COURT OF APPEALS
DECISION
DATED AND FILED

February 2, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1795 **Cir. Ct. No. 2004ME417**

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

IN THE MATTER OF THE MENTAL COMMITMENT OF VIRGIL D.:

ROCK COUNTY,

PETITIONER-RESPONDENT,

V.

VIRGIL D.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: JAMES E. WELKER, Judge. *Affirmed*.

¶1 DEININGER, J.[1] Virgil D. appeals an order extending his commitment under WIS. STAT. § 51.20 to the Rock County Department of Human

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2003-2004). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Services for mental health treatment. He cites a number of alleged but unobjected-to errors that he claims violated his due process right to a fair trial, and which, in his view, prevented the real controversy from being fully tried. Accordingly, he asks us to exercise our discretion under WIS. STAT. § 752.35 to reverse and order a new trial.

¶2 Virgil cites the following as having undermined the fairness of his trial: (1) comments made by the County's attorney during opening and closing that (a) suggested evidence not presented at trial would support an extension of Virgil's commitment, (b) vouched for the credibility of County witnesses, and (c) suggested jurors would be responsible for any harm Virgil might cause if his commitment were not extended; (2) testimony and argument noting that Virgil had chosen not to speak to an examining psychologist; and (3) testimony by the County's principal witness that referred to the hearsay conclusions of unnamed physicians in order to bolster the credibility of his own opinions.

¶3 After reviewing the trial transcript, we conclude that the matters Virgil cites neither rendered his trial unfair nor prevented the real controversy from being fully tried. Accordingly, we have not been persuaded that we should exercise our discretionary reversal authority under WIS. STAT. § 752.35.

BACKGROUND

¶4 As Virgil neared the end of an initial six-month commitment under WIS. STAT. § 51.20, the County petitioned to extend his commitment. During the initial commitment, Virgil was initially treated as an inpatient at the Mendota Mental Health Institute, later transferred to a community treatment setting and then returned to Mendota after making suicidal threats. The County presented three witnesses at the jury trial on its petition for extension: a psychologist, a

psychiatrist and a social worker who was Virgil's "case manager." Virgil did not testify or present any witnesses or other evidence.

¶5 The jury, after deliberating for less than a half-hour, unanimously found that (1) Virgil was mentally ill; (2) there was a substantial likelihood that he "would be a proper subject for commitment if [] treatment were withdrawn"; and (3) Virgil was "a proper subject for treatment." The jury having found the County had established the statutory grounds to extend Virgil's commitment, the circuit court entered an order extending the commitment for twelve months. Virgil appeals.

ANALYSIS

¶6 Virgil acknowledges that, because he did not make contemporaneous objections at trial regarding any of the matters he cites as grounds for reversal on appeal, his only avenue for relief is to persuade us to exercise our discretionary reversal authority under WIS. STAT. § 752.35. He also notes correctly that, because his claim is that "the real controversy has not been fully tried," ***id***., it is not necessary for him to convince us of a substantial probability of a different result on retrial. ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). Rather, given that Virgil was not prevented from presenting allegedly "crucial" evidence to the jury, he must convince us that the jury was permitted to hear inadmissible evidence or improper argument, that it received erroneous instructions, or that for some other reason, the true issues became obscured or confused, or that the jury's attention was diverted to extraneous or improper matters. *See* ***id***. at 20-22. Finally, we note that an appellate court should exercise its discretionary reversal authority sparingly and only in the most exceptional cases. *See* ***State v. Cuyler,*** 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶7 The first category of allegedly improper matters to come before the jury are statements by the corporation counsel during his opening and closing remarks to the jury that Virgil claims (1) alluded to additional, non-record evidence that would support an extension of Virgil's commitment, (2) vouched for the credibility of the County's witnesses, and (3) suggested jurors would be responsible for any harm Virgil might cause if his commitment were not extended. We consider below the specific statements Virgil complains of, their context and their apparent impact on the manner in which the issues were tried.

¶8 In his opening statement, the corporation counsel said this:

> But among the interest[s] which I feel compelled to try to serve is the interest of the efficiency of the Court and the respect for your time in not making a lengthy detailed trial that in my own judgment would be in excess of what would be reasonably necessary to allow you to understand and be satisfied to the required degree of proof.

In his closing, the County's counsel stated:

> This making of a closing argument is one of the two hardest parts of a trial like this for me for the same reasons that the hardest part which is analyzing and trying to get a feel for the case and deciding how much I can cut out and still provide you as a jury with the evidence that you need to do what I know is the right thing, as opposed to bringing in additional witnesses, going into details that don't really do anything to affect a reasonable person's common sense view of the evidence.
>
> ….
>
> The Court has read to you instructions that address the burden of proof which the County is required to meet. That is a judgment that is absolutely truly yours to make. I have to make a judgment so that I don't tie up even more of your time and the Court's time doing things that really aren't gonna (sic) help anybody and perhaps are just going to lead to unnecessary confusion.

Finally, counsel said this during his rebuttal argument:

> The evidence that I did present was certainly nowhere near as extensive as it could, but it was not as limited and meaningless as [opposing counsel] suggests….
>
> ….
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> Now, as [Virgil's counsel] has suggested to you, by closely examining [the psychologist]'s evaluation from June of 2004, in comparing it with his evaluation … done in November, the finding that [the psychologist] made that was very substantial was with regard to presenting a danger to or making other people afraid of danger. So there was something, and we have not presented to you evidence as to that incident.
>
> Now, I question would I really have made the record clearer for you if I'd have brought in more witnesses to more factual incidents when the law is—and the Judge will certainly correct me if I misspeak it—that for the purposes of this recommitment, you don't have to find that I have directly proven any specific acts of dangerousness.

¶9 Virgil did not move for a mistrial on account of any of these statements, nor did he even object to them when they were made. Thus, we need not and do not decide whether the cited remarks were improper. *See, e.g.*, ***State v. Davidson***, 2000 WI 91, ¶86, 236 Wis. 2d 537, 613 N.W.2d 606 (explaining that the failure to make a timely motion for mistrial "constitutes a waiver of … objections to the prosecutor's statements during closing arguments"). As for their impact on the issues to be decided by the jury, we conclude it was minimal. In the overall context of the County's opening and closing, the remarks were relatively brief and those made in rebuttal directly responded to Virgil's arguments regarding the lack of evidence of his dangerousness. Also, taken in context, the corporation counsel's comments were an attempt to explain his role in the commitment proceedings and his view that the County had presented sufficient evidence for jurors to find the extension criteria were met. We cannot conclude from the record before us that the cited comments misdirected jurors from evaluating the evidence the County presented at trial, or that jurors may have

found for the County because they believed the County had other, stronger evidence to support an extension than what was presented at trial.

¶10 Virgil next contends that the corporation counsel improperly vouched for the credibility of two County witnesses. Referring to the examining psychologist, who was the County's primary expert witness, counsel stated in closing argument, "I trust Dr. Kaye's professional judgment." Once again, Virgil's counsel did not object. We are satisfied counsel could properly have argued that, based on the examiner's professional qualifications presented at trial and the doctor's thorough examination of Virgil and his mental health history, counsel found the doctor's opinions worthy of belief and jurors should as well. In context, we conclude that is in fact what the corporation counsel argued. One sentence later, counsel told jurors, "I believe there's ample evidence here."

¶11 Counsel also said of the social worker/case manager, that "Mr. Bailey is pretty good at what he does." To the extent that this was indeed a comment on credibility (as opposed to a statement regarding the case manager's professional abilities, which is what the statement appears to be), the context of the remark shows counsel was attempting to dispel any impression that the case manager had ulterior motives for wanting Virgil's commitment extended. Immediately after saying that he "is pretty good at what he does," counsel explained the case manager's role and concluded with, "I think Mr. Bailey was credible in terms of what his motivation is." This argument is no different than one telling jurors, "Witness X had no reason to lie to you today because …," which would hardly be improper, let alone grounds for a new trial in the interest of justice.

¶12 As with the allegedly improper allusions to evidence not of record, we find the corporation counsel's two brief comments regarding the psychologist and the case manager did not prevent the relevant issues from being fully tried. The balance of the corporation counsel's argument directed jurors' attention to the evidence presented at trial, which counsel urged jurors to accept as sufficient proof of the extension criteria. We cannot conclude that the allegedly improper "vouching" so infected the proceedings that jurors were persuaded to find for the County, not because they believed its witnesses, but because the corporation counsel did.[2]

¶13 Finally, Virgil complains of the following statement by the corporation counsel during closing argument:

> Now, if [Virgil] succeeds in seriously injuring or killing himself, I think we have to feel a special responsibility to the degree that he has an illness and we have an effective way to help him and treat that illness, maybe not to cure it, but to treat it, and I think in terms of potential for dangerousness to others, that that is also something that we more than [Virgil] have to accept the responsibility for making hard choices.

We again look to context. Just prior to the above comments, counsel told jurors, "I have provided you with a very clear basis in a good conscience to find that [Virgil] would be a proper subject for commitment if his present treatment were withdrawn." This is appropriate argument as it directs jurors' attention to an issue they must decide and to the showing arguably made at trial regarding it.

[2] We also note, and others have observed, the mere fact that a prosecutor, or in this case, the corporation counsel, chose to file the action communicates to jurors that he or she believes the witnesses called to testify to the allegations in the complaint or petition. To state what is therefore self-evident, i.e., "I believe my witnesses," might be improper argument, but it is hardly the type of argument that merits reversal in the interest of justice.

¶14 The corporation counsel then explained the difficulty in attempting to persuade a mentally ill person to accept treatment when paranoia is a part of the illness, especially when it includes a belief that "medication [was] part of some conspiracy or some effort to do him harm." Counsel went on to say that none of the County's witnesses were angry with Virgil or held a "personal grudge" against him, followed by the quoted remarks that "*we*" (emphasis added), not the jurors, have a "special responsibility" to help treat Virgil's illness and reduce his potential for dangerousness to himself or others. In short, given the context and the use of the first-person pronoun, we find these remarks in the County's closing to be an explication of the County's role and interest in seeking to extend Virgil's involuntary treatment, not an attempt to tell jurors *they* would be responsible for whatever might follow if Virgil's commitment were not extended.

¶15 Next, Virgil complains that the examining psychologist told jurors that, six months earlier, at the time of his examination of Virgil for the initial commitment proceeding, Virgil was "electively mute," that is, he chose not to talk to the psychologist. In his closing argument, the corporation counsel also made a brief reference to the fact that, at that time, Virgil "refuse[d] to speak and attempt[ed] to remain mute." Relying on precedents interpreting the Fifth Amendment protection against self-incrimination, Virgil maintains that, like the State in a criminal prosecution, the County should not have informed jurors of Virgil's election to exercise his statutory right not to speak with the examiner. *See* WIS. STAT. § 51.20(9)(a)4 ("Prior to the examination, the subject individual shall be informed that his or her statements can be used as a basis for commitment, that he or she has the right to remain silent and that the examiner is required to make a report to the court even if the subject individual remains silent.")

¶16 Again, because Virgil objected to neither the examiner's testimony regarding his refusal to speak to the psychologist at the time of the original commitment proceedings, nor the County attorney's comment thereon during argument, we need not and do not decide whether it was error to permit such testimony or argument. For several reasons, we are confident that jurors were not misdirected by this testimony or argument into concluding that the extension criteria were met simply because they learned that Virgil had declined, six months earlier, to speak with the psychologist performing an examination for a different purpose. First, we note that the examiner, in response to a question from the corporation counsel, explained that a person's refusal to speak with an examiner is not necessarily evidence of mental illness: "And again, you know, it's sometimes hard to say if the person is refusing because of their legal rights or because they are angry or because they are so confused that you can't, and that's just interpretation by an examiner."

¶17 Second, the examiner testified that, at the time of the examination pertinent to the extension proceeding, which he had conducted about one month before trial for the purpose of evaluating Virgil's need for extended involuntary treatment, "this time [Virgil] was much more cooperative, and I had about an hour clinical interview with him." Thus, any negative inferences against Virgil jurors might have drawn from his refusal to speak to the examiner six months earlier were ameliorated, if not dispelled altogether, by the fact that Virgil had much more recently cooperated in an interview. Finally, the County did not in any way attempt to capitalize on Virgil's earlier silence or his failure to testify at trial by suggesting to jurors that Virgil's lack of cooperation or his failure to present a defense should be held against him. The corporation counsel, immediately after the brief reference in his closing argument to Virgil's refusal to speak, said this:

"[L]et there be no doubt [that] the County is the only side with the burden and with an obligation to speak, and I don't want to say anything that would indicate that I don't think that is as it should be…."

¶18 In short, we find no basis in the present record from which we could conclude that the two brief mentions of Virgil's silence during an examination six months earlier prevented the real controversy from being fully tried.

¶19 Virgil's final complaint is that the examining psychologist improperly bolstered his own testimony and opinions by giving the following response when asked to state his opinion "as to [Virgil]'s mental condition":

> I believe that, first of all, that he's psychotic, which means that he has very atypical reality testing and judgment. The way he thinks and understands things is very different than what an average person would. And that the[se] symptoms best fit the category described as paranoid schizophrenia and, indeed, that's a diagnosis he has been—carried over 20 years and has been made by a large number of doctors over at least six or seven hospitalizations in the past.

Later in his testimony, the examiner also noted that "in fact, his treating physicians have not released him yet from Mendota, which is a sign that they don't think that he's ready to go into the community, let alone get off commitment."

¶20 As with all of Virgil's other complaints, no objection was made to either response, and thus, the circuit court was not given the opportunity to declare the testimony hearsay, to strike it or to instruct the jury to disregard it. During cross-examination of the psychologist, however, when the examiner acknowledged he was "not present for any" of several incidents he had described from his notes, Virgil's counsel requested "a curative instruction with regard to the

use of hearsay evidence in the forming of the doctor's opinion and what use is proper for the jury to make of those things that Dr. Kaye just testified about." The court obliged, instructing jurors as follows:

> Members of the jury, this witness has testified to certain things that have happened in the hospital or that he believes have happened in the hospital having to do with suicide attempts, threatening others. That evidence has been received because this witness relied on those statements in the records for purposes of his opinion.
>
> You are not allowed, however, to accept this as proof that those things did happen or as to the truth of those assertions because this witness has only hearsay knowledge of what's in the records, so these are—that evidence is received not for the truth of the event, but only for the fact that this witness relied on those records in forming his opinion.

¶21 We conclude the foregoing instruction served to make jurors aware that they were not to accept as true any "assertions" from the psychologist as to matters he had obtained solely from reviewing Virgil's records. We note further that other, non-hearsay testimony also "bolstered" the psychologist's opinion regarding Virgil's mental illness, rendering the potential impact of the hearsay opinions of "unnamed others" of little or no consequence. The County presented testimony from a psychiatrist who had recently evaluated Virgil's "medication competency." *See* WIS. STAT. § 51.61(1)(g)3. The psychiatrist was asked for his opinion regarding Virgil's "mental condition," and he responded that Virgil suffered "from a condition known as paranoid schizophrenia," just as the psychologist had concluded and testified. Also, Virgil's case manager testified that, in his position with the County's "[c]ommunity [s]upport [p]rogram," his role was to "work with mentally ill clientele," and that he had worked with Virgil as a client in the program for the past ten years, permitting a reasonable inference that Virgil suffered from a chronic or long-term mental illness.

¶22 In short, the County presented ample, non-hearsay evidence that Virgil was mentally ill, a fact that Virgil did not seriously contest at trial. During closing argument, Virgil's counsel vigorously challenged the County's proof on "dangerousness and treatability." As to the first verdict question ("Is Virgil … mentally ill?"), however, counsel told jurors simply, "You heard a lot of evidence on that and you also heard that it's Virgil's opinion that he is not mentally ill, and that's Virgil's opinion and he's entitled to it. It's the doctors' opinion that he is mentally ill. I'll leave that up to you to decide." Although not an outright concession of the issue, it was at best one step removed. Accordingly, we cannot conclude that the examining psychologist's two passing references to the conclusions of other mental health professionals that Virgil was mentally ill prevented the real controversy from being fully tried.

¶23 In conclusion, we acknowledge that it may be possible for an amalgam of unobjected-to errors or improprieties to warrant a reversal under WIS. STAT. § 752.35, even when no single one does so alone. That is not the case here, however. Having reviewed the entire trial record, we are satisfied that none of the matters Virgil cites on appeal, singly or in concert, resulted in the real controversy over whether grounds existed for extending Virgil's commitment not being fully tried. As we noted at the outset of our analysis, an appellate court should exercise its discretionary reversal authority sparingly and only in the most exceptional cases. *See* ***Cuyler,*** 110 Wis. 2d at 141. This is not such a case.

CONCLUSION

¶24 For the reasons discussed above, we affirm the appealed order.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.