COURT OF APPEALS
DECISION
DATED AND FILED

March 4, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3361 **Cir. Ct. No. 95-CV-1036**

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

IN RE THE COMMITMENT OF RUVEN G. SEIBERT:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RUVEN G. SEIBERT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Ruven Seibert appeals an order denying his petition for supervised release from a WIS. STAT. ch. 980 commitment. Seibert argues that the trial court erred by: (1) allowing the State's expert witness to

testify regarding his use of the "Static 99" actuarial instrument; and (2) admitting testimony regarding FBI crime statistics. Seibert also contends that there was insufficient evidence to support the trial court's denial of his petition for supervised release. We reject Seibert's arguments and affirm the order.

BACKGROUND

¶2 In 1996, a jury found Seibert to be a sexually violent person within the meaning of WIS. STAT. ch. 980, based on two convictions for sexual assault of a child. The present appeal arises from the trial court's denial of Seibert's October 1999 petition for supervised release. In February 2001, the trial court appointed the Department of Health and Human Services to examine Seibert for purposes of his supervised release petition. Seibert was ultimately examined by Dr. Stephen Dal Cerro, a psychologist. At Seibert's request, the court also appointed Dr. Michael Kotkin to examine Seibert.

¶3 At the hearing on Seibert's petition for supervised release, Dal Cerro diagnosed Seibert as suffering from paraphilia, not otherwise specified, nonconsent, and antisocial personality disorder with psychopathy.[1] Dal Cerro's report opined that Seibert "presents a substantial probability (much more likely than not) that he would commit another sexually violent offense should he be released from secure confinement at this time." The trial court ultimately denied Seibert's petition for supervised release, concluding that Seibert was still a sexually violent person and that it was still substantially probable that he would

[1] Although Kotkin submitted his report, Seibert declined to present him as a witness at the hearing.

engage in acts of sexual violence if he did not remain under institutional care. This appeal follows.

ANALYSIS

A. Admission of Evidence

¶4 Evidentiary decisions are discretionary with the trial court. ***State v. Evans***, 187 Wis. 2d 66, 77, 522 N.W.2d 554 (Ct. App. 1994). This court will uphold a trial court's decision to admit or exclude evidence if the trial court examined the relevant facts, applied the proper legal standard to those facts, and used a rational process to reach a conclusion that a reasonable judge could reach. ***State v. Sullivan***, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998).

¶5 Here, Dal Cerro utilized a multi-step, research-based framework known as the Structured Risk Assessment ("SRA") method for assessing Seibert's risk for reoffending. This assessment method begins with "Static 99"—an analysis of the static or unchangeable factors pertaining to Seibert that research has revealed may predispose sex offenders to reoffend. According to Dal Cerro's report, Seibert fell into a category of sex offenders who showed a 52% rate of sexual reconviction within fifteen years. Dal Cerro's report noted, however, that this figure tends to establish a lower limit on the likely reoffense rate because "it is known that the majority of sexual offenders are not apprehended for every offense they commit, and when they are apprehended, are not charged and convicted for every offense they are responsible for."[2]

[2] The next step of the assessment refines the results of the first step by considering dynamic or changeable psychological or behavioral factors underlying sexual offending. Dal Cerro acknowledged five dynamic factors that have been identified as essential to the determination of a sex offender's risk for reoffense and concluded that Seibert continues to show problems in three of the five areas.

(continued)

¶6 Seibert argues that the trial court erred by allowing Dal Cerro to testify regarding his use of the "Static 99" actuarial instrument. Specifically, Seibert claims there was insufficient proof that "Static 99" is scientifically reliable. Admissibility of scientific evidence in Wisconsin, however, is not conditioned upon its reliability. *See* ***State v. Peters***, 192 Wis. 2d 674, 687, 534 N.W.2d 867 (Ct. App. 1995). With some exceptions that are inapplicable here, scientific evidence is admissible if it is relevant, the witness is qualified as an expert, and the evidence will assist the trier of fact in determining an issue of fact. *See* ***id.*** at 687-88.

¶7 Seibert contends that Dal Cerro was not qualified as an expert in the use of statistical instruments. Dal Cerro, however, was not offered as an expert in the use of statistical instruments but, rather, as an expert psychologist. As our supreme court has recognized, "an expert's opinion may be based in part on the results of scientific tests or studies that are not [his or] her own." ***State v. Williams***, 2002 WI 58, ¶29, 253 Wis. 2d 99, 644 N.W.2d 919. The ***Williams*** court further noted: "It is rare indeed that an expert can give an opinion without relying to some extent upon information furnished by others." ***Id.*** Dal Cerro's reference to "Static 99" was relevant as part of the clinical assessment forming a basis for his opinion that Seibert was not qualified for supervised release. Qualified as an expert, Dal Cerro's testimony assisted the trier of fact in determining whether Seibert was a viable candidate for supervised release. Because the three tests were

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Finally, the third step of the assessment considers whether a sex offender has made progress during intensive treatment to such a degree that his risk category may be revised. With respect to this third step, Dal Cerro noted that Seibert "has historically denied his need for treatment, and has been vocally depreciative of the value of treatment to the extent that he has been observed to exert a negative effect on fellow patients." Thus, Dal Cerro concluded Seibert failed to demonstrate that he "meaningfully lowered his risk of future sexual offending."

satisfied, the trial court properly admitted Dal Cerro's testimony regarding the assessment process he used as a basis for his expert opinion.

¶8 Seibert also argues the trial court erred by admitting hearsay evidence of FBI crime statistics regarding the number of sexual assaults that are reported in proportion to the number of assaults actually committed. The trial court overruled Seibert's objection to Dal Cerro's testimony that "the latest crime statistics from the FBI or the Department of Justice indicates that somewhere between 1 and 10 or 1 and 20 sexual assaults are, in fact, even reported." Although Seibert concedes that an expert may rely on hearsay information to form opinions if the information is of the type regularly relied upon by experts in the field, he argues that the information itself is not admissible unless it satisfies a specific hearsay exception. Seibert contends that the FBI crime statistics are not the sort of information reasonably relied upon by experts in the field of assessing sexually violent persons and that the statistics are not otherwise admissible under a hearsay exception. We are not persuaded.

¶9 The trial court ruled that this sort of crime statistic collected by the government is regularly relied upon by experts in Dal Cerro's field as providing context for their assessment of the risk of reoffending by sexually violent persons. In any event, Dal Cerro's opinion did not rely upon the specific assumption that there are twenty sexual assaults for every one conviction. Rather, Dal Cerro was merely acknowledging that "[r]econviction rates do not provide a true estimate of reoffense rates." Because Dal Cerro's testimony regarding the FBI statistics was not necessary to support Dal Cerro's opinion, the admission of that testimony, even if erroneous, was harmless as a matter of law. *See* ***State v. Dyess***, 124 Wis. 2d 525, 547, 370 N.W.2d 222 (1985).

B. Sufficiency of the Evidence

¶10 Finally, Seibert contends that the evidence was insufficient to establish that he was still a "sexually violent person" in need of treatment in an institutional setting. The standard of review for sufficiency of the evidence to support a commitment under WIS. STAT. ch. 980 is the same as the standard of review for a criminal conviction. ***State v. Curiel***, 227 Wis. 2d 389, 417, 597 N.W.2d 697 (1999). The test on appeal is whether the evidence adduced, believed, and rationally considered was sufficient to prove beyond a reasonable doubt that the respondent is a "sexually violent person." *See* ***id.*** at 418-19. Thus, we will not reverse a ch. 980 commitment unless the evidence, viewed most favorably to the State 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. *See* ***State v. Marberry***, 231 Wis. 2d 581, 593, 605 N.W.2d 612 (Ct. App. 1999).

¶11 "Sexually violent person" means 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 substantially probable that the person will engage in acts of sexual violence. WIS. STAT. § 980.01(7). "Substantially probable" means "much more likely than not." ***Curiel***, 227 Wis. 2d at 422.

¶12 Citing Dal Cerro's testimony that Seibert's score on the Static 99 placed him within a category of sex offenders who showed a 52% rate of sexual

reconviction within fifteen years, Seibert argues that a 52% chance does not establish that he is "much more likely than not" to reoffend. However, Dal Cerro's opinion was not based solely on Seibert's Static 99 score. Dal Cerro considered the relevant dynamic factors applicable to Seibert, the results of his clinical interview with Seibert, consultation with staff and a review of Seibert's treatment records and progress notes. Based on these considerations, Dal Cerro ultimately diagnosed Seibert as suffering from paraphilia not otherwise specified, nonconsent, as well as antisocial personality disorder with psychopathy. Because the evidence was sufficient to establish that Seibert was still a "sexually violent person," the trial court properly denied Seibert's petition for supervised release.

By the Court.—Order affirmed.

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