COURT OF APPEALS
DECISION
DATED AND FILED

June 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0183

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

IN RE THE COMMITMENT OF GUY DOUGLAS:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

GUY DOUGLAS,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

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

PER CURIAM. Guy Douglas appeals from a ch. 980 commitment order, adjudging him a sexually violent person and committing him to a secured facility for treatment. Douglas claims ch. 980 was unconstitutionally applied in this case because: (1) an improper definition of "substantial probability" was

utilized; (2) the jury was improperly instructed; and (3) the evidence was insufficient to support the commitment. Because the defense introduced the definition of "substantial probability" that Douglas now claims was erroneous, he has waived his right to raise this issue on appeal; because the trial court did not erroneously exercise its discretion when it instructed the jury and because the evidence is sufficient to support the commitment, we affirm.

I. BACKGROUND

On October 19, 1992, Douglas pleaded guilty to one count of first-degree sexual assault of a child, contrary to § 948.02(1), STATS. He was subsequently sentenced to forty-two months in prison. In January 1995, the State filed a petition alleging that Douglas was a sexually violent person eligible for commitment under ch. 980. The petition was initially dismissed on the grounds that ch. 980 was unconstitutional. This ruling, however, was summarily reversed by this court following our supreme court's pronouncements to the contrary in ***State v. Carpenter***, 197 Wis.2d 252, 541 N.W.2d 105 (1995), and ***State v. Post***, 197 Wis.2d 279, 541 N.W.2d 115 (1995).

A jury trial took place in September 1996. The State presented testimony from two expert witnesses, psychologists Dr. Bradley Allen and Dr. Rodney Miller. Douglas did not call any expert witnesses. The expert opinions were based solely on Douglas's records, as he declined to be personally interviewed or evaluated. Both doctors concluded that Douglas suffered from pedophilia and would be a danger to others because of his mental disorders and his refusal to receive treatment.

The jury found that Douglas was a sexually violent person. The trial court entered the commitment order. Douglas now appeals.

II. DISCUSSION

A. Substantial Probability Definition.

Douglas claims that ch. 980 was unconstitutionally applied to him because both of the State's experts used an improper definition of the "substantial probability" standard. He asserts that both experts defined substantial probability as "more likely than not" and the term should have been defined as "extremely likely."[1] The trial court's instructions to the jury did not define substantial probability. Subsequent to the briefing in this case, we decided that this term means "considerably more likely to occur than not to occur." ***State v. Kienitz***, 221 Wis.2d 275, 294, 585 N.W.2d 609, 612 (Ct. App. 1998). However, as noted below, failure to define the term in the jury instruction does not constitute error. The trial court gave the standard jury instruction and the jury was free to disregard the lower standard asserted by the expert witness. *See* ***Pautz v. State***, 64 Wis.2d 469, 476, 219 N.W.2d 327, 330 (1974).

Further, Douglas waived his right for review on this issue. The record demonstrates that the defense introduced the definition that Douglas claims on appeal was improper. The defense elicited the "more likely than not" standard from Dr. Miller during cross-examination where, in response to defense counsel's inquiry as to the term's meaning, Dr. Miller testified: "substantial probability means more likely than not, and the higher it goes beyond more likely than not, the more substantial." Defense counsel then used the "more likely than not" expression in his closing argument to the jury. The defense theory was that the

[1] The record demonstrates that only Dr. Miller testified that he uses the "more likely than not" definition.

State could not meet its beyond a reasonable doubt burden of proof because its expert was only testifying that Douglas was more likely than not to reoffend. Thus, Douglas, through his counsel, elected to seize on Dr. Miller's personal definition of substantial probability in defense of the State's allegations. Douglas cannot select one course of action in the trial court and then, on appeal, allege error precipitated by that course of action. *See* ***State v. Robles***, 157 Wis.2d 55, 60, 458 N.W.2d 818, 820 (Ct. App. 1990), *aff'd*, 162 Wis.2d 883, 470 N.W.2d 900 (1991). "Such an election constitutes waiver or abandonment of the right to complain." ***Id.***

Douglas concedes that his trial counsel injected the "more likely than not" standard into the case. However, he argues that defense counsel simply was mistaken as to how substantial probability should be defined. As a result, Douglas claims the improper standard constitutes plain error and we should review his contention in the interests of justice. *See* ***State v. Kircher***, 189 Wis.2d 392, 404, 525 N.W.2d 788, 793 (Ct. App. 1994). We decline to do so. The plain error rule applies only when a constitutional error is presented. *See* ***id.*** There is no constitutional error here. The United States Supreme Court found the Kansas sexual predator statute, which simply uses the term "likely," to be constitutional. *See* ***Kansas v. Hendricks***, 521 U.S. 346, 348, 117 S. Ct. 2072, 2076 (1997). The terms "likely" and "more likely than not" have been construed to mean the same thing. *See* ***United States v. Powell***, 761 F.2d 1227, 1233 (8th Cir. 1985).

B. Jury Instructions.

Next, Douglas claims that the trial court erroneously exercised its discretion when it failed to properly instruct the jury as to the meaning of the term "substantial probability." Absent a specific instruction, Douglas argues, the jury must have applied the "more likely than not" definition suggested by Dr. Miller and adopted by the defense. We reject his claim.

"A trial court has wide discretion as to instructions." ***State v. Lenarchick***, 74 Wis.2d 425, 455, 247 N.W.2d 80, 96 (1976). If the instructions of the court adequately cover the law applicable to the facts, we will not find error. *See* ***id.*** We look to the instructions as a whole to determine whether they were appropriate. *See* ***id.***

The jury was instructed that before it could find Douglas was a sexually violent person, the State had to prove three facts beyond a reasonable doubt:

> The first fact that must be established is that Guy Douglas has been convicted of a sexually violent offense. First degree sexual assault of a child is a sexually violent offense.
>
> The second fact that must be established is that Guy Douglas has a mental disorder. "Mental disorder" means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence. Acts of sexual violence means acts which would constitute sexually violent offenses. Although first degree sexual assault of a child is a sexually violent offense, not all persons who commit sexually violent crimes can be diagnosed as suffering from mental disorder, nor are all persons with a mental disorder predisposed to commit sexually violent offenses.
>
> The third fact that must be established is that Guy Douglas is dangerous to others because he has a mental

> disorder which creates a substantial probability that he will engage in acts of sexual violence.

These instructions adequately cover the law applicable to the facts in this case. We have already determined that it is not necessary to specifically define "substantial probability" because a jury is capable of determining, on the basis of its collective knowledge and experience, what this term means. *See* ***State v. Zanelli***, 212 Wis.2d 358, 375-76, 569 N.W.2d 301, 308 (Ct. App. 1997). Thus, the jury instructions given by the trial court were appropriate.

The fact that the defense elected to argue the "more likely than not" standard does not alter our conclusion and does not mean that the jury accepted the argument. The jury is presumed to follow the instructions given and is informed that closing argument does not constitute the evidence. Based on the foregoing, we cannot conclude on this record that the trial court erroneously exercised its discretion when instructing the jury.

C. Insufficient Evidence.

Douglas also claims the evidence is insufficient to support the commitment. He premises this claim on his contention that "substantial probability" means "extremely likely." Thus, he argues, because Dr. Miller defined the term to mean "more likely than not," there is insufficient evidence to support the jury's conclusion that he has a "mental disorder which creates a substantial probability that he will engage in acts of sexual violence." We reject his argument.

In reviewing a sufficiency of the evidence claim:

> [W]e reverse only if the evidence, viewed in the light most favorable to the verdict, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found [it substantially

> probable that the person will engage in acts of sexual violence] beyond a reasonable doubt.

Kienitz, 221 Wis.2d at 301, 585 N.W.2d at 619. There is sufficient evidence to support the commitment. Three elements need to be satisfied for a ch. 980 commitment: (1) that Douglas had been convicted of a sexually violent offense; (2) that he suffered from a mental disorder, that is, a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence; and (3) that he is dangerous to others because he has a mental disorder which creates a substantial probability that he will engage in acts of sexual violence. *See* § 980.02, STATS.; WIS J I—CRIMINAL 2502.

Douglas challenges only the third element. The record here reveals that there is evidence to prove the challenged element beyond a reasonable doubt and, under the correct definition of "substantial probability" set forth in ***Kienitz***: "We conclude that 'substantially probable' means 'considerably more likely to occur than not to occur.'" ***Id.*** at 294, 585 N.W.2d at 612.

Dr. Allen testified that Douglas suffers from a mental disorder of pedophilia, opposite sex, that predisposes him to commit acts of sexual violence. Pedophilia is believed to be a lifelong mental disorder that tends to be cyclic, that is, it goes through periods of exacerbations and remissions, but it is always present. Dr. Allen also testified that Douglas represents a significant risk that he may act out in a sexually violent manner in the future. Dr. Allen based his opinion on the pattern of sexual assault that Douglas exhibited toward children over the course of his life, as well as Douglas's denial and refusal to seek treatment. Dr. Allen explained that the pedophilia, together with lack of treatment, increased the likelihood that Douglas would commit future sexual crimes. Dr. Allen opined that the pedophilia exhibited by Douglas created a substantial probability that he will

engage in acts of sexual violence. Dr. Allen's testimony provides sufficient basis for the jury to conclude that Douglas was "considerably more likely than not" to engage in acts of sexual violence. *See* ***Kienitz***, 221 Wis.2d at 294, 585 N.W.2d at 612. Dr. Allen's testimony is sufficient to support the commitment. Therefore, we need not even address Dr. Miller's belief that "substantial probability" means "more likely than not."

By the Court.—Order affirmed.

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