

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 21, 2003**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 02-0767**

**Cir. Ct. No. 01-CV-824**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN RE THE COMMITMENT OF JEFFERY S. PESTOR:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**v.**

**JEFFERY S. PESTOR,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Walworth County:  
MICHAEL S. GIBBS, Judge. *Affirmed.*

Before Deininger, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Jeffery Pestor appeals an order committing him under WIS. STAT. ch. 980. The issues are: (1) whether the circuit court erred in granting the State's motion to prohibit the introduction of evidence at trial about

the availability and conditions of supervision in the community after Pestor's release; (2) whether Pestor was denied effective assistance of counsel because his attorney did not request a *Crane* jury instruction; and (3) whether Pestor is entitled to a new trial in the interest of justice. We affirm.

¶2 Pestor first challenges the circuit court's decision prohibiting him from presenting evidence at trial concerning possible conditions and supervision of his future release. Pestor contends the evidence should have been admitted because it tended to show that he would be less likely to re-offend. Generally speaking, relevant evidence is admissible. WIS. STAT. § 904.02 (2001-02).<sup>1</sup> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Section 904.01. "We review a circuit court's decision to admit or exclude evidence under an erroneous exercise of discretion standard." *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. We will uphold the circuit court's decision if it "examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion." *Id.*

¶3 The circuit court concluded that evidence of possible future conditions of supervision was not relevant. The circuit court reasoned that any potential future conditions and the effects of those conditions on Pestor were too far removed from the factual issues the jury needed to decide. The question for the jury was whether Pestor was "dangerous because he ... suffers from a mental

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

disorder that makes it substantially probable that [he] will engage in acts of sexual violence.” WIS. STAT. § 980.01(7). We agree with the trial court that the excluded evidence is not relevant to the issue of whether Pestor has a mental disorder that makes him substantially probable to engage in certain behavior. Only if the answer to that question is yes do possible conditions of supervision become relevant. Moreover, the question of whether at some point Pestor should be granted supervised release, and if so, on what conditions, is a matter for the court, and not a jury to decide. *See* WIS. STAT. § 980.08(4). The circuit court did not erroneously exercise its discretion in concluding that the proffered evidence was irrelevant.

¶4 Pestor next argues that he received ineffective assistance of trial counsel because his attorney failed to request a jury instruction based on *Kansas v. Crane*, 534 U.S. 407 (2002). As conceded by Pestor, however, the Wisconsin Supreme Court approved the jury instruction used in this case in *State v. Laxton*, 2002 WI 82, ¶2, 254 Wis. 2d 185, 647 N.W.2d 784, *cert. denied*, 123 S. Ct. 870 (2003). Therefore, Pestor’s challenge is unavailing in this court.

¶5 Finally, Pestor argues he is entitled to a new trial in the interest of justice. *See* WIS. STAT. § 752.35. That statute allows us to reverse a judgment “if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried.” After reviewing the briefs and record, we conclude that Pestor is not entitled to relief under the statute.

*By the Court.*—Order affirmed.

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



