COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP817 **Cir. Ct. No. 2009CI6**

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

IN RE THE COMMITMENT OF EMMITT WILSON, JR.:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

EMMITT WILSON, JR.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Emmitt Wilson, Jr., appeals a commitment order entered pursuant to WIS. STAT. § 980.06 (2011-12).[1] The sole issue on appeal is

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

whether sufficient evidence supports the circuit court's verdict that Wilson is a sexually violent person. We conclude that the evidence is sufficient, and we affirm.

BACKGROUND

¶2 Wilson was completing a term of initial confinement for first-degree sexual assault of a child when the State petitioned to commit him as a sexually violent person. In March 2011, the matter proceeded to a bench trial.

¶3 The State's evidence showed that Wilson, who was sixty-one years old at the time of trial, had criminal convictions in two states for sexually assaultive behavior spanning several decades.[2] In 1991, a woman and four girls, ages ten, thirteen, fifteen, and sixteen, accused Wilson of sexually assaulting them in a swimming pool in Tennessee. He resolved the resulting charges by pleading guilty to multiple counts of sexual battery and one count of aggravated sexual battery. In 2000, a six-year-old girl in Tennessee alleged that Wilson got into bed with her and penetrated her vagina with his fingers while visiting in her home. Wilson resolved the matter by pleading guilty to sexual battery. In 2005, a twelve-year-old girl in Wisconsin alleged that Wilson was a family houseguest when he awakened her by fondling her vagina in the middle of the night. Wilson pled guilty as charged to one count of first-degree sexual assault of a child. *See* WIS. STAT. § 948.02(1).

¶4 The State also presented expert testimony from Dr. Cynthia Marsh, a psychologist employed by the Wisconsin Department of Corrections, and Dr.

[2] Wilson's date of birth is January 27, 1950.

William Schmitt, a psychologist employed by the Wisconsin Department of Health Services. Both experts had reviewed Wilson's correctional and psychological records, and Marsh had additionally conducted a personal interview with Wilson.

¶5 Marsh diagnosed Wilson with antisocial personality disorder and with paraphilia not otherwise specified, and she testified that Wilson's conditions predispose him to commit sexually violent acts. Marsh then explained that she assessed Wilson's risk of reoffending in the future by using three actuarial instruments. She testified that the instruments assess a subject's likelihood of reoffending within a specified timeframe and that the results of each assessment reflect that Wilson's risk of reoffending after five years is less than fifty percent. She further testified, however, that she applied a formula that permits the assessor to extrapolate from the test results to determine a subject's lifetime risk of reoffending. Using this formula, Marsh concluded that, depending on the instrument used, Wilson's risk of reoffending during the remainder of his lifetime is as high as seventy-eight percent.

¶6 Marsh also testified that Wilson received "one of the highest scores" on a psychopathy assessment. As reflected in her written report, "a psychopath [i]s an individual who controls other people with charm, manipulation, intimidation and sometimes physical violence." Marsh testified that individuals with an elevated psychopathy score who also exhibit sexual deviance "have a higher rate of sexual reoffending."

¶7 Marsh told the circuit court that advancing age can attenuate the risk of reoffending, but, in Wilson's case, age did not reduce the risk to reoffend because Wilson had committed sexual offenses "to age fifty-five," an age "when

we would expect someone to be ... slowing down." She further testified that his history of committing sexual offenses while serving terms of community supervision, his lack of family support, and his failure to participate in sex offender treatment while in prison all contributed to his risk of reoffending. Marsh concluded to a reasonable degree of professional certainty that Wilson is more likely than not to commit a future act of sexual violence as a result of his mental disorders.

¶8 Schmitt diagnosed Wilson with antisocial personality disorder, and Schmitt also determined that Wilson had an "exceptionally high" psychopathy score. Schmitt testified that his review of Wilson's criminal history revealed nonsexual offenses in addition to sexual offenses, and Schmitt concluded that Wilson's personality disorder "predisposes [Wilson] to keep acting out in both nonsexual and sexual ways."[3]

¶9 Schmitt explained that he used one actuarial instrument to determine Wilson's lifetime risk of committing future sexual offenses. Schmitt extrapolated from the results measuring Wilson's risk to reoffend over periods of five years and ten years, and, based on that extrapolation, concluded that the risk of Wilson reoffending within fifteen years exceeded fifty percent.

¶10 Schmitt agreed with Marsh that Wilson's age did not reduce Wilson's risk of reoffending because he had a history of sexual offenses "dating at least [to the] ages 41 to 55.... [I]t certainly doesn't appear that he is slowing down despite his advancing age." As did Marsh, Schmitt testified that he believed, to a

[3] The record reveals that Wilson's history of criminal offenses other than sex crimes includes robbery, theft, assault causing bodily harm, and possession of narcotics.

reasonable degree of professional certainty, that Wilson is more likely than not to commit future acts of sexual violence.

¶11 Psychologist James Peterson testified as an expert on Wilson's behalf. Peterson agreed with the State's experts that Wilson suffers from antisocial personality disorder, but, in Peterson's opinion, Wilson's sexual offenses were "crimes of opportunity" that did not reflect a predisposition to commit acts of sexual violence. Peterson told the circuit court that the risk of Wilson reoffending after ten years was thirty-six percent and that the risk of an individual reoffending after reaching the age of seventy "is essentially zero, statistically." Peterson acknowledged, however, that "there are 70-year-olds and 80-year-olds and 90-year-olds who reoffend."

¶12 Wilson also testified. He told the circuit court that he had no difficulty controlling his sexual behavior, and he denied that he ever committed any sexually motivated crimes. He testified that the allegations in 1991 stemmed from an incident during which he was swimming with new acquaintances who made false claims against him when his hand "slip[ped] into [a ten-year-old-girl's] bathing suit" and when his tussle with a sixteen-year-old girl caused her top to "slip[] down." He explained that the allegation in 2000 arose when he stopped at the home of a female acquaintance for a visit in the middle of the night and decided to check on her sleeping daughter. According to Wilson, his acquaintance wrongly assumed, based on his past history, that he was the person who injured the six-year-old girl's vaginal area. Finally, he admitted that he molested a twelve-year-old girl in Wisconsin in 2005, but he testified that the crime was not sexually motivated. He explained that a woman had invited him to live with her, but he concluded that he was in "another bad situation.... And that's when [he] made up [his] mind to go and touch [the woman's] daughter knowing that [the]

daughter will tell [the woman], hopefully." Wilson said that he anticipated that the woman would "have [him] locked up so [he] c[oul]d try to go get in the penitentiary so [he] can make some money, try to get [him]self together and regroup."

¶13 The circuit court determined that Wilson was a sexually violent person and ordered him committed to the custody of the Department of Health Services for control, care, and treatment. *See* WIS. STAT. § 980.06. He appeals, contending that the State failed to establish beyond a reasonable doubt that he is more likely than not to engage in future acts of sexual violence.

DISCUSSION

¶14 Before the circuit court may commit an individual as a sexually violent person under WIS. STAT. ch. 980, the State must prove beyond a reasonable doubt that the individual: (1) has been convicted of a sexually violent offense; (2) currently suffers from a mental disorder; and (3) is dangerous to others because he or she is more likely than not, because of the mental disorder, to engage in at least one future act of sexual violence. *See* WIS. STAT. §§ 980.01(7), 980.05(3)(a); *see also* WIS JI—CRIMINAL 2502. In this appeal, Wilson does not dispute that he previously was convicted of a sexually violent offense. *See* WIS. STAT. § 980.01(6)(a) (defining sexually violent offense to include, *inter alia*, a crime specified in WIS. STAT. § 948.02(1)). Wilson also does not argue that the evidence at trial was insufficient to show that he currently suffers from a mental disorder. Wilson contends, however, that the State failed to prove that he is more likely than not to engage in future acts of sexual violence as a consequence of his mental disorder.

¶15 When we review the sufficiency of the evidence in a case under WIS. STAT. ch. 980, we apply the standard used in criminal cases. ***State v. Kienitz***, 227 Wis. 2d 423, 434, 597 N.W.2d 712 (1999). The test for sufficiency of the evidence is the same whether a jury or the circuit court acts as the factfinder. ***State v. Curiel***, 227 Wis. 2d 389, 418, 597 N.W.2d 697 (1999). Therefore:

> [w]e may not reverse the conviction based on insufficient evidence unless the evidence, viewed most favorably to the [S]tate and the commitment, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found the defendant to be a sexually violent person beyond a reasonable doubt.

Kienitz, 227 Wis. 2d at 434 (citation, formatting, some punctuation, and two sets of brackets omitted). Moreover, "[o]nly when the evidence is inherently or patently incredible will we substitute our judgment for that of the factfinder." ***State v. Saunders***, 196 Wis. 2d 45, 54, 538 N.W.2d 546 (Ct. App. 1995). The testimony of a single expert witness who is not inherently incredible or incredible as a matter of law is sufficient to sustain a verdict that an individual is a sexually violent person. *See* ***State v. Lombard***, 2003 WI App 163, ¶¶20-22, 266 Wis. 2d 887, 669 N.W.2d 157.

¶16 Wilson does not suggest that the expert witnesses presented by the State were inherently or patently incredible. Rather, Wilson challenges the sufficiency of the evidence because the circuit court concluded that "the actuarial evidence is not enough by itself to sustain a verdict in favor of the State." In Wilson's view, "[o]nce the court found that the evidence as rendered by the experts in this matter was not sufficient to find beyond a reasonable doubt that the [S]tate had met its burden of proof, the court should have found that Mr. Wilson was not an appropriate subject for commitment." Wilson is wrong.

¶17 No governing authority provides that a factfinder must base its finding of future dangerousness on an expert's testimony. *See* ***State v. Mark***, 2008 WI App 44, ¶51, 308 Wis. 2d 191, 747 N.W.2d 727. In this case, the circuit court explained that it was not persuaded to the requisite degree of certainty by the experts' conclusions drawn from the actuarial measurements but that other evidence persuaded the circuit court beyond a reasonable doubt that Wilson was a sexually violent person. The circuit court then discussed its findings and the evidence supporting them.

¶18 The circuit court found that Wilson committed a sexual offense when he was in his mid-fifties, and the circuit court therefore accepted the conclusion of the State's expert witnesses that his sexual misconduct "was not slowing down." The circuit court also took into account that Wilson had selected his minor victims without first cultivating a relationship with them. In the circuit court's view, he "simply helped himself," and his opportunistic behavior increased the likelihood that he would reoffend in the future.

¶19 The circuit court was most persuaded, however, by Wilson himself, specifically, his testimony and demeanor at trial. The circuit court described Wilson's testimony as "unnerving" and characterized his discussion of his criminal history as "preposterous" and "ludicrous to the point of being scary." The circuit court determined that Wilson lied on the stand and that his explanations for his criminal behavior were "so slippery that they make [the circuit court] worry about what he will do in the future to put himself in a position in order to exploit opportunities." Stating that Wilson "reweaves the facts to suit his purposes and manipulate others," the circuit court determined that Wilson had tried to "manipulate the outcome in this court," and that his "manipulative" and "shifty" testimony reflected the psychopathy discussed by the State's experts. The

circuit court further determined that Wilson had revealed himself at trial as "the kind of stranger who can talk [his] way into someone's home and then take advantage," and the circuit court concluded that the sum of the evidence showed that he was dangerous and more likely than not to commit a sexually violent offense in the future.

¶20 Wilson fails to demonstrate that the circuit court erred by relying on his testimony to make critical findings and reach a verdict. To the contrary, a factfinder in a proceeding under WIS. STAT. ch. 980 is explicitly empowered to "accept or reject the testimony of any expert, including accepting only parts of an expert's testimony; and to consider all of the non-expert testimony." ***Kienitz***, 227 Wis. 2d at 441. The record here shows that the circuit court considered the expert testimony as well as the other evidence presented, including Wilson's criminal record, his explanations for his behavior and criminal history, his character, and his demeanor on the stand. The totality of the evidence persuaded the circuit court that Wilson is a sexually violent person. We cannot say that the evidence presented was so insufficient that no reasonable trier of fact could have reached that conclusion. Therefore, we are required to affirm. *See* ***id.*** at 434.

By the Court.—Order affirmed.

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