State of Wisconsin
Court of Appeals
District I
Appeal No. 2008AP000153

I*n re the commitment of Tommie L. Mitchell:*

State of Wisconsin,

Petitioner-Respondent,

v.

Tommie L. Mitchell,

Respondent-Appellant.

Appeal from a judgment of commitment under Chapter 980 entered in the Milwaukee County Circuit Court, the Hon. William Brash, presiding

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Respondent-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

The issue presented by this appeal controlled by well-settled law and, therefore, the appellant does not recommend oral argument or publication.

Statement of the Issues

I. Whether the trial court abused its discretion in permitting the state's witnesses to give hearsay testimony concerning the facts of two alleged sexual incidents of which Mitchell was never charged nor convicted.

Answered by the trial court: No.

Summary of the Argument

MItchell was named in a petition filed pursuant to Chapter 980 alleging that he was a sexually violent person. The State's doctor testified that Mitchell was a sexually violent person because during the course of five separate incidents of home-invasion sexual assaults Mitchell was "sexually aroused" by the fact that the victims did not consent. A doctor called by Mitchell, though, testified that there simply was not sufficient evidence to conclude that Mitchell was aroused by the non-consent. Rather, it was just as likely that Mitchell simply wanted to have sex and he did not care whether or not the victim consented. Thus, a key issue in the case was Mitchell's specific intent in committing the offenses.

Mitchell filed a motion *in limine* arguing that the facts of the uncharged offenses for which Mitchell was not convicted could not be proved by hearsay because to do so would be to violate Mitchell's statutory right to confront the witnesses concerning his intent. The

trial court ruled that hearsay evidence concerning the incidents would be permitted.

Thereafter the state presented testimony from a probation agent who had reviewed the Department of Corrections record of the incidents. The agent described in detail the facts of each alleged assault.

As will be set forth in more detail below, in Chapter 980 cases a doctor's opinion that is based on inadmissible hearsay should not be considered. Thus, the trial court abused its discretion.

Statement of the Case

I. Procedural Background

The Respondent-Appellant, Tommie Mitchell ("Mitchell") was named in a petition filed pursuant Chapter 980, Wis. Stats., alleging that he was subject to involuntary commitment because he was a sexually violent person. (R:2) The petition was filed in Milwaukee County on July 13, 2001. Mitchell contested the petition and, after a probable cause hearing was held, the court bound Mitchell over for trial on the petition. (R:49-50)

The case was finally called for jury trial on March 12, 2007.[1] Prior to trial Mitchell moved *in limine* for a preliminary ruling on the admissibility of evidence pertaining to two prior incidents, alleged by the State to be "sexually motivated" which resulted in police reports but in no criminal conviction.[2] Mitchell's motion anticipated that the alleged victims in those incidents would not testify but, rather, the

1 What, the reader may wonder, took the case nearly six years to come to trial? Mitchell had seven different lawyers during the time the case was pending for trial. There was a fairly lengthy period where he proceeded *pro se*. Also, the case delayed (as were many Ch. 980 cases) while the implications of Act 187 were were settled.

2 Appendix A is a table of Mitchell's criminal charges and the disposition of each

State's doctor or other witnesses would merely make reference to the police report concerning the incident. Thus, Mitchell's objection was on the grounds of hearsay. Mitchell argued to the court, "I think if the evidence that she [state's doctor] relies on is not otherwise admissible, then it has to be excluded altogether, even from her opinion . . . as those cases say, you can't just put it in a report and make it admissible." (R:75-7)

The trial court apparently failed to completely understand the basis for Mitchell's objection. The judge ruled that the evidence was admissible- using an almost exclusive "other acts" analysis. The court reasoned:

> It would appear that that information is properly admissible. 904.04(2) does not apply to that information. It is something that can be considered, even under-- it would appear under 907.03 experts in formulating an opinion.
>
> So I don't believe, Counsel, that there is a basis for denying the admissibility of that information. It would appear to be relevant from the standpoint, again, as I understood it, it goes to the opinion as formulated by the doctor and that recidivism situation that revisiting the scene was a factor that the doctor took into consideration in formulating an opinion, and I believe its probative value outweighs the potential prejudicial effect.
>
> So I think it's admissible under 904.01 in contrast to 904.03 because it is relevant and material, and it's relevance is not outweighed by its prejudicial effect under 904.03. As noted, 904.04(2) does not apply and 906-- 907.03 would allow it, I believe, also to be considered by the doctor.
>
> But after looking at all that and what I garnered to be the intent and purpose of 980 and the law as related to that, I do believe that that information is properly admissible. So I'll deny you request for exclusion as set forth in your motion.

(R:75-15).

During the course of the trial the State introduced the facts of the uncharged incidents through the testimony of a probation and parole agent who had learned the information from a reading of Mitchell's Department of Corrections file. The doctors then made reference to these facts during the course of their testimony.

The jury returned a verdict finding that Mitchell was a sexually violent person. (R:77-44)

II. Factual Background

Mitchell's former probation agent, Rebecca Mahin, testified that she had reviewed Mitchell's Department of Corrections file. She then told the jury:

> On October 19th, 1988, Mr. Mitchell was convicted of first-degree sexual assault. This involved him breaking into the house of a twenty-four year-old woman who was unknown to him. He was wearing a ski mask and carrying a knife at the time that the victim woke up, and he was in her bedroom.
>
> He did force the victim out of her bed, forced an act of penis-to-vagina sexual intercourse with her.

(R:76-36, 37)

Additionally, Mahin testified that:

> January 10th of 1990 . . . . Mr. Mitchell had entered the home of a seventeen year-old female who was unknown to him. She woke up with him in her bedroom. He told her not to scream or he would kill her. This was about two o'clock in the morning.
>
> Mr. Mitchell had asked the victim, "Can I eat you out? He then grabbed the victim around the neck, forced her off of the bed and onto the floor, and forced an act of penis-to-vagina sexual intercourse.

(R:76-39)[3]

Next, Mahin was allowed to testify that on June 30, 1990 Mitchell entered the home of T.L.- the victim of the 1988 case- and attempted to sexually assault her. Love was able to scream, though, and Mitchell threw a knife at her and then jumped out of a window. (R:76-41)

Next, Mahin told the jury that on July 3, 1990 Mitchell entered the home of R.W. at about 11:45 p.m.[4] Mitchell cut a screen and entered West's kitchen. When she encountered Mitchell there he

3 This is one of the uncharged incidents
4 This is the second uncharged incident

told her that he "wanted some pussy". West claimed that she was menstruating and so Mitchell put his hand into her pants to check. Shortly thereafter Mitchell became distracted and West ran out of the home. (R:76-43)

Finally, Mahin described for the jury a September 5, 1990 incident in which Mitchell entered the home of a twenty-eight year-old woman. The woman found Mitchell in her kitchen holding a butcher knife. According to Mahin, Mitchell forced the woman onto the couch and had her remove her pants. Mitchell put four fingers into the woman's vagina. At that point she told him that she had a disease. So Mitchell decided to have a smoke. When he turned to look for a lighter the woman picked up the butcher knife and stabbed Mitchell in the buttocks. When he turned around she attempted to stab him in the chest and so Mitchell ran away. (R:76-45)

Ultimately MItchell was arrested and he was charged with all of these offenses. However, he reached a plea agreement where he pleaded guilty to "some" of the offenses and others were dismissed. (R:76-46)[5]

Debra Anderson, Ph.D., a psychologist, testified for the State. Dr. Anderson evaluated MItchell in 2001. (R:76-72). Dr. Anderson diagnosed Mitchell with a personality disorder with antisocial features. (R:76-74). Dr. Anderson explained that the pattern of five sexual assaults over a two year period led her to conclude that Mitchell had a paraphilia. (R:76-75) Plainly, Dr. Anderson's opinion was based in part upon the two uncharged incidents.

Dr. Craig Monroe, a staff psychologist at the Sand Ridge Secure Treatment Center who was called by Mitchell, concurred with

5 See Appendix A for a chart of Mitchell's convictions and uncharged incidents

Dr. Anderson's diagnosis of personality disorder. (R:77-22) However, Dr. Monroe did not find that Mitchell had a paraphilia. (R:77-23,2 4) Dr. Monroe explained that he could not find evidence in the record that Mitchell was aroused by the fact that the victims did not consent to the sexual acts. *Id.* As such, Dr. Monroe was unable to conclude that Mitchell was more likely than not to commit a sexual offense in the future. (R:77-29)

Argument

I. The trial court abused its discretion in permitting the state to introduce hearsay testimony concerning the facts of Mitchell's underlying offenses.

A. Standard of Appellate Review

Whether evidence was improperly admitted is reviewed under the erroneous exercise of discretion standard. *See State v. Peters*, 192 Wis.2d 674, 685, 534 N.W.2d 867, 871 (Ct. App.1995). The court of appeals will not overturn a trial court's evidentiary ruling if the court considered the relevant facts, applied the proper law, and reached a reasonable conclusion. *See id*.

B. The testimony concerning the facts of the underlying cases was inadmissible hearsay.

Although under sec. 907.03, STATS., an expert's opinion may be based upon hearsay and other forms of inadmissible evidence, the evidence itself does not become admissible merely because the expert relied upon it.

Sec. 907.03, STATS., provides:

> 907.03 Bases of opinion testimony by experts. The facts or data in the particular case upon which an expert bases an opinion or

> inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

This statute is frequently mis-cited as standing for the proposition that an expert witness is permitted to relate to the jury all underlying facts upon which she based her opinion- whether or not the underlying facts are admissible evidence or whether they have ever been established.

In, *State v. Weber,* 174 Wis.2d 98, 496 N.W.2d 762, 767 (Wis.App. 1993) the court of appeals put this myth to rest. The court wrote:

> Though the trial court correctly recognized that sec. 907.03, Stats. (1989-90), allowed Dr. Fosdal to offer an opinion based in part upon hearsay data that was otherwise inadmissible, the court erred in its apparent belief that the statute also permits the underlying hearsay data to be admitted as evidence. While Dr. Fosdal was clearly permitted under sec. 907.03 to rely upon the statement for his ultimate opinion as to Weber's mental responsibility, the state was obliged to qualify the statement under some exception to the hearsay rule before the statement itself could be admitted into evidence and used substantively for the truth of the matter asserted.

Specifically, with regard to Chapter 980 cases, the Wisconsin Supreme Court noted in *State v. Watson*, 227 Wis. 2d 167, 202 (Wis. 1999) that:

> At trial in a sexually violent person commitment, the subject of the petition has a statutory right to cross-examine witnesses. Wis. Stat. § 980.03(2)(c). In some circumstances, this right becomes a constitutional right to confront witnesses. Wis. Stat. § 980.05(1m). "It has long been conceded 'that hearsay rules and the Confrontation Clause [of the Sixth Amendment] are generally designed to protect similar values.

Thus, the Supreme Court found that it was not proper for an expert to base his or her opinion on inadmissible hearsay. The court further held that the trial court did not err in striking an expert's

opinion that was based solely on inadmissible hearsay. *Watson*, 227 Wis. 2d at 203.

Here, in admitting the hearsay evidence concerning the facts of Mitchell's underlying criminal offenses, the trial court abused its discretion in two respects: (1) The ruling was not based on the proper legal analysis because the judge based his ruling on an "other acts" analysis rather than on a hearsay analysis; and, (2) Had the judge done the proper hearsay analysis the evidence would not have been admitted.

i. Judge did not rule on Mitchell's hearsay objection

The court's bench decision on Mitchell's motion *in limine* to exclude the underlying facts of his criminal convictions focused almost exclusively on an "other acts" analysis under Sec. 904.04, Stats. This was not Mitchell's objection, though; nor could it be. Where the material issue in the trial is whether Mitchell is more likely than not to commit a crime of sexual violence in the future what more relevant evidence could there be than Mitchell's past sexual behavior? Mitchell's prior sexual behavior is not even properly characterized as "other acts" evidence- it is directly relevant to the issue at hand. Thus, the judge did not even address the substances (hearsay) of Mitchell's objection.

It is well established that a decision which requires the exercise of discretion and which on its face demonstrates no consideration of any of the factors on which the decision should be properly based constitutes an abuse of discretion as a matter of law. *Maier Const., Inc. v. Ryan*, 81 Wis.2d 463, 473, 260 N.W.2d 700 (1978); *Wisconsin Public Service Corp. v. Krist*, 104 Wis.2d 381, 395, 311 N.W.2d 624 (1981); *McCleary v. State*, 49 Wis. 2d 263,

278, 182 N.W.2d 512 (1971). If a trial judge bases the exercise of his discretion upon a mistaken view of the law, his conduct is beyond the limits of his discretion. *First Wis. Nat. Bank of Oshkosh v. KSW Inv*., 71 Wis. 2d 359, 364, 238 N.W.2d 123 (1976); *State v. Hutnik*, 39 Wis.2d 754, 763, 159 N.W.2d 733 (1968).

ii. No other legal theory supports the admission of the hearsay evidence.

At the outset it must be noted that just because Dr. Anderson relied upon the "facts" of these two uncharged incidents in forming her opinion it does not mean that the facts themselves are admissible in evidence. Thus, in order for the jury to properly hear evidence of these uncharged incident the evidence must be otherwise admissible.

The state may argue that the "facts" of the underlying the uncharged sexual assaults are admissible under an independent exception to the hearsay rule because they were contained in Mitchell's Department of Corrections file. In fact, before Dr. Anderson testified about the sexual assaults they were testified to by the probabtion agent, Mahin.

The logical starting point, then, is the so-called "business records" exception provided for by Sec. 908.03(6), Stats. That section provides:

> (6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with s. 909.02 (12) or (13), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.

The record in this case is unclear as to exactly what Mahin

was reading from during her testimony.[6] It is a fair assumption, though, that it was either from the criminal complaints filed in the cases or from a police report contained in the Department's file.

Plainly though, whatever the source, there are a number of levels of hearsay involved. Any Department report (or a criminal complaint) involves incorporating the hearsay set forth in the police report into the hearsay of the criminal complaint which may have then been incorporated into the Department summary. That is, the police interviewed witnesses at the scene (the original declarants), recorded those statements into the police reports (making the officer a second declarant), the prosecutor then read those reports and repeated the allegation in a criminal complaint (creating a third level of declarant). Each of these declarants may, or may not have, accurately recorded the statement of the declarant immediately preceding. Additionally, each declarant may have had a motive to "spin" the preceding declarant's statement to suit the recording declarant's purposes (i.e. cross-examination is important as to each declarant).

Thus, the most important statements involve several levels of hearsay and there are not exceptions for each level. In other words, these statements were not "transmitted by persons with knowledge" and, therefore, do not fall under the so-called business records exception.

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6 This is the line of questioning concerning the records:
Q What types of records do you keep on him?
A Keep records regarding prior arrests, convictions, treatment that he might have done in the institution setting, his conduct while in the institution, prior conduct while he was on probation or parole in the community. Things like that.
Q And are these typically the type of records that you keep on someone while they're in this situation?
A Yes.
Q So you're familiar then with the respondent's criminal history.
A Yes, I am.
Q So can you tell us about his conviction back in 1988 . . . . (R:76-36)

Thus, there does not appear to be any exception to the hearsay rule that would permit Mahin to read into the record the allegation from a criminal complaint or a Department summary based on a criminal complaint.

C. The error was not harmless

"An error is harmless and does not justify reversal if we can be sure that the error did not contribute to the guilty verdict." *Weber*, 174 Wis.2d at 109, 496 N.W.2d at 767 (citing *State v. Dyess*, 124 Wis.2d 525, 547, 370 N.W.2d 222, 233(1985)). The Supreme Court articulated the test for harmless error as whether there is a reasonable possibility that the error contributed to the conviction. *Dyess*, 124 Wis.2d at 543, 370 N.W.2d at 231-32.

In a Chapter 980 case, as in perhaps no other legal proceeding, there is a grave danger of prejudice by the jury- and this is particularly true where the victims of the sexual assault are children. One need look no further than the daily headlines in the Milwaukee newspapers to understand the level of fear and loathing that the public has for sex offenders. Whenever the Department attempts to place a sex offender in any community, even under strict supervision, it uniformly prompts public outcry and in many cases it prompts mass protest.

Playing upon this inherent fear, then, by permitting the State to inform the jury of the specifics of Mitchell's previous criminal conduct certainly contributed to the jury's finding that Geiger was a sexually dangerous person. It was reversible error. Such import facts must be proved by admissible evidence.

Moreover, Dr. Anderson's opinion- as opposed to Dr. Monroe's opinion- was based solely on the "sexual motivation" she

attributed to Mitchell's convictions.[7] That is, Dr. Anderson somehow drew the conclusion from the description of the offenses that Mitchell was "aroused" by the fact that the victims did not consent (as opposed to Mitchell just wanting to have sex and not caring whether the victim consented). Because the underlying facts of the offenses were proved by hearsay Mitchell was utterly unable to confront the witnesses about this issue.

Conclusion

For the foregoing reasons it is respectfully requested that the court reverse the judgment finding Mitchell to be a sexually violent person and to remand the matter for a new trial.

Dated at Milwaukee, Wisconsin this ____ day of _____, 2008.

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7 The court should note that in *Watson* the Supreme Court found that a Watson's sexual motivation was "undisputed" where the crime which Watson was convicted of was sexual assault- but such an inference in this case would oversimplify the issue. These are complicated cases because they require the jury to parse out the defendant's specific motivation in committing a crime of sexual violence. For example, it makes a difference to the psychologists whether Mitchell committed the sexual assault because he was "aroused" by the victim's non-consent or whether Mitchell just wanted to have sex and did not care whether or not the victim consented.

Certification

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 3205 words.

This brief was prepared using *Open Office* word processing software. The length of the brief was obtained by use of the Word Count function of the software

Dated this _____ day of _____, 2008:

_____

Jeffrey W. Jensen

State of Wisconsin
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I*n re the commitment of Tommie L. Mitchell:*

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Appendix Certification

A. Table of criminal charges and dispositions

B. Record on Appeal

C. Excerpt of trial court's ruling on Mitchell's motion in limine

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2008

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Appendix A-1 Tommie Mitchell
Table of criminal charges and dispositions

Date	Charge	Disposition	Sentence
10/19/1988	First degree sexual assault Victim: T.L.	guilty	probation
10/19/1988	Armed burglary Victim: T.L.	dismissed	
6/30/1990	Att. first degree sexual assault Victim: T.L.	dismissed	
6/30/1990	Armed burglary Victim: T.L.	guilty	4 years concurrent with count one
9/5/1990	First degree sexual assault Victim: R.N.	guilty	15 years prison
9/5/1990	Armed burglary Victim: R.N.	dismissed	

Appendix A-2 Tommie Mitchell
Table of uncharged incidents

Date	Description
1/10/1990	Mitchell is alleged to have broken into the bedroom of a seventeen year-old girl and asked to "eat her out." The girl claimed she had a disease and then Mitchell left
7/3/1990	Mitchell broke into the kitchen of R.W. with a butcher knife. R.W. claimed she was menstruating and so Mitchell left