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

**February 4, 2004**

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



**Appeal No. 02-0779** **Cir. Ct. No. 00-CI-1**

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

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**IN RE THE COMMITMENT OF LARRY E. PRUST:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**LARRY E. PRUST,**

**RESPONDENT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Larry E. Prust appeals from a judgment committing him as a sexually violent offender under WIS. STAT. ch. 980,[1] and from an order denying his post-trial motion for relief. The main thrust of his argument on appeal is that expert opinion testimony was insufficient to support his commitment because it relied on suspect or inadequate actuarial instruments. We conclude that the expert testimony was sufficient to support the trial court's findings and we reject Prust's request for a new trial in the interests of justice. We affirm the judgment and order.

¶2 In 1986 Prust was convicted of four counts of child enticement. The convictions arose out of an incident where Prust asked four children to accompany him to a garage where he offered them money to allow him to rub their feet with his penis. In 1992 Prust was convicted of enticement after asking a boy to accompany him to a secluded area of a beach where Prust allegedly exposed his penis. This WIS. STAT. ch. 980 commitment proceeding was commenced in March 2000.

¶3 At trial, Christopher Tyre, Ph.D., testified that Prust had a foot fetishism and schizoidal personality disorder. He acknowledged that Prust had never acted in a physically sexually aggressive manner or made actual sexual contact with a child. However, he opined that there was a substantial probability that Prust would reoffend. Canton Roberts, Ph.D., diagnosed Prust with fetishism and pedophilia. He also determined that Prust was substantially likely to reoffend. The defense expert, Michael Kotkin, Ph.D., also diagnosed Prust with fetishism

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

and a schizoidal personality disorder. However, he concluded that Prust was not predisposed to sexual violence and that his disorders did not create a substantial likelihood that he would sexually reoffend.

¶4 In a written decision, the trial court considered the testimony of one witness who observed Prust interacting with young girls on the beach in 1992 and patting the sand between their legs. Another witness testified that when she was nine, Prust approached her and a friend at a pool and engaged in sexual conversation. The court recounted the testimony of Prust's probation agent that Prust suggested he had a sexual problem, the discovery of sexually explicit materials at Prust's home, threats Prust made to harm his wife, a 1991 incident where Prust spoke to a child about sexual contact, and Prust's rule violations involving contact with children. The court rejected the testimony of the defense's expert mathematician who was called to challenge the validity of the risk assessment instruments utilized by Drs. Tyre and Roberts. It specifically found Dr. Tyre's testimony more credible than the testimony of Dr. Kotkin. Prust was determined to be a sexually violent person subject to commitment under WIS. STAT. ch. 980.

¶5 Prust's first claim is that there was no proof that he had a substantial likelihood of reoffending due to a mental disorder. *See* ***State v. Laxton***, 2002 WI 82, ¶30, 254 Wis. 2d 185, 647 N.W.2d 784, *cert. denied by* ***Laxton v. Wisconsin***, 537 U.S. 1114 (2003) ("requisite proof of lack of control is established by proving the nexus between the person's mental disorder and dangerousness"). He explains that the State's expert opinions were based on actuarial instruments which measure only general recidivism of all offenders and make no inquiry about disorders an individual may suffer or the link between the disorder and the

likelihood to reoffend. This argument is nothing more than a challenge to the trial court's assessment of the credibility of the witnesses.

¶6 We may not reverse a commitment on the basis of insufficient evidence unless the evidence, viewed most favorably to the State, 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 the necessary elements beyond a reasonable doubt. ***State v. Burgess***, 2003 WI 71, ¶9, 262 Wis. 2d 354, 665 N.W.2d 124, *reconsideration denied by* 2003 WI 140, 266 Wis. 2d 67, 671 N.W.2d 853. It is up to the trier of fact, here the trial court, to determine the weight and credibility of the evidence. *See* ***id.*** Only when the evidence that the trier of fact has relied upon is inherently or patently incredible may an appellate court substitute its judgment for that of the fact finder. ***Id.*** Nothing required the trial court to reject the expert opinions simply because they were based on actuarial instruments. Reliance on those instruments was approved in ***State v. Tainter***, 2002 WI App 296, ¶20, 259 Wis. 2d 387, 655 N.W.2d 538, *review denied*, 2003 WI 16, 259 Wis. 2d 101, 657 N.W.2d 707 (Wis. Feb. 19, 2003) (No. 01-2644), and ***State v. Lalor***, 2003 WI App 68, ¶14, 261 Wis. 2d 614, 661 N.W.2d 898, *review denied*, 2003 WI 140, 266 Wis. 2d 61, 671 N.W.2d 848. While experts may disagree about the usefulness or accuracy of those instruments, the trial court may accept the evidence and accord it the weight it deems appropriate.[2]

[2] This state has not adopted the approach utilized in the federal courts under ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579, 592-93 (1993), which explains that the trial court's gatekeeper role requires it to assess whether the reasoning or methodology underlying expert testimony is scientifically valid.

¶7 Moreover, the suggestion that the experts' opinions were based solely on the actuarial instruments is misplaced. Both Drs. Tyre and Roberts indicated that they relied on clinical data and assessment. Dr. Tyre explained that Prust obsessively pursues his admitted foot fetishism and gratifies his sexual impulses by certain behaviors which put him at risk to reoffend. He further described the link between Prust's personality disorder and the inability to form appropriate social relationships as only increasing his risk for future acts of sexual violence. Dr. Tyre concluded that treatment had not mitigated Prust's risk to reoffend because Prust indicated to one examiner that his employment at a children's shoe store would be appropriate. In sum, Dr. Tyre found that Prust's disorders affected his ability to regulate his sexual urges and behaviors. Dr. Roberts explained how Prust's disorders predispose him to seek out female children whose feet he can see or touch.[3] Although the actuarial instruments the doctors utilized may not link the disorders to the risk assessment, the doctors' testimony provided the requisite link. There was sufficient evidence that Prust suffers from disorders which cause a substantial probability that he would sexually reoffend.

¶8 Before we address the next issue, we acknowledge that the trial court erroneously stated that Dr. Tyre diagnosed Prust as suffering from pedophilia. Dr. Roberts and only Dr. Roberts made that diagnosis. However, we conclude the trial court's misstatement is harmless error. The test for harmless error is whether there is a reasonable possibility that the error contributed to the ultimate finding. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 792, 576 N.W.2d 30 (1998). Dr. Tyre

[3] Although the trial court did not mention Dr. Roberts' testimony in its written decision, we may look to the entire record when reviewing the sufficiency of the evidence.

explained why the disorders he found created a substantial probability that Prust would reoffend. The record reflects that even if Prust is not diagnosed as a pedophile, he is at risk to reoffend against children because of their accessibility. The court's ultimate finding is not brought into question by the misstatement that Dr. Tyre diagnosed pedophilia.[4]

¶9 Prust argues that he was denied the right to a fair trial when the trial court limited his cross-examination of Dr. Roberts. Prust pursued a line of questions demonstrating that Dr. Roberts' opinion would have been different without reliance on the actuarial instruments. Dr. Roberts acknowledged his opinion would have been different. Sustaining the State's relevancy objection, Prust was not allowed to extract what Dr. Roberts' opinion of the risk would be without reliance on the actuarial instruments. Prust claims he was precluded from showing that Dr. Roberts did not believe that an evaluation of Prust's mental condition alone was sufficient to create a substantial probability of reoffending, which he deems to be the most important issue at trial.

¶10 We will not consider whether evidentiary error occurred absent a proper offer of proof. WIS. STAT. § 901.03(1)(b). An offer of proof is a precondition to a claim that there was an erroneous exclusion of evidence. *See* ***State v. Williams***, 198 Wis. 2d 516, 538, 544 N.W.2d 406 (1996). Although no offer of proof is necessary where the expected testimony is apparent from the context, *see* ***Lambert v. State***, 73 Wis. 2d 590, 605, 243 N.W.2d 524 (1976), ***State***

[4] The same is true of the trial court's alleged misstatement at the post-trial motion hearing that Prust's prior record involved sexual assaults. The trial court's ultimate determination had been made before the misstatement and did not rely on any perception that Prust had sexually assaulted his victims.

***v. Tabor***, 191 Wis. 2d 482, 496, 529 N.W.2d 915 (Ct. App. 1995) (alleged error not waived where apparent from the record that the court and the parties were aware of the substance of the evidence), that is not the case here. We are not apprised of what Dr. Roberts' testimony would have been if Prust had been allowed to further probe the impact of the actuarial instruments. We need not address the issue. We note, however, that the error, if any, was harmless. Not only did Prust expose the fact that Dr. Roberts' opinion would have been different without reliance on actuarial instruments, the trial court rejected Prust's attempt to impugn the reliability of such instruments. Further, the court relied on Dr. Tyre's opinion.

¶11 With nothing more than an appeal to fundamental fairness and due process, Prust urges the judicial branch to set minimum threshold limits on persons that may be committed as sexual predators. He points to his circumstances as presenting a low threshold case because he is not a pedophile, did not commit crimes involving sexual contact or aggressive physical contact with any person, and does not exhibit deviant sexual arousal. Prust charges that the State has failed to adhere to the legislative design that commitments be "narrowly tailored to … only … the most dangerous of sexual offenders." ***State v. Post***, 197 Wis. 2d 279, 307, 541 N.W.2d 115 (1995).

¶12 The argument is more properly directed to the legislature and not this court. The legislature determined to make the crime of child enticement a violent sexual offense thereby exposing Prust to commitment as a sexually violent person. *See* WIS. STAT. § 980.01(6)(a). This court defers to the legislature's judgment and as an error correcting court does not engage in social legislation. *See* ***Chappy v. LIRC***, 136 Wis. 2d 172, 188, 401 N.W.2d 568 (1987).

¶13 Finally, Prust requests a new trial in the interests of justice under WIS. STAT. § 752.35. We exercise our discretionary power to grant a new trial infrequently and judiciously. *See* ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). A new trial may be ordered where the real controversy has not been fully tried or there was a probable miscarriage of justice. ***Id.*** at 875. Prust claims the real issue—the nexus between his mental disorder and the substantial probability of reoffending—was not fully tried. We have rejected his attempt to obliterate the expert opinions because they relied on actuarial instruments. Those opinions supplied the required proofs. There is no basis to conclude that the real controversy was not fully tried.

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

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