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

July 21, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 97-1337**

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

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**IN RE THE COMMITMENT OF FRANK CURIEL:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**v.**

**FRANK CURIEL,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

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

CURLEY, J. Frank Curiel appeals from a circuit court order finding him to be a sexually violent person under Chapter 980, STATS. Curiel claims that: (1) the circuit court erred in failing to grant his motion to dismiss at the close of the State's case; (2) there was insufficient evidence to support the

circuit court's order; and (3) the circuit court made an erroneous finding of fact. We affirm.

## I. BACKGROUND.

The State filed a petition on March 11, 1996, alleging that Curiel was a sexually violent person within the meaning of § 980.01(7), STATS. The petition alleged that Curiel had been convicted of a sexually violent offense, specifically, second-degree sexual assault, in violation of § 940.225(2), STATS., 1985-86, on May 8, 1989. The petition also alleged that Curiel suffers from a mental disorder that predisposes him to engage in acts of sexual violence, and that it is substantially probable that he will engage in future acts of sexual violence. The circuit court found probable cause to believe Curiel is a sexually violent person and, following several adjournments, a trial was held on December 2, 1996.

On the day of trial, Curiel waived his right to trial by jury, and chose to have his case tried to the court. At the beginning of the trial, the State moved into evidence a certified copy of the criminal complaint, information, judgment of conviction, and judgment roll from Curiel's criminal trial for second-degree sexual assault. This conviction served as the jurisdictional basis for the Chapter 980, STATS., action. The State then called its first witness, Dr. Frederick Waddell.

Dr. Waddell testified that he was employed as a psychologist at the Kettle Moraine Correctional Institute, and that he had evaluated Curiel to determine whether he met the definitions for commitment under Chapter 980, STATS. Dr. Waddell testified that, after examining Curiel's social service and clinical service files, and personally interviewing Curiel, he diagnosed Curiel as suffering from the mental disorder of pedophilia. Dr. Waddell also testified that he believed it was substantially probable that Curiel would reoffend sexually.

Dr. Waddell based this conclusion on a number of factors, including the facts that: (1) Curiel had been diagnosed with pedophilia; (2) he had episodes of exhibitionism; (3) although he had had some "programming," that was not considered treatment "in most professional circles"; (4) he had a serious problem with drugs and alcohol; and (5) his sexual offenses showed a trend of increasing seriousness. Dr. Waddell also testified that his conclusion was based on his finding that nine "statistical risk factors" were applicable to Curiel's case.

Dr. Waddell, however, upon further questioning, also testified that his conclusions were based on an assumption that "substantially probable" meant "more likely than not" rather than "much more likely than not," and that his conclusion as to Curiel's dangerousness would change if "substantially probable" was defined to mean "much more likely than not." The specific exchange which occurred between the assistant district attorney and Waddell was as follows:

> Q: Just one question. Doctor, earlier you had an, you had equated the phrase substantial probability with more likely than not. Correct?
>
> A: Yes.
>
> Q: What if I change that definition from more likely than not, to much more likely than not and we substitute much more likely than not, use that as a definition of substantial probability, using that in place of substantial probability. Does your opinion with respect to dangerousness change or remain the same?
>
> A: I think it would change.
>
> Q: How so?
>
> A: I don't think it would be as risky.
>
> Q: Why not?
>
> A: Because I think his probability of offending is not a great deal more than even, it is often [sic], but not a great deal.

Next, the State called Dr. Ronald M. Sindberg, who testified that he was employed as a psychologist at the Mendota Mental Health Institute in Madison, Wisconsin, and that he also had evaluated Curiel to determine whether he was a sexually violent person. Dr. Sindberg testified that he did not personally interview Curiel, because Curiel indicated that his attorney had advised him not to participate in an interview, but that he did not hold that fact against Curiel. Instead, Dr. Sindberg testified that he relied on other information in order to evaluate Curiel, including records from the Department of Corrections and from the Mendota Mental Health Institute, and information from other individuals who had direct contact with Curiel. Dr. Sindberg testified that after examining that information, he independently diagnosed Curiel as suffering from the mental disorder of pedophilia. Dr. Sindberg also testified that he believed there was a substantial probability that Curiel would commit a sexually violent offense. Dr. Sindberg based his conclusion on findings that: (1) Curiel met the criteria for seventeen of the thirty-one risk factors; and (2) Curiel's history of treatment, which included very little treatment relevant to sex offending, did not do much to lower his level of risk for sexually reoffending. Finally, Dr. Sindberg testified that his conclusion that there was a substantial probability that Curiel would sexually reoffend would be the same whether "substantially probable" was defined as "more likely than not" or as "much more likely than not."

The State then rested, and Curiel moved to dismiss on the basis that the evidence was insufficient to meet the "substantially probable" criteria set out in Chapter 980, STATS. The circuit court denied the motion.

The defense then called Dr. Charles Lodl, who testified that he was a psychologist in private practice. Dr. Lodl testified that after his evaluation of Curiel, which included a personal interview, he also diagnosed Curiel as suffering

from pedophilia. Dr. Lodl, however, testified that he did not believe it was substantially probable that Curiel would engage in acts of sexual violence, and that, to the contrary, Curiel poses a "moderate risk."

The circuit court then found that Curiel is a sexually violent person within the meaning of Chapter 980, STATS. In explaining its decision, the circuit court stated, in part:

> Now what I have then is someone who, according to everybody, including Dr. Lodl, is at a high risk of reoffending criminally, is at a moderate risk of reoffending sexually, if you look at Dr. Lodl's conclusions, at a much more likely than not risk if you listen to Dr. Sindberg and more likely than not if you listen to Dr. Waddell. Under any standard that I think – if – if the standard that's in Chapter 980 is constitutional, then this evidence in my mind establishes beyond a reasonable doubt that Mr. Curiel as he presently carries himself and views himself and deals with his psychological problems is dangerous as that term is defined in Chapter 980, and I am finding that the State has proved this case beyond a reasonable doubt, and I find that Mr. Curiel is a sexually violent person as alleged in the petition, and as such he is committed to the custody of the Department of Health and Social Services for control, care and treatment until such time as he is no longer a sexually violent person.

The circuit court then entered a formal order adjudging Curiel to be a sexually violent person and committing him to institutional care, and Curiel now appeals.

## II. ANALYSIS.

### *A. Motion to Dismiss/Sufficiency of the Evidence*

Curiel claims that the circuit court erred by denying his motion to dismiss at the close of the State's case because, at that point in the trial, there was insufficient evidence to support a finding that Curiel was a sexually violent person

under Chapter 980, STATS. A defendant, however, who moves for dismissal at the close of the State's case and then chooses to introduce evidence waives the motion to dismiss. *See* ***State v. Gebarski***, 90 Wis.2d 754, 773-74, 280 N.W.2d 672, 680-81 (1979) (insanity acquitee waived motion for directed verdict at recommitment hearing by putting in a defense after his motion was denied). Therefore, in considering Curiel's challenge to the sufficiency of the evidence, we need not restrict our examination to the State's evidence, but may instead review all of the evidence presented by both sides at trial. *See* ***id.***[1]

Curiel claims that the evidence as a whole was insufficient to support the circuit court's order. First, Curiel claims that it is unclear whether the circuit court believed that the phrase "substantially probable" meant "more likely than not," or "much more likely than not." If the circuit court believed the former, Curiel asserts that his constitutional rights to due process were violated. If the circuit court believed the latter, Curiel claims that the evidence was insufficient to support a finding of substantial probability, because two of the three experts, Dr. Waddell and Dr. Lodl, testified that it was not "much more likely than not" that Curiel would sexually reoffend. Further, Curiel claims that the circuit court could not have found Dr. Sindberg to be more credible than either Dr. Waddell or Dr. Lodl, because Dr. Sindberg did not personally interview Curiel. Finally, Curiel claims that the fact that the State's two expert witnesses testified

[1] Although commitment proceedings under Chapter 980, STATS., are civil, rather than criminal, proceedings, *see* ***State v. Carpenter***, 197 Wis.2d 252, 265-71, 541 N.W.2d 105, 110-13 (1995), many of the procedural safeguards which are typically reserved for criminal matters are employed, such as the right to a twelve-person jury, the right to counsel, the right against self-incrimination and proof beyond a reasonable doubt. *See* ***id.*** at 270, 541 N.W.2d at 112. *See also* § 980.05(1m), STATS. (all rules of evidence in criminal actions and all constitutional rights available in criminal actions apply to Chapter 980 trials). Therefore, we agree with the State's assertion, which Curiel has not contested, that the rule in criminal cases concerning waiver of motions to dismiss is equally applicable in Chapter 980 proceedings.

"inconsistently" with respect to whether it was "much more likely than not" that Curiel would sexually reoffend, "renders it impossible for the State to meet [its] burden of showing it was substantially probable [Curiel] would sexually reoffend."

To begin, we conclude that it is irrelevant whether the experts at Curiel's trial believed that the phrase "substantially probable" means "more likely than not," or "much more likely than not." First, it would not be unconstitutional to define "substantially probable" as "more likely than not." Although the Minnesota Supreme Court, in ***In re the Matter of Linehan***, 557 N.W.2d 171 (1996), recently held that "[t]he due process clauses of both the federal and state constitutions require that future harmful sexual conduct must be highly likely in order to commit a proposed patient under the [Minnesota Sexually Dangerous Persons] Act," ***id.*** at 180, that decision was vacated by the United States Supreme Court and remanded to the Minnesota Supreme Court for further consideration in light of the United States Supreme Court's even more recent decision in ***Kansas v. Hendricks***, 521 U.S. __, 117 S. Ct. 2072 (1997). *See* ***Linehan v. Minnesota***, 118 S. Ct. 596 (1997). In ***Hendricks***, the Court held that Kansas' Sexually Violent Predator Act does not violate the Due Process Clause, even though that act allows the commitment of a person who "'has been convicted of or charged with a sexually violent offense,' and 'suffers from a mental abnormality or personality disorder which makes the person *likely* to engage in the predatory acts of sexual violence.'" ***Hendricks***, 521 U.S. at ___, 117 S. Ct. at 2080 (emphasis added) (citation omitted). Therefore, were we to interpret the phrase "substantially probable," as it is found in Chapter 980, STATS., to mean "more likely than not," this would not violate Curiel's constitutional substantive due process rights.

This conclusion, however, is beside the point, since we conclude that the phrase "substantially probable" as it is used in Chapter 980, STATS., should not, and need not, be interpreted to mean either "more likely than not" or "much more likely than not." Wisconsin courts do not rewrite statutes. *See* ***State v. Martin***, 162 Wis.2d 883, 907, 470 N.W.2d 900, 910 (1991) (court's task is to construe statutes, not rewrite them by judicial fiat). If the legislature had desired to, it could have easily included in the list of definitions found in § 980.01, STATS., a definition of the phrase "substantially probable." The legislature, however, did not do so. Therefore, we decline to rewrite the statute by further defining the term "substantially probable." To the contrary, we conclude that when the legislature used the term "substantially probable," it intended that phrase to mean "substantially probable."

Because of this conclusion, we need not consider whether there was sufficient evidence to show that it either was "more likely than not" or "much more likely than not" that Curiel would sexually reoffend. To the contrary, this court's only task is to determine whether or not there was sufficient evidence for the circuit court to conclude that the State had proven, beyond a reasonable doubt, that Curiel suffers from a mental disorder which makes it "substantially probable" that he will engage in acts of sexual violence. We conclude that there was sufficient evidence to support such a finding.

Both Dr. Waddell and Dr. Sindberg testified that they believed, after evaluating Curiel, that he suffered from a mental disorder which predisposed him to engage in acts of sexual violence, and that it was substantially probable that Curiel would engage in acts of sexual violence. Both experts testified that their conclusions were based on Curiel's suffering from the mental disorder of pedophilia, combined with the presence of numerous statistical risk factors, and a

lack of adequate sexual offender treatment. Although Dr. Waddell stated that his conclusion would change if the phrase "substantially probable" were defined to mean "much more likely than not," the circuit court's conclusions were still supported by sufficient evidence because Dr. Waddell's ultimate conclusion was that it was "substantially probable" that Curiel would sexually reoffend. Thus, we conclude that there was sufficient evidence to support the trial court's findings.

*B. Factual Finding*

Curiel also claims that the order should be reversed because the circuit court made an erroneous factual finding that Dr. Lodl believed that he was "at a high risk of reoffending criminally." Curiel's claim is based on the following statement which the circuit court made near the end of a lengthy explanation of its decision:

> Now, what I have then is someone who, according to everybody, including Dr. Lodl, is at a high risk of reoffending criminally, is at a moderate risk of reoffending sexually, if you look at Dr. Lodl's conclusions, at a much more likely than not risk if you listen to Dr. Sindberg and more likely than not if you listen to Dr. Waddell.

It is true that Dr. Lodl did not testify that Curiel was at a high risk of reoffending criminally. The circuit court's statement, however, is inconsequential and was immediately followed with an accurate assessment of the various expert's positions as to the only relevant factor—the probability that Curiel would reoffend sexually. Therefore, we conclude that the circuit court clearly understood the expert's different positions, and specifically understood that Dr. Lodl did not believe that it was substantially probable that Curiel would sexually reoffend, but rather only believed that Curiel posed a "moderate risk." Thus, we conclude that the circuit court did not make an erroneous finding of fact.

*By the Court*.—Order affirmed.

Recommended for publication in the official reports.