COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2775 **Cir. Ct. No. 2007CI1**

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

IN RE THE COMMITMENT OF ERIC L. FANKHAUSER:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ERIC L. FANKHAUSER,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Barron County: EDWARD R. BRUNNER and TIMOTHY M. DOYLE, Judges. *Affirmed.*

Before Dykman, P.J., Vergeront and Lundsten, JJ.

¶1 LUNDSTEN, J. Eric Fankhauser appeals a circuit court judgment committing him, after a bench trial, as a sexually violent person under WIS. STAT. ch. 980.[1] He also appeals an order denying post-commitment relief. Fankhauser asks that we exercise our discretion to reverse in the interest of justice because the real controversy was not fully tried. More specifically, he argues that his prediction that he would reoffend if released, made in connection with a polygraph examination, was inadmissible, that the State's experts and the circuit court should not have relied on this prediction, and that the use of this prediction at trial clouded the issue of whether he is more likely than not to engage in a future act of sexual violence.

¶2 We assume without deciding that Fankhauser's prediction was inadmissible and that the State's experts and the circuit court should not have relied on it. We conclude, however, that the use of the prediction at trial did not prevent the real controversy from being fully tried. Accordingly, we decline to exercise our discretionary reversal power, and we affirm the judgment and order.

Background

¶3 In 2002, when Fankhauser was sixteen years old, he was adjudicated delinquent for first-degree sexual assault of a child. Approximately one year later, he was convicted of second-degree sexual assault of a different child and sentenced to a prison term.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 While in prison, Fankhauser agreed to submit to polygraph examinations as part of a sex offender treatment program. During one such examination, Fankhauser told the polygraph examiner that "once released he would sexually reoffend a child…. [T]hough he has made no plans to do so he knows that he will."

¶5 After receiving the polygraph examiner's report, one of Fankhauser's treatment providers, a social worker, spoke to Fankhauser about his prediction. Fankhauser apparently repeated his prediction in some form to the social worker.[2] The social worker understood the prediction to mean that, although Fankhauser had no actual plan to reoffend, he lacked confidence that he would not assault someone again.

¶6 As Fankhauser's release date approached, the State petitioned to have him committed as a sexually violent person under WIS. STAT. ch. 980. A trial was had to the court.

¶7 The State called two psychological experts. They both concluded that Fankhauser met the criteria for commitment under WIS. STAT. ch. 980, including that Fankhauser has a mental disorder that would make him more likely

[2] We refer to Fankhauser's prediction in the singular even though he re-stated that prediction in some form to the social worker. For purposes of our decision, we find it unnecessary to analyze the two statements separately.

than not to commit a sexually violent offense in the future if released.[3] Each of the State's experts based his opinion, in part, on Fankhauser's prediction.

¶8 Relying on the experts' opinions, on Fankhauser's prediction directly, and on other evidence, the circuit court found that the State had proven each of the elements necessary to commit Fankhauser.

Discussion

¶9 Fankhauser seeks a new trial in the interest of justice. He argues that his prediction that he would reoffend if released was inadmissible polygraph evidence, that the State's experts and the circuit court should not have relied on this prediction, and that the use of this prediction at trial prevented the real controversy from being fully tried.

¶10 Fankhauser's argument raises several issues regarding the proper or improper uses of polygraph evidence under the rules of evidence and case law. We need not, however, decide these issues. Even if we assume, without deciding, that Fankhauser's prediction should not have been used by the expert witnesses in forming their opinions and that the circuit court should not have considered this information, we conclude that the use of the prediction at trial did not prevent the real controversy from being fully tried.

[3] In order to commit Fankhauser as a sexually violent person under WIS. STAT. ch. 980, the State needed to show that Fankhauser (1) has been convicted of a sexually violent offense, (2) currently 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. WIS JI—CRIMINAL 2502.

¶11 Under WIS. STAT. § 752.35, we may reverse in the interest of justice when "it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried."[4] When, as here, a defendant argues that the real controversy was not fully tried, there does not need to be a showing that there is a substantial probability of a different result on retrial. ***State v. Johnson***, 149 Wis. 2d 418, 429, 439 N.W.2d 122 (1989). Still, appellate courts exercise their discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶12 The real controversy has not been fully tried if "the jury was precluded from considering 'important testimony that bore on an important issue' or … certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)). Fankhauser's argument goes to the second alternative, whether improperly received evidence clouded a crucial issue. An issue is clouded by improperly received evidence when the evidence and the prosecutor's use of that evidence

[4] WISCONSIN STAT. § 752.35 provides:

> **Discretionary reversal.** In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

"pervaded the entire trial" or when there is a "significant possibility" that the fact finder "simply deferred" to that evidence. *See* ***State v. Romero***, 147 Wis. 2d 264, 277-80, 432 N.W.2d 899 (1988).

¶13 In arguing that the issue of his risk to reoffend was clouded, Fankhauser points to portions of the State's experts' testimony and written reports and to the circuit court's rationale for its decision.[5] We examine each below and ultimately conclude that Fankhauser's prediction did not cloud the issue. Our reasoning, in brief, is that, even though it is apparent that the State's experts and the circuit court relied on Fankhauser's prediction, the record shows that the prediction did not pervade the entire trial and that the circuit court did not rely on the prediction to the exclusion of other evidence.

A. State's Experts' Testimony And Reports

¶14 The State's psychological experts were the centerpiece of the State's case. Each expert opined that Fankhauser met the criteria for commitment under WIS. STAT. ch. 980, including that Fankhauser has a mental disorder that makes him more likely than not to commit a sexually violent offense in the future if released into the community. Each of these experts based his opinion, in part, on Fankhauser's prediction that he would reoffend if released.

¶15 We acknowledge that portions of the experts' testimony and reports, when read in isolation, suggest that Fankhauser's prediction was a dominant factor in the experts' opinions. One of the experts, Dr. William Schmitt, testified that

[5] In the interest of brevity, we will often use the shorthand, "risk to reoffend," or similar phrasing, to refer to the issue of whether Fankhauser's mental disorder makes it more likely than not that he will engage in a future act of sexual violence.

Fankhauser's prediction that he would reoffend was the "most important piece of information in my mind that sort of trumps everything else." Similarly, Dr. Schmitt wrote in his report that Fankhauser's prediction "is considered by this examiner to essentially 'trump' all other relevant information." The State's other expert, Dr. Christopher Snyder, testified: "[I]t happens very infrequently" that a defendant admits that he feels he is likely to reoffend and "that's something that the actuarial instruments don't tap, and I take that information very seriously. So that is something that in my estimation increased Mr. Fankhauser's risk above what I arrived at by using the actuarial scores as anchors." Similarly, Dr. Snyder wrote in his report that "such an admission is unusual and should be considered as a risk factor that is not accounted for by the actuarial instruments."

¶16 Reviewing the State's experts' testimony and reports more fully, however, reveals that the use of Fankhauser's prediction at trial was akin to the use of a criminal defendant's confession when there is also separate overwhelming evidence of guilt. In such a criminal case, a juror might say that the confession trumps the other evidence, but in reality the confession does not pervade the entire trial or cloud the decision the juror must make. Our review of the evidence in this case discloses the following.

¶17 Dr. Schmitt diagnosed Fankhauser with the mental disorder of "Pedophilia, Sexually Attracted to Both Sexes, Exclusive Type." The diagnostic criteria for pedophilia are:

> A. Over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger).
>
> B. The person has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty.

> C. The person is at least age 16 years and at least 5 years older than the child or children in Criterion A.[6]

"Exclusive Type" means that the person diagnosed with pedophilia is sexually attracted exclusively to children.

¶18 Dr. Schmitt thoroughly reviewed all records available to him and scored Fankhauser on three actuarial risk measures, which he considered "state of the art" and superior to a psychological opinion that does not consider such measures. Those measures include the "RRASOR," "Static-99," and "MnSOST-R." On all three measures, Fankhauser fell into the "high risk" category, indicating that Fankhauser was "beyond" the more likely than not threshold for reoffending. Dr. Schmitt believed that the actuarial measures are generally more conservative than the actual rates of reoffending.

¶19 Fankhauser does not argue that his "high risk" scores on these actuarial measures depended on his prediction that he would reoffend. He also does not point to any evidence refuting Dr. Schmitt's opinion that the scores are generally more conservative than the actual rates of reoffending.

¶20 Dr. Schmitt also made clear that an important factor in determining risk to reoffend is participation in treatment. Research indicates that individuals who complete treatment generally show a lower risk than what the actuarial measures indicate. Dr. Schmitt acknowledged that Fankhauser completed a treatment program. Dr. Schmitt concluded, however, that Fankhauser's participation in treatment did not lower his risk of reoffending because his

[6] The criteria make an exception, not relevant here, for "an individual in late adolescence involved in an ongoing sexual relationship with a 12-or-13-year-old."

participation was inconsistent and because his treatment providers questioned whether he was really "internalizing" the treatment information.

¶21 Yet another significant factor in Dr. Schmitt's analysis was an admission by Fankhauser that he had sexually offended against approximately twenty children in addition to the offenses for which he was adjudicated delinquent and criminally convicted. This demonstrated to Dr. Schmitt that Fankhauser's offenses were not isolated instances of adolescent acting out.

¶22 As we have acknowledged, Dr. Schmitt also testified that Fankhauser's prediction was the "most important" piece of information that "trump[ed]" everything else. Nonetheless, Dr. Schmitt's testimony and report as a whole satisfy us that he would have concluded that Fankhauser was more likely than not to reoffend regardless of Fankhauser's prediction.

¶23 We turn to the testimony and report of the other State's expert, Dr. Snyder. Dr. Snyder, like Dr. Schmitt, diagnosed Fankhauser with "Pedophilia, Sexually Attracted to Both Sexes, Exclusive Type."[7] Dr. Snyder administered the same three actuarial measures that Dr. Schmitt used. Dr. Snyder considers these actuarial measures as "anchors" to be adjusted up or down depending on other factors and, like Dr. Schmitt, found that Fankhauser was "high risk" on all three measures.

[7] Dr. Snyder testified that he diagnosed Fankhauser with "nonexclusive" type pedophilia, but he also testified that he gave Fankhauser the same diagnosis as Dr. Schmitt. In addition, Dr. Snyder's report states "exclusive" type. Thus, we assume that Dr. Snyder likely misspoke in his testimony when he stated "nonexclusive." Regardless, our decision is not affected by whether Dr. Snyder diagnosed Fankhauser with exclusive type or nonexclusive type pedophilia.

¶24 Dr. Snyder explained that he also considers an individual's pattern of sexual offending, and that what raised particular concern for him in Fankhauser's case was that Fankhauser targeted particularly vulnerable children, not just young children, but emotionally or developmentally delayed children as well. Dr. Snyder noted that Fankhauser admitted to targeting such children because they are unable to report reliably or to understand what is being done to them, allowing Fankhauser to avoid detection.

¶25 Dr. Snyder stated that other factors he considers fall into "three major categories," the first of which did not apply. The second category covered Fankhauser's prediction that he would reoffend. The third category covered the presence of both psychopathy and sexual deviance, and Dr. Snyder found that Fankhauser had that combination. Dr. Snyder testified that the research literature is very clear that individuals who have this combination "are at the highest risk to reoffend of any group of sex offenders."[8]

¶26 Dr. Snyder also stated that there are certain "dynamic" factors for assessing recidivism that are not captured in all of the actuarial measures. He testified that a number of such factors were present in Fankhauser's case. These included not only Fankhauser's prediction that he would reoffend, but also noncompliance with supervision, which correlates highly with sexual recidivism, and emotional intimacy or emotional identification with children. Specifically, Dr. Snyder noted that Fankhauser had committed one of his offenses while on "day release" within two hours of the time he ceased being visually supervised.

[8] Dr. Snyder acknowledged that he and Dr. Schmitt disagreed on whether Fankhauser's score on a psychopathy measure was high enough to place Fankhauser in this highest risk group.

Dr. Snyder also noted that Fankhauser identifies more closely with children than with adults.

¶27 Dr. Snyder considered Fankhauser's participation in treatment, but saw a number of problems with it. In particular, Fankhauser was cited for sexual advances toward another inmate and had persisted in those advances even though they were unwelcome. Dr. Snyder concluded that, for the most part, Fankhauser had complied only superficially with treatment.

¶28 In short, we see no reason to think that Dr. Snyder's opinion of Fankhauser's risk to reoffend depended on Fankhauser's prediction.

¶29 To sum up so far, although it is apparent that the State's case depended largely on its experts, and that the experts found Fankhauser's prediction significant, we are confident that this prediction did not "cloud" either the experts' opinions or cloud how a reasonable fact finder would understand and give weight to those opinions.

B. Circuit Court's Rationale

¶30 Fankhauser also points to the circuit court's reliance on his prediction. He argues that, because the actuarial measures used by the State's experts were not designed for juvenile offenders, the court found the measures to be "not all that convincing." Fankhauser also argues that the court focused on only two factors, one of which was his prediction. According to Fankhauser, these aspects of the circuit court's decision show that the issue of risk to reoffend was "clouded." We disagree.

¶31 It is true that the circuit court expressed concerns with the State's actuarial measures, but the court also recognized that those measures "are there to

be used" and need to be considered. Thus, we disagree with Fankhauser that the court gave little weight to the actuarial measures.[9]

¶32 Moreover, although the circuit court expressly considered Fankhauser's prediction, the court did not, as Fankhauser argues, focus on it as one of only two factors. Rather, after considering the actuarial measures, the court enumerated a number of additional factors. Indeed, the court's reasoning shows that it found that Fankhauser was a "serious risk" even before taking Fankhauser's prediction into account. Specifically, before adding in the prediction, the court stated:

> [W]hat we have is a young man who has been convicted of two specific offenses and admitted to the equivalent of 19, which would bring this to 21, I believe is what the number was; that number of offenses all falling within the serious risk range of choosing children who are significantly younger than [Fankhauser] and utilizing a scheme of solicitation and grooming that seems to be pretty consistent throughout the whole process of his offending. And these have occurred over a period of at least five to six years. *This is serious—a serious risk record.*

(Emphasis added.) In addition, the court found that Fankhauser should not be released until he "does better in the treatment program," thus indicating that

[9] One of Fankhauser's strategies at trial was to attack the usefulness of the actuarial measures on various grounds, including whether they retained validity when applied to a relatively young offender such as Fankhauser. The State blunted the impact of this strategy, however, both by showing that the measures were considered among the best means available for assessing risk to reoffend and by demonstrating through one of Fankhauser's own experts that a scale developed for juvenile offenders used several factors that would have applied to Fankhauser.

Fankhauser's failure to make more significant progress in treatment was an important consideration.[10]

¶33 Thus, as with our analysis of the experts' testimony and reports, we are confident that the circuit court's use of Fankhauser's prediction did not prevent the real controversy from being fully tried.

Conclusion

¶34 For the above reasons, we decline to exercise our discretionary reversal authority under WIS. STAT. § 752.35. The circuit court's judgment and order are affirmed.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[10] Fankhauser points to limited evidence that he showed progress in treatment in some respects, then tries to use that evidence as a springboard to argue that the dominant factor at trial was his prediction. We do not find this argument persuasive. It is clear from the circuit court's findings that it credited other evidence showing that Fankhauser had not made progress in treatment sufficient to reduce his risk to reoffend. To the extent that there was any conflict in the evidence, this was for the circuit court to resolve. *See* ***Skrupky v. Elbert***, 189 Wis. 2d 31, 51, 526 N.W.2d 264 (Ct. App. 1994) ("[T]he trial court resolves … conflicts [in the evidence] and weighs the credibility of witnesses.").