COURT OF APPEALS
DECISION
DATED AND FILED

July 28, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1304-FT

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

IN RE THE GUARDIANSHIP AND PROTECTIVE PLACEMENT OF EDWARD S.:

MILWAUKEE COUNTY,

PETITIONER-RESPONDENT,

V.

EDWARD S.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: THOMAS P. DOHERTY, Judge. *Reversed.*

SCHUDSON, J.[1] Edward S. appeals, following a jury trial, from the trial court "determination and order appointing guardian" and "order for

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

protective placement." He contends that the trial court "improperly instructed the jury, to [his] prejudice, that his competency determination should be based upon his condition both at the time he was off medication (May, 1997) and when he was on medication (November, 1997)." This court agrees and, accordingly, reverses the orders.

The facts are undisputed. On May 9, 1997, Kathryn Krill, a Court Liaison with the Milwaukee County Mental Health Complex, filed a Petition for Appointment of Guardian and Protective Placement for Edward S. The Petition alleged that Edward S.: (1) was incompetent due to chronic schizophrenia, paranoid type; (2) "presented a substantial risk of harm to himself and others"; and (3) "demonstrated vast impaired ability to provide for his own care and custody." The trial court ordered a comprehensive psychological evaluation of Edward S. and appointed a guardian ad litem. On May 19, 1997, Edward S.'s guardian ad litem filed an "objection to the petition for guardianship and protective placement and a request for appointment of adversary counsel" on behalf of Edward S. The trial court then appointed adversary counsel for Edward S.

At the November 4, 1997 jury trial, Milwaukee County Corporation Counsel, representing the petitioner, presented the testimony of Dr. Timothy Wiedel. Dr. Wiedel testified that based on his examination of Edward S. on May 19 and 20, 1997, and based on his review of Edward S.'s medical records, he had concluded that Edward S. suffered from paranoid schizophrenia, and was incompetent and in need of a guardian. Dr. Wiedel acknowledged that when Edward S. was on medication, he did "reasonably well," but unequivocally maintained that Edward S. needed supervision to ensure that he stays on his medication.

At the conclusion of the testimony, the judge read the instructions to the jury and provided a special verdict, listing three questions: (1) "Is Edward S[.] incompetent?"; (2) "If you answer question no. 1 'yes,' then answer this question: Is such condition likely to be permanent?"; and (3) "If you answer question no. 2 'yes,' then answer this question: Is Edward S[.] in need of protective placement?"

During the deliberations, the jury sent out one question: "Do we base Mr. S[.]'s competency *on* or *off* medication?" The parties then addressed how they thought the judge should respond to the question. Corporation Counsel and Edward S.'s adversary counsel agreed that the appropriate answer should be "on medication" because, at the time of the jury trial, Edward S. was voluntarily taking his medication. The guardian ad litem did not agree. Instead, she advised the court that it should instruct the jury to determine Edward S.'s competency both on and off medication. The court responded to the jury's question by writing "both" on the note and sending it back to the jury.[2] Ultimately, the jury returned a verdict answering "yes" to all of the questions on the special verdict.

Edward S. argues that the circuit court "improperly instructed the jury . . . that his competency should be based upon his condition both at the time he was off medication . . . and when he was on medication . . . ." In response, Corporation Counsel concedes that the circuit court erred, but argues that the error was harmless. Corporation Counsel maintains that "the evidence was clear,

[2] This court notes that the jury's handwritten note is not included in the record. This court reminds the trial court that all proceedings and all communications to and from the jury should be included in the record to facilitate appellate review. *See* ***State v. Mainiero***, 189 Wis.2d 80, 93 n.3, 525 N.W.2d 304, 310 n. 3 (Ct. App. 1994).

convincing and uncontroverted that [Edward S.] was indeed incompetent at the time of the hearing. Therefore, any error in instruction of the jury as to this issue was harmless." This court cannot agree.

A trial court has broad discretion when instructing the jury. *See* ***Fischer v. Ganju***, 168 Wis.2d 834, 849, 485 N.W.2d 10, 16 (1992). "A challenge to an allegedly erroneous jury instruction warrants reversal and a new trial only if the error was prejudicial. An error is prejudicial if it probably and not merely possibly misled the jury." ***Id.*** at 849-50, 485 N.W.2d at 16 (citations omitted). If the overall meaning communicated by the instruction was a correct statement of the law, no ground for reversal exists. *See* ***id.*** In this case, therefore, because the parties agree that the trial court's answer of the jury's question erroneously stated the law, this court must determine whether the erroneous answer probably misled the jury.

To determine whether an erroneous instruction misled the jury, this court must first determine what the petitioner must prove before a jury can find the proposed ward incompetent and in need of a guardian. *See* ***R.S. v. Milwaukee***, 162 Wis.2d 197, 202, 470 N.W.2d 260, 262 (1991). The petitioner must establish incompetency by clear and convincing evidence. *See* ***id.***; *see also* § 880.33(4), STATS. An incompetent is defined as "a person adjudged by a court of record to be substantially incapable of managing his or her property or caring for himself or herself by reason of infirmities of aging, developmental disabilities, or other like incapacities. Physical disability without mental incapacity is not sufficient to establish incompetence." Section 880.01(4), STATS. "Incompetence has two components: (1) the functional incapacity and (2) the disorder or disability causing the functional incapacity." ***R.S.***, 162 Wis.2d at 203, 470 N.W.2d at 262. Moreover, "the mental incompetency must exist at the time of the hearing or else

the petition should be denied." ***Colliton v. Colliton***, 41 Wis.2d 487, 491, 164 N.W.2d 480, 482 (1969) (citation omitted).

Edward S. argues that the error affected the verdict. He contends that "by answering the question 'Both,' the Court's erroneous instruction opened the door for the jury to consider in full all of Edward S.'s prior health record for any purpose whatsoever. The issue of Edward S.'s present competency at the time of the hearing was now muddled and confused with twenty-year-old records …." Edward S. is correct.

Given the jury's question, this court can only surmise that the differing state of Edward S.'s condition, on and off medication, assumed some importance in the jury deliberations, requiring the trial court's clarification. The court, as the parties concede, answered the question incorrectly, thus allowing the jury to render a verdict based on an erroneous legal standard. That the evidence could have been sufficient for the jury, properly instructed, also to have found Edward S. incompetent at the time of trial is beside the point. As a result of the erroneous instruction, the jury's findings apparently were based not only upon Edward S.'s mental condition at the time of trial when he was on medication, but also on his condition many months and years before when he was off medication. [3]

[3] This court has carefully considered Corporation Counsel's arguments and has twisted and turned the jury question and the trial court's response to see if, somehow, the jury's verdict is reliable despite the error. It is not. The only way the jury verdict could have survived despite the erroneous response would have been if the court had supplemented its answer by providing additional questions on the special verdict: (1) Is Edward S. incompetent on medication?; (2) Is Edward S. incompetent off medication?; and (3) Is Edward S. incompetent both on and off medication? Then, despite the fact that the third question would have been based on an erroneous legal standard, and despite the fact that the second question would have improperly focused the jury solely on Edward S.'s earlier status, the errors would have been harmless because the jury's response to the first question still would have established the jury finding that Edward S. was incompetent at the time of trial.

This court has no disagreement with Corporation Counsel's position that Edward S.'s medical history, in particular his long history of discontinuing his medication when he is reintegrated in the community, was relevant to determining whether he was competent to care for himself and whether he posed a danger to himself or others. The fact remains, however, that the jury, in determining Edward S.'s competency, had to determine his present competency and this determination should have focused on his present status. Consequently, this court is unable to conclude that Edward S. was not prejudiced by the erroneous instruction.

By the Court.—Orders reversed.

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