COURT OF APPEALS
DECISION
DATED AND FILED

March 14, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2003AP1845 **Cir. Ct. No. 1998CI0019**

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

IN RE THE COMMITMENT OF DAMIEN RUDEBUSH:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DAMIEN RUDEBUSH,

RESPONDENT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Damien Rudebush appeals from a WIS. STAT. ch. 980 commitment judgment and post-commitment orders. Rudebush claims the trial court erroneously exercised its discretion in admitting certain documents into

evidence. Because we conclude the trial court did not erroneously exercise its discretion in admitting the evidence and/or that the evidence admitted constituted harmless error, we affirm.

BACKGROUND

¶2 Rudebush was in the Winnebago County Jail after being convicted of two batteries. During that time, a fellow prisoner reported that Rudebush had touched him sexually. Rudebush had a right to a hearing on the complaint. Rudebush did not admit to touching the fellow prisoner, but did not contest the discipline imposed by the jail, which was eight days of segregation.

¶3 A criminal complaint arising from the incident was also filed, charging Rudebush with fourth-degree sexual assault. The complaint, however, was later dismissed when the victim failed to appear in court to testify.

¶4 In 1998, the State filed a petition alleging that Rudebush was a sexually violent person. After repeated delays, a bench trial was held in early February 2003. The court found that Rudebush had a mental disorder and was dangerous to others because his disorder created a substantial probability of future sexual violence. *See* WIS. STAT. § 980.05(5) (2003-04).[1] Rudebush filed a post-commitment order requesting a new trial on the grounds that the trial court erroneously admitted into evidence a conduct report concerning the sexual assault allegation in the Winnebago County Jail and the criminal complaint related to the same incident. The trial court denied the motion. Rudebush now appeals.

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

DISCUSSION

A. Conduct Report.

¶5 Rudebush contends that the trial court erroneously exercised its discretion in admitting the conduct report relating to the incident with another prisoner in the Winnebago County Jail. We disagree.

¶6 Admitting out-of-court statements pursuant to a hearsay exception is a determination left to the discretion of the trial court. ***State v. Huntington***, 216 Wis. 2d 671, 680, 575 N.W.2d 268 (1998). Here, the trial court admitted the conduct report pursuant to WIS. STAT. § 908.03(6) (business records exception). Although we agree with Rudebush that this was not the correct exception under which to admit this evidence, we may affirm the admission of the evidence as long as there is a proper basis to do so in the law. *See* ***State v. Amrine***, 157 Wis. 2d 778, 783, 460 N.W.2d 826 (Ct. App. 1990).

¶7 We conclude that the conduct report could be properly admitted pursuant to the exception contained in WIS. STAT. § 908.03(8), which provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ….
>
> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law, or (c) in civil cases and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

¶8 Here, the conduct report at issue contained "factual findings resulting from an investigation made pursuant to authority granted by law …."

See ***id.*** Thus, it properly comes into evidence under the hearsay exception, WIS. STAT. § 908.03(8). As the State points out, we held in ***State v. Keith***, 216 Wis. 2d 61, 77, 573 N.W.2d 888 (Ct. App. 1997), that records of probation and parole officials compiled by the Department of Corrections met the requirements of § 908.03(8) because WIS. STAT. ch. 980 cases are civil proceedings. Thus, the conduct report falls under a hearsay exception and was properly admitted by the trial court.[2]

B. Criminal Complaint.

¶9 Rudebush next claims that the trial court erred in admitting into evidence the criminal complaint relating to the same incident, which was later dismissed. We conclude that any error relating to this issue was harmless.

¶10 The test for harmless error is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ***Hannemann v. Boyson***, 2005 WI 94, ¶57, 282 Wis. 2d 664, 698 N.W.2d 714 (citations omitted). Here, admitting the complaint was harmless because the conduct report was properly admitted. Both documents addressed the same incident. Accordingly, the admission of the complaint was cumulative to evidence already before the court.

¶11 In addition, Rudebush concedes that under WIS. STAT. § 907.03, if the information is of a type reasonably relied upon by experts in forming opinions,

[2] In his reply brief, Rudebush raises a claim that applying WIS. STAT. § 908.03(8) in this case violates his confrontation rights under ***Crawford v. Washington***, 541 U.S. 36 (2004). Because Rudebush waited until his reply brief to raise this issue, we decline to address it. *See* ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981).

the underlying facts need not be admissible in evidence. ***State v. Pharm***, 2000 WI App 167, ¶29, 238 Wis. 2d 97, 617 N.W.2d 163. Thus, even if the complaint had not been admitted, the experts' opinions based on the complaint would be admissible at trial.

¶12 One expert witness testified that the incidents in the county jail had a similar *modus operandi* to Rudebush's earlier offenses. He testified that Rudebush picked on individuals who would have a hard time reporting the incident, that it was a repeated kind of use of brutality and intimidation over a long period of time, and that the conduct, although separated by time, looked like virtually identical behavior.

¶13 The trial court made findings regarding Rudebush's longstanding pattern of deviant sexual behavior unrelated to the Winnebago County Jail incident. This included forced sexual abuse of his mentally impaired foster brother, and sexual encounters with juveniles at the Willow Glen Academy, which resulted in an adjudication finding him guilty of sexual assault.

¶14 In addition, Rudebush does not dispute that he has been diagnosed with mental disorders. In reviewing the trial court's decision, we conclude, based on the totality of the circumstances, that the criminal complaint related to the county jail incident was only a single factor the trial court considered in rendering its decision. The trial court's decision focused on a substantial amount of other evidence in making its findings. Accordingly, even if the complaint should not have been admitted, a new trial without its admission would not change the

outcome of this case. The admission of the complaint did not contribute to the verdict here. Thus, any error related to its admission was harmless.[3]

By the Court.—Judgment and orders affirmed.

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

[3] In his post-commitment motion, Rudebush raised a claim of ineffective assistance of counsel. Because he failed to argue that issue in his appeal brief, we deem the issue abandoned. *See* ***State v. Johnson***, 184 Wis. 2d 324, 344-45, 516 N.W.2d 463 (Ct. App. 1994).