

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 27, 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. 2006AP2473**

**Cir. Ct. No. 2003CI6**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**IN RE THE COMMITMENT OF  
JEROME THOMAS ODELL, JR.:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**v.**

**JEROME THOMAS ODELL, JR.,**

**RESPONDENT-APPELLANT.**

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APPEAL from orders of the circuit court for Milwaukee County:  
JEFFREY A. WAGNER, Judge. *Affirmed.*

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

¶1 CURLEY, P.J. Jerome Thomas Odell, Jr. appeals the commitment order entered against him after he was found to be a sexually violent person. He

also appeals the order denying his postcommitment motions. He argues that the trial court erroneously exercised its discretion when it granted a jury request to send the written expert witness reports to the jury during its deliberations. Because the trial court properly exercised its discretion in sending the requested reports to the jury, we affirm.

### I. BACKGROUND.

¶2 In April 1984, Odell was charged with first-degree sexual assault for having sexual contact with his then six-year-old daughter, C.K. At the time he was charged, he was on probation for first-degree sexual assault, having been convicted in 1982 of sexually assaulting the same daughter. After Odell's probation was revoked, the 1984 charge was dismissed and read into the record at sentencing. Odell received a sentence of eighteen years' imprisonment. According to documents found in the record, Odell was paroled in 1993, but subsequently in 2000, his parole was revoked for numerous violations, and he was reincarcerated.

¶3 On November 19, 2003, the State filed a petition alleging that Odell was a sexually violent person within the meaning of WIS. STAT. ch. 980 (2001-02).<sup>1</sup> The trial court found probable cause that Odell was a sexually violent person and that he was eligible for commitment. Thereafter, numerous motions seeking dismissal of the action were filed and resolved, and on May 8, 2006, a jury trial began. The sole issue before the jury was whether Odell was a sexually violent person as alleged in the petition. During the trial numerous witnesses were

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

called, including three doctors, who testified and gave their opinions concerning whether Odell fell within the definition of a sexually violent person. Dr. Anthony Jurek testified for the State and claimed that Odell was a sexually violent person. Drs. James Harasymiw and Diane Lytton, called by Odell, opined that he was not.

¶4 Originally the State and the defense agreed not to send the written doctors' reports to the jury during its deliberations. However, on May 11, 2006, after deliberating approximately three hours, the jury sent a note to the court stating that they were unable to reach a verdict. In response, after the jury deliberated approximately five hours, the trial court read them a modified *Allen* charge which urges the jurors to try to reach a verdict, and the trial court directed them to continue deliberations.<sup>2</sup> Shortly thereafter, the jury sent another note to the trial court seeking to have the "overall assessments of Mr. Odell from each of the three doctors." Over the objection of defense counsel, the reports of Drs. Jurek, Lytton and Harasymiw were sent to the jury. Defense counsel also asked the trial court to redact copies of the reports, but the trial court declined to do so. The next day, the jury returned a verdict finding Odell to be a sexually violent person. The trial court then committed Odell for care in a secure mental health facility. Odell brought motions after verdict which were denied by the trial court. This appeal follows.

## II. ANALYSIS.

¶5 Odell submits that the trial court erroneously exercised its discretion when it granted the jury's request for the doctors' reports. Initially Odell argues

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<sup>2</sup> The term *Allen* charge comes from the United States Supreme Court case detailing this instruction, *Allen v. United States*, 164 U.S. 492, 501 (1896).

that the trial court failed to apply the proper standard and “confused the issue of whether the reports were properly admitted into evidence with the issue of whether the exhibits should go back to the jury.” Additionally, Odell argues that giving the reports to the jury “increased the likelihood that the jury would improperly be swayed by emotion over reason, ... improperly g[ave] more weight to Dr. Jurek’s opinions than to the criticisms of those opinions, and introduced prejudicial material that the jury would not have heard otherwise.” Specifically, Odell claims that because Dr. Jurek concluded that Odell suffered from paraphilia and satisfied the criteria for commitment under WIS. STAT. ch. 980,<sup>3</sup> and the other two doctors did not diagnose Odell with that disorder, that the jury, upon reading Dr. Jurek’s report, despite the opposing doctors’ testimony challenging Dr. Jurek’s conclusion, would brand Odell as a sexual deviant. Odell also complains that because Dr. Jurek’s report contained numerous actuarial results concerning Odell’s chances of reoffending, the jury would be swayed by the statistics. Odell claims this is particularly troubling since the other two doctors testified that some of the actuarial tables Dr. Jurek cited were not trustworthy. Finally, Odell submits that the reports placed prejudicial information in front of the jury in the form of opinions of other doctors who did not testify, and this information not only unduly prejudiced him, but also resulted in the jury improperly using the reports. We are not persuaded.

¶6 Whether an exhibit should be sent to the jury during deliberations is a discretionary decision for the trial court. *See State v. Larsen*, 165 Wis. 2d 316,

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<sup>3</sup> According to Dictionary.com, paraphilia is defined as “a type of mental disorder characterized by a preference for or obsession with unusual sexual practices, as pedophilia, sadomasochism, or exhibitionism.” *Id.*, <http://dictionary.reference.com/browse/paraphilia> (last visited Dec. 5, 2007).

321-22, 477 N.W.2d 87 (Ct. App. 1991). “A court properly exercises its discretion when, in making a decision, it employs a process of reasoning which depends on facts that are in the record or are reasonably derived by inference from the record, and yields a conclusion based on logic and founded on proper legal standards.” *Id.* at 322 (citation and internal quotation marks omitted). “We will not reverse a discretionary determination by the trial court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court’s decision.” *Prahl v. Brosamle*, 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987).

¶7 A trial court’s decision whether to send exhibits to the jury during deliberations is guided by three considerations: (1) “whether the exhibit will aid the jury in proper consideration of the case”; (2) “whether a party will be unduly prejudiced by submission of the exhibit”; and (3) “whether the exhibit could be subjected to improper use by the jury.” *State v. Jensen*, 147 Wis. 2d 240, 260, 432 N.W.2d 913 (1988).

¶8 The record reveals that after the trial court received the note from the jury, it entertained argument from both the State and Odell’s attorney as to how to respond to the request. The State argued that the jury should receive the reports because what the jury requested was “the guts of the matter that is to be decided by [them].” The State reminded the court that, under WIS. STAT. § 907.07 (2005-06), expert witnesses can read their entire reports into the record, and it would have been perfectly proper for the experts to have read their reports to the jury, so giving the jury the reports to read was hardly a stretch. Odell’s attorney objected. He pointed out that the doctors did not read their reports into the record and that there was information in the reports that was never discussed during

testimony. He also argued that the jury's reading of the reports would dilute the testimony of the experts.

¶9 The trial court opted to send the reports to the jury, stating:

Well, I appreciate your advocacy but the underlying basis for their opinions are the reports that have been submitted and they have been received as evidence and I understand your objections but I couldn't agree more with what the State has stated in their argument and the statute that was cited under 907.

Although the trial court commented that the reports were admissible, Odell's suggestion that the court confused the fact that the reports were admissible with the appropriate factors to consider in giving exhibits to the jury is unfounded. The court adopted the arguments of the State, which said the reports would aid the jury and the jury was entitled to have all the evidence bearing on the issue before it after having heard the testimony of the experts and their cross-examinations by the attorneys. Thus, while the trial court's explanation was not extensive, it did not apply the wrong standard, and we can perceive a reasonable basis for the court's ruling.

¶10 We first look to see whether the experts' reports aided the jury in their proper consideration of the case. *See Jensen*, 147 Wis. 2d at 260. There can be no question that the reports were helpful to the jury in deciding whether Odell was a sexually violent person. The question before the jury required the assistance of expert witnesses because the determination of just what is a sexually violent person and who falls within the definition necessitated witnesses with specialized knowledge. As the State argued to the trial court, the reports were the "guts of the matter." The fact of the matter is that the jury should have had access to the reports. A tremendous burden had been placed on this jury's shoulders. It was

charged with making a significant decision that could, depending on the outcome, result in Odell's lifetime commitment as a sexual deviant. Certainly a decision of this magnitude entitled the jury to all the pertinent and available information.

¶11 We consider the next factor, whether Odell was “unduly prejudiced” by the submission of the reports to the jury. *See id.* Odell argues that the reports “increased the likelihood that the jury would improperly be swayed by emotion over reason, ... improperly g[ave] more weight to Dr. Jurek's opinions than to the criticisms of those opinions, and introduced prejudicial material that the jury would not have heard otherwise.” We strongly disagree.

¶12 Odell's claim that the jury would “be swayed by emotion over reason” after reading the reports is pure speculation. Nothing in the record supports this bald assertion. The jury requested the reports when, after five hours, they were unable to reach a verdict. If, as Odell suggests, the reports constituted such powerful emotional evidence, one would have expected an immediate verdict. Instead, the jury continued to deliberate for several hours after receiving the reports. Thus, giving the reports to the jury did not create the emotional response claimed by Odell.

¶13 Odell next argues that the paraphilia diagnosis by Dr. Jurek generated an improper response by the jury. Dr. Jurek's diagnosis that Odell suffered from a paraphilia disorder was already well known to the jury. So, too, when the jury obtained the reports, it had heard the criticisms of Dr. Jurek's diagnosis by the other two doctors. This is not a situation where one-sided information was sent to the jury. The jury heard the testimony of all of the doctors and received all of their reports. It is hard to imagine under these circumstances that the reports, in combination with the testimony of the experts, could possibly

be unduly prejudicial. To be sure, Dr. Jurek's report was detrimental to Odell. His report was twenty-six pages long and very detailed. In contrast, Dr. Harasymiw's three reports (the first, entitled "PSYCHOLOGICAL EVALUATION"; the second, called an "ADDENDUM"; and the third, entitled "CORRECTIONS TO ADDENDUM"), are collectively eighteen pages in length, and Dr. Lytton's letter and report are only six pages long. However, the fact that the other experts' reports are not as lengthy does not automatically transform Dr. Jurek's report into one that "unduly prejudiced" Odell. So, too, the record does not support Odell's claim that the jury was swayed by the statistical information found in Dr. Jurek's report. The jury heard Odell's doctors' testimony concerning the unreliability of these test results and the fact that the underpinnings for one of the tests had been called into question. The jury had the opportunity to observe the experts' demeanor and to discern the experts' knowledge during their testimony before obtaining the written reports. Simply reading about the statistical reports that were testified to by all parties was not "unduly prejudicial" to Odell.

¶14 Odell also contends that information found in the reports that was not mentioned in testimony rendered the reports "unduly prejudicial." Given that the reports could have been read into the record, *see* WIS. STAT. § 907.07 (2005-06), and the information found in the reports was of a type used by experts in these cases, it does not appear that having this information available to the jury was "unduly prejudicial." Moreover, some of the information referenced and contained in Dr. Jurek's report actually was favorable to Odell.

¶15 Finally, we address Odell's claim that the doctors' expert reports "likely were subjected to improper use by the jury." *See Jensen*, 147 Wis. 2d at 260. Odell writes that "the jury used the reports to resolve the credibility dispute that had led to the deadlock." We are hard-pressed to understand this argument.



The fact that the jury may have been aided by the reports in reaching its decision hardly qualifies as an improper use. Perhaps reading the reports persuaded a juror to change his or her mind, but it is also likely that it did not, and that something else led to the jury's decision. It must be remembered that the jury had all of the reports, not just that of the State's expert witness, and the reports were not the only evidence in the case. The jurors had the benefit of the testimony of the witnesses, including extensive cross-examination, the arguments of counsel and the court's instructions. The use of the reports to augment the other evidence heard by the jury was not an improper use. The trial court properly exercised its discretion when it granted the jury's requests for all the expert witnesses' reports. For the reasons stated, the trial court's decision is affirmed.

*By the Court.*—Orders affirmed.

Not recommended for publication in the official reports.

