

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 23, 2005

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. 2004AP2251

Cir. Ct. No. 2003CI1

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE COMMITMENT OF MICHAEL L. MCGEE:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

MICHAEL L. MCGEE,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Racine County:
ALLAN B. TORHORST, Judge. *Affirmed.*

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

¶1 PER CURIAM. Michael McGee appeals an order committing him as a sexually violent person pursuant to WIS. STAT. ch. 980 (2003-04).¹ He also appeals an order denying his motion for post-commitment relief. The issues are: (1) whether the evidence was sufficient to prove that McGee’s burglary was sexually motivated; and (2) whether McGee is entitled to relief in the interest of justice pursuant to WIS. STAT. § 752.35. We affirm.

¶2 We will not reverse an order committing a person under WIS. STAT. ch. 980 based on insufficient evidence

unless the evidence, viewed most favorably to the state and the [commitment], is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found [the defendant to be a sexually violent person] beyond a reasonable doubt.

State v. Kienitz, 227 Wis. 2d 423, 434, 597 N.W.2d 712 (1999) (citation omitted). “If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find [that the defendant is a sexually violent person], an appellate court may not overturn [the] verdict” *Id.* at 434-35 (citation omitted).

¶3 McGee contends there was insufficient evidence to show beyond a reasonable doubt that the burglary was sexually motivated, a requirement for him to be committed under WIS. STAT. ch. 980. He argues there was no evidence to establish that sexual arousal or gratification was one of the purposes of the burglary, especially because the victim stated that McGee told her that he thought the apartment he had entered was vacant. We disagree. This is essentially a

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

question of McGee's intent. The trier of fact could have inferred that the burglary was committed with a sexual motivation based on the fact—and on this fact alone—that the sexual assault occurred after the entry to the dwelling. *See, e.g.*, WIS JI—CRIMINAL 1424, comment 7 (intent is usually proved circumstantially by what a defendant did after he entered the building). A trier of fact is permitted to infer that a person intends to do what he or she did in fact do.

¶4 McGee next argues that we should grant him a new trial because the real controversy has not been fully tried and because there has been a miscarriage of justice. *See* WIS. STAT. § 752.35. To the extent the case was not well tried, this is because McGee chose to represent himself. Any deficiencies in the record are largely attributable to McGee's decision, perhaps unwisely made, to forgo counsel. McGee's claim that there was a miscarriage of justice is based on the fact that the circuit court said that the burglary was sexually related, not sexually motivated, which is the proper standard, in its oral ruling on the motion for reconsideration. *See* WIS. STAT. § 980.05(3)(b). However, the circuit court did use the proper standard when it made its findings to support the commitment. Therefore, we conclude that the circuit court was aware of and applied the correct standard and that the court's comment in its oral ruling was a simple misstatement and does not warrant a new trial in the interests of justice.

By the Court.—Orders affirmed.

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

