STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT II

Case Nos. 2019AP001753-CR & 2019AP001754-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BENJAMIN J. KLAPPS,

Defendant-Appellant.

On Appeal from an Order Revoking
Conditional Release under Wis. Stat. § 971.17(3)(e)
Entered in Winnebago County Circuit Court,
Judge Scott C. Woldt, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

> At the hearing on the petition to revoke Benjamin Klapps's conditional release under Wis. Stat. § 971.17(3)(e), the circuit court ordered revocation based on information not admitted into evidence. Is Klapps entitled to a new hearing, either because the circuit court was objectively biased or, in the alternative, in the interests of justice?

In ordering revocation of Klapps's conditional release, the circuit court relied on reports written and filed before the revocation proceeding by a psychologist who did not testify at the revocation hearing. (203:22-24; App. 122-24).

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is warranted. This case involves the application of established law to the facts and the issues can be fully addressed in the parties' briefs.

STATEMENT OF THE CASE AND THE FACTS

In 2000 Benjamin Klapps was charged with criminal offenses in two separate cases. In the first case he was charged with one count of second degree sexual assault of a child. (2019AP1753: R.1). In the

second case he was charged with felony bail jumping. (2019AP1754: R.1). He resolved both cases with a stipulated disposition under which he was found not guilty by reason of mental disease or defect and committed to institutional care for 26 years, 8 months. (2019AP1753: R.17; 2019AP1754: R.14).[1]

Klapps has been granted conditional release five times over the past two decades. The first grant was in October 2005. (49; 51; 52). Klapps committed various violations in the months after his release, was taken into and then released from custody, and his conditional release was ultimately revoked in July 2006. (53; 54; 55; 56; 57; 59; 61; 63; 64; 65).

He was next granted conditional release in July 2008, but that was rescinded two months later due to his behavior before the release plan was approved by the court. (82; 83; 84; 85).

He was granted conditional release again in July 2010. (97). While Klapps was taken into custody over alleged violations in January and June 2013, those violations did not result in revocation

[1] Because the two cases under review were not initiated at the same time, the number of documents in the records of the cases differs. However, since the two cases were disposed of together in October 2000, the proceedings and filings in them have been virtually identical. After Klapps filed a notice of appeal in each case, he moved to consolidate the appeals, and this court granted the motion. In the rest of this brief Klapps cites only to the record index numbers from Case No. 2019AP1753-CR, unless otherwise indicated.

proceedings and he was released. (98; 99; 100). His conditional release was ultimately revoked in March 2014 for multiple violations over the previous three-plus years. (101; 102; 103; 104; 106; 109; 110; 112).

In May 2016 Klapps was again conditionally released. (136). A few months later his agent sought to revoke the release order based on Klapps's violations of his conditions of release, including using a cell phone to access the internet and an unauthorized email account and to send and receive nude images. (137; 139; 140; 143; 146). The court granted the petition to revoke in September 2016. (148).

The most recent grant of conditional release was in December 2018. (192). That conditional release was revoked after a hearing held in March 2019. (196; 197; 203; App. 101-24). This revocation proceeding is the subject of this appeal.

On his release in December 2018 Klapps was placed at Bonnie View Adult Family Home. (191:1). The probable cause statement in support of the petition to revoke conditional release alleged that between the time he was released to Bonnie View and the end of February 2019, Klapps: made inappropriate sexual statements to Bonnie View staff; failed to follow directives to not sexually harass Bonnie View staff; pursued an intimate relationship with a staff member; and failed to disclose information to his treatment provider. (193; 194). The

details of this alleged conduct were set out in a summary created by Klapps's case manager, Patrick Woodbridge, based on his review of Bonnie View records. (195:2-3; 203:4, 5; App. 104, 105).

At the revocation hearing the state called Woodbridge to testify. (203:3; App. 103). Woodbridge testified he saw in Klapps's records "a troublesome pattern of inappropriate comments that were often sexual in nature, including what we viewed as very threatening comments." (203:5; App. 105). He then read his summary of the incidents. (203:6-11; App. 106-11). The incidents pertinent to the conduct alleged to support revocation, all of which occurred in 2019, were these:

- On January 10 Klapps told his sex offender treatment therapist, Karen Barter, that he was having sexual fantasies about B.B., the person initially assigned to be his case manager. Barter explained to Klapps that having sexual fantasies with someone he worked with directly is considered a risk. (195:2; 203:7; App. 107). As a result of this disclosure, Woodbridge was assigned to be his new case manager. (195:2; 203:8; App. 118).

- On January 11 Klapps told D.K., a Bonnie View staff member, that he thought he had to go to the doctor because he had "a hard on for 3 hours but it went away." (195:2; 203:7; App. 107).

● On January 14 Klapps was told not to talk to staff members at Bonnie View about his previous sexual encounters; he agreed and stated he would not bring up the topic again. (195:2; 203:7-8; App. 107-08).

● On January 31 Klapps continually asked D.K. why she was not doing his room checks anymore. (195:2; 203:8; App. 108).

● On February 3 Klapps followed D.K. around while she was working and was instructed to give her space to do her work. (195:3; 203:8; App. 108).

● On February 12 Klapps told a staff member that he was worried because some staff were saying other staff were "afraid of him," though he was unable to give specific examples. The next day, he asked D.K. if she was scared of him; when she replied, "no," Klapps said "[g]ood, because if I was going to attack you, I have had plenty of chances and I have feelings for you as a staff resident relationship." (195:3; 203:8; App. 108).

● On February 14, Barter addressed with Klapps his approach to and boundaries with staff and told him not to speak to staff about any sort of attraction. (195:3; 203:9; App. 109). The next day, however, Klapps approached D.K. and told her he had feelings for her, could not help the way he feels, but would never act on his feelings because he does not want to get in trouble. He also said that if he was going to attack her he would have done so already

because he had many chances, but "I won't because I don't want to get in trouble." (195:3; 203:9-10; App. 109-10).

- On February 17 Klapps told D.K. he was having thoughts of suicide, but not an "urge" to kill himself, and that it was his urges that are dangerous. He went on to tell D.K. that he had been having sexual urges about her since that morning, causing D.K. to go into the staff office and shut the door. Woodbridge did not know what time Klapps said this to D.K., but she reported she could hear Klapps pacing back and forth until 10:00 p.m. (195:3; 203:10, 16; App. 110, 116).

Based on this incident with D.K., on February 19 Barter advised Klapps's treatment team that he was demonstrating risky behavior and on February 21 he was taken into custody. When he was told of the allegations, Klapps became argumentative, saying "I did not touch [D.K.] or do anything" and complaining the staff at Bonnie View lie and that "I'll beat the hell out of them" if he was placed back there. (195:3; 203:10-11; App. 110-11).

Woodbridge's testimony also cited other incidents describing Klapps's resistance to or noncompliance with staff directives (going out to smoke instead of waiting in a clinic lobby; getting out of the car to stay with the staff chaperone during errands) that Woodbridge believed demonstrated Klapps was pushing boundaries, and that behavior, along with the sexual nature of Klapps's comments,

led the treatment team to believe Klapps was a risk to others. (195:2-3; 203:6-7, 9, 11; App. 106-07, 109, 111).

During cross examination Woodbridge acknowledged it was appropriate for Klapps to disclose suicidal thoughts to staff, as disclosure of his emotional and mental state is part of treatment. (203:12; App. 112). He also confirmed that Klapps had no physical contact with staff and made no specific threats of physical harm, nor did he have any sexual contact with staff or make any specific threats or descriptions about sexual activity beyond his generalized statement about sexual "urges." (203:12-13; App. 112-13). While Klapps was told to limit disclosure of sexual urges or thoughts to his therapist, that directive was conveyed to him February 14. (203:13; App. 113). Because Klapps saw his therapist every other week, he could not disclose his thoughts to her in the interim, and it happened that Barter was unavailable for the three weeks following her directive to him about such disclosures; thus, until Barter's return to availability, he would have had to disclose at least the general matter of his thoughts to staff and ask to see a therapist. (203:13-15, 16-17; App. 113-15, 116-17). Further, Klapps had complied with the directive he was given on January 14 to not disclose to staff his past sexual encounters. (203:15-16; App. 115-16).

The state called no witnesses other than Woodbridge and offered no exhibits into evidence. (203:18-19; App. 118-19). Klapps called no witnesses. (203:19; App. 119).

The parties then made their arguments about whether Klapps's conditional release should be revoked. The state argued Woodbridge's testimony proved Klapps "engaged in a pattern of escalating risky behavior, threatening sexual comments, um, that the State believes do pose a risk to the community, others, especially the staff members." Accordingly, the state argued Klapps was "a danger to himself or others at that placement at -- in -- in the community" and his conditional release should be revoked. (203:19; App. 119).

Klapps's attorney argued the state did not prove by clear and convincing evidence that Klapps was dangerous to himself or others and that his conditional release should continue, albeit at someplace other than Bonnie View. (203:20; App. 120). As to being a danger to himself, defense counsel argued that the one instance of suicidal thoughts with no specific plan did not establish such a danger. (203:22; App. 122). As to risk to others, counsel argued that Klapps followed the directive not to talk about previous sexual encounters, and that his statements to D.K. after being directed not to tell staff about any attraction he was feeling had to be assessed in the context of his therapist's unavailability and the concomitant treatment

expectation that he disclose his thinking to reduce the risk he simply internalizes and acts on the thoughts. (203:20-21; App. 120-21). Further, while he disclosed to staff that he was having sexual urges or feeling sexually attracted, he also said he was not going to act on them. Though his poorly phrased sentiment was "concerning," it is still the fact that he controlled his behavior and therefore was not a danger to others. (203:21-22; App. 121-22). Thus, counsel argued, while Klapps certainly needed more direction on and control over appropriately discussing his thoughts, the incidents did not show by clear and convincing evidence that Klapps was a danger to others. (203:22; App. 122).

The court granted the petition to revoke conditional release. The court rejected defense counsel's argument about how Klapps's disclosures should be construed because counsel was not an expert and the only evidence before the court was Woodbridge's testimony. (203:22-23; App. 122-23). The court continued:

> Clearly, based upon the nature of the underlying offenses which are sexual in nature, the mental history here with Mr. Klapps -- and I think this goes back to what Dr. Hauer said -- that really there's nothing you can do with Mr. Klapps. It's not really -- it's more of a there's no mental -- or psychotropic drugs or anything like that can change him. It's more of a personality disorder, and there's nothing we're really going to do to change him. He is a predator, a sexual predator, and all he does is try to prey on people and use

> predatory skills such as intimidation of people to try to get them to succumb to his predatory instincts which I don't think there's anything we're going to be able to do to change him. That's what Dr. Hauer says, and from time to time we try to give him another shot on conditional release and within months we're back here with a hearing for withdrawal of the conditional release because of the predatory instincts taking over once again.

(203:23; App. 123). Citing Klapps's statement that he would "beat the hell out of people" if he went back to Bonnie View and saying that Klapps was told "numerous times" to stop talking about his sexual experiences and his attraction to staff but "he continues to do it," the court found the state had proven by clear, and convincing evidence that Klapps posed a substantial risk of bodily harm to others. (203:23-24; App. 123-24). Accordingly, it revoked the conditional release order. (197; 203:24; App. 124).

Klapps appeals. (2019AP1753: R.199; 2019AP1754: R.190). Additional relevant facts will be included in the argument section, below.

ARGUMENT

Klapps is entitled to a new revocation hearing because the circuit court's reliance on information not admitted into evidence at the revocation hearing shows that the circuit court was objectively biased or, in the alternative, that the real controversy was not tried.

A. The law governing revocation of conditional release.

Wisconsin Statute § 971.17(3)(e) governs revocation of conditional release granted under Wis. Stat. § 971.17(3)(d) or (4). The statute provides in pertinent part that:

> …. If the department of health services alleges that a released person has violated any condition or rule [of release], or that the safety of the person or others requires that conditional release be revoked, he or she may be taken into custody under the rules of the department. The department of health services shall submit a statement showing probable cause of the detention and a petition to revoke the order for conditional release to the committing court…. The state has the burden of proving by clear and convincing evidence that any rule or condition of release has been violated, or that the safety of the person or others requires that conditional release be revoked. If the court determines after hearing that any rule or condition of release has

> been violated, or that the safety of the person or others requires that conditional release be revoked, it may revoke the order for conditional release and order that the released person be placed in an appropriate institution … until the expiration of the commitment or until again conditionally released under this section.

Proceedings under § 971.17(3)(e) to revoke conditional release must meet a minimum level of due process. In particular, a person subject to revocation of conditional release is entitled to the same procedure required in probation or parole revocation proceedings. *State v. Jefferson*, 163 Wis. 2d 332, 337, 471 N.W.2d 274 (Ct. App. 1991); *State v. Mahone*, 127 Wis. 2d 364, 370, 379 N.W.2d 878, 881 (Ct. App. 1985). The minimum procedural requirements are:

> (1) an initial hearing to justify detention pending a final commitment hearing; (2) written notice of the claimed violation; (3) disclosure of the evidence against the subject; (4) an opportunity to be heard in person and to present witnesses and documentary evidence; (5) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (6) a neutral and detached hearing body, and (7) a written statement by the fact-finder(s) as to the evidence relied upon and reasons for revocation of the conditional discharge.

Jefferson, 163 Wis. 2d at 337-38, *quoting Mahone*, 127 Wis. 2d at 370. *See also* Wis. Stat. § 971.17(7)(a)

(listing rights of defendant at hearings under § 971.17).

B. The circuit court's reliance on previously filed reports from a psychologist show the court was objectively biased, and Klapps is therefore entitled to a new revocation hearing.

The proceeding in this case comported in many ways with the minimum requirements of due process. Klapps was given written notice of the claimed violations. (193; 194). The evidence against him was disclosed—albeit not until the day before the hearing. (195). He appeared in person at the hearing. (203:3; App. 103). He had the opportunity to call witnesses or present his own evidence to confront and cross-examine Woodbridge, the state's witness; however, his ability to confront the witnesses to his alleged behavior was limited to the extent Woodridge had witnessed only one of the incidents on the list he compiled and got the rest by reviewing Bonnie View records. (203:5; App. 105).[2]

But in one crucial way the revocation hearing was fundamentally unfair. Specifically, the circuit court's statement of reasons for granting the state's petition to revoke conditional release created an appearance of bias that revealed a great risk of actual

[2] Klapps acknowledges that any potential defects regarding disclosure of the evidence and the opportunity to confront witnesses were not objected to below, so any challenge to them is forfeited.

bias, and that appearance of bias violated Klapps's due process right to an impartial decision maker.

Judges are presumed to act fairly, impartially, and without prejudice. *State v. Gudgeon*, 295 Wis. 2d 189, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114; *State v. Goodson*, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385. A defendant may rebut the presumption by showing that, even in the absence of actual bias, there is an appearance of bias on the judge's part that reveals a great risk of actual bias. *Gudgeon*, 295 Wis. 2d 189, ¶¶20-24; *Goodson*, 320 Wis. 2d 166, ¶¶9, 14. *See also Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 885 (2009). An appearance of bias offends due process principles when a reasonable person—taking into consideration human psychological tendencies and weaknesses—would conclude that the average judge could not be trusted to "hold the balance nice, clear and true" under all the circumstances. *Gudgeon*, 295 Wis. 2d 189, ¶¶23-24; *Goodson*, 320 Wis. 2d 166, ¶9. Whether a judge exhibited this kind of bias is a question of law that this court reviews independently. *Goodson*, 320 Wis. 2d 166, ¶7. *See also State v. Herrmann*, 2015 WI 84, ¶¶3, 23-36, 46, 364 Wis. 2d 336, 867 N.W.2d 772.

In *Gudgeon* this court examined whether a defendant had received due process where the judge had, in advance of the revocation hearing, written a note on a proposal from the probation agent saying "I want his probation extended." 295 Wis. 2d 189, ¶¶2-3. This court concluded that "[t]he ordinary

reasonable person would discern a great risk that the trial court in this case had already made up its mind to extend probation long before the extension hearing took place. Further, nothing in the transcript of the extension hearing would dispel these concerns." *Id.*, ¶26.

Similarly, in *Goodson* this court concluded that the trial court's statements prior to a reconfinement hearing telling Goodson what the hearing's outcome would be violated Goodson's due process right to be sentenced by an impartial judge because a reasonable person would conclude "that the judge had made up his mind about [the defendant's] sentence before the reconfinement hearing." 320 Wis. 2d 166, ¶13. The court based its conclusion on the principle that "'when a judge has prejudged ... the outcome,' the decision maker cannot render a decision that comports with due process." *Id.*, ¶17 (*citing Franklin v. McCaughtry*, 398 F.3d 955, 962 (7th Cir. 2005)).

So a judge who appears to have prejudged the facts or outcome cannot decide a case consistent with due process. That is what happened here.

The circuit court's statement of its reasons for revocation demonstrate it had been influenced by information that was not presented as evidence—namely, the report (or reports) of Allen Hauer, a psychologist who had examined Klapps in 2015, 2017, and 2018. (115; 120; 127; 165; 173). The circuit court said:

> Clearly, based upon the nature of the underlying offenses which are sexual in nature, the mental history here with Mr. Klapps -- and *I think this goes back to what Dr. Hauer said* -- that really there's nothing you can do with Mr. Klapps. It's not really -- it's more of a there's no mental -- or psychotropic drugs or anything like that can change him. It's more of a personality disorder, and there's nothing we're really going to do to change him. *He is a predator, a sexual predator, and all he does is try to prey on people and use predatory skills such as intimidation of people to try to get them to succumb to his predatory instincts which I don't think there's anything we're going to be able to do to change him. That's what Dr. Hauer says*, and from time to time we try to give him another shot on conditional release and within months we're back here with a hearing for withdrawal of the conditional release because of the predatory instincts taking over once again.

(203:23; App. 123 (emphasis added)). Further, the court cited Hauer's opinions in direct response to Klapps's lawyer's arguments that Klapps was not dangerousness because, as Klapps said, he was controlling his behavior and did not want to get in trouble, and that his disclosures were helping him control his behavior. (203:20-22; App. 120-22). After rejecting trial counsel's arguments because counsel was "not in the profession of making such determinations and conclusions," the court appealed to the authority of "Dr. Hauer." (203:23; App. 123).

Yet as the court itself noted, "the only evidence before this court is that issued [*sic*] by the -- Mr. Woodridge in this case." (203:23; App. 123). Hauer did not testify, and his reports were not—and could not be—admitted into evidence. The court's ready familiarity with Hauer's opinion, which was most recently expressed in a report filed almost 10 months earlier (173:2), shows the court was so struck by the opinion that it stayed in the court's mind or that the court reviewed Hauer's reports again before or during the hearing. Further, that Hauer's opinion influenced the court's judgment about the case in advance is evident from the plain language the court used to express it: Klapps "is a predator" and "I don't think there's anything we're going to be able to do to change him." (203:23; App. 123). In other words, the court adopted Hauer's opinion that Klapps is dangerous to others and always will be, so regardless of the evidence actually elicited at the revocation hearing he should not be on conditional release. Thus, just as in *Goodson* and *Gudgeon*, the trial court's statements gave the appearance that it had prejudged the matter and created an appearance of bias that "revealed a great risk of actual bias." *See Gudgeon*, 295 Wis. 2d 189, ¶23. This appearance of bias offends due process and Klapps is entitled to a new revocation hearing.

Klapps acknowledges his trial lawyer did not object to the circuit court's reliance on Hauer's reports at the revocation hearing. But he has not forfeited his judicial bias claim. That is clear from

State v. Carprue, 2004 WI 111, 274 Wis. 2d 656, 683 N.W.2d 31.

Carprue addressed a defendant's challenge to the circuit court calling and questioning witnesses, which could constitute a statutory violation and a due process violation based on judicial bias. *Id.*, ¶¶29-31, 58. The supreme court held that Carprue's statutory violation claim had been forfeited, but it addressed the due process claim on the merits even though Carprue had not preserved it with a contemporaneous objection. *Id.*, ¶¶35, 57-58.

The court prefaced its analysis of the alleged due process violation by noting that "such error could not be waived[.]" *Id.*, ¶57. As it noted, a biased judge creates structural error that requires automatic reversal. *Id.*, ¶59, *citing Tumey v. Ohio*, 273 U.S. 510 (1927), *and State v. Harvey*, 2002 WI 93, ¶37, 254 Wis. 2d 442, 647 N.W.2d 189. *See also State v. Nelson*, 2014 WI 70, ¶34, 355 Wis. 2d 722, 738, 849 N.W.2d 317, 324 (a biased judge is structural error). The court ultimately decided that Carprue's due process claim failed not because it was forfeited, but because he "present[ed] no basis" for finding bias and did "no more than allege that [the judge] harbored general bias in favor of the State in criminal prosecutions[.]" *Id.*, ¶60.

Thus, as *Carprue* makes clear, Klapps's due process claim of objective judicial bias cannot be waived or forfeited. For the reasons given above, the circuit court was objectively biased because its

reliance on an expert opinion that was not in evidence shows the court prejudged the revocation decision. Accordingly, Klapps is entitled to a new revocation hearing before a different judge. *Goodson*, 320 Wis. 2d 166, ¶18.

C. Alternatively, Klapps should be granted a new revocation hearing in the interest of justice.

Fact finders are charged with deciding cases based on the evidence offered and received at a trial or evidentiary hearing. As this court has said in the context of a criminal trial:

> Verdicts, whether rendered by juries or judges, must either be based on the evidence properly admitted at the trial, or matters for which judicial notice may be taken. Although there is some evidentiary leeway in trials to the court, bench-trial judges may not use inadmissible evidence to decide a "critical issue."

State v. Sarnowski, 2008 WI App 48, ¶12, 280 Wis. 2d 230, 694 N.W.2d 498, *quoting McCoy v. May*, 255 Wis. 20, 25, 38 N.W.2d 15, 17 (1949). A trial court may take judicial notice in limited areas—namely, of "fact[s] generally known within the territorial jurisdiction of the trial court," or "fact[s] capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id.*, ¶13, *citing* Wis. Stat. § 902.01(2). A court may not take judicial notice unless the parties have at some point "an opportunity to be

heard," Wis. Stat. § 902.01(5), and it may not take judicial notice of things that the judge knows unless that knowledge also falls within the rule. *Id. See also State v. Peterson*, 222 Wis. 2d 449, 457-458, 588 N.W.2d 84, 87-88 (Ct. App. 1998) ("A trial court sitting as fact-finder may derive inferences from the testimony and take judicial notice of a fact that is not subject to reasonable dispute, but it may not establish as an adjudicative fact that which is known to the judge as an individual" (footnotes omitted)).

A conditional release revocation hearing is not a criminal trial, for, as noted above, its procedures are like those applicable to revocation of probation or parole. *Jefferson*, 163 Wis. 2d at 339-40; *Mahone*, 127 Wis. 2d at 370. Nonetheless, the process due in a revocation hearing—disclosure of the evidence; the opportunity to be heard and present evidence; the right to confront witnesses; a neutral and detached decision maker—would be negated and rendered meaningless if the fact finder can stray from the evidence presented at the hearing and base its decision on evidence about which the defendant is given no notice and does not have the opportunity to try to rebut or confront. Therefore, a court hearing a petition to revoke conditional release must also base its decision on evidence admitted at the revocation hearing.

Even if the circuit court's reliance on Hauer's opinions does not show the appearance of bias, it shows the court considered information that was not in evidence. Again, Hauer did not testify and none of

his reports were (or could be) admitted into evidence. Nor were Hauer's opinions a proper subject for judicial notice, for they are, precisely, *opinions*, not "fact[s] generally known within the territorial jurisdiction of the trial court" or "fact[s] capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Moreover, Klapps had no chance to confront or contest Hauer's opinions because it was not until the court was explaining its ruling that the court revealed its reliance on them. Finally, Hauer's opinions were used by the court to decide the critical issue in the case—whether Klapps was dangerous and should be revoked from conditional release.

By using his own recollection or recent re-reading of one or more of Hauer's prior reports as a substitute for testimony from Hauer or some other expert, the trial judge became a witness for that evidence. As with the judge in *Sarnowski*, this was impermissible. *Sarnowski* involved a court trial on a charge of failure to pay child support where the defendant raised the defense of inability to pay due to a lack of work in carpentry, his trade. 280 Wis. 2d 243, ¶¶3-7. The judge rejected the defense based on her specific experience of having difficulty finding carpenters to work on her own home during the time period involved. *Id.*, ¶¶8-9. This court held that the judge's experience was not evidence of the relevant job market in general, and that by using her experience as substitute for evidence on that issue "the trial judge became, in essence, an impermissible surrogate witness for that evidence." *Id.*, ¶15 (*citing*

Solberg v. Robbins Lumber Co., 147 Wis. 259, 265, 133 N.W. 28, 30 (1911) (jurors may use personal knowledge to understand the evidence; they may not "supply a material item of evidence by assuming knowledge on the subject")). *Cf. American Family Mutual Insurance Co. v. Shannon*, 120 Wis. 2d 560, 564, 356 N.W.2d 175 (1984) ("The judge, in making an unrequested, unannounced, unaccompanied and unrecorded view of the scene, gathers evidence used to determine the credibility of witnesses that is not part of the record, and, therefore, is an error of law.").

Because the circuit court impermissibly relied on information that was not in evidence to conclude Klapps was dangerous and that conditional release should be revoked, Klapps should be given a new revocation hearing in the interest of justice. This court has the authority under Wis. Stat. § 752.35 to grant, in the interest of justice, a discretionary reversal of an order from which an appeal is taken if the real controversy was not tried, regardless of whether there was a proper objection to any error that caused the problem. *State v. Hubanks*, 173 Wis. 2d 1, 28–29, 496 N.W.2d 96 (Ct. App. 1992). While this court exercises this discretionary power of reversal only in exceptional cases, *State v. Cuyler*, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983), this is such a case.

The issue at the revocation hearing—that is, the controversy to be tried—was whether Klapps was currently dangerous and should be revoked from conditional release. The focus of the controversy

should have been on his conduct at Bonnie View over approximately seven weeks, as summarized by Woodbridge's testimony, and whether that showed he was dangerous. But that was not ultimately the court's focus. While it referenced three specific items in explaining its ruling—Klapps's angry outburst about beating up people at Bonnie View after being taken into custody and Klapps's continuing to talk about his sexual experiences and sexual attractions despite being told not to (203:23-24; App. 123-24)—it clearly viewed these behaviors through the lens of Hauer's opinions that "Klapps is a predator, a sexual predator" and that "really there's nothing you can do with Mr. Klapps … that can change him." (203:23; App. 123). By adopting Hauer's opinion the court rejected out-of-hand Klapps's attorney's argument that Klapps behavior overall showed not dangerousness justifying revocation but a measure of improved control, and that the strictures of conditional release should be allowed to continue their work. Thus, the circuit court's reliance on opinions that were not in evidence resulted in Klapps's contrary arguments being disregarded, and the real controversy in the case was not tried.

One final point, about whether the court's impermissible use of Hauer's opinions in determining dangerousness matters in light of its written order revoking release, which also found Klapps violated a condition of release. (197; App. 125). As with violations of conditions of probation or parole, a violation of a condition of conditional release is sufficient grounds for revocation as a matter of law.

Jefferson, 163 Wis. 2d at 338 n.6 and 339, *citing State ex rel. Cutler v. Schmidt*, 73 Wis. 2d 620, 622, 244 N.W.2d 230 (1976). Despite the checked box on the order finding Klapps violated his conditions of release, there is not a scintilla of evidence to prove that. The state offered no evidence of what Klapps's conditions were and made no argument as to which condition or conditions were violated and by which of Klapps's acts. Indeed, the state did not argue Klapps should be revoked for violating any conditions of release, but only due to his dangerousness. (203:19; App. 119). The court followed suit, and referred only to dangerousness, not rule violations, in explaining its reasons for ordering revocation. (203:22-24; App. 122-24). Thus, this alternative ground cannot sustain the circuit court's revocation order.

CONCLUSION

For the reasons given above, this court should reverse the circuit court's order revoking Benjamin Klapps's conditional release order and remand the case for a new revocation hearing before a different judge.

Dated this 16th day of December, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,469 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 16th day of December, 2019.

Signed:

JEFREN E. OLSEN
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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JEFREN E. OLSEN
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APPENDIX

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