**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**August 13, 2008**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2008AP436** **Cir. Ct. No. 2007ME126**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT II**

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**IN THE MATTER OF THE MENTAL COMMITMENT OF IVY S.:**

**MANITOWOC COUNTY HUMAN SERVICES DEPARTMENT,**

**PETITIONER-RESPONDENT,**

**V.**

**IVY S.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Affirmed.*

¶1 SNYDER, J.[1] Ivy S. appeals from an order of commitment that placed her in the care and custody of the Brown County Mental Health Center, a locked inpatient facility, for six months. She contends that her commitment was the result of a trial riddled with errors, including the erroneous admission of hearsay evidence, denial of her mistrial motion, failure to sequester witnesses, and an improper special verdict form. Although Ivy's six-month commitment has ended and resolution of her appeal will have no practical legal effect, she asserts that appellate review is required to address issues likely to recur in mental health commitment hearings. The County contends that the appeal is moot and does not meet any of the accepted exceptions to the mootness doctrine. We agree with the County and affirm.

*BACKGROUND*

¶2 Ivy's mother, father, and step-mother filed a petition for examination on August 9, 2007, alleging that Ivy was acting erratically, making paranoid statements and wild accusations, and was threatening violence. The court ordered a probable cause hearing to determine Ivy's mental condition and that hearing took place on August 13. Ivy contested the allegations, but the court concluded that there was probable cause to believe that Ivy was dangerous to herself or others and ordered her detained until a final hearing could be held. Ivy demanded a jury trial.

¶3 Four days prior to the trial, Ivy moved the court for an in camera inspection of the hospital records of her mother, petitioner Landa C. Ivy averred

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

that Landa's records would bear on the issue of credibility and the court's review would balance Landa's interest in confidentiality of her records with Ivy's right to put forth her defense. Ivy also moved the court for an order precluding the County from introducing any evidence of Ivy's prior commitment.

¶4 The court held that the records Ivy sought to have reviewed in camera would not be allowed. It held: "The burden … is on the person seeking the information to reasonably investigate the information and clearly articulate how the information sought corresponds to the theory of defense. And I don't believe that that's happened in this case." Regarding the motion to exclude evidence of past commitments, the court stated that "it may well be that information concerning [Ivy's] prior history may be relevant to the extent that it impacts on her mental condition today …. But I don't believe that includes the need to specifically discuss any prior mental health commitment proceedings." The court then instructed the County, "[B]efore you attempt to introduce such testimony, then, off the record, outside the presence of the jury, you are going to have to tell me what you are offering and then we'll make a determination whether or not it is admissible."

¶5 The County called Dr. Robert Dickens as its first witness. During Dr. Dickens' testimony, he prefaced certain remarks with "I don't know if this is admissible, from what the Judge had said before," and went on to state that Ivy had been admitted to Holy Family Hospital in 1993 and there diagnosed with paranoid schizophrenia. He also shared that he had seen Ivy for "several court evaluations after that" and she was again admitted to Holy Family Hospital in 1998. Ivy moved for a mistrial on grounds that Dr. Dickens' testimony violated the court's order precluding references to past commitment proceedings. The court took the motion "under advisement" and withheld its ruling.

¶6 Dr. Dickens opined that Ivy suffered from a chronic mental illness, which he believed to be treatable; furthermore, he stated that Ivy was a danger to herself and others and cited reports from Landa that Ivy had attacked her and threatened her, that Ivy had refused to eat for some time in 1998 and lost fifty pounds because she believed her food was poisoned, and that Ivy had refused tests for her fetus's well-being while pregnant. Dr. Dickens testified that he did not believe Ivy was capable of making an informed decision about the use of medication to treat her illness.

¶7 Other witnesses at the trial included Dr. Toby Watson, who testified that Ivy had a mental illness that made her a moderate risk to herself, specifically with regard to her ability to find housing and food. He added that Ivy was a danger to others, but explained that this assessment was mostly related to the relationship between Ivy and her mother. Dr. Watson stated that he believed Ivy did not agree with the recommendation that she take medication because she wanted to take advantage of alternative treatment.

¶8 Ivy's mother, Landa, also testified. She is designated as guardian of Ivy's person and is also guardian of Ivy's daughter. Landa described physical altercations with Ivy as well as Ivy's threat to kill her, which prompted Landa to move to her son's house. Ivy's father, Thomas, testified that Ivy had never threatened him with physical violence, but that he believed she had harmed herself in the past. He believed a commitment order was the only way Ivy would receive the treatment he felt she needed.

¶9 At the close of this testimony, the County sought permission for Landa and Thomas to remain in the courtroom for Ivy's testimony. The court denied the request, noting that they could be recalled as witnesses.

¶10 The County rested its case and the court took up Ivy's mistrial motion. The court denied the motion, stating that the controversial comments had come early in the trial and that the potential effect on the jury was minimal. The trial resumed and several witnesses testified in Ivy's defense. One witness offered testimony to discredit Landa's veracity. Others testified as to Ivy's ability to care for herself even without medication. When it came time for Ivy to take the stand, the County renewed its request that Landa and Thomas be allowed in the courtroom. Ivy again objected, but the court permitted Landa and Thomas to remain, with the understanding that they would not be recalled to testify.

¶11 Ivy testified at length to counter the allegations in the petition. She addressed her relationship with Landa, specifically denying the allegation that she threatened violence against Landa. She challenged Landa's credibility by asserting that Landa "[e]xaggerates," "makes things up" and is constantly critical of Ivy. She described an incident that resulted in Ivy's removal from the home in June 2007. In the incident report, defense exhibit 4, Ivy identified Landa as the aggressor in the confrontation. She explained that the reason she kept returning to Landa's home, despite the tumultuous environment, was because Landa was her guardian. Ivy acknowledged that she had a "need for counseling," but contested the diagnosis offered by Dr. Dickens.

¶12 At the close of Ivy's testimony, the court excused the jury and the parties prepared for final arguments and jury instructions. The court informed the parties of the instructions it intended to give the jury and both parties indicated they had no objection to the pattern instructions. In particular, the court advised that it would be using jury instructions on the issue of dangerousness "that relate to [WIS. STAT. §] 51.20(1)2.a. and (1)2.c." The parties indicated that this would be acceptable.

¶13 The special verdict asked three questions: (1) Is Ivy mentally ill? (2) Is Ivy dangerous to herself or to others? (3) Is Ivy a proper subject for treatment? The jury answered all three in the affirmative. On August 29, 2007, the circuit court ordered Ivy committed for six months under WIS. STAT. § 51.20. Ivy appeals.[2]

*DISCUSSION*

¶14 The County asserts that Ivy's appeal is entirely moot. Ivy's commitment order expired months ago and she is no longer in the County's custody. An appeal is moot if a decision will have no practical legal impact on the underlying controversy. *See* ***State ex rel. Badke v. Greendale Vill. Bd.***, 173 Wis. 2d 553, 568, 494 N.W.2d 408 (1993). However, there are exceptions to that general rule. For example, an appellate court will review an otherwise moot appeal on the merits if the issues presented are of great public importance, where the constitutionality of a statute is involved, where the situation is likely to recur and guidance for the trial courts is essential, where the issue is likely to recur and a decision is required to avoid future uncertainty, or when an issue is likely to recur and yet evade appellate review. *See* ***State v. Leitner***, 2002 WI 77, ¶14, 253 Wis. 2d 449, 646 N.W.2d 341.

¶15 Ivy insists that her appeal should be excepted from the mootness doctrine. In her appellate brief, Ivy asserts that four of the five issues presented are "capable of recurring, yet escaping review, due to the short length of commitment orders." In her reply brief, she specifically points to two issues that

[2] Ivy's commitment order expired on February 29, 2008.

are likely to recur in WIS. STAT. ch. 51 commitment cases: (1) the court's refusal to close the hearing during Ivy's testimony and (2) the contested jury instruction on dangerousness. We take each issue in turn, measuring it against the exceptions to the mootness doctrine.

¶16 Ivy first argues that the court's decision to deny her mistrial motion was error. Ivy moved for a mistrial when Dr. Dickens mentioned Ivy's prior mental health commitment and a "third party petition." Prior to Dr. Dickens' testimony, the circuit court had ruled that evidence of prior commitments would not be allowed. Whether certain testimony should lead to a mistrial is a discretionary decision for the circuit court. *See* ***State v. Pankow***, 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App 1988). Here, the circuit court considered Ivy's request and determined that the objectionable testimony occurred early in the trial and the likely impact on the jury was minimal. This was an appropriate exercise of discretion and, furthermore, it is a question likely to come up in the context of almost any trial. The issue is moot and no special circumstances warrant our review.

¶17 Next, Ivy contends that the circuit court should have provided an in camera review of Landa's medical records to ascertain whether certain entries could have been used by Ivy to attack Landa's credibility on the stand. However, rulings on discovery matters are discretionary with the circuit court. *See* ***Ranft v. Lyons***, 163 Wis. 2d 282, 290, 471 N.W.2d 254 (Ct. App. 1991). The court held that Ivy's offer of proof as to the relevance and materiality of the medical records was insufficient. Existing case law provides sufficient guidance for circuit courts as to what is discoverable, what is material and relevant, and how to weigh the competing interests. *See*, *e.g.*, ***id.*** at 290-91 (discussing discovery of medical records of a party in civil case); ***Winnebago County v. Harold W.***, 215 Wis. 2d

523, 530-32, 573 N.W.2d 207 (Ct. App. 1997) (stating medical records of a party are discoverable only if that party has put his or her condition at issue in claim or defense); ***State v. Richard A.P.***, 223 Wis. 2d 777, 783-89, 589 N.W.2d 674 (Ct. App. 1998) (discussing trial court's in camera review and determination of materiality of proffered mental health records); ***Sturdevant v. State***, 49 Wis. 2d 142, 147-48, 181 N.W.2d 523 (1970) (holding mental impairment alone is insufficient to affect credibility). With ample guidance already available, this issue does not present an exception to the mootness doctrine.

¶18 Ivy next argues that the circuit erred when it allowed Landa and Thomas to be present in the courtroom for Ivy's testimony. She asserts that "[w]hen a court is asked to close a commitment hearing, the court must hold a hearing on the question of closure." The County emphasizes that Ivy never moved for a closed hearing. Rather, Ivy requested that Landa and Thomas be sequestered and the court granted that request, excluding them from the courtroom until there was no risk that they could be recalled to the stand. We agree with the County. Nothing in the record supports Ivy's interpretation of her request as one to close the public hearing. We decline to address the issue because Ivy has mischaracterized her request and the court's ruling.

¶19 Ivy's final attempt to overcome the mootness of her appeal rests with her challenge to the special verdict question on dangerousness. The question posed to the jury read as follows: "Is Ivy dangerous to herself or to others?" Ivy now insists the question should have been divided into two parts, one asking if Ivy was a danger to herself, the other asking if Ivy was a danger to others. At trial, Ivy raised no objection to the special verdict question or the accompanying jury instruction. She will not be heard to object for the first time on appeal. *See*

WIS. STAT. § 805.13(3) (failure to object to proposed instructions or verdict questions constitutes waiver).

¶20 As to Ivy's remaining appellate argument, we do not read her to assert that the court's decision to allow Dr. Dickens' testimony, which Ivy claims was based on inadmissible hearsay, presents an issue that survives a mootness analysis. Rather, Ivy asks us to employ our discretionary reversal power under WIS. STAT. § 752.35 on grounds the controversy was not fully tried. We exercise our discretionary reversal power sparingly and with great caution. ***State v. Watkins***, 2002 WI 101, ¶79, 255 Wis. 2d 265, 647 N.W.2d 244. WISCONSIN STAT. § 907.03 permits an expert to rely on otherwise inadmissible evidence, such as hearsay, if the evidence is of the type experts typically rely on to form opinions. *See* ***State v. Watson***, 227 Wis. 2d 167, 191, 595 N.W.2d 403 (1999). Furthermore, hearsay is evidence offered for the truth of the matter asserted. WIS. STAT. § 908.01(3). Ivy has not demonstrated that Dr. Dickens' testimony ran afoul of § 907.03 or was offered for the truth of the matter asserted. Accordingly, discretionary reversal is inappropriate.

*CONCLUSION*

¶21 Because Ivy has already been released from her six-month commitment and no extension of that commitment is in place, we conclude that the appeal is moot. None of the exceptions to the mootness doctrine revives the appeal. Furthermore, we decline to invoke our discretionary reversal power under the circumstances presented. We affirm the order of the circuit court.

*By the Court.*—Order affirmed.

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