COURT OF APPEALS
DECISION
DATED AND FILED

April 7, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0668

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

IN RE THE COMMITMENT OF STANLEY MARTIN:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STANLEY MARTIN,

DEFENDANT-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. Stanley Martin was committed to a mental health facility as a sexually violent person pursuant to Chapter 980, STATS. Martin appeals from the trial court's order of commitment and from the trial court's order denying his post-verdict motions. Martin argues that his commitment should be

vacated because: (1) the expert witnesses allegedly misled the jury as to the proper standard by which Martin's status as a sexually violent person was to be judged; (2) the trial court allegedly erred in limiting Martin's cross-examination of an expert witness; and (3) Chapter 980 allegedly violates the Ex Post Facto Clause, the Double Jeopardy Clause, the Due Process Clause and the Equal Protection Clause of the United States Constitution. We reject Martin's arguments and affirm his commitment.

BACKGROUND

On June 11, 1996, less than 90 days before Martin's mandatory release date for his conviction of second-degree sexual assault, the State filed a petition under § 980.01(7), STATS., alleging that Martin was a sexually violent person. The trial on the petition began on October 30, 1996. The State presented expert testimony that Martin suffered from two mental disorders, paraphilia and antisocial personality disorder, which predisposed Martin to commit sexually violent acts.[1] The expert opinions were based upon, among other things, Martin's history of violent sexual behavior towards women, his failure to participate in sexual offender therapy, and interviews of Martin. The jury found that Martin was a sexually violent person, and the trial court ordered Martin committed.

DISCUSSION

[1] The essential feature of antisocial personality disorder is a pervasive pattern of disregard for, and violation of, the rights of others. *See* ***State v. Post***, 197 Wis.2d 279, 295–296 n.3, 541 N.W.2d 115, 119 n.3 (1995). Paraphilia may be characterized by recurrent, intense sexually arousing fantasies, sexual urges, or behaviors, generally involving children or other non-consenting persons. *See* ***id.***, 197 Wis.2d at 296 n.4, 541 N.W.2d at 119 n.4.

Martin argues that the State's expert witnesses misstated the standard by which his status as a sexually violent person was to be evaluated and thereby misled the jury as to the appropriate standard. He argues that because the jury did not use the proper standard, the real issue has not yet been tried and he is entitled to a new trial. *See* § 752.35, STATS. (court of appeals may remit a case to the trial court for a new trial if it appears from the record that the real controversy has not been fully tried).

Section 980.06(1), STATS., provides:

> If a court or jury determines that the person who is the subject of a petition under s. 980.02 is a sexually violent person, the court shall order the person to be committed to the custody of the department for control, care and treatment until such time as the person is no longer a sexually violent person.

A sexually violent person is "a person who has been convicted of a sexually violent offense … 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." Section 980.01(7), STATS. A mental disorder is defined as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." Section 980.01(2), STATS.

At trial, both experts testified that Martin suffered from both paraphilia and antisocial personality disorder, and that he was substantially likely to commit future acts of sexual violence. Martin's counsel then asked each of the experts how they used the statutory phrase "substantial probability" when they formed their opinions about Martin. One of the experts responded that Martin was "more likely than not to commit another offense," and that there was, "at the very

least," a fifty-percent chance that Martin would reoffend. The other expert stated that he used the phrase to mean at least "more likely than not," but that he usually used the phrase to mean "much more likely than not." He also testified that Martin was much more likely than not to reoffend.

Martin alleges that this testimony misled the jury as to the legal standard reflected by the phrase "substantial probability." We disagree. The experts did not provide a legal definition for the phrase "substantial probability," but rather explained how they used that term in expressing their opinions about Martin. Moreover, the jury was not bound by the opinions expressed by the experts. *See* ***State v. Post***, 197 Wis.2d 279, 305–306, 541 N.W.2d 115, 123 (1995) (statutory terms have legal, not medical, function, and the jury is not bound by medical labels, definitions, or conclusions as to what satisfies statutory terms). Martin made this very point in his cross-examination of one of the experts, when he elicited testimony that the phrase "substantial probability" was not a psychological term, but rather a legal term. Martin also addressed the legal standard reflected by the phrase "substantial probability" in his closing argument.

The jury instructions provided the jury with the legal standards by which it was to determine whether Martin was a sexually violent person. The jury was instructed in both the preliminary and the final instructions that it was not bound by the medical labels, definitions, conclusions or opinions offered by the experts. Martin does not challenge the jury instructions. We therefore reject Martin's argument that the jury was misled as to the standard by which it was to judge his status as a sexually violent person.

Martin next argues that the trial court erred in limiting his cross-examination of one of the State's expert witnesses. Martin contends that his

intended line of questioning would have revealed weaknesses in the method that the expert used to diagnose him, and that the trial court erred in prohibiting his line of questioning because it would have elicited relevant impeachment evidence.

Trial courts are granted broad discretion in determining whether to admit or exclude proffered evidence. ***State v. Larsen***, 165 Wis.2d 316, 319–320, 477 N.W.2d 87, 88 (Ct. App. 1991). Our review is limited to determining whether the trial court erroneously exercised this discretion. ***Id.***, 165 Wis.2d at 320 n.1, 477 N.W.2d at 89 n.1. We will not overturn a trial court's evidentiary ruling unless there was no reasonable basis for it. *See* ***State v. McConnohie***, 113 Wis.2d 362, 370, 334 N.W.2d 903, 907 (1983).

Both experts testified that they based their opinions that Martin was likely to reoffend, in part, upon the fact that he met several risk factors that are predictive of recidivist behavior. Martin attempted to cross-examine one of the experts about the reliability of one of the risk factors that the experts considered. The trial court precluded Martin from this line of questioning, however, because both experts testified that the risk factor at issue did not apply to Martin. Martin asserts that this was error because he was attempting to impeach the experts by challenging the method by which they formed their opinions regarding Martin.

We are unable to reach the merits of this issue because Martin failed to make an offer of proof in the trial court. There is nothing in the record from which we can determine whether Martin's line of questioning would have elicited relevant impeachment evidence. Martin has, therefore, waived the issue. *See* § 901.03(1)(b), STATS. (error may not be predicated upon a ruling excluding evidence unless the substance of the evidence was made known to the judge by offer or was apparent from the context within which the questions were asked);

State v. Hoffman, 106 Wis.2d 185, 217–218, 316 N.W.2d 143, 160 (Ct. App. 1982) (failure to make an offer of proof results in waiver).

Further, Martin was permitted to ask several other questions which elicited testimony that significantly challenged the experts' use of risk factors in forming their opinions about Martin. For example, one expert testified that "there are many things in those instruments and predictive studies [involving risk factors] that are open to question." Martin also elicited expert testimony that the use of risk factors was not a precise system, that the risk-factor analysis used for Martin had not yet been published in the professional literature for peer review, and that there were difficulties in evaluating the reliability of the risk factors. Therefore, the trial court's decision to limit Martin's cross-examination with respect to the risk factor that did not apply to him did not prejudice Martin because it did not prevent him from challenging the experts' use of risk factors. Thus, we reject Martin's assertion of error. *See* § 901.03(1), STATS. (error may not be predicated upon the exclusion of evidence unless a substantial right of the party is affected).

Martin's final argument is that his commitment should be vacated because Chapter 980 is unconstitutional. He asserts that Chapter 980 violates the Ex Post Facto Clause, the Double Jeopardy Clause, the Due Process Clause and the Equal Protection Clause of the United States Constitution. Martin concedes, however, that his constitutional attacks are foreclosed by controlling authority.

In ***State v. Carpenter***, 197 Wis.2d 252, 541 N.W.2d 105 (1995), the Wisconsin Supreme Court held that Chapter 980 is not an ex post facto law, and that it does not violate double jeopardy. *See* ***id.***, 197 Wis.2d at 271–274, 541 N.W.2d at 112–114. In ***State v. Post***, 197 Wis.2d 279, 541 N.W.2d 115 (1995), the supreme court held that Chapter 980 comports with both due process and equal

protection. *See* ***id.***, 197 Wis.2d at 301–317, 330, 541 N.W.2d at 122–128, 133. We therefore reject Martin's constitutional arguments.

By the Court—Orders affirmed.

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