

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 26, 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. 03-3126
STATE OF WISCONSIN**

Cir. Ct. No. 02CV000497

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE COMMITMENT OF TIMOTHY D. KOLOSSO:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

TIMOTHY D. KOLOSSO,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waupaca County:
JOHN P. HOFFMAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Timothy Kolosso appeals an order committing him as a sexually violent person under WIS. STAT. ch. 980 (2001-02).¹ He asks that we grant him a new trial in the interest of justice, using our discretionary authority under WIS. STAT. § 752.35. We decline that invitation and affirm.

¶2 Shortly before Kolosso finished serving a prison sentence for second-degree sexual assault, he became the subject of a ch. 980 proceeding and received a jury trial on the State's petition. During testimony by the State's two expert witnesses, the jury heard hearsay evidence about Kolosso's criminal and work history and social adjustment problems, as well as his misbehavior in prison, including the "stalking" or "grooming" of other inmates. Neither witness had any firsthand knowledge of this information and it, therefore, could have been subject to a hearsay objection. *See* WIS. STAT. § 906.02. However, trial counsel never objected to the introduction of any of this evidence and Kolosso contends that it was not only inadmissible but greatly damaging to him. Our supreme court has stated that "[o]ne way in which the controversy may not have been fully tried is that the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." *State v. Penigar*, 139 Wis. 2d 569, 578, 408 N.W.2d 28 (1987). In Kolosso's view, that is what occurred here.

¶3 Under WIS. STAT. § 752.35, we may exercise our discretion to order a new trial if it appears from the record that the real controversy has not been fully tried. We decline to use that authority here for two reasons. First, trial counsel

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

might have had a reasonable strategic reason for not objecting to the hearsay testimony. Kolosso has not pursued an ineffective assistance of counsel claim, however, and we do not have the benefit of counsel's testimony on the matter. Consequently, we can only speculate as to his reasons or the reasonableness of his decision not to object.

¶4 Second, it appears that the evidence in question was possibly inadmissible only because the witnesses who presented it lacked firsthand knowledge. Had the proper witnesses testified, Kolosso would have lost his basis for objecting to admission of the evidence. In order to show that the real controversy was not fully tried, Kolosso must show that evidence that should not have been presented to the jury reached the jury. Kolosso has failed to show that. He has failed to show, to our satisfaction, that the State could not have presented the same evidence by other witnesses who had firsthand knowledge. Therefore, we are not persuaded that use of the evidence clouded the issues such that it prevented a full and fair trial.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

