COURT OF APPEALS
DECISION
DATED AND FILED

September 18, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2787 **Cir. Ct. No. 2007CI2**

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

IN RE THE COMMITMENT OF MICHAEL S. ZIEGLER:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MICHAEL S. ZIEGLER,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: GARY R. SHARPE, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Michael S. Ziegler appeals from a judgment committing him as a sexually violent person. He argues that, standing alone, the trial court's decision to send the report of one of the State's testifying psychologists to the jury room was an erroneous exercise of discretion, and that the error then was compounded by the court's refusal to send in the reports of two psychologists who testified on his behalf. We disagree and affirm.

¶2 Ziegler was convicted in 1994 of one count of first-degree sexual assault of one child and two counts of second-degree sexual assault of a second child. When Ziegler was nearing the end of his sentence in 2007, the State filed a petition alleging that he was a sexually violent person under WIS. STAT. ch. 980 (2011-12).[1] The court found probable cause.

¶3 The matter was tried to a jury. During its deliberations, the jury asked to see the report of psychologist Dr. William Schmitt, one of the State's experts. An addendum to Schmitt's four prior reports, the report updated Ziegler's institutional behavioral records from July 2011 through February 2012. Ziegler objected to "sending this report back or, frankly, any reports." The trial court granted the jury's request, but first redacted the doctor's conclusion that Ziegler met the full criteria for civil commitment. The portion sent to the jury was less than a page of factual information and explanatory comments.

¶4 Later, the jury asked to see, among other exhibits, the reports of Ziegler's experts, psychologists Dr. Diane Lytton and Dr. Michael Kotkin. Ziegler restated his objection to sending any reports to the jury. The court

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

declined to allow the jury to see Lytton's ten-page report or Kotkin's twenty-one-page report. The jury returned a verdict finding that Ziegler was a sexually violent person. The court committed him for treatment, and he appeals.

¶5 Ziegler still maintains that none of the expert reports, including the defense reports, should have gone to the jury room. The problem, he posits, is that the correct second decision magnified the error of first. We disagree that the first decision was error.

¶6 Determining what exhibits may go to the jury room is a matter within the trial court's discretion. ***State v. Jensen***, 147 Wis. 2d 240, 259, 432 N.W.2d 913 (1988). The decision should be guided by whether the exhibit will aid the jury in proper consideration of the case, will unduly prejudice a party, or could be subjected to improper use by the jury. ***Id.*** at 260.

¶7 The portion of the Schmitt report sent to the jury simply contained a factual recitation of Ziegler's behavioral record—positive and negative—since prior reports. So as not to unduly emphasize Schmitt's unchanged opinion that Ziegler met the full criteria for commitment, the court redacted that conclusion. As the jury already heard those facts during Schmitt's testimony, we cannot see how the jury could put the redacted report to improper use.

¶8 Again, Ziegler does not claim that the trial court *should* have admitted the Lytton and Kotkin reports. Rather, he asserts that the decision itself was proper but that it compounded the alleged error in sending in the Schmitt report, and also was supported by incorrect reasoning.

¶9 First, we already have determined that the court did not erroneously exercise its discretion in allowing the jury to see the Schmitt report. Thus, there was no error to compound.

¶10 Second, we find no fault with the trial court's rationale. After the parties debated the jury's request, the court explained to them why it would not send the lengthy defense reports to the jury room:

> The reports contain enormous amounts of information. The reports contain the witness[es'] take on the records that they have reviewed in some instances. That information is in conflict with other expert reports. Certainly, each of the reports contain[s] an enormous amount of information that was not presented to the jury.
>
> I agree that the statement [of one of the victims] itself contains much more information about the specific acts from the perspective of the victim than was actually read. I don't know how we could possibly redact from these reports all that which should not be provided to the jury…. I think that we should respond identifying that the jury must rely upon its notes and collective memories as to the testimony of the expert—testimony of the witnesses.

The court then explained its decision to the jury in a note that read:

> The reports you are requesting contain information that was used at trial, but also include[] information that was not part of the record and in some instances information that is not relevant to your decision. Sometimes information is simply not available to the jury. I ask that you rely on your collective memory and notes from the trial, but the exhibits will not be sent back.

Ziegler contends the court's rationale is wrong because, once admitted into evidence, the information in the reports in fact *was* presented to the jury and *was* part of the record. We reject this hypertechnical argument.

¶11 True, the Lytton and Kotkin reports were admitted in their entirety but, at ten and twenty-one pages, the reports contained far more information and

detail than the jury heard at trial. All of the material, therefore, was not "presented" to the jury. We agree with the State that the note to the jury simply explained the court's decision in language understandable to nonlawyers. Also, we presume the defense presented to the jury the material it deemed important and necessary. As redaction was not feasible, the surplus portions could distract the jury from a proper consideration of the case or be put to an improper use.

By the Court.—Judgment affirmed.

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