COURT OF APPEALS
DECISION
DATED AND FILED

February 12, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1146 **Cir. Ct. No. 00-CV-40**

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

IN RE THE COMMITMENT OF RAY A. SCHILLER:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

RAY A. SCHILLER,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Winnebago County: WILLIAM H. CARVER, Judge. *Affirmed*.

Before Nettesheim, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Ray A. Schiller appeals from an order for commitment pursuant to WIS. STAT. ch. 980 and an order denying his postverdict motions. He argues on appeal that the trial court erred when it denied his request

for a jury instruction under ***In re Crane***, 7 P.3d 285 (Kan. 2000); that the trial court erroneously exercised its discretion in certain evidentiary rulings; and that he is entitled to a new trial in the interests of justice. Because we conclude that the circuit court did not err and that Schiller is not entitled to a new trial in the interests of justice, we affirm.

¶2 Schiller was charged as a sexually violent person under WIS. STAT. § 980.02 (1999-2000).[1] A jury trial was held and Schiller was found to be a sexually violent person. The circuit court entered an order for commitment. He subsequently brought postverdict motions. These motions were denied and Schiller appeals.

¶3 Schiller first argues that the trial court erred when it denied his request for a jury instruction based on ***In re Crane***. The circuit court denied his request and instead used the standard jury instruction, WIS JI—CRIMINAL 2502. Schiller argues that while the jury instruction he requested does not exactly match the language of the United States Supreme Court in ***Kansas v. Crane***, 534 U.S. 407 (2002), that case had not yet been decided at the time of his trial. He asserts, however, that the instruction he proposed contained the element of volitional impairment which he argues is not contained in the standard jury instruction.

¶4 Our supreme court has already decided this issue. As Schiller acknowledges, the supreme court held in ***State v. Laxton***, 2002 WI 82, ¶¶22-23, 254 Wis. 2d 185, 647 N.W.2d 784, *cert. denied*, ___ S. Ct. ___, 2003 WL 98460 (U.S. Jan. 13, 2003) (No. 02-6652), that the standard jury instruction was

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

constitutionally valid because the statute implicitly requires proof of volitional control. Schiller relies on the dissenting opinion filed in ***Laxton*** in support of his argument. The court of appeals is primarily an error correcting court. ***State ex rel. Swan v. Elections Bd.***, 133 Wis. 2d 87, 94, 394 N.W.2d 732 (1986). We are bound by both the prior decisions of this court, ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997), and of the supreme court, ***State v. Olsen***, 99 Wis. 2d 572, 583, 299 N.W.2d 632 (Ct. App. 1980). This court must follow the decision of the majority.

¶5 Schiller next argues that the circuit court erred when it made certain evidentiary rulings. First, Schiller argues the circuit court erred when it denied his motion to exclude 301 pages of pictures, drawings and photographs seized from him. At trial, his defense counsel objected to this evidence because it had not been timely disclosed by the State. The prosecutor responded that while the documents had been seized from Schiller on October 26, 2000, he did not receive them until he was preparing for trial in January 2001. When he received the documents, he further stated, he immediately had copies express delivered to Schiller's counsel.

¶6 We conclude that the circuit court did not err in allowing this evidence in. While Schiller complains that the State gave the documents to him too late, he does not cite to any scheduling order that might govern the situation. The prosecutor stated that he gave the documents to Schiller immediately after he received them. Further, these are not documents subject to discovery under WIS. STAT. § 971.23(1). Schiller has not identified, either in the circuit court or here, any statutory violation. Moreover, the evidence was not the type of exculpatory evidence the prosecutor had an obligation to turn over to Schiller. *See* ***Brady v. Maryland***, 373 U.S. 83 (1963). As the State suggests, Schiller objected to the evidence being admitted because it was inculpatory.

¶7 In addition, Schiller moved that the evidence be excluded. He could have asked for an adjournment or moved for a short continuance to review the evidence. He did not do so. We conclude that the circuit court did not err in admitting this evidence.

¶8 Schiller also argues that the circuit court erred when it allowed a detective to testify that his investigation revealed that Schiller had sexually abused eleven children. Schiller asserts that the testimony brought in evidence of uncharged offenses and was inadmissible hearsay evidence. We conclude that Schiller has waived the right to object to the admission of this evidence on hearsay grounds.

¶9 At the beginning of the trial, Schiller's counsel raised an in limine objection to the admission of this evidence on hearsay grounds. He went on to argue to the court, however, that the evidence was, in essence, not relevant. Later, when the detective was actually testifying, Schiller's counsel did not raise a hearsay objection but rather objected to the testimony because it was about offenses for which Schiller had never been charged. When the court ultimately ruled on the objection, it was not in response to a hearsay objection but rather on the grounds raised by Schiller's counsel. The court allowed the evidence because it provided the foundation for the experts who testified later and who had relied, in part, on the detective's investigations. In order to preserve an issue, a party must raise the issue with sufficient prominence so that the trial court realizes it is being asked to rule on the specific point. *See* ***State v. Salter***, 118 Wis. 2d 67, 79, 346 N.W.2d 318 (Ct. App. 1984). In this case, the trial court ruled on the objection before it. Because Schiller did not raise the hearsay objection with sufficient prominence when the evidence was being admitted, the trial court did not rule on it and he has not preserved it for appeal.

¶10 We further conclude that the circuit court properly admitted the evidence. The experts who testified later stated that they had relied on these reports. The circuit court properly ruled that the detective provided a foundation for their testimony.

¶11 Schiller also argues that the circuit court erred when it would not allow him to read a portion of the State's remarks from his initial sentencing hearing in 1993. He contends that the State's recommendation at that time was for probation and that position was inconsistent with its position at the commitment hearing. We note, as did the State, that the sentencing transcript is not part of the record in this appeal. In addition, however, we conclude that the offered evidence would not have been relevant or helpful to the jury.

¶12 The issues in a criminal sentencing hearing are different from those presented in a WIS. STAT. ch. 980 commitment proceeding. Chapter 980 was designed to "serve the legitimate and compelling state interests of providing treatment to the dangerously mentally ill and protecting the public from the dangerously mentally ill." ***Laxton***, 2002 WI 82 at ¶12. The purpose of the commitment hearing is to determine whether an individual is a sexually violent person. *See* ***id.*** at ¶20. A prosecutor's recommendation at a sentencing hearing, however, is merely the State's suggestion as to what would be an appropriate sentence for a convicted defendant. It is not evidence and can be accepted or rejected by the sentencing court.

¶13 Nor is it surprising or in any way prejudicial that the State's position may have changed over the years. Schiller's sentencing occurred more than seven years before the commitment proceeding. The prosecutor's comments at the time were presumably based on the information he had available to him then. In the

intervening years, the State learned more about Schiller. Not only did the State learn that Schiller continued to pursue his fixations while in prison, but it uncovered more episodes of likely sexual assaults. The positions taken by the State at the sentencing hearing and in the commitment proceeding were not contradictory. Each was based on what the State knew at the time. The sentencing comments were not relevant to the issues presented in the commitment proceeding and were properly excluded by the court.

¶14 Schiller also argues that we should grant a new trial in the interests of justice because of the errors he asserts occurred. Because we have rejected his other arguments, we also decline to exercise our authority to order a new trial in the interests of justice. For the reasons stated, we affirm the orders of the circuit court.

By the Court.—Orders affirmed.

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