COURT OF APPEALS
DECISION
DATED AND FILED

December 13, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2481 **Cir. Ct. No. 2005CI4**

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

IN RE THE COMMITMENT OF JOHN WHITEMAN:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JOHN WHITEMAN,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: JUAN B. COLAS, Judge. *Affirmed.*

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

¶1 PER CURIAM. John Whiteman appeals a judgment denying his petition for discharge from confinement as a sexually violent person. He argues that: (1) he is entitled to a new trial in the interest of justice because the real

controversy was not fully tried due to misleading, contradictory, and unclear jury instructions; and (2) the State failed to present sufficient evidence to support the verdict. We reject these arguments, and affirm the judgment.

¶2 Reversal in the interest of justice when the real controversy has not been fully tried is appropriate only in exceptional cases. ***State v. Doss***, 2008 WI 93, ¶86, 312 Wis. 2d 570, 754 N.W.2d 150, *cert. denied*, 555 U.S. 1037 (2008). This court reviews the totality of the circumstances to determine whether a new trial is required to accomplish the ends of justice. ***State v. McGuire***, 2010 WI 91, ¶59, 328 Wis. 2d 289, 786 N.W.2d 227, *cert. denied*, 131 S. Ct. 832 (2010). Reversal in the interest of justice may be appropriate when erroneous jury instructions prevent the real controversy from being fully tried. ***Doss***, 312 Wis. 2d 570, ¶86. However, the circuit court has broad discretion in instructing the jury provided that the court exercises its discretion in order to fully and fairly inform the jury of the applicable rules of law. *See* ***State v. Sanders***, 2011 WI App 125, ¶13, 337 Wis. 2d 231, 806 N.W.2d 250, *review denied*, 2012 WI 2, 338 Wis. 2d 322, 808 N.W.2d 714 (No. 2010AP658). Whether a jury instruction is appropriate under the given facts of a case is a legal issue subject to independent review. ***Id.*** On review, we view the jury instructions as a whole, and grant relief only if we are persuaded that the instructions misstated the law or misdirected the jury. ***Id.***

¶3 Whiteman contends that the jury instructions here were misleading because they contained contradictory language, failed to give a complete explanation of "serious difficulty controlling behavior," and failed to make clear that recidivism alone was not a sufficient reason for finding that Whiteman was a sexually violent person. Each of these contentions was rejected in ***Sanders***. ***Id.***, ¶¶14-16. Whiteman attempts to distinguish ***Sanders*** because the circuit court in this case did not read the entire pattern jury instruction. However, considering the

instructions as a whole, we conclude that the instructions appropriately defined the elements of WIS. STAT. § 980.01.[1] The court instructed the jury that, before it could find Whiteman was still a sexually violent person, the State had to prove three facts by clear and convincing evidence: (1) that Whiteman had been convicted of a sexually violent offense; (2) that Whiteman currently has a mental disorder, which the court defined as a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence and causes serious difficulty controlling behavior; and (3) that Whiteman is dangerous to others because he has a mental disorder that makes it more likely than not that he will engage in future acts of sexual violence. The court specifically cautioned the jury that mental disorders do not include merely deviant behaviors that conflict with prevailing societal standards and that not all persons who commit sexually violent offenses can be diagnosed as suffering from a mental disorder. The court further informed the jury that not all persons with a mental disorder are predisposed to commit sexually violent offenses or have serious difficulty controlling behavior. The dangerousness instruction not only clarifies the instruction on the "mental disorder" element, it also stands alone as a separate requirement that the jury find that Whiteman has serious difficulty in controlling his behavior.

¶4 Whiteman also contends that the instructions failed to clarify that the jury could not find him to be sexually dangerous based on his offense history alone. We disagree. The language in the instruction that explains that there needs to be a qualifying mental disorder makes it sufficiently clear that the jury cannot

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

find Whiteman sexually dangerous based purely on his offense history. Reviewing the jury instructions as a whole, we cannot conclude that the real controversy was not fully tried.

¶5 Whiteman argues that the State failed to present sufficient evidence to support the verdict. Specifically, he contends there was no showing that he had serious difficulty controlling his behavior or that he was dangerous because of any mental disorder. This court must view the evidence most favorably to the State, and can reverse the jury's determination only if the evidence is so lacking in probative value and strength that, as a matter of law, no reasonable trier of fact could have found by clear and convincing evidence that Whiteman was sexually violent. *See* ***State v. Kienitz***, 227 Wis. 2d 423, 434, 597 N.W.2d 712 (1999).

¶6 The State's case was based on the testimony of two witnesses, Dr. Richard McKee, a treatment psychologist at Sand Ridge Secure Treatment Center, and Dr. Melissa Westendorf, a psychologist for the Wisconsin Department of Health Services and part of a group of doctors who perform evaluations for Chapter 980 commitments and annual re-examinations of persons committed at Sand Ridge. Dr. McKee testified that Whiteman had been placed in corrective thinking treatment due to his high psychopathy scores, but that Whiteman had withdrawn his consent to treatment in 2009 and was no longer participating in it. Dr. McKee did not believe that Whiteman had satisfied his treatment needs as would be necessary to modify his future risk of committing sexually violent offenses. Dr. McKee also testified that, while in Sand Ridge, Whiteman engaged in prohibited conduct and inappropriate interactions with female staff.

¶7 Dr. Westendorf evaluated Whiteman and his history, and diagnosed him with personality disorder not otherwise specified with antisocial features.

Features of this disorder include a disregard for others, criminal acting out, impulsivity, and problems with interacting with others. Dr. Westendorf testified that Whiteman's personality disorder predisposes Whiteman to engage in sexually violent offenses and this is aggravated by Whiteman's high level of psychopathy. She concluded that Whiteman's personality disorder makes it more likely than not that he will commit future acts of sexual violence in his lifetime. Dr. Westendorf also based her assessment on "dynamic risk factors," or Whiteman's changeable characteristics, including his failure to complete treatment.

¶8 The jury was entitled to believe Dr. McKee's and Dr. Westendorf's opinions. *See* ***State v. Zanelli***, 223 Wis. 2d 545, 555-56, 589 N.W.2d 687 (Ct. App. 1998). Dr. McKee's testimony supports a finding that Whiteman discontinued therapy that was necessary to reduce the risk of committing additional sexual offenses. Dr. Westendorf's testimony supports a finding that Whiteman had a mental disorder, was dangerous, and had serious difficulty controlling his behavior because of his disorder. Dr. Westendorf's actuarial instruments and the "dynamic risk" factors she used in making her assessment provide sufficient evidence to support a finding that Whiteman is dangerous based on his mental disorder.

By the Court.—Judgment affirmed.

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