COURT OF APPEALS
DECISION
DATED AND FILED

August 18, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1269 **Cir. Ct. No. 2006CI7**

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

IN RE THE COMMITMENT OF ALFRED HARRELL:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ALFRED HARRELL,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Alfred Harrell appeals from a commitment order. The issue is whether there was sufficient evidence to support the trial court's general determination that Harrell was a sexually violent person, and specifically whether there was sufficient evidence of Harrell's dangerousness, namely that he has a mental disorder making it more likely than not that he will engage in a future act of sexual violence. We conclude that there is sufficient credible evidence to support the trial court's determination; a conflict in the evidence of dangerousness does not negate the existence of that evidence. Therefore, we affirm.

¶2 Harrell was convicted of and sentenced for rape in 1976. At the end of Harrell's prison sentence, the State petitioned for his commitment as a sexually violent person. *See* WIS. STAT. § 980.02 (amended Apr. 29, 2006). Following a bench trial, the court determined that Harrell was a sexually violent person and ordered his commitment as such. Harrell appeals, challenging the sufficiency of the evidence.

¶3 To prove that an individual is a sexually violent person who warrants commitment, the State must prove that that individual: (1) has been convicted of a sexually violent offense; (2) suffers from a mental disorder; and (3) is more likely than not, because of that mental disorder, to engage in at least one future act of sexual violence ("dangerous or dangerousness"). *See* WIS. STAT. § 980.01(7) (amended Aug. 1, 2006).[1] Appellate review of the sufficiency of the evidence to support a (sexually violent person) commitment order is the same as that

[1] All references to WIS. STAT. § 980.01 and its subsections are to the version amended August 1, 2006 unless otherwise noted.

applicable to support a judgment of conviction. *See* ***State v. Curiel***, 227 Wis. 2d 389, 418-19, 597 N.W.2d 697 (1999). In other words,

> an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the *conviction* [commitment], is so lacking in probative value and force that no trier of fact, acting reasonably, could have found *guilt* [that respondent was a sexually violent person] beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find *the requisite guilt* [that respondent was a sexually violent person], an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found *guilt* [that respondent was a sexually violent person] based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citation omitted) (italicized word(s) from criminal context modified to those in brackets for commitment context).

¶4 The trial court's determination on the three elements constituting a sexually violent person was that Harrell: (1) was convicted of an index or sexually violent offense in 1976; (2) was diagnosed as currently suffering from paraphilia or antisocial personality disorder; and (3) is "predispose[d because of his disorder] to [commit] future sexually violent acts, and that he is dangerous to others because he has that mental disorder which makes it more likely than not [that he will] engage in future acts of sexual violence." We review the sufficiency of the evidence, particularly that of Harrell's dangerousness.

¶5 The State introduced the judgment of conviction, establishing that Harrell was convicted of two counts of rape, in violation of WIS. STAT. § 944.01 (1973), a sexually violent offense pursuant to WIS. STAT. § 980.01(6).

Consequently, there is sufficient credible evidence that Harrell was convicted of a sexually violent offense pursuant to § 980.01(6) and (7).

¶6 The State's two expert witnesses, Department of Corrections psychologist Anthony Jurek, and Department of Health and Family Services psychologist Sheila Fields, each testified that Harrell suffers from antisocial personality disorder.[2] The defense expert, clinical psychologist Craig Rypma, also testified that Harrell suffers from antisocial personality disorder. Consequently, there was sufficient expert testimony that Harrell suffered from a mental disorder.

¶7 The dispute on appeal focuses on the sufficiency of the evidence of the third element, namely whether Harrell was dangerous. *See* WIS. STAT. § 980.01(7). We review the evidence of dangerousness.

¶8 Jurek testified that paraphilia and antisocial personality disorder predispose Harrell to commit at least one future act of sexual violence. Jurek based his risk assessments on three different actuarial measures, all of which predicted that Harrell was dangerous. *See* ***State v. Kienitz***, 221 Wis. 2d 275, 287-89, 585 N.W.2d 609 (Ct. App. 1998), *aff'd*, 227 Wis. 2d 423, 597 N.W.2d 712 (1999) (accepting the validity of actuarial studies over clinical judgment as predictors of recidivism).

¶9 On the Rapid Risk Assessment for Sexual Offense Recidivism ("RRASOR"), Jurek ultimately scored Harrell as a 6.3, which according to the guide sheet used by the Wisconsin Department of Corrections for these types of

[2] Jurek also diagnosed Harrell as suffering from paraphilia NOS ("not otherwise specified"). Jurek diagnosed Harrell's particular paraphilia NOS as his being sexually aroused by his victims' lack of consent.

assessments, showed a reconviction rate for sexual offenses ("recidivism") after five years of 49.8 percent, and after ten years of 73.1 percent.[3] WISCONSIN STAT. ch. 980 uses a lifetime period for recidivism. Jurek also used the Static Risk Assessment 99 ("Static-99") on which Harrell ultimately scored a nine.[4] The reconviction rates for the sample group according to the Static-99 for anyone scoring a six or higher was thirty-nine percent for a five-year period, forty-five percent for a ten-year period, and fifty-two percent for a fifteen-year period. Jurek also used the Minnesota Sex Offender Screening Test-Revised ("MNSOST-R") risk assessment on which Harrell scored a fifteen. A score of thirteen or higher on the MNSOST-R predicts a seventy percent re-arrest rate in six years and an eighty-eight percent re-arrest rate if the individual is in the community for the entire six-year period (as opposed to the seventy percent re-arrest rate for those who are re-arrested and thereby removed from the community during that six-year period).[5] Applying the lifetime period for ch. 980 offenses, Jurek testified that the eighty-eight percent rate was applicable to Harrell and testified that he was at high risk to reoffend. Jurek also testified that he did not reduce his stated risk for Harrell's participation in treatment because Harrell had been removed from one treatment program and refused to participate in others. Jurek ultimately testified that Harrell was dangerous.

[3] Jurek initially scored Harrell as a three on what he explained were incorrect assumptions.

[4] Jurek initially scored Harrell as an eight and explained why he raised Harrell's score to a nine.

[5] Re-arrest rates are likely to be higher than reconviction rates.

¶10 Fields testified that she diagnosed Harrell with antisocial personality disorder, a somewhat common diagnosis for incarcerated individuals, but that that disorder alone did not reflect dangerousness. Fields testified that Harrell had a high degree of psychopathy and used several specific examples of Harrell's hostility toward women.

¶11 Fields assessed Harrell's risk according to some of the same actuarial instruments that Jurek used, the RRASOR and the Static-99. Fields scored Harrell as a five on the RRASOR, less than the 6.3 score from Jurek, but still at the threshold of a reconviction rate of forty-nine percent after five years, and seventy-three percent after ten years. Fields scored Harrell as a nine on the Static-99 (as had Jurek), which she testified was very high and "extremely rare"; the threshold score was six. Fields also scored Harrell according to the Hare Psychopathy checklist ("PCL-R") that would be useful to measure the psychopathy diagnosis, which Fields describes as an intense form of antisocial personality. Fields scored Harrell as a thirty-four; thirty indicates a psychopathic personality. Fields also testified that she did not reduce the stated risk for Harrell's age (mid-fifties) because a reduction was not applicable to individuals, such as Harrell, who had high psychopathy. Fields also testified about Harrell's continuing problems with female guards and a patient, demonstrating "[h]e simply is not changing or slowing down." Fields also noted that such a reduction may be appropriate for those individuals who are in treatment; however, Harrell was not in treatment. Fields ultimately testified that Harrell was dangerous.

¶12 Defense expert Rypma diagnosed Harrell as suffering from antisocial personality disorder, but testified that he was not predisposed to commit

a sexually violent act because his disorder was not coupled with paraphilia. Rypma also used the Static-99 and scored Harrell as a six.[6] Rypma used the PCL-R and scored Harrell as a twenty-one. Rypma also testified that he reduced Harrell's risk with age.

¶13 The trial court found that the parties "basically stipulated" that Harrell had committed a sexually violent offense in 1976, and that all three experts testified that Harrell suffered from a mental disorder. It is the third element, dangerousness, where there is a conflict in the evidence. The trial court explained that "[t]here were some inconsistencies amongst the experts." The State's experts testified that Harrell was "a risk to re-offend sexually." The trial court relied upon the importance of "actuarial instruments … anchored in clinical judg[]ment." It noted that "the actuarials, were extremely high." It also recognized the "inconsistencies" in the evidence – namely on the element of dangerousness – but determined that one of Harrell's disorders, either paraphilia or his antisocial personality "predisposes him to future sexually violent acts, and that he is dangerous to others because he has that mental disorder which makes it more likely than not to engage in future acts of sexual violence."

¶14 Harrell contends that the trial court's findings are inadequate, as exemplified by its failure to specify which expert and which disorder were the basis for its determination of dangerousness. The conflicting evidence on Harrell's dangerousness does not negate the sufficiency of the evidence from two

[6] Rypma did not consider Harrell's conviction for restraining an officer while masked as sexually motivated. The facts underlying that conviction were that Harrell, while incarcerated, grabbed a female correctional officer by the throat and hair, and pushed her against a wall. Had Rypma considered that conviction sexually motivated, he testified that he would have scored Harrell as an eight or a nine on the Static-99.

experts, Jurek and Fields, whose individual, much less collective testimony was sufficient to support the trial court's determination of dangerousness. *See* ***State v. Pletz***, 2000 WI App 221, ¶19, 239 Wis. 2d 49, 619 N.W.2d 97 (as long as there is sufficient evidence of each element of WIS. STAT. § 980.01(7), the fact finder need not specify which mental disorder predisposes the appellant to recidivism). We conclude that there was sufficient credible evidence to support the trial court's ultimate determination that Harrell was a sexually violent person, and specifically that he was dangerous, namely that his current mental disorder made it more likely than not that he would engage in at least one future act of sexual violence. *See* § 980.01(7).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).