COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2006AP2030 **Cir. Ct. No. 2005CI5**

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

IN RE THE COMMITMENT OF JEROME EDWARDS:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JEROME EDWARDS,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 FINE, J. Jerome Edwards appeals a judgment finding him to be a sexually violent person, *see* WIS. STAT. § 980.01(7) (2003–04), and an order committing him to a secure mental health facility, *see* WIS. STAT. § 980.06. Edwards claims that: (1) the trial court erroneously admitted hearsay, and (2) the evidence was insufficient to support the conclusion that he was a sexually violent person. We affirm.

I.

¶2 In July of 1995, Edwards was convicted of second-degree sexual assault of a child. *See* WIS. STAT. § 948.02(2) (1993–94). The trial court sentenced Edwards to ten years in prison. In June of 2005, the State filed a WIS. STAT. ch. 980 petition alleging that Edwards: (1) had previously been convicted of a sexually violent offense; (2) was within ninety days of his release; and (3) suffered from a mental disorder which made it "substantially probable" he would engage in acts of sexual violence.[1]

[1] The trial court also applied the "substantially probable" criterion. Effective for "hearings, trials, and proceedings that are commenced on" or after April 22, 2004, however, the definition of a "sexually violent person" was changed to mean someone who is "likely," rather than "substantially probable" to engage in acts of sexual violence. 2003 Wis. Act 187, §§ 2, 8. The word "likely" was defined to mean "more likely than not." WIS. STAT. § 980.01(1m) (2003–04) (created by 2003 Wis. Act 187, § 1, also effective for "hearings, trials, and proceedings that are commenced on" or after April 22, 2004. 2003 Wis. Act 187, § 8). Edwards does not contend that the trial court's application of the "substantially probable" criterion prejudiced him. Indeed, the "substantially probable" criterion requires a greater showing than does the "more likely than not" standard:

> By enacting 2003 Wis. Act 187, the legislature lowered the level of dangerousness required to commit a person under chapter 980. The prior language, "substantially probable," was judicially defined to mean "much more likely than not." ***State v. Curiel***, 227 Wis. 2d 389, 401, 597 N.W.2d 697[, 702] (1999); *see also* ***State v. Kienitz***, 227 Wis. 2d 423, 434, 597 N.W.2d 712[, 717] (1999). The current term, "likely," is statutorily

(continued)

¶3 Edwards waived his right to a jury and was tried by the court. At Edwards's trial, David Melby, a probation/parole agent, testified that Edwards was convicted in 1988 of second-degree sexual assault and was put on probation for three years. According to Melby, while Edwards was on probation in 1990, he committed what Melby considered to be a "sexually motivated" crime that was ultimately reduced to aggravated battery, as an habitual criminal, although it was initially charged as a sexual assault. *See* WIS. STAT. §§ 940.19(1), 939.62 (1989–90). The Record does not give a reason for the reduction. Melby testified that Edwards "disputed" the report's assessment of the 1990 crime, but admitted that he had violated the rules of his probation by committing a battery and by drinking alcohol.

¶4 At the end of Melby's testimony, the State moved to admit several documents from Edwards's Department of Corrections file, including some of the documents relating to the 1990 crime. Edwards's lawyer objected, claiming that there were "too many levels of hearsay to make these admissible." The trial court declared that it would "accept the exhibits that have been proposed."

¶5 Susan Sachsenmaier, Ph.D., a licensed psychologist, also testified for the State. She spoke with Edwards at the Racine Correctional Institution and also reviewed Edwards's records. She diagnosed Edwards as suffering from

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> defined to mean "more likely than not." WIS. STAT. § 980.01(1m); *see also* ***State v. Tabor***, 2005 WI App 107, ¶5, 282 Wis. 2d 768[, 773], 699 N.W.2d 663[, 665] (legislature intended "to *change* (and lower)" the standard)[(emphasis in ***Tabor***)], *review denied*, 2005 WI 136, 285 Wis. 2d 629, 703 N.W.2d 379 (No. 2004AP1986).

State v. Nelson, 2007 WI App 2, ¶5, ___ Wis. 2d ___, ___, 727 N.W.2d 364, 367.

"paraphilia not otherwise specified" and "antisocial personality disorder." Dr. Sachsenmaier told the trial court that her diagnosis was based in part on what she considered to be two sexually motivated crimes Edwards had committed in addition to the 1995 sexual assault of a child: a 1988 "very aggressive rape" of a seventeen-year-old girl, and the 1990 "aggravated battery," which, as we have seen, was originally charged as a sexual assault.

¶6 In determining whether Edwards was a dangerous sexually violent person, Dr. Sachsenmaier told the trial court that Edwards scored "high" and "moderately high" on the various protocols she used. She also told the trial court that she considered the 1988 sexual assault and the 1990 "aggravated battery" in making her assessment. She testified that she viewed the 1990 "aggravated battery" as sexually motivated, based on a report from the Beacon Sex Offender Treatment Program that recounted that Edwards "had attacked his 1990 victim as an attempted rape because he was angry at his friend George." The victim was "George"'s friend. Dr. Sachsenmaier indicated that she also considered that Edwards told her that he did not intend to rape the victim, as well as a police report recounting that "George" told the police that he heard Edwards tell the victim that he wanted to have sex with her, and also that the victim told the police that Edwards did not try to sexually assault her. Dr. Sachsenmaier explained her analysis to the trial court:

> Well, I truly don't know if at the time he started to physically assault her, if he was thinking he was going to sexually assault her at that point. Although he had pushed her into an alley and was attempting to push her through a basement window into an abandoned house. So one has to use some common sense when one sees that he had convinced his friend [] that he was going to have sex with her, she said she was going to have sex with him, they left together and he gets halfway home and decides he can't take her there because his girl friend is there, shoves her over into an abandoned alley and tries to force her into a

> house at which point she apparently fights back and he as he told me felt that she was attacking him. Although she's a great, great deal smaller than he was and he rather viciously assaults her. So it's significant to me that even though she said to the police that he did not try to sexually assault her right then, it was a very sexualized context where they both believed they were going to have sex together.

Considering what she told the trial court were Edwards's "individual factors," including his history of sexual deviance, lack of behavioral self-control, and questionable treatment status, she opined to a reasonable degree of psychological certainty that "there's an adequate -- foundation in the work that I did for me to say that [Edwards] meets the criteria for more likely than not to commit another sexually violent offense in the future."[2]

¶7 William Schmitt, Ph.D., a licensed psychologist, also testified for the State. He told the trial court that he reviewed Edwards's file and determined that Edwards suffered from an "antisocial personality disorder" and "paraphilia not otherwise specified non consent," which Dr. Schmitt explained means that the person is aroused sexually by "non consensual sexual contact with others." Dr. Schmitt also considered the 1990 "aggravated battery" and said that he viewed it as a sexually motivated crime, based on his review of the criminal complaint, police reports, and an "apparent admission" in the Beacon Report that "at some point Mr. Edwards acknowledged that it was an attempted rape." Dr. Schmitt told the trial court that he saw several "red flags" in connection with Edwards even though Edwards had completed his most recent treatment, including that Edwards had failed other treatment programs, continued to either deny that he committed his crimes or minimized his responsibility, and, in Dr. Schmitt's view, lacked an

[2] As seen in footnote one, Dr. Sachsenmaier applied the correct criterion.

adequate relapse-prevention plan. Dr. Schmitt opined to a reasonable degree of psychological certainty that Edwards was "a high risk sex offender who has the prerequisite mental disorders that predispose him to commit another sexually violent crime."

¶8 Edwards called two psychological experts to testify on his behalf. The first, Cynthia Marsh, Ph.D., is a licensed psychologist. She admitted that Edwards had "paraphilia not otherwise specified" and "antisocial personality disorder," but concluded that she did "not think it's likely that [Edwards] will reoffend in a sexually violent way." In assessing his risk, Dr. Marsh explained that although she initially included the 1990 "aggravated battery" in her assessment, she did not consider the crime to be sexually motivated. She explained to the trial court that the victim told the police that Edwards did not do anything sexual and, in her opinion, "[t]ypically, the victim is the most reliable witness to a crime."

¶9 The second psychological expert to testify for Edwards was Charles Lodl, Ph.D., a licensed psychologist. He told the trial court that Edwards suffered from a personality disorder with antisocial features, and that he had a "moderate to high level" risk of reoffending, noting that Edwards had made "sufficient progress" in treatment "to lower his level of risk." Dr. Lodl testified that he, too, did not consider the 1990 "aggravated battery" to be sexually motivated because "the situation was at least ambiguous" and opined to a reasonable degree of psychological certainty that Edwards's risk of reoffending was "below the standards of … more likely than not."[3]

[3] As seen from footnote one, Dr. Lodl also applied the correct criterion.

¶10 The trial court ordered Edwards to be committed as a sexually violent person, concluding, as material, that "there was a substantial probability that [Edwards] will engage in acts of sexual violence." *See* WIS. STAT. § 980.01(7) (2003–04).[4]

II.

A. *Hearsay.*

¶11 Edwards contends that the trial court erroneously exercised its discretion when it: (1) received into evidence the report prepared by the probation department, and (2) permitted the experts to base their opinions on that report. We address each contention in turn.

¶12 As we have seen, Edwards claims that the probation report had multiple levels of inadmissible hearsay. *See* ***State v. Weber***, 174 Wis. 2d 98, 107, 496 N.W.2d 762, 766 (Ct. App. 1993) ("Hearsay data upon which the expert's opinion is predicated may not be automatically admitted into evidence by the proponent and used for the truth of the matter asserted unless the data are otherwise admissible under a recognized exception to the hearsay rule."). Although we assume without deciding that the investigation report was hearsay (*but see* WIS. STAT. RULES 908.03(6) and 908.03(8)), the trial court sitting as the fact-finder could consider it under WIS. STAT. RULE 907.05 to evaluate the experts' opinions and reasoning. *See also* WIS. STAT. RULE 907.03 (expert may rely on inadmissible data if of a type reasonably relied on by experts in the field in forming an opinion or inference). RULE 907.05 provides:

[4] See footnote one.

> The expert may testify in terms of opinion or inference and give the reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Thus,

> [n]ow that Rule 703 [of the Federal Rules of Evidence—upon which RULE 907.03 is patterned] permits experts to rely on certain inadmissible data, the direct examiner may wish to bring out all the data on which the expert relied in order to bolster the testimony. Rule 705 [of the Federal Rules of Evidence—upon which RULE 907.05 is patterned] permits the examiner to do this, assuming the Court believes that bringing out the data not independently admissible is acceptable, something discussed under Rule 703.

2 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL 1195–1196 (6th ed. 1994).

¶13 Here, the trial judge, again, sitting as the fact-finder, "accept[ed] the exhibits that have been proposed," including the report, and permitted the experts to explain how and to what extent they used the report in forming their opinions. This was fully permitted by the rules. *See* ***McCoy v. May***, 255 Wis. 20, 25, 38 N.W.2d 15, 17 (1949) (presumed trial court follows rules of evidence). Significantly, Edwards does not point to any instance where the trial court used the report as substantive evidence. Indeed, in its oral ruling, the trial court made limited references to "reports" solely in connection with its evaluation of the experts' opinions:

> we look at the -- at the testimony, and it falls down on two lines.
>
> You've got Dr. Sachsenmaier and Dr. Schmitt with certain conclusions that his scores and his -- the risk evaluation places [Edwards] in a likelihood that is well above the requirement.

> You've got Dr. Marsh and Dr. Lodl, which don't agree with that, and were quite adamant in their positions that he did not fall into the category.
>
> But Dr. Lodl and Dr. Marsh both, I think, placed a lot of emphasis on the Beacon [P]rogram, which I just don't see warranted in those reports.
>
> And secondly, their evaluation of the 1990 attack is, I think, questionable.
>
> You know, the evidence in that -- in that report, in those reports that are in here, I think that there is fairly strong evidence that this was a sexually-motivated crime.
>
> And they -- rather than say, well, you know, I've considered that, and I think that that's important, but I think that it's mitigated by this, that, or the other, they basically dismissed it, and it's the dismissal that causes me concern.
>
> You know, if they considered it and told me why they didn't think it was important, I think I would be more inclined to listen to that than just dismissing it.
>
> The victim's statement was -- was inconsistent with the defendant's description of the event.
>
> The witness's statement was inconsistent with the defendant's statement of the event.
>
> Their statements were very consistent with one another, and why both doctors determined that they were not gonna [*sic*] find those credible and accept the defendant's statement is beyond me, because his behavior was consistent with his prior events.
>
> So that is what is -- would lend some credibility to, I think, the victim and the witness, but they did not do that, and I find that very questionable.

¶14 We also reject Edwards's contention that the experts improperly based their opinions on inadmissible hearsay in the report. While conceding, as phrased in his main brief on this appeal, that "it is well-known that experts routinely review [Department of Corrections] records and routinely rely upon them in forming their opinions," he claims that this case is "different" because the

experts drew from the report an impermissible "factual inference" that the 1990 "aggravated battery" was sexually motivated. We disagree.

¶15 WISCONSIN STAT. RULE 907.03 provides:

> 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.

Experts are thus permitted to "form[] opinions or [make] inferences" based on inadmissible data. In this case, the experts were offering their opinions whether the "aggravated battery" was sexually motivated to explain how they reached the conclusion that Edwards did or did not meet the definition of a sexually violent person. This is the very core of what RULE 907.03 permits, and Edwards could have attacked the opinions of those experts who opined that he was a dangerous sexually violent person by showing, if he could, that the experts' characterization of the 1990 "aggravated battery" was misplaced. The experts, however, were entitled to factor that crime into their calculus.

B. *Sufficiency of the Evidence.*

¶16 Under WIS. STAT. ch. 980, the State had to prove beyond a reasonable doubt that Edwards was a sexually violent person. WIS. STAT. § 980.05(3)(a). Under WIS. STAT. § 980.01(7) (2003–04), a sexually violent person:

> means a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect, or illness, and who is

> dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in acts of sexual violence.[5]

(Footnote added.) Here, the trial court determined, and Edwards does not dispute, that Edwards had been convicted of a sexually violent offense and that he had a requisite mental disorder. As the trial court noted, the "lynchpin" of this case was the assessment of whether Edwards's mental disorder was the proper subject of commitment under ch. 980.

¶17 Edwards, in a variant of his other contentions, claims that the inference that the 1990 "aggravated battery" was sexually motivated was critical to the State's position and the trial court's analysis, and that without the report about the "aggravated battery" and its alleged sexual underpinning there was insufficient evidence to support the trial court's conclusion that Edwards was substantially probable to engage in acts of sexual violence. We disagree.

¶18 We will not reverse a WIS. STAT. ch. 980 commitment "'unless the evidence, viewed most favorably to the state and the [commitment], is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found [the defendant to be a sexually violent person] beyond a reasonable doubt.'" ***State v. Marberry***, 231 Wis. 2d 581, 593, 605 N.W.2d 612, 619 (Ct. App. 1999) (quoted source omitted; brackets in ***Marberry***).

[5] In addition to the amendment discussed in footnote one, WIS. STAT. § 980.01(7) has been amended effective August 1, 2006. 2005 Wis. Act 434, § 70. The changes are not material to this appeal.

¶19 Here, as we have seen, the experts were properly allowed to rely on the report, and the trial court appropriately weighed the experts' opinions, as well as also considering Edwards's background, age, and treatment history. This evidence was more than sufficient to support the trial court's conclusion that "there was a substantial probability that [Edwards] will engage in acts of sexual violence." Thus, *a fortiori*, Edwards met the lower criterion of "more likely than not." *See* footnote one.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.