COURT OF APPEALS
DECISION
DATED AND FILED

December 11, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 95-1067

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

STATE OF WISCONSIN,

PETITIONER-APPELLANT,

v.

JOHN J. WATSON,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed in part; reversed in part.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

EICH, C.J. The supreme court, after accepting our certification of this case on August 15, 1996, deadlocked on a decision and returned it to us for

determination.[1] The State appeals the circuit court's determination that it failed to establish probable cause to believe that John Watson was subject to commitment under the "sexual predator law," chapter 980, STATS.

In 1980, Watson pled guilty to a charge of false imprisonment and was sentenced to 30 years in prison.[2] In 1994, as he was about to complete serving that sentence, the State filed a petition under chapter 980, STATS., seeking to have him committed to the Department of Health and Family Services as a "sexual predator." The law authorizes such a commitment upon a determination that the individual is a "sexually violent person," as that term is defined in the law. It is a two-step process, involving a preliminary "probable-cause" hearing on the issue and, if probable cause is found, a trial.

The sexual predator law authorizes commitment of a "sexually violent person" and defines the term—insofar as is relevant to this appeal—as one who: (1) "has been convicted of a sexually violent offense"; and (2) 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" in the future. Section 980.01(7), STATS. A "sexually violent offense" is either a stated sexual crime or, as in this case, a crime that has no sexual component but, in its commission, "is determined … to have been sexually motivated." Section 980.01(6)(b). Thus, the State was required to establish probable cause that

[1] We have been furnished with the parties' briefs to the supreme court on the certification and, because these briefs amplify the arguments made in their initial briefs to this court, we have considered them in deciding this appeal.

[2] Watson was also convicted of endangering safety for brutally beating the victim. That offense is not before us because the State relies only upon the false imprisonment charge as a basis for seeking Watson's commitment.

Watson's false imprisonment of the victim was sexually motivated within the meaning of the law.

The circuit court dismissed the State's petition, concluding that the sexual predator law is unconstitutional and that the State failed to establish probable cause to believe that Watson was a sexually violent person because the only evidence on that point—a psychologist's opinion—was based entirely upon inadmissible hearsay.

Since the circuit court's decision, the Wisconsin Supreme Court has upheld the sexual predator law against several constitutional challenges, including those Watson makes in this case, in ***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). The only remaining issue is whether the court erred in dismissing the petition for lack of probable cause on the sexual-motivation issue. We conclude that it did not. We therefore reverse the court's ruling on the constitutional issue but affirm its dismissal of the State's petition for lack of probable cause.

At the probable-cause hearing, the State called only one witness, Dr. Richard Althouse, a psychologist, and he offered testimony on both elements of the statute. He stated that, in his opinion, Watson suffers from the mental disorder of paraphilia, a condition involving uncontrollable urges for sexual contact with nonconsenting partners. He based that conclusion on two interviews with Watson and on his review of various files relating to Watson's conviction.

With respect to the issue at the heart of this appeal, Dr. Althouse testified that, in his opinion, Watson's false imprisonment of the victim was sexually motivated. The opinion came in response to a question on direct examination of whether, based on his training, education and experience, he had

formed "an opinion to a reasonable degree of psychological certainty as to whether [the false-imprisonment] count … was a sexually violent offense or sexually motivated offense?" Dr. Althouse responded: "It is my professional opinion based on my experience that the offense was sexually motivated."

On cross-examination, Dr. Althouse acknowledged that his opinion "rest[ed] entirely" on a statement the victim made to a probation agent in the presentence investigation in 1980. According to the agent's report, while she was in Watson's car he had said: "Now you are going to suck me off, bitch." Dr. Althouse was then asked: "[A]ssuming that statement wasn't made, would that change your opinion that the false imprisonment charge was sexually motivated …?" He responded: "If I didn't have that statement, it would be virtually impossible to draw that conclusion." Watson denied ever making this statement.

As indicated, the circuit court found Dr. Althouse's testimony insufficient to establish probable cause on the issue, reasoning that: (1) the statement in the presentence report was hearsay contained within a hearsay document and thus provided no "independent foundation" to trigger an exception to the hearsay ban; and (2) Dr. Althouse conceded that without this statement it would be "virtually impossible" to conclude that Watson's offense had been sexually motivated.[3]

[3] The court amplified its reasoning at a later hearing, stating:

> The record is poignantly clear in this case that the statement attributed to Mr. Watson by [the victim] is the controlling and driving factor in Dr. Althouse's opinion. He had no opinion as to whether or not the crime was sexually motivated without that statement ….
>
> As I stated before … the facts supporting sexual motivation are an essential element that must be shown at the

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The State argues on appeal that the trial court erred because, under § 907.03, STATS., an expert opinion based in part on hearsay is admissible. The statute provides:

> **907.03 Bases of opinion testimony by experts.** The facts or data … upon which an expert bases an opinion … may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

According to the State, no cases have held that "an expert opinion which is based in part on inadmissible evidence cannot be given any weight," and that to so hold would be absurd because most expert opinions are based, in part at least, on hearsay.

We agree with the State that, because experts are "fully capable of judging for [themselves] what is, or is not, a reliable basis for [their] opinion," such a rule "respects the functions and abilities of both the expert witness and the trier of fact, while assuring that the requirement of witness confrontation is fulfilled." ***United States v. Sims***, 514 F.2d 147, 149 (9th Cir. 1975). We disagree, however, with the State's conclusion that our inquiry ends once we recognize this rule.

We question whether Dr. Althouse's opinion was an "expert" opinion within the meaning of § 907.03, STATS. While the prosecutor's initial

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> probable cause hearing in order to bring Mr. Watson under Chapter 980 and to give this Court jurisdiction. Since there is no admissible evidence of the statement, the opinion itself does not prove the statement, and the State has failed to carry its burden of proof with regard to probable cause on the issue of sexual motivation ….

question sought his opinion as an expert, Dr. Althouse's subsequent testimony suggests that it was not.

Because expert testimony is testimony on a subject which is "'distinctively related to some science, profession, business or occupation,'" it is "'beyond the realm of the average lay[person].'" ***State ex rel. Kalt v. Milwaukee Bd. of Fire and Police Comm'rs***, 145 Wis.2d 504, 517, 427 N.W.2d 408, 414 (Ct. App. 1988) (quoted source omitted). A court will receive expert testimony in evidence only "when the issue under consideration involves 'special knowledge or skill or experience on subjects which are not within the realm of the ordinary experience of [hu]mankind,'" ***Grace v. Grace***, 195 Wis.2d 153, 159, 536 N.W.2d 109, 111 (Ct. App. 1995) (quoted source omitted), and it is helpful to the court "only to the extent the expert draws on some special skill, knowledge, or experience to formulate [his or her] opinion." ***United States v. Benson***, 941 F.2d 598, 604 (7th Cir. 1991). The testimony must reflect an *expert* opinion—one "informed by the witness' expertise[] rather than simply an opinion broached by a purported expert." ***Id***. These concepts are embodied in Wisconsin's expert-testimony statute, § 907.02, STATS., which provides:

> **907.02 Testimony by experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

We do not question Dr. Althouse's expert qualifications as a psychologist, but not all of his testimony was expert testimony. And on the crucial issue of sexual motivation, he based his opinion solely on a probation agent's hearsay statement recounting the victim's hearsay statement as to what Watson is alleged to have said to her. The statement was not only double—if not triple—

hearsay, it was no more than a layperson's representation of what another person said to her. It was not, in our opinion, the type of data or information reasonably relied upon in the formation of an expert opinion.[4] Indeed, when Watson's counsel objected to the question eliciting Dr. Althouse's opinion, the prosecutor, even though having just phrased the question in terms of "expert opinion," argued to the court that it was not: "It is not an opinion that an expert need make. An ordinary citizen can draw such a conclusion as I am asking [Dr. Althouse] to draw …."

According to the Judicial Council Committee's note to § 907.03, STATS., the second sentence of the rule—stating that an expert's opinion is not rendered inadmissible because it is based in part on evidence that is itself inadmissible—has its genesis, and finds support, in Professor McCormick's view that such a provision is appropriate because "an expert in a science is presumably competent to judge … the reliability of statements made to him by other investigators or technicians. He seems just as competent indeed to do this as a judge and jury are to pass upon the credibility of an ordinary witness on the stand." CHARLES T. MCCORMICK, LAW OF EVIDENCE, § 15, at 33 (1954) (quoted in ***Vinicky v. Midland Mut. Cas. Ins. Co.,*** 35 Wis.2d 246, 254-55, 151 N.W.2d 77, 82 (1967)).

This is not a situation like that envisioned by Professor McCormick, where the witness, in arriving at an expert opinion, relies on texts, articles, reports,

[4] We note in this regard that at least some courts have recognized that an expert who merely summarizes the content of a hearsay source without applying his or her own expertise is merely a "hearsay witness." ***State ex rel. Missouri Highway & Transp. Comm'n v. Modern Tractor & Supply Co.***, 839 S.W.2d 642, 655 (Mo. App. 1992). *See also* ***Stang-Starr v. Byington***, 532 N.W.2d 26, 30-31 (Neb. 1995); ***Arizona v. Lundstrom***, 776 P.2d 1067, 1074 (Ariz. 1989).

or statements of other experts, investigators, or technicians—materials that an expert not only commonly relies on in forming opinions but is in a position to evaluate for worth or trustworthiness as a result of his or her training, experience and expertise. To the extent the State suggests that presentence investigation reports are materials typically and reasonably relied on by people like Dr. Althouse, the record is, at best, equivocal. At a December 29, 1994, hearing captioned "Preliminary Hearing - Sexual Predator Law," Dr. Althouse was asked whether he had in the past found files kept by the Department of Corrections to be "reliable."[5] He responded that, while he had no reason at the moment to consider them unreliable, he was not sure that he had "any way of knowing" their reliability.[6] In such circumstances, it is difficult to conclude that the hearsay statement in one of those files was something he could reasonably rely on to justify an expert opinion.

The other problem with Dr. Althouse's reliance on the hearsay statement in this case is that it formed the only basis for his opinion, and that—in his own words—without that statement, "it would be virtually impossible to draw

[5] Apparently, this hearing was the initial probable-cause hearing on the petition to have Watson declared a sexual predator. According to the State's brief, Watson filed several motions to dismiss the petition, some of which the court, Judge Jack Aulik presiding, denied. According to the State, Judge Aulik denied some of the motions and deferred decision on several others. The State says that another judge, Judge Angela B. Bartell, "subsequently entered an order finding the petition and evidence presented at the probable cause hearing inadequate to confer jurisdiction," and dismissed the petition. An appeal was taken and, after "[v]arious proceedings … in the trial court, [the court of appeals] and the Wisconsin Supreme Court," the State was "authorized … to file a redrafted petition." Judge Bartell eventually held a probable-cause hearing on the redrafted petition, which resulted in the order dismissing the petition that is the subject of this appeal.

[6] After acknowledging that he had "used" such files in the past, he was asked: "And have you found them to be reliable?" His response was: "I'm not sure I have any way of knowing that. Yes, I would say so in that I've had no reason at this point to find them unreliable."

that conclusion." Thus, Dr. Althouse's opinion rests both on the *existence* of the statement in the presentence report and on his *assumption that it was true*—that Watson actually made the statement. Just as Dr. Althouse would have no opinion if the statement did not exist, he would have no opinion if the statement were untrue, for implicit in his opinion that those words indicated a sexual motivation for Watson's actions is his assumption that Watson had, in fact, said them.

It is black-letter law that a witness, lay or expert, may not testify that the statement of another witness is truthful. ***State v. Jensen***, 147 Wis.2d 240, 249, 432 N.W.2d 913, 917 (1988); ***State v. Haseltine***, 120 Wis.2d 92, 96, 352 N.W.2d 673, 676 (Ct. App. 1984). And while the State is correct in noting that, at a probable-cause hearing, neither the weight of the evidence nor the credibility of the witnesses is at issue, ***State v. Dunn***, 121 Wis.2d 389, 397-98, 359 N.W.2d 151, 154-55 (1984), in this case Dr. Althouse, not the court, made the "credibility" assessment; his opinion necessarily assumed the truthfulness of the victim's hearsay statement—a statement which, as Dr. Althouse himself acknowledged at the first probable-cause hearing on December 29, 1994, Watson denied making.

As the State points out, a probable-cause hearing is not a trial. But the rules of evidence do apply at such hearings, so that where the sole evidence presented on the determinative 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) (where the only evidence supporting bindover on charge of sexually assaulting a child was child's hearsay statement,

"the record is devoid of any evidence to suggest that a felony was committed" and the trial court's probable-cause finding must be reversed).[7]

We conclude, therefore, that Dr. Althouse was not testifying as an expert when he stated that, in his opinion, Watson's false imprisonment of the victim was sexually motivated. We thus reject the State's argument that his opinion, though based on inadmissible evidence, was nonetheless admissible under the expert-witness statute, § 907.03, STATS. Additionally, even if he could be considered to be testifying as an expert, Dr. Althouse necessarily assumed the truth of a lay witness's hearsay statement of observed fact; and that is simply not the type of data or information the statute presumes to be within the special competence of an expert witness to verify and reasonably rely on.

Alternatively, the State argues that even if § 907.03, STATS., does not justify admission of Dr. Althouse's sexual-motivation testimony, the statement in the presentence report is independently admissible under various exceptions to the hearsay rule. However, the State did not advance any such argument in the trial court—either at the probable-cause hearing or at a hearing two weeks later, when the State was invited to address the probability of success on appeal[8]—and we have consistently held that we will not consider an argument raised for the first time on appeal. ***In re C.A.K.***, 154 Wis.2d 612, 624, 453 N.W.2d 897, 902 (1990).

[7] The parties concede in this case, and the trial court agreed, that a probable-cause hearing under chapter 980, STATS., is analogous to the preliminary hearing in felony prosecutions in terms of procedure and proof.

[8] The State listed several hearsay exceptions in its statement to the court at this second hearing but never argued any of them, saying only: "We do not believe the Court considered the provisions of Section[s] 908.01(4)(b)1, [and] 908.03(1), (8), and (24) in deciding whether to allow the hearsay statement …."

We acknowledge that this "waiver" rule is one of judicial administration which does not absolutely prohibit us from reviewing an issue; but when the alleged error was never brought to the trial court's attention, thus denying the court the opportunity to address it, such a result "frustrates one of the fundamental principles underlying the ... rule." ***Town of Menasha v. City of Menasha***, 170 Wis.2d 181, 196, 488 N.W.2d 104, 111 (Ct. App. 1992) (citation omitted). We have also held that, in cases such as this, where the State is not in its usual role as a respondent but is the appellant seeking to reverse a trial court ruling, "[w]e will without hesitation apply the waiver rule against the state where the issue was not first raised by it at the trial court." ***State v. Holt***, 128 Wis.2d 110, 125, 382 N.W.2d 679, 687 (Ct. App. 1985). In so holding, we emphasized the policy underlying the rule:

> Contemporaneous objection gives the trial court an opportunity to correct its own errors, and thereby works to avoid the delay and expense incident to appeals, reversals and new trials which might have been unnecessary had the objections been properly raised in the lower court. Moreover, the waiver rule prevents a party from deliberately setting up the record for appeal by sitting silently by while error occurs and then seeking reversal if the result is unfavorable.

Id. at 124, 382 N.W.2d at 686 (citations omitted).[9]

[9] In a later case, ***State v. Rogers,*** 196 Wis.2d 817, 539 N.W.2d 897 (Ct. App. 1995), we applied the ***Holt*** rule, declining to entertain on appeal the State's "new" theory supporting admission of hearsay evidence rejected by the trial court. We again emphasized the underlying philosophy of the rule:

> The ***Holt*** rule is based on a policy of judicial efficiency. By forcing parties to make all of their arguments to the trial court, it prevents the extra trials and hearings which would result if parties were only required to raise a general issue at the trial level with the knowledge that the details could always be relitigated on appeal (or on remand) should their original idea not win favor. We will not, however, blindside trial courts with

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Even giving the State the benefit of the doubt, the arguments it offers in favor of admissibility are unpersuasive.

The State first suggests that the statement is an "admission by a party opponent," citing § 908.01(4)(b)1, STATS. Section 908.01(4)(b)1 provides that any prior out-of-court statements made by a party opponent are not hearsay. Watson's alleged statement would fall under this rule. The State, however, must elicit testimony from someone who actually heard the statement or find another hearsay exception for the report and Dr. Althouse to avoid the problem of hearsay within hearsay. *Cf.* ***State v. Whiting***, 136 Wis.2d 400, 419-20, 402 N.W.2d 723, 731-32 (Ct. App. 1987). The presentence report merely recorded the statement as recounted by the victim, and Dr. Althouse relied upon the report, never having actually heard the statement from either the declarant or the victim.

The State next argues that the statement is admissible as a "present sense impression" under § 908.03(1), STATS., because it was "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." As Watson points out, however, the cases applying the rule involved situations in which the present-sense impression was communicated *to the witness testifying at trial*,[10] not to a nontestifying intermediary—or, as in this case through *two* nontestifying

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> reversals based on theories which did not originate in their forum.

Id. at 827, 539 N.W.2d at 901 (citations omitted).

[10] *See*, *e.g.*, ***Hamed v. Milwaukee County***, 108 Wis.2d 257, 273 n.3, 321 N.W.2d 199, 207 (1982); ***Shoemaker v. Marc's Big Boy***, 51 Wis.2d 611, 616-17, 187 N.W.2d 815, 818-19 (1971); ***Rudzinski v. Warner Theatres, Inc.***, 16 Wis.2d 241, 248-49, 114 N.W.2d 466, 470 (1962).

intermediaries. The State has not referred us to any cases applying § 908.03(1) to facts even remotely resembling those before us here. Nothing in the presentence report, or elsewhere in the record, suggests compliance with the requirement of § 908.03(1) that the statement be made while, or immediately after, perceiving the event.

The State also argues that the presentence report qualifies as an "official government document" within the meaning of § 908.03(8)(c), STATS., which authorizes the admission of "factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." The State likens the presentence report to "case records" maintained by the Department of Health and Social Services, which it says were held admissible in ***State ex rel. Prellwitz v. Schmidt,*** 73 Wis.2d 35, 242 N.W.2d 227 (1976), and police reports, which it says were allowed in ***Mitchell v. State,*** 84 Wis.2d 325, 267 N.W.2d 349 (1978).

In ***Prellwitz***, the issue was whether the department's records established that a probationer had not regularly reported his whereabouts to his agent and had not paid restitution, as required under the conditions of his probation—facts which are readily established by data recorded in the course of the department's daily operations. ***Prellwitz***, 73 Wis.2d at 40, 242 N.W.2d at 229. In this case, on the other hand, the portion of the presentence report at issue is not such a record: it is no more than a representation to a department employee of what one person said another person said. We do not see ***Prellwitz*** as lending significant support to the State's argument.

We think the same may be said—perhaps even more so—for ***Mitchell***. In that case, the question was whether the rules of evidence permitted

the State to introduce a police report into evidence at a preliminary hearing. The charged offense was auto theft, and the trial court admitted two police reports prepared by the arresting officer. One was an "offense report" of the theft of the car, and the other was the officer's description of his telephone conversation with the owner of the car. ***Mitchell***, 84 Wis.2d at 330, 267 N.W.2d at 352. The supreme court distinguished between "the details of which the officer had personal knowledge," and the "repetition of declarations made by [the victim] to the officer over the phone," and concluded that the public-records exception "does not allow admission of this second level of hearsay." ***Id***. "The admission of the police reports containing the declarations of [the victim] was … a violation of the hearsay rules." ***Id***. at 334, 267 N.W.2d at 354. The State has not persuaded us that the public-records exception to the hearsay rule applies to the victim's statement in this case.

Finally, the State argues that the victim's statement is admissible under the "residual" provisions of § 908.03(24), STATS., authorizing admission of "[a] statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness." According to the State, the victim's statement has such guarantees of trustworthiness because: (1) the statement was recorded in the presentence report, a document that "was carefully investigated and drafted"; (2) the statement is "consistent with the account of [the victim's] false imprisonment" as set forth in the criminal complaint; (3) the presentence report "is highly detailed and does not shy from rather sensitive topics," including information of a "sensitive, personal nature" which indicates that "accurate reporting constituted [the victim]'s only objective"; and (4) admission of the statement "conforms with the spirit of admitting the

[presentence report] itself under the sec. 908.03(8) official records hearsay exception."

Again, we are not persuaded. First, we find nothing in the record to indicate the extent of the probation agent's investigation, or the degree of care used in preparing the report. Second, Watson's purported statement is never mentioned in the criminal complaint. Nor do we see how the subject matter of the statement imbues it with a guarantee of trustworthiness. As to § 908.03(8), STATS., we have already concluded that it does not warrant admission of the statement.

The ***Mitchell*** court also considered § 908.03(24), STATS., and declined to apply the residual exception to the portion of the police report recounting the officer's telephone conversation with the victim. ***Mitchell***, 84 Wis.2d at 332-33, 267 N.W.2d at 353. The State argued that the conversation was admissible because it was used in a preliminary hearing—a probable-cause hearing governed by the same rules applicable to the hearing from which this appeal derives. The court rejected the argument, saying:

> The State suggests that [the victim]'s declarations to the police should be considered a residual hearsay exception under sec. 908.03(24), Stats., only for the purpose of a preliminary hearing and a finding of probable cause. However, this residual exception, by its form, applies to statements determined to have guarantees of trustworthiness comparable to the enumerated hearsay exceptions. The residual exception thus focuses, as do all of the enumerated hearsay exceptions, on the character of the statements and the circumstances under which they are made, not upon the type of judicial forum at which the statement is offered. We do not believe that restricting the forum at which such statements can be used provides the guarantees of trustworthiness contemplated by this rule. Statements made to the police over the telephone by the victim concerning the theft of an automobile have some guarantees of trustworthiness, but they do not have

> sufficient guarantees of trustworthiness to be admissible under the residual hearsay exception ….

Id. at 333, 267 N.W.2d at 333. We believe the same rationale applies here, and we conclude that the statement in the presentence report is not independently admissible under § 908.03, STATS.

While we may differ with the trial court as to the precise reasoning underlying its holding that the State had failed to establish probable cause that the predicate false imprisonment offense was sexually motivated, we are satisfied the court reached the proper result under applicable law.

Finally, because of the possibility that the dissenting opinion, by dwelling on Watson's past crimes over the past forty-five years, will lead to misperceptions of what this case is about, we feel constrained to discuss it briefly. As we have said, as part of the process of committing Watson as a sexual predator, the State had to show probable cause that a non-sex-related offense—a 1980 false imprisonment charge—was sexually motivated. It elected to do so through the testimony of Dr. Althouse, whose opinion was solely based on the statement Watson is alleged to have made to the victim.

This case has nothing to do with Watson's lengthy prior record. He has, obviously, done bad things in his life. But what he may have done in 1953 or 1971 did not contribute in any way to the formation of Dr. Althouse's opinion that the 1980 false imprisonment was sexually motivated. Nor was it based on the fact that, in addition to falsely imprisoning the victim in this case, Watson savagely

beat her. He was charged and convicted of that offense, and it has nothing to do with the issues before us on this appeal.[11]

Nor was Dr. Althouse's opinion based on any of the other "facts" the dissent says must form the basis for determining the existence of probable cause.[12] His opinion on the sexual motivation of the offense had nothing to do with his two interviews with Watson, or with the "Hare psychopathy checklist," or with Watson's paraphilia. Those matters may have contributed to other opinions of Dr. Althouse's which are not relevant to this appeal, but *not* to his opinion that the false imprisonment was sexually motivated.[13] In Dr. Althouse's own words,

[11] It should be noted that the State never alleged that Watson sexually assaulted or had sexual contact with the victim in this case.

[12] The State lodges an argument similar to the dissent's, asking us to consider the "totality of the evidence." Our analysis rejecting the dissent's position applies equally to the State's argument.

[13] Despite Dr. Althouse's unequivocal acknowledgment that his opinion that the false imprisonment offense was sexually motivated was "based solely" on Watson's statement, the dissent is grounded on a contrary premise—that Dr. Althouse considered "other information" in forming his opinion. The assertion is based on Dr. Althouse's response to a generally phrased prefatory question the prosecutor posed shortly after he had taken the stand: What, if anything, had he learned from the presentence report "of a sexual nature" concerning the false imprisonment charge? After a flurry of objections, Dr. Althouse responded, as the dissent indicates: "The statement that I relied upon which I believe you are asking about to form in part the basis of my opinion" was Watson's statement. He was then asked whether, based on the materials he had reviewed and his interview with Watson, he had an opinion "as to whether Mr. Watson suffered from a mental disorder." Dr. Althouse responded that, in his opinion, Watson suffered from paraphilia.

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Watson's alleged statement was the *only* basis for his opinion in that regard and he acknowledged that, indeed, it would be "impossible" for him to so conclude without that statement.

By the Court.—Order affirmed in part and reversed in part.

Not recommended for publication in the official reports.

As we stress throughout this opinion, two elements must be established in order to obtain a commitment under the sexual predator law: (1) the person has been convicted of either an offense that is a designated sex crime or another offense that was "sexually motivated"; and (2) the person "suffers from a mental disorder." Section 980.01(7), STATS. The dissent thus attempts to compare apples to oranges by attaching Dr. Althouse's testimony on the second element to his testimony on the first element—which, as we also stress, is the sole issue the State has brought before us on this appeal. Indeed, that issue was not broached in Dr. Althouse's testimony until a dozen pages later in the transcript when the prosecutor, having completed his questioning on the mental-disorder element, moved on to the issue of sexual motivation and asked Dr. Althouse whether he had an opinion on whether the offense was "sexually motivated." And, as Dr. Althouse candidly acknowledged, his opinion in that regard was based not on any interview or any tests—or even consideration of Watson's criminal history—but, again in his words, "solely" on the statement in the presentence report.

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DYKMAN, P.J. *(dissenting).* This case is about the phrase "probable cause." The majority concludes that the State failed to show probable cause that one of Watson's past crimes was sexually motivated. I believe that it did. I do so in part because the Wisconsin Supreme Court has described probable cause as a minimal showing of the truth of an assertion. Not much is required for a conclusion that probable cause exists.

In ***State v. Mitchell***, 167 Wis.2d 672, 681-82, 482 N.W.2d 364, 367-68 (1992), the supreme court explained the phrase "probable cause." The court noted that a "possibility or suspicion" does not meet this test, but that the evidence need not show that "guilt is more likely than not" to meet the test. This "not more likely than not" test shows the low threshold that evidence must pass. In the usual situation, it can be "more likely than not" that a defendant is not guilty of the crime charged, and yet "probable cause" exists. Here, it can be "more likely than not" that Watson's act which led to his conviction for false imprisonment was *not* sexually motivated, and probable cause can still be found.

The dispositive issue is whether Watson's 1980 conviction for false imprisonment was sexually motivated. All agree that the only evidence of sexual motivation was a statement allegedly made by the victim of the crime that Watson told her: "Now you are going to suck me off, bitch." A psychologist, Dr. Richard Althouse, testified that without that statement, it would be virtually impossible to conclude that the false imprisonment was sexually motivated.

The majority concludes that the victim's statement, admittedly hearsay, cannot be the basis for Dr. Althouse's opinion because he was not testifying as an expert when he said that he believed Watson had made the statement. I view the matter differently.

Ordinarily, I would agree that no one can testify that another person is telling the truth. ***State v. Haseltine***, 120 Wis.2d 92, 96, 352 N.W.2d 673, 676 (Ct. App. 1984). But the hearing at which Dr. Althouse testified was not a trial; it was a hearing to determine whether there was probable cause to proceed to trial. The question was not whether Watson's underlying crime was sexually motivated, but whether it was probably sexually motivated. Probable cause requires much less certainty than the proof required at trial. Where the majority and I differ is in the reliance that we, the trial court and Dr. Althouse may place on a hearsay statement allegedly made by the victim of Watson's crime.

First, I do not agree that Dr. Althouse's opinion was based only upon Watson's statement, considered in isolation. The question asked was: "What, if anything, did you learn from that presentence connected with Count 3 that appears in Exhibit 1 of a sexual nature?" After Watson's objection was overruled, Dr. Althouse answered: "The statement that I relied upon which I believe you are asking about to form *in part* the basis of my opinion, is this: 'Now you are going to suck me off, bitch.'" (Emphasis added.) Later, Dr. Althouse testified: "It is my professional opinion *based upon my experience* that the offense was sexually motivated." (Emphasis added.)

Dr. Althouse's answers pertain to whether Watson's crime was sexually motivated, not to whether he suffered from a mental disorder. I cannot transform what Dr. Althouse actually said: "It is my professional opinion … that

the offense was sexually motivated" into something else having to do with Watson's mental disorder. I am aware that a question asking whether a crime is of a "sexual nature" is not the best way to ask whether a crime is sexually motivated. But it is by no means a question that inquires into whether Watson suffered from a mental disorder. The transcript of the probable cause hearing speaks for itself. These are direct quotes from Dr. Althouse, not digests or interpretations of what he said.

Once one considers Dr. Althouse's answers, and in particular the italicized portions, I do not think that it is correct to assert, as the majority does, that "[Dr. Althouse's] opinion on the sexual motivation of the offense had nothing to do with his two interviews with Watson, or with the 'Hare psychopathy checklist,' or with Watson's paraphilia." At best, Dr. Althouse's answers would lead to an inquiry into all of the factors that led to his opinion, and what in Dr. Althouse's experience helped him to conclude that Watson's crime was sexually motivated.

Once one accepts, as I do, that there were other factors that Dr. Althouse considered before coming to his conclusion, the question becomes whether the information that Dr. Althouse knew would support his conclusion that Watson's crime was sexually motivated. The majority considers this other information irrelevant and usable only to show that Watson is a bad man. That is not my purpose. I agree with the majority that Watson has done bad things in his life. But the question is whether the information that Dr. Althouse knew about Watson could form the basis for his decision to believe that Watson made the statement to his victim. I believe that the following information could form a basis for Dr. Althouse's decision to believe the victim and not Watson.

In 1953, Watson was convicted of carnal knowledge and abuse. In 1971, he was convicted of two counts of endangering safety by conduct regardless of life and one count of attempted rape. In 1980, he was convicted of battery, two counts of false imprisonment and one count of endangering safety by conduct regardless of life.

The facts giving rise to Watson's latest convictions were that in 1971, Watson picked up three women in Milwaukee and was driving them to Algoma. He forced the women to disrobe by threatening them with a knife and attempted to tape together the hands of one of them. He disrobed and crawled into the back seat of his car, where he attempted to have sexual intercourse with one of the women. The women successfully fled the vehicle. In 1980, Watson picked up a female hitchhiker, drove to and parked in the University of Wisconsin Arboretum, and threatened the woman with a knife. During a struggle, Watson hit the woman about the head with a hammer wrapped in a cloth. He tied the woman up, forced her into the back seat and wrapped tape around her head. The woman freed herself and, after a struggle, escaped from the car. Later that morning, Watson picked up another female hitchhiker and began striking her about the head with a hammer. She managed to break away and exit the car. Watson followed her and began hitting her with the hammer again before fleeing.

Dr. Althouse interviewed Watson twice for a total of about two and one-half hours. He reviewed the Department of Corrections social services file, the Bureau of Clinical Services confidential file, including Watson's presentence report, and reviewed Watson's legal file. He used a "Hare psychopathy checklist," which assesses twenty variables in order to measure anti-social personality disorders. The test revealed that Watson was in an area reserved for people who are commonly thought of as having serious anti-social personality disorders. Dr.

Althouse discussed Watson's prior record with him. Watson admitted being convicted of carnal knowledge and abuse of a minor, although he denied actually raping or attempting to rape the victim. Watson described his previous conviction for attempted rape and two counts of endangering safety by conduct regardless of life as a joke that apparently went too far. Watson denied that his prior offenses were sexually motivated with the exception of the one in 1953, and he admitted that he asked the victim in one of his convictions to disrobe. Dr. Althouse diagnosed Watson as suffering from paraphilia, a condition that results in uncontrollable urges that involve sexual contact with non-consenting partners.

I do not think it is necessary to conclude that Dr. Althouse was guessing or speculating when he decided to believe Watson's victim's view of what happened over Watson's explanation. Althouse knew of the two different stories. He used his experience and expertise in psychology, his knowledge of Watson's past criminal record, and what Watson revealed in interviews to determine that Watson probably made the statement.

This is the information from which we must determine whether there is probable cause to believe that Watson's crime was sexually motivated. We need not conclude that it is more likely than not that Watson fits this definition. We need only conclude that it is more than a possibility or a suspicion that Watson is sexually violent. ***Mitchell***, 167 Wis.2d at 681-82, 482 N.W.2d at 367. Indeed, we can conclude that it is more likely than not that Watson's crime was not sexually motivated and still find probable cause that it is. ***Id.*** at 682, 482 N.W.2d at 367-68. I conclude that it is more than a possibility or speculation that Dr. Althouse was probably correct in determining that Watson made the statement and therefore, in his opinion, Watson's crime was sexually motivated. It is not necessary that it is "more likely than not" that Dr. Althouse correctly made his

assessment. A court's duty at a preliminary or probable cause hearing is to determine whether there exists a believable or plausible account of the defendant's guilt. *See* ***State v. Dunn***, 121 Wis.2d 389, 398, 359 N.W.2d 151, 155 (1984). Here, the question is whether there is a believable or plausible account from which Dr. Althouse, the trial court and this court can say that Watson's previous crime was probably sexually motivated.

Using the standard we are to use at the probable cause stage of a Chapter 980, STATS., proceeding, I conclude that there is probable cause to believe that Watson's crime was sexually motivated. I would therefore remand to the trial court for a trial at which a jury could decide whether the State could prove beyond a reasonable doubt that it was.