COURT OF APPEALS
DECISION
DATED AND FILED

March 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0709

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

IN RE THE COMMITMENT OF
WALTER ALLISON:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

WALTER ALLISON,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

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

PER CURIAM. Walter Allison appeals from an order, following a jury trial, committing him to a secure mental health facility as a sexually violent person under ch. 980, STATS., and from an order denying his motion for post-

commitment relief. Allison presents four issues for review: (1) whether there was sufficient evidence to commit him as a sexually violent person because, he claims, an "antisocial personality disorder" does not predispose a person to engage in acts of sexual violence, and thus does not satisfy the criterion under the definition of "sexually violent person" found in § 980.01(7), STATS.; (2) if the evidence of his psychiatric diagnosis is sufficient to commit him as a sexually violent person, whether § 980.01(7), STATS., is unconstitutional as applied to him because an "antisocial personality disorder" is too imprecise a category to satisfy the requirements of due process; (3) whether the State proved beyond a reasonable doubt that it was "substantially probable" that Allison would commit a sexually violent offense; and (4) whether a new trial should be granted in the interests of justice. We affirm.

I. BACKGROUND.

On July 15, 1994, the State filed a petition to commit Allison as a sexually violent person pursuant to ch. 980, STATS. The petition sought commitment because Allison had convictions for rape and sexual perversion, and because, while on parole, Alison allegedly engaged in two acts of sexual misconduct. After probable cause was found to bring Allison to trial, a jury trial commenced on September 30, 1996.

At trial, a State witness, Dr. Margaret Alexander, who is a psychologist for the Department of Corrections, testified that Allison has an antisocial personality disorder that predisposes him to future acts of sexual violence and that there was a greater than 50% likelihood that Allison would re-offend. Also testifying was Dr. Michael Kotkin, who was a witness for the defense. He noted Allison's antisocial traits, but found it difficult to distinguish

them from alcohol induced behaviors and, thus, concluded that Allison did not fit the criteria for commitment, because there was insufficient reason to believe that Allison would commit a sexually violent act in the future. Dr. Kenneth Robins, the Director of the Mendota Health Institute, was subpoenaed by the defense to testify. He was expected to testify to the conclusions found in an earlier report generated by him that Allison did not meet the criteria for commitment. Dr. Robins, however, changed his assessment of Allison shortly before he was to testify and, after informing the defense of this change, the defense did not call him as a witness.

The jury found Allison to be a sexually violent person and the court ordered him to be committed to a secure mental health facility. Allison sought post-commitment relief, which was denied. This appeal followed.

II. ANALYSIS.

Allison first argues that the evidence adduced at trial was insufficient to sustain a finding of commitment, because the diagnosis of an antisocial personality disorder does not predispose a person to engage in acts of sexual violence, a requirement for commitment. He further argues that if the evidence was sufficient, then the statute is unconstitutional as applied to him because antisocial personality disorder is too imprecise a category to satisfy due process. We disagree.

Subsequent to the briefing in this case, this court decided ***State v. Adams***, 223 Wis.2d 60, 588 N.W.2d 336 (Ct. App. 1998). ***Adams*** presented the issue of whether a person suffering from an antisocial personality disorder could satisfy one of the requirements found in the sexually violent person commitment statute. We held that a diagnosis of "antisocial personality disorder," uncoupled

with any other diagnosis, but coupled with sufficient evidence establishing that a defendant is a "sexually violent person," may constitute "a mental disorder that makes it substantially probable that the subject of the petition will engage in future acts of sexual violence," under § 980.01(7), STATS. *See* ***id.*** at 64, 588 N.W.2d at 338. In ***Adams***, we rejected the same argument Allison presents on appeal, explaining:

> Section 980.01(2), STATS., does not define "mental disorder" as a condition that, *generally*, predisposes "people," or "persons," or the "prison population," or even the "mentally disordered population" to engage in sexual violence. It simply refers to "a person." And who is that person? Under § 980.01(7), that person can be no one other than the specific individual—the subject of the petition—who is "*a* person" who meets the statutory prerequisites "and who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that *the* person will engage in acts of sexual violence." (Emphasis added.)
>
> Similarly, [***State v. Post***, 197 Wis.2d 279, 541 N.W.2d 115 (1995)] does not state that "[t]he key to the constitutionality of the definition of mental disorder" is a nexus linking the subject of the petition to a mental disorder that, *generally*, predisposes "people," or "persons," or the "prison population," or even the "mentally disordered population" to engage in sexual violence. Instead, ***Post*** clarifies 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." ***Post***, 197 Wis.2d at 306, 541 N.W.2d at 124 (emphasis added). Thus, ***Post*** requires that the statutory focus be on *the* person who is the subject of the petition, and hinges its holding on the specific link between *that* person's mental disorder and the effect of that mental disorder on *that* person. Indeed, to conclude otherwise would be to hold that the legislature, inexplicably, chose to *exclude* from potential commitment *all* persons diagnosed solely with "antisocial personality disorder," regardless of their history of sex crimes, recidivism, denial, and refusal of treatment .... Accordingly, we conclude that, under ch. 980, a person who has the mental disorder of "antisocial personality

> disorder," uncoupled with any other mental disorder, may be found to be a "sexually violent person."

Id. at 67-68, 588 N.W.2d at 339-40.

Addressing Adams's arguments on the constitutionality of the statutory scheme, we concluded "that the inclusion of 'antisocial personality disorder' as, potentially, a 'condition' qualifying as a 'mental disorder' under [§ 980.01(7), STATS.], does not render the statute unconstitutionally imprecise." ***Id.*** at 69-70, 588 N.W.2d at 340. Accordingly, we reject Allison's arguments.

Allison next argues that the evidence produced by the State did not prove beyond a reasonable doubt that he would commit a sexually violent offense in the future. He specifically contends that the court was confused about the meaning of "substantially probable," and that the "jury instructions were inadequate to ensure that the jury held the State to the proper burden."

Subsequent to the briefing in this case, this court also decided ***State v. Kienitz***, 221 Wis.2d 275, 585 N.W.2d 609 (Ct. App. 1998). In that case, we concluded that under § 980.01(7), STATS., "'substantially probable' means 'considerably more likely to occur than not to occur.'" ***Id.*** at 282, 585 N.W.2d at 612. We also concluded that the correct standard of review for challenges to the sufficiency of the evidence in a ch. 980, STATS., commitment appeal is the standard applied in criminal cases. Accordingly,

> we 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 reasonable 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.

Id. at 301, 585 N.W.2d at 619. Under this standard, we conclude that the evidence here was sufficient.

The evidence at trial included information about Allison's history of sexually violent crimes, sexual misconduct and his antisocial behavior. Dr. Alexander testified that Allison suffered from antisocial personality disorder, a mental disorder which predisposes him toward future acts of sexual violence. She concluded that it was substantially probable that Allison would engage in future acts of sexual violence, quantifying that probability at greater than 50% likelihood.

At the close of evidence, the jury was given the following standard jury instruction concerning the standard to be applied in deciding whether Allison should be committed:

> The third fact that must be established is that Walter Allison is dangerous to others because he has the mental disorder which creates a substantial probability that he will engage in acts of sexual violence. If you are satisfied beyond a reasonable doubt that Walter Allison has been convicted of a sexually violent offense, that he has a mental disorder and that he is dangerous to others because the mental disorder creates a substantial probability that he will engage in acts of sexual violence, you should find Walter Allison a sexually violent person. If you are not so satisfied, you must not find that Walter Allison is a sexually violent person.

Using this standard, the jury found the evidence proved beyond a reasonable doubt that Allison was a sexually violent person within the meaning of ch. 980, STATS. The trial court then determined that he should be committed to a secure mental health facility. Allison has offered nothing to establish that the trial court's jury instruction utilizing the "substantially probable" definition was at odds with ***Kienitz***'s standard. Absent some showing that the court used a lesser standard

than that which the ***Kienitz*** court enunciated, we cannot conclude that the trial court erred by giving the standard jury instruction to the jury.

Finally, Allison asserts that, in the interests of justice, a new trial should be granted. The court of appeals is permitted to exercise its discretionary authority when it appears that the real controversy has not been fully tried. *See* § 752.35 STATS. The power of discretionary reversal may only be exercised in extraordinary cases. *See* ***State v. Betterly***, 183 Wis.2d 165, 178, 515 N.W.2d 911, 916 (Ct. App. 1994), *aff'd*, 191 Wis.2d 406, 529 N.W.2d 216 (1995). The real controversy has not been tried when the jury has not been given an opportunity to hear important testimony bearing on an important issue, or when improperly admitted evidence obscures a crucial issue. *See* ***State v. Schumacher***, 144 Wis.2d 388, 400, 424 N.W.2d 672, 676 (1988). We are satisfied that the real controversy was fully tried.

Allison claims the real controversy has not been fully tried because the jury did not hear "important evidence that bore on an important issue" and the jury heard evidence which "clouded a crucial issue in the case."

First, Allison asserts that because Dr. Robins did not testify "that change created an evidentiary inference to which Mr. Allison should not have been subjected." Allison's reference to an "evidentiary inference" refers to the fact that in opening arguments defense counsel told the jury Dr. Robins would be testifying. Allison maintains the defense was "sandbagged" by Dr. Robins's change in position, and he claims the State knew of the doctor's change before the defense.

The record shows that the State learned of Dr. Robins's actual change of opinion either the day before Dr. Robins was to testify, or that day. The

record also reveals that the defense admitted there was no bad faith on the part of Dr. Robins. Further, the State points out that while the State was aware of Dr. Robins's indecision, the defense also had the opportunity to meet with Dr. Robins before the trial date and that Dr. Robins likely did "express that uncertainty" to defense counsel too. In denying Allison's motion for mistrial, the court noted that the defense was able to present an expert witness, Dr. Kotkin, who testified "quite strongly" and the State also presented only one expert. Thus, Allison was not in a situation where he was left with no witness to support his defense or where the State's expert witnesses outnumbered his. Therefore, the trial court reasoned that the fact that Dr. Robins changed his position did not require a mistrial. We agree. Allison's defense was presented to the jury through an expert witness. Further, we note that Allison cannot argue that the jury was improperly prevented from hearing Dr. Robins's testimony, because Allison himself chose not to call Dr. Robins to testify.

In contending that he is entitled to a new trial in the interests of justice, Allison next claims that testimony given by Dr. Alexander clouded a crucial issue in the case. Allison refers specifically to testimony the doctor gave relating to the background information she reviewed in making her diagnosis of Allison. In doing so, she inadvertently mentioned to the jury that Allison had committed two disputed criminal offenses. Defense counsel moved for a mistrial based on this testimony. The trial court denied the motion and gave a curative instruction to the jury:

> Before we continue, I have to advise you folks of something. In the last answer the doctor gave, she recited a litany of some offenses or trouble that she had considered. Two of them were a battery and an armed robbery.
>
> There is no evidence in this case of Mr. Allison, before you, of Mr. Allison having been involved in or convicted of

> either of those offenses and I assume those were stated inadvertently by Dr. Alexander and you should not consider those offenses as applying or those offenses or anything in connection with those as applying to Walter Allison. So, ignore that part of the answer please.

We presume the jurors followed the court's instruction and did not consider that particular testimony of Dr. Alexander. *See* ***State v. Chambers***, 173 Wis.2d 237, 259, 496 N.W.2d 191, 199 (Ct. App. 1992). The trial court's immediate instruction cured any impression the jurors may have formed based on this testimony. Thus, the testimony did not obscure a crucial issue in the case and we conclude that the real controversy has been fully tried in this case.

By the Court.—Orders affirmed.

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