**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**June 28, 2005**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2004AP1981** **Cir. Ct. No. 2003CI1**

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

---

**IN RE THE COMMITMENT OF PHILLIP M. ROSS:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**PHILLIP M. ROSS,**

**RESPONDENT-APPELLANT.**

---

APPEAL from a judgment and an order of the circuit court for Brown County: MARK A. WARPINSKI, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Phillip Ross appeals a commitment order and a judgment finding he is a sexually violent person. Ross argues that improperly

admitted hearsay evidence tainted the jury's assessment of conflicting expert testimony. Alternatively, he requests a new trial in the interest of justice.[1] Because we conclude that no hearsay evidence was admitted in the first place, we affirm the order and judgment.

## BACKGROUND

¶2 In February 2004, a jury trial was conducted to determine whether Ross was a sexually violent person requiring commitment under WIS. STAT. ch. 980.[2] The element in dispute at trial was whether Ross's mental disorder created a substantial probability that he would engage in future acts of sexual violence. Three doctors offered their expert opinions on this question. Two rendered opinions that Ross was not sufficiently dangerous to require commitment: Dr. Craig Monroe and Dr. Diane Lytton. Monroe's opinion rested heavily on Ross's risk scores on two actuarial instruments, which indicated he was not a high risk to reoffend. Lytton did not use actuarial instruments, but instead used a comprehensive analysis looking at a wide variety of risk factors to reach the same conclusion.

¶3 A third doctor, Cynthia Marsh, testified that Ross should be committed. Marsh utilized the same two actuarial instruments as Monroe, which she agreed indicated Ross was not a high risk. However, she also used a third

[1] Ross raises an additional alternative argument asking us to remand for an evidentiary hearing if we determine he waived his challenge to the hearsay evidence by his counsel's failure to object. Because we address and reject Ross's hearsay objection on the merits, we need not discuss Ross's alternative claim for ineffective assistance. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

instrument, on which Ross was a high risk. In addition, she relied on her clinical judgment and considered other risk factors, including that Ross offended while on probation, solicited a relationship while incarcerated, quit treatment after his first offense, reoffended shortly after his first release, and did not complete the sex offender treatment program.

¶4 During her testimony, Marsh indicated she was familiar with the book "Evaluating Sex Offenders" by Dr. Dennis Doren. The prosecutor then asked Marsh the following:

> Q … In his book, Dr. Doren lists a number of what he would term dynamic factors?
>
> A Which factors does Dr. Doren mention?
>
> Q …. [H]e basically comes up with four. Current attitudes in support of or at least not protective against sexual offending. Have you heard of these before?
>
> A Um-hum.
>
> ….
>
> Q Chronic negative mood, especially if a main coping mechanism is sexual fantasy. Lack of emotional connection to others such as thrown from emotional loneliness, lack of empathy or remorse, lack of family or other community support, social withdrawal and acting in ways contrary to or ignorant of a relapse prevention plan, including both generally impulsive acts and behaviors that demonstrate a lack of concern for increasing ones situational risk. Have you heard those four factors before?
>
> A Sure.
>
> Q Are you aware does [Ross] have any family support system in place?
>
> A No, not to my knowledge.

¶5 At this point, defense counsel objected:

> Your Honor, I guess I'm going to enter an objection. It sounds as though [the prosecutor] is going to enter a learned treatise into evidence almost without having the author here, without giving me notice. I know he's given comment through Dr. Monroe, but I think that's crossing the line to have a person testify here from a book.

The court instructed the jury:

> I think the jury should know the book is not a learned treatise. It can't be considered as such because it wasn't properly noticed. Is that acceptable as a cautionary instruction, [defense counsel]?

To which defense counsel responded, "Thank you, Your Honor."

¶6 The jury returned a verdict finding that Ross was a sexually violent person. Ross filed several motions after verdict. However, the court denied those motions and ordered Ross committed.

## DISCUSSION

¶7 Ross contends that Doren's risk factors were improperly admitted hearsay evidence that tainted the jury's evaluation of the conflicting expert opinions. Whether to admit or exclude evidence is within the discretion of the trial court, and we review that decision using the erroneous exercise of discretion standard. ***State v. Bellows***, 218 Wis. 2d 614, 627, 582 N.W.2d 53 (Ct. App. 1998).

¶8 Ross argues that Doren's book is hearsay and that the only way it could be received in evidence is by notice under WIS. STAT. § 908.03(18)(a). Section 908.03(18) is the learned treatise exception to the general rule against hearsay, providing in relevant part:

> A published treatise … on a subject of history, science or art is admissible as tending to prove the truth of a matter

> stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in the writer's profession or calling as an expert in the subject.
>
> (a) No published treatise … constituting a reliable authority on a subject of history, science or art may be received in evidence, except for impeachment on cross-examination, unless the party proposing to offer such document in evidence serves notice in writing upon opposing counsel at least 40 days before trial.…

Because the State failed to notify Ross it intended to use Doren's book, Ross argues, the four risk factors were improperly admitted into evidence.

¶9 However, Ross's arguments assume that Doren's risk factors were hearsay and were admitted as evidence. He is wrong. Hearsay is a statement "offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3). The factors from Doren's book were never admitted for their truth. Rather, the prosecutor only asked Marsh if she had heard of the factors. Before the prosecutor could ask anything about the truth of the factors, defense counsel objected. Marsh never testified that she agreed with those factors or utilized them in the course of her evaluation. Accordingly, the factors Ross complains about were never admitted as evidence at all.

¶10 Furthermore, any arguable error was remedied by the circuit court's curative instruction. "Potential prejudice is presumptively erased when admonitory instructions are properly given by a trial court." ***State v. Collier***, 220 Wis. 2d 825, 837, 584 N.W.2d 689 (Ct. App. 1998). The court instructed the jury that the book could not be considered as a learned treatise because proper notice had not been given. Defense counsel agreed the instruction was acceptable.

¶11 Alternatively, Ross argues that he is entitled to a new trial in the interests of justice, pursuant to WIS. STAT. § 752.35. This discretionary power of reversal allows us to order a new trial "whenever the real controversy has not been fully tried." ***State v. Wyss***, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985). We have already concluded that the complained-of hearsay was not hearsay at all and that any potential prejudice was eliminated by the court's curative instruction. Additionally, Doren's risk factors were only briefly identified and not endorsed, explicated or applied to the facts. Therefore, we reject Ross's claim that the admission of Doren's risk factors into evidence tainted the jury's credibility determinations when weighing the conflicting expert testimony.

*By the Court.*—Judgment and order affirmed.

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