

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 6, 2004

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. 03-1832
STATE OF WISCONSIN**

Cir. Ct. No. 02CI000001

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE COMMITMENT OF JAMES C. SMITH:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

JAMES C. SMITH,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
MARK A. WARPINSKI, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PETERSON, J. James Smith appeals an order committing him as a sexually violent person pursuant to WIS. STAT. § 980.06.¹ He argues the court erroneously relied on inadmissible evidence of prior sexual offenses. We conclude that any error was harmless and therefore we affirm the order.

BACKGROUND

¶2 The State filed a petition on October 31, 2002, seeking commitment of Smith as a sexually violent person. The State alleged and Smith stipulated that he was convicted of second-degree sexual assault in 1994 and was sentenced to eight years in prison. He was due to be released on November 7, 2002.

¶3 The State called two psychologists at trial. First, Dr. Anthony Jurek testified that Smith suffered from paraphilia and personality disorder. Jurek concluded that these disorders predisposed Smith to acts of sexual violence. Jurek determined that there was a substantial probability that Smith would engage in future acts of sexual violence.

¶4 Second, Dr. Patricia Coffey testified that Smith suffered from a personality disorder and that the disorder predisposed Smith to acts of sexual violence. She agreed with Jurek that there was a high risk that Smith would reoffend sexually.

¶5 Smith's expert, Dr. Lynn Maskel, questioned the accuracy of the actuarial instruments Jurek and Coffey used and said their risk assessments were not made with the requisite degree of scientific certainty. Maskel did not evaluate

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

Smith, however, and had no opinion regarding whether Smith suffers from a mental disorder or whether he is predisposed to engage in acts of sexual violence.

¶6 Jurek and Coffey also prepared written reports that contained, among other things, information about two sexual offenses Smith committed in March and April of 1978. Their reports referred to police reports, presentence investigation reports, and criminal complaints. Neither Jurek nor Coffey testified about the prior incidents, and no other evidence was submitted regarding them.

¶7 The State offered the doctors' reports into evidence. Smith objected and the court sustained the objection. After presenting its case, the State again asked the court to receive the reports into evidence. Smith objected, arguing the reports contained hearsay. The court stated it would receive the reports into evidence but was undecided whether it would take them into consideration. However, the court stated it had read the reports and it would be difficult to ignore them.

¶8 When court reconvened the next morning, Smith again argued the reports contained hearsay. The court stated it would receive the reports into evidence but would not “review those for their factual content in—for purposes of making my decision, but rather rely on the notes I have taken and my recollection of the testimony.”

¶9 The court found that Smith suffered from a personality disorder and that the disorder predisposed him to acts of sexual violence. It referred to the 1978 incidents, stating:

I think that looking at Mr. Smith's past history which most notably the episode in the—I think it was the supermarket parking lot in April of 1978 ... And that episode in combination with the testimony of the doctors, would

suggest to me and lead me to the conclusion that Mr. Smith is predisposed to engage in acts of sexual violence. His history tells us that.

We have three different episodes of attempted or actual sexual violence

The court also found that Smith's personality disorder caused him to have difficulty controlling his behavior. Again, the court referred to the 1978 incidents: "And likewise it would seem to me that an individual who is incarcerated for a period of time for inappropriate sexual activity after the 1978 episodes to go back to that again in 1994 would tell me that a person can't control it." The court then found that Smith was more likely than not to engage in future acts of sexual violence and committed him to the custody of the Department of Health and Family Services.

¶10 In a post-trial motion, Smith argued that the court improperly based its finding on facts not in the record when it referred to the 1978 incidents. Smith sought a new trial. The court denied the motion, stating:

What happened here is that Dr. Coffey's report, according to the official records of the Court, Dr. Coffey's report was received in evidence. It was offered by the state and received. Assuming that to be the case, Dr. Coffey's report is a source of information upon which this Court can rely.

DISCUSSION

¶11 Smith argues the doctors' reports are hearsay and thus the court erred by admitting them into evidence. While the State disputes that the reports constitute hearsay, it does concede that the court improperly considered the information from the 1978 incidents after it stated it would not.

¶12 If evidence has been erroneously admitted, we will independently determine whether that error was harmless or prejudicial. See *State v. Patricia A.M.*, 176 Wis. 2d 542, 556-57, 500 N.W.2d 289 (1993). Generally, an error is harmless if there is no reasonable possibility that it contributed to the outcome. *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). A “reasonable possibility” is one that is sufficient to undermine confidence in the outcome of the proceeding. *Patricia A.M.*, 176 Wis. 2d at 556.

¶13 We conclude that the court’s comments regarding the 1978 convictions are not sufficient to undermine our confidence in the outcome. We are confident the court would have found all the elements present without the information from the 1978 convictions. The court relied primarily on Jurek’s and Coffey’s testimony regarding the elements and referred to their testimony throughout its decision. Although Smith’s expert disputed Jurek’s and Coffey’s conclusions, the court as the finder of fact is the ultimate arbiter of the credibility of the witnesses and of the weight to be given to each witness’ testimony. See *Plesko v. Figgie Int’l*, 190 Wis. 2d 764, 775, 528 N.W.2d 446 (Ct. App. 1994).

¶14 First, the court had to determine whether Smith suffered from a mental disorder. The court noted that all three experts agreed that Smith suffered from a personality disorder. Next, the court turned to whether the disorder affects Smith’s emotional or volitional capacity. The court stated that Coffey’s testimony was “most helpful” in that regard: “[Coffey] indicated that when you look at this disorder and you look at the facts surrounding Mr. Smith’s personal history is that one of the components of this disorder is that it affects or it shows a lack of capacity to empathize with victims.” Finally, the court determined that Smith’s disorder predisposed him to acts of sexual violence. It stated that “his history tells us that” and that “that is supported by the testimony of Dr. Jurek and Dr. Coffey.”

¶15 The court also discussed all three experts' testimony regarding the reliability of actuarial instruments used to evaluate risk of sexual reoffense. It concluded, "these tests are [not] so deficient as to be unreliable." The court also noted that Smith's expert did not offer a contradictory opinion regarding Smith's likelihood of reoffense. When we read the court's decision as a whole, we are satisfied that the court relied on proper evidence. Consequently, we conclude that the court would have found sufficient evidence to order Smith's commitment even without the 1978 incidents. Thus, our confidence in the outcome is not undermined and any error was harmless.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

