COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Nos. 99-0957
00-0552

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

IN RE THE COMMITMENT OF NATHAN LALOR:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

NATHAN LALOR,

RESPONDENT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Judgment affirmed in part, reversed in part and cause remanded; order affirmed.*

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. In court of appeals case No. 99-0957, Nathan Lalor has appealed from a judgment committing him for institutional care in a secure

facility based upon a determination that he is a sexually violent person within the meaning of WIS. STAT. § 980.01(7) (1999-2000).[1] In court of appeals case No. 00-0552, Lalor has appealed from an order denying his motion for relief from judgment.[2]

¶2 Lalor raises eleven issues in his consolidated appeals, including a claim that the judgment of commitment must be reversed because the State failed to prove at trial that he was within ninety days of discharge or release from a secured correctional facility or a secured child caring institution. Based upon ***State v. Thiel (Thiel I)***, 2000 WI 67, 235 Wis. 2d 823, 612 N.W.2d 94, and ***State v. Thiel (Thiel II)***, 2001 WI App 52, 241 Wis. 2d 439, 625 N.W.2d 321, *review denied,* 2001 WI 88, 246 Wis. 2d 165, 630 N.W.2d 219 (Wis. May 8, 2001) (No. 99-0316), we reverse the judgment in part and remand the case for the limited purpose of conducting a trial on the issue of whether Lalor was within ninety days of discharge or release as alleged in the petition filed against him pursuant to WIS. STAT. § 980.02(2).[3] We reject the remainder of Lalor's arguments challenging the judgment. In addition, we affirm the order denying Lalor's motion for relief from the judgment.

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

[2] These appeals were consolidated by this court on July 27, 2000.

[3] These appeals were placed on hold pending release of the Wisconsin Supreme Court's decision in ***State v. Thiel (Thiel I)***, 2000 WI 67, 235 Wis. 2d 823, 612 N.W.2d 94. On June 23, 2000, this court ordered the parties to file supplemental briefs addressing the issues that were remanded to this court in ***Thiel I***. The remanded issues were ultimately decided in ***State v. Thiel (Thiel II)***¸ 2001 WI App 52, 241 Wis. 2d 439, 625 N.W.2d 321, *review denied*, 2001 WI 88, 246 Wis. 2d 165, 630 N.W.2d 219 (Wis. May 8, 2001) (No. 99-0316).

¶3 We first address the order denying relief from judgment. In his motion for relief from judgment, Lalor claimed that WIS. STAT. § 980.02(2)(ag) did not permit a petition to be filed against him because he was adjudicated delinquent under WIS. STAT. ch. 48 (1993-94) rather than under WIS. STAT. ch. 938. He repeats this argument on appeal. Lalor's argument fails based upon ***State v. Gibbs***, 2001 WI App 83, ¶1, 242 Wis. 2d 640, 625 N.W.2d 666, *review denied*, 2001 WI 114, __Wis. 2d __, 634 N.W.2d 320 (Wis. July 18, 2001) (No. 00-1176), wherein this court held that WIS. STAT. ch. 980 permits a petition to be filed against an individual who was found delinquent for a violent sexual offense under former ch. 48.[4]

¶4 Lalor's remaining arguments are raised in his appeal from the judgment committing him as a sexually violent person. The first issue is whether the trial court committed reversible error when it refused to excuse Juror 34 for cause. Lalor argues that Juror 34 was both objectively and subjectively biased, and that he was improperly forced to use a peremptory strike to remove Juror 34 after the trial court refused to strike him for cause. Relying on ***State v. Ramos***, 211 Wis. 2d 12, 564 N.W.2d 328 (1997), Lalor contends that because he used a peremptory strike to remove a juror who should have been removed for cause, he is entitled to reversal of the judgment and a new trial.

¶5 After briefing was completed in this case, the Wisconsin Supreme Court issued its decision in ***State v. Lindell***, 2001 WI 108, ¶5, 245 Wis. 2d 689,

[4] ***State v. Gibbs***, 2001 WI App 83, 242 Wis. 2d 640, 625 N.W.2d 666, *review denied*, 2001 WI 114, __Wis. 2d __, 634 N.W.2d 320 (Wis. July 18, 2001) (No. 00-1176), was not yet decided when Lalor filed his motion for relief from judgment, or when the trial court denied the motion.

629 N.W.2d 223, overruling ***Ramos***. The court held that when an appellant claims that a trial court erred in refusing to strike a juror for cause based upon bias, but does not claim that he or she was deprived of an impartial jury, the reviewing court must consider whether the error affected the substantial rights of the appellant. *See* ***Lindell***, 2001 WI 108 at ¶111. The court further stated: "The substantial rights of a party are not affected or impaired when a defendant chooses to exercise a single peremptory strike to correct a circuit court error." ***Id.*** at ¶113.

¶6 Lalor's argument concerning juror bias pertains to only one juror and one peremptory strike. Because Lalor's rights were not affected or impaired by his use of a single peremptory strike to remove Juror 34, he is not entitled to relief on appeal. We therefore need not decide whether the trial court properly denied Lalor's motion to strike.

¶7 Lalor's next argument is that the trial court erroneously permitted Dr. Dennis Doren, an expert called by the State, to testify that in evaluating Lalor's future dangerousness, he considered that Lalor was "currently scheduled to be released without any supervision." Dr. Doren indicated that Lalor's release without supervision was a concern because there would be no one watching over his behavior to help ensure that he stayed away from potential victims and "whatever he needs to stay away from." Lalor contends that this violated the general rule that a trial court is not permitted to tell the jury the effect of its verdict. He further contends that the trial court should have ruled that Dr. Doren's testimony opened the door for the presentation of evidence by the defense indicating that Lalor was amenable to community supervision. He contends that the trial court's error in precluding such evidence was compounded when, during jury deliberations, the trial court responded to a jury question, which asked, "What are the consequences of being found a sexually violent person under sec. 980?"

The trial court answered the question without first notifying counsel and seeking their input, informing the jury that the question was not relevant to the issue it had to decide, and that the court could not answer it.

¶8 Dr. Doren's testimony was presented in the context of describing how he evaluated Lalor's future dangerousness. One factor considered by Dr. Doren was that Lalor was scheduled to be released from his juvenile disposition without supervision. Dr. Doren indicated that this fact differentiated Lalor from the majority of persons he evaluated under WIS. STAT. ch. 980, who usually had a period of parole or probation awaiting them. Dr. Doren's testimony was thus offered to show how he conducted his evaluation, and how he assessed future dangerousness. It was not evidence related to the disposition of this ch. 980 proceeding.[5]

¶9 In connection with this argument, we also conclude that the trial court properly refused to provide the jury with information about the effect of being found a sexually violent person. The jury had been informed that a sexually violent person may be committed to the custody of the Department of Health and Social Services. Any additional explanation would have violated the principle that juries are not to be instructed regarding the consequences of their verdicts. ***Anderson v. Seelow***, 224 Wis. 230, 233, 271 N.W. 844 (1937).

[5] It is unclear to this court whether Lalor is also contending that Dr. Doren's testimony violated an order resolving the State's motion in limine, which sought to preclude the admission at trial of evidence relating to disposition. The parties indicate that the motion was uncontested and was not ruled upon by the trial court, so it is unclear to this court how Lalor could argue that the testimony violated a trial court order regarding dispositional evidence. In any event, for the reasons discussed in the body of this opinion, we conclude that Dr. Doren's testimony did not constitute dispositional evidence.

¶10 Lalor's next argument is that Dr. Michael Hagan, another expert called by the State, defined sexual violence to include psychological violence and third-degree sexual assault, which constitutes a broader definition of sexual violence than is permitted under WIS. STAT. § 980.01(6). Lalor contends that Dr. Hagan's opinion as to his propensity to commit future acts of sexual violence within the meaning of WIS. STAT. ch. 980 is therefore based upon an erroneous understanding of the law.

¶11 We reject this argument for several reasons. First, Dr. Hagan's comments regarding third-degree sexual assault and psychological violence were made on cross-examination. Assuming Dr. Hagan's responses were an indication that he regarded some acts as sexually violent even if they did not meet the statutory definition of sexually violent offenses, nothing in the record provides a basis to conclude that his opinion regarding Lalor was based upon an improper standard. The predicate offense underlying the petition against Lalor was incest, an offense included in WIS. STAT. § 980.01(6). In testifying as to the probability that Lalor would commit future sexual offenses, Dr. Hagan repeatedly discussed offenses involving a child or the use of force or threats of force, acts which would qualify as sexually violent offenses under § 980.01(6). The cross-examination about other offenses was thus not relevant to this case and does not establish that Dr. Hagan's opinion as to Lalor was based upon an erroneous legal standard.

¶12 We also note that in closing argument, Lalor's counsel attempted to impeach Dr. Hagan's opinion by arguing that he had considered sexual offenses which did not constitute sexually violent offenses within the meaning of WIS. STAT. § 980.01(6). In addition, the jury was instructed that it was not bound by the opinion of any expert. It was also properly instructed on the definition of a sexually violent offense, which did not include third-degree sexual assault or all

offenses involving psychological coercion. Under these circumstances, it was for the jury to decide whether Dr. Hagan's testimony assisted it in determining whether it was substantially probable that Lalor would engage in acts of sexual violence.

¶13 Lalor's next contention is that the trial court committed reversible error by admitting prejudicial other-acts evidence regarding pictures of young girls found in Lalor's Bible, and inappropriate sexual remarks made by Lalor concerning the daughter and wife of a counselor at the Ethan Allen School. Lalor also contends that the trial court should have excluded evidence that Lalor took off his clothes and exposed his genitals when placed in an observation room at the Ethan Allen School, an act which was observed by a counselor.

¶14 Contrary to Lalor's characterization of this evidence, none of it was other-acts evidence within the meaning of WIS. STAT. § 904.04(2). With some exceptions which are not applicable here, § 904.04(2) prohibits the admission of evidence of other acts to prove a defendant's character, and to prove that the defendant acted in conformity with that character. However, in a proceeding under WIS. STAT. ch. 980, the issue is whether the respondent has a mental disorder which predisposes him or her to engage in acts of sexual violence. WIS. STAT. § 980.01(2), (7). Evidence regarding past inappropriate sexual behavior is offered to show that the respondent will act in conformity with such behavior in the future. In this context, the United States Supreme Court has stated that "[p]revious instances of violent behavior are an important indicator of future violent tendencies." ***Kansas v. Hendricks***, 521 U.S. 346, 358 (1997) (citing ***Heller v. Doe***, 509 U.S. 312, 323 (1993)).

¶15 Because the evidence challenged by Lalor is not other-acts evidence within the meaning of WIS. STAT. § 904.04(2), neither the standards for admitting other-acts evidence as discussed in ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), nor Lalor's offer of a stipulation under ***State v. Wallerman***, 203 Wis. 2d 158, 552 N.W.2d 128 (Ct. App. 1996), is applicable to these appeals. The issue is solely whether the evidence was relevant and admissible under WIS. STAT. §§ 904.01 and 904.02.

¶16 A circuit court has discretion in determining whether to admit evidence. ***State v. Wollman***, 86 Wis. 2d 459, 464, 273 N.W.2d 225 (1979). When reviewing a question on the admissibility of evidence, this court must determine whether the trial court exercised its discretion in accordance with accepted legal standards and the facts of record. ***Id.***

¶17 Relevant evidence is evidence having any tendency to make the existence of any fact which is of consequence to the determination of the action more probable or less probable than it would be without the evidence. WIS. STAT. § 904.01. However, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. WIS. STAT. § 904.03.

¶18 The evidence offered by the State was clearly relevant to the issue of whether it was substantially probable that Lalor would engage in acts of sexual violence in the future. Evidence indicated that an employee at the Mendota Mental Health Care facility found the pictures of young girls in bathing suits and dresses in Lalor's Bible when he shook the Bible to make sure that it contained no combs or picks. Dr. Hagan testified that this "indicates to me when he hides them, he recognizes that he's not supposed to have them, and it indicates to me that he's got an interest in this type of behavior." Dr. Hagan further testified that the

pictures reflected a "deviant interest in young children, which is consistent with his sexual reoffending." Because Dr. Hagan based his opinion regarding Lalor's dangerousness in part on the pictures, they were relevant to the jury's evaluation of Dr. Hagan's opinion, and the jury's ultimate determination of whether Lalor's mental disorders created a substantial probability that he would engage in future acts of sexual violence.

¶19 In formulating his opinion as to dangerousness, Dr. Hagan also considered Lalor's act of exposing himself, and the sexually inappropriate remarks he made concerning a counselor's wife and daughter. Dr. Hagan testified that these behaviors reflected Lalor's "sexual inappropriateness" and "his lack of impulse control." Because Dr. Hagan also testified that Lalor's impulsiveness was a risk factor for sexually reoffending, Lalor's comments concerning the counselor's family and his behavior in exposing himself to another counselor were relevant to the issue of whether it was substantially probable that he would reoffend.[6]

¶20 We also reject Lalor's claim that the trial court erroneously exercised its discretion when it failed to determine that the probative value of the challenged evidence was substantially outweighed by the danger of unfair prejudice. "[U]nfair prejudice results where the proffered evidence, if introduced, would have a tendency to influence the outcome by improper means or if it

[6] In this regard, Lalor misses the mark when he contends that none of the challenged evidence was relevant because it did not prove that he would commit incest again. While incest was the offense underlying his juvenile delinquency adjudication, the issue in this proceeding was whether there was a substantial probability that he would engage in sexually violent offenses in the future. The law does not require that the offense be the same type that led to the respondent's underlying conviction or adjudication.

appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." ***State v. Mordica***, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992).

¶21 Of the three pictures at issue, two are of girls in bathing suits and one is of two young girls in matching dresses. On their face, there is nothing shocking or disturbing about the pictures. Their relevance, as discussed above, was thus not outweighed by the danger of unfair prejudice. Similarly, while Lalor's statements and his conduct in exposing himself were damaging to his defense, the evidence was not unfairly prejudicial, and its probative value was not outweighed by other factors under WIS. STAT. § 904.03.

¶22 Lalor also contends that the trial court erred when it permitted the State to ask Dr. Doren a hypothetical question about the pictures found in Lalor's Bible. Although Dr. Doren had testified to a reasonable degree of professional certainty that Lalor's mental disorder predisposed him to commit sexually violent acts as defined in WIS. STAT. ch. 980, he was unable to conclude that there was a substantial probability that Lalor would do so.

¶23 The trial court permitted the State to ask Dr. Doren if his opinion would change if the pictures found in Lalor's Bible were possessed by him for the purpose of sexual arousal by children. Dr. Doren indicated that if Lalor possessed the pictures for purposes of sexual arousal by children, then he would conclude to a reasonable degree of psychological certainty that Lalor was dangerous to others because he suffered from a mental disorder which made it substantially probable that he would engage in sexually violent acts.

¶24 An expert witness may be asked hypothetical questions to help explain the significance of other evidence that was admitted. ***State v. Owen***, 202 Wis. 2d 620, 638, 551 N.W.2d 50 (Ct. App. 1996). If hypothetical questions are used, they must be based on assumptions that have some support in the record. ***Schulz v. St. Mary's Hosp.***, 81 Wis. 2d 638, 652, 260 N.W.2d 783 (1978). However, the assumptions need not be uncontroverted. ***Id.***

¶25 Lalor contends that the hypothetical question was improper because nothing in the evidence indicated that the pictures were possessed for purposes of sexual arousal. However, contrary to Lalor's contention, both the testimony of Dr. Hagan and the circumstances surrounding Lalor's possession of the pictures permitted the jury to find that he possessed them for purposes of sexual arousal. One picture is of girls who appear to be age six or younger, leaning over a wall with their backs to the camera. The other two pictures are of girls in swimming suits. At least one of the girls appears to be prepubescent. The pictures appear to have been torn out of magazines.

¶26 Dr. Hagan testified that Lalor's keeping and hiding of the pictures indicated that he recognized that he was not supposed to have them. He testified that "my opinion is, for someone to be interested in these pictures enough to rip them out and enough to hoard them or to hide them in a bible so that they won't be found, it's reflective of a deviant interest in children. I can't think of any other explanation for them."

¶27 Based upon Dr. Hagan's testimony and the jurors' own reasonable inferences from Lalor's act of tearing out and hiding the pictures, the jury could find that Lalor possessed pictures of young girls for purposes of sexual arousal.

The record thus supported the assumption underlying the hypothetical question posed to Dr. Doren.

¶28 Lalor's next challenge is to the sufficiency of the evidence to support a finding that it is substantially probable that he will commit an act of sexual violence in the future. In support of this argument, Lalor contends that Dr. Doren was unable to conclude that there was a substantial probability that he would commit a sexually violent act in the future. He also notes that Dr. Hagan testified that, in his opinion, Lalor "*without treatment* is going to sexually reoffend at some point in the future if he is not prevented from doing so for some reason such as being incarcerated." (Emphasis added.) Lalor contends that Dr. Hagan's qualified opinion assumed facts not in evidence regarding future treatment, or the lack thereof. He also contends that the studies on incest offenders and juvenile sex offenders do not show a substantial probability of reoffending for these populations.

¶29 The standard of review of the sufficiency of the evidence to support a commitment under WIS. STAT. ch. 980 is the same as the standard of review of a criminal conviction. ***State v. Curiel***, 227 Wis. 2d 389, 417, 597 N.W.2d 697 (1999). The test on appeal is whether the evidence adduced, believed and rationally considered by the jury was sufficient to prove beyond a reasonable doubt that the respondent is a sexually violent person. *See* ***id.*** at 418-19.

¶30 It is the jury's task to sift and winnow the credibility of the witnesses and to determine what, if any, weight to give to a witness's testimony, including the testimony of expert witnesses. ***Id.*** at 421. Moreover, in evaluating expert testimony, the jury may accept certain portions of an expert's testimony while

rejecting other portions. ***State v. Kienitz***, 227 Wis. 2d 423, 440-41, 597 N.W.2d 712 (1999).

¶31 Applying these standards here, we conclude that even if Dr. Hagan qualified his opinion, the evidence was sufficient to permit the jury to find a substantial probability that Lalor would commit a sexually violent offense. As previously noted, Dr. Doren testified that if the pictures found in Lalor's Bible were possessed by him for purposes of sexual arousal by children, then he would conclude to a reasonable degree of psychological certainty that Lalor was dangerous to others because he suffered from a mental disorder which made it substantially probable that he would engage in sexually violent acts. The jury could have combined this portion of Dr. Doren's testimony with Dr. Hagan's testimony that Lalor's possession of the pictures reflected a deviant interest in children, and concluded that it was substantially probable that Lalor would reoffend.

¶32 Lalor's argument that the evidence was insufficient because research studies on incest and juvenile sex offenders do not show a substantial probability of reoffending also fails. Experts testifying in WIS. STAT. ch. 980 cases are not required to adhere to one particular methodology to predict future sexual violence. ***Kienitz***, 227 Wis. 2d at 439 n.12. The weight to be given the statistics cited by the experts in this case was for the jury, which was entitled to conclude that the research was inconclusive, or that, in light of Lalor's history, it was substantially probable that he would reoffend despite a low recidivism rate for most other juvenile incest offenders. The lack of studies showing a high recidivism rate for juvenile incest offenders thus does not provide a basis for determining that the evidence was insufficient to support Lalor's commitment.

¶33 In a related argument, Lalor contends that the evidence was insufficient because nothing in the evidence indicates that attention deficit hyperactivity disorder (ADHD), conduct disorder, or antisocial personality disorder predisposes a juvenile incest offender to commit acts of sexual violence.[7] However, to show a nexus between Lalor's mental disorder and a substantial probability of reoffending, the State was not required to show that ADHD, conduct disorder, or antisocial personality disorder generally predisposes people who suffer from these disorders to commit acts of sexual violence. *See* ***State v. Adams***, 223 Wis. 2d 60, 68, 588 N.W.2d 336 (Ct. App. 1998). Instead, the statutory focus is on the person who is the subject of the petition, and hinges "on the specific link between *that* person's mental disorder and the effect of *that* mental disorder on *that* person." ***Id.*** Thus, a person with antisocial personality disorder, or another mental condition which does not generally predispose its sufferers to commit acts of sexual violence, may be found to be a sexually violent person. ***Id.*** at 68-69. The issue is whether the condition, in combination with other evidence, satisfies the criteria of WIS. STAT. § 980.01(7). ***Adams***, 223 Wis. 2d at 70-71.

¶34 The State met its burden of proving that Lalor's mental disorders predisposed him to commit acts of sexual violence. Dr. Hagan testified that Lalor suffered from conduct disorder and ADHD and that "in his case … they significantly are related to his sexually assaultive behavior, and … they do predispose him substantially toward future acts of sexual violence." Dr. Doren similarly opined that Lalor's antisocial personality disorder and conduct disorder

[7] Lalor stipulated that he had been diagnosed with ADHD and conduct disorder. Dr. Doren testified that because of Lalor's age, the diagnosis of conduct disorder could also be called antisocial personality disorder.

predisposed him to commit sexually violent acts as defined by WIS. STAT. ch. 980. Dr. Doren testified that Lalor's disorders involve a pattern of behavior which disregards the rights of others and, in Lalor's case, this pattern includes sexually violent acts. The evidence was thus sufficient to permit the jury to find that Lalor was dangerous to others because his mental disorder created a substantial probability that he would engage in acts of sexual violence.

¶35 Lalor's next two arguments relate to the dispositional hearing. First, he objects to the predispositional report filed by Matthew Kaeserman, a social services specialist at the Wisconsin Resource Center. Kaeserman's report recommended inpatient placement. Lalor moved to strike the report, claiming that it constituted hearsay and that Kaeserman's failure to appear to testify regarding its contents deprived him of his right of cross-examination.

¶36 The trial court denied Lalor's motion to strike. It determined that a dispositional hearing was similar to a sentencing hearing, and that a predispositional report writer, like a presentence report writer, need not appear. We agree with the trial court.

¶37 Although WIS. STAT. ch. 980 proceedings are civil proceedings, they share many of the same procedural and constitutional features present in criminal cases. ***Curiel***, 227 Wis. 2d at 417. Because of the parallels between actions under ch. 980 and criminal actions, review of ch. 980 proceedings frequently involves application of criminal case law involving evidentiary and constitutional issues. ***Curiel***, 227 Wis. 2d at 417.

¶38 Pursuant to WIS. STAT. § 980.06(2)(a) (1997-98),[8] after issuance of a judgment determining that the subject of a WIS. STAT. ch. 980 petition is a sexually violent person, the court may order the Department of Health and Family Services to conduct a predisposition investigation using the procedure set forth in WIS. STAT. § 972.15. Section 972.15 prescribes the procedure for a presentence investigation in a criminal case. Because the same statutory procedure is used for presentence investigations in criminal cases and predisposition investigations in ch. 980 cases, it logically follows that the law involving presentence reports and the manner in which they are used should also apply to predisposition investigation reports. Because presentence reports are used at sentencing hearings without calling the presentence writer as a witness, the predispositional report may also be used at the dispositional hearing without requiring its author to appear. This is also consistent with WIS. STAT. § 911.01(4)(c), which provides that the rules of evidence do not apply at a sentencing hearing in a criminal case.[9]

¶39 Lalor also argues that at the dispositional hearing, the State bore the burden of proof using the standard of beyond a reasonable doubt. He complains that the State failed to meet this burden, and that the trial court failed to make findings that it was met.

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[8] The version of WIS. STAT. § 980.06 which was in effect at the time of Lalor's trial was the 1997-98 version.

[9] Lalor's reliance on ***State v. Watson***, 227 Wis. 2d 167, 595 N.W.2d 403 (1999), in support of his argument on this issue is misplaced. In ***Watson***, the court noted the similarities between a probable cause hearing under WIS. STAT. ch. 980 and a preliminary examination in a criminal case, and decided that the rules of evidence for preliminary hearings should also apply to probable cause hearings. ***Watson***, 227 Wis. 2d at 201-02. ***Watson*** thus reinforces the view of this court and the trial court that the predisposition investigation report should be treated like a presentence report.

¶40 We reject Lalor's claim that the State had a burden beyond a reasonable doubt at the dispositional hearing. As already discussed, the dispositional hearing is analogous to a sentencing hearing. This court has expressly declined to adopt a formal burden of proof requirement for sentencing hearings. ***State v. Hubert***, 181 Wis. 2d 333, 345, 510 N.W.2d 799 (Ct. App. 1993). We stated that we were satisfied that "the present law which places all sentencing under the standard of judicial discretion remains the more practical and workable rule for both the trial court when imposing a sentence and the appellate court when reviewing a sentence." ***Id.***

¶41 When issuing a commitment order at the dispositional hearing, the trial court is required to specify either institutional care or supervised relief and is entitled to consider various factors enumerated by statute. WIS. STAT. § 980.06(2)(b) (1997-98). A determination of the appropriate placement under § 980.06(2)(b) (1997-98) involves the exercise of discretion by the trial court. ***State v. Keding***, 214 Wis. 2d 363, 367, 571 N.W.2d 450 (Ct. App. 1997). Because the State did not bear the burden of proof beyond a reasonable doubt at the dispositional hearing, this court rejects Lalor's argument that the State failed to satisfy its burden.[10]

¶42 The final issue we address is whether Lalor is entitled to relief based upon the State's failure to present evidence at trial establishing that he was within ninety days of release or discharge from a secured corrections or child caring

[10] Lalor also states that "the disposition should be for the least restrictive alternative as for other civil committees. The court applied no such presumption here." However, Lalor does not develop this argument with any discussion of the facts or law. It therefore will not be addressed further. ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

facility. In ***Thiel I***, the Wisconsin Supreme Court held that in a commitment trial pursuant to WIS. STAT. ch. 980, the State must prove beyond a reasonable doubt that the petition was filed within ninety days of the subject's release or discharge from a sentence imposed for a sexually violent offense. ***Thiel I***, 2000 WI 67 at ¶1. In ***Thiel II***, this court held that the holding of ***Thiel I*** must be applied retroactively. ***Thiel II***, 2001 WI App 52 at ¶1. We further held that the appropriate remedy for the State's failure to produce evidence as to the release date was a remand for a trial at which the State would have an opportunity to present evidence regarding the detainee's release date. ***Id.*** at ¶30. This court declined to remand for an entire new trial, holding that trial would be limited to whether the detainee was within ninety days of his release date. ***Id.*** at ¶31.

¶43 Based upon ***Thiel II***, we reverse in part the judgment committing Lalor as a sexually violent person. We remand the matter for an evidentiary hearing or trial limited to the issue of whether Lalor was within ninety days of release or discharge from a secured correctional facility or secured child caring institution when the petition was filed against him pursuant to WIS. STAT. § 980.02(2)(ag).[11]

By the Court.—Judgment affirmed in part, reversed in part and cause remanded; order affirmed.

[11] Lalor had a jury trial in this case, unlike the appellant in the ***Thiel*** cases, who had a bench trial. ***Thiel I***, 2000 WI 67 at ¶5. Because the appellant in the ***Thiel*** cases was committed after a bench trial, this court remanded the case for an evidentiary hearing at which the State would be entitled to introduce evidence of the release date. ***Thiel II***, 2001 WI App 52 at ¶32. As conceded by the State, because Lalor was committed after a jury trial, on remand he will be entitled to a jury determination of whether the State filed its petition within ninety days of his release date. He may also waive his right to a jury trial of the issue and instead elect to have the issue be decided by the trial court at an evidentiary hearing.

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