COURT OF APPEALS DECISION DATED AND FILED

July 21, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP2008

Cir. Ct. No. 2007CI1

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

IN RE THE COMMITMENT OF ERIC J. DAHL:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ERIC J. DAHL,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: JAMES K. MUEHLBAUER, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. A jury determined that Eric J. Dahl was a sexually violent person within the meaning of WIS. STAT. ch. 980 (2007-08)[1] and the trial court ordered him committed. Dahl seeks a new trial. He claims various evidentiary errors prevented the real controversy from being tried and that two errors merit a new trial in the interest of justice. For the following reasons, we affirm the judgment.

¶2 The predicate offense on Dahl's commitment was his 1997 convictions for second-degree sexual assault of a child and incest with a child. He was sentenced to ten years in prison on each conviction, consecutive. The court also stayed the incest sentence and ordered Dahl to serve ten years' probation consecutive to the sexual assault sentence. Denied presumptive mandatory release, he served the full sexual assault sentence.

¶3 The State filed the commitment petition just before Dahl was set to discharge from his sentence. The jury found him sexually violent and the court ordered him committed under WIS. STAT. ch. 980. Dahl appeals. Additional facts will be supplied as needed.

¶4 Commitment as a sexually violent person requires that an offender was convicted of a sexually violent offense, currently has a mental disorder and is dangerous to others because the mental disorder makes it more likely than not that he or she will engage in one or more future acts of sexual violence. *See* WIS JI—CRIMINAL 2502. Only the third is at issue here.

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

¶5 Dahl first contends that the trial court made two erroneous evidentiary rulings that changed the course of the trial: (1) it permitted the State to elicit opinions expressed in department of corrections (DOC) records regarding Dahl's risk to reoffend and (2) it excluded evidence regarding the effect of supervision on the risk he posed. We discuss them in turn.

¶6 We will affirm a trial court's evidentiary decisions if they reflect a proper exercise of discretion. *See* ***State v. Shomberg***, 2006 WI 9, ¶10, 288 Wis. 2d 1, 709 N.W.2d 370. This is a highly deferential standard which requires the trial court to correctly apply accepted legal standards to the facts of record and to reach a reasonable conclusion by a demonstrated rational process. *See* ***id.***, ¶11.

¶7 The trial court granted Dahl's motion in limine to prohibit anyone but a qualified expert from rendering an opinion on the risk he posed for future sexual violence. Lawrence Stahowiak, the offender records supervisor at Oshkosh Correctional Institution, testified about Dahl's uncooperativeness with the sex offender treatment program (SOTP) while at that facility. Over Dahl's objection, the court allowed Stahowiak to read from a 2003 Parole Commission Presumptive Mandatory Release Review report regarding Dahl's presumptive release date. The excerpt read: "As … you're an untreated sex offender, you pose an unreasonable risk to the community."

¶8 In a similar vein, Emily Kerr, Dahl's probation officer, read from three different reports relating to Dahl's prison treatment history. Reading from a sex offender assessment report prepared shortly after Dahl's 1997 entry into the prison system, Kerr read—again over Dahl's objection—that a psychological services associate noted Dahl's refusal to cooperate with treatment and that he was "perceived as a high threat to the community." Kerr also read a therapist's

explanation in a 1998 report that part of the reason Dahl was terminated from the SOTP was that the therapist considered Dahl "to be a high risk to reoffend, and not appropriate for placement at a minimum security facility." The third report from which Kerr read was the 2003 Parole Commission Presumptive Mandatory Release Review report from which Stahowiak had read. Kerr read to the jury the same excerpt which noted that Dahl posed an unreasonable risk to the community.

¶9 Dahl argues that his successful motion in limine should have precluded the admission of the DOC record information because it amounted to expert opinions regarding his risk assessment and, as expert opinion, it was not properly qualified.[2] We disagree.

¶10 The trial court explained that it granted Dahl's motion to prevent unqualified persons from testifying on risk assessment—Dahl's current dangerousness—but viewed the DOC records simply as background information about parole commission actions and Dahl's treatment and correctional history. Trial courts have discretion to admit evidence for background purposes. *See* ***State v. Shillcutt***, 116 Wis. 2d 227, 236-37, 341 N.W.2d 716 (Ct. App. 1983), *aff'd*, 119 Wis. 2d 788, 350 N.W.2d 686 (1984). The court also stated that, because "not by any stretch of the imagination" was the evidence an opinion as to Dahl's current state but "just what happened back then," it concluded the evidence was not

[2] The trial court overruled Dahl's objections to the statement Stahowiak read and to the first one Kerr read. The State asserts that Dahl waived appellate review of his objection to the other two statements by not objecting to them. *See* ***State v. Pletz***, 2000 WI App 221, ¶21, 239 Wis. 2d 49, 619 N.W.2d 97. That is the general rule but under these facts we agree with Dahl that counsel need not object when the point at issue is one on which the court has just ruled adversely. *See* ***State v. Matson***, 2003 WI App 253, ¶32, 268 Wis. 2d 725, 674 N.W.2d 51.

unfairly prejudicial. *See* WIS. STAT. § 904.03 (relevant evidence may be excluded if probative value substantially outweighed by danger of unfair prejudice).

¶11 We agree. The first of these evaluations occurred upon Dahl's entry into prison in 1997. The others—the most recent of which predated the trial by five years—set forth his documented history of SOTP participation in the correctional setting. They made no projection of future dangerousness. The trial court applied accepted legal standards to the facts of record and reached a reasonable conclusion by a demonstrated rational process. We see no error.

¶12 Dahl next contends that the trial court wrongly precluded evidence of the effect of intense supervision on the risk to reoffend. As noted, Dahl was on probation for the imposed-and-stayed ten-year prison sentence on the incest conviction. He sought to admit evidence that he currently was on probation and that the experts in the case cited supervision as a factor relevant to the assessment of risk. Dahl argued that disallowing the conditions of probation kept relevant information from the jury.

¶13 The court ruled that the fact of Dahl's probation was admissible but, under ***State v. Budd***, 2007 WI App 245, 306 Wis. 2d 167, 742 N.W.2d 887, not the conditions of his probation. In that case, Budd was incarcerated after being convicted of a sexually violent offense. ***Id.***, ¶2. Shortly before his release date, the State filed a WIS. STAT. ch. 980 petition to detain him. The State's expert testified at the probable cause hearing that, based on her evaluation of him, Budd was more likely than not to reoffend. The State moved to bar evidence at trial that Budd would be under supervision following his release from prison. The court of appeals granted the motion, holding that, in line with its prior decision in ***State v. Mark***, 2005 WI App 62, ¶47, 280 Wis. 2d 436, 701 N.W.2d 598, both the fact and

the terms of supervision were irrelevant to whether Budd was a sexually violent person under WIS. STAT. § 980.01(7) and therefore was inadmissible. ***Budd***, 306 Wis. 2d 167, ¶¶13-14. On appeal, the supreme court affirmed ***Mark***. ***State v. Mark***, 2006 WI 78, 292 Wis. 2d 1, 718 N.W.2d 90.

¶14 Dahl attempts to distinguish ***Budd*** and ***Mark***. He claims they address evidence of supervision as an additional factor outside the actuarial risk assessment tools, where here the experts considered whether supervision impacts recidivism rates. He notes, for instance, that the report of psychologist Dr. Sheila Fields, one of the State's expert witnesses, observed that, in one recent study, "the presumably much tighter community supervision was likely the major contributor" for a drop in recidivism rates. Dahl contends he thus should have been allowed to explore the accuracy the actuarial tools used to assess his future risk.

¶15 We disagree for two reasons. First, Dahl does not say what admissible evidence he was precluded from putting before the jury. Three experts—two for the State, one Dahl's—submitted reports and testified. Fields testified that, although the research is "mixed," the "speculation" is that the drop in sexual recidivism base rates may be linked to more intense supervision. Dr. Cynthia Marsh, the State's other expert, testified that the impact of "dynamic" variables like supervision, treatment and an individual's support system on risk assessment merit further study, but that it remains a developing science. Dahl's own witness, Dr. Craig Rypma, likewise testified that the research "is beginning to talk about" dynamic variables. In short, all indicated that the decades-old statistical data in currently used actuarial tools are undergoing review, but none stated that definitive new empirical data was available.

¶16 Second, of the three scholarly articles Dahl cites in his brief that critique current actuarial instruments, two were written in 2009—after his trial. The third, written in 2003, indicates that the development of instruments that take into account improvements in treatment and supervision are only experimental. Continuing study in this area may lead to changes in analysis and the tools used to perform it. At this time, however, ***Budd*** and ***Mark*** remain good law. The trial court properly exercised its discretion.

¶17 Dahl next asks that we exercise our discretionary reversal authority because he claims two evidentiary errors prevented the real controversy from being tried. First, two of the State's experts testified under direct examination about the percentage of WIS. STAT. ch. 980 evaluations in which they determined that the subject met the commitment criteria. One found that the criteria were met approximately twenty-five percent of the time; the other that the criteria were met in approximately seventy percent of her evaluations. Second, a prosecution witness read an excerpt of the sentencing judge's comments in which he called Dahl's underlying offense "an aggravated and vicious, vicious act."

¶18 It is undisputed that Dahl failed to object to either of these two claims. He therefore has forfeited the right to their review. *See* ***State v. Romero***, 147 Wis. 2d 264, 274, 432 N.W.2d 899 (1988). Nonetheless, we may reverse in the interest of justice when the record indicates that the real controversy has not been fully tried or that it is probable that justice has miscarried. WIS. STAT. § 752.35. We exercise the power of discretionary reversal "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶19 Dahl contends the real controversy was not fully tried because the improperly received evidence clouded a crucial issue in the case. *See* ***State v.***

Darcy N.K., 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998). Accordingly, we will consider whether the errors Dahl asserts would have clouded the issue of whether he was more likely than not to commit future acts of sexual violence if released.

¶20 Dahl argues that Fields' and Marsh's testimony about their commitment recommendation percentages impermissibly bolstered their credibility before he attacked it. *See* ***State v. Johnson***, 149 Wis. 2d 418, 427, 439 N.W.2d 122 (1989) (a witness' credibility cannot be bolstered until it is attacked). Dahl also argues that the percentage evidence unfairly implied that he was among the most dangerous sex offenders evaluated. We disagree.

¶21 The statistical information came in with background information as to the psychologists' experience and credentials. Further, had only the "twenty-five percent" expert testified, the jury might have fairly inferred that Dahl fell into the group of the most dangerous of sex offenders. The two experts gave wide-ranging percentages, however, making such an inference unlikely. In addition, Dahl's expert testified that he found that those he evaluated met the criteria in approximately sixty-one out of one hundred and fifteen cases, or about fifty-three percent of the time.[3] As one of Dahl's trial strategies was to show that the experts were engaged in an inexact science, it is equally plausible that these differences among the percentages worked to his advantage. We conclude that the percentage evidence did not cloud the issue of Dahl's likelihood to reoffend.

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[3] Dahl asserts that he elicited his expert's percentage testimony only after the State "went down this improper path first."

¶22 Dahl next complains that the jury improperly heard a State's witness read an excerpt of the sentencing judge's comments calling the underlying offense "an aggravated and vicious, vicious act." Without more, allowing this evidence might have been treading close to the edge of propriety. However, there is more.

¶23 By this time, the jury knew that Dahl had sexually assaulted his daughter from the time she was a few months old until she was two, when he forced her to perform fellatio on him while she resisted, crying "daddy, daddy." The jury at this 2008 trial likely could differentiate between the "then" of the 1997 assault and the "now" of the 2008 question of his likelihood of reoffending. And again, Dahl did not object. For all of these reasons, we conclude hearing the 1997 sentencing comments did not cloud the issue of whether he was more likely than not to commit future acts of sexual violence if released. *See* ***Darcy N.K.***, 218 Wis. 2d at 667. Singly or together, these claimed errors do not merit reversal.

By the Court.—Judgment affirmed.

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