

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 15, 2009

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. 2008AP1620

Cir. Ct. No. 2006CI107

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE COMMITMENT OF OWEN BUDD:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

OWEN BUDD,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Rock County:
DANIEL T. DILLON, Judge. *Affirmed.*

Before Vergeront, Higginbotham and Bridge, JJ.

¶1 HIGGINBOTHAM, J. This is a WIS. STAT. ch. 980 (2007-08)¹ case. Owen R. Budd challenges a judgment and commitment order entered on a jury verdict finding him to be a sexually violent person and an order denying his post-commitment motion. This is the second time Budd has been found to be a sexually violent person by a jury. We reversed the first judgment in an opinion issued on October 4, 2007. A second jury trial was held approximately eighteen months later on the State's ch. 980 petition. Budd argues that, in the second trial, the trial court erred by barring his experts from testifying about sexual offender treatment he received at the Sand Ridge Secure Treatment Facility during the eighteen month interlude between trials and that, as a result, he is entitled to a new trial. In the alternative, he requests that we exercise our discretionary authority under WIS. STAT. § 752.35 to reverse and order a new trial in the interests of justice because the real controversy was not fully tried.

¶2 We conclude that the trial court erred by barring Budd's experts from testifying about sexual offender treatment Budd received during the eighteen month period between trials. Evidence regarding a person's current dangerousness is relevant in a WIS. STAT. ch 980 trial and therefore is admissible. *See State v. Williams*, 2001 WI App 263, ¶18, 249 Wis. 2d 1, 637 N.W.2d 791. However, we also conclude that Budd waived his objection to the court's rulings barring his experts from testifying regarding Budd's treatment, and invited the court to err. In the alternative, we conclude that the court's error was harmless and that Budd has failed to demonstrate that the real controversy was not fully

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

tried. We therefore affirm the judgment and commitment order and the court's order denying Budd's post-commitment motion for a new trial.

BACKGROUND

¶3 In January 2006, the State filed a petition under WIS. STAT. ch. 980 alleging that Owen Budd was a sexually violent person. A jury found Budd to be a sexually violent person in September 2006 and he was committed accordingly. Budd moved for a new trial. We reversed the judgment and commitment order and a second jury trial was held in late March 2008. A jury once again found Budd to be a sexually dangerous person. Additional facts will be discussed in the opinion below. Budd appeals.

DISCUSSION

¶4 Budd challenges the trial court's exclusion of evidence concerning his current dangerousness. "We review a circuit court's decision to admit or exclude evidence under an erroneous exercise of discretion standard." *State v. Shomberg*, 2006 WI 9, ¶10, 288 Wis. 2d 1, 709 N.W.2d 370, (quoting *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698). A trial court has broad discretion in determining the relevance and admissibility of evidence. *State v. Oberlander*, 149 Wis. 2d 132, 140, 438 N.W.2d 580 (1989). We will uphold a trial court's evidentiary ruling if the court examined the relevant facts, applied the proper standard of law, and, using a demonstrated rational process, reached a reasonable conclusion. *State v. Walters*, 2004 WI 18, ¶14, 269 Wis. 2d 142, 675 N.W.2d 778.

¶5 Budd argues that his experts should have been permitted to testify that he had received sexual offender treatment during the eighteen months since

the first trial and to opine as to his current dangerousness based in part on that treatment. He asserts that evidence of his treatment during the eighteen month interlude was relevant to the issue of his current dangerousness and therefore should have been admitted. We agree.

¶6 In a WIS. STAT. ch. 980 proceeding, the State must prove beyond a reasonable doubt that the person “has a mental disorder” and is “then actually dangerous to others.” *Williams*, 249 Wis.2d 1, ¶18 (citations and emphasis omitted). At trial, the court excluded all evidence concerning Budd’s current circumstances, including expert opinions that would have taken into account treatment Budd had received since the first trial. In the court’s view, the second trial was essentially a retrial of the facts in existence at the time of the first trial. However, in a ch. 980 proceeding, evidence of a person’s current circumstances must be considered by the jury to determine whether the person is a sexually violent person. Thus, because evidence of Budd’s current circumstances, including treatment he received after the 2006 trial, is relevant, we conclude that the trial court erred by excluding the evidence.

¶7 The State, however, argues that Budd waived² his objection to the court’s ruling excluding this evidence and argues alternatively that Budd invited court error by acquiescing in the court’s evidentiary ruling. We agree.

² The parties use the term waiver in this context. We note that forfeiture is the more appropriate term here. See *State v. Ndina*, 2009 WI 21, ¶¶29-30, 315 Wis. 2d 653, 761 N.W.2d 612 (distinguishing forfeiture from waiver, noting that the former is the failure to make the timely assertion of a right, while the latter is the intentional relinquishment or abandonment of a known right). However, because the parties use the term waiver, we use it as well.

¶8 Waiver is a rule of judicial administration and whether we apply the rule is a matter addressed to our discretion. *See Ford Motor Co. v. Lyons*, 137 Wis. 2d 397, 417, 405 N.W.2d 354 (Ct. App. 1987).

¶9 The trial court's ruling excluding evidence of Budd's treatment during the time between trials came after other evidentiary rulings the court made on the topic of treatment. And, as we discuss below, the court appears to have mistakenly believed that these rulings barred all evidence concerning the treatment Budd had received after the first trial.

¶10 Prior to trial, Budd filed a motion in limine seeking to exclude any reference to the results of the first trial. Budd argued that he would be prejudiced if the jury learned that at the first trial he had been determined to be a sexually violent person, a determination that had been reversed on appeal. The State ultimately agreed to exclude this evidence. In a second motion in limine, Budd sought to exclude statements that he made during a periodic re-examination for possible supervised release or discharge as required by WIS. STAT. § 980.07, and to bar the admission of the report prepared by Christopher Snyder, Psy. D., which the State sought to admit through a pre-trial motion. Budd argued, and the court agreed, that to use these statements and the report at the retrial would be unfair because an examination for discharge or supervised release relates to events that took place after his initial commitment and is not comparable to the issues related to an initial examination.

¶11 At trial, Budd objected to testimony the State was eliciting from two of its experts regarding whether Budd needed more treatment. Budd argued, and the court agreed, that this testimony would incorrectly lead the jury to think that the purpose of a WIS. STAT. ch. 980 commitment was to give more treatment and

that the person is released once that treatment has been completed. The issue before the jury was whether Budd was currently a sexually violent person, not whether he would be sexually violent if he had additional treatment.

¶12 The problem arose when Budd's defense counsel sought clarification from the court on whether it would be appropriate for his expert, Dr. Craig Rypma, to testify about Budd's treatment during the past eighteen months. Counsel told the court that Rypma had seen Budd since the first trial and that one sentence in his revised report referred to Budd's post-trial treatment. The court's comments indicate it believed that defense counsel was seeking to introduce evidence Budd had objected to being introduced by the State. The State asserted that the court had previously restricted evidence of Budd's treatment to the circumstances that existed before the first trial. The court adopted the State's view of its prior evidentiary rulings and prohibited Budd from introducing any evidence regarding events subsequent to the first trial, including any reference to or expert opinion taking account of Budd's treatment.

¶13 Budd's counsel did not object to the court's ruling. Indeed, it appears that counsel acquiesced with the court's ruling. Counsel did not attempt to clarify the court's confusion regarding its previous rulings by distinguishing the differences between the grounds for preventing the State from introducing treatment evidence and Budd's desire to introduce evidence of his treatment since the first trial. To compound the problem, the court reiterated its ruling excluding evidence of Budd's treatment since the first trial at several points during the trial and defense counsel never objected or attempted to set the court straight on the nature of its prior rulings. We therefore conclude Budd waived his objection to the court's exclusion of evidence concerning Budd's treatment since the first trial and invited court error by acquiescing in the court's order and by failing to clarify

for the court that its previous rulings had not barred all evidence regarding Budd's treatment following the first trial.

¶14 The State raises an alternative argument that the trial court's error was harmless. It is not necessary to determine whether the error was harmless because we have concluded that Budd waived his objection to the exclusion of the evidence concerning his treatment after the first trial and invited error. However, we choose to do so and conclude the error was harmless.

¶15 A harmless error analysis determines whether the error affected the substantial rights of the party. *Martindale*, 246 Wis. 2d 67, ¶30; *see also* WIS. STAT. § 805.18(2). An error affects the substantial rights of a party where “there is a reasonable possibility that the error contributed to the conviction. A reasonable possibility is a possibility sufficient to undermine our confidence in the conviction.” *State v. Moore*, 2002 WI App 245, ¶16, 257 Wis. 2d 670, 653 N.W.2d 276 (quoting *State v. Williams*, 2002 WI 58, ¶50, 253 Wis. 2d 99, 644 N.W.2d 919). The State has the burden “to establish that there is no reasonable possibility that the error contributed to the conviction.” *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). We consider the entire record to determine whether error is harmless. *State v. Patricia A.M.*, 176 Wis. 2d 542, 556-57, 500 N.W.2d 289 (1993).

¶16 We conclude that the exclusion of evidence concerning treatment Budd received after the first trial does not undermine our confidence in the jury's verdict. As the State aptly points out, Budd has not identified, either at trial or on appeal, any evidence his experts would have offered concerning Budd's post-trial treatment. He also does not explain what that evidence would have demonstrated

and how it would have affected the jury's verdict or how that evidence is relevant to the question of whether he was a sexually violent person.

¶17 Budd responds that an offer of proof was unnecessary because evidence that Budd had participated in sex offender treatment at Sand Ridge during the intervening eighteen months was, standing alone, relevant to the issue of his future dangerousness, and “was sufficient to provide the court with notice that this evidence was relevant to a critical issue in the case.” He maintains that, once evidence was presented about being treated, the details of his treatment at Sand Ridge could have been explored through cross-examination and highlighted during closing argument. Budd also argues that evidence that he was treated would have offset the evidence presented by the State through two of its experts that Budd did not complete sex offender treatment. Instead, according to Budd, the jury was “erroneously led to believe that Budd had last received treatment in [the] Beacon [Sex Offender Treatment program] over two years earlier.” He asserts that the jurors may have concluded that he had not sufficiently reduced his risk to reoffend simply because he did not complete treatment.

¶18 To the extent that Budd is arguing that the strongest evidence against him was that he did not complete treatment, he ignores the other evidence that amply supports the jury's verdict. In any event, we are not persuaded that a reasonable jury would have found him to be a sexually dangerous person based primarily on evidence that he did not complete treatment. The jury was informed that Budd did not complete his treatment because of his sentence structure. Thus, a reasonable jury would likely not attach any significance to the fact that Budd did not complete treatment and would likely not draw from that a conclusion that Budd must be a sexually dangerous person.

¶19 Moreover, our independent review of the record does not support Budd's contention that the excluded evidence, if allowed to be presented, would have affected the verdict. Budd had three experts testify on his behalf: Dr. Rypma; Dr. Sheila Fields, who, at the time of trial, was a psychologist employed by the Wisconsin Department of Health and Family Services; and Dr. Terrance Campbell, a board certified forensic psychologist. Dr. Rypma's report contains only one sentence referring to Budd's treatment during the eighteen months. Budd does not argue that this one sentence compels reversal here.

¶20 With respect to Dr. Fields' report, the only information it offers that is different from her 2006 report is a statement that treatment reduces recidivism risks and that Budd was currently participating in the CORE treatment program at Sand Ridge. Her opinion regarding Budd's likely risk of reoffending changed from "possible" to "likely probable." Significantly, Dr. Fields told the trial court that the 2008 score rating the likelihood of Budd reoffending was no different from the 2006 score. Dr. Campbell's report says very little about Budd himself, and instead commits a substantial part of the report to summaries of and quotations from psychological and social science literature on sexually violent persons.

¶21 Budd also requests that we exercise our discretionary authority under WIS. STAT. § 752.35 and grant him a new trial in the interest of justice. Section 752.35 confers on this court the discretionary authority to grant a new trial in the interest of justice "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." The exercise of our discretion under this statute "is to be done infrequently and

judiciously.” *State v. Ray*, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992).

¶22 Budd contends that the real controversy was not fully tried because the court barred him from introducing any evidence of his post-commitment treatment. This argument is essentially the same as his first argument that the trial court erred in excluding this evidence, which we have rejected. We acknowledge that we have the discretionary power of reversal under WIS. STAT. § 752.35 based on waived error. *See Vollmer v. Luety*, 156 Wis. 2d 1, 13, 456 N.W.2d 797 (1990). However, here, Budd has not produced any affidavits showing that a particular expert would have provided different testimony than what had been offered at trial, nor has he explained what different testimony could have been elicited had the experts testified at trial about the treatment he received during the intervening eighteen months. We cannot say that this is one of those “exceptional circumstances” warranting our exercise of discretion in the interest of justice. *See State v. Gove*, 148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989).

CONCLUSION

¶23 Although we conclude that the trial court erred by excluding evidence of Budd’s treatment at Sand Ridge during the eighteen month period between trials, we conclude that Budd waived his objection to the error and invited the court to err. In the alternative, we also conclude that the court’s error was harmless and that Budd is not entitled to a new trial in the interest of justice. We therefore affirm the judgment and commitment order and the trial court’s order denying Budd’s post-commitment motion for a new trial.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

