

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 24, 2007

David R. Schanker
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. 2006AP2848

Cir. Ct. No. 2003ME89

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN THE MATTER OF THE MENTAL COMMITMENT OF MICHAEL B.:

ONEIDA COUNTY,

PETITIONER-RESPONDENT,

v.

MICHAEL B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Oneida County:
MARK MANGERSON, Judge. *Affirmed.*

¶1 CANE, C.J.¹ Michael B. appeals an order extending his mental commitment. Michael argues a new trial should be granted in the interest of justice because the admission of expert testimony concerning certain incidents prevented the jury from considering the real controversy to be tried. Alternatively, Michael argues a new trial should be granted because the trial court erroneously exercised its discretion in submitting the expert's report to the jury. We disagree and affirm the order.

BACKGROUND

¶2 On December 5, 2005, Oneida County filed an application to extend Michael's mental commitment, due to expire on January 12, 2006. The court signed an order requiring Dr. William Roberts to examine Michael and determine his mental condition. The order also required Roberts to deliver a report of Michael's mental examination to the court no later than forty-eight hours prior to the hearing on recommitment.

¶3 On January 5, 2006, a jury trial on Michael's commitment was held. The County presented two witnesses. The County's first witness was Roberts, the only expert to appear in this matter. Roberts gave testimony regarding his evaluation of Michael. Roberts based his testimony on his review of Michael's psychiatric records and also "close verbal communication with the nursing staff." Roberts concluded, based on the treatment records and his own evaluation of

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Michael, that Michael suffered from paranoid schizophrenia and that his “primary delusions are usually related to hyper-religiosity.”

¶4 Roberts also testified to several incidents contained within Michael’s treatment record, which had led to Michael’s mental commitment. He related to the jury the incidents where Michael became physically violent when confronted by the facility staff about his interrupting the delivery of medication to other patients. Roberts’s testimony was corroborated by the County’s other witness, Randy Herman, who was part of the nursing staff and witnessed these events first-hand. Roberts also related a similar incident that occurred while Michael was not committed. During this incident, police were called to enforce the court-ordered administration of Michael’s medication because he refused to take it. When police arrived, Michael became physically violent and made death threats.

¶5 Additionally, Roberts testified to an incident where Michael swam “sort of naked” in a lake in the presence of young girls. Michael objected to this testimony. The court allowed it as long as Roberts made clear he was not implying Michael was a sex offender or pedophile, but rather, he was simply using this portion of the treatment record to establish the basis of his expert opinion. Roberts stated Michael was not a sexual offender or pedophile. However, given Michael’s statements that certain Bible passages entitled him to special relations with young girls, Roberts believed this incident indicated Michael was dangerous if not undergoing treatment. Based on his evaluation, Roberts’s opinion was that Michael should remain in a secure facility where he could receive psychiatric and medical treatment because a less restrictive environment would not be consistent with the safety of Michael and others.

¶6 Michael also testified at trial. During his testimony, Michael admitted that, in the past, when he was not committed he did not continue his treatment. When asked, Michael also stated if released from confinement he again would discontinue his treatment.

¶7 After the jury was instructed and began its deliberations, the jury requested permission to examine Roberts's report. On two previous occasions, the County had tried to submit the report to the jury. Michael objected both times and his objections were sustained. Michael also objected to the jury's request, but the court sent the report to the jury. The jury found that Michael was mentally ill, dangerous and a proper subject for treatment. The court then entered an order extending Michael's commitment.

DISCUSSION

¶8 Michael argues he is entitled to a new trial in the interest of justice because the admission of Roberts's hearsay testimony concerning Michael's dangerousness prevented the real controversy from being fully tried. On appeal, Michael objects to Roberts's testimony as to all of the incidents. However, at trial, Michael objected only to the testimony regarding his swimming around young girls. Therefore, we restrict our discussion to Roberts's testimony relating to that incident. *See State v. Edwards*, 2002 WI App 66, ¶9, 251 Wis. 2d 651, 642 N.W.2d 537 (parties waive any objections to the admissibility of evidence when they fail to object before the circuit court). We disagree with Michael's argument because it confuses the role of Roberts's testimony—his testimony was to clarify

how he reached his opinion regarding Michael, not to establish those events actually occurred.²

¶9 In order for Michael to be involuntarily recommitted, the County needed to prove that based upon his treatment records there was a substantial likelihood if treatment was withdrawn from him that he would become a proper subject for treatment. *See* WIS. STAT. § 51.20(1)(am). WISCONSIN STAT. § 51.30(1)(b) defines a treatment record as including “the registration and all other records that are created in the course of providing services to individuals for mental illness, developmental disabilities, alcoholism, or drug dependence and that are maintained by the department, by county departments under s. 51.42 or 51.437, and their staffs, and by treatment facilities.” To establish this requirement, the County relied on Roberts’s expert testimony based on Michael’s treatment records that Michael would become a proper subject for treatment because he would become a danger to himself and others if released. Under WIS. STAT. § 907.03, an expert may “rely on inadmissible evidence if of a type reasonably relied upon by experts in the field in forming an opinion or inference.” *State v. Watson*, 227 Wis. 2d 167, 191, 595 N.W.2d 403 (1999).

¶10 Pursuant to WIS. STAT. § 51.20(9)(a)5, Roberts had the authority to review Michael’s treatment records in formulating his opinion with regard to whether Michael needed to be recommitted. Under WIS. STAT. § 907.03, Roberts is allowed to consider inadmissible evidence as the basis in forming his opinion that Michael would be dangerous if released, as long as that is the type of evidence

² We also note that Michael had the opportunity to cross-examine Roberts regarding his actual knowledge of those events, but chose to not pursue that line of questioning.

experts in that field would reasonably rely upon. The events Michael now objects to were the instigating factors that have led to various involuntary mental commitments under WIS. STAT. ch. 51 throughout his life, and therefore are treatment records for the purposes of § 51.30(1)(b). Therefore, Roberts's testimony was not inadmissible hearsay because these incidents are the types of evidence experts in his field would reasonably rely upon.

¶11 Alternatively, Michael argues he is entitled to a new trial because the circuit court erroneously exercised its discretion in sending Roberts's report to the jury. Whether an exhibit should be sent to the jury is a discretionary decision. *State v. Hines*, 173 Wis. 2d 850, 858, 496 N.W.2d 720 (Ct. App. 1993). In exercising its discretion, the circuit court should consider three factors: (1) whether the statement will aid the jury in proper consideration of the case; (2) whether a party will be unduly prejudiced by the exhibit's submission; and (3) whether the exhibit could be subjected to improper use by the jury. *Id.* at 860. However, we may also independently search the record for a reasonable basis for the trial court's decision. *Id.* at 858, 860-61.

¶12 Specifically, Michael contends the circuit court erroneously exercised its discretion by not following the three factors set out above. In deciding to send the report to the jury, the circuit court concluded:

Well, the reason I didn't allow it to be published to the jury was just a matter of expediency. I thought Dr. Roberts was testifying so extensively that it wasn't necessary that they see the report.... But by asking the question, they have told me it is necessary that they see the report. The report's been available to both sides. Both sides had a chance to interrogate Dr. Roberts concerning the substance of the report. I'm going to give it to them at this time over the objection.

¶13 Regarding the first factor, the circuit court stated, “by asking the question, they have told me it is necessary that they see the report.” This statement demonstrates the court considered the probative value of the report to the jury’s deliberations. As the court noted, the request for the report evidences the jury’s need to review that report in making its decision.

¶14 Regarding the second factor, the circuit court noted “[t]he report’s been available to both sides. Both sides had a chance to interrogate Dr. Roberts concerning the substance of the report.” This statement demonstrates the court considered the prejudice to the parties because it shows the court considered whether both parties had an opportunity to address the contents of the report to the jury.

¶15 Regarding the third factor, the report merely contained details of incidents described during testimony and similar behavior by Michael. While Michael argues the report contains inadmissible hearsay, those items are admissible because they go to the basis for Roberts’s expert opinion regarding whether Michael should be committed. *See* WIS. STAT. § 907.03. Therefore, allowing the jury to view the report, which may have contained more specific details of these types of events, did not unduly prejudice the jury. In sum, the trial court reasonably exercised its discretion when permitting Roberts’s testimony, and submitting his report to the jury. Thus, Michael is not entitled to a new trial.

By the Court.—Order affirmed.

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

