COURT OF APPEALS
DECISION
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Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2016AP1918 **Cir. Ct. No. 2013CI1**

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

IN RE THE COMMITMENT OF CHRISTOPHER E. MIKULSKI:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

CHRISTOPHER E. MIKULSKI,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Polk County: MOLLY E. GALEWYRICK, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Christopher Mikulski appeals a judgment entered upon a jury verdict adjudging him to be a sexually violent person under WIS. STAT. ch. 980 (2015-16).[1] On appeal, Mikulski contends the evidence introduced at trial was insufficient to support the jury's verdict because the State's expert opined that Mikulski was "likely," rather than "more likely than not" to commit another sexually violent offense. We conclude there was sufficient evidence for the jury to conclude Mikulski was more likely than not to commit a sexually violent offense. We therefore affirm.

BACKGROUND

¶2 Mikulski was convicted of one count of first-degree sexual assault of a child in 2006 and sentenced to seven years' initial confinement and eight years' extended supervision. In September 2013, shortly before Mikulski's release date, the State petitioned to civilly commit Mikulski as a sexually violent person pursuant to WIS. STAT. ch. 980.

¶3 The State presented three witnesses, including Mark Lemke, a former probation and parole agent who drafted Mikulski's presentence investigation report (PSI), and Dr. Christopher Tyre, a psychologist. Lemke testified that while interviewing Mikulski for the PSI, Mikulski indicated that "[i]f [Mikulski's] in a situation with children, he knows he's vulnerable, and he isn't sure if he can refrain from committing acts."

¶4 Doctor Tyre opined as follows:

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

> I did conclude that Mr. Mikulski possesses a mental disorder and in this case two diagnoses that I felt would qualify as a mental disorder as defined within [c]hapter 980 and that in my opinion those mental disorders made it likely that he would engage in a future act of sexual violence.

Twice more, Tyre opined that Mikulski was "likely" to engage in a future act of sexual violence. However, on cross-examination, Tyre explained "that [Mikulski's] risk is likely more likely than not."

¶5 Doctor Tyre testified that he formed his opinion of Mikulski's likelihood of committing future acts of sexual violence by scoring Mikulski on various actuarial instruments to assess his risk of reoffending. On one such instrument, the RRASOR,[2] Tyre scored Mikulski at five points on a range of zero to six. Tyre testified a score of five was the highest possible score for Mikulski's age group and estimated seventy percent of offenders with Mikulski's score on the RRASOR would later be convicted of a new sexual offense. On another actuarial tool, the Static-99, Tyre gave Mikulski a score of seven. Tyre explained that scores of six and above on the Static-99 are associated with a high risk of recidivism and the data predicted a fifty-two percent rate of reconviction for a person with Mikulski's score. Tyre also scored Mikulski on the Static-99R, a revised version of the Static 99, giving Mikulski a score of six. Finally, Tyre testified that he scored Mikulski on the SSPI,[3] giving him the maximum score on a range of zero to five.

[2] RRASOR refers to the Rapid Risk Assessment for Sex Offender Recidivism.

[3] SSPI refers to the Screening Scale for Pedophilic Interest.

¶6 Mikulski presented one expert witness, Dr. Lakshmi Subramanian. When asked about the standard for commitment, Subramanian explained that "[u]nder Wisconsin law a person's probability to commit another sexually violent offense should be more likely than not or should be 50 percent. So more likely than not defined as being over 50 percent." Subramanian testified her initial opinion was that Mikulski was more likely than not to reoffend. However, since preparing her opinion, Subramanian had reviewed a publication that caused her to reassess the likelihood of Mikulski's recidivism based upon his scores. The article indicated that the previously used recidivism rates associated with Static-99 test scores were too high, and provided recalculated rates that were lower. Thereafter, though Subramanian's assessment of Mikulski's score on the Static-99R did not change, she came to the conclusion that Mikulski's risk of re-offense did not exceed fifty percent.

¶7 After the conclusion of evidence, Mikulski stipulated that he had been convicted of a predicate offense under WIS. STAT. ch. 980 and that he had a mental condition that predisposed him to commit sexually violent acts. Whether Mikulski was more likely than not to reoffend was the only issue submitted to the jury. The circuit court instructed the jury as follows:

> A Petition has been filed alleging that Christopher Mikulski is a sexually violent person. A sexually violent person is one who has been convicted of a sexually violent offense and is dangerous to others because he or she currently has a mental disorder that makes it more likely than not that the person will engage in future acts of sexual violence. You will now be asked to decide whether Christopher Mikulski is a sexually violent person.
>
> ....
>
> Before you may find that Christopher Mikulski is a sexually violent person the [S]tate must prove by evidence

> which satisfies you beyond a reasonable doubt that the following three elements are established.
>
> Number one, that Christopher Mikulski has been convicted of a sexually violent offense. Counsel agree this element is proved.
>
> Two, that Christopher Mikulski currently has a mental disorder. Counsel agree this element is proved.
>
> Three, that Christopher Mikulski is dangerous to others because he has a mental disorder which makes it more likely than not that he will engage in one or more future acts of sexual violence.[4]

The court then instructed the jury as to the meaning of the phrase "acts of sexual violence," and as to the reasonable doubt standard concluded:

> If you are satisfied beyond a reasonable doubt that the [S]tate has proved all three elements you should find that Christopher Mikulski is a sexually violent person. If you are not so satisfied you must not find that Christopher Mikulski is a sexually violent person.
>
> In reaching your verdict examine the evidence with care and caution. Act with judgment, reason, and prudence. The law presumes that Christopher Mikulski is not a sexually violent person.

¶8 The jury returned a verdict finding Mikulski to be a sexually violent person. The circuit court entered a judgment and commitment order committing Mikulski to the custody of the Department of Health Services for treatment. Mikulski now appeals.

[4] The circuit court instructed the jury as to the third element word-for-word from the jury instruction. *See* WIS JI—CRIMINAL 2502.

DISCUSSION

¶9 To commit a person under WIS. STAT. ch. 980, the State must prove beyond a reasonable doubt that he or she is a sexually violent person. WIS. STAT. § 980.05(3)(a). "Sexually violent person" is defined as:

> a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect, or illness, and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence.

WIS. STAT. § 980.01(7).

¶10 Therefore, to prove that a person is sexually violent, the State must prove beyond reasonable doubt that the person: (1) has been convicted of a sexually violent offense; (2) has a mental disorder; and (3) is dangerous to others because he has a mental disorder which makes it more likely than not that he will engage in one or more future acts of sexual violence. *See* WIS JI—CRIMINAL 2502.

¶11 In determining whether the evidence was sufficient to sustain a finding that the person is sexually violent, we use the same standard of review used in criminal cases. ***State v. Kienitz***, 227 Wis. 2d 423, 434, 597 N.W.2d 712 (1999). Under this standard:

> If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find [that the defendant is a sexually violent person], an appellate court may not overturn a verdict even if it believes the trier of fact should not have found [the defendant to be a sexually violent person] based on the evidence before it.

Id. at 434-35 (alteration in original) (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)).

¶12 Mikulski argues the trial evidence was insufficient as a matter of law to establish that it was more likely than not that he would commit a crime of sexual violence in the future.[5] Mikulski contends the State offered no expert opinion that he was more likely than not to engage in a future act of sexual violence, and that such expert testimony is required under Wisconsin law.[6] Mikulski's arguments are based entirely on the fact that Dr. Tyre testified that, in his opinion, Mikulski was "likely" to reoffend, and Tyre did not explain that "likely" has the same meaning as "more likely than not" under WIS. STAT. ch. 980. Mikulski then claims Dr. Subramanian's opinion that he is not more likely than not to reoffend was uncontradicted in the record.

¶13 In reviewing the sufficiency of the evidence, the test is whether "any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial" to find that Mikulski was more likely than not to commit a future act of sexual violence. ***Kienitz***, 227 Wis. 2d at 434-35. Mikulski acknowledges that for the purposes of WIS. STAT. ch. 980 proceedings, "'[l]ikely' means more likely than not." The statute itself uses the term "likely."

[5] We note that Mikulski's counsel submitted a plainly deficient appendix that failed to comply with WIS. STAT. RULE 809.19(2). Counsel is admonished to comply with RULE 809.19 in the future.

[6] Despite making this argument, Mikulski explains that Wisconsin courts have not conclusively addressed the question of whether expert testimony is necessary in order to support a finding of future dangerousness in WIS. STAT. ch. 980 proceedings. Nevertheless, we need not reach the issue because we find that the expert testimony presented by the State and Dr. Subramanian, was sufficient for the jury to find Mikulski was a sexually violent person. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (stating that if a decision on one point disposes of the appeal, we need not address the other issues raised).

See WIS. STAT. § 980.01(1m); *see also* ***State v. Smalley***, 2007 WI App 219, ¶3, 305 Wis. 2d 709, 741 N.W.2d 286. Therefore, it was possible for the jury to conclude that when Dr. Tyre said "likely," he meant more likely than not. To the extent it was necessary for Tyre to say the precise words "more likely than not," Tyre did use these words when he explained his conclusion during cross-examination.

¶14 Moreover, despite Dr. Tyre's use of the singular term "likely," he explained how he scored Mikulski on the various actuarial tools he used, and the likelihood of Mikulski's risk of reconviction based upon those scores. Specifically, Tyre testified that for Mikulski's score on the Static-99, the data predicted a fifty-two percent rate of reconviction. Tyre explained an estimated seventy percent of offenders with Mikulski's score on the RRASOR would be reconvicted of a new sexual offense. These opinions clearly provide evidence of a reconviction rate showing Mikulski was more likely that not, or more likely than fifty percent, to be reconvicted of a sexually violent offense.

¶15 Doctor Tyre also testified that Static-99 and RRASOR estimates are conservative. They are based on reconviction rates, which are lower than reoffense rates because "there's far more sexual offenses that occur tha[n] ever get reported to authorities." Tyre also explained that many of the actuarial tools calculate reconviction rates over a five, ten and fifteen year period, while the law in Wisconsin requires an "evaluation of somebody's risk over their lifetime, not just for the next five years or ten years, but over their lifetime." Therefore, when applied in Wisconsin, the actuarial tools may underestimate recidivism rates, thus providing further evidence that Mikulski's test scores indicated a greater than fifty percent likelihood of re-offense.

¶16 Doctor Subramanian testified that "more likely than not" means greater than fifty percent, and that her conclusion had changed since she first formed an opinion as to Mikulski's likelihood of reoffending. The jury could have concluded from the experts' combined testimony that Mikulski was more likely than not to reoffend. Further, a jury can accept as much of a medical expert's testimony as it finds credible. ***State v. Owen***, 202 Wis. 2d 620, 634, 551 N.W.2d 50 (Ct. App. 1996). Therefore, the jury could have accepted Subramanian's initial conclusion that Mikulski was more likely than not to reoffend rather than her subsequent, revised opinion.

¶17 Finally, the circuit court instructed the jury as to the proper standard, emphasizing that if the State had not met its burden to prove beyond a reasonable doubt that Mikulski was more likely than not to commit one or more future acts of sexual violence, the jury could not find he was a sexually violent person. Given this instruction by the court, in addition to the evidence presented at trial, we see no reason to question the jury's verdict.

¶18 We conclude the jury had sufficient evidence from which to find that Mikulski was more likely than not to sexually engage in one or more acts of sexual violence.

By the Court.—Judgment affirmed.

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