

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 6, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-3789

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE COMMITMENT OF TOD A. BERGEMANN:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

TOD A. BERGEMANN,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
RICHARD J. DIETZ, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Tod Bergemann appeals an order denying his petition for supervised release as a sexual predator. He argues that the State did not present sufficient evidence to support the trial court's finding that Bergemann is still a sexually violent person and that it is still substantially probable that he

will engage in acts of sexual violence if he is not in institutional care. Because sufficient evidence supports the trial court's finding, we affirm the order.

In any challenge to the sufficiency of the evidence, this court must consider all credible evidence and reasonable inferences therefrom in the light most favorable to the prevailing party and sustain the finding unless there is no evidence to support it. *See* § 805.14(1), STATS. The trial court is the arbiter of the witnesses' credibility and the sole judge of the weight to be accorded their testimony and the inferences to be drawn from the evidence. *See Baumgarten v. Bubolz*, 104 Wis.2d 210, 220, 311 N.W.2d 230, 235 (Ct. App. 1981).

Dr. Raymond Wood's testimony supports the trial court's finding. He testified that he looks at a patient's entire history and not just his current functioning when he makes a diagnosis. Bergemann's history includes sexual relations with both of his parents and his sister, sexually aggressive behavior toward girls beginning at the age of ten, sexual charges commencing at the age of fourteen including sexual contact with two foster brothers. Wood also referred to two incidents of bestiality involving intercourse with the family dog and an incident in which Bergemann forced a woman to have sex with a dog, took photographs, and publicly displayed the photographs to humiliate the woman. Bergemann was charged with four counts of sexually assaulting fifteen and sixteen-year old girls, although one of the contacts was consensual. He pleaded guilty to one count of sexual assault and one count of attempted sexual assault. Three of the victims testified that Bergemann had threatened them.

Bergemann's treatment history includes recommendations from corrections personnel for additional treatment because Bergemann was viewed as a high risk to reoffend. He dropped out of treatment on two occasions, once after

being confronted with a report that he sexually assaulted a twenty-two month old child. Wood testified that Bergemann had a number of unresolved treatment issues and was concerned about Bergemann's lack of motivation for treatment, his tendency to deny or minimize his sexual behavior and his failure to take responsibility for his offenses.

Wood testified that he diagnosed Bergemann with paraphilia, not otherwise specified (NOS), and antisocial personality disorder. Wood testified that either paraphilia (NOS) or antisocial personality disorder would qualify as a mental disorder under ch. 980, STATS., and that either disorder or the combination of both created a substantial likelihood that he would reoffend in a sexually violent manner. Wood testified that he saw no evidence that treatment had been successful with the possible exception of anger management, and that Bergemann did not understand the pattern of his sexual violence well enough to avoid a relapse. He found no evidence that Bergemann had, outside of treatment, changed the aspects of his behavior that would allow his safe return into the community.

Bergemann argues that the trial court was required, as a matter of law, to disregard Wood's opinion that Bergemann suffered from paraphilia (NOS) because there was no recent evidence of Bergemann's bizarre sexual behavior. Proof of a recent overt act is not necessary to establish that an incarcerated individual is a sexually violent person. *See State v. Carpenter*, 197 Wis.2d 252, 275-76, 451 N.W.2d 105, 114 (1995). Wood's diagnosis was based on Bergemann's history of sexual behavior, his lack of participation or progress in treatment, his lack of motivation concerning treatment, his tendency to minimize his offenses and present himself as a victim, and his lack of insight into his own pattern of sexual violence. From this evidence, Wood concluded that Bergemann is still a sexually violent person who will probably engage in acts of sexual

violence if he is not continued in institutional care. *See* § 980.08(4), STATS. The trial court was allowed to base its decision on Wood's testimony despite the absence of recent overt acts and despite Bergemann's expert witness's conclusion that Bergemann does not suffer from paraphilia.

Wood's diagnosis of antisocial personality disorder is also sufficient to support the finding. Bergemann's expert witness, Dr. James Armentrout, agreed that Bergemann has an antisocial personality disorder, but testified that the disorder did not necessarily predispose a person to act out in a sexual manner. His own report, however, expressed an opinion that there was a nexus between Bergemann's antisocial personality disorder and his sexual misconduct. Armentrout's testimony that antisocial personality disorder increases the risk for maladjustment of various kinds, not specifically sexually violent acts, does not benefit Bergemann. To meet the definition of "mental disorder" under § 980.01(1), STATS., the disorder does not have to predispose the person to commit exclusively sexually violent crimes. Bergemann's sexual history and treatment history establish substantial probability that he will act on his antisocial personality disorder in a sexually violent manner.

Finally, Bergemann argues that Wood's testimony is insufficient because he testified that a relapse was "possible." While Wood used that term in his testimony, he also testified that he believed there was a "substantial likelihood" or "substantial probability" that Bergemann would engage in sexually violent acts. His use of the word "possibility" on one occasion does not diminish the effect of his testimony.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

