COURT OF APPEALS
DECISION
DATED AND FILED

March 30, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2008AP340
2008AP2528
2010AP329

Cir. Ct. No. 2004CI3

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

IN RE THE COMMITMENT OF HUNG NAM TRAN:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

HUNG NAM TRAN,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Racine County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Hung Nam Tran appeals pro se from orders committing him as a sexually violent person, denying his post commitment motion and denying his petition for discharge from commitment. Tran raises a plethora of challenges to his original commitment and the subsequent proceedings.[1] None of his arguments persuades us. We affirm all three orders.

¶2 Tran was convicted in 1992 of first-degree sexual assault of a child. In November 2004, as Tran approached the end of his prison term, the State petitioned to commit him as a sexually violent person under WIS. STAT. § 980.02 (2003-04).[2] Department of Corrections (DOC) psychologist Dr. Anthony Jurek diagnosed Tran with a mental disorder—pedophilia, sexually attracted to males—and made a provisional diagnosis of Personality Disorder Not Otherwise Specified (NOS) with Anti-Social and Narcissistic Features. Tran represented himself at the May 2007 trial. The jury found that he met the criteria for commitment as a sexually violent person. The court committed Tran to the custody of the then-named Department of Health and Family Services (DHFS), which committed him to institutional care.

¶3 Tran filed a pro se notice of appeal from the order of commitment. Circumstances not essential to the determination of this appeal resulted in Tran's appeal of the commitment being remanded to the trial court for post commitment proceedings. In the meantime, in August 2008, Tran filed a pro se petition for discharge from commitment. The court denied it without a hearing and Tran

[1] This court appreciates the State's distillation and clear presentation of Tran's issues.

[2] Further references to the Wisconsin Statutes are to the 2009-10 version unless noted.

appealed. In April 2009, Tran filed his motion in the trial court for post commitment relief. The court denied the motion and Tran appealed from that order. This court ultimately consolidated the three appeals. Tran now asks that we vacate his commitment order and/or grant a new trial.

I. Orders of Commitment and Denying Post Commitment Motion.

¶4 For Tran to be committed as a sexually violent person, the State had to prove beyond a reasonable doubt that Tran (1) has been convicted of a sexually violent offense; (2) was within ninety days of discharge or release when the petition was filed; (3) has a mental disorder; and (4) is dangerous because his mental disorder makes it more likely than not that he will engage in future sexual violence. *See* WIS. STAT. §§ 980.01(1m), 980.02(2) and 980.05(3)(a) (2003-04).

¶5 We first consider whether the evidence was sufficient to support the verdict. The sufficiency of the evidence in a WIS. STAT. ch. 980 case is reviewed under the standard applicable to criminal convictions—that is, whether 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 [it more likely than not that the person would commit at least one future sexually violent offense] beyond a reasonable doubt." ***State v. Curiel***, 227 Wis. 2d 389, 416-17, 597 N.W.2d 697 (1999) (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990)). If any possibility exists that the evidence adduced at trial permitted the jury to find to the requisite degree that Tran was a sexually violent person, we may not overturn the verdict even if we would not have so found. *See* ***Poellinger***, 153 Wis. 2d at 507.

¶6 The State introduced Tran's 1992 judgment of conviction for first-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(1), a sexually violent offense, *see* WIS. STAT. § 980.01(6), and established that it filed its petition ten days before Tran's mandatory release date. Evidence also was adduced, through the testimony of a police officer who investigated some of the assaults and an attorney who had prosecuted his juvenile case, that Tran admitted molesting several boys ages four to eight and was "grooming" two other boys, ages five and seven. Two of Tran's victims, now grown, testified about the nature of the assaults. Prison psychologist Linda Nauth testified that she evaluated Tran's need for sex offender treatment when he first was incarcerated. She described Tran's sexually assaultive behavior as "compulsive and repetitive," making him an appropriate candidate for the more intensive treatment program. She testified that Tran was disruptive in and unmotivated for treatment; that he repeatedly was terminated from treatment and/or refused to participate in it; that he "sexualized" his prison roommate; and that he passed letters to a teenaged male Wisconsin Resource Center (WRC) inmate, an act perceived by staff as grooming behavior and which also was prohibited contact between a prisoner and a patient.[3] Dr. Jurek testified that offenders with male-oriented pedophilia pose a higher risk of reoffense than the actuarial instruments reflect and opined that Tran is more likely than not to engage in future acts of sexual violence. We conclude that the evidence adduced at trial was sufficient to permit a reasonable jury to find to the requisite degree of certainty that Tran was a sexually violent person.

[3] The WRC houses both DOC prisoners and WIS. STAT. ch. 980 patients but houses them in separate units and does not permit their interaction.

¶7 Tran next fires a volley of attacks, a mix of facial and as-applied challenges, against the constitutionality of WIS. STAT. ch. 980. We first note that ch. 980 has withstood rigorous constitutional scrutiny. *See* ***State v. Carpenter***, 197 Wis. 2d 252, 263-72, 541 N.W.2d 105 (1995), and ***State v. Post***, 197 Wis. 2d 279, 301-31, 541 N.W.2d 115 (1995). However, we review de novo whether a statute is constitutional. ***Post***, 197 Wis. 2d at 301. We presume that all legislative enactments are constitutional, and resolve doubts in favor of the statute's constitutionality. ***State v. Laxton***, 2002 WI 82, ¶8, 254 Wis. 2d 185, 647 N.W.2d 784. The challenger bears the burden of proving the statute unconstitutional beyond a reasonable doubt. ***Id.***

¶8 Tran first contends he had no notice of the probable cause hearing. He claims the hearing was held on November 24, 2004, just a day after his defense attorneys were appointed, such that they had no opportunity to "marshal facts or prepare a defense." In reality, his attorneys requested an adjournment on November 24 to afford them sufficient time to prepare. Tran expressly and voluntarily waived the statutory time frame. *See* WIS. STAT. § 980.04(2).

¶9 We read Tran's next complaint to be that he has a due process right to bail or another alternative to pretrial commitment. The cases he cites do not support that proposition, however. Moreover, Tran was afforded a hearing on his temporary detention and a jury trial on his commitment.

¶10 Tran next contends, correctly, that he was entitled to have the facts impartially determined. *See* ***State v. Jefferson***, 163 Wis. 2d 332, 337-38, 471 N.W.2d 274 (Ct. App. 1991). He intimates, however, that Nauth and Dr. Jurek were not neutral fact finders. The argument's premise is flawed. The fact finders

were not the psychologists but the judge at the probable cause hearing and the jury at his commitment trial. Indeed, the jury was free to accept or reject portions or all of any expert's opinion. *See* ***State v. Harrell***, 2008 WI App 37, ¶41, 308 Wis. 2d 166, 747 N.W.2d 770. Furthermore, Tran points to nothing suggesting that either entity was biased.

¶11 Tran next challenges the admission through other witnesses of "prejudicial hearsay" from statements made by a victim's mother, prison officials, the presentence investigation writer and in psychiatric reports. A party waives any objection to the admissibility of evidence by failing to object before the trial court. *See* ***State v. Mayer***, 220 Wis. 2d 419, 430, 583 N.W.2d 430 (Ct. App. 1998). There is an exception to the waiver rule for plain error. *See* WIS. STAT. § 901.03(4). Tran does not assert that he either objected at trial or that the admission of the alleged hearsay was plain error.

¶12 A petition alleging that a person is sexually violent must allege that the person is dangerous. WIS. STAT. § 980.02(2)(c). Tran asserts that "dangerousness" implies the need to allege a recent overt act and that due process requires it. This court already has rejected a substantive due process challenge to the definition of dangerousness. *See* ***State v. Nelson***, 2007 WI App 2, ¶¶9-18, 298 Wis. 2d 453, 727 N.W.2d 364. Further, the State need not establish a recent overt act to demonstrate probable cause of dangerousness of an offender incarcerated when the petition is filed. *See* ***Carpenter***, 197 Wis. 2d at 275-76.

¶13 In a related challenge, Tran argues that WIS. STAT. ch. 980 offends due process because it permits a prediction of dangerousness without requiring a

finding of a specific type of conduct the person will engage in or the likelihood that he or she will engage in it.

¶14 Predicting an offender's dangerousness under WIS. STAT. ch. 980 obliges the fact finder to examine the offender's past actions, relevant character traits and patterns of behavior, including his or her behavior while incarcerated, and then to make a determination as to whether the person's current mental condition predisposes him or her to commit another sexually violent act. ***State v. Bush***, 2005 WI 103, ¶¶33, 37, 283 Wis. 2d 90, 699 N.W.2d 80. We accord particular deference to reasonable legislative judgments in the mental health arena. *See* ***Post***, 197 Wis. 2d at 311. It is the general propensity for sexual violence that makes the individual particularly threatening to society. *Cf.* ***State v. Olson***, 2006 WI App 32, ¶1, 290 Wis. 2d 202, 712 N.W.2d 61 (involving predicting dangerousness in the temporal sense). The legislature's determination not to enumerate *particular* sexually violent acts does not render the statute unconstitutionally infirm.

¶15 In his next challenge, Tran argues that the State should have to prove that his mental disease or defect made him unable to control his behavior. Civil commitment under WIS. STAT. ch. 980 does not require a separate factual finding that the person has serious difficulty with behavior control. ***Laxton***, 254 Wis. 2d 185, ¶21. While there must be a nexus between the mental disorder and dangerousness, proof of the nexus necessarily and implicitly involves proof that the mental disorder involves serious difficulty for self-control. ***Id.***, ¶22.

¶16 Tran next contends that WIS JI—CRIMINAL 2502 creates mandatory presumptions on each of the elements the State was to prove. A mandatory

presumption is unconstitutional because it relieves the State of its burden to prove every element beyond a reasonable doubt. ***State v. Gardner***, 2006 WI App 92, ¶10, 292 Wis. 2d 682, 715 N.W.2d 720.

¶17 WISCONSIN JI—CRIMINAL 2502 requires proof that Tran has been convicted of a sexually violent offense, currently has a mental disorder and is dangerous to others because he has a mental disorder which makes it more likely than not that he will engage in one or more future acts of sexual violence. Tran first complains that the jury should have been allowed to find whether the conduct leading to his conviction for first-degree sexual assault of a child was violent. That conduct is not the element, however. The element is whether Tran has been convicted of a sexually violent offense. The jury determined that element by considering the evidence, which included the judgment of conviction.

¶18 Tran next argues that the instruction required the jury to find that he had a mental disorder once it found that he committed a sexual offense. We disagree. The jury was instructed that it had to find that he has a mental disorder. The jury then was expressly informed that "[n]ot all persons who commit sexually violent offenses can be diagnosed as suffering from a mental disorder." *See* WIS JI—CRIMINAL 2502. No mandatory presumption is created.

¶19 The State also had to prove that Tran was "dangerous to others because he has a mental disorder which makes it more likely than not that he will engage in future acts of sexual violence." *See* ***id.*** He appears to argue that his predicted dangerousness derived solely from actuarial instruments and that Dr. Jurek's opinion failed to consider that his actuarial instrument scores were associated with recidivism rates of less than fifty percent. Dr. Jurek testified,

however, that actuarial scores understate the likely recidivism rate of male-oriented pedophiles such as Tran. The jury was free to accept or reject any or all of the evidence predictive of Tran's dangerousness.

¶20 Tran also claims he was not within ninety days of "release" when the commitment petition was filed. *See* WIS. STAT. § 980.02(2)(ag) (2003-04). Tran contends the jury should have been allowed to determine whether he was "released" because, in his view, he simply was transferred from one correctional facility to another. We disagree.

¶21 The State filed the petition for commitment ten days before the end of Tran's "sentence … imposed for a conviction for a sexually violent offense." ***Id.*** After the probable cause hearing, he was released and transferred to WRC as a DHFS patient, not a DOC prisoner.

¶22 Tran next appears to raise double jeopardy and/or ex post facto claims. He argues that his civil commitment under WIS. STAT. ch. 980 is an extension of his criminal conviction because, he claims, the State really is using the same underlying facts to "circumvent the criminal proceeding under a different statute" so as to deprive him of his liberty. Tran also contends that his commitment is punitive because the State has failed to provide him with sex offender treatment.

¶23 The Double Jeopardy Clause protects against subsequent criminal prosecutions for the same offense. ***State v. Rachel***, 2002 WI 81, ¶20, 254 Wis. 2d 215, 647 N.W.2d 762. When analyzing a claim under either the Double Jeopardy Clause or the Ex Post Facto Clause, the threshold question is whether the challenged action is criminal or civil. ***Rachel***, 254 Wis. 2d 215, ¶18. We afford

the legislative preference for the civil label great deference. ***Id.***, ¶42. Detention is not necessarily punishment. *See* ***id.***, ¶45. If we conclude that one of the actions in question is civil and does not impose a criminal punishment, our double jeopardy analysis ends there. ***Id.***, ¶20. Only upon "the clearest proof" will we find the sanctions imposed by WIS. STAT. ch. 980 so "punitive in form and effect as to render them criminal" despite the legislature's intent to the contrary. ***Rachel***, 254 Wis. 2d 215, ¶42 (citations omitted).

¶24 Tran has not shown by "the clearest proof" that WIS. STAT. ch. 980 is punitive in effect. For the most part, Tran has refused sexual offender treatment. Even were there no treatment available, however, commitment is not based on either amenability to treatment or on a constitutional right to it. ***Post,*** 197 Wis. 2d at 307-08.

¶25 Tran also contends that the more stringent release standards under WIS. STAT. ch. 980 as compared to the civil commitment statute, WIS. STAT. ch. 51, violate guarantees of equal protection. Our supreme court already has determined that the State has a compelling interest in protecting the public from dangerous mentally disordered persons and that its statutorily distinctive mechanisms in ch. 980 do not violate equal protection. ***Post***, 197 Wis. 2d at 325-31. Thus, although a respondent's ability to seek supervised release as an alternative to institutional commitment may be limited, ch. 980 is narrowly tailored and does not violate substantive due process. *See* ***Rachel***, 254 Wis. 2d 215, ¶¶61-68.

¶26 Tran next argues that the statutory terms "likely" and "mental disorder," *see* WIS. STAT. § 980.01(1m) and (2), are unconstitutionally vague.

These arguments, too, have been scrutinized and rejected. *See* ***Post***, 197 Wis. 2d at 303-07 ("mental disorder"), and ***Nelson***, 298 Wis. 2d 453, ¶18 ("likely").

¶27 Tran's separation-of-church-and-state argument likewise fails. He asserts that notions of sexual deviancy are rooted in concepts of religious, particularly Christian, morality that views procreation as the purpose of sexual activity and denounces homosexuality. He argues that if his victims had been female he would not have met the threshold for commitment.

¶28 The First Amendment absolutely protects freedom of religious belief. The freedom to act on the basis of religious beliefs, however, is subject to government regulation. ***State v. Horn***, 126 Wis. 2d 447, 454, 377 N.W.2d 176 (Ct. App. 1985) (citing ***Cantwell v. Connecticut***, 310 U.S. 296, 303-04 (1940)), *aff'd*, 139 Wis. 2d 473, 407 N.W.2d 854 (1987). Tran was not found to be sexually disordered for having non procreational sex or being homosexual, but for sexually victimizing very young children. Even if his proclivities were religion-based, Wisconsin's law against sexual assault of children neither illegalizes his beliefs nor forces him to adopt any he wishes not to. In sum, none of Tran's constitutionality arguments persuade us.

¶29 Tran next contends that the State impermissibly used his no contest plea in the subsequent civil commitment proceeding in violation of WIS. STAT. § 904.10 ("Evidence of … a plea of no contest … is not admissible in any civil … proceeding against the person who made the plea ….") and the doctrine of collateral estoppel. We disagree.

¶30 The petition alleging that Tran was a sexually violent person alleged that he had been convicted of a sexually violent offense. *See* WIS. STAT.

§ 980.02(2)(a)1. A criminal judgment can be used to prove "the fact of conviction and the legal consequences flowing therefrom" but not the truth of the allegations underlying the criminal proceeding. *See* ***Gedlen v. Safran***, 102 Wis. 2d 79, 96, 306 N.W.2d 27 (1981). The judgment of conviction thus was properly admissible to prove the conviction.

¶31 We also understand Tran to argue that the State once again is litigating his guilt in the underlying case, contrary to the doctrine of collateral estoppel, now issue preclusion. Again we disagree. Under that doctrine, a final judgment bars the relitigation of a factual or legal issue that actually was litigated and decided in the earlier action. ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995). Whether issue preclusion applies is a question of law subject to our de novo review. *See* ***Michelle T. by Sumpter v. Crozier***, 173 Wis. 2d 681, 686, 495 N.W.2d 327 (1993). Issue preclusion is not implicated because the underlying crime was not relitigated. Therefore, his additional claim that the alleged relitigation also violated his right to be free of double jeopardy similarly fails.

¶32 Tran next argues that he was denied the right to confront witnesses whose testimonies, in the form of reports, were introduced through the testimonies of psychologist Nauth, Dr. Jurek, Attorney Margaret Borkin, the assistant district attorney who prosecuted Tran's juvenile sexual assaults, and Racine County Sheriff's Department Investigator Lieutenant John Gordon. He also contends he was not permitted to call certain witnesses on his behalf. We are not persuaded.

¶33 The testimonial statement of a person absent from trial is admissible only if the person is unavailable and the defendant has had a prior opportunity to

cross-examine the declarant about the statement. ***Crawford v. Washington***, 541 U.S. 36, 67-68 (2004). Nauth's testimony was admissible because it was based on her personal knowledge. *See* WIS. STAT. § 906.02.

¶34 Dr. Jurek's testimony was based on reports and actuarial instruments in Tran's WRC file. Tran's confrontation right was satisfied because, although Dr. Jurek's opinion partly was based on others' work, he testified to his independent opinion and was subject to cross-examination. *See* ***State v. Barton***, 2006 WI App 18, ¶¶20, 22, 289 Wis. 2d 206, 709 N.W.2d 93 (Ct. App. 2005). Futhermore, the materials supporting his opinion were elicited not for the truth of their contents but to help the jury assess the weight of his opinion. ***Id.***, ¶22. Finally, Tran failed to timely object to Dr. Jurek's references to others' reports and to Borkin's testimony about records relating to the prosecution of Tran's juvenile case. That failure arguably has waived any right to contest it now. *See* ***Holmes v. State***, 76 Wis. 2d 259, 272, 251 N.W.2d 56 (1977).

¶35 Tran did raise a ***Crawford*** objection when Lieutenant Gordon testified about what one of the victims told him. The court responded that the Confrontation Clause does not apply in civil cases,[4] but sustained Tran's objection on hearsay grounds. We affirm because the trial court reached the correct result. *See* ***State v. King***, 120 Wis. 2d 285, 292, 354 N.W.2d 742 (Ct. App. 1984).

[4] While correct for trials arising from commitment petitions filed on or after August 1, 2006, *see* 2005 Wis. Act 434, §§101, 131, 132, the petition leading to Tran's May 2007 trial was filed in November 2004. Tran thus had available to him all constitutional rights available to a defendant in a criminal proceeding. *See* WIS. STAT. § 980.05(1m) (2003-04); *see also* ***State v. Mark***, 2006 WI 78, ¶2, 292 Wis. 2d 1, 718 N.W.2d 90.

¶36 Tran also claims he was denied the right to call defense witnesses. Tran asked the court to authorize the transport of Marcellus Walker, who was committed pursuant to WIS. STAT. ch. 980. Tran said Walker would testify that—based on knowledge he gained from being in the system—actuarial instruments are inaccurate and that the entire ch. 980 proceeding is a "fraud" skewed toward commitment. Tran also sought to call witnesses to rebut allegations about sexual acts involving his roommate and prohibited contact with a juvenile WRC inmate. Tran disputed the allegations but asserted he had not had time to prepare rebuttals or to identify the witnesses. The court denied Tran's requests.

¶37 An individual's right to present a defense is not absolute. ***State v. Campbell***, 2006 WI 99, ¶33, 294 Wis. 2d 100, 718 N.W.2d 649. He or she has no constitutional right to present irrelevant evidence. ***State v. Jackson***, 188 Wis. 2d 187, 196, 525 N.W.2d 739 (Ct. App. 1994). As long as the court's rationale for excluding the evidence is not arbitrary and serves a legitimate state interest, the right to present a defense is not abridged. *See* ***Campbell***, 294 Wis. 2d 100, ¶33.

¶38 The court explained that Tran had not established that Walker had any "expertise beyond being a customer of the facility," making his testimony of little value to the jurors. The court also explained that Tran's claimed unpreparedness flew in the face of his earlier insistence that he was ready for trial and to represent himself.

¶39 Tran next alleges a violation of his Fifth Amendment right against self-incrimination. He claims that the opinions and testimonies of Dr. Jurek, psychologist Nauth and WRC social worker Kimberly Roberts were based on statements he, Tran, made to other psychologists, the PSI writer and prison

officials. He argues that he was not informed that those statements would be "used against him at future proceedings to further incarcerate[] him" and that he "should have been Mirandized[5] by all of these mental health professionals" before the evidence was presented to the jury. We disagree.

¶40 To fall within the Fifth Amendment privilege, Tran's statements would have had to have been both compelled and incriminating. *See* ***State v. Mark***, 2006 WI 78, 292 Wis. 2d 1, ¶28, 718 N.W.2d 90. "Incriminating" statements are ones which could incriminate Tran in a pending or subsequent criminal prosecution. *See* ***id.***, ¶¶29-30. The object of Tran's WIS. STAT. ch. 980 civil commitment trial was to determine the likelihood he would commit a future act of sexual violence, not to convict him of a crime. Furthermore, WIS. STAT. § 980.05(1m) (2003-04) did not entitle Tran to ***Miranda*** warnings before his pre-petition evaluation with Dr. Jurek in regard to whether a ch. 980 petition should be filed because that evaluation was not "at the trial." *See* ***State v. Lombard***, 2004 WI 95, ¶¶36-37, 273 Wis. 2d 538, 684 N.W.2d 103.

¶41 Tran next claims he was deprived of a fair trial because he was not allowed to advance his own theory of defense so as "to contest every element of the offense charged." Tran contends the jury should have been able to decide whether his underlying offense was a sexually *violent* offense, or only a sexual one, and whether WRC is a prison. *See* WIS. STAT. § 302.01.

¶42 There was no question for the jury on either point. The legislature has designated child sexual assault as a sexually violent offense. *See* WIS. STAT.

[5] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

§ 980.01(6)(a). Further, the Department of Health Services (formerly DFHS), not the DOC, administers WRC. *See* WIS. STAT. §§ 46.011(1), 46.056(1). Relative to his commitment, Tran was not detained at WRC by the DOC because of his sentence for child sexual assault. Rather, he was detained by DHFS as a result of a separate discretionary decision to seek his commitment under WIS. STAT. ch. 980. Regardless, WRC's designation is not an element the State had to prove.

¶43 Tran finishes up with a grab bag of arguments. He challenges the science underlying the actuarial instruments; claims that Dr. Jurek, a "medical witness," should not have been allowed to opine on the legal issue of "mental disorder"; alleges trial court misconduct through its "continuous[]" interruptions; and claims that new scientific data shows that he does not meet the threshold for commitment. We disagree.

¶44 This court already has upheld the admission of testimony drawn from actuarial instruments. ***State v. Tainter***, 2002 WI App 296, ¶20, 259 Wis. 2d 387, 655 N.W.2d 538. Dr. Jurek's opinion about Tran's psychological status was relevant evidence the jury could, but was not bound to, accept as to whether Tran has a mental disorder. The trial court demonstrated extraordinary patience in keeping Tran's pro se endeavor reasonably focused. Looked at together or separately, none of the foregoing claims of error persuade us that Tran should not have been committed. We decline to exercise our discretionary power under WIS. STAT. § 752.35 to order a new trial in the interest of justice.

II. Order Denying Petition for Discharge.

¶45 In August 2008, Tran, still pro se, filed a petition for discharge and a motion to have healthcare examiners of his choice appointed for the re-

examination. Tran alleged in support that (1) he no longer has "Anti-social Personality Disorder," the mental disorder he "originally had been committed upon"; (2) a recent test score showed he no longer is more likely than not to commit an act of sexual violence; (3) no evidence exists of judgment-impairing "misconduct[], fantasy [or] sexual urges"; (4) there was no evidence of misconduct during his placement at Sturtevant Transitional Facility, a minimum-security institution; (5) there was no evidence of misconduct while in the custody of the Division of Community Supervision and residing among "all the members of the community"; (6) the re-examiner indicated there is no current evidence that he remains sexually dangerous; (7) on re-examination, two of the actuarial tools supporting his initial commitment show he now poses only a moderate risk; (8) the State lost jurisdiction to hold him in custody because it did not seek an extension of the initial commitment order when the order expired in May 2008; and (9) if released he would be under DOC supervision and on a hold by immigration authorities, giving him incentive to conform his behavior to the law.

¶46 The State opposed the petition. It responded that (1) Tran was committed upon a diagnosed mental disorder of pedophilia, not anti-social personality disorder; (2) Tran's continued mental disorder of pedophilia predisposes him to engage in sexually violent acts; (3) the trial record amply supports a conclusion that he poses a risk of committing future acts of sexual violence; (4) and (5) Sturtevant is a secure facility, not community placement, and the "community" members with whom Tran resided were other inmates, not the community at large; and Tran likely controlled his behavior because he was awaiting revocation proceedings; (6) the trial record of a predisposition to sexual dangerousness is not negated by a bare assertion of "no current evidence";

(7) Tran failed to mention that the third actuarial tool, and the one deemed most accurate, puts him in the high-risk range; (8) there is no requirement that the State file for an extension of commitment; and (9) Tran's conditions of supervision are irrelevant to whether he is a sexually violent person.

¶47 The court adopted the State's reasoning and denied Tran's petition without a hearing. On appeal, Tran contends that he presented sufficient facts to have been granted a full evidentiary hearing, that WIS. STAT. §§ 980.09 and 980.10 (2003-04) are unconstitutional, that he was denied the right to present evidence and that the trial court's decision was erroneously based on evidence of prior bad acts rather than mental illness. Once again, none of his arguments succeed.

¶48 Resolving the issue of whether Tran should have been granted an evidentiary hearing requires us to interpret and apply WIS. STAT. § 980.09.[6] That presents a question of law that we review de novo. ***State v. Arends***, 2010 WI 46, ¶13, 325 Wis. 2d 1, 784 N.W.2d 513.

¶49 WISCONSIN STAT. § 980.09 mandates a two-step process in determining whether to hold a discharge hearing. ***Arends***, 325 Wis. 2d 1, ¶¶3, 51. The court first undertakes a limited paper review only of the petition and its attachments, if any. ***Id.***, ¶4; *see also* § 980.09(1). Under subsec. (2), the court must review all past and current re-examination and treatment progress reports filed pursuant to WIS. STAT. § 980.07 if those items already are in the record,

[6] The first block of text in WIS. STAT. § 980.09 is not numbered. Because the second block is labeled "(2)," we will refer to the first block of text as "subsec. (1)." *See* ***State v. Arends***, 2010 WI 46, ¶23 n.16, 325 Wis. 2d 1, 784 N.W.2d 513.

relevant facts in the petition and in the State's written response, arguments of counsel and any other supporting documentation the person or the State provides. *See* ***Arends***, 325 Wis. 2d 1, ¶5; *see also* § 980.09(2).

¶50 Here, the order denying the petition indicates that the court examined Tran's petition and the State's response. Tran's petition stood alone. The State's response included the portions of Dr. Jurek's May 2007 trial testimony in which he (1) described why Tran's diagnosed mental disorder of pedophilia, sexually attracted to males, predisposes Tran to commit future acts of sexual violence toward children; (2) described why personality disorder NOS was a provisional and separate diagnosis; (3) described and interpreted Tran's actuarial instrument scores; and (4) opined that Tran is dangerous because he is more likely than not to engage in future acts of sexual violence.

¶51 The State's response also included an excerpt of psychologist Dr. Richard Elwood's July 25, 2008 report of Tran's WIS. STAT. § 980.07 re-examination.[7] Dr. Elwood interpreted Tran's actuarial instrument and other static risk scores to indicate that, if released and given the opportunity, Tran more likely than not would commit another sexually violent act. Evaluations of dynamic risk factors led Dr. Elwood to conclude that Tran "has not made progress in reducing his risk." Tran waived participation in a re-examination interview.

[7] Dr. Elwood's entire nine-page re-examination report was filed in the circuit court along with a progress report from WRC indicating that Tran's progress was difficult to evaluate because he declined treatment and assessments. The court did not expressly reference either report but they were a part of the record when it signed the order on September 30.

¶52 The order states that the court was "oblige[d]" to deny the petition without a hearing because the petition did not sustain the burden imposed by law. We agree. Because the court considered the State's response, its denial of the appeal presumably was pursuant to WIS. STAT. § 980.09(2). Accordingly, the court had before it Tran's unsupported petition, the State's response with attached exhibits, the rationale for Tran's initial commitment and the current WIS. STAT. § 980.07 report. From those materials, the court determined that Tran's petition did not contain facts from which a court or jury could conclude that he did not meet the criteria for commitment. The court properly denied the petition without an evidentiary hearing.

¶53 We also agree that the circuit court properly, albeit implicitly, denied Tran's motion to have an examiner appointed.

¶54 In August 2008 in conjunction with his petition for discharge, Tran moved for the appointment of specifically named health care examiners: either a particular Johns Hopkins psychiatrist or, if unavailable, a certain Milwaukee-area psychologist, and a University of Wisconsin neurologist. In addition to neurological evaluation, Tran wanted the neurologist to perform neuropsychological testing and "other neuroimaging procedures." Tran brought his motion pursuant to what now is WIS. STAT. § 980.031(3). It provides that if a person "required to submit to an examination of his or her mental condition under this chapter" is indigent, "the court shall, upon the person's request, appoint a qualified and available licensed physician, licensed psychologist, or other mental health professional to perform an examination of the person's mental condition." ***Id.***

¶55 Petitions for discharge and the procedures for discharge hearings are governed by WIS. STAT. §§ 980.09 and 980.095. A petitioner "may use experts or professional persons to support his or her petition." WIS. STAT. § 980.075(4). Neither section *requires* the petitioner to submit to an examination of his or her mental condition, however. By contrast, although Tran was required to be so evaluated in connection with his re-evaluation, he filed a document indicating he did not want either counsel or an examiner appointed for his re-examination. *See* WIS. STAT. § 980.07(1).

¶56 Accordingly, Tran waived the appointment of an examiner for his required re-examination and he is not entitled to one on his sua sponte petition for discharge. Tran's reliance on ***State v. Thiel***, 2001 WI App 32, 241 Wis. 2d 465, 626 N.W.2d 26, which arose under the 1999-2000 statutes, does not alter our decision. ***Thiel*** addressed a committed person's request for a court-appointed expert to conduct a second, independent examination for a *required* re-examination.

¶57 Tran once again challenges the constitutionality of portions of WIS. STAT. ch. 980 and assorted other claims. He did not raise these arguments in the trial court. We therefore decline to address them for the first time on appeal. *See* ***State v. McCoy***, 143 Wis. 2d 274, 284-85, 421 N.W.2d 107 (1988).

By the Court.—Orders affirmed.

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