COURT OF APPEALS
DECISION
DATED AND FILED

March 28, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP2146 **Cir. Ct. No. 1999ME1664**

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

IN THE MATTER OF THE MENTAL COMMITMENT OF EDWARD S.:

MILWAUKEE COUNTY,

PETITIONER-RESPONDENT,

V.

EDWARD S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MARTIN J. DONALD, Judge. *Affirmed.*

¶1 CURLEY, J.[1] Edward S. appeals the order extending his involuntary commitment. Edward contends that he was denied a fair extension

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04).

hearing when the trial court permitted the Milwaukee County Department of Human Services (county) to elicit hearsay evidence about alleged suicide attempts through an expert witness without giving a cautionary instruction, and requests that this court grant him a new extension hearing. This court concludes that while it was error to admit hearsay evidence without a cautionary instruction, the error was harmless because a substantial amount of admissible evidence supported the verdict. Consequently, the order extending the commitment is affirmed.

I. BACKGROUND.

¶2 Edward has an almost thirty-year history of mental illness, and currently resides at a large group home called Belwood. At Belwood he is supervised but able to come and go freely. Edward's diagnosis includes chronic paranoid schizophrenia, and his symptoms include paranoia and delusions. As a result, he takes a number of psychotropic mediations, and even though he remains paranoid and delusional, his medications have substantially improved his symptoms. Edward has been medication-compliant for nine months, but has a history of noncompliance, which has resulted in several hospitalizations at the Milwaukee County Mental Health Complex (Mental Health Complex), an inpatient mental health hospital. For this reason, the staff at Belwood monitors his medications seven days per week, twice per day, to ensure compliance. Edward resides at Belwood due to an involuntary commitment under WIS. STAT. § 51.20 (2003-04).[2]

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

¶3 On January 20, 2005, the county filed a motion, pursuant to WIS. STAT. § 51.20(13)(g)3., for an extension of Edward's commitment, alleging that Edward would continue to benefit from treatment, including medications, meetings with psychiatrists and case managers, and particularly the supervised living situation, and that despite recent improvements, without a commitment order, Edward would discontinue his treatment and become a danger to himself and others.

¶4 Edward contested the motion, expressed a desire to live independently, and requested a jury trial. A jury trial was held on February 8, 2005.

¶5 During the county's opening statement, counsel told the jury that the evidence would show that "when [Edward] does not take his medication, he has jumped off a 10-story building." Defense counsel objected and a sidebar was held. When counsel continued her opening statement, she repeated "when [Edward] has been non-compliant in the past, the results have been very, very, very serious suicide attempts," including that he "jumped off … a 10-story building," "attempted to saw himself—his arm with an electric saw," and "has burns over certain portions of his body related to some sort of an electrical accident." Later, the court made a record of the sidebar, which indicated that defense counsel had objected to the reference to jumping off a building on grounds of remoteness, hearsay, and prejudice. The court disagreed, and concluded that despite remoteness in time, the evidence being hearsay, and prejudicial, the evidence was relevant and admissible because it was part of Edward's treatment history and thus related to his current treatment.

¶6 The first witness was Dr. Leslie Gombus, who has been Edward's psychiatrist for the past sixteen years. Dr. Gombus testified that he is very familiar with Edward's history of mental illness and that Edward's paranoid schizophrenia requires psychotropic medication. He explained that Edward "requires supervision to ensure compliance with taking medications," and that when Edward discontinues taking his mediation

> he shows an exacerbation of psychosis which means he becomes out of touch with reality, has significant paranoid ideations, becomes a danger, either to himself or others, to himself because his paranoia will interfere with him doing normal things. He drinks significant amounts of water, which can be a real problem for his electrolytes in his system. The paranoid ideations make[] him think that people are doing things when they're not. He can strike out at others. He has had a history of very problematic behavior.

¶7 Dr. Gombus was then asked whether Edward has had any significant suicide attempts. Defense counsel again objected as to remoteness and hearsay. The court overruled the objection as to remoteness. With respect to hearsay, the court agreed to overrule the objection if the county laid the proper foundation, which counsel proceeded to do. Dr. Gombus then testified Edward's medical records reveal four serious suicide attempts, which resulted in Edward spending ten years in inpatient treatment at the Mental Health Complex. Specifically, in 1977, Edward was hospitalized after attempting to cut off his left hand with a power saw; in 1978, police observed Edward starting fires, which he claimed were part of a religious ceremony; in 1980, Edward was in critical condition due to burns on sixty percent of his body from an electric explosion; and in 1981, Edward was hospitalized due to injuries from jumping from a ten-story building into the Milwaukee River. Dr. Gombus underscored that the relevance of these events is that "historically, he has displayed behavior which is extremely dangerous to

himself," when he is not medicated. Since 1970, Edward has had about twenty inpatient hospitalizations as a direct result of his failure to take his medication.

¶8 Dr. Gombus acknowledged that Edward has been medication-compliant for nine months, and that the goal is to allow Edward to live in the least restrictive environment possible, the next step being a smaller group home, but emphasized that "continued monitoring of medication is required because of [Edward's] current lack of insight into the need for the medication." He explained that the reason Edward has been able to live at Belwood is attributable to his medications, and the reason Edward takes his medications is the commitment order, and that without the medications Edward "would deteriorate, and again, present as a danger to either himself or others to the point that he would again become an appropriate individual for a Chapter 51 involuntary commitment process."

¶9 Dr. Charles Rainey, a psychiatrist, was appointed by the trial court to evaluate Edward. Dr. Rainey reviewed Edward's medical records and met with Edward in person, and testified that, in his opinion, "if [Edward] was not required by outpatient treatment commitment to be compliant with his medications and services, … it is likely that he would shortly decompensate and become the proper subject for the emergency detention process…."

¶10 Dr. Joan Nuttall, a psychologist, was likewise appointed by the trial court to evaluate Edward. Although she tried to arrange for a meeting, she and Edward never actually met. She instead spoke with Edward's case manager and reviewed Edward's medical records. She testified that, despite not meeting with Edward, she was comfortable with her conclusion that Edward needs a commitment extension, because if the commitment is not extended, Edward would

likely refuse to take his medication, become less stable, become "dangerous to himself or other people, and … [be] re-hospitalized."

¶11 Next to testify was Sonya Rausch, Edward's residential case manager at Belwood, who does treatment plans for Edward and is in contact with him on a daily basis. She explained that the goal is for Edward to be medication-compliant and to stay out of the Mental Health Complex. She testified that medication compliance is a large component, and that commitment is necessary because of Edward's history and because "[w]hen he is also noncompliant with taking his medications, he does decompensate and ends back in the Mental Health Complex." She admitted that it is not necessary to be under a commitment order to receive mental health services, but highlighted that Edward would need a commitment order to secure medication compliance, even if he resided in a smaller group home or even in a supported apartment.

¶12 The last expert to testify was Gina Merkt, a social worker who sees Edward approximately three times per week, and who, among other things, monitors Edward's medications and makes sure that he goes to his appointments with his psychiatrist, nurse, doctor and dentist. It was Merkt who petitioned the court to continue the commitment order, and she explained that she did so due to Edward's history of suicide attempts and noncompliance, and because she believes that he is currently medication-compliant as a result of the commitment. She testified that although the goal is to move Edward into a less restrictive environment, she believes he would still need a commitment order because, without one, he "he would go off [his] medication, refuse treatment and then decompensate, be a harm to himself and others." While admitting that supportive services do exist without an order, she stressed that Edward "would be a voluntary

client," and that "he probably wouldn't choose to receive medication or be on other treatment."

¶13 Edward also chose to testify. He indicated that, contrary to the other witnesses, he has been medication-compliant for five years and wants to live in his own apartment. When asked whether he would continue to take his medication, Edward changed the subject and claimed that Dr. Gombus "completely ignores" him. He then asked for and received permission to read a letter he had prepared. The letter included the following passages:

> In 1956 on February 2nd, my parents had my myelin sheath of my pineal gland removed, making me virtually apoplectic....
>
> Then at the age of four, they popped myotic mirrors in my eyes and then ditched my lenses of color. See I'm microphysically color blind. I don't see everything that you see, and the—he sun to me is green, while the sky to me is red. See, you see something I don't see, and I'm microphysically color blind.
>
> ….
>
> And in 1975, I was forced to confess for killings my family was doing. I remind you, I am almost legally blind. Two years later, I have—after being fed LSD—fed LSD, my brother almost cut off my left hand. I was taken to the hospital where the metacarpal bone of my pointer finger on my left hand was removed by Dr. Rainey and given to a man who would later be known as Pope John Paul, II.
>
> ….
>
> In 1976, my brother … alias Jimmy Carter, was elected President. With Zodiac as the President, the killings became extreme, and a year later, I wound up in the Waupun State hospital for the criminally insane.…
>
> You don't understand. The doctors were giving me prescription LSD. I ripped—I ripped the window off the solution room and escaped, but I hid. I hid in the electrical substation which was a mistake. What Jeffrey Dahmer did to me is extreme, but it can't be described. I fell asleep in

> the stationhouse but woke up with a bullet in my head from a German Luger in the back of my head and my body wired to an electrical grid and my shoes and socks were off. … Somehow I made it to St. Mary's Hospital and five near-death experiences. And the sciatic muscle from my right arm was removed and once again given to Pope John Paul, II. In other words, I was sold to the church by my family.
>
> In 1980, I just signed more papers, confessions. I once again was pressed and given LSD. I escaped again and went to my Brother Bill's apartment. I drank a beer containing 5,000 hits of blue acid, and I started running with Zodiac and Dahmer right behind, and in fact my brother Bill was dressed in a policeman's uniform, laughing and shooting at me. I climbed up on top of the First Wisconsin building using the fire escape. Luckily, the ladder to the roof collapsed just as I got to the top of the building with my brother still laughing and firing bullets at me from the fire escape. I executed a perfect three point dive into the Milwaukee River to get away from him.
>
> I was later taken to County General, summarily given six hits of strychnine acid on an operating table and had my right colon removed by Dr. Rainey with Dr. Gombus supervising and several other people. They wanted to leave an impression on me. So they finished off the Dulcolax lobe job.
>
> ….
>
> This is the letter I wrote about what's going on down on 27th Street. They have taken over 500 articles of clothing and taken over 200 pieces of art. I have been stabbed with ice picks over 25 times, seven times in the heart. I have been hit with grease guns over 30 times in the neighborhood, and I have been assaulted with fists 12 times. I have been shot at hundreds of time with live ammunition. I have had my teeth filed to pulp, had my head shaved every night, watched and seen 15 people jump—have seen 15 people jump to their death off that 27th street viaduct and counted over 38 murders within two blocks of the building.

¶14 At the end of the trial, the jury was presented with three special verdict questions. First, the jury was asked, "Is [Edward] mentally ill?" If the answer was "yes," the jury was to proceed to the second question: "Is there a

substantial likelihood, based on [Edward's] treatment record, that he would be a proper subject for commitment if treatment were withdrawn?" If the answer was "yes," the jury was to proceed to the final question: "Is [Edward] a proper subject for treatment?" The jury answered "yes" to all three questions, with one juror dissenting on the second question. The trial court entered an order extending Edward's commitment for nine months. Edward now appeals.

II. ANALYSIS.

¶15 Edward contends that the trial court erred in permitting the county to elicit hearsay evidence through expert testimony without a cautionary instruction. In reviewing evidentiary issues, "[t]he decision to admit or exclude evidence lies within the discretion of the trial court." ***Hennig v. Ahearn***, 230 Wis. 2d 149, 178, 601 N.W.2d 14 (Ct. App.1999). The question on appeal is only "whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record." ***State v. Wollman***, 86 Wis. 2d 459, 464, 273 N.W.2d 225 (1979). This court will uphold a trial court's discretionary determination if we find that there was a reasonable basis for it. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983).

¶16 Edward contends that the evidence of prior suicide attempts was inadmissible hearsay. He asserts that while the experts could offer an opinion based on hearsay, the underlying hearsay data was not independently admissible, and the trial court therefore erred in allowing the unrestricted admission and use of the hearsay evidence without a cautionary instruction. Edward also dismisses the contention that the admission of the evidence was harmless. With respect to the second special verdict question—whether there a substantial likelihood, based on Edward's treatment record, that he would be a proper subject for commitment if

treatment were withdrawn—Edward claims that "the jury could answer 'yes' only if it was convinced that Edward [] would engage in behavior dangerous to himself or others if treatment were withdrawn." He claims that the only way the jury could have reached that conclusion would have been by relying on the evidence of the suicide attempts.

¶17 The county responds that it is not required to present evidence of recent dangerous acts, but under WIS. STAT. § 51.20(1)(am), it need only show, based on the treatment record, that there is a substantial likelihood that Edward would be a proper subject for commitment if treatment is withdrawn. The county submits that it has met its burden under WIS. STAT. § 51.20(1)(am), and that "weighed against the total credible evidence supporting the verdict the admission of hearsay evidence was harmless."

¶18 The issue of hearsay will be addressed first. WISCONSIN STAT. § 907.03 governs the bases on which an expert witness may rely in forming an opinion:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Id. Our courts have explained that § 907.03 is not an exception to the rule against hearsay and "does not transform inadmissible hearsay into admissible hearsay." ***State v. Watson***, 227 Wis. 2d 167, 198-99, 595 N.W.2d 403 (1999). By contrast, what § 907.03 does do is permit the admission of an expert opinion, even if that expert relied on inadmissible hearsay in arriving at the opinion, as long as it is the type of facts or data "reasonably relied upon by experts in the particular field in

forming opinions or inferences upon the subject." Sec. 907.03. ***Watson*** cautions that:

> A circuit judge administering this rule must be given latitude to determine when the underlying hearsay may be permitted to reach the trier of fact through examination of the expert—with cautioning instructions for the trier of fact to head off misunderstanding—and when it must be rigorously excluded altogether. In the end, the trier of fact must understand its authority to disregard or devalue the expert's opinion if it is not based on evidence of record.

Watson, 227 Wis. 2d at 200-01.

¶19 It is clear that the evidence of suicide attempts was hearsay because neither Dr. Gombus, who provided the most detailed accounts of the incidents, nor any of the other experts, claimed to have witnessed the events. It is also undisputed that the hearsay evidence contained in Edward's extensive medical record—including the suicide attempts—were part of what the experts relied on in reaching their opinions, and under WIS. STAT. § 907.03, the experts were certainly authorized to do so. ***Watson***, however, dictates that § 907.03 does not exclude the data contained in those records from the rule against hearsay. Still, the trial court made no effort to limit the testimony about details of Edward's medical history, stating: "If the county feels in its questioning it wants to elicit any additional details, that's their prerogative. I'm not going to put any limits on the questioning." The jury was not adequately informed of its "authority to disregard or devalue the expert's opinion if it is not based on evidence of record," ***Watson***, 227 Wis. 2d at 200-01, and this court agrees that the jury should have been given a cautionary instruction to that effect.

¶20 Our inquiry does not end here, however. Improperly admitted evidence justifies reversal only if the erroneous admission affected the substantial

rights of the party seeking reversal. WIS. STAT. § 805.18(1); *see* ***State v. Britt***, 203 Wis. 2d 25, 41, 553 N.W.2d 528 (Ct. App. 1996) (evidentiary error subject to a harmless error analysis). Our supreme court has recently explained the test for harmless error: "An error is harmless if the beneficiary of the error proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" ***State v. Hale***, 2005 WI 7, ¶60, 277 Wis. 2d 593, 691 N.W.2d 637 (citation omitted); *see also* ***State v. Weed***, 2003 WI 85, ¶29, 263 Wis. 2d 434, 666 N.W.2d 485. In determining whether an error is harmless, we are to consider some or all of the following factors: "the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense, the nature of the State's case, and the overall strength of the State's case." ***Hale***, 277 Wis. 2d 593, ¶61.

¶21 This case, as mentioned, arises out of a motion for an extension of an involuntary commitment brought under WIS. STAT. § 51.20(13)(g)3. Section 51.20(13)(g)3. provides, in relevant part:

> If the court determines that the individual is a proper subject for commitment as prescribed in sub. (1)(a)1. and evidences the conditions under sub. (1)(a)2. or (am) …, it shall order judgment to that effect and continue the commitment. The burden of proof is upon the county department or other person seeking commitment to establish evidence that the subject individual is in need of continued commitment.

Under WIS. STAT. § 51.20(1)(a), every petition must allege that the individual is "mentally ill drug dependent or developmentally disabled" and "a proper subject for treatment," § 51.20(1)(a)1., and that the individual is "dangerous," § 51.20(1)(a)2. Section 51.20(1)(a)2.a.-e. provides five possible scenarios through

which to prove danger, however, "[i]f the individual has been the subject of outpatient treatment for mental illness, … immediately prior to commencement of the proceedings as a result of a commitment ordered by a court under this section," then WIS. STAT. § 51.20(1)(am) provides, that:

> [T]he requirements of a recent overt act, attempt or threat to act under par. (a)2.a. or b., a pattern of recent acts or omissions under par. (a)2.c. or e. or recent behavior under par. (a)2.d. may be satisfied by a showing that there is a substantial likelihood, based on the subject individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn.

(Emphasis added.) The purpose of this subsection is to avoid the "vicious circle of treatment, release, over act, recommitment." ***State v. WRB***, 140 Wis. 2d 347, 351, 411 N.W.2d 142 (Ct. App. 1987).

¶22 By asserting that the jury necessarily relied on Edward's suicide attempts in answering the second special verdict question in the affirmative Edward appears to argue that the county was required to satisfy the requirements of WIS. STAT. § 51.20(1)(a)2. through specific acts of dangerous behavior. Edward is incorrect. The county's burden was to prove first that Edward is "mentally ill" and "a proper subject for treatment," WIS. STAT. § 51.20(1)(a)1., and second, that Edward is "dangerous," which could be proven by showing "that there is a substantial likelihood, based on [his] treatment record, that [he] would be a proper subject for commitment if treatment were withdrawn," WIS. STAT. § 51.20(1)(am).

¶23 Based on Edward's treatment record, there was overwhelming evidence—without reference to the details of the suicide attempts—that there is a substantial likelihood that Edward would be a proper subject for commitment if treatment were withdrawn. *All* the experts, including Dr. Nuttall and Dr. Rainey,

who had been appointed by the court, agreed that Edward's medications are an essential part of his treatment, and that without a commitment order, Edward likely would stop taking his medication, decompensate and become a danger to himself and others.

¶24 The testimonies of the five experts were in fact strikingly similar. First, Dr. Gombus testified that: "If treatment in the form of medications is withdrawn, it was my professional opinion that he would deteriorate, and again, present as a danger to either himself or others to the point that he would again become an appropriate individual for a Chapter 51 involuntary commitment process." Second, Dr. Rainey testified that "if he was not required by outpatient treatment commitment to be compliant with his medications and services, that it is likely that he would shortly decompensate and become the proper subject for the emergency detention process…." Third, Dr. Nuttall testified that if the commitment is not extended, Edward would refuse to take his medication, become "less and less stable … become[] dangerous to himself or other people, and he [would] end[] up injuring himself or other people and then [be] re-hospitalized." Fourth, Sonya Rausch testified that, "[w]hen he is also noncompliant with taking his medications, he does decompensate and ends back in the Mental Health Complex." Finally, Gina Merkt, testified that she "believe[s] that he is currently med[ication] compliant because of the Chapter 51 commitment" and that he needs a commitment order, because without one, "he probably wouldn't choose to receive medication or be on other treatment," "would go off [his] medication, refuse treatment and then decompensate, [and] be a harm to himself and others."

¶25 Although all the experts presumably considered Edward's suicide attempts in forming their opinions, as they certainly were allowed to under WIS. STAT. § 907.03, the vast majority of the experts' testimonies did not reference

those suicide attempts, but emphasized Edward's treatment history in general terms, particularly focusing on his history of noncompliance with his medications. Dr. Gombus, the only witness to give any details about the suicide attempts, in fact went on to explain that the significance of those events is that Edward has a history of dangerous behavior, thereby focusing on their impact on Edward's current treatment, rather than the specifics of the events themselves.

¶26 Moreover, Edward focuses solely on the expert testimony and appears to disregard his own testimony. In light of Edward's baffling testimony, it is not difficult to understand why the jury concluded that Edward was mentally ill. Likewise, it is certainly conceivable that the jury could have seen the extremely violent events that Edward described as an indication of him being a danger to himself or others. Especially given that the jury had already been told that Edward had been medication-compliant for nine months, and that Edward has a history of noncompliance, it appears reasonable for the jury to have concluded that his behavior, while noncompliant, might well be exactly as violent as he described.

¶27 This court concludes that it is clear beyond a reasonable doubt that a rational jury would have reached the same result without the unrestricted admission of the hearsay evidence. *See* ***Hale***, 277 Wis. 2d 593, ¶60. In fact, Edward's situation seems to be exactly the type of scenario for which WIS. STAT. § 51.20(1)(am) was intended: to avoid a vicious circle of "treatment, release, over act, recommitment." ***WRB***, 140 Wis. 2d at 351. Therefore, even though the trial court's admission of hearsay evidence was error, the error was harmless. Accordingly, this court affirms.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.