COURT OF APPEALS
DECISION
DATED AND FILED

April 17, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP98 **Cir. Ct. No. 2002CI1**

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

IN RE THE COMMITMENT OF TERRY L. OLSON:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

TERRY L. OLSON,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Washington County: ANDREW T. GONRING, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Terry L. Olson was convicted in 1991 of two counts of first-degree sexual assault of a child and has been diagnosed with

pedophilia. Committed in 2003 under WIS. STAT. ch. 980 (2011-12),[1] Olson petitioned for discharge in 2010. Olson appeals the order denying his petition on the basis that that the evidence was insufficient as a matter of law to establish that he is dangerous to others because of a mental disorder that makes it more likely than not that he will engage in future sexual violence. We disagree and affirm.

¶2 To prove that an individual is a sexually violent person who warrants commitment, the State must prove by clear and convincing evidence that the person has been convicted of a sexually violent offense, suffers from a mental disorder, and is dangerous to others because of a mental disorder which makes it more likely than not that the person will engage in one or more future acts of sexual violence. *See* WIS. STAT. §§ 980.01(7) and 980.09(3). Only the third prong is at issue in this appeal.

¶3 We apply the same standard of review to WIS. STAT. ch. 980 commitments as we do to review criminal convictions. ***State v. Curiel***, 227 Wis. 2d 389, 417, 597 N.W.2d 697 (1999). Accordingly, we may not substitute our judgment for that of the trier of fact—here, the court—unless the evidence, viewed most favorably to the State and the commitment, is so lacking in probative value and force that no reasonably acting trier of fact could have found beyond a reasonable doubt that Olson was a sexually violent person. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If there is "any possibility" that the trier of fact could have drawn the appropriate inferences from the evidence to make that finding, this court may not overturn the verdict even if

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

we believe that, based on the evidence before it, the trial court should not have found that Olson was a sexually violent person. *See* ***id.***

¶4 Three psychologists testified as to whether they believed Olson was more likely than not to commit another act of sexual violence in the future. Dr. Carolyn Hensel Fixmer testified for the State that Olson was more likely than not to reoffend. Dr. Fixmer testified that the Static 99-R, an actuarial tool, is used to estimate the reoffense rate at five and ten years out, but a likelihood to *ever* reoffend is necessary. *See* WIS. STAT. § 980.01(7). She used a research-based extrapolation method advocated by Dr. Dennis Doren and others to assess lifetime risk. Dr. Fixmer assessed Olson's lifetime risk to be 50.4 percent.

¶5 In contrast, Dr. Luis Rosell testified that he believed Olson was not more likely than not to reoffend. Dr. Robert Barahal testified that Olson's risk "probably straddles that 50 percent figure, but [could not] say that it is clearly over that." He also told the court that there is "no good scientific way to do" extrapolation, terming it "junk science." Dr. Fixmer acknowledged that there is a "considerable amount of dispute" about the Doren method.

¶6 Determining issues of credibility, weighing the evidence and resolving any conflicts in the testimony are for the trial court. *See* ***State v. Gomez***, 179 Wis.2d 400, 404, 507 N.W.2d 378 (Ct. App. 1993). The trial court found Dr. Rosell's opinion the least credible. It was not obligated to accept Dr. Rosell's opinion simply because he was designated as an expert. *See* ***State v. Owen***, 202 Wis. 2d 620, 634, 551 N.W.2d 50 (Ct. App. 1996).

¶7 Having given lesser weight to Dr. Rosell's opinion, the court compared Dr. Fixmer's and Dr. Barahal's opinions. It concluded that, while they differed over the validity of the Doren extrapolation method, there otherwise was

little difference between them. Both agreed on the necessity of extrapolation and the pedophilia diagnosis, scored him a "5" on the Static 99-R and categorized him as "high risk/high need."

¶8 The trial court properly exercised its discretion in assigning greater weight to Dr. Fixmer's testimony. She established her credentials and specialized training and testified about the use of extrapolation by other experts in the field. While Dr. Fixmer acknowledged that the Doren method is the subject of considerable debate, WIS. STAT. § 907.02 (2009-10)[2] does not require that expert testimony be allowed only if verified by published, peer-reviewed articles. The fact that Dr. Doren's extrapolation method is debated in psychological circles does not render it inadmissible "junk science." "When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact." ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345.

¶9 In any event, sufficient evidence beyond the actuarial data supports the court's ultimate conclusion that Olson still meets the criteria for commitment. The court found significant that Olson engaged in "grooming behaviors" at Sand Ridge, disregarded several warnings and ultimately received a conduct report; pursued a relationship with a boyish-looking patient thirty years his junior; had a personality conflict with a female staff member; and possessed a DVD movie that, while rated PG-13, showed partial child nudity. It termed "worrisome" Olson's decision to return to Phase One of Sand Ridge's treatment program rather than

[2] Olson filed his petition for discharge prior to the effective date of the amendment of WIS. STAT. § 907.02.

continue with Phase Two and deemed it evidence that Olson was "'gaming' the system." These findings are not clearly erroneous and the court was entitled to determine the weight to assign to them. The evidence was more than sufficient to clearly and convincingly establish that Olson more likely than not would engage in future acts of sexual violence.

¶10 During his imprisonment for sexually assaulting young boys, Olson wrote sexually explicit letters to an Australian pen pal, also a sex offender. The letters graphically detail sexual encounters with boys aged eight to fourteen. The letters were introduced into evidence at Olson's original commitment trial. At the discharge hearing, the trial court commented on the "lasting effect" of the "Australian letters." Olson complains that the trial court thus erroneously relied on evidence not admitted into the record.

¶11 While the letters themselves were not made part of the record at the discharge hearing, they were referred to in testimony and referenced in Dr. Fixmer's and Dr. Barahal's reports. Some of his conduct at Sand Ridge was termed "offense paralleling behavior." Predicting an offender's dangerousness under WIS. STAT. ch. 980 obliges the fact finder to examine the offender's past actions, relevant character traits and patterns of behavior, including behavior while incarcerated, and then to make a determination as to whether the person's current mental condition predisposes him or her to commit another sexually violent act. ***State v. Bush***, 2005 WI 103, ¶¶33, 37, 283 Wis. 2d 90, 699 N.W.2d 80. The weight to be given to this behavior is for the factfinder—here, the same judge that presided over the commitment trial and discharge hearing—to decide. ***Id.***, ¶37.

¶12 Finally, Olson asserts that the trial court based its conclusion that Dr. Rosell lacked credibility on a finding of fact that was contrary to a stipulation

of the parties. Dr. Rosell had said that a polygraph showed Olson was "up front" about listing his victims, a statement the trial court termed a "mistaken belief" because "no such polygraph took place." In fact, the parties stipulated that Olson verified his sexual offense history in a July 26, 2006 polygraph examination.

¶13 The trial court's assessment of Dr. Rosell's credibility was not confined to the misstatement about the polygraph. The court found that Dr. Rosell's credibility suffered in several regards. His statement that Sand Ridge used Static-99 scoring to "fill up the place" reflected a lack of neutrality. His statement that he was "worried about today" rather than five years from now reflected a misunderstanding that the statutory definition of a sexually violent person covers lifetime reoffense rates. In addition, Dr. Rosell admitted being unfamiliar with both Olson's past sex offender treatment program at Oshkosh and the program at Sand Ridge, yet he criticized the Sand Ridge program, testifying that he saw nothing in Phase Two that Olson needed to accomplish and that Olson could have completed the Oshkosh program "three times by now." Olson has not shown how the court's misstatement operated to his prejudice. *See* ***Kalb v. Luce***, 239 Wis. 256, 260-61, 1 N.W.2d 176 (1941). The error was harmless.

By the Court.—Order affirmed.

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