BILLY W. GLADNEY,

RESPONDENT-APPELLANT.

APPEAL from the judgment and orders of the circuit court for Milwaukee County: ELSA C. LAMELAS and VICTOR MANIAN, Judges.[1] *Affirmed.*

[1] Judge Elsa C. Lamelas issued the judgment and order for commitment and order denying Gladney's post-commitment motion. Upon remand from this court, Judge Victor Manian issued the order denying Gladney's additional post-commitment motion.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Billy W. Gladney appeals from the August 25, 1999 judgment and order for commitment, following a trial in which the jury found that he was a sexually violent person. He also appeals from the September 17, 1999 order denying his post-commitment motion and from the July 14, 2000 order, which, upon remand, denied his additional post-commitment motion.

¶2 Gladney argues that: (1) the trial court erred in granting the State's motion *in limine* to exclude what Gladney contends were admissions of a party opponent, thereby violating his confrontation rights; (2) the State failed to prove beyond a reasonable doubt that Gladney was within ninety days of release when the ch. 980 petition was filed, as required by WIS. STAT. §§ 980.02(2)(ag) and 980.05(3)(a) (1999-2000);[2] and (3) a diagnosis of personality disorder, not otherwise specified, does not qualify as a ch. 980 mental disorder and, therefore, it did not establish a sufficient basis for his commitment. We affirm.

I. BACKGROUND

¶3 In 1986, Gladney was convicted of battery. In 1990, he was convicted of battery and second-degree sexual assault. In 1992, while on probation for the 1990 sexual assault, he was convicted of first-degree sexual assault, as well as other violent offenses. Since that time, his probation was revoked twice and he was terminated from a sex offender treatment program twice. In 1998, the State petitioned for his ch. 980 commitment.

[2] All references to the Wisconsin Statutes are to the 1999-2000 version.

¶4 A probable cause hearing was held on February 9, 1998, pursuant to WIS. STAT. § 980.04. Dr. Kenneth Diamond, a senior staff psychologist for the Department of Corrections testified that he was "sure" that there was a substantial probability that Gladney would commit another sexually violent offense. The court found probable cause and set a trial date.

¶5 In preparation for the trial, Assistant District Attorney Nancy Ettenheim arranged for Dr. Caton Roberts, a psychologist, to evaluate Gladney. Dr. Roberts kept notes of any contacts he had had regarding Gladney's evaluation. In those notes, he detailed a telephone message that Ettenheim had left for him:

> she wants my report ASAP as it is the basis for all pre-trial motions etc. Moreover, if I opine lack of substantial probability, she'll probably dismiss [because Dr. Diamond] was 'really bad' in testimony, she felt, and she wasn't convinced it'd fly. So she wanted to know what I thought to gauge whether to proceed. Also said she told court that presence of defense counsel was unacceptable, and heard in response Mr. Gladney had decided not to participate in any event.

In his notes, Dr. Roberts also detailed a conversation that he had had with Ms. Ettenheim in which he "[t]old her [that he] wasn't done but [that the] case might wind up with no opinion call based on a very quick impressionistic look-through of the initial materials." The notes continued, "[Ettenheim] said[,] if so, she'd dismiss because [Dr. Diamond] was so bad (a walking fuck-up, she said)."

¶6 At trial, the State, represented by an Assistant Attorney General, filed a motion *in limine* to prohibit any reference "to [Ettenheim's] opinion of any potential witness's work product, performance on the witness stand or any other similar opinion, and … [a]ny reference or evidence … concerning any opinion and/or assessment of the strength of the state's case or possibility of dismissal or other prosecutorial decisions." The court granted the motion because "[it did] not

believe that Ms. Ettenheim's view of this case, its strength or lack of strength, is relevant to what the jury has to do." The following colloquy then occurred:

> [DEFENSE COUNSEL]: Well, I think there might be one exception to that; and that is whether or not as a result of those statements made to them any of the witnesses either did something that they wouldn't have otherwise done or declined to do, something that they otherwise would have done, if there is any response to those statements that in any way affects their opinions or their testimony, then I think it would be relevant.
>
> THE COURT: I don't see Ms. Ettenheim's views as having any relevance whatsoever, so that's that, or of her opinion of the doctors, whether they were good, bad, or indifferent. I just don't think it has anything to do with this case.
>
> [DEFENSE COUNSEL]: I understand, but perhaps the court didn't understand my point.
>
> THE COURT: I think I did understand it, and my ruling has remained the same. So that distinction is not one that I find compelling. And if the Court of Appeals disagrees and finds that to be a persuasive distinction, I will be corrected in due time.

¶7 The jury found Gladney to be a sexually violent person and the court ordered a predispositional investigation. On August 25, 1999, the trial court ordered that Gladney be committed for institutional care in a secure mental health facility.[3]

[3] On September 14, 1999, Gladney filed a post-commitment motion. The trial court denied the motion on September 17, 1999. Gladney appealed the judgment and order for commitment and the order denying his post-commitment motion. He then filed a motion to stay the appeal and requested a remand to the trial court with leave to file an additional post-commitment motion to address "issues [that were] arguably waived, insufficiently preserved, or may need to be addressed as part of an ineffective assistance of counsel claim." On June 23, 2000, this court remanded the case to the trial court allowing Gladney to file his additional post-commitment motion. The motion was filed in the trial court on July 14, 2000 and was denied.

II. DISCUSSION

A. Admissions of a Party Opponent/Confrontation Rights

¶8 Gladney first argues that the trial court erroneously excluded Dr. Roberts's notes regarding communications with Assistant District Attorney Ettenheim. He contends that these were admissions of a party opponent that should have been admitted to impeach Dr. Roberts and, further, that their exclusion violated his confrontation rights.[4] We agree that the notes were admissible; their exclusion, however, was harmless.

¶9 A trial court has discretion to determine the proper scope of cross-examination to impeach a witness. *See* ***Rogers v. State***, 93 Wis. 2d 682, 689, 287 N.W.2d 774 (1980). Any "material or relevant matters may be inquired into on cross-examination and that cross-examination is not limited to the scope of direct

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[4] At Gladney's first post-commitment motion hearing, he relied on ***State v. Cardenas-Hernandez***, 219 Wis. 2d 516, 531, 579 N.W.2d 678 (1998), to argue that Ms. Ettenheim's assertions to Dr. Roberts constituted admissions by a party opponent and were therefore admissible. The trial court rejected this argument and "agree[d] with the State's position that ***Cardenas*** [was] inapplicable."

On appeal, Gladney again argues that ***Cardenas*** "allows for the introduction of prosecutor's statements as 'admissions of party opponents.'" In its response, the State does not argue that ***Cardenas*** is inapplicable as it did at the post-commitment motion hearing. Instead, the State outlines and attempts to apply the three criteria ***Cardenas*** says must be satisfied to allow the introduction of a prosecutor's statements as admissions of a party opponent to show that the trial court did not err in excluding Dr. Roberts' notes.

The applicability of ***Cardenas*** is open to fair debate. ***Cardenas***, and the federal cases on which it relies, deals with factual assertions made by an attorney in one criminal proceeding and the admission of those assertions at a subsequent criminal proceeding. *See* ***id.*** at 529-30; *see also* ***United States v. Orena***, 32 F.3d 704, 716 (2d Cir. 1994) (relying on several federal cases to support its conclusion that no absolute rule bars the use of an earlier opening statement or closing argument in a subsequent trial). Ettenheim's assertions to Dr. Roberts were not made during a criminal proceeding; they were out-of-court statements summarized in Dr. Roberts's notes.

examination." ***Id.*** We will not reverse a trial court's discretionary decision to permit cross-examination to expose a witness's possible motive to lie unless the court's decision "represents a prejudicial [erroneous exercise] of discretion." ***State v. Scott***, 2000 WI App 51, ¶21, 234 Wis. 2d 129, 608 N.W.2d 753 (quoted source omitted).

¶10 Gladney argues that, under WIS. STAT. § 908.01(4)(b)1., he had the right to impeach Dr. Roberts with his notes of Ms. Ettenheim's comments because, he contends, they show that she directed Dr. Roberts to deliver strong testimony in support of Gladney's commitment. We agree that Dr. Roberts's notes were admissible.

¶11 WISCONSIN STAT. § 908.01(4)(b)1. provides:

> **(4)** STATEMENTS WHICH ARE NOT HEARSAY. A statement is not hearsay if:
>
> ….
>
> (b) *Admission by party opponent*. The statement is offered against a party and is:
>
> 1. The party's own statement, in either the party's individual or a representative capacity[.]

Dr. Roberts's notes reflected Ms. Ettenheim's "own statement[s]" in "[her] representative capacity" and, therefore, were not hearsay. *See* WIS. STAT. § 908.01(4)(b)1., s*ee also* ***State v. Benoit***, 83 Wis. 2d 389, 402, 265 N.W.2d 298 (1978) (under § 908.01(4)(b)1., any prior out-of-court statements by a party, whether or not they are "against interest" are not hearsay); ***State v. Williamson***, 84 Wis. 2d 370, 383, 267 N.W.2d 337 (1978) ("The bias or prejudice of a witness is not a collateral issue and extrinsic evidence may be used to prove that a witness has a motive to testify falsely." (citation omitted)). The trial court's exclusion of Dr. Roberts' notes, however, was harmless error.

¶12 "[E]rror is harmless if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189 (quoting ***Neder v. United States***, 527 U.S. 1, 18 (1999)). When determining whether error is harmless, we consider the entire record. ***State v. Moore***, 2002 WI App 245, ¶16, __ Wis. 2d __, 653 N.W.2d 276 (citation omitted).

¶13 Gladney contends that he was denied the right to confront and impeach Dr. Roberts regarding his communications with Ms. Ettenheim. We disagree. Gladney cross-examined Dr. Roberts at length about this issue:

> [DEFENSE COUNSEL:] Look, doctor, let's be frank. You were brought in on this case to specifically have a different opinion than Dr. D[iamond]; isn't that true?
>
> [DR. ROBERTS:] No, not as far as I know. I'm not sure what you're referring to. I'm doing my job, which is to independently evaluate the Department of Health and Family Services, which is an entirely different department than the Department of Corrections.
>
> It has the obligation under the statute to independently review the cases, to form final recommendations about whether the individual should be committed. I disagree with the Department of Corrections quite a bit. That has caused some friction at times, but so I guess I just don't really agree with you.
>
> [DEFENSE COUNSEL:] You were given an assignment in this case. And as part of the assignment that you got in this case, you received, did you not, a critique of Dr. Diamond's testimony and were specifically asked to do something differently?
>
> [DR. ROBERTS:] No.
>
> ….
>
> [DEFENSE COUNSEL:] How about a conversation, doctor, after February 9 of 1998 when you were given marching orders on what to do in this case

> because of what happened at the probable cause hearing? That happened, didn't it?
>
> [DR. ROBERTS:] I don't take marching orders from anybody. I'll answer that as no.
>
> ….
>
> [DEFENSE COUNSEL:] Without regard to whatever that conversation may have had to do with …. You were told you needed to fit … Gladney into personality disorder[, not otherwise specified,] with antisocial features as being one that would predispose him to sexually re[-]offend or the case wasn't going to go anywhere. Isn't that what you understood your assignment to be?
>
> [DR. ROBERTS:] That is completely untrue. That is an absolutely ridiculous and distorted view of whatever you're coming up with. I do my own work, and I resent the accusation that I'm taking marching orders from anybody. I've pissed off the Department of Justice several times and been willing to stand up for my independent psychological review. I have an extraordinarily high ethical standard, and I'm not willing to sacrifice that for anybody, sir.

¶14 We have carefully considered the entire record, *see* ***Moore***, 2002 WI App 245 at ¶16, and, we conclude, although Dr. Roberts's notes should have been admitted, the trial court's error was harmless. Gladney confronted Dr. Roberts regarding his communications with Ms. Ettenheim. The record reveals no basis for concluding that the admission of Dr. Roberts's notes would have altered his testimony in any substantive way. Thus, it is clear that "a rational jury would have found [Gladney a sexually violent person]" had the notes been admitted. *See* ***Harvey***, 2002 WI 93 at ¶49.

B. The Ninety-Day Element

¶15 Gladney next argues that the State failed to prove that he was within ninety days of release and, therefore, under ***State v. Thiel***, 2000 WI 67, 235 Wis. 2d 823, 612 N.W.2d 94 (***Thiel I***), he is entitled to a jury trial on the issue of whether he

was within ninety days of release. Because the undisputed documentary evidence established that Gladney was within ninety days of his release date when the State filed the commitment petition, we conclude, under ***Thiel I***, that he is not entitled to a new trial on that element.

¶16 In ***Thiel I***, the supreme court held that ch. 980 requires the State to prove that its petition was filed within ninety days of a defendant's release date. ***Thiel I***, 2000 WI 67 at ¶¶1, 10-21. The supreme court also stated, however: "We will affirm the order of commitment if the trial record reflects that the petition was filed within 90 days of Thiel's [mandatory release] date, notwithstanding the circuit court's failure to make a specific finding to that effect." ***Id.*** at ¶26. Because, in ***Thiel I***, the record was not sufficiently clear for the supreme court to determine whether Thiel was within ninety days of his release when the State filed the petition, it remanded the case to this court to determine the appropriate remedy. ***Id.*** at ¶¶1, 29-38. On remand, in ***State v. Thiel***, 2001 WI App 52, 241 Wis. 2d 439, 625 N.W.2d 321, *review denied*, 2001 WI 88, 246 Wis. 2d 165, 630 N.W.2d 219 (No. 99-0316) (***Thiel II***), this court concluded, in part, that because there was "no challenge to the sufficiency of the evidence supporting the criteria for commitment … all that [was] necessary [was] a trial limited to whether Thiel was within ninety days of his release." ***Thiel II***, 2001 WI App 52 at ¶31.

¶17 Here, no new trial is needed because the record is clear and undisputed. As the State points out, "there was no conflicting or inconsistent evidence regarding Gladney's release date." The State explains:

> [T]here was direct, uncontradicted, and unimpeached testimony by the State's witness that Gladney's release date was February 13, 1998. The State introduced documentary evidence that also showed a release date of February 13, 1998. The defense made no objection to the admission of this testimony or exhibit.

> Without any objection from the defense, the trial court took judicial notice that the State filed the chapter 980 petition on February 5, 1998. The petition contained in the record was file-stamped on February 5, 1998. February 5, 1998 is within ninety days of February 13, 1998.

Thus, no remand for additional trial is needed.

C. Nexus Between Personality Disorder and Future Acts of Sexual Violence

¶18 Finally, Gladney argues that the personality disorder about which evidence was introduced was not a sufficient basis for commitment because "there [was] no 'nexus' between [that personality disorder] and the commission of future acts of sexual violence." *See* ***State v. Laxton***, 2002 WI 82, ¶11, 254 Wis. 2d 185, 647 N.W.2d 784 (ch. 980 requires a nexus—it does not apply unless a person is diagnosed with a disorder that predisposes him or her to engage in sexually violent acts); *see also* ***State v. Post***, 197 Wis. 2d 279, 306, 541 N.W.2d 115 (1995). He argues that because a diagnosis of personality disorder, not otherwise specified, does not generally predispose all people with this disorder to commit acts of sexual violence, it is not a qualifying disorder under ch. 980. We are not persuaded.

¶19 In ***State v. Adams***, 223 Wis. 2d 60, 588 N.W.2d 336 (Ct. App. 1998), this court determined that "persons will not fall within chapter 980's reach unless *they* are diagnosed with a disorder that has the specific effect of predisposing *them* to engage in acts of sexual violence." ***Id.*** at 68 (citation omitted). Thus, "the statutory focus [needs to] be on *the* person who is the subject of the petition, and … on the specific link between *that* person's mental disorder and the effect of *that* mental disorder on *that* person." ***Id.***

¶20 Gladney concedes that this court rejected his theory in ***Adams*** and he admits that the State's expert witness testified that his personality disorder does

predispose him to committing acts of sexual violence. In his brief to this court, he quotes Dr. Roberts' testimony:

> [Gladney's] personality disorder … was such that he demonstrated a pervasive disregard for the rights and feelings of others and violation of their rights. That pervasive disregard[,] in his case[,] included on two occasions sexual violation.
>
> And when a personality disorder that's largely composed of antisocial structure … has as part of it the repeated history of sexual violence, then it is in my opinion reasonable and even necessary to conclude that the individual is predisposed by virtue of character to do that again.

This testimony established a nexus between Gladney's mental disorder and his sexually violent behavior. Thus, commitment under ch. 980 was appropriate.

By the Court.—Judgment and orders affirmed.

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