COURT OF APPEALS
DECISION
DATED AND FILED

November 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3179

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., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Tod Bergemann appeals an order that denied him supervised release from his sexual commitment under ch. 980, STATS. Bergemann concedes that he is still a sexually violent person. That is one of the elements

needed to deny him supervised release. *See* § 908.08(4), STATS. Nonetheless, he argues that the prosecution failed to prove a second element—that he was substantially likely to commit a sexually violent act if released into the community for treatment. *See* § 908.08(4). Bergemann points out that the prosecution's expert offered no opinion on whether Bergemann was substantially likely to commit a sexually violent act. Bergemann also argues that the trial court improperly placed the burden of proof on the issue on him, forcing him to show that he was not substantially likely to commit a sexually violent act if released for outpatient treatment. We reject these arguments and affirm the order denying supervised release.

¶2 Trial courts must grant petitions for supervisory release unless the State proves its case by clear and convincing evidence. ***State v. Sprosty***, 227 Wis.2d 316, 325, 595 N.W.2d 692, 696 (1999). In such factual inquiries, the trial court is the arbiter of witness credibility and the weight to give to expert opinions. *See* ***In re J.A.L.***, 162 Wis.2d 940, 966, 471 N.W.2d 493, 504 (1991). The trial court may accept some, and not all, of an expert's testimony. *See* ***State v. Owen***, 202 Wis.2d 620, 634, 551 N.W.2d 50, 56 (Ct. App. 1996). The trial court may also draw an inference that the expert did not. *See* ***id***. We will reverse only clearly erroneous findings. *See* ***State v. Harvey***, 139 Wis.2d 353, 376, 407 N.W.2d 235, 245 (1987). Reversal is not required if there is evidence to support a contrary finding. *See* ***Bank of Sun Prairie v. Opstein***, 86 Wis.2d 669, 676, 273 N.W.2d 279, 282 (1979). Rather, we accept the inference drawn by the trier of fact when more than one reasonable inference can be drawn from the evidence. *See* ***Id***.

¶3 Here, the evidence permitted a finding that Bergemann was substantially likely to commit sexual violence without confinement. While no

expert expressed an opinion on this ultimate fact, the trial court could reasonably draw that inference from the following evidence. Dr. Travis Hinze testified that Bergemann had made some progress but that his treatment providers still had concerns that Bergemann was not applying what he had learned in treatment, including anger management. He believed that Bergemann had only a "limited conception and some limited plans" for relapse prevention. In his view, Bergemann was still "very early in the treatment program at WRC" and "hasn't had enough time to develop his progress in therapy yet." Dr. Hinze pointed out that Bergemann had a "history of inconsistent treatment adherence in the past." In addition, Dr. Hinze's written report, which was admitted in evidence, stated that "treatment has not sufficiently or effectively addressed these disorders or substantially reduced his risk of future sexual violence." The report concluded that "effective treatment can only be provided within a secure mental health facility at this time." In short, the trial court had ample evidence to find that Bergemann remained substantially likely to commit a sexually violent act. The finding was not clearly erroneous.

¶4 We also conclude that the trial court did not shift the burden of proof. Bergemann points to the trial court's finding that Bergemann "had not reached that qualitative level at this point by which the Court would be satisfied that there is not a substantial probability that he would engage in acts of sexual violence if not confined in a secure mental health unit." In Bergemann's view, this finding shows that the trial court relieved the prosecutor of its burden of proof and placed it upon Bergemann. Bergemann is correct that the prosecution had the burden to prove Bergemann was substantially likely to commit a sexually violent act. *See* § 980.08(4), STATS.; ***Foucha v. Louisiana***, 504 U.S. 71, 83 (1992); *cf.* ***State v. Randall***, 192 Wis.2d 800, 808, 532 N.W.2d 94, 97 (1995). Bergemann

misreads the trial court's finding. The trial court never referred to Bergemann as having the burden of proof. It simply found that the State met its burden to show that Bergemann continued to be a sexually violent person who was substantially likely to reoffend if not confined. This finding was consistent with the prosecution having the burden. Moreover, the trial court expressly acknowledged the prosecution's burden of proof at other points. Read as a whole, the trial court's findings reveal proper placement of the burden of proof.[1]

By the Court.—Order affirmed.

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

[1] Bergemann also states that the trial court overemphasized his failure to complete the institution's full twenty-eight-month treatment program. According to Bergemann, this effectively neutralizes his right to seek supervised release every six months. We see no error. The trial court could reasonably conclude that the full twenty-eight-month program would significantly help reduce the risk of Bergemann's recidivism. That was relevant to the supervised release decision.