COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0841

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

IN RE THE COMMITMENT OF
CONRAD HAGENKORD:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

CONRAD HAGENKORD,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Conrad Hagenkord appeals from an order adjudging him a "sexually violent person" under ch. 980, STATS., and requiring him to be committed to institutional care. He also appeals from an order denying

his motion to reconsider the commitment order. He claims: (1) the State improperly used expert testimony as a conduit to adduce inadmissible hearsay; (2) the evidence was insufficient to support a ch. 980 commitment; (3) the trial court denied him the right to the "least restrictive" setting for serving the commitment; and (4) ch. 980 was unconstitutionally applied to him in violation of equal protection. Because the expert testimony was properly admitted; because there was sufficient evidence to support the commitment; because the trial court did not err in its placement decision; and because ch. 980 is not unconstitutional as applied to Hagenkord, we affirm.

I. BACKGROUND

On June 20, 1995, the State filed a petition alleging that Hagenkord was a sexually violent person eligible for commitment pursuant to ch. 980, STATS. Hagenkord's sentence for one count, first-degree sexual assault of a child would end on July 11, 1995. The trial court found probable cause to detain Hagenkord and a hearing was held in June 1995. A trial to the court occurred in October 1996. At trial, the State introduced the testimony of psychologist Dr. Dennis Doren. Dr. Doren testified that Hagenkord suffered from two mental conditions which predisposed him to engage in acts of sexual violence: pedophilia and borderline personality disorder with antisocial features. When questioned as to the bases for his opinion, Dr. Doren stated that he based his opinion on Hagenkord's recorded behavior and recorded statements and specifically referred to two incidents in the Department of Corrections files. Hagenkord objected to the admissibility of this information, asserting it was hearsay. The trial court overruled the objection, stating that the hearsay was not being offered for the truth of the matter asserted.

At the conclusion of the trial, the court found that Hagenkord was a sexually violent person and ordered a predisposition investigation. Thereafter, the trial court found that Hagenkord had extensive needs in the areas of sexual offense treatment, alcohol and drug treatment, and in dealing with authority figures. It further concluded that Hagenkord was still in denial of his violent criminal behavior and pedophiliac interests, and that treatment could be more meaningfully administered in an institutional setting. The trial court ruled that this was also required to protect the community.

The court ordered Hagenkord committed to institutional care in a mental health unit or facility. Hagenkord filed a motion to reconsider this decision. It was denied. He now appeals.

II. DISCUSSION

A. Expert Testimony.

Hagenkord claims that allowing Dr. Doren to testify regarding the information in the Department of Corrections files was erroneous because it allowed the introduction of inadmissible evidence. We are not persuaded.

Whether evidence was improperly admitted is reviewed under the erroneous exercise of discretion standard. *See* ***State v. Peters***, 192 Wis.2d 674, 685, 534 N.W.2d 867, 871 (Ct. App. 1995). We will not overturn a trial court's evidentiary ruling if the court considered the relevant facts, applied the proper law, and reached a reasonable conclusion. *See* ***id.***

Dr. Doren testified that in reaching his diagnoses, he relied on the following: a twenty-minute conversation with Hagenkord and a review of the Department of Corrections records. The records contained a social service

chronological history, treatment records, psychiatric notes and parole planning reports. Dr. Doren testified that these records and reports were of the type that psychologists reasonably rely on in performing evaluations.

The question presented to us is whether Dr. Doren can testify regarding the contents of the records he reviewed or whether such testimony should have been excluded as inadmissible hearsay. Having reviewed the relevant law, we conclude that the trial court did not erroneously exercise its discretion in allowing the testimony.

Clearly, Dr. Doren relied on inadmissible hearsay in forming his ultimate opinion and bases for his opinion. Nevertheless, we cannot conclude that this rendered his testimony inadmissible. Section 907.03, STATS., provides that:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Moreover, Wisconsin law provides that a physician can properly render an opinion based in part on medical information and material gleaned from the reports of others. *See* ***State v. Mann***, 135 Wis.2d 420, 427, 400 N.W.2d 489, 491 (Ct. App. 1986). The rule applies to mental health professionals as well. *See* ***Roberts v. State***, 41 Wis.2d 537, 549, 164 N.W.2d 525, 531 (1969).

The law does not permit admitting the underlying evidence for its substantive value unless it is independently admissible. *See* ***State v. Weber***, 174 Wis.2d 98, 107, 496 N.W.2d 762, 766 (Ct. App. 1993). Whether the underlying evidence at issue here was independently admissible is not relevant. The State

offered Dr. Doren's testimony regarding the underlying facts for a limited purpose and not for its substantive value. The trial court accepted the testimony on this limited basis.[1] A party calling an expert witness is entitled to have the expert witness explain the bases for his or her opinion because the trier of fact has to assess the validity of the opinion. *See* ***Heyden v. Safeco Title Ins. Co.***, 175 Wis.2d 508, 522, 498 N.W.2d 905, 909-10 (Ct. App. 1993), *overruled on other grounds*, ***Weiss v. United Fire & Cas. Co.***, 197 Wis.2d 365, 541 N.W.2d 753 (1995); *see also* § 907.05, STATS. ("The expert may testify in terms of opinion or inference and give the reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise."). Thus, the trial court did not erroneously exercise its discretion in admitting Dr. Doren's testimony regarding the underlying bases for his ultimate opinion.

B. Insufficient Evidence.

Hagenkord next argues that there was insufficient evidence to support the commitment. As a part of this argument, he contends that the trial court used the wrong standard in rendering its decision. The trial court said that there is a "substantial possibility," rather than the correct standard "substantial probability," that Hagenkord will engage in an act of sexual violence. We reject this claim.

In reviewing a sufficiency of the evidence claim:

> [W]e reverse only if the evidence, viewed in the light most favorable to the verdict, is so insufficient in probative value and force that it can be said as a matter of law that no trier

[1] Because the evidence was not admitted for substantive purposes, we do not address the cases Hagenkord cites in support of his claim that Dr. Doren should not have been allowed to testify regarding the bases for his opinion.

> of fact, acting reasonably, could have found [it substantially probable that the person will engage in acts of sexual violence] beyond a reasonable doubt.

State v. Kienitz, 221 Wis.2d 275, 301, 585 N.W.2d 609, 619 (Ct. App. 1998). There is sufficient evidence to support the commitment. Three elements need to be satisfied for a ch. 980, STATS., commitment: (1) that Hagenkord had been convicted of a sexually violent offense; (2) that he suffered from a mental disorder, that is, a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence; and (3) that he is dangerous to others because he has a mental disorder which creates a substantial probability that he will engage in acts of sexual violence. *See* § 980.02, STATS.; WIS J I—CRIMINAL 2502.

The record here reveals that there is evidence to prove each element beyond a reasonable doubt. First, a certified copy of Hagenkord's judgment of conviction for first-degree sexual assault was admitted. Second, Dr. Doren testified that Hagenkord suffered from two disorders which qualified under § 980.02(2)(b), STATS., because they predisposed him to commit acts of sexual violence. Third, Dr. Doren also testified that these mental disorders created a substantial probability, that is, "much more likely than not" that Hagenkord would commit acts of sexual violence in the future. This is sufficient to support the commitment.

Hagenkord makes the additional argument that "substantial probability" should be interpreted to mean "a high probability of harm." He cites a Minnesota case in support of this contention. *See* ***In re Linehan***, 557 N.W.2d 171, 180 (Minn. 1996), *vacated*, 118 S. Ct. 596 (1997). We recently defined this term in ***Kienitz*** to mean "considerably more likely to occur than not to occur." ***Kienitz***, 221 Wis.2d at 294, 585 N.W.2d at 612. The record reflects that this

standard was utilized when Dr. Doren rendered his conclusion and when the trial court rendered its decision. Accordingly, we are not persuaded by Hagenkord's request to apply Minnesota law.

Hagenkord's additional argument that the trial court utilized the improper standard of "possibility" rather than "probability" is also rejected. Although the record does reflect that the trial court used the wrong term, the trial court did so in its oral ruling. The written order reflects the correct standard. This fact, together with the fact that Dr. Doren's testimony utilized the correct legal standard, leads us to conclude that the trial court simply misspoke when it used the term possibility.

C. Least Restrictive Commitment.

Hagenkord next claims that the trial court denied him the right to treatment in the least restrictive setting when it accepted the Department's recommendation for institutional treatment based on the fact that no community-based treatment was available. We are not persuaded.

Determining the appropriate placement pursuant to § 980.06(2), STATS., involves a discretionary act. *See* ***State v. Keding***, 214 Wis.2d 363, 367, 571 N.W.2d 450, 451-52 (Ct. App. 1997). We review a trial court's decision on this issue, therefore, under the erroneous exercise of discretion standard and will not reverse unless the trial court failed to consider the facts of record, apply the correct legal standard and reach a reasonable decision. *See* ***id.*** at 367, 571 N.W.2d at 452. Applying this standard of review, we cannot conclude that the trial court erroneously exercised its discretion in committing Hagenkord to institutionalized care.

The record does reflect that the predisposition investigation report states that there is little hope of finding a community-based treatment facility to accept Hagenkord. Nevertheless, Hagenkord does not identify, nor can we locate, any portion of the trial court's decision that directly relies on this fact. Rather, the trial court, after considering Hagenkord's violent background, extensive treatment needs and the need to protect the community, concluded that treatment could be more meaningfully administered in an institutionalized setting. The trial court concluded that supervised release was not appropriate. This decision was not an erroneous exercise of discretion.

D. Constitutional Challenge.

Hagenkord's last claim is that ch. 980, STATS., was unconstitutional as applied to him because the trial court was predisposed to commit him to an institution based on the lack of any community-based facility. He claims that if a community-based facility had been available, the trial court may have ordered supervised release.

He argues that our supreme court found this chapter constitutional in part because supervised release and least restrictive commitment is required by the statute. *See* ***State v. Carpenter***, 197 Wis.2d 252, 266, 541 N.W.2d 105, 110 (1995), *cert. denied*, 117 S. Ct. 2507 (1997); ***State v. Post***, 197 Wis.2d 279, 313, 541 N.W.2d 115, 126 (1995), *cert. denied*, 117 S. Ct. 2507 (1997). As a result of these provisions, our supreme court found that the statute is not punitive, but rather serves the purposes of protecting the community and providing treatment. *See* ***id.***

Hagenkord claims that ch. 980, STATS., violates equal protection as applied to him because individuals committed under ch. 51, ch. 55 and § 971.17,

STATS., are afforded supervised release opportunities in the community, whereas, he was forced to be committed to institutionalized care because no community facilities were available. He argues that the State has failed to provide community treatment options promised by ch. 980 and this disparity in treatment violates equal protection. We reject this claim.

"When a party attacks a statute on the grounds that it denies equal protection under the law, the party must demonstrate that the state unconstitutionally treats members of similarly situated classes differently." ***Post***, 197 Wis.2d at 318, 541 N.W.2d at 128. Hagenkord has failed to so demonstrate. He has not offered any evidence that anyone committed under ch. 971 or chs. 51 or 55, who presents the same danger to the community that he does, would have received a conditional release or supervised release into the community. Thus, his equal protection argument fails.

To the extent that he raises additional constitutional claims of *ex post facto*, double jeopardy or due process, we reject those as well. Each claim is based on Hagenkord's belief that he should have received supervised release rather than commitment to an institution. Therefore, his claims fail. The trial court concluded that Hagenkord was not a candidate for supervised release. Instead, the trial court ruled that institutionalized care would most appropriately meet Hagenkord's treatment needs and protect the community. The State provides the treatment program for sexually violent persons at the Wisconsin Resource Center, where Hagenkord will be able to obtain therapy, treatment and training necessary to improve so that he is no longer a substantial risk to re-offend. The fact that the trial court determined Hagenkord's treatment needs required institutional care, and the fact that the State provides this treatment on an inpatient basis, does not

transform the treatment to punishment. Because it is treatment, rather than punishment, neither *ex post facto* law nor double jeopardy are violated.

Finally, we reject any due process claim as well. "Due process requires that the nature and duration of the commitment bear some reasonable relation to the purpose for which the individual is committed." ***Post***, 197 Wis.2d at 313, 541 N.W.2d at 126. The purposes of ch. 980, STATS., are to protect the community and to treat persons suffering from disorders that predispose them to commit sexually violent acts. *See* ***id.*** In the instant case, commitment to an institutionalized facility serves both purposes delineated. Hagenkord will obtain appropriate treatment and the community will be protected. Thus, confinement in the mental health facility did not violate his due process rights. We reject Hagenkord's claim that ch. 980 is unconstitutional as applied to him.

By the Court.—Orders affirmed.

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