COURT OF APPEALS
DECISION
DATED AND FILED

February 15, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-0052

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

IN RE THE COMMITMENT OF MICHAEL L. WILSON:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

MICHAEL L. WILSON,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: J. D. MC KAY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Michael Wilson appeals an order committing him as a sexually violent person under WIS. STAT. ch. 980,[1] following trial to the court.

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

He argues: (1) when the court found beyond a reasonable doubt that it was substantially probable he would sexually violently reoffend, it was required to define "substantially probable;" (2) timely filing of a petition is an element that the State failed to prove beyond a reasonable doubt; and (3) the court erroneously permitted the State's expert to testify that the report of a deceased doctor was consistent with and confirmed his judgment. We reject these arguments and affirm the order.

¶2 At trial, Dr. Craig Blumer diagnosed Wilson with pedophilia, alcohol and cannabis abuse, and a personality disorder with antisocial features. He opined that pedophilia made it more likely that Wilson would engage in acts of sexual violence even though Blumer did not consider pedophilia automatic proof of that likelihood. Wilson's score on the Rapid Risk Assessment of Sex Offender Recidivism (RRASOR) was highly predictive of future sexual offenses. Wilson's substance abuse, his failure at treatment and refusal of subsequent sex offender treatment created a high risk that he would reoffend. Without defining the term, Blumer concluded to a reasonable degree of psychological certainty that there was a "substantial likelihood" that Wilson would commit acts of sexual violence in the future.

¶3 The prosecutor also asked Blumer whether he had reviewed the report of Dr. Ronald Sindberg, deceased. The defense interposed a hearsay objection, adding "the man is deceased." The prosecutor explained that his question only dealt with the impact, if any, Sindberg's report had on Blumer's determination. The court overruled the objection and Blumer responded that he formed his opinion and wrote his report before Sindberg and had no knowledge of Sindberg's conclusions at that time. "Subsequent reading of Dr. Sindberg's report

only confirmed my—is consistent with and confirms my judgment." Wilson did not object to this answer as unresponsive.

¶4 Dr. Craig Monroe also testified regarding Wilson's condition. His diagnosis was the same as Blumer's. He testified that Wilson had a 48.6% risk for being reconvicted within ten years and a 66.75% risk of being reconvicted within twenty-five years. Monroe was uncertain whether the reoffending would involve sexually violent offenses rather than nontouching offenses such as indecent exposure. Monroe testified that if more touching offenses were established from credible sources, he would conclude that Wilson posed a substantial risk for future sexual violence. Likewise, statements of intent to reoffend in a sexually violent manner would affect his opinion.

¶5 Two inmates testified that Wilson told them he was intent on driving to Ohio to look for young runaways or prostitutes. He told one of them he had oral sex with a young girl in Michigan. He told the other inmate that he liked to train young girls to do what he wanted.

¶6 Without defining the term, but indicating that it was required to "look at another definition," the court found beyond a reasonable doubt that it was "substantially probable" that Wilson will engage in acts of sexual violence. The court noted that Monroe's uncertainty was based on lack of information and that some of that information was provided by other testimony.

¶7 The court was not required to define "substantially probable" when making its decision. Wilson relies on a statement in ***State v. Curiel***, 227 Wis. 2d 389, 401, 597 N.W.2d 697 (1999) where the Wisconsin Supreme Court disagreed with the Court of Appeals' decision that the term needs no further definition. The supreme court applied the "common and appropriate usage of the term" and

concluded that it meant "much more likely than not." ***Id.*** at 406. That holding does not require the trial court to define the term any time it is used in its findings, any more than it would be required to define "probable cause" or "reasonable doubt."

¶8 Furthermore, the experts' testimony, combined with that of other witnesses regarding Wilson's previously undisclosed acts of sexual violence and plans for further sexual assaults against children, established that it is "much more probable than not" that Wilson will reoffend. It is not material that the expert witnesses did not provide their definition of "substantial probability." The court, as the trier of fact, appropriately relied on the reasons given by the experts for their opinions and then determined whether the evidence supported the opinions under the proper standard. Wilson's RRASOR score, his treatment history, the information he gave to other inmates and Blumer's testimony that it was "highly probable" and that Wilson presents a "high risk" to reoffend provided sufficient evidence to support the verdict under the correct standard. Nothing in the record suggests that either of the expert witnesses or the trial court applied an incorrect standard.

¶9 Relying on dicta from two supreme court decisions, Wilson argues that the State must prove beyond a reasonable doubt that the petition was filed within ninety days of his release date. *See* ***State v. Curiel***, 227 Wis. 2d at 396 n.4; and ***State v. Kienitz***, 227 Wis. 2d 423, 430 n.6, 597 N.W.2d 712 (1999). We conclude that filing the petition within ninety days of release is not a substantive element, but merely a pleading requirement. While WIS. STAT. § 980.05(3)(a) requires the State to prove the allegations in the petition, and WIS. STAT. § 980.02(2)(ag) requires the petition to allege that the person is within ninety days of discharge or release, we conclude that the legislature did not intend to make the

ninety-day requirement a substantive element for three reasons. First, it has no relationship to the purpose and policy behind WIS. STAT. ch. 980, to protect society by preventing future acts of sexual violence through commitment and treatment of persons suffering from disorders that predispose them to commit sexually violent acts. *See* ***State v. Post***, 197 Wis. 2d 279, 313, 541 N.W.2d 115 (1995). Second, the Criminal Jury Instructions Committee, whose work is "the product of painstaking effort of an eminently qualified committee of trial judges, lawyers and legal scholars, designed to accurately state the law and afford a means of uniformity of instructions throughout the state," ***State v. Gilbert***, 115 Wis. 2d 371, 379, 340 N.W.2d 511 (1983), concluded that the ninety-day restriction was not an element to be proved beyond a reasonable doubt. *See* WIS JI—CRIMINAL 2502. Third, WIS. STAT. § 980.05(5) requires the court to enter judgment on the petition or dismiss it based on the trier of facts's finding whether the subject of the petition is a sexually violent person. The ninety-day restriction is not included in the definition of a "sexually violent person." *See* WIS. STAT. § 980.01(7).

¶10 Wilson argues that the ninety-day requirement substantively affects dangerousness because the release date provides a context for evaluating his present dangerousness. This premise does not lead to the conclusion that the legislature intended the ninety-day requirement to be an element. It is merely a procedural mechanism the legislature chose to ensure that the determination of dangerousness is relevant by prescribing the time for proving that a subject is a sexually violent person. The purpose of requiring the petition within ninety days of release, to ensure that he is eligible for release upon completion of his treatment, can be adequately served by treating the ninety-day restriction as a pleading requirement relating to the court's competency to proceed. *Accord,* ***State v. Zanelli***, 212 Wis. 2d 357, 365, 569 N.W.2d 301 (Ct. App. 1997). That purpose

is served by requiring proof that he is within ninety days of his release date only if that issue is challenged at a preliminary stage. The comments to WIS JI—CRIMINAL 2502 reflect the committee's decision that the ninety-day requirement is a fact to be established before the trial can go forward rather than an element to be established at trial.

¶11 Finally, Blumer's statement that he read Sindberg's report and it confirmed and was consistent with Blumer's judgment provides no basis for relief. The question did not call for a hearsay response. It was not admitted for the truth of the matter asserted, but only to ascertain the basis for Blumer's report. *See* ***State v. Anderson***, 230 Wis. 2d 121, 138, 600 N.W.2d 913 (Ct. App. 1999). Wilson did not object to Blumer's additional information as unresponsive and he raises the Dead Man's Statute, WIS. STAT. § 885.16, for the first time on appeal. The statement "the man is deceased" does not adequately invoke the Dead Man's Statute.[2] Therefore, those issues are not properly preserved for appeal. *See* WIS. STAT. § 901.03(1)(a). In addition, Wilson has established no prejudice from Blumer's unadorned statement that Sindberg agreed with him. Contrary to Wilson's argument, there is no evidence that the trial court considered Sindberg's opinion when determining the relative weight to accord Blumer's and Monroe's testimony. The evidence the court found persuasive to alleviate all doubts created by Monroe's testimony was that of the other inmates, not Blumer's recitation of Sindberg's opinion.

By the Court.—Order affirmed.

[2] An objection under the Dead Man's Statute must be directed to the competency of the witness to testify. *See* ***Mielke v. Nordeng***, 114 Wis.2d 20, 24, 337 N.W.2d 462 (Ct. App. 1983). An objection to the admissibility of the evidence on the grounds that it pertains to a transaction with a deceased person is not a proper objection. *See* ***id.***

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