COURT OF APPEALS
DECISION
DATED AND FILED

June 13, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 98-2488

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

IN RE THE COMMITMENT OF JAY WARREN DOWNS:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

JAY WARREN DOWNS,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed in part, and cause remanded with directions.*

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

¶1 PER CURIAM. Jay Warren Downs appeals from an order committing Downs as a sexually violent person under Chapter 980, and from an

order denying his motions after verdict.[1] We affirm in part, and remand with directions.

I. BACKGROUND

¶2 On July 14, 1994, the State filed a petition seeking to commit Downs as a sexually violent person. Prior to trial, Downs filed two requests for civil discovery.[2] The trial court denied these requests, ruling that "the full panoply of civil discovery rights" is not available in Chapter 980 cases. Downs also objected to the State's "use of hearsay as substantive evidence" in a written pretrial motion. The trial court decided to rule on evidentiary challenges during the course of the testimony.

¶3 At the court trial, Dr. Michael Caldwell, one of the State's expert witnesses, stated that in forming his opinion, he was assisted by a presentence report describing a 1973 incident involving the sexual molestation of children by Downs.[3] Over objection, the court admitted this evidence, pursuant to WIS. STAT.

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[1] Downs argues on appeal that insufficient evidence was presented to commit him because the State failed to prove he was within 90 days of release from a sentence for a sexually violent offense, as required by WIS. STAT. § 980.02(2)(ag) (1993-94). This argument, however, was not raised in the trial court, and is therefore waived. Consequently, we will not consider it on appeal. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501, 505 (1997) (issues not presented in trial court will not be considered for the first time on appeal).

[2] In addition to Judge Hansher, two judges were assigned to, and made rulings in, this case. Downs's first demand for civil discovery was made before Judge Jeffrey Wagner on August 8, 1994. His second demand for discovery was made before Judge Diane S. Sykes on April 4, 1996. Downs primarily focuses on Judge Sykes's ruling, however, regarding the civil-discovery issue.

[3] The presentence report contained a written description of an interview of Downs by his probation officer, in which Downs described the 1973 incident.

§ 907.03 (1993-94), noting "It's self reporting. It was in a presentence report."[4] Dr. Michael S. Kotkin, Downs's expert witness, did not dispute the pedophilia and personality disorder diagnoses, and addressed the 1973 molestation incident during direct examination.

¶4 The court also heard testimony from Linda Karleigh, a defense witness, who stated that she never left Downs alone with her young daughter, even for a short time. Karleigh stated that Downs expressed an interest to "groom" her daughter, which, she said meant to teach her daughter "sex education about boys [and] AIDS." In addition to hearing testimony, the court took judicial notice of the judgment of conviction for the predicate offenses,[5] and considered the parole revocation reports, the presentence report, the transcript from Downs's plea hearing, and a letter written by Downs while in prison.[6]

¶5 The trial court ordered Downs to be committed as a sexually violent person, pursuant to WIS. STAT. §§ 980.05 and 980.065. In making this ruling, the

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[4] WISCONSIN STAT. § 907.03 (1993-94) provides:

> **Bases of opinion testimony by experts.** 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.

All references to the Wisconsin Statutes are to the 1993-94 version unless otherwise noted.

[5] On October 8, 1982, Downs was convicted of two counts of first-degree sexual assault of a child, in violation of WIS. STAT. § 940.225(1)(d) (1981-82) and two counts of sexual exploitation of children, in violation of WIS. STAT. § 940.203(1) (1981-82).

[6] In the letter, Downs encouraged a mother to engage in sexual activity with her two young sons and then provide him with intimate details.

court concluded "it is substantially probable that he is a sexually violent person and in the future would probably commit a sexually violent offense."

II. ANALYSIS

A. Civil Discovery

¶6 The question of whether the rules of civil procedure govern discovery in this case involves the interpretation of ch. 980 and WIS. STAT. § 801.01(2). Thus, it is a question of law that we review *de novo*. *See* ***State v. Brown***, 215 Wis. 2d 716, 721, 573 N.W.2d 884, 886 (Ct. App. 1997).

¶7 The issue of whether civil discovery applies in ch. 980 proceedings was recently addressed in ***State v. Rachel***, 224 Wis. 2d 571, 591 N.W.2d 920 (Ct. App. 1999).[7] The court answered in the affirmative. Chapter 980 proceedings are civil in nature. *See* ***id.***, 224 Wis. 2d at 573, 591 N.W.2d at 921. Further, WIS. STAT. § 801.01(2) requires the rules of civil procedure to apply "except where different procedure is prescribed by statute or rule." Thus, ***Rachel*** concluded that "the rules of civil procedure apply in ch. 980 proceedings because no different procedure is prescribed therein." ***Id.***, 224 Wis. 2d at 574–575, 591 N.W.2d at 921.

¶8 The foregoing is dispositive as to this issue.[8] The trial court erred when it concluded that Downs was not entitled to the full panoply of civil

[7] Downs characterizes his civil discovery argument as a due-process and equal-protection violation. The State acknowledges ***State v. Rachel***, 224 Wis. 2d 571, 591 N.W.2d 920 (Ct. App. 1999), but argues that Downs was not deprived of any rights because of the comprehensive nature of the pretrial discovery he received, contending "Downs [essentially] received all the information a defendant in a criminal case would have received under an open file policy, and more." As Downs correctly points out, however, "this was not a criminal case."

[8] Although ***Rachel*** was decided after Downs's trial concluded, it applies nonetheless. *See* ***Griffith v. Kentucky***, 479 U.S. 314, 323 (1987) (new rule applies retroactively to cases not yet final); *see also* ***State v. Koch***, 175 Wis. 2d 684, 499 N.W.2d 152 (1993).

discovery. We remand to the trial court on this issue, with directions that civil discovery be permitted. Following that discovery, the trial court is to determine whether Downs was prejudiced by the failure to get the discovery before trial in light of all the circumstances of the case and the degree of informal discovery made available to Downs. If the trial court determines that Downs was prejudiced, it shall then determine whether there is a "reasonable probability" that his failure to get formal discovery before trial contributed to his commitment as a sexually violent person. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222, 232 (1985). If the trial court determines that Downs's failure to get formal discovery before the trial did contribute to his commitment as a sexually violent person, Downs is entitled to a new trial. *See* ***id.***

B. Sufficient Evidence

¶9 Next, Downs claims that there was insufficient evidence to support his commitment. Specifically, Downs asserts that much of the evidence upon which the trial court relied was inadmissible hearsay that the trial court gleaned from the testimony of the State's expert witnesses. In a sexually-violent-person-commitment case, we will use the standard for sufficiency of the evidence used in criminal cases. *See* ***State v. Kienitz***, 227 Wis. 2d 423, 434, 597 N.W.2d 712, 717 (1999). When reviewing the sufficiency of the evidence, we may only reverse if the evidence viewed most favorably to the State and the conviction is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752, 755 (1990). In addition, "trial courts have wide discretion as to admitting opinion evidence of expert witnesses." ***Kreyer v. Farmers Co-op. Lumber Co.***, 18 Wis. 2d 67, 75, 117 N.W.2d 646, 650 (1962).

¶10 According to ***State v. Watson***, 227 Wis. 2d 167, 195, 595 N.W.2d 403, 416 (1999), "[WIS. STAT. § 907.03] authorizes the admission of an expert's opinion when it is based on information reasonably relied upon by experts in the particular field. This includes presentence investigations, even though the PSI upon which the opinion is based includes inadmissible hearsay." WISCONSIN STAT. § 907.03 is not a hearsay exception, however, and data upon which the expert's opinion is based cannot be automatically admitted into evidence for the truth of the matter asserted unless it is admissible under a recognized exception to the hearsay rule. *See* ***id.***, 227 Wis. 2d at 198–199, 595 N.W.2d at 417 (citation omitted). The trial court "must be given latitude to determine when the underlying hearsay may be permitted to reach the trier of fact through examination of the expert," and also "must understand its authority to disregard or devalue the expert's opinion if it is not based on evidence of record." ***Id.***, 227 Wis. 2d at 200–201, 595 N.W.2d at 418.

¶11 Here, it was entirely appropriate for Dr. Caldwell to rely on the presentence report in forming his opinion, and the trial court properly found the hearsay evidence contained in the report to be admissible when it stated, "It's self-reporting. It was in a presentence report." A presentence investigation report is an investigative report of a government agency which is admissible under the public record exception to the hearsay rule contained in WIS. STAT. § 908.03(8).[9] *See*

[9] WISCONSIN STAT. § 908.03(8) excludes from the hearsay rule:

> **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth:
> (c) in civil cases and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.
> (d)

State v. Keith, 216 Wis. 2d 61, 77, 573 N.W.2d 888, 896 (Ct. App. 1997) (probation and parole files compiled by the Department of Corrections fall within the definition of public records).[10] While Downs concedes that presentence reports are admissible under the public records exception, he argues that "the whole point of ***Watson*** is that such records must be handled very carefully because its information may be inaccurate and unverified." The trial court did that here and its decision reflects a proper exercise of discretion.

¶12 Moreover, sufficient evidence existed to support the commitment in this case without the hearsay evidence complained of by Downs. The trial court considered the predicate offenses, the transcript of the guilty pleas, the presentence report, parole violation report, the letter written by Downs while in prison, and the testimony of Downs's own witnesses, Linda Karleigh and Dr. Kotkin. All of this evidence was admissible and amounted to sufficient evidence to commit Downs as a sexually violent person.

C. "Substantially Probable" Standard

¶13 The definition of "sexually violent person" includes the requirement that a person "is dangerous because he or she suffers from a mental disorder that makes it *substantially probable* that the person will engage in acts of sexual violence." WIS. STAT. § 980.01(7) (emphasis added). The Wisconsin Supreme Court has defined "substantially probable" to mean "much more likely than not." ***State v. Curiel***, 227 Wis. 2d 389, 422, 597 N.W.2d 697, 712 (1999); ***Kienitz***, 227 Wis. 2d at 427, 597 N.W.2d at 714. Downs asserts that the trial court applied the

[10] The parole revocation report is admissible for the same reason. The fact that Downs was not actually revoked does not affect the admissibility of the parole revocation report under WIS. STAT. § 908.03(8).

wrong legal standard when it determined that he was a sexually violent person by stating: "it is substantially probable that he is a sexually violent person and in the future would *probably* commit a sexually violent offense." We disagree.

¶14 When looking at the trial court's opinion as a whole, it is clear that it applied the correct legal standard. The trial court used the term "probably" within a lengthy oral statement. Later, the court stated:

> I find specifically [Downs] has been convicted of a violent sexual offense. I find he has a mental disorder as described previously in Dr. Caldwell's report and I find he's dangerous to others. Because of this mental disorder, the Court finds this would create a substantial probability that he will engage in acts of sexual violence if released in the community.

In addition, Downs made no objection at trial, nor was the trial court asked to define "substantially probable." Thus, the record supplies no basis to conclude that the trial court applied the wrong legal standard.

By the Court.—Orders affirmed in part, and cause remanded with the directions set out in ¶8.

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