STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP2104

IN RE THE COMMITMENT OF JAMIE LANE STEPHENSON:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

JAMIE LANE STEPHENSON,

Respondent-Appellant.

APPEAL FROM AN ORDER DENYING DISCHARGE UNDER WIS. STAT. § 980.09, ENTERED IN THE CIRCUIT COURT FOR DUNN COUNTY, THE HONORABLE ROD W. SMELTZER, PRESIDING

BRIEF OF THE PETITIONER-RESPONDENT

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ISSUES PRESENTED

1. Is the factfinder bound by an expert's ultimate conclusion in a Chapter 980 case that a person is not more likely than not to reoffend, or may the factfinder reject the expert's conclusion and, based on the other evidence presented, conclude otherwise?

The circuit court answered that a factfinder may reject the expert's conclusion and conclude that the person satisfies the dangerousness requirement.

This Court should conclude the same.

2. Did the State present sufficient evidence to prove that Respondent-Appellant Jamie Lane Stephenson was more likely than not to reoffend?

The circuit court answered, "Yes."

This Court should answer, "Yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. That said, the State would readily participate in argument, if it would benefit this Court.

The State agrees that publication may be warranted. The circuit courts would benefit from a citable decision holding that expert testimony, while helpful, is not required to prove that a sexually violent person is more likely than not to reoffend.

INTRODUCTION

Stephenson is a sexually violent person committed under Chapter 980. He seeks discharge from his sexually violent person commitment.

A sexually violent person is "a person who has been convicted of a sexually violent offense . . . and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence." Wis. Stat. § 980.01(7). "'Mental disorder' means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." Wis. Stat. § 980.01(2). "'Likely' means more likely than not." Wis. Stat. § 980.01(1m).

To defeat a discharge petition, the State must prove by clear and convincing evidence that the person still meets the criteria for commitment as a sexually violent person. Wis. Stat. § 980.09(3). Accordingly, the State must show that (1) the person has been convicted of a sexually violent offense, (2) the person suffers from a mental disorder, and (3) the person is dangerous because his mental disorder makes it more likely than not that he will engage in one or more acts of sexual violence.

The third element is the only element at issue here. That element is often referred to as proving "dangerousness," the "dangerousness element," or "risk," or it is shortened to the phrase, "more likely than not to reoffend."

Stephenson raises two claims in support of discharge. First, he says that the State must present expert testimony on the third element, meaning an expert must testify that the person is more likely than not to reoffend. According to Stephenson, because no expert testified that he was more likely than not to reoffend, the State failed to meet its burden and he must be discharged. Alternatively, he argues that even if no expert testimony is required on the third element, the State still failed to present sufficient evidence. Stephenson is wrong.

To be clear: no governing authority provides that a factfinder must base its finding that a person is more likely

than not to reoffend on an expert's testimony. And that makes sense because "courts are not rubber stamps for expert testimony." *State v. Brown*, 2005 WI 29, ¶ 88, 279 Wis. 2d 102, 693 N.W.2d 715. As the factfinder, the court is free to weigh the experts' testimony, to accept or reject all or some of that testimony, and to consider the other evidence presented in determining whether the person is more likely than not to reoffend. Here then, the court was free reject the experts' ultimate conclusions that Stephenson was not more likely than not to reoffend and to conclude otherwise, based on its weighing of the evidence.

The State presented sufficient evidence to prove that Stephenson was more likely than not to reoffend. That evidence included Stephenson's extensive history of sexual assault, his poor performance on supervision, his continued violations of institution rules, his recent statements that he believed he could drink socially in the community, despite his alcohol disorder, and his own estimate that his risk of reoffending was a five out of ten.

This Court should affirm.

STATEMENT OF THE CASE

Stephenson has a history of sexual assault—an undeniably extensive one. (R. 218:2–3.)

In September 2000, when Stephenson was 15, the State charged him with three counts of fourth-degree sexual assault. (R. 218:3.) He was adjudicated delinquent for one count, and the two remaining counts were dismissed but read into the record at sentencing. (R. 218:3.)

Roughly a year later, Stephenson was adjudicated delinquent of second-degree sexual assault of a child. (R. 218:3.) In that case, Stephenson led a girl "to a secluded area of the high school, forcefully pushed her up against a wall

using both hands, pulled down her pants, and began engaging in forced intercourse." (R. 1:7.)

That same year, Stephenson was adjudicated delinquent of repeated sexual assault of the same child. (R. 1:7.) Stephenson assaulted the same girl discussed above on four new occasions. (R. 1:7.) On the first occasion, Stephenson "rubbed his groin up and down along the back side of the victim," and when she asked him what he was doing, he "laughed and walked away." (R. 1:7.) On two other occasions, Stephenson approached "the victim from behind and then press[ed] his groin against the buttocks of the victim without her consent." (R. 1:7.) On the last occasion, Stephenson followed the girl to a secluded area and tripped her. (R. 1:7.) While she was lying on the floor, Stephenson lifted her "left hand above her head" and "attempted to put his hand under the victim's shirt," but she fought him off. (R. 1:7.) As she fled, Stephenson threatened, "If you tell anyone, I'll kill you." (R. 1:7.)

In 2004, the State charged Stephenson with two counts of second-degree sexual assault, and Stephenson later pled guilty to two counts of fourth-degree sexual assault.[1] (R. 1:6.) Stephenson, who was 18 at the time, engaged in sexual intercourse with two 15-year-old girls. (R. 1:6.) Stephenson was sentenced to two years of probation, but that probation was later revoked, and a jail term was imposed.[2] (R. 1:6; 218:3.)

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[1] Stephenson's Wisconsin Circuit Court Access record (CCAP) for Pierce County Circuit Court Case No. 2004CF67 can be found at the following link: https://wcca.wicourts.gov/caseDetail.html?caseNo=2004CF000067&countyNo=47&index=0&mode=details.

[2] In 2003, the State charged Stephenson with two counts of second-degree sexual assault of a child, but those charges were

That same year, Minnesota charged Stephenson with two counts of first-degree criminal sexual conduct, two counts of second-degree criminal sexual conduct, and one count of illegal consumption of alcohol. (R. 1:5.) On two separate occasions, Stephenson, who was 19 at the time, engaged in sexual intercourse with a 12-year-old girl. (R. 1:5.) In 2006, Stephenson was ultimately convicted of one count of second-degree criminal sexual conduct, and he received 25 years of probation. (R. 1:5.)

In 2007, the State charged Stephenson with one count of sexual assault of a child under the age of 16 and one count of third-degree sexual assault. (R. 1:3–4.) Stephenson, who was 22 at the time, began online chatting with a 14-year-old-girl. (R. 1:3.) Stephenson lied to the girl, misrepresenting that his name was James Minder and that he was 17. (R. 1:3.) On two different occasions, Stephenson assaulted both the 14-year-old girl and her 16-year-old sister. (R. 1:3.)

As to the 14-year-old victim, Stephenson cuddled her and attempted to remove her shorts and underwear, but she resisted, telling Stephenson, "no," and slapping his hand away. (R. 1:4.) Nevertheless, Stephenson "began rubbing" her "vagina" over her shorts, and he took her hand "an pulled it to his exposed penis." (R. 1:4.) He then "inserted his penis" between her "upper legs," "pulling her back and forth." (R. 1:4.) The victim "counted in her head to three" and then retreated into a bathroom. (R. 1:4–5.)

As to the sister, Stephenson was over at the home watching a movie when the two shared a brief "consensual" kiss, before the she refused to engage in any further activity. (R. 1:5.) Despite her refusal, Stephenson "pulled down [her] pants and underwear" and "engaged in forced intercourse for

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later dismissed and read into the record at sentencing on the 2004 case.

approximately one minute." (R. 1:5.) The sister eventually escaped, falling off the side of the bed and running to a different part of the home. (R. 1:5.)

Based on those assaults, Stephenson pled guilty to second-degree sexual assault of a child, and the State dismissed the third-degree sexual assault count in 2009. (R. 1:3; 218:3.) The court sentenced Stephenson to six years of imprisonment, consisting of two years of initial confinement followed by four years of extended supervision. (R. 1:1.)

In 2011, the State filed a petition for commitment under Chapter 980. (R. 1.) After a bench trial in 2012, the circuit court found that Stephenson qualified as a sexually violent person and ordered him committed under Chapter 980. (R. 54.)

Stephenson has sought discharge every year since his initial commitment in 2012. (R. 82; 105; 132.) In 2015, the circuit court held a discharge hearing and concluded that Stephenson still qualified as a sexually violent person. (R. 135.) In 2016, Stephenson filed but later withdrew petitions for discharge and supervised release. (R. 143; 144; 150; 151.)

In January 2017, Stephenson filed another petition for discharge.[3] (R. 154.) The State initially opposed a hearing on Stephenson's petition on the grounds that Stephenson had not demonstrated a sufficient change in condition that would allow a factfinder to likely conclude that Stephenson no longer met the criteria for commitment. (R. 155.) When the State later learned that Stephenson had moved into phase three of

[3] Since 2014, Stephenson, through his attorney, has hired Dr. Courtney Endres to perform his evaluations. (R. 108.) In each evaluation, Dr. Endres concluded that Stephenson no longer qualified as a sexually violent person and should therefore be discharged from commitment. (R. 109:13; 117:9; 153:22; 187:21.)

treatment at Sand Ridge, it withdrew its opposition to holding a discharge hearing. (R. 157.)

At the discharge hearing, the State presented one witness, psychologist Donn Kolbeck, and the defense presented two, psychologist Darren Matusen and Dr. Courtney Endres. The following is a summary of the evidence presented at trial; it is not an exhaustive recitation of the evidence.

Kolbeck testified that he is a licensed psychologist and a member of the Sand Ridge evaluation unit. (R. 264:6, 8.) He offered his opinion about whether Stephenson still qualified as a sexually violent person. Kolbeck ultimately concluded that Stephenson "continue[d] to suffer from two qualifying Chapter 980 mental disorders," (R. 264:18), but Stephenson was not more likely than not to reoffend (R. 264:43, 78).

Kolbeck first addressed whether Stephenson suffered from a qualifying mental disorder. Kolbeck explained that a mental disorder for Chapter 980 purposes means "a congenital or acquired defect that predisposes an individual to -- it affects their emotional volitional capacity, predisposing them to engage in acts of sexual violence." (R. 264:13.) Kolbeck opined "that [Stephenson] continue[d] to suffer from two qualifying Chapter 980 mental disorders." (264:18.) Specifically, Stephenson suffered from "other specified personality disorder with anti-social and borderline features and alcohol abuse disorder." (R. 264:18.)

As to the alcohol disorder, Kolbeck explained that Stephenson's symptoms were technically "in remission" since he had not used "alcohol during the last 12 months or more," given his "controlled environment which restrict[ed] his access to alcohol." (R. 264:19.) Nevertheless, Kolbeck said that he saw "evidence that [Stephenson's] alcohol abuse predisposed him" to commit "acts of sexual violence." (R. 264:19–20.)

Kolbeck pointed to Stephenson's "own admission" during a recent group session that he had "never committed a crime sober." (R. 264:20.) Kolbeck relayed Stephenson's history of alcohol abuse, started "at a very early age" and led to "frequent intoxication over time." (R. 264:20.) That intoxication led to "sexual misbehavior." (R. 264:20.) Given Stephenson's admissions and his history with alcohol, Kolbeck testified that "there [was] ample evidence that Mr. Stephenson's use of alcohol was essentially a condition that predisposed him to engage in acts of sexual violence." (R. 264:20.)

As to the personality disorder, Kolbeck defined it as "an enduring pattern of inner experience and behavior that deviates from -- markedly from the expectations of the individuals culture leading to impairments in cognitions, emotions, interpersonal functioning, and impulse control." (R. 264:21.) Kolbeck opined that Stephenson's personality disorder had "a direct causal connection to [his] sexually violent behaviors in the community." (R. 264:23.)

To support his opinion, Kolbeck pointed to numerous instances where Stephenson's behavior was motivated by his personality disorder. (R. 264:23–24.) For example, Stephenson "repeatedly failed to observe societal norms," and he "repeatedly engaged in behaviors that were grounds for arrest, including by [Kolbeck's] count, a total of 13 charges for illicit sexual contact and six convictions for sexual offenses." (R. 264:24.) Moreover, Stephenson had "a history of disregard for and violation of the rights of others," and of "deceitfulness, conning, and manipulation." (R. 264:24.) And he exhibited other antisocial traits like "impulsivity, irritability, consistent irresponsibility and a lack of remorse." (R. 264:24–25.)

Kolbeck also discussed Stephenson's borderline traits. (R. 264:25.) Kolbeck explained that Stephenson had "a history of an unstable self image," and he exhibited "[s]elf damaging impulsivity." (R. 264:25.) Kolbeck pointed to Stephenson's

"sexually impulsive promiscuous sexual encounters in the community" and "his impulsive use of alcohol" as examples. (R. 264:25.)

Looking at Stephenson's 2007 offense, Kolbeck observed that Stephenson had "engage[d] in conning and manipulation to gain access to a pubescent victim." (R. 264:26.) Kolbeck also pointed to Stephenson's pattern of sexual assaults, highlighting that Stephenson continued to reoffend, despite being repeatedly charged, convicted, and punished. (R. 264:27.)

In addition, Kolbeck discussed Stephenson's behavior while committed. Kolbeck acknowledged that Stephenson had not received a behavior dispositional record in the last year, but he pointed to several instances he believed provided "evidence of antisocial traits at work." (R. 264:28–29.)

For example, Stephenson had recently responded untruthfully to polygraph questioning. To Kolbeck, that indicated "possible" "lying or deception." (R. 264:29.) In an even more recent polygraph, Stephenson admitted to making "an unauthorized phone call." (R. 264:29.) To Kolbeck, that indicated continued "resistance to rules, certainly rule violations." (R. 264:29.)

According to Kolbeck, Stephenson also demonstrated resistance to rules and manipulative and deceitful behavior by repeatedly covering his room window with a towel, in violation of the institution's rules. (R. 264:30–31.) When caught by staff, Stephenson would suggest that he had received permission from another staff member, when he had never received such permission. (R. 264:31.)

Kolbeck also discussed an incident where Stephenson requested prohibited clothing. Specifically, Stephenson requested women's "Satan thong underwear." (R. 264:36.) To Kolbeck, Stephenson's behavior showed "resistance to rules by ordering items already known to him to be likely prohibited

by the Sandridge team," and "suggest[ed] that he's pushing boundaries with staff and also just a general resistance to rules." (R. 264:36–37.)

After discussing Stephenson's mental disorder, Kolbeck addressed Stephenson's risk of reoffending. Kolbeck testified that he recently changed his methodology for calculating risk, using the Static-99R and the Violence Risk Scale—Sex Offender Version (VRS-SO), instead of the Static-99R and the Static-2002R. (R. 264:42–43.) Applying that new methodology, Kolbeck opined that Stephenson was not more likely than not to commit a new sexual offense. (R. 264:43, 78.)

As to the Static-99R, Kolbeck scored Stephenson at a "seven," which was "consistent across evaluations throughout [Stephenson's] time at Sandridge." (R. 264:46.) Kolbeck testified that Stephenson's score corresponded to a 40.6 percent risk of being arrested or charged with a sexual offense in the next ten years. (R. 264:47.) Even though the Static-99R assesses risk from group data, Kolbeck opined that Stephenson's individual risk was 40.6 percent. (R. 264:47.) In his report, which was submitted into evidence, Kolbeck acknowledged that scores on the Static-99R measure a ten-year risk of recidivism, not lifetime recidivism, as the statute requires. (R. 177:9.)

As to the VRS-SO, Kolbeck explained that he switched to it because he believed it "measure[d] treatment change in a quantifiable fashion." (R. 264:44.) According to Kolbeck, the VRS-SO measured Stephenson's change by comparing a pre-treatment score to a post-treatment score. (R. 264:44–45.)

Kolbeck scored Stephenson "pretreatment a 35," and posttreatment a 27.5, which resulted in a "change score of 7.5." (R. 264:77; 178:2.) Even though the VRS-SO measures a ten-year risk of recidivism (defined as recharging), Kolbeck calculated Stephenson's "actual" "lifetime risk" to be "41 percent." (R. 264:77–78.) Kolbeck acknowledged that one

issue with scoring on actuarial assessments is that "we don't know how many undetected offenses there are," but he claimed he accounted for that by multiplying Stephenson's base risk rate by 1.2. (R. 264:78–80.)

Kolbeck also used the Psychopathy Checklist-Revised (PCL-R) to assess Stephenson's risk. (R. 264:64; 177:9.) Stephenson scored a "29" on the PCL-R, which "equates to high psychopathy." (R. 264:64.) Kolbeck testified that the average score "for the prison population" is "[r]ouhgly 23." (R. 264:64–65.)

Kolbeck went on to discuss several other considerations relevant to risk. First, Kolbeck acknowledged that "[s]exual recidivism after a single offense does not tend to be as high as sexual recidivism for individuals," like Stephenson, "who have reoffended after multiple offenses." (R. 264:51.) Kolbeck also noted that Stephenson struggled when placed on supervision for his criminal offenses. (R. 264:54.) When on supervision, Stephenson picked up "[m]ultiple revocations" and "new offenses." (R. 264:54.)

Second, Kolbeck highlighted that Stephenson's February 2016 nonsuppression penile plethysmograph (PPG) test indicated that he was "still aroused to stimuli depicting teenager coercive interactions."[4] (R. 264:55.) The PPG also showed that Stephenson "was aroused by" "graphic depictions of victims crying or in some form of suffering related to their offense." (R. 264:55–56.) Stephenson's suppression PPG

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[4] A nonsuppression PPG provides stimuli "from a wide variety of stimuli segments." (R. 264:109.) "Individuals are encouraged to freely express their arousal to the depictions of sexual interactions provided in the nonsuppression PPG examination." (R. 264:109.) Individuals are not supposed to "suppress anything" during a nonsuppression PPG. (R. 264:109–10.) By contrast, a "suppression PPG tests the patient[']s ability to use mental strategies or mental interventions to suppress his experience of sexual arousal." (R. 264:57.)

showed that he "possess[ed] the capability to suppress" his arousal, but as the prosecutor pointed out, a PPG could not measure whether Stephenson was "interested in suppressing [his] urges," only that he had the "capacity" to. (R. 264:57.)

Third, Kolbeck expressed concern that Stephenson had stated during group sessions that he saw "himself capable of social drinking in the community." (R. 264:57–58, 120–22.) In addition, when challenged by his peers about his ability to drink socially, Stephenson was "somewhat resistant." (R. 264:58.)

Finally, Kolbeck acknowledged that Stephenson made significant progress in treatment, but he noted that Stephenson was "recently" "dropped from a phase three maintenance group" based "upon absence from groups." (R. 264:82, 139.) Stephenson had also discontinued his "intensive alcohol education group." (R. 264:83.) Kolbeck noted that staff at Sand Ridge expressed "concern" about Stephenson's "treatment engagement." (R. 264:83.)

Nevertheless, Kolbeck opined that Stephenson met the criteria for discharge because Kolbeck's actuarial assessment calculations placed Stephenson's risk of reoffending at 41 percent. (R. 264: 43, 78, 94.)

When Kolbeck finished testifying, the State rested, and the defense moved for a directed verdict. (R. 265:24–25.) The court took the motion under advisement. (R. 265:27.)

The defense called Matusen, who testified about Stephenson's treatment history.

Matusen testified that he is "a psychologist for the State of Wisconsin Department of Health Services." (R. 265:28.) In his role "as a treatment evaluator," Matusen "evaluate[d] [the] treatment progress of [patients] at Sandridge." (R. 265:30.)

Matusen testified that Stephenson has been in "phase three" of treatment since August 2016. (R. 265:40.) Matusen said that Stephenson "typically attends and participates in his group sessions." (R. 265:42.) According to Matusen, Stephenson's "willing to address issues in treatment," indicated "positive treatment engagement." (R. 265:42.)

Matusen further testified that Stephenson was working on replacing "his dynamic risk factors with healthy alternatives." (R. 265:46.) For example, although Stephenson was "still callous at times," he had demonstrated more "empathy for his peers when they [were] struggling." (R. 265:47.) In addition, while Stephenson still "experience[d] grievance thinking," he was learning to cope and deal with it "in healthy, more adaptive ways." (R. 265:48.) Moreover, despite his "history of minimizing the seriousness of his sexual offenses," Stephenson had "recently" acknowledged that "adolescents are incapable of consent" and had accepted responsibility. (R. 265:50.)

Matusen explained that Stephenson was "not interested in supervised release" because he "didn't need the extreme supervision provided by supervised release." (R. 265:53.) Instead, Stephenson wanted to be discharged. (R. 265:53.)

On cross-examination, the State asked Matusen, "[I]n 2016, when you asked [Stephenson] how likely he was to commit another sexual assault, what did he tell you?" (R. 265:62.) Matusen replied, "[Stephenson] estimated his risk to commit another sexual assault was approximately five out of ten." (R. 265:62.)

The defense also called Dr. Endres, who testified about whether Stephenson had a qualifying mental disorder and whether he was more likely than not to reoffend.

Dr. Endres testified that she manages her own forensic psychology practice and that the defense asked her to perform

an evaluation. (R. 265:73, 79.) Dr. Endres opined that Stephenson no longer qualified as a sexually violent person because he no longer suffered from a qualifying mental disorder, and he was not more likely than not to reoffend. (R. 265:84–85.)

As to the mental disorder requirement, Dr. Endres used two personality assessments to determine whether Stephenson suffered from a personality disorder. (R. 265:90–91.) Both assessments were "self-report" assessments, meaning Stephenson completed the evaluations himself. (R. 265:91–94.) Dr. Endres testified that neither assessment "show[ed] [Stephenson] to be an antisocial person." (R. 265:98.)

As to risk, Dr. Endres also used the Static-99R and the VRS-SO. (R. 265:109.) Dr. Endres scored Stephenson a "seven" on the Static-99R. (R. 265:114.) In her report, which was submitted into evidence, Dr. Endres stated that "[a] score of '7' meant that Mr. Stephenson [was] most similar to groups of sex offenders of whom 27 percent were charged or convicted of a new sexual offense within the initial five-years following their release." (R. 187:17.) Unlike Kolbeck, Dr. Endres did not use the high-risk/high-needs group to estimate Stephenson's risk. (R. 187:15–17.) She also did not calculate Stephenson's ten-year risk of reoffending. (R. 187:17.)

On the VRS-SO, Dr. Endres calculated a change score of "ten." (R. 265:123.) According to Dr. Endres, that score "put [Stephenson] at ten percent risk over five years and 17 at ten years." (R. 265:123.)

Given the above, Dr. Endres concluded that Stephenson no longer qualified as a sexually violent person.

After hearing the evidence, the circuit court concluded that Stephenson still qualified as sexually violent person. (R. 265:165–66.) Accordingly, the court denied Stephenson's discharge petition. (R. 265:166.) As to risk, the court

specifically ruled that "based on the record" before it, Stephenson was "still more likely than not to commit an act of sexual violence in his lifetime." (R. 265:167.)

Stephenson filed a postconviction motion. (R. 232.) In it, he raised two issues: (1) the State failed to meet its burden on the dangerousness element because no expert testified that Stephenson was more likely than not to reoffend, and expert testimony should be required, and (2) even if expert testimony was not required to satisfy the risk element, the State still failed to present sufficient evidence that Stephenson was more likely than not to reoffend. (R. 232.)

After a hearing, the circuit court denied Stephenson's motion. (R. 236; 266.) The court concluded that expert testimony was not needed: "I'm going to find that at least at this time that there wasn't expert testimony needed to tie the mental disorders that were applicable to Mr. Stephenson tied to the behaviors and patters of behaviors that he had that he was more likely than not to reoffend . . . ." (R. 266:16.) The court further ruled that it had sufficient evidence before it to conclude that Stephenson was more likely than not to reoffend. (R. 266:16.)

Stephenson appeals.

ARGUMENT

I. The circuit court, as the factfinder, was not bound by the experts' conclusions that Stephenson was not more likely than not to reoffend.

Stephenson first argues that the State must present expert testimony to prove that a sexually violent person is more likely than not to reoffend. There is no requirement that a finding of future dangerousness be based on expert testimony.

A. Standard of review

"[W]hether expert testimony is necessary to prove a given claim is a question of law" that this Court "review[s] de novo." *Racine Cty. v. Oracular Milwaukee, Inc.*, 2010 WI 25, ¶ 24, 323 Wis. 2d 682, 781 N.W.2d 88.

B. The factfinder is not required to accept an expert's conclusion.

No governing authority provides that a factfinder must base its finding of future dangerousness on an expert's testimony. *State v. Kienitz*, 227 Wis. 2d 423, 439–40, 597 N.W.2d 712 (1999) (noting that "[n]either this court, nor the United States Supreme Court have squarely addressed whether expert testimony is required for a determination on the question of future dangerousness," and declining to answer the question because "there was expert testimony on the issue of future acts of sexual violence"); *State v. Mark*, 2008 WI App 44, ¶ 51, 308 Wis. 2d 191, 747 N.W.2d 727 ("We add that we are aware of no case holding that a finding of future dangerousness must be supported by expert testimony.").

And that makes sense, as "courts are not rubber stamps for expert testimony." *Brown*, 279 Wis. 2d 102, ¶ 88. A court, acting as the factfinder, is not "required to accept an expert's ultimate conclusion." *Id.*; Wis. JI–Criminal 200 (2011) ("Opinion evidence was received to help you reach a conclusion. However, you are not bound by an expert's opinion.").

Certainly, expert testimony regarding a person's likeliness to reoffend can assist the factfinder, but a finding that a person is more likely than not to reoffend is "well within the capacity of a normal jury." *Kansas v. Crane*, 534 U.S. 407, 423 (2002) (Scalia, J., dissenting) (commenting that the findings a jury must make are "coherent, and (with the

assistance of expert testimony), well within the capacity of a normal jury"). Expert testimony can help the factfinder identify factors it should consider in assessing a person's likelihood to reoffend, such as age, non-sexual criminal history, sexual criminal history, victim demographic, supervision history, treatment history, etc.

But the factfinder is—and must remain—free to weigh the evidence and assess the witnesses. Wis. JI–Criminal 300 (2000) ("It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility, that is, the believability, of the witnesses and of the weight to be given to their testimony."). "[T]he trier of fact, '[is] free to weigh the expert's testimony when it conflict[s] and decide which was more reliable; to accept or reject the testimony of any expert, including accepting only parts of an expert's testimony; and to consider all of the non-expert testimony in deciding whether" the sexually violent person is more likely than not to reoffend. *Kienitz*, 227 Wis. 2d at 441.

Moreover, the fact that an expert's "actuarial test score [does] not give rise to scores showing a high risk of re-offending does not preclude the fact-finder from coming to an alternative conclusion." *State v. Vantreece*, 771 N.W.2d 585, ¶ 12 (N.D. 2009) (quoting *State v. Hehn*, 745 N.W.2d 631, ¶ 21 (N.D. 2008)). "The importance of independent judicial decision-making means the judge, rather than the test scores or the psychologists who create them, is the ultimate decision-maker." *Id.* (quoting *Henh*, 745 N.W.2d 631, ¶ 21). Because courts do not "engage in contests of percentage points, the fact that the actuarial tests do not indicate [that a person] is statistically likely to reoffend is of little consequence" in determining whether there is clear and convincing evidence to support commitment. *Hehn*, 745 N.W.2d 632, ¶ 21.

In addition to or in lieu of expert testimony, a court can consider, among other things, a sexually violent person's

"significant number of prior sexual offenses" and his history "of reoffending or preparing to reoffend under supervision." *Kienitz*, 227 Wis. 2d at 437. In fact, as the Supreme Court has recognized, "[t]he fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness. Indeed, this concrete evidence may be at least as persuasive as any predictions about dangerousness that might be made in a civil-commitment proceeding." *Id.* at 439 n.10 (quoting *Jones v. United States*, 463 U.S. 354, 364 (1983)).

For example, in *Kienitz*, the Wisconsin Supreme Court reaffirmed that a court is not obligated to accept "the weight [an expert] assigned the various factors in his scoring [on an actuarial assessment], nor [is] it obligated to choose either [one expert's] or [another expert's] [actuarial] score and rely solely on that score as a measure of probability." *Kienitz*, 227 Wis. 2d at 435 (citation omitted). There, the State's two experts testified that Kienitz was more likely than not to reoffend, and the defense expert testified that he was not more likely than not. *Id.* at 430. The factfinder concluded that Kientz was more likely than not to reoffend based on testimony from the defense expert and Kienitz's probation agent. *Id.* at 432.

Kienitz argued that the State presented insufficient evidence because "the only expert found reliable by the circuit court, [the defense expert], testified there was not a substantial probability that Kienitz would reoffend." *Kienitz*, 227 Wis. 2d at 438. The supreme court rejected Kienitz's argument.

The court explained that the "trier of fact has the ability to accept so much of the testimony of a medical expert that it finds credible, *and it then weighs the evidence and resolves any conflicts in testimony*." *Kienitz*, 227 Wis. 2d at 435. (emphasis added) (citations omitted). That evidence included Kienitz's extensive criminal history, his poor performance on

supervision, his preparation to reoffend, his denial of the need for treatment, and the expert's general testimony about "the nature of Kienitz's disorder; the risk factors that are, or are not predictive of recidivism and whether those factors were, or were not applicable to Kienitz." *Id.* at 436, 441.

Applying the above, the supreme court concluded that the State presented sufficient evidence to satisfy the dangerousness element, even though the circuit court found most reliable the expert who testified that there was not a substantial probability that Kienitz would reoffend. *Kienitz*, 227 Wis. 2d at 438–39. The court so concluded by weighing all the other evidence offered at trial. *Id.* at 436, 441.

C. The circuit court was entitled to reject the experts' conclusions, and, based on the other evidence presented, conclude that Stephenson was more likely than not to reoffend.

As the factfinder, the circuit court here was free to "accept or reject the testimony of any expert, including accepting only parts of an expert's testimony." *Kienitz*, 227 Wis. 2d at 441 (citation omitted).

Accordingly, the court was free to reject, in whole or in part, the experts' actuarial assessment scores. For example, the court was free to reject Kolbeck's actuarial assessment score for the VRS-SO but to accept his assessment score for the Static-99R and the PCL-R, both of which labeled Stephenson high risk. It would have been reasonable for the court to do so since the experts strongly disagreed on how to score the VRS-S0 and, consequently, reached dramatically different risk estimates. And it would have been reasonable for the court to accept and credit the experts' Static-99R scores since both scored Stephenson a "7."

The court was also free to discredit Kolbeck's testimony that his actuarial assessment scores predicted Stephenson's

individual risk, because "[a]s with any actuarial assessment, accuracy refers to predictive ability in the aggregate, not in every individual case." 9 Christine M. Wiseman, *Wisconsin Practice Series: Criminal Practice and Procedure* § 4:2 at n.8 (2nd ed. 2018). "Since risk is inherently a group characteristic, risk assessments should be ascribed to the relevant group, not to the individual defendant." *Brown*, 279 Wis. 2d 102, ¶ 84 n.31 (quoting Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment With Sex Offender: Accuracy, Admissibility and Accountability*, 40 Am. Crim. L. Rev. 1443, 1495–96 (2003)).

The court was free to consider all the other evidence presented at Stephenson's trial when assessing his risk of reoffending. *Kienitz*, 227 Wis. 2d at 436 (noting that the circuit court placed "great weight" on the other evidence presented and concluding that the court "was entitled to rely on [that] evidence in determining that it was much more likely than not that Kienitz would reoffend). That evidence, which will be discussed in greater detail in the next section, included Stephenson's extensive history of sexual assault, his poor performance on supervision, his continued violations of institution rules, his recent statements that he believed he could drink socially in the community despite his alcohol disorder, and his own estimate that his risk of reoffending was a five out of ten.

The court was also free to weigh Stephenson's risk factors differently than the experts. In particular, the court was free to weigh heavily Stephenson's estimate that his risk "to commit another sexual assault was approximately five out of ten." (R. 265:62–63.) Neither expert testified about that statement, and neither included it in their report.

In addition, the court was free to weigh heavily Stephenson's statements during group sessions that he saw "himself capable of social drinking in the community," despite his alcohol abuse disorder. (R. 264:57–58, 120–22.) Those

statements were especially troubling, since Stephenson's sexual misbehavior was directly linked to his drinking. (R. 264:20 ("Mr. Stephenson was quoted to say he never committed a crime sober."), ("He has disclosed in the context of various legal documents and reports that his sexual misbehavior was related to his use of alcohol so there is ample evidence that Mr. Stephenson's use of alcohol essentially was a condition that predisposed him to engage in acts of sexual violence.").)

The record here shows that the circuit court considered the expert testimony as well as the other evidence presented. The totality of the evidence persuaded the circuit court that Stephenson was a sexually violent person. This Court should not disturb the court's proper discharging of its duty as factfinder to assess the witnesses, weigh the evidence, and reach a supportable determination.

Accepting Stephenson's argument—that an expert must opine that a sexually violent person is more likely than not to reoffend—could lead to absurd results.

For example, picture a discharge trial like this one, where the State's expert refrains from opining that the sexually violent person is more likely than not to reoffend. Now, assume that the sexually violent person takes the stand and testifies that he will reoffend the very moment he is released. The State recalls its expert and asks if his opinion has changed, given the sexually violent person's testimony. The expert responds that his opinion has not changed because he is a "numbers guy" and his actuarial assessment score stands.

Under Stephenson's rule, the sexually violent person must be discharged because no *expert* testified that the person was more likely than not to reoffend. The court could not override the expert's ultimate conclusion, despite testimony from the sexually violent person that he would 100 percent

reoffend upon release. To bind the factfinder in that way would be absurd.

Stephenson's main argument in support of requiring expert testimony is that dangerousness is an "extension of" the "threshold determination of whether the person has a mental disorder, for determining dangerousness requires determining what kind of behavior the person's mental disorder will cause." (Stephenson's Br. 16.)

The State agrees that a person's dangerousness must be connected to his mental disorder: "and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence." Wis. Stat. § 980.01(7). But in testifying that a person has a qualifying mental disorder, the expert has already linked a person's dangerousness to his mental disorder.

This is because the term mental disorder is defined as, "a congenital or acquired condition affecting the emotional or volitional capacity *that predisposes a person to engage in acts of sexual violence*." Wis. Stat. § 980.01(2) (emphasis added). Accordingly, when an expert testifies that a person suffers from a qualifying disorder, the expert is already testifying that the disorder predisposes the person to engage in acts of violence. The remaining question then is how high the person's risk of reoffending is, given his predisposition. That question—whether the person is more likely than not—does not require expert testimony, as the factfinder can assess risk.

This is also why Stephenson's reliance on tort cases involving medical issues is misplaced. (Stephenson's Br. 10–11.) Certainly, an expert is needed to testify about Stephenson's mental disorder. *State v. Sorenson*, 2002 WI 78, ¶ 20, 254 Wis. 2d 54, 646 N.W.2d 354. A mental disorder diagnosis requires "special knowledge or skill or experience on [a] subject[s] which [is] not within the realm of the

ordinary experience of mankind, and which require[s] special learning, study, or experience." *Cramer v. Theda Clark Memorial Hospital*, 45 Wis. 2d 147, 150, 172 N.W.2d 427 (1969).

In Chapter 980 cases, the expert properly decides the medical question necessary to support commitment. The expert decides whether the person has a "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." Wis. Stat. § 980.01(2).

Once the expert decides that medical question, though, the only remaining question is how high the person's risk of reoffending is, given his predisposition. Risk is not a medical issue that must be assessed by an expert.

Although Wisconsin does not impose the death penalty, death penalty cases may be helpful here. In those cases, jurors are similarly asked to determine the likelihood of a defendant committing future crimes. *Barefoot v. Estelle*, 463 U.S. 880, 896–97 (1983), *superseded on other grounds by statute*, 28 U.S.C.A. § 2253(c)(2).

In rejecting a petitioner's claim that experts should not be allowed to testify at all about a defendant's risk of reoffending, the Supreme Court made the following observations about a layperson's role in assessing risk or future dangerousness:

> It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal behavior is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant bail, for instance, must turn on a judge's prediction of the defendant's future conduct. Any sentencing authority must predict a person's probable future conduct when it engages in the process of determining what punishment to

> impose. For those sentenced to prison, the same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate is must determine.

Barefoot, 463 U.S. at 897 (quoting *Jurek v. Texas*, 428 U.S. 262, 274–76 (1976)).

In the death penalty context, the Supreme Court does not require that a finding of future dangerousness be based on expert testimony. *Barefoot*, 463 U.S. at 897 (noting that "there was only lay testimony with respect to dangerousness in *Jurek*"). If a factfinder can assess future dangerousness in a death penalty case, then a factfinder can assess future dangerousness under Chapter 980.

This Court should reject Stephenson's arguments and confirm that expert testimony, while helpful, is not required to prove that a sexually violent person is more likely than not to reoffend.

II. The State presented sufficient evidence to prove that Stephenson still qualified as a sexually violent person, subject to continued commitment under Chapter 980.

Stephenson next argues that even assuming expert testimony is not required, the State still failed to present sufficient evidence that he was more likely than not to reoffend. The State presented compelling evidence at trial that Stephenson was more likely than not to reoffend.

A. Standard of review

"We utilize the criminal standard of review to determine whether there is sufficient evidence to prove a

person was a sexually violent person subject to commitment." *Kienitz*, 227 Wis. 2d at 434. "The question of whether the evidence was sufficient to sustain" a commitment order "is a question of law, subject to [this Court's] de novo review." *State v. Smith*, 2012 WI 91, ¶ 24, 342 Wis. 2d 710, 817 N.W.2d 410.

B. Legal principles governing a sufficiency of the evidence claim

A court "may not reverse [a] commitment based on insufficient evidence" unless the evidence, "viewed most favorably to the state and the [commitment], 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" the individual to still qualify as a sexually violent person, by clear and convincing evidence. *Kienitz*, 227 Wis. 2d at 434 (second alteration in original) (quoting *State v. Curiel*, 227 Wis. 2d 389, 416, 597 N.W.2d 697 (1999)). If "any possibility exists that the trier of fact could have drawn appropriate inferences from the evidence adduced at trial to find" that the defendant is a sexually violent person, then "an appellate court may not overturn" the commitment, "even if it believes the trier of fact should not have found" the individual to be a sexually violent person based on the evidence before it." *Id.* at 434–35 (quoting *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)).

As noted above, "[t]he trier of fact determines issues of credibility, weighs the evidence, and resolves conflict in testimony." *Kienitz*, 227 Wis. 2d at 435. The factfinder may also "accept or reject an expert's opinion and accept or reject certain portions while disregarding others." *Mark*, 308 Wis. 2d 191, ¶ 51.

Given the above, a petitioner "bears a heavy burden" when raising a sufficiency challenge. *State v. Klingelhoets*, 2012 WI App 55, ¶ 10, 341 Wis. 2d 432, 814 N.W.2d 885. "It's very difficult for a defendant to convince an appellate court

that the evidence presented to a jury was insufficient to support a [commitment]." *United States v. Meza-Urtado*, 351 F.3d 301, 302 (7th Cir. 2003).

C. The State offered sufficient evidence to show that Stephenson was more likely than not to reoffend.

At a discharge trial, the State "has the burden of proving by clear and convincing evidence that the person meets the criteria for commitment as a sexually violent person." Wis. Stat. § 980.09(3). The clear and convincing standard is higher than the preponderance of the evidence standard and lower than the beyond a reasonable doubt standard. It is often referred to as the "intermediate standard." *Addington v. Texas*, 441 U.S. 418, 425 (1979); *State v. West*, 2011 WI 83, ¶ 76, 336 Wis. 2d 578, 800 N.W.2d 929 (referring to it as the "middle burden of proof") (citation omitted). "'Clear and convincing evidence' means evidence which, when weighed against that opposed to it, clearly has more convincing power." Wis. JI–Criminal 2506 (2017).

As discussed above, a sexually violent person means "a person who had been adjudicated of a sexually violent offence," "and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence." Wis. Stat. § 980.01(7). "'Mental disorder' means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." Wis. Stat. § 980.01(2). "'Likely' means more likely than not." Wis. Stat. § 980.01(1m).

Stephenson conceded that he has been convicted of a sexually violent offense and that he suffers from a qualifying mental disorder. (Stephenson's Br. 21–22.) Accordingly, the only issue here is whether the State offered sufficient evidence to show that Stephenson is more likely than not to

reoffend. The State offered compelling evidence that Stephenson was more likely than not to reoffend.

First, the State offered Stephenson's extensive record of sexual assault. As noted above, "[t]he fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness. Indeed, this concrete evidence may be at least as persuasive as any predictions about dangerousness that might be made in a civil-commitment proceeding." *Kienitz*, 227 Wis. 2d at 437 n.10 (quoting *Jones*, 463 U.S. at 354).

Furthermore, Stephenson continued to engage in sexual assault even after being repeatedly charged, convicted, and punished for his assaults. (R. 264:27, 51 ("[R]epeated offenses after having been sanctioned for a prior offense [is] an indication of irresponsibility which is in fact a component of antisocial traits"), ("Sexual recidivism after a single offense does not tend to be as high as sexual recidivism for individuals who have reoffended after multiple offenses.").)

Second and relatedly, Stephenson performed poorly on supervision. Despite receiving numerous opportunities to conform his behavior, Stephenson picked up multiple revocations and new offenses during his terms of supervision. (R. 264:54.)

Third, the State offered evidence that showed Stephenson has continued to violate the institution's rules. Stephenson admitted to making "an unauthorized phone call." (R. 264:29.) Stephenson also repeatedly covered his room window with a towel, even though he knew it was against the institution's rules. (R. 264:30–31.) More troubling, when caught by staff, Stephenson demonstrated manipulative and deceitful behavior by suggesting that he received permission from another staff member, when he had never received such permission. (R. 264:30–31.) Stephenson also demonstrated "resistance to rules" by ordering an item

hew knew was prohibited—women's "Satan thong underwear." (R. 264:36–37.)

Fourth, the State offered evidence that Stephenson did not take seriously his alcohol abuse disorder. As described above, Stephenson's statement that he that he saw "himself capable of social drinking in the community" was troubling, given his disorder. (R. 264:57–58, 120–22.) Even more concerning is the fact that Stephenson's sexual misbehavior is directly related to his drinking. (R. 264:20.)

Fifth, and perhaps most important, Stephenson estimated his own risk of reoffending to be a five out of ten. (R. 265:62–63.) Stephenson's own calculation of his risk, coupled with the other above-described evidence, provided the court with sufficient evidence to conclude that Stephenson was still more likely than not to reoffend.

Given the above, it cannot be said that the evidence, viewed most favorably to the State and the commitment, was so "insufficient in probative value and force" that "no trier of fact, acting reasonably, could have found" Stephenson to be a sexually violent person. *Kienitz*, 227 Wis. 2d at 434 (quoting *Curiel*, 227 Wis. 2d at 416).

Stephenson argues that the State presented no "substantive evidence for the trial court to use to decide for itself what Stephenson's risk really is, leaving the court to speculate on that issue." (Stephenson's Br. 22.) The State disagrees.

For example, both experts scored Stephenson a "seven" on the Static-99R. (R. 264:46; 265:114.) Kolbeck testified that that Stephenson's score corresponded to a 40.6 percent risk of being arrested or charged with a sexual offense in the next ten years. (R. 264:47.) In his report, which was submitted into evidence, Kolbeck acknowledged that scores on the Static-99R measure a ten-year risk of recidivism, not lifetime recidivism, as the statute requires. (R. 177:9.) Kolbeck also testified that

the actuarial assessments cannot account for undetected offenses. (R. 264:78.) Based on that information alone, the circuit court had "substantive evidence" to (1) find that Stephenson's score on the Static-99R undercalculated his risk and (2) conclude that Stephenson's lifetime risk of reoffending was more likely than not.

At the end of the day, Stephenson's sufficiency argument is just a reweighing of the evidence in the light most favorable to the defense. (Stephenson's Br. 21–36.) But that is not the test. If any possibility exists that the factfinder "could have drawn appropriate inferences from the evidence adduced at trial to find" that the defendant is a sexually violent person, then "an appellate court may not overturn" the commitment, "even if it believes the trier of fact should not have found" the individual to be a sexually violent person based on the evidence before it." *Kienitz*, 227 Wis. 2d at 434–35 (quoting *Poellinger*, 153 Wis. 2d at 507). Here, the court had sufficient evidence before it to conclude that Stephenson was more likely than not to reoffend. Because Stephenson has not met his "heavy burden" of demonstrating that the evidence was insufficient, his claim must fail. *Klingelhoets*, 341 Wis. 2d 432, ¶ 10.

CONCLUSION

This Court should affirm the circuit court's order denying discharge under Wis. Stat. § 980.09.

Dated this 18th day of April 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,053 words.

Dated this 18th day of April 2019.

_____
JENNIFER R. REMINGTON
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 18th day of April 2019.

_____
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