COURT OF APPEALS
DECISION
DATED AND FILED

August 16, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Nos. 99-1383
99-2588

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

IN RE THE COMMITMENT OF JACKSON D. CARPENTER:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JACKSON D. CARPENTER,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: EARL SCHMIDT, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

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

¶1 PER CURIAM. Jackson Carpenter appeals from a judgment of commitment as a sexually violent person and from an order denying Carpenter's

post-commitment motion. He raises several issues. We affirm all issues except the ***Thiel II*** issue, on which we reverse and remand.

¶2 Carpenter's first argument is that the commitment judgment must be vacated because the State failed to prove that he was within ninety days of release when the petition for commitment was filed. Most of the points the parties argued on this issue have since been decided in ***State v. Thiel***, 2001 WI App 52, 241 Wis. 2d 439, 625 N.W.2d 321 ("***Thiel II***"). In accord with that decision, we conclude that the State was required to prove this element in Carpenter's case, and that a remand for an evidentiary hearing on that issue would not violate his right to be free from double jeopardy.

¶3 One issue not addressed in ***Thiel II*** was whether a remand is necessary in every case, or only in those cases where the record presents room for disagreement as to whether this element was met. The State argues that in Carpenter's case we should decide the issue ourselves because, in its view, there is some evidence supporting the necessary finding, and none opposing it. Carpenter disagrees that the record is sufficient. As the parties know, we are not a fact-finding court. In previous cases, such as ***Thiel II***, 2001 WI App 52 at ¶31, and ***State v. Denman***, 2001 WI App 96, ¶16, 243 Wis. 2d 14, 626 N.W.2d 296, we have remanded for a trial court decision. We do so again here.

¶4 Carpenter's next argument is that WIS. STAT. §§ 980.01(7) and 980.02(2)(c) (1999-2000)[1] are unconstitutional because their use of the term

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

"substantial probability"[2] is "vague as applied" in his case. The argument is based on what he describes as the supreme court's view that this term would be void for vagueness in the absence of further definition. *See* ***State v. Curiel***, 227 Wis. 2d 389, 415, 597 N.W.2d 697 (1999). However, the ***Curiel*** opinion supplied a definition, concluding that "substantial probability" means "much more likely than not." ***Id.*** at 413. In Carpenter's case, however, the jury was not instructed with any additional definition of the term, and therefore, he argues that the statute was "vague as applied."

¶5 The State responds that Carpenter waived this issue by not raising it during the trial. In the State's view, Carpenter had an opportunity to raise his concern about the vagueness of the statute at the jury instructions conference. If he did not raise it at that time, the State argues, he waived the opportunity, in accord with well-established case law regarding failure to object to jury instructions.

¶6 For purposes of this opinion, we accept Carpenter's argument that the statute is unconstitutionally vague without an additional definition. The statute has been saved from being vague on its face by the ***Curiel*** definition. The question Carpenter is raising, essentially, is whose burden is it to ensure that this additional definition is used at trial? The most obvious way to inform the jury of the additional definition is through jury instructions. The customary method for determining jury instructions is for the party who desires that instruction to request it. If Carpenter's "vague as applied" argument were to prevail, it would mean that

[2] WISCONSIN STAT. § 980.01(7) refers to the term "substantially probable" and WIS. STAT. § 980.02(2)(c) refers to the term "substantial probability," however, both phrases share a common meaning. ***State v. Curiel***, 227 Wis. 2d 389, 402-03, 597 N.W.2d 697 (1999).

the burden to ensure proper jury instructions would be shifted to the State or the trial court. We see nothing in the case law that suggests this was the intended result. The supreme court did not use its supervisory authority, for example, to place this burden on the court. Carpenter has not offered any case law that supports such a change in the usual procedure for creating jury instructions. Therefore, we decline to remove the burden of requesting this instruction from the party who would ostensibly benefit from it. This conclusion does not necessarily leave Carpenter without a remedy, however, because the issue can still be addressed through ineffective assistance of counsel. We address that issue next.

¶7 Carpenter argues that his trial counsel was ineffective by not requesting that the court instruct the jury using the definition of "substantial probability" that was found in ***State v. Kienitz***, 221 Wis. 2d 275, 585 N.W.2d 609 (Ct. App. 1998), *aff'd,* 227 Wis. 2d 423, 597 N.W.2d 712 (1999). The ***Kienitz*** definition was that the term means "considerably more likely to occur than not to occur." ***Id.*** at 295.

¶8 The standards for determining ineffective assistance of counsel, which were established in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984), are not in dispute and need not be repeated here. At the post-commitment evidentiary hearing, trial counsel testified that he was aware of the ***Kienitz*** decision. When asked why he did not ask for the jury to be instructed with a definition of "substantially probable," he said, in part, that he was "not completely convinced" that the new definition "is that much better than using 'substantially probable.'" When asked which version he thought would make it easier to find a person dangerous, he replied that he was "just not sure."

¶9 We are satisfied that a reasonable attorney, comparing the statutory term and the judicial definition, could conclude that the judicial definition would not make a significant difference in the outcome of cases. That is particularly true in this case, where the focus of the defense was primarily on whether Carpenter had a mental disorder, and not as much on the probability that he would engage in acts of sexual violence. Therefore, we conclude that trial counsel's performance was not deficient.

¶10 Carpenter next argues that the trial court violated his constitutional right to present a defense by excluding certain testimony of one of Carpenter's experts. Carpenter's trial counsel, while questioning the expert about the risk of Carpenter re-offending, attempted to bring out the fact that after release from prison Carpenter would be subject to certain rules of parole for several years. The prosecutor objected to this question on the ground of relevance, and the court sustained the objection after stating that "it sounds like argument."

¶11 It is not immediately clear why Carpenter is arguing this issue as a constitutional one, rather than as a discretionary ruling on the admission of evidence. Although he cites one case on the general constitutional right to present a defense, his brief makes no attempt to relate the specific facts of his case to specific constitutional law. We decline to speculate as to what constitutional argument Carpenter may have intended, and we will instead review the issue as an evidentiary ruling.

¶12 Viewed in these terms, we conclude the error, if any, was harmless. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985) (stating test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction). The expert's partial answer was not stricken, and in that

answer he stated that Carpenter would be under the control of a parole agent for several years, and could be expected to follow the rules the agent would put down. In addition, the probative value of the parole discussion was modest, because Carpenter's parole supervision would presumably end at some point, freeing him from those rules. In deciding whether Carpenter will commit future acts of sexual violence, the jury is not prevented from considering what Carpenter might do after his parole ends.

¶13 Finally, Carpenter argues that the trial court erred by refusing to strike a juror for cause. His argument is based on the principle that the use of a peremptory challenge to correct a trial court error is adequate grounds for reversal because it arbitrarily deprives the defendant of his right to exercise all of his peremptory challenges. *See* ***State v. Ramos***, 211 Wis. 2d 12, 14, 564 N.W.2d 328 (1997). However, ***Ramos*** was recently overruled in ***State v. Lindell***, 2001 WI 108, ¶¶51-53, No. 99-2704-CR. Under ***Lindell***, the focus is instead on whether the error has affected the substantial rights of the party, and the supreme court concluded that the substantial rights of a party are not affected or impaired when a defendant chooses to exercise a single peremptory strike to correct a trial court error. ***Id.*** at ¶¶111, 113. In the present case, Carpenter removed the juror in question with a peremptory strike. Therefore, regardless of whether the trial court erred by denying his request to strike the juror for cause, reversal is not appropriate because Carpenter's substantial rights were not affected.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded with directions.

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