COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP3050 **Cir. Ct. No. 1998CI2**

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

IN RE THE COMMITMENT OF PETER A. OLIVER:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

PETER A. OLIVER,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed*.

Before Dykman, P.J., Lundsten and Higginbotham, JJ.

¶1 LUNDSTEN, J. Peter Oliver appeals a circuit court judgment committing him, after a jury trial, as a sexually violent person under WIS. STAT.

ch. 980.[1] He asks that we exercise our discretion to reverse in the interest of justice because the real controversy was not fully tried. Oliver argues that reversal is justified because:

> (1) one of the State's psychological experts testified that Wisconsin Department of Health Services psychological evaluators are more conservative than other states' evaluators when evaluating sex offenders;
>
> (2) two of the State's psychological experts testified regarding the percentage of evaluations in which they have determined that the ch. 980 criteria are met;
>
> (3) one of the State's psychological experts testified about the steps leading up to a ch. 980 trial;
>
> (4) the jury instructions inadequately defined "acts of sexual violence"; and
>
> (5) the prosecutor misstated evidence during closing arguments.

We are not persuaded by any of Oliver's arguments and, therefore, we decline to exercise our discretionary reversal power. We affirm the judgment of commitment.

Background

¶2 Oliver was previously convicted of three sexually violent offenses, including one count of enticing a child for immoral purposes in 1989 and two counts of first-degree sexual assault of a child in 1993. The enticement conviction involved Oliver putting his mouth on a nine-year-old boy's genitals and asking the boy to reciprocate. The child sexual assault convictions involved Oliver touching

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

the penises of two boys, ages seven and eleven. Oliver admitted to a police detective that he had overwhelming feelings for young boys and that, in the detective's words, he was "out of control and needed help."

¶3 After the State filed the petition for Oliver's commitment, a psychologist administered a penile plethysmograph (PPG) on Oliver. The PPG gauges sexual arousal in response to visual and auditory stimuli by measuring change in penis circumference. Oliver showed significant arousal to stimuli involving sexual activity with pre-school, grammar school, and adolescent males. Oliver showed no significant arousal in response to stimuli involving consensual sexual activities with a male or female adult.

¶4 Three psychological experts who evaluated Oliver under the WIS. STAT. ch. 980 criteria testified for the State. Each expert testified that Oliver had a mental disorder (pedophilia) that fits the definition in ch. 980.[2] Each also testified that Oliver was more likely than not, because of his mental disorder, to commit future acts of sexual violence if released.

¶5 The State also elicited expert testimony that successful completion of a treatment program is associated with decreased risk to reoffend, but that Oliver failed to meaningfully complete any treatment. In addition, one of the experts testified that a meta-analysis, or a "study of other studies," indicated that PPG results showing a sexual preference for children was the "single highest correlation" for sex offender recidivism.

[2] WISCONSIN STAT. § 980.01(2) defines "[m]ental disorder" as a "congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence."

¶6 A fourth psychological expert testified for Oliver. She agreed with the State's three experts that Oliver suffered from a mental disorder (pedophilia) that fits the definition in WIS. STAT. ch. 980. Oliver's expert concluded, however, that Oliver was not more likely than not to reoffend if released.

¶7 The jury found that Oliver was a sexually violent person, and the circuit court ordered Oliver committed as such.

Discussion

¶8 Commitment as a sexually violent person requires that an offender (1) has been convicted of a sexually violent offense, (2) currently has a mental disorder, and (3) is dangerous to others because he has a mental disorder which makes it more likely than not that he will engage in one or more future acts of sexual violence. *See* WIS JI—CRIMINAL 2502. Oliver concedes that the third element was the only one seriously contested at trial.

¶9 It is undisputed that Oliver failed to object to any of the errors he asserts now. Therefore, he has forfeited the right to review of the issues he raises. *See* ***State v. Romero***, 147 Wis. 2d 264, 274, 432 N.W.2d 899 (1988) ("[T]o preserve an issue for appeal as a matter of right, a party must object to the error at trial ...."). Additionally, Oliver does not claim ineffective assistance of counsel. Rather, the only question before us is whether we should exercise our discretionary reversal authority.

¶10 We may reverse in the interest of justice under WIS. STAT. § 752.35 when "it appears from the record that the real controversy has not been fully tried,

or that it is probable that justice has for any reason miscarried."[3] We exercise this power of discretionary reversal "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶11 Oliver tells us that he is proceeding under the real-controversy-not-fully-tried alternative. Under this alternative, he need not show a substantial probability of a different result on retrial. *See* ***State v. Johnson***, 149 Wis. 2d 418, 429, 439 N.W.2d 122 (1989). The real controversy is not fully tried when "the jury was precluded from considering 'important testimony that bore on an important issue' or … certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)). Accordingly, we will consider whether any of the errors Oliver asserts would have "clouded" the issue of whether Oliver was more likely than not to commit future acts of sexual violence if released.

[3] WISCONSIN STAT. § 752.35 provides:

> **Discretionary reversal.** In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

1. Testimony That Wisconsin Department Of Health Services Psychological Evaluators Are More Conservative Than Other States' Evaluators When Evaluating Sex Offenders

¶12 At trial, the State asked one of its psychological experts to describe research he was conducting regarding the sexually violent person population in Wisconsin. As part of this testimony, the expert stated:

> A We just completed a study comparing the sexually violent person population here in Wisconsin with similar populations of sex offenders in three other states looking at the rates with which we diagnose conditions and other risk indicators and how their populations differ from ours.
>
> Q How does their population differ from Wisconsin's?
>
> A Generally, the evaluators within the Department of Health Services here in Wisconsin, that is the Sand Ridge unit, *we tend to diagnose sexual disorders and personality disorders less frequently. That is, we're more conservative. We tend to make sure that they have it. So we generally diagnose less commonly than evaluators in other states.*

(Emphasis added.)

¶13 Oliver argues that this testimony was irrelevant, and, in the alternative, impermissible character evidence. He also argues that the testimony was unfairly prejudicial. He points out the State's concession that this testimony may have positively affected the weight the jury gave to one or more of the State's experts.

¶14 Assuming without deciding that this testimony was inadmissible, we are not persuaded that it would have had any significant effect on the jury or would have otherwise clouded the disputed issue of whether Oliver was more likely than not to reoffend if released. The testimony did not focus on *likelihood to reoffend,* but rather on whether Wisconsin evaluators are relatively conservative

in diagnosing *mental disorders*. It was not seriously disputed that Oliver had a qualifying mental disorder; even his expert conceded that he did. Although the State's expert in his testimony at one point referenced "other risk indicators" when specifying the difference between Wisconsin evaluators and those in other states, he spoke about diagnosing "sexual disorders and personality disorders less frequently."

2. Testimony Regarding The Percentage Of Evaluations In Which An Expert Has Determined That The WIS. STAT. Ch. 980 Criteria Are Met

¶15 Two of the State's experts testified under direct examination about the percentage of WIS. STAT. ch. 980 evaluations in which they determined that the subject met the commitment criteria. One of the experts found that the criteria were met in approximately 27% of 300 evaluations; the other expert found that the criteria were met in approximately 70% of 98 evaluations.[4]

¶16 Oliver argues that this percentage evidence should not have been admitted for several reasons. Among his arguments is that, under ***Johnson***, 149 Wis. 2d 418, the evidence impermissibly bolstered the witnesses' credibility before Oliver had attacked it. *See* ***id.*** at 427 ("[O]ne cannot bolster a witness's credibility until such credibility is attacked."). The State does not respond to Oliver's bolstering argument other than to say that, "[i]f [Oliver] has any claim at all, it concerns only the timing of the testimony, that is, whether the prosecutor should have waited until either redirect or rebuttal." Under ***Johnson***, however,

[4] The second expert testified that he found that the criteria were met in 69 of 98 evaluations.

timing is precisely the point. Accordingly, we will assume without deciding that it was error under ***Johnson*** for the State to elicit this testimony when it did.

¶17 Oliver further argues that the percentage evidence unfairly implied that he was among the most dangerous sex offenders evaluated. We are not persuaded.

¶18 Had the jury heard only from the 27% expert, Oliver's argument might have more force. Given the 70% testimony, however, it is unlikely the jury would have inferred that Oliver must be among the most dangerous of sex offenders. Moreover, Oliver's expert testified that she found that the criteria were met in approximately 60% of Wisconsin cases.[5] If anything, the differences among the percentages played into Oliver's hands because one of his trial strategies was to show that the experts were engaged in an inexact science with ample room for disagreement. For all of these reasons, the percentage evidence did not cloud the issue of Oliver's likelihood to reoffend.

3. Testimony About The Steps Leading Up To A WIS. STAT. Ch. 980 Trial

¶19 The State elicited testimony from one of its experts regarding the steps leading up to a WIS. STAT. ch. 980 trial. This testimony informed the jury that:

- First, a referral is made by the Department of Corrections to "[b]asically a set of prosecutors but officially the Attorney General's Office";

[5] Oliver asserts that, in light of the State's experts' testimony, his elicitation of the percentage testimony from his expert was understandable.

- Next, the Attorney General's Office "does what it does to decide whether to file a petition";
- Finally, after the petition is filed, there is a probable cause hearing "where the finding is [that] there is [a] general reason to keep the person detained for further evaluation."

The expert further testified that probable cause was found in Oliver's case and that, before the expert was assigned to evaluate Oliver, a different evaluator had to find that Oliver met the ch. 980 criteria.

¶20 In ***State v. Budd***, 2007 WI App 245, 306 Wis. 2d 167, 742 N.W.2d 887, we addressed similar testimony. There, a State psychological expert testified about the "screening" process that resulted in Budd's selection for WIS. STAT. ch. 980 proceedings. ***Id.***, ¶¶4, 16 n.6, 18. More specifically, the expert testified that the chair of the End of Confinement Review Boards screens out 75% of sex offenders of the potential ch. 980 pool, that the board itself screens out another 50%, and that the expert would refer only about one-third of the cases she receives for ch. 980 proceedings. ***Id.***, ¶¶4, 18. Thus, Budd was among only 4.5% of sex offenders selected for ch. 980 proceedings. ***Id.***, ¶18. We concluded that this testimony was inadmissible because it was irrelevant, at least in the context of Budd's case. ***Id.***, ¶¶15-16. We explained:

> The problem with the screening evidence admitted in this case is that it did not establish why Budd was selected for ch. 980 proceedings. The evidence only explained that most sex offenders scheduled for release are not selected for ch. 980 proceedings, without explaining why a select few are so chosen. There was no testimony as to the qualification of the [board] or its chairman, or explanation of the evaluation process used by either. From the record, the [board]'s process could be random, or based on irrelevant criteria. As Budd points out, all the evidence served to do in this case was to inform the jury that Budd was selected as one of the 4.5% of sex offenders recommended for ch. 980 proceedings. Without explaining

> why, we do not see how that information is relevant to whether Budd is a sexually violent person ….

Id., ¶16 (footnotes omitted).

¶21 Accordingly, here, as in ***Budd***, the testimony regarding the steps leading up to Oliver's trial was inadmissible. The evidence suffers from a similar flaw, even absent references to specific percentages, because it suggested, without explaining why, that Oliver was more likely to be sexually dangerous because of the screening process described.[6]

¶22 We recognize that ***Budd*** left open the question of whether testimony of this nature might be relevant in some cases. *See* ***id.***, ¶16. Here, the State argues that the testimony has relevance because it shows how the expert who gave the testimony became involved in the case. The State's argument fails, however, because the same could have been said in ***Budd***. We see no reason why the details regarding how the expert became involved in the case are any more relevant here than they would have been in ***Budd***.

¶23 Having concluded that this testimony was inadmissible, we turn to Oliver's argument that it unfairly prejudiced his case. In ***Budd***, we exercised our discretion to reverse Budd's commitment in the interest of justice. ***Id.***, ¶¶1, 18. There, however, three experts, including a court-appointed expert, testified that Budd did *not* meet the criteria for commitment. ***Id.***, ¶6 & n.2. We deemed it a

[6] Although Oliver relies on ***State v. Budd***, 2007 WI App 245, 306 Wis. 2d 167, 742 N.W.2d 887, he questions its rationale. Oliver asserts that a more detailed explanation of the criteria for selection and the qualifications of the previous evaluators would actually exacerbate the problematic nature of the testimony. We need not decide whether this assertion has merit, or whether there are reasons other than relevance to preclude this type of testimony, in order to hold that the evidence here is inadmissible under ***Budd***.

"close case," and concluded that "the impact of telling the jury that [Budd] was one of only 4.5% of sex offenders selected for ch. 980 proceedings, where three of the four experts testified that the respondent did not meet the criteria of a sexually violent person, contributed to the jury's finding that Budd is a sexually violent person." ***Id.***, ¶18. Here, in contrast, the bulk of the expert testimony cut against Oliver, and there was no neutral, court-appointed expert who testified in Oliver's favor. Moreover, the 4.5% figure in ***Budd*** suggested much more strongly that Budd must be among the worst of all sex offenders.

4. Jury Instruction Definition Of "Acts Of Sexual Violence"

¶24 The circuit court instructed the jury that, in order for Oliver to be committed, the jury would have to find that Oliver is dangerous to others because his mental disorder makes it more likely than not that he will engage in future "acts of sexual violence." The jury was further instructed that "[a]cts of sexual violence means acts which would constitute sexually violent offenses as defined by the Wisconsin Statutes. Enticing a child for immoral purposes and first degree sexual assault of a child are sexually violent offenses."

¶25 Oliver argues that this definition of "[a]cts of sexual violence" in the instruction was inadequate and that we should reverse because there was a substantial risk that the jury misinterpreted or misapplied the instruction to his detriment.[7] We are not persuaded. Regardless whether it would have been better

[7] Under WIS. STAT. § 980.01(1b), "'[a]ct of sexual violence' means conduct that constitutes the commission of a sexually violent offense." Section 980.01(6) defines "sexually violent offense" as any of the following:

> (a) Any crime specified in s. 940.225(1), (2), or (3), 948.02(1) or (2), 948.025, 948.06, 948.07, or 948.085.

(continued)

to define "acts of sexual violence" differently, we agree with the State that the instruction is not a reason to reverse in this case.

> (am) An offense that, prior to June 2, 1994, was a crime under the law of this state and that is comparable to any crime specified in par. (a).
>
> (b) Any crime specified in s. 940.01, 940.02, 940.03, 940.05, 940.06, 940.19(2), (4), (5), or (6), 940.195(4) or (5), 940.30, 940.305, 940.31, 941.32, 943.10, 943.32, or 948.03 that is determined, in a proceeding under s. 980.05(3)(b), to have been sexually motivated.
>
> (bm) An offense that, prior to June 2, 1994, was a crime under the law of this state, that is comparable to any crime specified in par. (b) and that is determined, in a proceeding under s. 980.05(3)(b), to have been sexually motivated.
>
> (c) Any solicitation, conspiracy, or attempt to commit a crime under par. (a), (am), (b), or (bm).

"'Sexually motivated' means that one of the purposes for an act is for the actor's sexual arousal or gratification or for the sexual humiliation or degradation of the victim." Section 980.01(5).

The Wisconsin pattern jury instruction provides as follows:

> **Meaning of "Acts of Sexual Violence"**
>
> "Acts of sexual violence" means acts which would constitute "sexually violent offenses."
>
> ELECT ONE OF THE FOLLOWING DEPENDING ON WHAT IS ALLEGED IN THE PETITION.
>
> [(Name crime or crimes specified in § 980.01(6)(a)) is a sexually violent offense.]
>
> [(Name crime or crimes specified in § 980.01(6)(b)) may be a sexually violent offense if it is sexually motivated. "Sexually motivated" means that one of the purposes for the offense was the actor's sexual arousal or gratification or the sexual humiliation or degradation of the victim.]

WIS JI—CRIMINAL 2502 (footnotes omitted).

¶26 At trial, the jury was informed of the prior offenses for which Oliver had been convicted—enticing a child for immoral purposes and first-degree sexual assault of a child—the same offenses used as examples in the instruction. In addition, the jury heard evidence regarding the acts underlying those offenses. Based on this evidence, the jury would have understood, correctly, that "acts of sexual violence" under WIS. STAT. ch. 980 "include" the type of conduct for which Oliver was already convicted. If anything, the instruction may have caused the jury to believe that the definition is narrower than it is.

¶27 Moreover, the jury heard testimony that a sexually violent offense under WIS. STAT. ch. 980 depends on whether a charge is sexual in nature or is sexually motivated. Similarly, the jury heard testimony that a crime such as contributing to the delinquency of a minor is *not* necessarily a sexually violent offense but that it depends on whether the intent of the perpetrator is to have sexual contact. Accordingly, we are satisfied that the jury would not have applied an overly broad definition of "acts of sexual violence" and that the instruction the jury received did not cloud the issue of whether Oliver was more likely than not to reoffend.

5. Prosecutor's Statement During Closing Argument

¶28 The State's experts' opinions that Oliver was more likely than not to reoffend were based, in part, on the score that each expert assigned to Oliver on certain psychological tests or, in the experts' parlance, "risk instruments." Oliver's scores correlated with reconviction rates as high as 40% or 49% within ten or fifteen years, depending on the instrument. The State also elicited testimony from its experts to show that reconviction rates underestimate reoffense rates. For example, one expert testified that recent research shows that only about

30% of child sexual assaults are reported to police. Another expert testified that he found research indicating that reconviction rates should be increased by about 40% in order to estimate reoffense rates.

¶29 Based apparently on this and similar evidence, the State commented during closing argument:

> Being reconvicted involves a lot more than just reoffending, and [reoffending is] what the Wisconsin law looks at. That the person is likely, meaning more likely than not, [to] … engage in future acts of sexual violence…. *That doesn't mean they have to get caught at it. In fact, most don't.*

(Emphasis added.) Oliver argues that the State's comment that "most" perpetrators do not get caught misstated the evidence and was unfairly prejudicial. We disagree.

¶30 First, contrary to the circuit court's statement and the State's concession, there is evidence supporting the prosecutor's assertion that most perpetrators do not get caught at it. The testimony that only 30% of child victims report being sexually assaulted supports the view that, when an offense occurs, most often the perpetrator is not caught.

¶31 Second, we agree with the circuit court's observation that the prosecutor's statement "was made in an attempt to highlight a reasonable argument," namely, that the evidence showed that reconviction rates underestimate reoffense rates.

¶32 Oliver asserts that his expert effectively discounted the proposition that reconviction rates underestimate reoffense rates. We disagree. At most, Oliver's expert made the less significant point that it is difficult to know with

certainty how substantial the underestimate is. Oliver's expert conceded that "[it] always has to be understood that there may be undetected offenses on top of [convictions]."

¶33 Moreover, the circuit court instructed the jury that its decision must be based solely on the evidence and that "evidence" does not include the attorneys' closing arguments. Under all of the circumstances, we are confident that the prosecutor's "most" comment did not cloud the issue of Oliver's likelihood to reoffend.

6. Cumulative Effect Of Any Error

¶34 Finally, Oliver argues that the errors he asserts, when combined, prevented the real controversy from being fully tried. He does not, however, make any new developed arguments in this regard.

¶35 We observe that, apart from any evidence associated with the asserted errors, the jury heard damaging evidence on the issue of likelihood to reoffend, including that Oliver admitted to police that he had overwhelming feelings for young boys and that he was out of control and needed help; that successful completion of a treatment program may reduce his risk, but that Oliver failed to successfully complete treatment; and that Oliver's PPG test results showing a sexual preference for children was the "single highest correlation" for sex offender recidivism.

¶36 We are satisfied that, even viewing the asserted errors collectively, the issue of Oliver's likelihood to reoffend was not clouded and the real controversy was fully tried.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.