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

December 8, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 98-1396**

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

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**IN RE THE COMMITMENT OF JOHN T. SHAW:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**v.**

**JOHN T. SHAW,**

**RESPONDENT-APPELLANT.**

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APPEAL from orders of the circuit court for Marinette County: DENNIS J. MLEZIVA, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

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

CANE, C.J. After a nonjury trial, John Shaw appeals two orders, one requiring his civil commitment as a sexually violent person under ch. 980, STATS., and another denying his postjudgment motions. Shaw makes the

following arguments: (1) the definition of "substantially probable" under § 980.01(7), STATS., is unconstitutionally vague, or alternatively, the trial court erred by defining the term as "more likely than not" and that the evidence was therefore insufficient to prove he is sexually violent; (2) the trial court erred by denying his motion to dismiss because under § 980.02(1), STATS., the district attorney has no authority to file the petition unless either the Department of Corrections (DOC) refers the matter to the district attorney or the Department of Justice (DOJ) declines to file it; (3) the trial court erroneously exercised its discretion by releasing his confidential presentence investigation reports for use in the petition, by experts, and at trial; (4) the State failed to establish probable cause because the trial court erroneously permitted the expert at the probable cause hearing to rely on confidential presentence investigation reports (PSI reports); (5) postpetition release of the PSI reports for use in the petition was error; (6) the PSI reports were inadmissible at trial because they violated his confrontation rights and were inadmissible hearsay; (7) restrictive postcommitment release provisions in ch. 980 are "unconstitutionally punitive"; and (8) we should grant a new trial in the interest of justice because the real issue, the likelihood that Shaw would reoffend, was not fully tried.

Because we recently defined "substantial probability" as "considerably more likely to occur than not to occur" in ***State v. Kienitz***, 221 Wis.2d 275, 585 N.W.2d 609 (Ct. App. 1998), *rev. granted*, we reverse and remand this case to the trial court for its determination under that standard. On remand, we further direct the trial court to consider whether to waive the confidentiality of the PSI reports under both § 972.15(4), STATS., and the applicable factors in ***State v. Zanelli***, 212 Wis.2d 358, 374-76, 569 N.W.2d 301, 308 (Ct. App. 1997). In addition, we instruct the trial court to analyze the

admissibility of the hearsay statements in the PSI reports. We reject Shaw's remaining arguments. Therefore, we affirm in part, reverse in part and remand with directions.

## I. BACKGROUND

In February 1996, the State filed a ch. 980, STATS., petition alleging that Shaw is dangerous because he suffers from a mental disorder, pedophilia, which creates a substantial probability he will engage in future sexual violence. Shaw filed a motion to dismiss the petition, asserting various grounds for the statute's unconstitutionality, including that it violated equal protection and substantive and procedural due process. Shaw's motion also alleged that pursuant to § 980.02(1), STATS., the district attorney had no authority to file the petition. At the probable cause hearing, the trial court found probable cause to believe Shaw is sexually violent under § 980.04(2), STATS., and set a trial date. The trial court accepted the State's experts' definition of "substantially probable" as "more likely than not," and concluded that Shaw suffers from the mental disorder of pedophilia and is dangerous to others because he presents a substantial probability of committing future acts of sexual violence We will discuss additional facts as necessary.

## II. ANALYSIS

### 1. Definition of "Substantially Probable" & Sufficiency of the Evidence

Section 980.01(7), STATS., defines a "sexually violent person" as "a person who has been convicted of a sexually violent offense … and who is

dangerous because he or she suffers from a mental disorder[1] that makes it substantially probable that the person will engage in acts of sexual violence." In denying Shaw's motion to dismiss, the trial court rejected the argument that "substantially probable" was vague, relying on ***State v. Carpenter***, 197 Wis.2d 252, 541 N.W.2d 105 (1995), and ***State v. Post***, 197 Wis.2d 279, 541 N.W.2d 115 (1995). At the bench trial, the parties disputed the meaning of "substantial probability," and the court ordered post-trial briefs on the definition. The State's experts, Drs. Ronald Sindberg and Margaret Alexander, defined "substantial probability" as "more likely than not." The trial court adopted the State's experts' definition, "more likely than not," to find Shaw sexually violent.

Shaw raises a number of challenges regarding the trial court's definition of substantial probability. He argues: (1) that the "element of dangerousness" in § 980.01(7), STATS., is unconstitutionally vague; (2) the trial court's post-trial adoption of the "more likely than not" standard was vague and violated his due process right to fair notice because he did not know what standard the court would apply; and (3) because "substantially probable" means "extreme likelihood," insufficient evidence supports his commitment.

After the trial court's decision in this case, we decided ***Kienitz*** in which we rejected an argument that "substantially probable" means "extreme likelihood" and concluded that "substantially probable" in § 980.01(7), STATS., means "considerably more likely to occur than not to occur." ***Id***. at 294-95, 585 N.W.2d at 616-17. We perceive a difference in degree between the standard we

[1] Section 980.01(2), STATS., defines a "mental disorder" as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence."

adopted in ***Kienitz*** and the standard the trial court applied here. Accordingly, we reverse and remand to the trial court for its determination under the ***Kienitz*** standard.

Although the matter is remanded, we address some of Shaw's remaining arguments because they are likely to arise on remand. First, we point out that the supreme court in ***Post*** rejected Shaw's constitutional challenge to the definition of dangerousness. *See* ***id***. at 302, 541 N.W.2d at 122. Second, we reject Shaw's suggestion in his insufficiency of the evidence argument that in a ch. 980, STATS., case, "expert testimony is needed to help the trier of fact determine, *based on actuarial methods*, the particular probability that the individual" will engage in future acts of sexual violence. (Emphasis added.)

Wisconsin law does not mandate that experts testifying in a ch. 980, STATS., case base their testimony on actuarial methods. Requiring adherence to one particular behavioral science methodology to predict future sexual violence, such as actuarial methods, would dissolve the important distinction between the legal and behavioral science standards our supreme court discussed in ***Post***. ***Kienitz***, 221 Wis.2d at 307, 585 N.W.2d at 622 (discussing ***Post***). Rather, if the witness is qualified, and the expert testimony is both relevant and of assistance to the trier, it is admissible. ***Id***. Once admitted, the fact finder decides whether the expert's testimony is reliable. ***Id***. Finally, we point out that the appellate standard

of review for sufficiency of the evidence in a ch. 980 case is the same standard we apply in criminal cases.[2] ***Id***. at 301-02, 585 N.W.2d at 619-20.

**2. District Attorney's Authority to File the Petition under § 980.02(1), STATS.**

Both parties agree that § 980.02(1), STATS., is clear and unambiguous, but they disagree about its meaning. Shaw argues that under § 980.02(1), the district attorney has no authority to file a ch. 980 petition unless the DOC has requested that a petition be filed, or the DOJ declines to file one. Although Shaw concedes that the statute is unambiguous, he points to the statute's legislative history, which he contends clearly expresses the legislature's intent that the DOC and DOJ be "gatekeepers" in ch. 980 cases. Thus, Shaw reasons, because the district attorney filed the petition neither pursuant to the DOC's referral or after the DOJ's declination, we must dismiss the State's petition. In response, the State insists that the statute's unambiguous language allows the appropriate district attorney to file a petition without referral or declination.

The trial court concluded that § 980.02(1), STATS., allows the petition to be filed by one of the persons listed, including the district attorney for the county where the defendant was convicted. Shaw was convicted in Marinette County, and the district attorney for Marinette County filed the petition. We agree with the trial court that under the unambiguous language of § 980.02(1), the district attorney here had authority to file the petition.

[2] The standard of review for a challenge to a verdict based on the sufficiency of evidence in a ch. 980, STATS., case is as follows: "[W]e reverse only if the evidence viewed in the light most favorable to the verdict is so insufficient in probative value and force that it can be said as a matter of law that no reasonable trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Kienitz***, 221 Wis.2d 275, 301, 585 N.W.2d 609, 619 (Ct. App. 1998), *rev. granted*.

Section 980.02(1), STATS., provides that a "petition alleging that a person is a sexually violent person may be filed by *one of the following*:"

> (a) *The department of justice* at the request of the agency with jurisdiction, as defined in s. 980.015(1), over the person. If the department of justice decides to file a petition under this paragraph, it shall file the petition before the date of the release or discharge of the person.
>
> (b) *If the department of justice does not file* a petition under par. (a), *the district attorney* for one of the following:
>
> 1. The county in which the person was convicted of a sexually violent offense, adjudicated delinquent for a sexually violent offense or found not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect or illness.
>
> 2. The county in which the person will reside or be placed upon his or her discharge from a sentence, release on parole, release from imprisonment, from a secured correctional facility, as defined in s. 938.02(15m), or a secured child caring institution, as defined in s. 938.02(15g), or from a commitment order. (Emphasis added.)

The interpretation of a statute is a question of law we review de novo. ***State v. Setagord***, 211 Wis.2d 397, 405-06, 565 N.W.2d 506, 509 (1997). The goal of statutory interpretation is to ascertain the legislature's intent, and to do so, we first consider the statute's language. ***Id***. If the statute's language clearly and unambiguously sets forth the legislative intent, we apply that language to the case before us and do not look beyond the language to ascertain its meaning. ***Id***. at 406, 565 N.W.2d at 509. A statute is ambiguous when it is capable of being understood in two or more different ways by reasonably well-informed persons. ***Id***. at 406, 565 N.W.2d at 510. If a statute is ambiguous, we look to the scope, history, context, subject matter and object of the statute to ascertain legislative intent. ***Id***. "However, resort to legislative history is not appropriate in the absence

of a finding of ambiguity." ***Id***.; *see also* ***State v. Swatek***, 178 Wis.2d 1, 5, 502 N.W.2d 909, 911 (Ct. App. 1993).

Section 980.02(1), STATS., is straightforward. It provides that a ch. 980, STATS., petition may be filed by "*one* of the following," and then sets forth who may file. Subsection (a) allows the DOJ to file the petition at the request of the agency with jurisdiction.[3] If the DOJ does not file a petition under subsec. (a), the petition may be filed by the district attorney either for the county in which the person was convicted of a sexually violent offense or the county in which the person will reside or be placed upon discharge. *See* § 980.02(1)(b), STATS. Subsection (b) gave the district attorney authority to file the petition because: (1) the DOJ did not file the petition; and (2) it was filed by the district attorney for the county in which Shaw was convicted. Nothing in § 908.02(1) supports Shaw's reading that the DOC and DOJ are keepers of the gate through which the district attorney must pass to file the petition.

Here, the parties agree that the statute is unambiguous, but disagree as to its meaning. This does not render the statute ambiguous. *See* ***Setagord***, 211 Wis.2d at 406, 565 N.W.2d at 510. Because the statute is unambiguous and clear on its face, it is inappropriate to resort to the legislative history Shaw sets forth at length in his brief. *See* ***id***. In summary, we hold that § 980.02(1), STATS., allows the following to petition the court for commitment under ch. 980: (1) the DOJ (after referral from the agency with jursidiction); *or* (2) the district attorney (a) in the county of conviction *or* (b) the county in which the person will reside or be

[3] Section 165.255, STATS., provides that the DOJ "may, at the request of an agency with jurisdiction under s. 980.02(1), represent the state in sexually violent person commitment proceedings under ch. 980."

placed on discharge. Accordingly, the trial court properly denied Shaw's motion to dismiss the petition.

**3. Confidentiality of the PSI Reports**

Shaw moved to dismiss the petition in part because it was based on confidential information contained in the PSI reports. The petition referenced Dr. Margaret Alexander's report, and her report relied, in part, on PSI reports prepared in 1985 and 1988. Further, the petition quotes the reports. The trial court denied the motion after an analysis under § 972.15(4), STATS.

A trial court may waive the confidentiality bar to PSI reports under § 972.15(4),[4] STATS., which allows the reports to be made available "upon specific authorization of the court." ***Zanelli***, 212 Wis.2d at 378, 569 N.W.2d at 309. In ***Zanelli***, we concluded that the trial court has discretion to apply § 972.15(4) to disclose the PSI reports to the State's psychologists who determine whether a person is sexually violent. ***Id***. at 378, 569 N.W.2d at 309. To make this discretionary determination, the trial court should consider the following factors: (1) the relevancy of the information in the PSI reports; (2) whether the evidence contained in the PSI reports is available from other sources; (3) the probative value of the evidence and its potential for unfair prejudice; and (4) all other relevant factors. ***Id***. We also noted in ***Zanelli*** that a trial court should make a similar decision regarding the use of PSI reports evidence at trial. ***Id***. A trial court should make both determinations on a case-by-case basis. *See* ***id***.

[4] Section 972.15(4), STATS., provides that: "After sentencing, unless otherwise authorized under sub. (5) or ordered by the court, the presentence investigation report shall be confidential and shall not be made available to any person except upon specific authorization of the court."

The record reflects that the trial court considered the reports' relevancy and potential prejudice. The trial court found that the PSI reports were relevant for "a full and clear picture of his present situation" especially treatment issues. Additionally, the trial court determined that Shaw was familiar with the information in the PSI reports, had ample time before trial to properly address this information, and had the opportunity at trial to cross-examine William Drier, the person who prepared the PSI reports. It therefore concluded that the evidence's probative value outweighed its potential for unfair prejudice. We agree. However, the record does not reflect the trial court's consideration of whether the evidence contained in the reports was available from other sources. Accordingly, on remand, the trial court must also consider, on the record, whether the evidence in the PSI reports was available from other sources and also consider any other factors it deems relevant.[5] *See* ***id***. at 377-78, 569 N.W.2d at 309.

**4. Probable Cause and "Post-Petition Release"**

Shaw contends that the trial court should have dismissed the petition because without Alexander's testimony, which Shaw asserts was based on confidential information, no probable cause existed. *See* §§ 980.04(3) and 980.05, STATS. He also argues that the petition was defective because it improperly relied on information contained in the PSI reports that had not been released by court order.

[5] The State argues that § 972.15(5), STATS., authorizes use of existing PSI reports during ch. 980, STATS., proceedings. We rejected this argument in ***State v. Zanelli***, 212 Wis.2d 358, 377-78, 569 N.W.2d 301, 309 (Ct. App. 1997), in which we held that the trial court improperly applied § 972.15(5), to justify using PSI reports in the petition or as evidence at trial. Consequently, on remand, we directed the trial court in ***Zanelli*** to use its discretionary authority under § 972.15(4).

At a pretrial motion hearing, the trial court found that:

> the petition would meet probable cause standards under the statute 980.02 even without the statements attributed to Mr. Shaw from the … Presentence Investigation Report, recounted in the petition. His record of sexually-related crimes and convictions, together with his refusal of treatment in prison and the psychological diagnosis in prison as to his mental condition, provides a sufficient basis for the petition itself.

The court also concluded that while Alexander's opinion was based in part on the PSI reports, "much more information" supported her opinion. In its decision, the trial court reiterated that even "without relying on any specific information from the presentence investigation reports," there was sufficient evidence in the petition and evidence in the record at the probable cause hearing to meet the statutory allegations in the petition under § 980.02, STATS., and probable cause under 980.04, STATS. Based on our review of the record, we agree with the trial court.[6]

At the outset, we conclude that the rules and standards governing a preliminary examination in felony cases likewise apply to a ch. 980, STATS., probable cause hearing. When the sole evidence presented on the probable cause issue is inadmissible, the trial court's determination of probable cause must fail. *See* ***State v. Gerald L.C.***, 194 Wis.2d 548, 564-65, 535 N.W.2d 777, 782 (Ct. App. 1995). To find probable cause in a criminal proceeding, a court determines whether a believable or plausible account of the defendant's guilt exists. *See* ***State v. Dunn***, 121 Wis.2d 389, 398, 359 N.W.2d 151, 155 (1984). Similarly, we conclude that in a ch. 980 probable cause hearing, the court must determine

[6] While a "fair and errorless trial" cures any error at the preliminary "probable cause" hearing in felony cases, *see* ***State v. Webb***, 160 Wis.2d 622, 636, 467 N.W.2d 108, 114 (1991), the commitment trial here was not errorless.

whether there exists a believable or plausible account that the subject of the petition is sexually violent. The court neither weighs the evidence, ***State v. Marshall***, 92 Wis.2d 101, 115, 284 N.W.2d 592, 598 (1979), nor considers the witnesses' credibility. ***State v. Padilla***, 110 Wis.2d 414, 423-24, 329 N.W.2d 263, 268 (Ct. App. 1982).

The record reveals that Alexander was the only witness to testify at the probable cause hearing. To diagnose Shaw with pedophilia,[7] Alexander relied upon, in addition to the PSI reports: her clinical file; the social service file and its program review committee notes; her psychological evaluation; transcripts in the district attorney's file; and a 1985 psychological evaluation. Alexander had information about Shaw's prior convictions and crimes from court files, his refusal of sex offender treatment as contained in his program reviews, and Shaw's mental disorders and history of sexual abuse from his mental health records and clinical services reports. These materials provide sufficient support for Alexander's diagnosis and the court's determination that probable cause existed.

Likewise, we conclude, for similar reasons supporting the trial court's finding of probable cause at the hearing, that the petition was sufficient, even absent the information from the PSI reports, because its essential facts indeed establish probable cause.

**5. Hearsay and Confrontation Objections to the Presentence Investigation Reports**

A trial court may waive the confidentiality bar and release PSI reports if it appropriately exercises its discretion under § 972.15(4), STATS. The

[7] Alexander also diagnosed Shaw with "alcohol abuse in institutional remission," but she testified that his alcohol abuse was not pertinent to a ch. 980, STATS., commitment.

PSI reports, however, are still subject to the rules of evidence and constitutional considerations, including hearsay rules and a respondent's confrontation right. At trial, Shaw also objected to the admission of the PSI reports on the grounds that the reports contained multiple layers of hearsay and violated his right to confrontation. After Shaw's probation and parole officer, Drier, testified that he had prepared the PSI reports, the trial court overruled Shaw's objections:

> I'm going to overrule the objection. I believe, as indicated, that Mr. Drier is here to answer the questions about it and I believe that if there is any hearsay involved that can be addressed and pointed out and that will go to the weight of the evidence in terms of the report. It's a written document prepared in the ordinary course of business by the Department, and I believe as such is admissible. And the underlying weight is a matter of argument and can be pointed out, as I indicate, by counsel in cross examination.

Shaw's counsel then argued that the PSI reports not only contained statements from Drier, but statements of other parties and therefore contained "hearsay within hearsay." The trial court again acknowledged that the PSI reports contained hearsay, but noted that the reports were admissible as records the department prepared for the court in the ordinary course of business. In its post-trial decision, the trial court again stated that the PSI reports fall under § 908.03(6), STATS.,[8] the hearsay exception for regularly conducted activity. Further, it again rejected Shaw's confrontation objection, noting that although "§ 980.03(2), STATS., does not specifically state a right to confrontation," Drier, the person who prepared both PSI reports, testified at trial "so that the reliability of the information in the [reports] could be challenged by cross examination."

[8] The trial court's decision cites § 980.03(6), STATS., as the applicable statute. Section 980.03(6) does not exist. From the context of the court's decision, however, we assume that this was a typographical error and that the trial court meant § 908.03(6), STATS.

Shaw refers to the PSI report as a "business records exception"[9] and argues that it does not extend to a probation officer's report containing hearsay, citing ***Rusecki v. State***, 56 Wis.2d 299, 201 N.W.2d 832 (1972), and ***Wilder v. Classified Risk Ins. Co.***, 47 Wis.2d 286, 177 N.W.2d 109 (1970). Shaw takes issue with Drier's testimony, based on the 1985 PSI report, concerning: (1) Shaw's prior record; (2) information from Shaw's wife that he molested their daughter in 1965 and also molested their grandchildren; and (3) information about his release on parole. Additionally, Shaw complains that Drier used the 1988 PSI report to introduce information that Shaw: (1) had "rejected any involvement in counseling regarding or relating to his sexual adjustment problems upon parole"; and (2) was not involved in clinical service treatment due to sexual behavior problems during his incarceration. In response, the State contends that each level of hearsay was admissible under the hearsay rules and that the evidence therefore did not violate Shaw's confrontation rights.

We review a trial court's decision to admit evidence for misuse of discretion. *See* ***State v. Bellows***, 218 Wis.2d 614, 627, 582 N.W.2d 53, 59 (Ct. App. 1998). A trial court exercises the appropriate discretion when it examines the relevant facts, applies a proper standard of law, uses a demonstrative rational process, and reaches a conclusion that a reasonable judge could reach. *See* ***State v. Sullivan***, 216 Wis.2d 768, 780, 576 N.W.2d 30, 36 (1998). Generally, we look for reasons to sustain discretionary determinations. *See* ***Steinbach v. Gustafson***, 177 Wis.2d 178, 185-86, 502 N.W.2d 156, 159 (Ct. App. 1993).

[9] It is misleading to characterize § 908.03(6), STATS., as a "business records exception" because the exception extends to records for any regularly conducted activity. 7 DANIEL D. BLINKA, WISCONSIN PRACTICE: EVIDENCE § 803.6 at 479 (1991).

Under § 908.01(3), STATS., hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ***State v. Patino***, 177 Wis.2d 348, 362, 502 N.W.2d 601, 606-07 (Ct. App. 1993). Multiple layers of hearsay may be admissible if each layer falls under a recognized hearsay exception. *See* ***id***. (citing § 908.05, STATS.). To admit the PSI reports, the trial court relied on § 908.03(6), STATS., which provides as follows:

> **RECORDS OF REGULARLY CONDUCTED ACTIVITY**. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate lack of trustworthiness.

Because multiple layers of hearsay are common with business records, this exception allows for the admission of layers of hearsay within this single exception. *See* 7 DANIEL D. BLINKA, WISCONSIN PRACTICE: EVIDENCE, § 803.6 at 481 (1991) (*citing* MCCORMICK, EVIDENCE, § 324.3 at 912 (3d ed. 1984)). Section 908.03(6), STATS., however, requires that all the declarants involved in the document's making be part of the organization that prepared it. ***State v. Gilles***, 173 Wis.2d 101, 113, 496 N.W.2d 133, 138 (Ct. App. 1992). If one of the declarants is not part of the organization, an additional level of hearsay is presented, and if the statements are offered for truth of the matter asserted, each additional level must fall under some other exception. *See* ***id***. at 113-14, 496 N.W.2d at 138; *see also* BLINKA, § 803.6 at 483.

The trial court in this case erroneously concluded that § 908.03(6), STATS., allowed the PSI reports to be admitted in toto because the presentence investigation reports contained statements by declarants who were not part of the

DOC, the organization that prepared the record. Accordingly, because this case is remanded, we direct the trial court to address the admissibility of the statements in the PSI reports to which Shaw objected on the basis of hearsay and to address Shaw's claim that the statements violated his right to confrontation.[10]

**6. Equal Protection**

Next, Shaw argues that ch. 980, STATS., violates his equal protection rights and is "unconstitutionally punitive" because its postcommitment release provisions are inconsistent with the release provisions of ch. 51, STATS. We reject both arguments. First, in ***Post***, 197 Wis.2d at 330-31, 541 N.W.2d at 133, our supreme court held that ch. 980, in its entirety, is constitutional on equal protection grounds. Specifically, the ***Post*** court held that the indefinite release provisions of ch. 980 withstood an equal protection challenge. ***Id***. at 327-28, 541 N.W.2d at 132. The ***Post*** court stated that "the state has a compelling interest in protecting the public from dangerous mentally disordered persons and we find that its statutorily distinctive mechanisms, as found in ch. 980, do not violate equal protection." ***Id***. at 330, 541 N.W.2d at 133. Nevertheless, Shaw argues that ***Kansas v. Hendricks***, 117 S.Ct. 2072 (1997), compels a different result. We disagree. Nothing in ***Hendricks*** persuades us that ch. 980 violates equal protection.

[10] Shaw also briefly mentions that the admission of the hearsay evidence in the PSI reports violated his Fifth Amendment "right to not be compelled to testify," but he fails to develop this argument or cite to authority. We have often said that we refuse to address undeveloped arguments without citation to authority. *See, e.g.,* ***State v. Pettit***, 171 Wis.2d 627, 646-47, 492 N.W.2d 633, 642 (Ct. App. 1992).

In upholding the Kansas Sexually Violent Predator Act, which closely resembles ch. 980, STATS.,[11] the United States Supreme Court noted that the Kansas Act did not establish criminal proceedings and that involuntary confinement under the Act was not punitive because: (1) the State limited confinement to a small segment of particularly dangerous individuals; (2) directed that confined persons be segregated from the general prison population and afforded the same status as other civil committees; (3) provided strict procedural safeguards; (4) recommended treatment if possible; and (5) permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired. [12] ***Hendricks***, 117 S.Ct. at 2085.

Chapter 980, STATS., is in accord with ***Hendricks***. First, as in ***Hendricks***, ch. 980 limits commitment to a small segment of potentially dangerous individuals: those who have been convicted of sexually violent acts and who are substantially probable to again such acts because a mental disorder predisposes them to engage in such conduct. *See* ***Post***, 197 Wis.2d at 325, 541 N.W.2d at 131. Second, those committed under ch. 980 are not part of the general inmate population. *See* ***Carpenter***, 197 Wis.2d at 267, 541 N.W.2d at 111. Third, ch. 980 provides strict procedural safeguards, affording a person with all the rights available to a defendant in a criminal trial, *see* ***Post***, 197 Wis.2d at 326, 541

[11] For a discussion of the similarities between the Kansas statute and ch. 980, STATS., *see* WIS J I-CRIMINAL 2502, cmt. 16.

[12] Shaw also argues that ch. 980, STATS.', failure to grant safeguards commensurate with ch. 51, STATS., committees violates the equal protection rationale of ***Humphrey v. Cady***, 405 U.S. 504 (1972), and ***Jackson v. Indiana***, 406 U.S. 715 (1972). However, Shaw fails to develop this argument other than to cite these cases. We therefore decline to address this argument because we would first have to develop it. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) ("amorphous and insufficiently" developed arguments need not be considered).

N.W.2d at 131, rather than punishment or warehousing. *See* ***Carpenter***, 197 Wis.2d at 267, 541 N.W.2d at 111. Finally, under ch. 980, the person is entitled to discharge as soon as the person's dangerousness or mental disorder abates. ***Id***. Thus, not only do ***Post*** and ***Carpenter*** reject his equal protection arguments, but he has also failed to persuade us that ch. 980 violates equal protection pursuant to ***Hendricks***.

**7. New Trial in the Interest of Justice**

Finally, Shaw requests a new trial in the interest of justice because the real controversy, whether he is substantially likely to reoffend, has not been fully tried. To support this request, Shaw makes two arguments. First, he argues that we should grant a new trial "to permit trial based on an important analytical framework," that is, Dr. R. Karl Hanson's scoring system for sexual recidivism," which was unavailable at Shaw's ch. 980, STATS., trial. Second, he claims that a new trial would "permit retrial without purported experts giving opinions on what is essentially a legal standard on likelihood to sexually reoffend." We reject these arguments.

Section 752.35, STATS., grants our court the authority to reverse a judgment or order if: (1) the real controversy has not been tried; or (2) it is probable that justice has miscarried.[13] *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 16,

[13] Section 752.35, STATS., provides, in pertinent part, that:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial.

456 N.W.2d 797, 804 (1990). When the real controversy has not been fully tried, we may exercise our power of discretionary reversal without considering the possibility of a different result on trial. *See* ***id***. We exercise our powers of discretionary reversal only in exceptional cases. *See* ***id***.

Shaw's first argument, that Hanson's research was unavailable in 1996 when this case was tried is not a persuading basis to grant a new trial. Were we to accept this argument, we would be granting new trials any time research suggests a new method for determining whether a person is likely to sexually reoffend. We reject such a proposition. Also, because we remanded for a determination whether Shaw is a sexually violent person under the ***Kienitz*** standard, no experts will "give opinions on what is essentially a legal standard ["substantial probability"] to sexually reoffend." Accordingly, Shaw's argument for a new trial in the interest of justice fails.[14]

[14] Shaw also argues that under Hanson's scoring system, the evidence was insufficient to support the trial court's conclusion that he is sexually violent person, even under the "more likely than not" standard. Given that we have directed the trial court to apply the ***Kienitz*** standard on remand, we need not address this argument. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (only dispositive issues need be addressed).

*By the Court.*—Orders affirmed in part; reversed in part and cause remanded with directions.

Recommended for publication in the official reports.