STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No. 2010AP658

In re the Commitment of
Paschall Lee Sanders:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

PASCHALL LEE SANDERS,

Respondent-Appellant.

APPEAL FROM AN ORDER OF COMMITMENT AND AN ORDER DENYING A MOTION FOR POSTCOMMITMENT RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JEFFREY A. KREMERS, PRESIDING

BRIEF OF PETITIONER-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The parties' briefs will fully develop

the issues presented, which can be resolved by applying well-established legal principles.

STATEMENT OF THE CASE AND FACTS

As Respondent, the State exercises its option not to include separate statements of the case and facts. *See* Wis. Stat. (Rule) § 809.19(3)(a)2. Any necessary information will be included where appropriate in the State's argument.

ARGUMENT

Respondent-Appellant Paschall Lee Sanders appeals an order committing him as a sexually violent person pursuant to Wis. Stat. ch. 980 (46). He also appeals an order denying his motion for postcommitment relief (78). On appeal, Sanders seeks a new trial in the interest of justice because he claims that the pattern jury instruction explaining what the jury must find to conclude a person is sexually violent, Wis. JI–Criminal 2502 (2007), incorrectly stated the law (Sanders's brief 3-16). Sanders argues that the instruction, when combined with the trial testimony, led to the real controversy not being tried, and he is thus entitled to a new trial (Sanders's brief at 16-21).

This court should reject Sanders arguments and affirm the circuit court's orders. The jury instruction properly stated the law to the jury. As such, the real controversy was fully tried and Sanders should not get a new trial.

WISCONSIN JI–CRIMINAL 2502 PROPERLY DEFINES WHAT CONSTITUTES A "SEXUALLY VIOLENT PERSON" AND THE REAL CONTROVERSY WAS FULLY TRIED.

A. Legal principles governing this court's authority to grant a new trial in the interest of justice.

Sanders asks this court to review his claim of instructional error by seeking a new trial in the interest of justice (Sanders's brief at 3-21). This is because, as he acknowledges, he did not object to the jury instructions at trial (Sanders's brief at 16). In fact, Sanders's trial counsel specifically disclaimed any objection to the instructions (62:104-05).

Sanders admits that normally, forfeited errors such as this must be raised in the context of ineffective assistance of counsel (Sanders's brief at 16 n.4). But Sanders refuses to raise his claim in this manner because he maintains his interpretation of Wis. JI–Criminal 2502 is novel, and his counsel thus would have had no duty to raise this objection at trial (Sanders's brief at 16 n.4 (citing *State v. McMahon*, 186 Wis. 2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994)). So, instead of attempting to sustain his considerable burden under *Strickland v. Washington*, 466 U.S. 668 (1984), to show deficient performance by counsel and resulting prejudice, Sanders seeks relief in the interest of justice based on his assertion that the real controversy was not fully tried. *See Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) ("'Surmounting *Strickland's* high bar is never an easy task'") (quoting *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485 (2010)).

The trial and appellate courts of this state share the authority to grant discretionary reversal of a conviction in the interest of justice. *See* Wis. Stat. § 751.06 (supreme court); § 752.35 (court of appeals); §§ 974.02 and 809.30 (trial court). *State v. Henley,* 2010 WI 97, ¶¶ 58-66, 328 Wis. 2d 544, 787 N.W.2d 350.

The courts share the authority to grant discretionary reversal under two circumstances: (1) the real controversy was not fully tried, or (2) there was a miscarriage of justice. *See Vollmer v. Luety*, 156 Wis. 2d 1, 17-20, 456 N.W.2d 797 (1990); Wis. Stat. §§ 809.30, 751.06, 752.35. *See also State v. Harp*, 161 Wis. 2d 773, 779-82, 469 N.W.2d 210 (Ct. App. 1991).

This court's authority to grant a new trial in the interest of justice under the first test, when the real controversy has not been fully tried, does not require a showing that a new trial would likely produce a different outcome. *State v. Williams*, 2006 WI App 212, ¶ 36, 296 Wis. 2d 834, 723 N.W.2d 719.

Reversal in the interest of justice when the real controversy has not been fully tried is appropriate "'only in exceptional cases.'" *State v. Doss,* 2008 WI 93, ¶ 86, 312 Wis. 2d 570, 754 N.W.2d 150 (quoted source omitted). Reversal in the interest of justice may be appropriate when an erroneous jury instruction prevents the real controversy from being fully tried. *Id.*

This court looks to the "'totality of circumstances and determine[s] whether a new trial is required to accomplish the ends of justice.'" *State v. McGuire*, 2010 WI 91, ¶ 59, 328 Wis. 2d 289, 786 N.W.2d 227 (quoted source omitted). *See*

State v. Hicks, 202 Wis. 2d 150, 161, 549 N.W.2d 435 (1996).

B. Wisconsin JI-Criminal 2502.

An appellate court's review of jury instructions is deferential to the trial court. *State v. Wille*, 2007 WI App 27, ¶ 23, 299 Wis. 2d 531, 728 N.W.2d 343. Reversal based on instructional error is only warranted if the instructions, taken as a whole, misled the jury or expressed an incorrect statement of law. *State v. Laxton*, 2002 WI 82, ¶ 29, 254 Wis. 2d 185, 647 N.W.2d 784.

In order to commit someone as a sexually violent person under Wis. Stat. ch. 980, the State has to prove beyond a reasonable doubt that the person was convicted of a sexually violent offense and remains dangerous because the person suffers from a mental disorder that makes it more likely than not that the person will engage in one or more acts of sexual violence in the future. *See* Wis. Stat. §§ 980.01(7); 980.05(3)(a).

Thus, in this case, the State needed to prove, and the jury was instructed:

(1) Sanders was convicted of a sexually violent offense;

(2) Sanders suffered from a "mental disorder"; and

(3) Sanders is "dangerous" because his mental disorder makes it more likely than not that he will

engage in one or more future acts of sexual violence.

Wis. JI–Criminal 2502 at 1-2 (62:110-11).

Sanders's challenge to this instruction is to the second element's definition of "mental disorder." The instruction reads, and the circuit court instructed the jury, that:

> "Mental disorder" means a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence and causes serious difficulty in controlling behavior. Mental disorders do not include merely deviant behaviors that conflict with prevailing societal standards. Not all persons who commit sexually violent offenses can be diagnosed as suffering from a mental disorder. Not all persons with a mental disorder are predisposed to commit sexually violent offenses or have serious difficulty in controlling behavior. You are not bound by medical opinions, labels, or definitions.

Wis. JI-Criminal 2502 at 2 (footnote omitted) (62:110).

Specifically, Sanders maintains that the jury was not properly instructed on the phrase "'serious difficulty in controlling behavior'" (Sanders's brief at 3). This jury instruction committee added this language to the instruction in response to the United States Supreme Court's decision in *Kansas v. Crane*, 534 U.S. 407 (2002). Wis. JI-Criminal 2502 nn.8 and 11. In *Crane*, the Supreme Court held that due process required proof of a serious difficulty in controlling behavior in order to civilly commit individuals. *Crane*,

534 U.S. at 412-13. Proof of this difficulty, the Court determined, was what distinguishes dangerous persons subject to commitment from the typical recidivist convicted in an ordinary criminal case. *Id.*

The Wisconsin Supreme Court addressed *Crane* as it applied to ch. 980 in *Laxton*. Laxton was civilly committed before *Crane*, and the jury instruction given at his trial did not include the "serious difficulty" language. *Laxton*, 254 Wis. 2d 185, ¶ 27. The court held that this did not matter because Wis. Stat. ch. 980 implicitly requires proof of a serious difficulty in controlling behavior. *Id.* ¶¶ 20-21. The court determined that when the State proves that a person is a sexually violent person, it necessarily proves the person has serious difficulty in controlling his behavior. *Id.* ¶ 20. This is so because of the "nexus" between the person's mental illness and proof of the person's dangerousness. *Id.* ¶¶ 20-23.

After *Laxton*, the jury instruction committee has left the "serious difficulty" language in place. *See* Wis. JI-Criminal 2502 at n.8. The committee noted that while *Laxton* does not require that the jury be instructed with this language, it retained the language because "it is prudent to make explicit what is implicit in the statutory standard." *Id.*

C. The jury instruction accurately stated the law.

Sanders complains, first, that the jury instruction's explanation of "mental disorder" is misleading and contradicts itself (Sanders's brief at 8-10). He notes that the first sentence correctly

explains the term as it is defined in Wis. Stat. § 980.01(2) (Sanders's brief at 8-9). Under this section, a mental disorder is defined as a condition affecting a person's emotional or volitional capacity that predisposes a person to engage in acts of sexual violence and causes serious difficulty in controlling behavior. The problem with the instruction, Sanders maintains, is that the instruction subsequently says that not all persons with mental disorders are predisposed to commit acts of sexual violence or have serious difficulty in controlling behavior (Sanders's brief at 9). This contradiction, Sanders claims, would allow a jury to find a person has a "mental disorder" without also finding a predisposition to sexual violence or a difficulty in controlling behavior (Sanders's brief at 9).

This court should reject this argument. Admittedly, the two sections of the instruction appear contradictory. This is because, as Sanders notes, the first definition of mental disorder is referring to the legal standard, while the latter explanation is a reference to the medical concept of a mental disorder (Sanders's brief at 9-10).

But this contradiction does not mean that Sanders is entitled to a new trial. Sanders's analysis parses the jury instructions into discrete parts. This is an inappropriate way to review claims of instructional error. *See Laxton*, 254 Wis. 2d 185, ¶ 29. An instruction must be considered with all the others given, and this court must reject a narrow, out-of context interpretation of an instruction. *See State v. Vick*, 104 Wis. 2d 678, 691, 312 N.W2d 489 (1981); *State v. McCoy*, 143 Wis. 2d 274, 293, 421 N.W.2d 107 (1988).

Viewed in their entirety, the jury instructions properly stated the law. The contradictory language that Sanders notes was negated by the remainder of Wis. JI-Criminal 2502. The third element instructed the jury that it had to find that Sanders was "dangerous to others because he has a mental disorder which makes it more likely than not that he will engage in one or more future acts of sexual violence" (62:110). This language reinforces the first definition of mental disorder in element two as requiring findings of predisposition to future acts of violence and serious difficulty in controlling behavior. Additionally, the dangerousness element is a stand-alone requirement that the jury find a predisposition to commit future acts of violence. By finding Sanders dangerous, the jury necessarily found that he was suffering from a mental disorder within the meaning of Wis. Stat. § 980.01(2). When viewed as a whole, the instructions made it clear that the jury needed to find a connection between Sanders's mental disorder and his difficulty in controlling his behavior.

Sanders second challenge to the instruction is that it does not make clear that a person's offense history, by itself, is not enough for the jury to find the existence of a mental disorder (Sanders's brief at 10-12). Without such guidance, Sanders claims, a jury is likely to commit someone as a sexually violent person simply because they have committed sexually violent crimes in the past (Sanders's brief at 10-12).

This argument ignores the instructions given in Sanders's case. The trial court instructed the jury that evidence of Sanders sexually violent offenses committed before the offense on which the petition

was based "alone is not sufficient to establish that Paschall Sanders has a mental disorder. Before you may find that Paschall Sanders has a mental disorder you must be so satisfied beyond a reasonable doubt from all of the evidence in the case" (62:111). *See* Wis. JI-Criminal 2502 at 3. Thus, the jury was specifically instructed not to make the inference Sanders speculates it could have. The jury is presumed to have followed the instructions. *See State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989).

Sanders also argues that the instruction is lacking because it does not explain that the offense on which the petition is based cannot alone be the basis for a finding of mental disorder (Sanders's brief at 10-11). This is another cramped reading of the instruction. The existence of the predicate offense is one of the elements the State must prove to commit a person. The State also has to prove the existence of a mental disorder and dangerousness. The very fact that the State needs to prove three elements to show that a person is sexually violent makes it unlikely if not impossible that the jury would commit a person solely on the basis of the predicate offense.

Sanders next claims that the instruction is inadequate because it does not explain that a diagnosis from the American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders* (4th ed., text rev. 2000) (DSM), along with a criminal history is not enough to commit a person (Sanders's brief at 13-14). It is not at all obvious to the State why a jury would be inclined to reach this conclusion. The jury in this case was instructed on the elements of what makes a person sexually violent. It was also

instructed that it was not bound by medical opinions, labels, or definitions. The jury was also instructed that evidence of past offenses did not, standing alone, make Sanders sexually violent. Finally, the jury was instructed that it needed to consider all the evidence and to do so with care and caution in making its decision (62:109-11). The jury was not instructed that it could commit Sanders based solely on an DSM diagnosis and his criminal history, and it is entirely speculative to suggest that this might have been the basis for their verdict.

Sanders's support for this proposition comes not from any case law, controlling or otherwise, but rather from a journal article which disagrees with *Crane's* holding and claims that it "introduce[ed] an unjustified assumption about S[exually] V[iolent] P[redators]-relevant mental disorders." Daniel F. Montaldi, *The Logic of Sexually Violent Predator Status in the United States of America*, 2 Sexual Offender Treatment 1 (2007). Much of the article disagrees with the legal principles of *Crane* and *Laxton*.

The article is the author's, and apparently Sanders's, opinion of what the law governing sexually violent person commitments should be. It is not the law that binds this court. Instead, this court is obligated to follow *Crane* and *Laxton*. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). As noted, *Laxton* concluded that the pattern jury instruction, without the "serious difficulty" language, properly conveyed the law under Chapter 980. *Laxton*, 254 Wis. 2d 185, ¶ 27. Further, as explained in this brief, the addition of the "serious difficulty" language does not impact the instruction's ability to correctly explain the

law. There was no error in the jury instructions, and Sanders is not entitled to a new trial.[1]

D. The real controversy was fully and fairly tried.

Sanders's last argument is that the combination of the misleading jury instruction and the expert testimony at his trial led to the real controversy not being fully tried (Sanders's brief at 16-21). This court should reject this argument. Initially, as previously explained, the jury instruction correctly stated the law, and thus did not prevent the real controversy from being fully tried.

Further, the expert testimony also did not keep the real controversy from being fully tried. The issue at trial was whether Sanders was a sexually violent person, that is, whether he has a mental disorder that makes is more likely than not that he will reoffend. The expert testimony directly addressed this issue.

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[1]The State notes that since *Laxton*, the law, and Wis. JI-Criminal 2502, have changed such that the State now needs to prove that it is "likely" that the person will engage in future acts of sexual violence, rather than that it is "substantially probable" that the person will do so. *See State v. Nelson*, 2007 WI App 2, ¶¶ 3-6, 298 Wis. 2d 453, 727 N.W.2d 364; Wis. JI-Criminal 2502 at 7 n.1. This change does not appear to be relevant to the arguments Sanders makes or the manner in which the State relies on *Laxton* in response.

The State also notes that Sanders proposes a new version of Wis. JI-Criminal 2502 that he claims would take care of all of the deficiencies he finds in it (Sanders's brief at 14-16). The State does not respond to this proposal because the current instruction accurately states the law.

The State's expert, Dr. Dale Bespalec, testified that he diagnosed Sanders with paraphilia not-otherwise-specified based on his history of sexual assaults of non-consenting victims (61:120-25). Bespalec also testified that he diagnosed Sanders with antisocial personality disorder, based on his entire criminal history (61:125-129). Bespalec said that these two disorders, in combination, affected Sanders's emotional and volitional capacity, and that they predisposed him to engage in future acts of sexual violence (61:125, 129). Bespalec further testified that based on his analysis of the risk factors, actuarial instruments, and his clinical judgment, it was likely that Sanders would commit future acts of sexual violence (61:156).

Sanders presented two experts. The first, Dr. Susan Sachsenmaier, testified that she also diagnosed Sanders with paraphilia not-otherwise-specified and antisocial personality disorder based on his past criminal history, and that these diagnoses predisposed Sanders to commit acts of sexual violence (62:32-33). Sachsenmaier said that when she evaluated Sanders in 2004, she believed he met the criteria for commitment, but she no longer held that opinion because of Sanders's advancing age and health problems, and that she could not say Sanders was currently more likely than not to re-offend (62:10-14, 31).

Sanders's second expert, Dr. Sheila Fields, testified that she also diagnosed him with paraphilia not-otherwise-specified and antisocial personality disorder based on his criminal past (62:58-59). Fields testified that considering several actuarial instruments, her observations of Sanders, and his advancing age, she was unable to

say that Sanders was more likely than not to reoffend (62:68-76).

The experts' testimony directly addressed the real controversy at trial, which was whether Sanders had a mental disorder that predisposed him to acts of sexual violence that made it likely that he would reoffend. The experts testified about little else.

Sanders complains that the experts' testimony suggested that the jury could find that he had a mental disorder based solely on his criminal history (Sanders's brief at 16-20). This is not so. It is true that the experts relied on Sanders's past in making their diagnoses under the DSM. But their conclusions about whether Sanders had a mental disorder under Chapter 980 and whether this disorder made him dangerous were based on more, including their assessments of various actuarial instruments and their professional psychological judgment. Further, the jury was instructed that criminal history was not enough to support a finding of a mental disorder (62:111). The experts' testimony did not mislead the jury.

Sanders also argues that the jury instruction's deficiencies were compounded because the key issue in his case was the effect of his aging on his likelihood of reoffense (Sanders's brief at 17-18). Again, there was no problem with the jury instruction. Further, the key issue in Sanders's case was whether he met the criteria of Chapter 980. While certainly Sanders's aging was a factor in this analysis, the jury heard plenty of

testimony on this matter, particularly from Drs. Sachsenmaier and Field (62:11-15, 17, 56-57, 75).

Finally, Sanders complains that the experts' testimony was not focused, and instead was bifurcated into discussions of diagnosis and risk assessment, which he claims is common in Chapter 980 proceedings (Sanders's brief at 18-21). This too, according to Sanders, led to the real controversy not being fully tried because it exacerbated the "jury's natural tendency to find a legally-sufficient mental disorder based upon criminal history" (Sanders's brief at 20, internal quotation marks omitted). But, as already noted, Sanders's support for this speculative assertion about the jury is found not in any case law, but rather a journal article (Sanders's brief at 21). The jury instruction correctly stated the law and allowed the jury to properly weigh the experts' testimony about whether Sanders should be committed. The real controversy was fully tried.

CONCLUSION

Upon the foregoing, the State respectfully requests that this court affirm the circuit court's

order of commitment and order denying Sanders's motion for postcommitment relief.

Dated this 22nd day of February, 2011.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,426 words.

Dated this 22nd day of February, 2011.

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AARON R. O'NEIL
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 22nd day of February, 2011.

_____

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