COURT OF APPEALS
DECISION
DATED AND FILED

October 27, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP538 **Cir. Ct. No. 2008CI1**

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

IN RE THE COMMITMENT OF MATTHEW A. BAILEY:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MATTHEW A. BAILEY,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Manitowoc County: JEROME L. FOX, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Matthew A. Bailey appeals from a judgment and an order committing him, after a jury trial, as a "sexually violent person" under

WIS. STAT. ch. 980 (2007-08).[1] He also appeals from an order denying his postverdict motion for a new trial on the ground that revisions to an actuarial risk assessment tool constitutes newly discovered evidence. In the alternative, he requests a new trial in the interest of justice. We affirm the circuit court rulings.

¶2 Bailey was convicted in 1997 of a sexually violent offense. Shortly before his release from prison in 2008, the State filed a petition alleging that he was eligible for commitment under WIS. STAT. ch. 980. The element in dispute at Bailey's jury trial was whether his mental disorder, pedophilia, made it more likely than not that he would engage in future sexual violence. *See* WIS JI—CRIMINAL 2502; *see also* WIS. STAT. § 980.02(2).

¶3 Two psychologists, Drs. William Merrick and Richard McKee, rendered expert opinions that Bailey should be committed. Both used the Rapid Risk Assessment of Sexual Offense Recidivism ("RRASOR"), the Static-99 and the Psychopathy Checklist—Revised ("PCL-R") to assess Bailey's risk for reoffending.[2] Dr. McKee also used two additional actuarial instruments.

¶4 Bailey's RRASOR test scores indicated that he posed a twenty-one to twenty-five percent chance of reoffending within ten years; his Static-99 score of "5" indicated a thirty-eight percent chance. Dr. Merrick testified that Bailey's PCL-R score indicated a higher degree of psychopathic traits than in the average prisoner and, combined with his pedophilia, placed Bailey within "the highest group of recidivists." Dr. McKee similarly testified that the combination of

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

[2] "Risk to reoffend" in the actuarial tools means risk of reconviction for a sexual offense.

Bailey's high PCL-R score with his pedophilia indicates a "much more serious risk of reoffending[] sexually. Much higher."

¶5 Finally, Dr. Merrick and Dr. McKee considered other risk factors, including that Bailey has a serious alcohol problem; performed poorly on supervision; got drunk and committed another assault on the same day he got out of an alcohol treatment program; continued to "hang around" children unsupervised; quit the sex offender treatment program twice because he did not think he needed it; and his minimalization and denial interfered with effective treatment. These factors, their clinical judgment and the information gleaned from the assessment tools led both to opine that Bailey was more likely than not to reoffend in the future.

¶6 A few months before trial, the court had appointed a third psychologist, Dr. Diane Lytton, as Bailey's consulting expert. Dr. Lytton advised Bailey's counsel shortly before trial that calling her as a witness would be ill-advised because the information she reviewed left her unable to counter the opinions of the State's experts. The court denied Bailey's motion for a continuance. No expert testified in Bailey's favor. The jury found Bailey to be sexually violent and the court ordered his commitment.

¶7 Postcommitment, Dr. Lytton indicated in a letter to Bailey's postcommitment counsel that a revised Static-99, the "Static-99R," had come out around the time of Bailey's trial. She stated that new research showed that the original version overpredicted recidivism among older sexual offenders. Evaluated under the new norms, fifty-year-old Bailey's score is associated with a twenty-four percent risk of reoffending in ten years, compared to thirty-eight percent. She stated that since twenty-four percent is "obviously far less than

'more likely than not,'" this research altered her earlier opinion, there was "a likelihood" that it also would alter the opinions of the State's experts and, with the revised data, she would have testified as a witness for Bailey. Bailey moved for a new trial on the basis of new evidence or in the interest of justice, a copy of Dr. Lytton's letter attached. The trial court denied the motion on briefs. It concluded that, despite being new empirical data, the Static-99R was not newly discovered evidence sufficient to warrant a new trial because it was cumulative and not material. Bailey appeals.

¶8 A new trial will be granted on grounds of newly discovered evidence only if the defendant clearly and convincingly establishes that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking to discover it; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to the testimony introduced at trial; and (5) it is reasonably probable that, with the evidence, a different result would be reached at a new trial. ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). A defendant seeking a new trial on this basis must satisfy all five criteria. ***State v. Carnemolla***, 229 Wis. 2d 648, 656, 600 N.W.2d 236 (Ct. App. 1999).

¶9 It is true that Bailey's score on the Static-99 indicated a thirty-eight percent risk of sexually reoffending within ten years and the revised norms indicate a twenty-four percent risk. Even thirty-eight percent does not establish "more likely than not." Reasonably, then, the jury must have pinned its decision on evidence other than the Static-99. Both psychologists testified, for instance, that Bailey's mental disorder and degree of psychopathy made him a high recidivism risk and about various factors that have thwarted effective treatment. Even as interpreted under the revised norms, Bailey's score would not diminish

his scores on the other psychometrics or mitigate the evidence of his failures in treatment and on supervision. We agree the Static-99R is not material.

¶10 We also agree it is cumulative. The Static-99 was but one of several tools relied upon to evaluate Bailey's risk of reoffending. The Static-99R simply changes the weight a jury would give to one score in assessing that risk. The parties sparred in closing arguments over whether to rely solely on the assessment tools, which indicated Bailey's risk to be between eight and thirty-eight percent. Defense counsel argued that the jury should embrace them, as the percentages were hardly "more likely than not." The jury plainly heeded the prosecutor's urging to consider the full array of evidence presented. We agree with the trial court that the revised tool is "hardly transformational" of the evidence presented. There is no reasonable probability that the Static-99R would lead a new jury to reject the proposition that Bailey is more likely than not to reoffend.

¶11 Bailey argues that the verdict would have been different if an expert had testified in his favor. The jury was not required to accept the testimonies of the State's experts, even though they were uncontradicted. *See* ***State v. Fleming***, 181 Wis. 2d 546, 561, 510 N.W.2d 837 (Ct. App. 1993). Uncontradicted testimony still must "pass through the screen of the fact trier's judgment of credibility." ***Pautz v. State***, 64 Wis. 2d 469, 476, 219 N.W.2d 327 (1974) (citation omitted).

¶12 Bailey requests in the alternative that we exercise our authority under WIS. STAT. § 752.35 to order a new trial in the interest of justice because the real controversy was not fully tried. The real controversy is not fully tried when the jury either erroneously was not given the opportunity to hear important testimony bearing on an important issue of the case or had before it improperly

admitted evidence that clouded a crucial issue in the case. ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). He contends that the jury did not hear important testimony bearing on an important issue of the case because only the State's experts testified and the jury did not have before it the new research that would have presented the full range of facts regarding his likelihood to reoffend.

¶13 We disagree. The jury had before it numerous facts aside from Bailey's Static-99 score regarding his likelihood to reoffend. The revised norms, and Dr. Lytton's testimony about them, would have altered only the weight to be given to one piece of the evidence. The Static-99R would not change Bailey's other scores, his psychopathy, his pedophilia, his poor performance while on supervision—including committing other sexual assaults—or his having quit treatment twice. This is not one of the "exceptional cases" for the exercise of our power of discretionary reversal. *See* ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

By the Court.—Judgment and order affirmed.

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