**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 8, 2002**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 01-1162** **Cir. Ct. No. 00-CI-2**

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

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**IN RE THE COMMITMENT OF RICHARD A. STRAND:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**RICHARD A. STRAND,**

**RESPONDENT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Richard Strand appeals a WIS. STAT. ch. 980[1] judgment and commitment order. Strand argues that: (1) the changes made to ch. 980 by 1999 Wis. Act 9 violate Strand's right to equal protection; (2) in order to be constitutional, ch. 980 must require a finding of lack of volitional control, and the trial court erred when it refused to instruct the jury or permit a finding on the issue of lack of volitional control; (3) the trial court erred by directing a verdict on whether the petition was filed within ninety days of Strand's discharge or release; (4) the trial court erred when it refused to accept Strand's stipulation to his prior convictions and to exclude other acts evidence counsel claimed would in effect retry those prior cases; and (5) the State failed to prove by expert opinion that it was substantially probable Strand would sexually and violently reoffend. We reject Strand's arguments and affirm the judgment and order.

## BACKGROUND

¶2 On April 24, 2000, the State filed a WIS. STAT. ch. 980 petition alleging Strand, a diagnosed pedophile, was a sexually violent person. The trial court held a probable cause hearing on April 27. The State submitted a certified copy of a Department of Corrections form stating that Strand's mandatory release date was April 26.

¶3 The court conducted a trial in February 2001. At trial, defense counsel argued that the State had to prove that the WIS. STAT. ch. 980 petition was filed within ninety days of Strand's release. The State contended that whether the petition was filed within ninety days of Strand's release is a finding the court

[1] All references to the Wisconsin Statutes are to the 1999-2000 version.

makes, not the jury. A representative of the Department of Probation and Parole testified that Strand's mandatory release date was April 26. Defense counsel asked the court for a special verdict on the four elements the State had to prove, including whether the petition was filed within ninety days of Strand's release. The court determined as a matter of law that Strand was within ninety days of release when the ch. 980 petition was filed.

¶4 The jury found Strand to be a sexually violent person. Defense counsel asked for a dispositional hearing to present evidence of the least restrictive alternative. The court nevertheless entered judgment and committed Strand to the custody of the Department of Corrections after the State noted that the applicable statute had been amended and commitment was initially required.

## DISCUSSION

### I. AMENDMENTS TO WIS. STAT. Ch. 980.

¶5 Strand contends that changes made to WIS. STAT. ch. 980 by 1999 Wis. Act 9 violate his right to equal protection. However, after briefing was complete in this appeal, our supreme court upheld the constitutionality of the amendments to ch. 980.[2]

[2] Strand initially argued that the charges violated due process. We ordered rebriefing after the Wisconsin Supreme Court issued its decision in ***State v. Laxton***, 2002 WI 82, 254 Wis. 2d 185, 647 N.W.2d 784. In ***State v. Rachel***, 2002 WI 81, ¶68, 254 Wis. 2d 215, 647 N.W.2d 762, our supreme court held that WIS. STAT. ch. 980 does not violate due process. In ***Rachel***, the court also determined that ch. 980 is not criminal or punitive in nature and does not violate the double jeopardy or ex post facto clauses of the Wisconsin or the United States Constitutions. ***Id.*** at ¶18. Presumably in light of ***Rachel***, Strand has abandoned his due process argument in his replacement brief.

¶6 In ***State v. Williams***, 2001 WI App 263, ¶20, 249 Wis. 2d 1, 637 N.W.2d 791, we determined that WIS. STAT. ch. 980 does not violate equal protection. In ***Williams***, we acknowledged that for equal protection purposes, persons committed as sexually violent under ch. 980 are similarly situated to those civilly committed under WIS. STAT. ch. 51 and those committed after being acquitted by reason of mental disease or defect under WIS. STAT. § 971.17. ***Williams***, 2001 WI App 263 at ¶10. "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." ***Id.*** at ¶11 (quoting ***State v. Post***, 197 Wis. 2d 279, 321, 541 N.W.2d 115 (1995)). Applying the "strict scrutiny" standard, we concluded that the application of ch. 980 does not violate the right to equal protection of the laws. ***Williams***, 2001 WI App 263 at ¶20. The legislature imposed more stringent standards in ch. 980 because it deemed sexually violent persons, as a class, more dangerous than those subject to § 971.17 and ch. 51. *See* ***id.*** at ¶18. The stricter procedures are narrowly tailored to promote a compelling government interest.

II. VOLITIONAL CONTROL

¶7 Strand makes numerous arguments regarding the necessity of a finding of lack of volitional control. However, our supreme court recently addressed these issues in ***State v. Laxton***, 2002 WI 82, 254 Wis. 2d 185, 647

N.W.2d 784, a WIS. STAT. ch. 980 case relating to lack of volitional control and interpreting ***Kansas v. Crane***, 534 U.S. 407, 122 S.Ct. 867 (2002).[3]

¶8 In ***Laxton***, the court concluded that "civil commitment under WIS. STAT. ch. 980 does not require a separate factual finding that an individual's mental disorder involves serious difficulty for such person in controlling his or her behavior." ***Id.*** at ¶30. Rather, the court determined that the required proof of lack of control may be established "by evidence of the individual's mental disorder and requisite level of dangerousness, which together distinguish a dangerous sexual offender who has serious difficulty controlling his or her behavior from a dangerous but typical recidivist." ***Id.*** at ¶21. Proof that a mental disorder makes a person substantially probable to engage in acts of sexual violence "necessarily and implicitly includes proof that the person's mental disorder involves serious difficulty in controlling his or her sexually dangerous behavior." ***Id.*** at ¶23. Therefore, ch. 980, in requiring the nexus between mental disorder and dangerousness, satisfies due process and is narrowly tailored to meet compelling state interests. ***Id.*** The findings already necessary for a commitment under

[3] In ***Kansas v. Crane***, 534 U.S. 407, 122 S.Ct. 867, 871 (2002), the Supreme Court held that in the area of mental illness, constitutional safeguards are "not always best enforced through precise bright-line rules." It rejected an "absolutist approach" that would require proof of "total or complete lack of control," but concluded that a dangerous sexual offender cannot be committed "without any lack-of-control determination." ***Id.*** at 870. The court requires "proof of serious difficulty in controlling behavior … sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." ***Id.***

ch. 980 are sufficient to satisfy due process and no other findings of fact are necessary. ***Id.***[4]

III. DIRECTED VERDICT

¶9 Strand argues that the trial court erred when it took judicial notice that the petition was filed within ninety days of Strand's release date. He argues that a directed verdict on the issue was improper because it is an element that must be proven beyond a reasonable doubt and constitutes reversible error. We agree that the court erred, but deem it harmless.

¶10 In ***State v. Thiel***, 2000 WI 67, ¶18, 235 Wis. 2d 823, 612 N.W.2d 94, our supreme court concluded that whether a person was within ninety days of discharge or release when the petition was filed is an element of the State's case and must be proved beyond a reasonable doubt. However, our supreme court also has concluded that omission of an element during jury instructions is properly subject to harmless error analysis. ***State v. Tomlinson***, 2002 WI 91, ¶59, __ Wis. 2d __, 648 N.W.2d 367. Moreover, where the omitted element is supported by uncontroverted evidence, the error is harmless. ***Neder v. United States***, 527 U.S. 1, 18 (1999).

¶11 Here, despite Strand's claim to the contrary, the record reflects conclusively that the petition was filed within ninety days of Strand's scheduled

[4] Strand also claims that "[t]o the extent that 'emotional or volitional' capacity as disparate concepts are both alleged as to a ch. 980 [commitment] and the application of both is not explained, he has been denied due process." However, Strand was diagnosed with pedophilia. Expert testimony established that his pedophilia affects both his emotional and volitional capacity; it predisposes him to engage in acts of sexual violence; and he is much more likely than not to engage in such acts.

release. Because the proof is conclusive, any error was harmless beyond any reasonable doubt. ***Id.***

## IV. OTHER ACTS EVIDENCE

¶12 Strand alleges that the trial court erred when it refused to accept his "stipulation to his prior convictions and to exclude other acts evidence counsel claimed would in effect retry those prior cases." However, because Strand and the State never agreed to any stipulation, none was offered for the court's approval. The court was not asked to order the State to stipulate or to rule that specific evidence was inadmissible in light of Strand's willingness to stipulate.[5]

¶13 Moreover, reference to the "other" crimes, wrongs or acts rule is not applicable in WIS. STAT. ch. 980 proceedings. The court in a ch. 980 case does not consider whether the respondent committed a crime, except to the extent that the State must prove a predicate conviction or adjudication. At issue is whether the respondent has a mental disorder that predisposes him to commit acts of sexual violence. In effect, ch. 980 requires proof of a propensity to commit sexually violent crimes as a prerequisite for a respondent's commitment.[6]

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[5] In ***State v. Veach***, 2002 WI 110, ¶9, __ Wis. 2d __, 648 N.W.2d 447, our supreme court held the State has the right to present evidence on every element, even if the defendant is willing to stipulate to an element.

[6] It therefore appears that, in the WIS. STAT. ch. 980 context, the legislature intended that propensity evidence be admissible. Even if this is not the legislature's intent, evidence of Strand's "other acts" would be admissible under WIS. STAT. § 904.05(2). This statute allows evidence of "specific instances of a person's conduct" in cases where character of a person is an essential element of a charge or claim. Because ch. 980 proceedings necessarily involve a question of whether a person may be characterized as a sexually violent person, acts showing a tendency to this type of character are admissible.

¶14 In a WIS. STAT. ch. 980 proceeding, evidence that the respondent engaged in inappropriate sexual behavior is not offered to prove commission of a particular act. The evidence is offered to show a substantial probability that he will act in conformity with his past behavior in the future, making him dangerous. This other acts evidence is relevant to proving that Strand will act in conformity with his past behavior. The United States Supreme Court has recognized, "[p]revious instances of violent behavior are an important indicator of future violent tendencies." ***Kansas v. Hendricks***, 521 U.S. 346, 358 (quoting ***Heller v. Doe***, 509 U.S. 312, 323 (1993)).

¶15 Under WIS. STAT. § 904.01, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Strand does not argue that the evidence was not relevant. The trial court properly exercised its discretion by admitting the evidence, which is relevant under WIS. STAT. § 904.01 and not otherwise excludable under § 904.03.[7]

V. SUFFICIENCY OF EVIDENCE

¶16 Strand also argues that the State failed to prove by expert opinion that it was substantially probable that he would sexually violently reoffend. He contends that there was a failure of proof and a due process violation because actuarial instruments showed Strand not to be a sexually violent person. We

[7] Strand does not contend to the contrary.

conclude, however, that abundant evidence showed Strand is substantially probable to reoffend.

¶17 Under a WIS. STAT. ch. 980 commitment, the State must prove that it is substantially probable that the respondent will commit future acts of sexual violence in his lifetime. WIS. STAT. §§ 980.02(2) and 980.05(3)(a). "Substantially probable" means "much more likely than not." ***State v. Curiel***, 227 Wis. 2d 389, 422, 597 N.W.2d 697 (1999).

¶18 Here, Strand challenges the jury's conclusion that it is substantially probable that he will reoffend in a sexually violent manner during his lifetime. Specifically, Strand asserts that the actuarial instruments showed (1) he was not a sexually violent person, (2) the "[c]linical judgment was not sufficiently precise," and (3) reliance on a high RRASOR[8] score was improper. However, our review of the evidence supports the jury's reasonable decision that the evidence proved Strand is a sexually violent person.

¶19 Contrary to Strand's argument, the actuarial instruments did not show that Strand was not a sexually violent person. Strand had a RRASOR score of four and, based on the sample, 48.6% of those who scored a four were reconvicted of a sexually violent offense within ten years.

¶20 Strand's Static Risk Assessment 99 score of four compared with a sample group that had a 36% rate of reconviction within fifteen years. Dr. Craig Monroe, a defense expert, indicated that, "Pedophiles typically don't get picked up as readily as being high risk on this instrument." The jury heard evidence that

[8] Rapid Risk Assessment of Sex Offender Recidivism.

because the recidivism rates in the studies look at reconviction (not reoffense) over a period of time, the rates are lower than the actual number of individuals who will reoffend over an unspecified period of time. Thus, as the experts testified, the recidivism rates can be viewed as a conservative estimate of the likelihood that persons with that score will reoffend.

¶21 Also, the evidence demonstrates that Strand is more likely to be among those who will reoffend. Contrary to Strand's assertion, Dr. Christopher Tyre, the State's expert, did not use the RRASOR score in isolation to predict that Strand is substantially likely to reoffend. One of the developers of the RRASOR and Static-99, Dr. David Thornton, wrote to Tyre:

> An alternative approach to this kind of case is to look at dynamic risk factors. There is evidence from three samples now that dynamic risk classification adds information to static classification. If you could show that your guy [h]as a well established sexual preference for children, thinks the behavior is harmless or that kids seduce him, and has low self-esteem, is emotionally lonely, and awkward with adults but relaxed with kids then I think you could make an argument on that basis.

Tyre testified that he also looked at dynamic risk factors to evaluate Strand's risk and based his opinion that Strand was substantially likely to reoffend on the RRASOR score combined with the dynamic risk factors.

¶22 The jury heard evidence about dynamic factors that would demonstrate that Strand is much more likely to reoffend. These factors include:

1. Strand remains sexually aroused by children. In fact, evidence indicated that he prefers sex with juveniles to sex with adults.

2. Strand has been characterized as having low self-esteem, being naïve, insightless and socially isolated.

3. Strand has difficultly establishing relationships with adults and tends to pursue solitary activities or withdraw from interactions with others. Strand is, however, comfortable around children.

4. Strand failed on probation by continuing to reoffend even while his behavior was being monitored and when the consequences are very high.

5. Despite warnings, Strand repeatedly masturbated in public, in view of other inmates, in prison. Strand even touched himself or masturbated while the plethysmograph was being administered.

6. Strand admits that he is at risk of reoffending, and that he needs further treatment to prevent him from reoffending.

¶23 Given these factors, it cannot be said that Tyre's recommendation for civil commitment is inconsistent with Thornton's advice to Tyre. Rather, Strand presents dynamic factors consistent with those listed by Thornton, including a well-established sexual preference for children, low self-esteem, social isolation, difficulty establishing adult relationships, and comfort interacting with children. Although there may not be a formal protocol for considering dynamic factors, it was well within Tyre's professional judgment to do so.

¶24 Further, contrary to Strand's assertion, Tyre explained his methods for coding the Static-99. For example, he explained that an institutional rule violation that would constitute a chargeable offense outside the institution can count as an offense. Here, because public masturbation is a chargeable offense, Tyre counted Strand's rule violation for publicly masturbating as an offense for coding purposes.[9]

[9] The fact that Strand publicly masturbated in prison is well established by admissible evidence presented at trial.

¶25 In any event, the ultimate weight to give these factors, as well as the expert testimony, rests with the jury as the trier of fact. ***State v. Kienitz***, 227 Wis. 2d 423, 438, 597 N.W.2d 712 (1999). The jury heard testimony about Strand's diagnosis and risk from two experts, Tyre and Monroe. Both opined that Strand was substantially probable to reoffend. The jury also heard testimony about evaluating WIS. STAT. ch. 980 respondents from Dr. Patricia Coffey. All three experts discussed the actuarial instruments, dynamic risk factors, and how they evaluate risk. Two of Strand's probation agents, one of Strand's victims and a correctional officer also provided evidence.

¶26 The jury, as the trier of fact and having heard the reasons for the experts' opinions, was free to weigh and accept or reject the expert testimony and consider all the nonexpert testimony in deciding whether there was a substantial probability that Strand would commit future acts of violence. *See* ***Kienitz***, 227 Wis. 2d at 441. The evidence, both the testimony and supporting documents, is more than sufficient to support the jury's verdict in this case.

*By the Court.*—Judgment and order affirmed.

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