COURT OF APPEALS
DECISION
DATED AND FILED

March 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2119

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TIMOTHY MCCAIN,

DEFENDANT-APPELLANT.

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

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

PER CURIAM. Timothy McCain appeals from an order, following a court trial, committing him to a secure mental health facility as a sexually violent person under ch. 980, STATS., and from an order denying his motion for postcommitment relief. McCain presents five issues for review: (1) whether, at the probable cause hearing, the circuit court erred in admitting the

expert testimony of Thomas Speaker, who was not a licensed psychologist; (2) whether § 938.35(1), STATS., bars the use of delinquency adjudications as evidence in a ch. 980 proceeding; (3) whether the evidence was sufficient because, he claims, an "antisocial personality disorder" does not predispose a person to engage in acts of sexual violence and, thus, cannot satisfy the mental disorder criterion of the definition of "sexually violent person" under § 980.01(7), STATS.; (4) if the evidence was sufficient, whether § 980.01(7) is unconstitutional because "antisocial personality disorder" is too imprecise to satisfy the requirements of due process; and (5) whether the State's evidence was sufficient to prove beyond a reasonable doubt that it was "substantially probable" that he would engage in acts of sexual violence. We affirm.

I. BACKGROUND

On April 18, 1996, the State filed a petition alleging that McCain was a sexually violent person eligible for commitment under ch. 980, STATS. On April 24, 1996, a probable cause hearing was held before the Honorable Diane Sykes.

At the probable cause hearing, the State called Thomas Speaker. Speaker testified that he held a Ph.D. in psychology and psychological services from Columbia Pacific University; that after receiving his Ph.D., he worked in private practice for three years; that he was then employed as a psychotherapist and director of the Counseling Center of Charter Hospital of Milwaukee; and that he has been employed half time by the Ethan Allen School's Serious Sex Offender Program since October of 1994. Speaker also testified that he had evaluated over one thousand people for mental diseases or disorders; that he had worked with over five hundred adult sex offenders; at the Kettle Moraine Facility, under a

contract with the Department of Corrections; and that he had worked with approximately seventy juvenile offenders at the Ethan Allen School's Serious Sex Offender Program.

Speaker acknowledged that he had obtained his Ph.D. through a non-resident program, that he was not licensed as a psychologist or psychotherapist, and that he had not published any articles. On these bases, defense counsel objected to Speaker's qualifications to testify as an expert witness. The circuit court overruled defense counsel's objection and permitted Speaker to testify.

Speaker testified that McCain suffered from antisocial personality disorder, an acquired condition that affected both his emotional and volitional capacity and which predisposed him to commit acts of sexual violence. The trial court entered an order finding probable cause.

At McCain's trial, the State introduced the testimony of Mary Shelley, Supervisor of Intensive Probation at the Children's Court Center. Shelley informed the court that McCain had been adjudictated delinquent in 1994 for first- and second-degree sexual assault. Defense counsel objected to the court's receipt of this information, and after an extensive debate over the issue, the trial court overruled defense counsel's objection and permitted the State to use the adjudications.

The State then introduced the testimony of Dr. Ronald Sindberg, a psychologist at the Mendota Mental Health Complex, who testified that McCain suffered from antisocial personality disorder. Dr. Sindberg opined that McCain's history of sexual aggression coupled with his mental disorder made it substantially probable that McCain would engage in acts of sexual violence in the future. At the close of the evidence, the trial court entered its order finding that the State had

established beyond a reasonable doubt that McCain was a sexually violent person as alleged in the petition and ordering that he be committed to a secure mental health facility.

II. DISCUSSION

McCain first argues that he is entitled to a new trial because, at the probable cause hearing, the circuit court admitted and relied on Speaker's testimony. McCain contends that because Speaker was not licensed as a psychologist in any state, he could not provide diagnostic evidence and, therefore, should not have been allowed to do so at the probable cause hearing. We disagree.

Whether an individual is qualified to testify as an expert rests in the sound discretion of the court. *See* ***State v. Robinson***, 146 Wis.2d 315, 332, 431 N.W.2d 165, 171 (1988). This court will not reverse a trial court's discretionary ruling absent an erroneous exercise of discretion. *See* ***id.***

Section 907.02, STATS.,[1] permits qualification of an expert witness by "knowledge, skill, experience, training, or education." Neither Wisconsin case law nor § 907.02 requires an expert to be licensed in order to testify or render an opinion. "The qualification of an expert has historically been a matter not of licensure, but of experience." ***Robinson***, 146 Wis.2d at 332, 431 N.W.2d at 171; *see also* ***State v. Donner***, 192 Wis.2d 305, 317-18, 531 N.W.2d 369, 375 (Ct. App.

[1] Section 907.02, STATS., provides:

> **Testimony by experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

1995) (expert qualified by experience to testify about the effects of blood alcohol concentration); ***State v. Hollingsworth***, 160 Wis.2d 883, 896, 467 N.W.2d 555, 560 (Ct. App. 1991) (experience and technical training are proper bases for expert opinion). Section 907.02 is broadly phrased to encompass experts who are qualified to testify on a subject matter based not only on their degree or certification, but also on their vast experience, knowledge or specialized training.

Rejecting McCain's challenge to Speaker's testimony, the circuit court concluded:

> There is nothing in chapter 980 in particular or sec. 907.02 generally that requires a license in order to give expert testimony in this area.
>
> I'm satisfied based on what Dr. Speaker testified to about his training and experience, knowledge and education that he has the requisite specialized knowledge that will assist in this determination about whether the defendant is a sexually violent person or whether there is probable cause to believe he is a sexually violent person under the statute and, therefore, I will qualify him as an expert for those purposes, for the purpose of the hearing, and he may so testify in that regard.

We agree. Speaker had vast experience working with persons with mental disorders, having evaluated over one thousand people to determine whether they had mental illnesses. He also had vast experience working with sexually violent persons at Kettle Moraine and at Ethan Allen, and had conducted numerous ch. 980 evaluations and qualified as an expert in three other ch. 980 proceedings. Clearly, under § 907.02, STATS., Speaker had sufficient expertise to testify.

Accordingly, we conclude that the circuit court's acceptance of his testimony was not an erroneous exercise of discretion.[2]

McCain next argues that the trial court erred by admitting his juvenile adjudications for first-degree sexual assault of a child in the ch. 980 proceeding. He claims that "despite chapter 980's provision authorizing commitment based upon delinquency adjudications, this court must give effect to

[2] Relying on § 455.01(5)(a), STATS., the statute governing the licensing requirements for psychologists, McCain argues that this statute "prohibited Dr. Speaker from diagnosing a mental disorder." He claims that "only licensed psychologists and psychiatrists can diagnose mental disorders and, therefore, argues that "[s]ince [Dr.] Speaker was forbidden to make this diagnosis, the court was prohibited from accepting it as an expert opinion." We disagree.

First, as we have previously explained, the rules of evidence do not require a person giving testimony under § 907.02, STATS., to be licensed. Second, McCain's argument fails because, under subsection (2m) of § 455.02, STATS., certain people are exempt from the licensing requirement. Section 455.02(2m) provides, in relevant part:

> EXCEPTIONS. A license under this chapter is not required for any of the following:
>
> . . . .
>
> (m) A person providing psychological services as an employe of a federal, state or local governmental agency, if the person is providing the psychological services as part of the duties for which he or she is employed, is providing the psychological services solely within the confines of or under the jurisdiction of the agency by which he or she is employed and does not provide or offer to provide psychological services to the public for a fee over and above the salary that he or she receives for the performance of the official duties with the agency by which he or she is employed.

Speaker was a half-time employee of Ethan Allen, a facility operated by the State. Clearly, he fell within the exemption contained in § 455.02(2m)(m), STATS. Finally, we reject McCain's contention because the logical extension of this argument would prohibit the testimony of practitioners licensed in other states. Clearly this result would be contrary to the plain language of § 907.02, STATS.

the plain statutory language in the subsequently-enacted chapter 938, which bars delinquency adjudications from being admitted into evidence." We disagree.

Whether § 938.35, STATS., prohibits the introduction of juvenile adjudications in chapter 980 proceedings presents an issue of statutory interpretation, which we review *de novo*. *See* ***State v. Setagord***, 211 Wis.2d 397, 405-06, 565 N.W.2d 506, 509 (1997). "The purpose of statutory interpretation is to discern the intent of the legislature." ***Id.*** at 406, 565 N.W.2d at 509. In doing so, we first consider the language of the statute. *See* ***id.*** If the language of the statute clearly and unambiguously sets forth the legislative intent, we apply it as written and look no further. *See* ***id.*** If the statute is ambiguous, however, we look to the scope, history, context, subject matter and object of the statute to ascertain the legislative intent. *See* ***id.*** at 406, 565 N.W.2d at 510. A statute is ambiguous if it may be subject to two or more interpretations by reasonably well-informed persons. *See* ***id.***

Section 938.35, STATS., provides:

> **Effect of judgment and disposition. (1)** The court shall enter a judgment setting forth the court's findings and disposition in the proceeding. A judgment in a proceeding on a petition under this chapter is not a conviction of a crime, does not impose any civil disabilities ordinarily resulting from the conviction of a crime and does not operate to disqualify the juvenile in any civil service application or appointment. The disposition of a juvenile, and any record of evidence given in a hearing in court, is not admissible as evidence against the juvenile in any case or proceeding in any other court except for the following:
>
> (a) In sentencing proceedings after conviction of a felony or misdemeanor and then only for the purpose of a presentence investigation.
>
> (b) In a proceeding in any court assigned to exercise jurisdiction under this chapter and ch. 48.

> (c) In a court of civil or criminal jurisdiction while it is exercising the jurisdiction over an action affecting the family and is considering the custody of juveniles.
>
> (cm) In a court of civil or criminal jurisdiction for purposes of setting bail under ch. 969 or impeaching a witness under s. 906.09.
>
> (d) The fact that a juvenile has been adjudged delinquent on the basis of unlawfully and intentionally killing a person is admissible for the purpose of s. 854.14(5) (b).

McCain argues that under § 938.35(1), STATS., in conjunction with ch. 980, STATS., the records clearly were inadmissible. In response, the State contends:

> When sec. 938.35(1) is read in connection with ch. 980, as [McCain] does, the language absolutely prohibits the state from establishing a juvenile adjudication of a predicate offense under sec. 980.02, despite the provision for disclosure to the department of justice, the district attorney, defense counsel and the court [*see* §§ 938.78(2)(e) & 938.369(2)(e)]. This result is absurd.

We agree with the State.

As noted, the primary goal of statutory construction is to ascertain and give effect to the legislature's intent. *See* ***State v. Williams***, 198 Wis.2d 516, 527, 544 N.W.2d 406, 410 (1996). "'The true meaning of a single section of a statute . . . , however precise its language, cannot be ascertained if it [is] considered apart from related sections . . . .'" ***Id.*** at 534, 544 N.W.2d at 413 (citation omitted) (ellipsis in original). Subsections of a statute must therefore be interpreted in a manner consistent with the purpose of the statute as a whole, *see* ***id.*** at 527, 544 N.W.2d at 410-11, and this court should always seek to construe a statute so as to avoid absurd results, *see* ***id.*** at 532, 544 N.W.2d at 413.

Although § 938.35(1), STATS., does not provide for the admission of a juvenile adjudication in a ch. 980 proceeding, other sections of ch. 938, STATS., coupled with the mandates of ch. 980, STATS., do so provide. First, § 980.015(3)(a), STATS., requires the department of corrections or any other

agency with the duty to release or discharge "a person who may meet the criteria for commitment as a sexually violent person" to notify the appropriate district attorney's office and the department of justice prior to releasing the offender. *See* § 980.015(3)(a), STATS. Corresponding to this mandate, § 938.78(2)(e), STATS., addressing subsection (2)(a) of § 938.78, which requires that juvenile records be kept confidential, states that subsection (2)(a):

> does not prohibit the department from disclosing information about an individual adjudged delinquent under s. 938.183 or 938.34 for a sexually violent offense, as defined in s. 980.01 (6), to the department of justice, or a district attorney or a judge acting under ch. 980 or to an attorney who represents a person subject to a petition under ch. 980. The court in which the petition under s. 980.02 is filed may issue any protective orders that it determines are appropriate concerning information disclosed under this paragraph.

Section 938.78(2)(e), STATS.

In addition, § 938.396(2)(e), STATS., states that the court shall assist the department of corrections in meeting its mandate by providing:

> Upon request of the department of corrections to review court records for the purpose of providing, under s. 908.015 (3) (a), the department of justice or a district attorney with a person's offense history, the court shall open for inspection by authorized representatives of the department of corrections the records to the court relating to any juvenile who has been adjudicated delinquent for a sexually violent offense, as defined in s. 980.01 (6).

Moreover, within § 938.35, STATS., is a subsection under which a court may disclose "information to qualified persons if the court considers the disclosure to be in the best interests of the juvenile or of the administration of justice." Section 938.35(2).

In addition to the provisions noted in ch. 938, STATS., ch. 980, STATS., also has a number of sections which address the use of delinquency adjudications. Section 980.01(7), STATS., for example, specifically includes "a person who has been adjudicated delinquent for a sexually violent offense" among those defined as a sexually violent person, and § 980.02(2)(a), STATS., specifically authorizes a petition to be filed if a person has been found delinquent as the result of having committed a sexually violent offense. Thus, given the interplay between ch. 980 and ch. 938, we can only conclude that the statutes, taken together, permit the admission of juvenile adjudications as evidence in support of a ch. 980 commitment.

McCain next argues that the evidence was insufficient because the diagnosis of antisocial personality disorder does not predispose a person to engage in acts of sexual violence. He further argues that if the evidence was sufficient, then the statute is unconstitutional as applied because an antisocial personality disorder is too imprecise to satisfy due process. We disagree.

Subsequent to the briefing in this case, this court decided ***State v. Adams***, No. 96-3136 (Wis. Ct. App. Nov. 10, 1998, ordered published Nov. 25, 1998). We held that a diagnosis of "antisocial personality disorder," uncoupled with any other diagnosis, but coupled with sufficient evidence establishing that a defendant is a "sexually violent person," may constitute "a mental disorder that makes it substantially probable that the subject of the petition will engage in future acts of sexual violence, under § 980.01(7), STATS." *See* ***id.***, slip op. at 3. In ***Adams***, we rejected the same argument McCain presents on appeal, explaining:

> Section 980.01(2), STATS., does not define "mental disorder" as a condition that, *generally*, predisposes "people," or "persons," or the "prison population," or even the "mentally disordered population" to engage in sexual

> violence. It simply refers to "a person." And who is that person? Under § 980.01(7), that person can be no one other than the specific individual—the subject of the petition—who is "a person" who meets the statutory prerequisites "and who is dangerous because he or she suffers form a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence." (Emphasis added.)
>
> Similarly, [***State v.Post***, 197 Wis.2d 279, 541 N.W.2d 115 (1995)] does not state that "[t]he key to the constitutionality of the definition of mental disorder" is a nexus linking the subject of a petition to a mental disorder that, *generally*, predisposes "people," or "persons," or the "prison population," or even the "mentally disordered population" to engage in sexual violence. Instead, ***Post*** clarifies that "persons will not fall within chapter 980's reach unless *they* are diagnosed with a disorder that has the specific effect of predisposing *them* to engage in acts of sexual violence." ***Post***, 197 Wis.2d at 306, 541 N.W.2d at 124 (emphasis added). Thus, ***Post*** requires that the statutory focus be on *the* person who is the subject of the petition, and hinges its holding on the specific link between *that* person's mental disorder and the effect of that mental disorder on *that* person. Indeed, to conclude otherwise would be to hold that the legislature, inexplicably, chose to *exclude* from potential commitment all persons diagnosed solely with "antisocial personality disorder," regardless of their history of sex crimes, recidivism, denial, and refusal of treatment…. Accordingly, we conclude that, under ch. 980, a person who has the mental disorder of "antisocial personality disorder," uncoupled with any other metal disorder, may be found to be a "sexually violent person."

Id., slip op. at 6-7.

Addressing Adams's arguments on the constitutionality of the statutory scheme, we concluded "that the inclusion of 'antisocial personality disorder' as, potentially, a 'condition' qualifying as a 'mental disorder' under the statute [§ 980.01(7), STATS.,] does not render the statute unconstitutionally imprecise." ***Id.***, slip op. at 8. Accordingly, we reject McCain's arguments.

Finally, McCain argues that the evidence did not prove beyond a reasonable doubt that it was substantially probable that he would commit a

sexually violent offense in the future. Specifically, he contends that the trial court's "verdict" was insufficient to insure that the State "was held to a sufficient burden" because the court expressed confusion about the definition of "substantially probable" in another ch. 980 commitment proceeding, and never defined what it meant in this proceeding.[3]

Subsequent to the briefing in this case, this court also decided ***State v. Kienitz***, 221 Wis.2d 275, 585 N.W.2d 609 (Ct. App. 1998). We concluded that under § 980.01(7), STATS., "'substantially probable' means 'considerably more likely to occur than not to occur.'" ***Id.*** at 282, 585 N.W.2d at 612. We also concluded that the correct standard for reviewing challenges to the sufficiency of the evidence in a ch. 980, STATS., commitment appeal is the standard applied in criminal cases. Accordingly,

> we reverse only if the evidence, viewed in the light most favorable to the verdict, 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 substantially probable that the person will engage in acts of sexual violence] beyond a reasonable doubt.

Id. at 301, 585 N.W.2d at 619. Under these standards, we conclude that the evidence was sufficient.

The evidence, largely undisputed at trial, included information about McCain's history of sexually violent crimes, non-sexual crimes, truancy, and about his antisocial behavior, and failure to take responsibility for his behavior. Dr. Sindberg testified that McCain suffered from antisocial personality disorder,

[3] In support of this contention, McCain cites the trial court's comments in a different ch. 980, STATS. commitment case and asks this court to infer that the trial court was still "confused" about the meaning of "substantially probable" at the time of his (McCain's) trial. We decline McCain's request and limit our review to the record of the case before us.

and that based on the factors demonstrated by research to be predictive of future dangerousness, he believed that McCain's mental disorder made it substantially probable that he would engage in future acts of sexual violence.

At the close of evidence, the trial court used the standard instruction, applied the words without elaboration, found that the evidence proved beyond a reasonable doubt that McCain was a sexually violent person within the meaning of ch. 980, and ordered that he be committed to a secure mental health facility. McCain has offered nothing to establish that the trial court's utilization of "substantially probable" without further definition was at odds with ***Kienitz***'s standard. Absent some showing that the court used a lesser standard than that which the ***Kienitz*** court enunciated, we cannot conclude that the trial court used an erroneous standard in finding, beyond a reasonable doubt, that it was substantially probable that McCain would engage in future acts of sexual violence.

By the Court.—Orders affirmed.

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