COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP148 **Cir. Ct. No. 2009CI3**

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

IN RE THE COMMITMENT OF LEE ROY RATZEL, JR.:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LEE ROY RATZEL, JR.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Lee Roy Ratzel, Jr., appeals from an order committing him to institutional care upon a jury's verdict that he is a sexually violent person. He claims that the circuit court erroneously denied his request for

a special jury instruction in the wake of an expert witness's testimony. We reject his contention and affirm.

BACKGROUND

¶2 In 1989, Ratzel entered an ***Alford*** plea[1] to committing first-degree sexual assault in 1987 in violation of WIS. STAT. § 940.225(1)(b) (1987-88).[2] The circuit court imposed a twenty-year prison sentence. In 1991, Ratzel pled guilty to committing first-degree sexual assault in violation of WIS. STAT. § 940.225(1)(b) (1989-90), while he was out of custody in 1989 awaiting disposition of the earlier sexual assault charge. The circuit court imposed a consecutive seventy-month sentence. In May 2009, as Ratzel neared his mandatory release date, the State filed a petition seeking to commit him as a sexually violent person under WIS. STAT. ch. 980. The matter proceeded to a jury trial.

¶3 Dr. William Merrick testified as a psychological expert for the State. As relevant here, Merrick told the jury that Ratzel had an antisocial personality disorder that predisposed him to commit acts of sexual violence. Merrick's testimony also addressed Ratzel's history of making obscene telephone calls and exposing his genitals while imprisoned, and Merrick testified that the telephone calls reflected "sexual violence as a characteristic in [] Ratzel." The following exchange took place when Ratzel's trial counsel cross-examined Merrick:

[1] *See* ***North Carolina v. Alford***, 400 U.S. 25, 38 (1970) (defendant may accept a criminal conviction while protesting his innocence).

[2] All subsequent references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Q: 1989 was a long time ago, right, sir?

A: Yes, sir.

Q: That was the last time [] Ratzel committed a sex offense, a sexually violent offense.

A: I would not say that's true.

Q: Let's get into that. You maintain that [] Ratzel engaged in sexually violent offenses since 1989.

A: Yes.

Q: Is that despite the fact that Chapter 980 doesn't recognize obscene phone calls or exposing one's genitals to another person as sexually violent offenses?

A: If an offense is only defined by what's illegal then there are a lot of acts that take place that are not arrested [sic] and not chargeable that certainly are immoral and offensive.

Q: Certainly. But do they qualify as sexually violent offenses as Chapter 980 defines them?

A: That's not what you asked.

Q: I am asking that now.

A: No, you didn't ask the 980 part.

Q: I am asking it now.

A: What is the question?

Q: You recognize that those aren't sexually violent offenses as recognized or as defined under Chapter 980?

A: Yes.

Q: Despite that, are you finding that these are sexually violent offenses?

> A: When I say sexually violent offense in the terms of those, scat[o]logia,[3] I am talking as a real person would, not as a lawyer would, not as a psychologist, but as a real person in just plain English.

¶4 At the conclusion of the trial testimony, Ratzel requested "a special curative instruction" because, in Ratzel's view, Merrick implied during his testimony that "the jury could find whatever they possibly wanted to decide is a sexually violent offense ... not having to follow anything in Chapter 980." Ratzel proposed an instruction to "follow along with the jury instruction that already says [that] acts of sexual violence are sexually violent offenses." The circuit court rejected the request for a specially-tailored instruction, and instead instructed the jury in accordance with the pattern jury instructions. Ratzel appeals, arguing that the circuit court erred by failing to give the special instruction he requested.

DISCUSSION

¶5 "The circuit court is afforded great latitude when giving jury instructions." ***State v. Laxton***, 2002 WI 82, ¶29, 254 Wis. 2d 185, 647 N.W.2d 784. We will not reverse a jury's verdict and order a new trial unless "the jury instructions, as a whole, misled the jury or communicated an incorrect statement of law." ***Id.*** Further, the circuit court's broad discretion extends to "deciding whether to give a requested jury instruction. If the instructions given adequately cover the law applied to the facts, we will not find error in refusing special instructions even though, if given, they, too, would not be erroneous." ***State v.***

[3] Testimony earlier in the trial defined the term "scatologia" for the jury as "obscene phone calls."

Lombard, 2003 WI App 163, ¶7, 266 Wis. 2d 887, 669 N.W.2d 157 (citation omitted). The circuit court must, however, exercise its discretion in a way that fully and fairly explains the rules applicable to the case and assists the jury in making a reasonable analysis of the evidence. ***State v. Coleman***, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996).

¶6 The jury in this case was required to determine whether Ratzel was a sexually violent person within the meaning of WIS. STAT. § 980.01(7). The statute provides:

> "[s]exually violent person" means a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect, or illness, and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence.

Id.

¶7 The Wisconsin criminal jury instruction committee developed a pattern instruction, WIS JI—CRIMINAL 2502, for use in trials conducted to determine whether a person is sexually violent. The circuit court used the pattern instruction here. In conformity with the instruction, the circuit court explained to the jury that it could not find Ratzel was a sexually violent person unless the jury found beyond a reasonable doubt that: (1) he "had been convicted of a sexually violent offense"; (2) he "currently has a mental disorder ... that predisposes [him] to engage in acts of sexual violence and causes serious difficulty in controlling behavior"; and (3) he "is dangerous to others because he has a mental disorder that makes it more likely than not that he will engage in one or more ... future acts of sexual violence." *See* WIS JI—CRIMINAL 2502 (Rel. No. 45—5/2007).

¶8 The phrase "act of sexual violence" is statutorily defined for purposes of WIS. STAT. ch. 980 as "conduct that constitutes the commission of a sexually violent offense." WIS. STAT. § 980.01(1b). Further, the phrase "sexually violent offense" is statutorily defined as any one of certain Wisconsin crimes that are listed and described in § 980.01(6).[4] *See* ***id.*** The crimes listed in the statute include first-degree sexual assault. *See* ***id.*** Accordingly, and in conformity with WIS JI—CRIMINAL 2502, the circuit court instructed the jury both that "'acts of sexual violence' means acts that would constitute 'sexually violent offenses,'" and that "first-degree sexual assault, contrary to 940.225, sub. 1, sub. b, is a sexually violent offense." *See* WIS JI—CRIMINAL 2502.

[4] WISCONSIN STAT. § 980.01(6) provides, in relevant part:

> **(6)** "Sexually violent offense" means any of the following:
>
> (a) Any crime specified in s. 940.225(1), (2), or (3), 948.02(1) or (2), 948.025, 948.06, 948.07, or 948.085.
>
> (am) An offense that, prior to June 2, 1994, was a crime under the law of this state and that is comparable to any crime specified in par. (a).
>
> ….
>
> (c) Any solicitation, conspiracy, or attempt to commit a crime under par. (a) [or] (am).

Section 980.01(6) also includes a category of crimes that may be deemed sexually violent if the State proves that the crimes were committed with a sexual motivation. *See* § 980.01(6)(b). The State asserts in its respondent's brief that this category of crimes is not relevant to Ratzel's case. Ratzel did not file a reply brief in this matter, so we take the State's point as conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (party cannot complain if propositions are taken as conceded that he or she does not undertake to refute).

¶9 The pattern criminal jury instructions "'are the product of painstaking effort of an eminently qualified committee of trial judges, lawyers, and legal scholars, designed to accurately state the law and afford a means of uniformity of instructions throughout the state.'" ***State v. Gilbert***, 115 Wis. 2d 371, 379, 340 N.W.2d 511 (1983) (citation omitted). Thus, although the instructions are not binding on us, "the committee's assessment of a proper jury instruction is 'persuasive.'" ***State v. Ellington***, 2005 WI App 243, ¶8, 288 Wis. 2d 264, 707 N.W.2d 907 (citation omitted).

¶10 Ratzel believes that WIS JI—CRIMINAL 2502 was not sufficient in this case. He sought an additional instruction "to follow along with" the pattern instruction, because, in his view, "the direct testimony of [] Merrick when coupled with the opinion he provided during cross examination served to confuse the jury.... Merrick muddied the waters by including in his definition of ['] sexually violent offenses[']acts committed by [] Ratzel that do not meet the statutory definition of that term." In Ratzel's view, the jury therefore "was free to determine that not only had [] Ratzel committed sexually violent offenses in 1989 and 1992 [sic] but that he continued to commit such offenses while incarcerated." He maintains that the circuit court should have given the supplemental special instruction that he proposed to avert this alleged risk.[5]

[5] Ratzel proposed that the circuit court give the following supplemental instruction:

> Dr. William Merrick's personal opinion that the telephone calls were sexually violent offenses is inconsistent with the law governing this case.
>
> There is no legal distinction between "sexually violent offenses" and "acts of sexual violence."

(continued)

¶11 We do not agree with Ratzel's characterization of the proceedings. Trial counsel cross-examined Merrick regarding his assessment of Ratzel's history of improper and illegal acts, and Merrick explicitly conceded that obscene telephone calls and exposing genitalia are not "sexually violent offenses" as that term is defined by WIS. STAT. ch. 980. Merrick also explicitly acknowledged the difference between acts that he viewed as merely immoral and offensive and acts that constitute sexually violent offenses within the meaning of ch. 980.

¶12 Moreover, Dr. Christopher Tyre, another psychologist who testified as an expert for the State, also told the jury during his cross-examination that Ratzel's acts of scatologia and exhibitionism are not sexually violent offenses within the meaning of WIS. STAT. ch. 980:

> Q: Exposing one's genital area in public is a crime called lewd and lascivious behavior, correct?
>
> A: Yes....
>
> Q: Making an obscene telephone call is against the law, isn't it?
>
> A: Yes....

> You may only find Mr. Ratzel to be a Sexually Violent Person if you find that he is more likely than not to engage in a sexually violent offense.
>
> Making an obscene or harassing telephone call is not a sexually violent offense, no matter how threatening.
>
> Making an obscene or harassing phone call is not a sexually violent offense.
>
> Exposing one's genitals to an unsuspecting person is not a sexually violent offense.

> Q: Are either unlawful use of the telephone or lewd and lascivious behavior, are either of those in the list of sexually violent offenses?
>
> A: No, neither of those are.

Tyre further acknowledged that he had reviewed Ratzel's criminal history and that Ratzel had "committed two sexually violent offenses." Ratzel's trial counsel next inquired:

> Q: If you thought []Ratzel was just going to go out and make dirty phone calls again you would not be recommending him for commitment, correct?
>
> A: That's correct.

¶13 The record thus shows that both of the State's experts told the jury that scatologia and exhibitionism are not sexually violent offenses within the meaning of WIS. STAT. ch. 980. We also note that, as part of the defense case, Ratzel presented testimony from two psychological experts, neither of whom testified that scatologia or exhibitionism is a sexually violent offense within the meaning of ch. 980. In these circumstances, Ratzel does not demonstrate the need for a special jury instruction to supplement WIS JI— CRIMINAL 2502.

¶14 Indeed, as the State points out, the supreme court reached a similar conclusion under similar circumstances in ***Laxton***, 254 Wis. 2d 185, ¶¶28-29. There, a person whose behavioral history included window peeping and exposing his genitals challenged his commitment under WIS. STAT. ch. 980, contending that "the jury should have been instructed that acts of exhibitionism and voyeurism are not sexually violent." *See* ***Laxton***, 254 Wis. 2d 185, ¶¶1, 28. The supreme court rejected the argument, explaining that it "ignores the fact that the circuit court specifically instructed the jury: 'Acts of sexual violence' means 'acts which constitute sexually violent offenses.'" ***Id.***, ¶29 (one set of quotation marks

omitted). As we have seen, the circuit court in this case gave the jury a virtually identical instruction, in conformity with WIS JI—CRIMINAL 2502.

¶15 We therefore agree with the State that ***Laxton*** is instructive in the instant case.[6] The pattern jury instruction that the circuit court used here defines the phrase "acts of sexual violence" as only those "acts which would constitute sexually violent offenses." *See* WIS JI—CRIMINAL 2502.[7] No supplemental instruction was required because both of the State's expert witnesses clarified and confirmed during their testimony that exhibitionism and scatologia are not sexually violent offenses within the meaning of WIS. STAT. ch. 980, and no other witness contradicted that testimony. The pattern instruction thus fully covered the law that applied to the facts presented at trial. Therefore, the circuit court properly exercised its discretion when it declined to give the instruction that Ratzel proposed.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

[6] Ratzel's appellate brief includes no discussion of ***State v. Laxton***, 2002 WI 82, 254 Wis. 2d 185, 647 N.W.2d 784. Ratzel did not file a reply brief, and thus he offered nothing to rebut the State's contention that ***Laxton*** is applicable here. As previously noted, we deem unrefuted arguments conceded. *See* ***Charolais Breeding Ranches, Ltd.***, 90 Wis. 2d at 109.

[7] The criminal jury instruction committee modified WIS JI—CRIMINAL 2502 after Ratzel's trial ended in 2010. The language relevant here, however, remained the same. *Compare* WIS JI—CRIMINAL 2502 (Rel. No. 45—5/2007) *with* WIS JI—CRIMINAL 2502 (Rel. No. 49—5/2011) (modifying the definition of mental disorder) *and with* WIS JI—CRIMINAL 2502 (Rel. No. 50—4/2012) (making a stylistic change to the description of the language describing the State's burden of proof).