COURT OF APPEALS
DECISION
DATED AND FILED

January 6, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0622 **Cir. Ct. No. 01CI000661**

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

IN RE THE COMMITMENT OF ROGER A. BRAINARD:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ROGER A. BRAINARD,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: JOHN W. ROETHE, Judge. *Affirmed.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Roger Brainard challenges the sufficiency of the evidence to support an order finding him to be a sexually violent person and

committing him to a secure mental health facility. We affirm for the reasons discussed below.

BACKGROUND

¶2 Brainard was convicted of first-degree sexual assault of a child in 1994. Within ninety days of his scheduled release from prison, the State filed a Chapter 980 petition seeking to detain Brainard as a sexually violent person.

¶3 The State presented two expert psychological witnesses at trial. The first, Dr. Christopher Tyre from the Department of Corrections, testified that he believed there was a substantial probability that Brainard would engage in future acts of sexual violence. Tyre explained that he understood "substantial probability" to mean much more likely than not, but said that he would not assign a specific metric or numeric probability to that term based solely on actuarial assessments. He further explained that his opinion was based on the entirety of his risk assessment, which included both actuarial instruments and additional clinical consideration of factors such as Tyre's diagnoses of nonexclusive pedophilia, exhibitionism, and personality disorder, otherwise unspecified, with antisocial features; the length of time Brainard had been committing sexual offenses, dating back to exposure incidents in the 1960s; the relatively advanced age of fifty-two at which Brainard had committed his most recent offense; the fact that past convictions had not deterred Brainard from committing additional offenses; Brainard's failure to complete treatment; and Brainard's own expressed concerns about whether he might develop attractions toward his grandchildren.

¶4 The actuarial instruments Tyre administered were the Rapid Risk Assessment for Sex Offender Recidivism (RRASOR), the Static-99, and the revised Minnesota Sex Offender Screening Tool (MnSOST-R). Dr. Tyre scored

Brainard a 4 on the RRASOR, which was associated with a 32.7% rate of rearrest or reconviction after five years and a 48.6% rate of rearrest or reconviction after 10 years. He scored him a 7 on the Static-99, which was associated with a 39% reconviction rate after 5 years, a 45% reconviction rate after 10 years, and a 52% reconviction rate after 15 years. He scored him a plus 11 on the MnSOST-R, which was associated with a 59% reconviction rate after 6 years. Tyre pointed out that the recidivism rates described by the actuarial instruments did not include individuals who were reoffending but had not been caught doing it. He also noted that Brainard's scores did not take into account Brainard's acknowledged molestation of his first stepdaughter, because Brainard was never arrested for that offense. Brainard's scores put him in what the authors of the instruments identified as high-risk categories.

¶5 The State's second witness, Dr. Caton Roberts from the Department of Health and Family Services, also made diagnoses of pedophilia and exhibitionism, and scored Brainard a 4 on the RRASOR and a 7 on the Static-99. Roberts testified that he did not rely on the MnSOST-R, due to concerns about how well its validity had been tested.

DISCUSSION

¶6 In order to commit a person under Chapter 980, the State must prove that the person is dangerous because the person's mental disorder makes it much more likely than not that he or she will engage in future acts of sexual violence. ***State v. Curiel***, 227 Wis. 2d 389, 403, 406, 597 N.W.2d 697 (1999). We review the sufficiency of the evidence in a Chapter 980 case under the same standard applicable to criminal convictions—that is, whether the evidence viewed most favorably to the State "'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 [a substantial probability that the person would commit future sexually violent offenses] beyond a reasonable doubt.'" ***Id.*** at 416 (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990)).

¶7 Brainard's challenge to the sufficiency of the evidence in this case rests primarily upon the premise that, "[a]t worst, the state's experts predicted that Brainard had a 48% to 52% likelihood of reoffending 10-15 years into the future," along with a corresponding assertion that "a risk of 50% or less is not 'much more likely than not.'" Brainard's premise is fundamentally flawed, however, because the actuarial instruments do not measure rates of reoffending; one measures rates of rearrest and reconviction and one measures only rates of reconviction. As Dr. Tyre pointed out, the instruments do not take into account individuals who reoffend but are not caught. We think it is a matter of simple common sense and general knowledge that *reoffense* rates are significantly higher than the rates of rearrest and especially reconviction. We are, therefore, satisfied that a trier of fact could reasonably find that an individual's actual risk of reoffending is higher than the 48.6% rate predicted by the RRASOR instrument or the 52% rate predicted by the Static-99 instrument.

¶8 Brainard further argues that additional testimony from the State's expert witnesses established that his actual risk of reoffending was lower than the actuarial instruments would predict because: (1) the recidivism rates predicted by the actuarial instruments include nonviolent sexual offenses; (2) Brainard was sixty-two years old by the time of the hearing, and recidivism rates decline with age; (3) recidivism rates for incest perpetrators, and particularly older incest perpetrators, are lower than for other types of sexual offenders; and (4) Brainard scored low on a test for psychopathy.

¶9 While we agree that Brainard could fairly argue his theory to the trial court from the testimony he cites, we disagree that the only permissible inference to be drawn from that evidence was that Brainard's risk of reoffending was lower than the actuarial instruments would suggest. For instance, while the actuarial instruments do encompass both violent and nonviolent sexual offenses, Brainard himself had committed prior violent sexual offenses. Similarly, while recidivism rates for incest perpetrators might generally be low, Brainard had groped a complete stranger on the street, as well as molested both of his stepdaughters, and he had expressed his own concern about developing inappropriate feelings for his grandchildren. Furthermore, although there have been studies suggesting that recidivism rates decline with age, Dr. Roberts pointed out that it is unsettled whether those statistics apply to an offender who has already committed a sexually violent offense past the age of fifty, as Brainard had. And, finally, Dr. Roberts expressed his opinion that the psychopathy test relates more to general criminality, and that there was no strong evidence that it could, standing alone, predict sexual reoffense. Essentially, then, Brainard is simply asking this court to consider the evidence in the light most favorable to his position, rather than in the light most favorable to the verdict. We will not substitute our judgment for that of the fact finder in that manner.

By the Court.—Order affirmed.

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