STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP002104

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 Dunn County Circuit Court, Judge Rod Smeltzer, Presiding

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REPLY BRIEF OF RESPONDENT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

ARGUMENT

The State Did Not Present Sufficient Evidence To Prove That Jamie Stephenson Is Likely To Engage In Acts Of Sexual Violence And Therefore Did Not Prove He Is Still A Sexually Violent Person.

A. To prove that a person meets the criteria for commitment under ch. 980 the state must present expert opinion testimony that the person is dangerous.

The state agrees that it must present expert testimony to prove that a person subject to ch. 980 proceedings has a "mental disorder" as defined in Wis. Stat. § 980.01(2). As the state concedes, whether a person has a mental disorder involves a subject that is "not within the realm of the ordinary experience of mankind, and which require[s] special learning, study, or experience." (State's brief at 22-23, *quoting* ***Cramer v. Theda Clark Memorial Hospital***, 45 Wis. 2d 147, 150, 172 N.W.2d 427 (1969)).

The state also agrees that under ch. 980 a person's dangerousness "must be connected to his mental disorder" given that Wis. Stat. § 980.01(7) defines a "sexually violent person" as someone "who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will

engage in … acts of sexual violence." (State's brief at 22). Despite its recognition of the need to prove a connection between mental disorder and dangerousness, however, the state claims it need not present expert testimony to prove dangerousness. Its arguments in support of this claim should be rejected.

The state claims the necessary link between mental disorder and dangerousness is satisfied once an expert has testified the person has a mental disorder. This is so, the state argues, because "mental disorder" is defined in § 980.01(2) as a condition that *predisposes* a person to engage in acts of sexual violence, so the expert testimony needed to establish the person's diagnosis will include evidence the person has a predisposition to engage in sexually violent acts. While proving a person has a mental disorder requires an expert opinion, the state claims dangerousness is a matter of "how high the person's risk of reoffending is, given his predisposition," and that does not require expert testimony. (State's brief at 22). "Risk is not a medical issue that must be assessed by an expert." (*Id.* at 23). Instead, risk can be established by consideration of all the other evidence. (*Id.* at 19-20).

Expert testimony that a person has a *predisposition* to commit sexually violent acts along with other testimony about risk is not sufficient to prove the link between mental disorder and dangerousness, for the following reasons.

First, the clear language of § 980.01(7) requires proof that the person is dangerous "*because* he or she suffers from *a mental disorder that makes it likely*" the person will commit sexually violent acts. This language directly links the mental disorder to a specific level of risk—namely, that the person is "likely" to reoffend, defined in § 980.01(1m) as "more likely than not." By requiring proof that the person's likely reoffending is caused by his mental disorder, the statute treats dangerousness as an extension of the question of whether the person has a mental disorder. As with the question of whether the person has a mental disorder, the question of whether the mental disorder makes the person dangerous cannot be answered without specialized knowledge, study, skill, or experience on a subject that is not within the realm of the ordinary experience of lay persons.

The link between mental disorder and the requisite level of risk is not just a requirement of § 980.01(7). It is also required by the constitutional limits to commitments under ch. 980. Substantive due process demands that commitments like those under ch. 980 apply not to typical criminal recidivists, but to offenders who have a mental disorder that causes them serious difficulty in controlling behavior.

As explained in Stephenson's brief-in-chief (at 12-16), this is clear from the cases starting with ***Kansas v. Hendricks***, 521 U.S. 346 (1997), which, in upholding the Kansas sexually violent person law, noted that "[a] finding of dangerousness, standing

alone," is ordinarily not sufficient to justify indefinite involuntary commitment. ***Id.*** at 358. Instead, "proof of some additional factor," such as a mental disorder," is needed "to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control." ***Id.*** Like § 980.01(7), the Kansas statute reviewed in ***Hendricks*** required proof that the person being committed had a mental disorder that made the person likely to engage in acts of sexual violence. ***Id.*** at 352. Because the statute required a finding of future dangerousness linked to the existence of a mental condition "that makes it difficult, if not impossible, for the person to control his dangerous behavior," the statute "narrows the class of persons eligible for confinement to those who are unable to control their dangerousness." ***Id.*** at 358. ***Kansas v. Crane***, 534 U.S. 407 (2002), reaffirmed the need for proof of mental disorder that causes serious difficulty in controlling behavior to distinguish the mentally disordered sexual offender subject to civil commitment from the dangerous but typical recidivist subject to criminal sanctions.

In applying ***Hendricks*** and ***Crane*** to ch. 980, ***State v. Laxton***, 2002 WI 82, 254 Wis. 2d 185, 647 N.W.2d 784, read ch. 980 to comport with ***Hendricks*** and ***Crane*** because it "requires a nexus between the mental disorder and the individual's dangerousness. Proof of this nexus necessarily and implicitly involves proof that the person's mental disorder involves serious difficulty for the person to control his or her behavior." ***Id.***, ¶22. ***Laxton*** found the required nexus

in § 980.01(7)'s provision that a person is "dangerous *because* he or she suffers from a *mental disorder* that *makes it substantially probable that the person will engage in acts of sexual violence*." ***Id.*** (emphasis supplied by court).[1]

Under these cases, then, ch. 980 requires proof that the person has a mental disorder that causes a person serious difficulty in controlling his behavior. While this requirement is not explicit in the statutory text, the requirement in § 980.01(7) that the person's mental disorder cause the specified level of risk assures the lack-of-control requirement is met. To put it another way: The person is more likely than not to reoffend because his mental disorder causes him to be unable to control his behavior; thus, the person is not an ordinary recidivist and may be subject to civil commitment.

Accordingly, in light of § 980.01(7)'s clear language and ***Hendricks***, ***Crane***, and ***Laxton***, it is crucial there be proof that a person's mental disorder is the cause of the person's high risk of reoffending. Because ch. 980's dangerousness element, like its "mental disorder" element, requires evidence about the effect of a mental disorder, the dangerousness element must be established with expert opinion testimony. As with the question of whether a person *has* a mental disorder, the question of whether the

[1] When ***Laxton*** was decided, the risk standard was "substantially probable." That was changed to the current standard of "more likely than not" by 2003 Wisconsin Act 187.

disorder causes the requisite level of risk requires special knowledge, skill, or experience that is not within the realm of ordinary experience of a judge or jury. ***Cramer***, 45 Wis. 2d at 150.

The dangerousness element is also like the tort cases Stephenson cited in his brief (at 10-11), which the state dismisses without discussion (brief at 22). In particular, determining dangerousness under ch. 980 is indistinguishable from the issue presented in ***Wal-Mart Stores, Inc. v. LIRC***, 2000 WI App 272, 240 Wis. 2d 209, 621 N.W.2d 633, where an employee asserted that the behavior that led to his firing was caused by his obsessive-compulsive disorder, so by firing him the employer discriminated against him because of his disability. 240 Wis. 2d 209, ¶¶2-7. This court held that whether the employee's disorder caused his behavior was a complex and technical issue of "medical/scientific fact." ***Id.***, ¶19. Thus, it was not within the realm of ordinary experience and the employee needed to present expert testimony to support the claim. ***Id.***, ¶¶16-19. It follows that whether a person is dangerous as defined by ch. 980 is a "medical/scientific fact" and proving it requires expert testimony that the person meets that standard of dangerousness.

Furthermore, contrary to the state (brief at 22), expert testimony that the person has a mental disorder and, therefore, is predisposed the person to offend is not sufficient to establish the required link between mental disorder and dangerousness.

Predisposition alone does not satisfy the demand for evidence that the mental disorder causes the person serious difficulty in controlling his behavior because predisposition and lack of control are different; a person can have a predisposition that he can control, in which case he is not dangerous for purposes of ch. 980. *Cf.* ***Hendricks***, 521 U.S. at 357 (due process requires proof of "more than a mere predisposition to violence; rather, it requires evidence of … a present mental condition that creates a likelihood" of reoffending).

Nor is it enough for an expert to "assist" the factfinder by identifying "risk factors"—*e.g.*, age, criminal history for sexual and non-sexual crimes, treatment history—that the factfinder can use to determine risk. (State's brief at 16-17, 17-18, 19-20). Ordinary factfinders do not have the special knowledge, skill, and experience to assess whether such factors establish that the person's mental disorder causes the requisite level of risk. It is not always clear how or even whether the factors relate in any way to the person's mental disorder or, most crucially, to the effect of the disorder on the person's risk. In particular, a factfinder may not rely solely on the person's history of offending to conclude he meets the requisite level of risk. (State's brief at 17-18). Evidence of the respondent's prior sexually violent offenses is insufficient by itself to prove the respondent has a mental disorder. Wis. Stat. § 980.05(4); ***State v. Sorenson***, 2002 WI 78, ¶20, 254 Wis. 2d 54, 646 N.W.2d 354. Logically, it must also be

insufficient by itself to prove the person's mental disorder makes him dangerous.

In addition, to the extent the risk factors the state points to relate primarily to the risk of general criminal recidivism, they distract from rather than illuminate whether the person's mental disorder makes it likely he will commit sexually violent acts. Thus, the state's reference to death penalty cases is inapt. (State's brief at 23-24). Those cases are concerned with a defendant's general risk of future criminality, of ordinary recidivism; ch. 980 is not. As a matter of statutory language and substantive due process, ch. 980 demands that the offender pose a requisite level of risk that is caused by a mental disorder. Risk assessments used in ordinary criminal proceedings about ordinary recidivists do not ask if the risk is caused by the offender's mental disorder.

Two more points. The state argues factfinders are not bound by experts' testimony, but are free to weigh the testimony and accept or reject the testimony in whole or in part. (State's brief at 16-19, 19-20). That is true. But whether an expert's testimony is credible or entitled to more or less weight is a wholly separate question from whether expert testimony is necessary before the issue even gets to a factfinder for a decision. If a case presents an issue that is complex or technical enough to require the assistance of expert testimony, then the *absence* of such testimony would require the factfinder to engage in speculation to decide the case and the lack of expert testimony "constitutes an

insufficiency of proof." ***Wal-Mart Stores***, 240 Wis. 2d 209, ¶16, *quoting* ***Cramer***, 45 Wis. 2d at 152. The insufficiency means the plaintiff's (or petitioner's) claim may be dismissed without being considered by the factfinder. *See* ***Reuben v. Koppen***, 2010 WI App 63, ¶34, 324 Wis. 2d 758, 784 N.W.2d 703. If a particular issue must be proved with expert testimony, the rule that the factfinder is not bound to accept expert testimony comes into play only if the plaintiff or petitioner secures the required expert witness; if the plaintiff or petitioner is unable to do that, there is no expert opinion evidence for the factfinder to consider.

Lastly, requiring the state to present expert opinion testimony on dangerousness will not lead to absurd results, as the state posits (brief at 21). The state creates a straw man "numbers guy" expert who does nothing but plug information from treatment records into an actuarial coding table. In fact, the "numbers" aspect of ch. 980 evaluations–the use of actuarial instruments like Static-99R—is only one part of the assessment. As illustrated by Donn Kolbeck, the state's expert, ch. 980 evaluations involve an in-person interview; a thorough review of treatment records containing information about person's words and actions along with treatment providers' assessments; and then use of various research-based assessment tools that guide the expert's evaluation of the person. (264:15-16, 42-46, 59-64). Risk is never reduced to "numbers." Thus, if a committed person credibly assures the factfinder he

is "100 percent" going to reoffend, no expert is going to remain unmoved by that declaration.

B. Even if the state need not present expert opinion testimony to prove dangerousness, the evidence in this case is insufficient to prove that element.

Because Kolbeck testified that Stephenson is *not* dangerous as defined in ch. 980, the state argued in the trial court that, for two basic reasons, Kolbeck's opinion about Stephenson's risk to reoffend was too low. In this court the state renews and elaborates somewhat on its argument.

First, the state argued below that the actuarial instruments understate risk because they are based on samples of offenders who were charged or convicted over a 10 year period. (265:147-48, 149; A-Ap. 107-08, 109). The state renews this claim (brief at 28-29), though in a conclusory manner that fails to address why those limitations provide no basis to conclude Stephenson meets the risk standard. As Stephenson argued (brief-in-chief at 30-32), the existence of the limitations does not tell us *how much* the risk is understated, either generally or in Stephenson's case specifically. Nor do the limitations provide substantive evidence on which to assess whether Stephenson is likely to reoffend *because of his mental disorder*. To reach conclusions about those matters, the factfinder needs evidence on which it could reasonably assess how much the instruments

understate Stephenson's risk. The state's conclusory argument cites no such evidence, as there was none.

While the court was not required to credit Kolbeck's careful efforts to account for undetected offenses and lifetime risk (177:9; 264:77-81), there is no evidence his efforts were wrong and, again, no evidence about how much the risk for mentally disordered offenders is understated because of the flaws in the risk instruments. In the absence of such evidence, a factfinder can only speculate about how much the risk instruments understate Stephenson's risk when they are applied to him. A factfinder cannot base its decision on conjecture and speculation. ***State ex rel. Kanieski v. Gagnon***, 54 Wis. 2d 108, 117, 194 N.W.2d 808 (1972).

Second, the state argued below that Stephenson's "pattern of behavior" over time showed he is more likely than not going to reoffend. (265:149, 164; 266:9-10; A-Ap. 108, 124, 145-46). The state reiterates its claim, citing Stephenson's criminal, supervision, and institutional records and a statement he made about his risk. (State's brief at 27-28).

As Stephenson argued at length (brief-in-chief at 33-36), his "pattern of behavior" does not show the evidence at trial was sufficient to prove he is more likely than not going to commit sexually violent offenses *because of his mental disorder*. While the evidence of Stephenson's "pattern of behavior" at trial supports Kolbeck's diagnosis of OSPD (264:27,

265:145-46; A-Ap. 105-06), diagnosing a mental disorder is only the first step. The next step is showing that the mental disorder is more likely than not going to cause the person to engage is certain behavior.

The "pattern of behavior" evidence does not show that risk here. First, for a committed person who has engaged in significant treatment, relying solely on the "pattern of behavior" that led to the original commitment would mean no person could be discharged because his prior behavior can never change. As to Stephenson's recent conduct at SRSTC, none of it involves sexual misconduct, and it shows his improvement dealing with being held accountable, consistent with Kolbeck's conclusion that Stephenson is exhibiting a declining trajectory of antisocial traits. (179; 180; 181; 182; 183; 264:27-32, 33, 34-40, 99, 101-02; 265:10-13, 17-19; 265: 10-13, 17-19). Thus, the incidents provide no additional probative evidence that, because of his diagnosed mental disorders, Stephenson will more likely than not commit acts of sexual violence in the future.

As to Stephenson's comments about alcohol use, while Kolbeck expressed some concern Stephenson was relaxing his previously expressed belief that he must maintain absolute sobriety, he concluded Stephenson has taken significant steps at SRSTC to maintain his sobriety. (264:57-59, 118-20, 121-22). Moreover, seen against the other significant factors supporting Kolbeck's conclusion, one remark

does not suffice to prove Stephenson is more likely than not going to reoffend.

Finally, the state says "perhaps [the] most important" fact is Stephenson's own estimate in 2016 that his re-offense risk was "five out of ten." (State's brief at 28, *citing* 265:62-63). The probative weightlessness of this remark is clear from its staleness. It was made 18 months before trial (142:26) and was superseded by a more confident attitude a year later, after a period of "impressive treatment progress gains" that led him to declare "I don't think I would" commit additional sex offenses. (185:9).

CONCLUSION

For the reasons given above and in Stephenson's brief-in-chief, the state did not present sufficient evidence to prove that his mental disorder makes it more likely than not he will engage in acts of sexual violence. The circuit court's order denying Stephenson's petition for discharge should be reversed and the case remanded with directions that he be discharged from the commitment.

Dated this 10th day of May, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,000 words.

CERTIFICATE OF COMPLIANCE WITH RULE 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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 10th day of May, 2019.

Signed:

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