COURT OF APPEALS
DECISION
DATED AND FILED

May 6, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1129

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

IN RE THE COMMITMENT OF FRANK A. NORMINGTON,

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

FRANK A. NORMINGTON,

RESPONDENT-APPELLANT.

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

Before Dykman, P.J., Eich and Deininger, JJ.

PER CURIAM. Frank A. Normington appeals an order committing him to the custody of the Department of Health and Family Services for care and treatment until such time as he is no longer a sexually violent person. Normington claims: (1) he was deprived of due process and his right to an impartial jury when

the trial court refused to strike several venirepersons for cause; (2) the trial court erroneously exercised its discretion by admitting the testimony of an expert witness who relied on a confidential presentence investigation report for her evaluation; (3) the trial court erroneously exercised its discretion by admitting the testimony of an expert witness absent a statistically validated foundation for the expert's opinion; (4) the trial court's refusal to instruct the jury that the State needed to prove an "extreme likelihood" of reoffense deprived him of due process and equal protection of the law; and (5) there was insufficient evidence to support the verdict even under the instruction given. We conclude that: (1) Normington has failed to show manifest bias on the part of the jurors who sat on his jury, and he waived any objection to the venirepersons against whom he exercised preemptory challenges; (2) the release of the presentence investigation report prior to trial provided a reasonable basis for the trial court's decision not to strike testimony based upon the report; (3) the trial court properly determined that arguments as to the scientific validity of the expert's opinion went to the weight rather than the admissibility of the expert's testimony; (4) the trial court's instruction was constitutional and a proper exercise of discretion; and (5) the evidence was sufficient to support the verdict. Accordingly, we affirm.

BACKGROUND

On March 13, 1977, Normington was convicted of enticing a child for immoral purposes after he took a four-year-old girl on a picnic, then spanked her bare bottom and inserted his finger into her vagina, causing her to scream, cry, and bleed. On March 25, 1984, Normington was convicted of cruel maltreatment of a child after he hit and bruised the face of his six-year-old daughter, directed her

to lie down with him, and rubbed her vaginal area.[1] On November 7, 1990, Normington was convicted of first-degree sexual assault of a child for spanking the bare bottom of his three-year-old daughter and then inserting his finger into her vagina, causing her to bleed. Pursuant to a plea agreement on the last offense, the trial court dismissed and read in an additional charge of first-degree sexual assault of a child based upon Normington's insertion of his finger into the vagina of another four-year-old girl who lived next door to him, also after spanking her. On October 2, 1997, within ninety days of Normington's release from his sentence on the most recent sexual assault conviction, the State filed a petition alleging that Normington was a sexually violent person eligible for commitment under ch. 980, STATS. After a jury found Normington to be sexually violent, the trial court ordered him committed to the custody of the Department of Health and Family Services for care and treatment. Additional facts relevant to each issue Normington raises on appeal will be set forth in the discussion below.

STANDARDS OF REVIEW

The trial court has discretion to determine whether a prospective juror is biased and should be removed for cause, *see* ***State v. Ferron***, 219 Wis.2d 481, 499, 579 N.W.2d 654, 661, *reconsideration denied,* 220 Wis.2d 369, 585 N.W.2d 160 (1998); to determine the admissibility of evidence, *see* ***State v. Jenkins***, 168 Wis.2d 175, 186, 483 N.W.2d 262, 265 (Ct. App. 1992); and to frame the instructions for the jury, *see* ***Buel v. La Crosse Transit Co.***, 77 Wis.2d 480, 492, 253 N.W.2d 232, 237 (1977). We will sustain discretionary acts by the trial court so long as it "examined the relevant facts, applied a proper standard of

[1] The conviction was based upon a single incident, although the daughter testified that the molestation occurred regularly from the time she was three to seven years old.

law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Modica v. Verhulst***, 195 Wis.2d 633, 650, 536 N.W.2d 466, 474 (Ct. App. 1995). However, we will independently determine whether the trial court exercised its discretion under an erroneous view of the law, *see* ***State v. Keith***, 216 Wis.2d 61, 69, 573 N.W.2d 888, 893 (Ct. App. 1997), *review denied,* 217 Wis.2d 518, 580 N.W.2d 689 (1998); or whether any of its determinations deprived the defendant of his constitutional rights, *see* ***State v. Randall***, 222 Wis.2d 53, 60, 586 N.W.2d 318, 321 (Ct. App.) *review denied,* 222 Wis.2d 674, 589 N.W.2d 628 (1998). We will review the evidence supporting a jury verdict in the light most favorable to the verdict, and we will uphold the verdict if there is any credible evidence, or reasonable inference therefrom, upon which the jury could have based its decision. *See* ***id.***

ANALYSIS

Impartiality of Jurors

Normington asserts that the trial court violated his statutory right to an impartial jury by failing to strike a number of potential jurors for cause. *See* § 805.08(1), STATS.; *see also* § 980.05(1m), STATS., (guaranteeing the subject of a ch. 980 petition all constitutional rights which would be available to a defendant in a criminal proceeding); U.S. CONST. amend. VI; WIS. CONST. art. I, § 7. Under § 805.08(1), STATS., a potential juror who "has expressed or formed any opinion, or is aware of any bias or prejudice in the case" or who "is not indifferent in the case," shall be excused for cause. Assuming prejudice can be established, the presence of a biased juror on the jury warrants a new trial. *See* ***State v. Zurfluh***, 134 Wis.2d 436, 439-40, 397 N.W.2d 154, 155 (Ct. App. 1986). Additionally, "the use of a peremptory challenge to correct a circuit court error for failure to

strike a juror for cause is adequate grounds for reversal [without any additional showing of prejudice] because it arbitrarily deprives the defendant of a statutorily granted right." ***Ferron***, 219 Wis.2d at 504, 579 N.W.2d at 663; § 805.08(3), STATS. We will uphold a circuit court's factual determination of impartiality unless the record reveals manifest bias, because either: (1) there is nothing to show that the juror was a reasonable person who was sincerely willing to set aside an opinion or prior knowledge, or (2) no reasonable person in the juror's position could be expected to set aside that opinion or prior knowledge. *See* ***Ferron***, 219 Wis.2d at 497-98, 579 N.W.2d at 660-61.

Normington claims that six venirepersons who should have been struck for cause served on his jury and that he was forced to use preemptory challenges to strike an additional two venirepersons who should have been struck for cause. Normington bases his claims of bias upon three exchanges that occurred during voir dire.

First, when the trial court asked the voir dire panel whether anyone knew any members of Normington's family, Lorene Babcock volunteered the information that there was a Normington in the Social Services system when she worked there, prompting the following exchange:

> THE COURT: Would that fact that there was someone with that same last name have—in any way influence your ability to be a fair and impartial juror?
>
> JUROR BABCOCK: Probably not, no.
>
> THE COURT: Well, can you say that with certainty?
>
> JUROR BABCOCK: No.

Normington now argues that Babcock, who ultimately served on the jury, should have been dismissed for cause because her answers about her prior acquaintance with a Normington indicated an inability to commit to being fair and impartial. However, we cannot conclude the record establishes manifest bias when there is no confirmation that the person Babcock knew about was in fact any relation to Normington. Furthermore, since defense counsel did not follow up on Babcock's responses when given the opportunity to do so during voir dire, and did not move to strike her on the ground that she knew someone named Normington. Normington has thus waived the right to further review of this issue on appeal. *See* ***State v. Olexa***, 136 Wis.2d 475, 482, 402 N.W.2d 733, 736 (Ct. App. 1987).

Later during voir dire, defense counsel outlined some of the facts relating to child molestation that were likely to be presented during the trial and asked whether there was anyone who was uncertain that he or she could be fair given those facts. Fourteen people raised their hands, including Mark Duesterbech, whom the defense ultimately struck by means of a peremptory challenge, and Jennifer Young, Richard Stanley, Christopher Kisting, Lorene Babcock, Janice Hendrickson and Joyce Peters, who all served on the jury. The trial court followed up on this, stating:

> [T]here were a number of you who, in response to Mr. Isaacson's question, said that you are not absolutely positive that you can be fair. You understand now that you are not being asked to somehow be fair. You don't have to make a decision even. This jury doesn't have to make a decision as to what will happen to Mr. Normington, regardless of the result.
>
> The only issue for this jury is to find as a fact whether Mr. Normington has a mental disorder and whether than mental disorder creates a substantial probability that he's going to engage in acts of sexual violence in the future. That's what this jury has to decide,

> and I will give some further instructions at the end of the trial on what the legal standard is, once you've heard all the facts, what the legal standard is that you have to find before you can reach that conclusion.

The trial court then asked:

> Now, knowing that, is there any one of you who feels that, because of your background or your own views about life, that you would be unable to follow the instructions that I give and apply the law as I give it to you to the facts in this case as you find them to be? Is there anyone who would be unable to do that?

Only one person raised his hand in response to the trial court's inquiry, and that person was excused from service.

Normington contends that the initial responses of all those who raised their hand to indicate uncertainty as to whether they could be fair listening to the facts in this type of case were sufficient to require their removal for cause. We disagree. It is both permissible and appropriate to explore a panel member's equivocal response during voir dire. *See, e.g.,* ***Ferron***, 219 Wis.2d at 501 n.8, 579 N.W.2d at 662. Defense counsel was afforded the opportunity to make more specific inquiries of those panel members who had raised their hands in response to his question, but declined to do so. Because the trial court's own follow up questions indicated that the remaining venirepersons would be willing and able to follow the law, the trial court was not required to strike them for cause based upon their initial uncertainty.

After several venirepersons had been excused for cause, new panel members were chosen to replace them. One of them, Bonita Thostenson, was questioned as follows:

> MS. SCHULTZ: Do you think you would be able to listen to the kind of testimony that we are gonna hear and be fair?
>
> JUROR THOSTENSON: That's what bothers me, no I don't think so.
>
> THE COURT: I'm sorry, I didn't understand that answer.
>
> JUROR THOSTENSON: I don't think so.
>
> THE COURT: You don't think what?
>
> JUROR THOSENSON: That I want to—I mean, I didn't like hearing what I heard when I was sitting back there. You know, I just don't—
>
> THE COURT: That's not the question. I don't think there's anybody in this courtroom who likes hearing testimony about distasteful things. The issue is whether your reaction to that testimony would be so overwhelming that you would be unable to sit here and force yourself to listen to the testimony and follow the instructions that I give as to the law. That's the question. Can you do that?
>
> JUROR THOSTENSON: Probably. I don't know.

Voir dire proceeded, and at its conclusion defense counsel asked the court "to excuse the witnesses [sic] for cause that indicated that they felt that they were not certain they could be fair in this particular case." The trial court denied the motion. The defense used peremptory challenges to strike Duesterbach and Thostensen, and then renewed its request to strike Young, Stanley, Peters, Kisting, Babcock and Hendrickson on the basis of their initial uncertainty as to whether they could be fair. The trial court again denied the motion on the grounds that each of these jurors had ultimately indicated that he or she could follow the judge's instructions at the end of the trial. As we have discussed above, the court

did not erroneously exercise its discretion by failing to excuse this group of jurors for cause.

Normington argues that the trial court should have struck Thostenson upon his initial motion to excuse everyone who indicated uncertainty as to whether he or she could be fair. However, we conclude that Normington's indefinite group motion was insufficient to focus the trial court's attention on Thostenson and preserve the issue of her impartiality for our review. The trial court apparently understood Normington to be challenging the group of people who had initially raised their hands to indicate that they were uncertain they could be fair, and Normington did nothing to correct the trial court's understanding. Normington never objected to Thostenson by name, and did not include her in the list of names which he later presented to the trial court for exclusion. Because the trial court was not specifically asked to rule on Thostensen's impartiality, we will not consider the issue on appeal. *See* ***Olexa***, 136 Wis.2d at 482, 402 N.W.2d at 736.

Dr. Kenworthy's Testimony

Dr. Joy Anne Kenworthy, the chief regional psychologist for the Division of Community Corrections for Janesville, Madison and Beloit, evaluated Normington to determine whether he was an appropriate candidate for involuntary commitment, and made diagnoses of nonexclusive pedophilia[2] and sexual sadism,[3]

[2] Pedophilia may be diagnosed when the subject has demonstrated over a period of at least six months, recurrent, intense, sexually arousing fantasies, sexual urges, and/or behaviors involving sexual activity with a prepubescent child, generally under thirteen years of age. The condition is non-exclusive when the subject shows some degree of sexual arousal to adults as well.

as well as a personality disorder with antisocial and borderline characteristics.[4] Prior to interviewing Normington, Dr. Kenworthy examined his presentence evaluation report under the belief that release of the PSI was authorized under § 972.15(4), STATS. After this court rejected § 972.15(4) as a basis for automatic release of PSIs to ch. 980 evaluators in ***State v. Zanelli***, 212 Wis.2d 358, 377, 569 N.W.2d 301, 309 (Ct. App.), *review denied,* 215 Wis.2d 423, 576 N.W.2d 279 (1997), the State moved for, and was apparently granted, discretionary release of the PSI under § 972.15(4), STATS.[5]

Section 972.15(4), STATS., provides that "the presentence investigation report shall be confidential and shall not be made available to any person except upon specific authorization of the court." Normington asserts that Dr. Kenworthy's use of the PSI prior to obtaining court authorization violated his right of confidentiality under § 972.15(4), thus warranting the suppression of her testimony as to any opinion formed in part upon knowledge gained from the PSI. The State concedes that Dr. Kenworthy's use of the PSI without prior court authorization violated § 972.15(4). However, it disputes that the violation required suppression of Dr. Kenworthy's testimony.

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[3] Sexual sadism may be diagnosed when the subject has demonstrated over a period of at least six months recurrent, intense sexually arousing fantasies, sexual urges, and/or behaviors involving acts (real, not simulated) in which the psychological or physical suffering (including humiliation) of the victim is sexually exciting to the subject.

[4] A person with an antisocial personality disorder exhibits a pattern of behavior evincing disregard for and violation of the rights of others.

[5] The record does not contain an order releasing the PSI; however, the parties refer to Judge Dahlberg's release of the report and Normington does not contest the fact that the PSI was released prior to trial.

First, the State claims that Normington waived the issue by withholding his motion to strike until after the close of the evidence. However, we are satisfied that the trial court was given a sufficient opportunity to consider the issue and preserve it for our review. The State next asserts that its failure to obtain advance authorization was cured by obtaining release of the PSI prior to trial. We agree that, under ***Zanelli***, the trial court may effect a retroactive release, and are satisfied that is what occurred here. Thus, although the trial court may have cited the wrong reason for its determination that no violation had occurred, and thus, that no sanction was warranted, a proper application of the law would have yielded the same result. *See* ***State v. Holt***, 128 Wis.2d 110, 124, 382 N.W.2d 679, 687 (Ct. App. 1985) (holding that the principle of efficient judicial administration allows this court to affirm proper decisions by the trial court, even when reached for the wrong reasons). Because the substance of Dr. Kenworthy's opinion was in no way affected by the timing of her review of Normington's PSI, the release cured the initial error and the trial court did not erroneously exercise its discretion by refusing to strike her testimony. *Cf.* ***Steinberg v. Jensen***, 194 Wis.2d 439, 469, 534 N.W.2d 361, 372 (1995) (holding that the trial court had broad discretion whether to exclude testimony of a physician who disclosed confidential records in a medical malpractice case).

Dr. Monroe's Testimony

Psychiatrist Craig Monroe also evaluated Normington and concluded to a reasonable degree of professional certainty that he suffered from pedophilia and a personality disorder with antisocial features. In addition, Dr. Monroe felt there was a possibility that Normington had a sexual sadism disorder, but he lacked sufficient information to make that diagnosis with certainty. He testified it was substantially probable that Normington would engage in future acts of sexual

violence, and that it was likely that Normington would commit another act of sexual violence as defined by ch. 980. Dr. Monroe's conclusion was based upon the fact that Normington possessed a number of characteristics, or risk factors, which had been shown in independent studies to predict recidivism. Dr. Monroe admitted, however, that he had no statistical study to show the recidivism rate for an individual with all of the combined risk factors exhibited by Normington.[6]

The defense moved to strike Dr. Monroe's testimony on the basis that there was no peer-tested actuarial foundation for his opinion that Normington was substantially probable to reoffend. The trial court denied the motion on the grounds that the basis for the expert's opinion went to weight, not admissibility, of the evidence. We agree. An expert need not espouse any particular behavioral science methodology in order for his testimony to be relevant and of assistance to the jury. *See* ***State v. Kienitz***, 221 Wis.2d 275, 306-07, 585 N.W.2d 609, 622 (Ct. App.), *petition for review granted,* 221 Wis.2d 653, 588 N.W.2d 631 (1998).

Jury Instruction on Substantial Probability.

Normington claims he was entitled to an instruction that a "substantial probability" that the subject will commit another act of sexual violence means an "extreme likelihood." However, we rejected that same argument in ***Keinitz***, and instead concluded that the phrase "substantially probable" means "considerably more likely than not to occur." *See* ***id.*** at 294,

[6] Dr. Monroe explained that integrating the statistical research on recidivism is difficult because different studies use different definitions of recidivism, such as committing another offense, being arrested for another offense or being convicted of another offense. Another problem is that most studies are limited to a period of five or ten years, while the standard in a ch. 980 case is the probability the subject will commit another act of sexual violence during his lifetime.

585 N.W.2d at 616-17. We need not repeat our analysis here. *See* ***Cook v. Cook***, 208 Wis.2d 166, 189-90, 560 N.W.2d 246, 256 (1997) (holding that the court of appeals is bound by court of appeals precedent). In short, Normington was not constitutionally entitled to an extreme likelihood instruction.

Nor was the instruction actually given in any way improper. The trial court instructed the jury:

> It is not sufficient that the evidence merely establish that it is probable or more likely than not that he will commit such acts in the future. The evidence must convince you beyond a reasonable doubt that he is highly likely to commit such acts in the future.

We conclude that the standard set forth by the trial court was equivalent to that set forth in ***Keinitz***, and was well within the court's discretion.

Normington further contends that if "substantial probability" means anything less than an "extreme likelihood," the commitment statute is unconstitutionally vague, and also creates a lower burden of proof for committing sexually violent persons than for other civil committees, in violation of the equal protection clause. However, we have already rejected procedural due process challenges to ch. 980 in ***Zanelli*** and ***Keinitz***, holding that the term "substantially probable" gives fair notice of the dangerousness requirement to potential subjects of commitment. *See* ***Zanelli***, 212 Wis.2d at 375, 569 N.W.2d at 308; ***Keinitz***, 221 Wis.2d at 310, 585 N.W.2d at 623. Furthermore, we agree with the State that Normington's equal protection argument is based on a misunderstanding of the burden of proof in a ch. 51 commitment case. As we explained in ***Keinitz***, the legislative history of ch. 51 is insufficient to establish that the phrase "substantially probable" requires an extreme likelihood, *see* ***Keinitz***, 221 Wis.2d at

295-300, 598 N.W.2d at 617-19, and Normington cites no other authority for that proposition.

Sufficiency of the Evidence.

Normington claims the evidence was insufficient to support the verdict against him, even under the "highly likely" standard, because at one point during his testimony, Dr. Monroe stated his belief that Normington was "likely" to commit another act of sexual violence. However, this comment did not negate the fact that Dr. Monroe also testified to a reasonable degree of professional certainty that Normington was substantially probable to commit further acts of sexual violence, and that sexual sadists are "in a very, very extraordinarily high risk group" of "chronic offenders." Although Dr. Monroe himself felt he lacked enough information to determine whether Normington qualified as a sexual sadist, Dr. Kenworthy did diagnose him as having a sexual sadism paraphilia. In addition, Dr. Monroe thoroughly explained why he believed that Normington's other risk factors indicated a substantial probability that he would reoffend. Because we conclude that the combined testimony of the expert witnesses was more than sufficient to support a jury finding that Normington was highly likely to reoffend, we need not address Normington's additional argument that expert testimony is necessary to establish the link between mental disorder and likelihood of reoffending.

By the Court.—Order affirmed.

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