COURT OF APPEALS
DECISION
DATED AND FILED

August 19, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3043 **Cir. Ct. No. 02CI000001**

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

IN RE THE COMMITMENT OF JAMES G. GEIGER:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JAMES G. GEIGER,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed*.

Before Deininger, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. James Geiger appeals a judgment determining him to be a sexually violent person and committing him to institutional care at a secure mental health facility. He also appeals an order denying his postjudgment

motions. Geiger challenges the sufficiency of the evidence to support the verdict and claims the trial court erred in allowing an expert witness to read and summarize for the jury the factual allegation portions of several criminal complaints previously filed against Geiger. We affirm for the reasons discussed below.

Sufficiency of the Evidence

¶2 The parties agree that, in order to prove its case, the State needed to establish it was much more probable than not that, due to a mental disorder which caused him serious difficulty in controlling his behavior, Geiger would commit an act of sexual violence unless he was confined. *See* ***State v. Laxton***, 2002 WI 82, ¶23, 254 Wis. 2d 185, 647 N.W.2d 784, *cert. denied*, 537 U.S. 1114 (2003). When reviewing the sufficiency of the evidence to support a Chapter 980 commitment, we will sustain the verdict unless the evidence, viewed most favorably to the State, is so lacking 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 respondent to be a sexually violent person beyond a reasonable doubt. ***State v. Marberry***, 231 Wis. 2d 581, 593, 605 N.W.2d 612 (Ct. App. 1999).

¶3 Here, the State presented testimony from two experts that Geiger had serious difficulty controlling his behavior and was much more likely than not to reoffend unless he were detained. Unless an expert's testimony is incredible as a matter of law, a jury has the right to accept the expert's opinion notwithstanding conflicting testimony from other witnesses. ***State v. Lombard***, 2003 WI App 163, ¶21, 266 Wis. 2d 887, 669 N.W.2d 157, *aff'd*, 2004 WI 95, __ Wis. 2d __, 684 N.W.2d 103.

¶4 Geiger argues that the opinions of the State's experts were not credible because they failed to properly consider statistical drops in recidivism rates for sexual offenders beyond the ages of forty-five and sixty, and because the experts made an impermissible leap in logic, from the fact that Geiger still had a sexual interest in children, to the conclusion that he is substantially probable to touch them rather than merely look at them. Testimony is not incredible as a matter of law, however, unless it is in conflict with the uniform course of nature or with fully established or conceded facts. ***Estate of Neumann v. Neumann***, 2001 WI App 61, ¶27, 242 Wis. 2d 205, 626 N.W.2d 821.

¶5 Here, testimony from one of the State's experts indicated that two of the actuarial instruments she used incorporated the age of the offender. The expert noted that, while Geiger was approaching the age at which some studies show recidivism starts to decline, more recent analysis shows that offenders like Geiger, with high actuarial scores, tend to continue reoffending at a similar rate to younger individuals.

¶6 In addition to the prior sexual offenses Geiger had committed, there was also evidence that Geiger continued to clip pictures of children out of magazines and used those pictures for purposes of sexual arousal and masturbation. Staff members considered Geiger's behavior obsessive compulsive because his possession of the pictures violated the institution's rules.

¶7 In sum, the opinions of the State's experts were not in conflict with fully established facts or otherwise incredible as a matter of law merely because there could be some disagreement about the proper weight to give to Geiger's age when calculating his probability of reoffending or about what inferences could be

reasonably drawn from Geiger's behavior. The experts' testimony was sufficient to support the verdict. *See* ***Lombard***, 266 Wis. 2d 887, ¶22.

Testimony About Complaints

¶8 One of the State's experts testified that she had reviewed Geiger's criminal complaints as part of her evaluation of him. Then, over a defense objection, she read the allegation portion of one complaint to the jury and summarized the allegations from three other complaints. Geiger contends the expert's testimony about the content of the complaints should have been excluded on hearsay grounds.

¶9 WISCONSIN STAT. § 907.03 (2001-02)[1] allows an expert to rely upon inadmissible evidence when forming an opinion. An expert witness is also permitted to explain the basis for his or her opinion in order to assist the trier of fact in assessing the validity of the opinion. *See* ***Heyden v. Safeco Title Ins. Co.***, 175 Wis. 2d 508, 522, 498 N.W.2d 905 (Ct. App. 1993), *overruled on other grounds*, ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 541 N.W.2d 753 (1995). Even if an expert has relied upon a hearsay statement, however, the State must still establish that the statement falls into a hearsay exception before the statement may be admitted to show the truth of the matter asserted. ***State v. Weber***, 174 Wis. 2d 98, 107, 496 N.W.2d 762 (Ct. App. 1993).

¶10 The State contends that each level of hearsay in the complaints fell within one of the hearsay exceptions. While we find the State's adoptive

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

admission argument persuasive with respect to some of the out-of-court statements contained in the complaints, we do not find it necessary to address the merits of the hearsay issue in depth because we conclude that any error in admitting hearsay was harmless.

¶11 An error is harmless when there is no reasonable probability that it contributed to the verdict. ***State v. Dyess***, 124 Wis. 2d 525, 541-42, 370 N.W.2d 222 (1985). Here, the criminal complaints were admitted into evidence as Exhibits 4, 6, 21, and 22 without objection from the defense. In addition, the allegations from those complaints were also summarized on a chart entitled "Offense History," which was admitted into evidence without objection as Exhibit 24, and which the defense explicitly agreed could be published to the jury for demonstrative purposes during voir dire and opening argument. The chart remained on view throughout the entire trial and was sent into the jury room upon request. Defense counsel's only objection to sending the chart to the jury room was that the jurors had already had ample time to review the chart and take notes during the trial.

¶12 In other words, the information contained in the out-of-court statements read from the complaints was already before the jury in another format. Since the testimony at issue was merely cumulative to other evidence that had already been presented to the jury without objection before the testimony was offered, we see no reasonable probability that excluding it would have led to a different verdict.

By the Court.—Judgment and order affirmed.

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