COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3046

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

IN RE THE DETENTION OF JACK R. MARTINSEN:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

JACK R. MARTINSEN,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Lincoln County: J. MICHAEL NOLAN, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

MYSE, J. Jack R. Martinsen appeals a judgment finding him to be a sexually violent person and detaining him for treatment. Martinsen argues that the trial court erroneously construed the statutory requirement that it be "substantially probable that the person will engage in acts of sexual violence[,]"

see § 980.01(7), STATS., and further, that there is insufficient evidence to conclude he met this requirement. Because this court concludes that the trial court correctly construed the statutory language "substantially probable" and that there is sufficient evidence to support the findings, the judgment is affirmed.

Martinsen was convicted twice for sexually related offenses. On October 9, 1986, he was convicted under § 940.225(1)(d), STATS., (first degree sexual assault), and on September 29, 1989, under § 942.225(2)(e), STATS. (second degree sexual assault). The 1986 conviction involved sexual contact with a neighborhood boy, approximately ten years of age, in a secluded wooded area. The 1989 conviction involved sexual contact with a twelve-year-old boy in the bathroom of a friend's house.

Martinsen was released from prison on parole in 1993, but his parole was revoked in 1994. On May 8, 1996, a trial was held to declare Martinsen a sexually violent person and detain him for treatment. At the trial, Dr. Margaret Alexander diagnosed Martinsen with a psychotic disorder in partial remission; pedophilia, primary same gender, not exclusive type; and an antisocial personality disorder. Alexander also reviewed various risk factors related to sex offender recidivism, demonstrated how Martinsen met many of them, and concluded to a reasonable degree of psychological certainty that Martinsen met the statutory definition of a sexually violent person.

Dr. Dennis Doren also testified, and based on his review of the records, found that both Martinsen's pedophilia and personality disorder predisposed him towards committing a sexually violent act. Further, Dr. Doren testified that after reviewing risk factors and potential treatment benefits, he

concluded to a reasonable degree of psychological certainty that there was a substantial probability Martinsen will again commit a sexually violent act.

Dr. Frederick Fosdal testified for the defense, and concluded that the 1986 diagnosis of Martinsen's pedophilia was appropriate. Furthermore, Dr. Fosdal concluded that Martinsen continues to have the disorder, and that it is "a concern" in this case. Finally, Dr. Fosdal conceded that Martinsen presents a risk, and possibly even a moderate to high degree of risk, that he will reoffend.

Testifying on his own behalf, Martinsen contended that he no longer had a sexual interest in boys, and that he was engaged to a woman he intended to marry upon his release from prison. Martinsen also conceded that he had been subject to more than one disciplinary proceeding relating to sexual misconduct while in prison.

Following the evidentiary portion of the hearing, the trial court found Martinsen to be a sexually violent person, and ordered institutional care in a secure medical facility, *see* § 980.065, STATS. In finding Martinsen to be sexually violent, the trial court defined the term "substantially probable [to] engage in acts of sexual violence" as meaning "much more likely than not [that he will do so]." Martinsen appeals.

Martinsen first challenges the trial court's interpretation of "substantially probable" in § 980.01(7), STATS. Under that section, a sexually violent person is defined as one "who has been convicted of a sexually violent offense … and who 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." The statute does not, however, define the term "substantially probable." Our determination of whether the trial court's interpretation of the

statute was proper is based on a de novo review. ***State v. Anderson***, 141 Wis.2d 653, 658, 416 N.W.2d 276, 278 (1987).

The State contends that "substantially probable" should not be defined by this court, and adopts a seemingly contradictory justification. On the one hand, the State stresses the difficulty we would face were we to try to offer a precise definition. On the other hand, the State stresses the ease in which the factfinder can understand these ordinary words of common acceptance. The State compares "substantially probable" to other legal terms that have escaped further definition because of similar difficulties. One such example is "reasonable doubt," a term which some jurisdictions outside of Wisconsin have refused to further define because "an attempt to define [the term] presents a risk without any real benefit." ***United States v. Hanson***, 994 F.2d 403, 408 (7th Cir. 1993) (quoting ***United States v. Hall***, 854 F.2d 1036, 1039 (7th Cir. 1988)).

We agree that we should refuse in this case to give the term a precise definition, because the specific facts of this case and the nature of its briefing do not require us to do so. We express our concern, however, that the failure to provide a definition may result in factfinders assigning different meanings to the term in different sexual predator cases. While we conclude that a precise definition would protect against random and inconsistent results, we defer to another time when the issues may be more clearly drawn.

In offering its own working definition, the trial court explained that the burden imposed by the statute required the State to demonstrate it was "much more likely than not" that Martinsen would again commit acts of sexual violence. This understanding of the statutory burden was sufficiently accurate. While it may be argued that a lesser burden would still result in an appropriate finding, we need

not address that issue because it is not before us. Our independent review of the statute convinces us that the trial court's decision reasonably reflected the statutory language.

In the absence of a statutory definition of a term, our review begins with its plain meaning, aided by dictionary definitions. ***Wood County v. State Board of VTAE***, 60 Wis.2d 606, 614, 211 N.W.2d 617, 620 (1973). Although many alternative definitions of "probable" exist, the most common one that fits in the context of this statute is "having more evidence for than against," or "likely." BLACK'S LAW DICTIONARY 1201 (6th ed. 1990); *see also* WEBSTER'S THIRD NEW INT'L DICTIONARY 1806 (1976) ("based on … fairly convincing though not absolutely conclusive … evidence," synonymous with "likely").

In § 980.01(7), STATS., "probable" is modified by "substantially." Once again, many definitions of "substantial" and "substantially" exist, but the most common one fitting within the context of the statute is "to a large degree." WEBSTER'S THIRD NEW INT'L DICTIONARY 2280. Because the word "probable" on its own normally means "likely," it is reasonable to assume that the legislature intended to enhance this meaning when it inserted "substantially" before it. Although the State argues that the drafter's notes suggest the intent behind using "substantially probable" was merely to restate "likely," we disagree because we must construe statutes so as to avoid rendering superfluous any of the statutory language. ***State ex rel. Frederick v. McCaughtry***, 173 Wis.2d 222, 226, 496 N.W.2d 177, 179 (Ct. App. 1992). To adopt the State's definition would be to ignore the modifier "substantially." We therefore conclude that the combination of words selected by the legislature requires something more than a mere showing that the person is likely to again commit a sexually violent act.

The trial court concluded that "much more likely than not" was the appropriate standard by which the State must demonstrate whether Martinsen would again commit a violent sexual act. We believe that this has a connotation similar to and consistent with the language contained in the statute. We caution, however, that in resolving this issue we have not made an attempt to give a specific meaning to the statutory language, but have concluded only that "much more likely than not" adequately embraces the standards set forth in § 980.01(7), STATS. We therefore do not address whether a lower standard might be permissible.

Martinsen's second contention on appeal is that there is insufficient evidence to support the factfinder's conclusion that he is a sexually violent person. Martinsen's challenge to the sufficiency of the evidence is reviewed with great deference to the factfinder. *See* ***Widell v. Tollefson***, 158 Wis.2d 674, 684, 462 N.W.2d 910, 913 (Ct. App. 1990). Assessing the credibility of witnesses is a matter within the unique function of the factfinder, and will not be reversed unless based on caprice, an abuse of discretion, or an error of law if there is any evidence to support the conclusion. *See* ***In re Dejmal***, 95 Wis.2d 141, 151-52, 289 N.W.2d 813, 818 (1980). In reviewing the record, all facts and inferences arising therefrom must be resolved in favor of the factfinder where more than one reasonable inference may be drawn. ***Id.*** at 151, 289 N.W.2d at 818.

Our review of the record establishes that sufficient evidence existed to support a finding that Martinsen is a sexually violent person. Both Dr. Alexander and Dr. Doren expressed the opinion to a reasonable degree of psychological certainty that Martinsen was likely to again commit sexually violent crimes. Even Dr. Fosdal, testifying for the defense, concluded that Martinsen posed some risk of reoffending, possibly even a high risk. This testimony,

combined with his more recent sexual misconduct while incarcerated and the past convictions involving acts of sexual assault related to Martinsen's pedophilia, is sufficient to support the factfinder's conclusion that Martinsen is a sexually violent person.

We conclude that the trial court did not erroneously construe the sexual predator statute, and that sufficient evidence existed to support his findings. Therefore, we affirm the judgment.

By the Court.—Judgment affirmed.

Recommended for publication in the official reports.