

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 11, 2007

David R. Schanker
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. 2007AP1222

Cir. Ct. No. 2003ME89

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN THE MATTER OF THE MENTAL COMMITMENT OF MICHAEL B.:

ONEIDA COUNTY,

PETITIONER-RESPONDENT,

v.

MICHAEL B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Oneida County:
MARK MANGERSON, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Michael B. appeals an order extending his mental commitment. Michael argues the trial court erred by allowing the jury to hear

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

inadmissible hearsay evidence. Michael also argues the trial court erroneously exercised its discretion in submitting the expert's report to the jury. We disagree and affirm the order.

BACKGROUND

¶2 In 2003, Michael was placed on a WIS. STAT. ch. 51 mental commitment. Each year the commitment was extended. The County again filed for a twelve-month extension on December 12, 2006. Prior to the jury trial, the County asked Dr. William Roberts to perform an independent psychological evaluation on Michael for use at the trial. Roberts completed a court-ordered evaluation and prepared a pretrial report for counsel detailing his psychological evaluation.

¶3 The jury trial was held on January 10, 2007. The County called Roberts to testify regarding his evaluation of Michael. Roberts testified that his opinions were based on “[p]ast psychiatric records, my past experience in treating the patient, and the newest information that I had received about Michael on his transfer back to Trempealeau County Health Care Center.” He diagnosed Michael as suffering from schizophrenia. Roberts testified that his opinion was formulated based on Michael's past behavior in exhibiting “auditory hallucinations, paranoid delusions, and disorganization of thought.”

¶4 Roberts further testified that “if treatment were withdrawn, [Michael] would be a proper subject for commitment and his condition would rapidly deteriorate. The facts in the past when he was much more dangerous, much more psychotic would rapidly recur almost undoubtedly.” Then, the County asked: “what is it that's out there that you're aware of that leads you to believe that he would be a danger to the public?” Michael objected on the basis of

hearsay. However, Roberts testified that he was relying on documents that he would ordinarily rely on as a psychologist and that he was the custodian of the records. The court overruled the objection. Roberts then testified:

Some of the dangerousness in the past history have included inappropriate and provocative actions towards others especially females, certain psychotic beliefs regarding certain privileges that he has with others of opposite sex and hypersexual thoughts. In addition, there's documentation that he has been physically aggressive towards members of his family and others at some of the treatment facilities in the past.

¶5 After the jury began deliberations, the court addressed whether Roberts' report should be published to the jury. Michael objected to publication, stating the report "would unduly emphasize [Roberts'] testimony." The court considered the issue and initially agreed not to publish the report to the jury, stating, "If they ask for it, I'll reconsider." The jury later requested the report. The court decided to allow the jury to have the report, concluding:

Apparently they want to check something. It's in evidence, it's available to them in the court's discretion. ... There is only one expert. I think there's a good argument that they should be able to double check what that expert said. It's certainly preferable to reading back the testimony of the expert....

The jury then decided Michael should be recommitted to the care and custody of the Oneida County Human Services Center for one year.

DISCUSSION

¶6 Michael first argues the "testimony of Dr. Roberts about past instances of dangerous behavior was inadmissible hearsay." "The decision to admit or exclude evidence lies within the discretion of the trial court." *Hennig v. Ahearn*, 230 Wis. 2d 149, 178, 601 N.W.2d 14 (Ct. App. 1999). We will uphold

the trial court's discretionary determination if there was a reasonable basis for it. *State v. Pharr*, 115 Wis. 2d 334, 332, 340 N.W.2d 498 (1983).

¶7 In order for Michael to be involuntarily recommitted, the County needed to prove that, based upon his treatment records, there was a substantial likelihood if treatment was withdrawn, then he would become a proper subject for treatment. *See* WIS. STAT. § 51.20(1)(am). WISCONSIN STAT. § 51.30(1)(b) defines a treatment record as including “the registration and all other records that are created in the course of providing services to individuals for mental illness, developmental disabilities, alcoholism, or drug dependence and that are maintained by the department, by county departments under s. 51.42 or 51.437 and their staffs, and by treatment facilities.”

¶8 Pursuant to WIS. STAT. § 51.20(9)(a)5, Roberts had the authority to review Michael's treatment records in formulating his opinion on whether Michael needed to be recommitted. Further, pursuant to WIS. STAT. § 907.03, Roberts may consider inadmissible evidence in order to form his opinion that Michael would be dangerous if released, as long as it is the type of evidence experts in that field would reasonably rely upon. Roberts stated that the information in the report was the type that experts in his field would reasonably rely upon.

¶9 At trial, the County asked Roberts what in Michael's treatment records led him to form his opinion of Michael's mental condition. Roberts responded with certain general descriptions of Michael's past behavior. These statements were not offered to prove the truth of the statements, but rather to show the basis of his opinion and were therefore not hearsay. *See* WIS. STAT. § 908.01(3).

¶10 Additionally, even if the evidence was admitted in error, any error would be harmless. Where there is a reasonable possibility the error contributed to the outcome of the trial, the error is not harmless. *See State v. Moore*, 2002 WI App 245, ¶16, 257 Wis. 2d 670, 653 N.W.2d 276. A reasonable possibility is a possibility which is sufficient to undermine our confidence in the outcome. *See id.*

¶11 As noted above, the County needed to prove that based upon his treatment records there was a substantial likelihood that if treatment was withdrawn, Michael would become a proper subject for treatment. Roberts testified that this standard was met and that his opinion was based on records a doctor would usually rely on to make a diagnosis. No other expert testified to contradict Roberts' opinion.

¶12 Michael also argues the trial court erroneously exercised its discretion in sending Roberts' report to the jury. Whether an exhibit should be sent to the jury is a discretionary decision. *State v. Hines*, 173 Wis. 2d 850, 858, 496 N.W.2d 720 (Ct. App. 1993). In exercising its discretion, the circuit court should consider three factors: (1) whether the statement will aid the jury in proper consideration of the case; (2) whether a party will be unduly prejudiced by the exhibit's submission; and (3) whether the exhibit could be subjected to improper use by the jury. *Id.* at 860. We may independently search the record for a reasonable basis for the trial court's decision. *Id.* at 858.

¶13 In this case, the court initially considered the three factors, stating:

There are some things that weren't inquired upon and if we now let those go to a jury, of course, there's no opportunity for the defense to question him concerning those particular certifications. I don't think the jury needs it. I think it may focus the jury entirely on the report and pull them away from other considerations of evidence. If they ask for it, I'll reconsider.

The jury later asked for the report and the court reversed its original decision. While the court did not again review all three factors on the record, it had already demonstrated its familiarity with these factors when making its initial ruling. Michael lists a number of reasons why he believes the trial court should not have published the report to the jury. However, the reasons Michael gives are merely reasons the court could have chosen not to reverse its earlier decision. Michael does not provide any evidence that the trial court erroneously exercised its discretion.

¶14 Regarding the first factor, the court demonstrated its consideration of the report's usefulness to the jury by stating, "Apparently they want to check something. ... I think there's a good argument that they should be able to double check what that expert said." Regarding the second factor, both parties received the report prior to the trial and had an opportunity to question Roberts regarding information in the report. Additionally, there is no prejudice from unduly highlighting the State's expert's opinion. Roberts' opinion was the *only* opinion the jury heard, it was not emphasized at the expense of another countervailing opinion. In regards to the third factor, Michael argues "To the extent that the report contained inadmissible hearsay and matters not testified to in front of the jury, the report's publication could only *improperly* influence the jury...." Michael does not point to any improper hearsay contained within the report. We will not search the record to develop his argument for him. See *Barakat v. DHSS*, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995); *Tam v. Luk*, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990).

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)4.

