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

March 8, 2001

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



**No. 00-1218**

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

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**IN RE THE COMMITMENT OF ELLEF E. ELLEFSON:**

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**ELLEF E. ELLEFSON**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed.*

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

¶1 PER CURIAM. Ellef Ellefson appeals from a judgment finding him to be a sexually violent person and committing him to a secure mental health facility under the supervision of the Department of Health and Social Services. He

claims that the trial court erroneously exercised its discretion by admitting hearsay evidence, that the evidence was insufficient to support the verdict, and that his commitment violates the double jeopardy and *ex post facto* provisions of the federal and state constitutions. We conclude that any evidentiary error was harmless, that there was sufficient expert testimony to support the verdict, and that his commitment was constitutional according to controlling precedent. We therefore affirm.

## BACKGROUND

¶2 Ellefson was convicted of at least seven sexual offenses between 1937 and 1990. Shortly before his parole date for a first-degree sexual assault of a child which he had committed when he was eighty-six years old, the State petitioned to have him civilly committed under WIS. STAT. ch. 980 (1999-2000)[1] as a sexually violent person.

¶3 Three psychologists agreed that Ellefson was properly diagnosed with pedophilia. There was evidence that he was sexually aroused by deviant stimuli, including forced and non-forced sexual interactions with male and female prepubescent and adolescent children, and that he had failed to complete a treatment program while in prison. However, due to Ellefson's advanced age (he was ninety-five years old at trial), only one of the psychologists concluded to a reasonable degree of professional certainty that Ellefson was substantially probable to reoffend.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶4 Ellefson's most recent parole agent testified that he could not conceive of any plan to effectively assure that Ellefson would have no contact with children if he were released into the community. He explained how even the strictest parole supervision level then available had failed to prevent Ellefson from masturbating several pre-pubescent boys who had come into his house after mowing his lawn, and noted that if Ellefson were monitored twenty-three hours a day, "[h]e would flip out on the 24th hour and do whatever." The agent also read to the jury a comment from a pre-sentence investigation report (PSI) written by a prior parole agent expressing the author's opinion that Ellefson presented "an extreme risk to society and a real danger to children" because of the difficulty in monitoring him twenty-four hours a day.

¶5 After hearing all of the testimony, the jury found Ellefson to be a sexually violent person, and the trial court committed him to institutional care. Ellefson appeals.

## STANDARD OF REVIEW

¶6 We review the trial court's evidentiary decisions under the erroneous exercise of discretion standard. ***State v. Sullivan***, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). We will affirm the trial court so long as it considered the facts of record under the proper legal standard and reasoned its way to a rational conclusion. ***Burkes v. Hales***, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991). In reviewing the sufficiency of the evidence, we will not substitute our judgment for that of the jury "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). With regard to

constitutional questions, we will sustain the trial court's findings of historical facts unless they are clearly erroneous, but will apply constitutional standards to those facts without deference to the trial court's conclusion. ***State v. Borhegyi***, 222 Wis. 2d 506, 508-09, 588 N.W.2d 89 (Ct. App. 1998).

## ANALYSIS

### *Hearsay*

¶7 Ellefson contends that the parole agent's opinion from the PSI was hearsay and that its admission was prejudicial error. *See* WIS. STAT. § 908.02. The State responds that the PSI qualified as an exception to the hearsay rule because it was a public record or report.[2] *See* WIS. STAT. § 908.03(8). We need not resolve this dispute because we conclude that, even if the admission of the statement from the PSI was error, it was harmless.

¶8 The test for harmless error is "whether there is a reasonable possibility that the error contributed to the conviction." ***Sullivan***, 216 Wis. 2d at 792. We are satisfied that the three sentences which were quoted from the PSI had only minimal probative value in the context of the two-day trial. The PSI author's comments were very similar in tone to the independent conclusions made by the parole agent who read them to the jury. They were unlikely to have had a greater impact than the testimony of the witnesses who appeared in court, including not only the parole agent but three psychologists. Moreover, the comments did not directly address the age issue which appears to have been the focus of Ellefson's

[2] The State also argues that Ellefson waived any challenge to the admission of individual statements from the PSI when he failed to object to the admission of the entire document. We are satisfied, however, that Ellefson did not intend to abandon his prior, more specific objection.

argument against his continued dangerousness. We see no reasonable possibility that the jury would have reached a different result absent the statements.

*Sufficiency of the Evidence*

¶9 We see no merit whatsoever to Ellefson's contention that there was insufficient evidence to support the verdict. The fact that he had assaulted young boys while in his eighties seriously undermined his argument that he would be unlikely to commit further assaults while in his nineties. The jury could reasonably have determined, based on Ellefson's extensive history of sexual offenses, his failure to complete treatment, and a psychologist's opinion, that it was substantially probable he would reoffend and that he was a sexually violent person.

*Double Jeopardy & Ex Post Facto Clauses*

¶10 Finally, Ellefson asks this court to "reconsider" the holding by the Wisconsin Supreme Court in ***State v. Carpenter***, 197 Wis. 2d 252, 541 N.W.2d 105 (1995), that the civil commitment procedures under WIS. STAT. ch. 980 are constitutional. We are, however, bound by the precedent of the supreme court. ***State v. Clark***, 179 Wis. 2d 484, 493, 507 N.W.2d 172 (Ct. App. 1993).

*By the Court.*—Judgment affirmed.

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