COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP491 **Cir. Ct. No. 2007CI2**

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

IN RE THE COMMITMENT OF MIGUEL TANON:

STATE OF WISCONSIN,

PETITIONER-APPELLANT,

V.

MIGUEL TANON,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: DAVID T. FLANAGAN, Judge. *Affirmed.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. The State appeals an order granting Miguel Tanon a new trial in a Chapter 980 commitment case. We affirm the order for the reasons discussed below.

BACKGROUND

¶2 Tanon was convicted in 1994 of seven counts of varying degrees of sexual assault of a child involving six different girls between the ages of twelve and fifteen, committed over a period of two years. Tanon was paroled in 2005, but his parole was revoked the following year based upon instances of inappropriate sexual conduct with two more women. The State initiated Chapter 980 proceedings in 2007 to commit Tanon as a sexually violent person before he could be released again.

¶3 At trial, the State presented testimony from Tanon's parole agent about several of Tanon's underlying convictions and the incidents that had led to revocation, as well as testimony from a social worker about Tanon's participation in a prison treatment program. We will not detail that testimony here because it is not at issue on the present appeal. The testimony that is at issue—which the circuit court determined was improperly admitted and warranted a new trial—came from the State's expert witnesses, Dr. Janet Hill and Dr. Richard Ellwood.

¶4 Tanon challenges three specific portions of the expert testimony.[1] First, both Hill and Ellwood informed the jury that individuals committed under Chapter 980 are afforded annual reviews of their commitments to determine

[1] He raised an additional challenge in the trial court regarding the factual accuracy of some of the testimony, which he has since withdrawn.

whether they could be safely released. Second, both Hill and Ellwood informed the jury that Tanon would have access to a superior treatment program if he were committed that would not be available to him if he were not committed. And third, Hill informed the jury that she had been appointed to examine Tanon because he was one of "a certain few individuals" referred by an End of Confinement Review Board.

¶5 Because Tanon made no contemporaneous objection to these portions of the testimony, he based his motion for a new trial in the interest of justice, arguing that the testimony had prevented the real controversy from being fully tried. He produced statistical evidence at the postcommitment hearing showing that only 10% of people committed under Chapter 980 have secured release, and that the average length of commitment for those released is 10.6 years. The trial court granted Tanon's motion for a new trial and the State appeals.

STANDARD OF REVIEW

¶6 A trial court's decision whether to grant a new trial under WIS. STAT. § 805.15(1) (2007-08)[2] is discretionary in nature. *See* ***Goff v. Seldera***, 202 Wis. 2d 600, 614, 550 N.W.2d 144 (Ct. App. 1996). Accordingly, we will look for reasons to sustain the trial court's decision and will set it aside only if the trial court fails to provide a reasonable explanation for its decision or grounds the decision upon a mistaken view of the evidence or an erroneous view of the law.

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

Sievert v. American Family Mut. Ins. Co., 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct. App. 1993).

DISCUSSION

¶7 WISCONSIN STAT. § 805.15(1) permits the trial court to grant a new trial in the interest of justice. The interest of justice may warrant a new trial when the jury's findings are against the great weight and clear preponderance of the evidence; when the real controversy has not been fully tried; or when there has been a miscarriage of justice. ***Id.***, 180 Wis. 2d at 431; ***State v. Harp***, 161 Wis. 2d 773, 779, 469 N.W.2d 210 (Ct. App. 1991). In order to establish that the real controversy has not been fully tried, a party must show "that the jury was precluded from considering important testimony that bore on an important issue or that 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) (citation omitted). We are satisfied that the trial court made a reasonable decision applying the proper legal standard to the facts of record when it determined that the real controversy had not been fully tried.

¶8 First, the court agreed with Tanon that the challenged expert testimony about annual reviews for people committed under Chapter 980 was "completely immaterial" to the issue actually before the jury, and the State does not argue otherwise on appeal. The court noted that the annual review testimony erroneously suggested that a commitment "was a flexible circumstance, with the potential for modification readily available," contrary to the statistical evidence showing that a commitment is likely to result in a "very significant period of additional custody." The court reasoned that this testimony was prejudicial

because it invited the jury to regard less seriously the significance of their decision.

¶9 With respect to the suggestions from the State's experts that there was a superior treatment program available only to those committed under Chapter 980, the court noted that not only was the information immaterial, it was also unclear that Tanon himself would actually have an opportunity to participate in that program. The court also pointed out that the State had emphasized this irrelevant information in its closing by arguing that the case was about ensuring that Tanon got the treatment he needs. Finally, the court determined that Hill's testimony about the mechanism for her appointment was improper because it could have given the jury the impression that other authorities beside Hill had also decided that Tanon should be committed. Although the court viewed that testimony as less consequential because it was an isolated reference, taken in conjunction with the other improper testimony, it concluded that Tanon had been prejudiced by having the real issue clouded.

¶10 The State disputes the prejudicial effect of the expert testimony, and offers several theories as to why the circuit court should have reached a different decision. It first attempts to distinguish a line of cases regarding the prejudicial effect of mentioning the possibility of an appeal in a criminal case from the situation here, where the court similarly reasoned that mentioning the possibility of annual reviews may have undermined the seriousness with which the jury needed to regard its decision. The State next dismisses the significance of the statistical data regarding the average times people committed under Chapter 980 spend in custody. The State then argues that since the challenged testimony about annual reviews and treatment programs was irrelevant to the actual question before the jury—namely whether Tanon was a sexually violent person—it could

have had no impact on the jury's verdict. Under our standard of review, we cannot say that the circuit court erroneously exercised its discretion in considering and weighing each of these factors in Tanon's favor.

¶11 The State next contends that the interest of justice test should not have been applied here in the first place, suggesting that a better mechanism for review would have been an allegation that counsel provided ineffective assistance by failing to raise timely evidentiary objections to the dubious testimony. While it may be true that the defendant could have used an ineffective assistance of counsel claim to bring waived evidentiary errors before the court, the State has provided no authority to suggest that relief from such waived errors cannot also be sought under the interest of justice standard.

¶12 Finally, the State directs our attention to a recently decided case, ***State v. Kaminski***, 2009 WI App 175, ___ Wis. 2d ___, ___ N.W.2d ___, to support its position that a Chapter 980 expert's references to the annual review process and to treatment available to committees do not warrant granting a new trial in the interest of justice. It is true that the same two expert witnesses testified for the State in ***Kaminski*** as in this case, and that their testimony regarding the annual review process and a specific treatment program was substantially similar to that given here. ***Kaminski*** is not on point with this case procedurally, however, because there this court was being asked to exercise our own independent authority to grant a new trial under WIS. STAT. § 752.35. As we have explained above, here we are reviewing the trial court's decision to grant a new trial under the erroneous exercise of discretion standard. This is a significant distinction. We give great deference to the trial court's decision to grant a new trial because it is in the best position to observe and evaluate whether such relief is appropriate. ***Goff***, 202 Wis. 2d at 614.

¶13 Here, the trial court reasoned that the cumulative impact of all the improperly received evidence needed to be viewed in the context of a close case. It noted that Tanon had provided an expert witness whose testimony was, in the court's view, more reasonable and credible than that of the State's witnesses, and that the defendant had demonstrated "a truly unusual level of success" during his parole supervision. In addition, the State here had explicitly argued to the jury near the very end of its closing that: "This [case] is about ensuring that Mr. Tanon gets the treatment that he obviously needs and while at the same time protecting the public." This reinforcement of the improperly admitted testimony regarding a treatment option that would be available to Tanon only if he was committed increased the likelihood of confusing the issue before the jury. In sum, the trial court was in the best position to make an assessment of how the challenged testimony would have affected the trial, and we cannot conclude that it erroneously exercised its discretion when it ordered a new trial.

By the Court.—Order affirmed.

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