State of Wisconsin
Court of Appeals
District 3
Appeal No. 2016AP001918

In re the commitment of Christopher E. Mikulski,

State of Wisconsin,

Petitioner-Respondent,

v.

Christopher E. Mikulski,

Respondent-Appellant.

On appeal from a judgment of the Polk County Circuit Court, The Honorable Molly E. Galewyrick, presiding

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Respondent-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

The issue presented by this appeal is controlled by well-settled law. Therefore, the appellant does not recommend either oral argument or publication.

Statement of the Issues

I Where the the petitioner's only expert witness testified--three times-- that it was merely "likely" that Mikulski would commit an act of sexual violence in the future, was the evidence sufficient as a matter of law to support the jury's verdict finding that Mikulski was a sexually violent person?

Answered by the circuit court: Yes.

Summary of the Argument

Concerning the third element of the commitment standard, in order to establish that Mikulski is a sexually violent person, the state was required to present evidence sufficient to establish that it was "more likely than not" that Mikulski would engage in a sexually violent act in the future.

The state's expert, Dr. Tyre, never acknowledged that the statute requires the risk to be "more likely than not", and three

times he offered the opinion that Mikulski was merely "likely" to engage in a sexually violent act in the future.

On the other hand, Mikulski's expert, Dr. Subramanian, was clear in her opinion that Mikulski was not more likely than not to engage in a sexually violent act in the future.

Thus, there was no evidence in the record to establish the third element of the commitment standard.

Statement of the Case

I. Procedural History

The state filed a petition pursuant to Chapter 980 alleging that the respondent-appellant, Christopher Mikulski (hereinafter "Mikulski") was a sexually violent person. The court conducted a preliminary hearing on the petition and found probable cause.

Eventually, the matter was tried to a jury. The state called one expert witness, Dr. Tyre; and Mikulski called one expert witness, Dr. Subramanian.

At the conclusion of the presentation of evidence, the parties stipulated that Mikulski had been convicted of a predicate offense under Chapter 980, and that he had a mental condition that predisposed him to commit sexually violent acts. (R:3/2/2016-102) The only issue argued and presented to the jury was the question of whether it was more likely than not that Mikulski would engage in a sexually violent act in the future.

The jury returned a verdict finding that Mikulski was a sexually violent person. The court committed him for treatment.

Mikulski filed a notice of intent to pursue post-commitment relief. He then filed a notice of appeal. There were no post-commitment motions.

II. Factual Background[1]

The state began by presenting the testimony of a probation officer, Mark Lemke, who told the jury that years earlier, while he was interviewing Mikulski for a presentence investigation report, Mikulski said that if he is in a situation with children, he knows he is vulnerable, and he is not sure if he would be able to refrain from committing acts. (R:2/29/2016-202) These "acts" were not specifically identified.

Additionally, Dr. Christopher Tyre testified as an expert for the State. Dr. Tyre explained his understanding of the statutory definition of a sexually violent person. He said, "Within Chapter 980 that definition is a person who has been either adjudicated delinquent, found guilty . . . of the sexually violent offense or sexually motivated offense; and has a mental disorder *that makes it likely* that they will engage in a future act of sexual

[1] The parties stipulated that Mikulski had a mental condition that predisposed him to commit crimes of sexual violence. The only issue at trial was whether he was more likely than not to commit a crime of sexual violence (i.e. the "risk assessment") Therefore, only the expert testimony related to the risk assessment will be presented.

violence." (R:3/1/2016- 27, 28) Dr. Tyre did not acknowledge that, under § 980.01(1m), "likely" means "more likely than not."

Thereafter, Dr. Tyre testified that, "I did conclude that Mr. Mikulski possesses a mental disorder and in this case two diagnoses that I felt would qualify as a mental disorder . . . and that in my opinion . . . *made it likely that he would engage in a future act of sexual violence*." (emphasis provided; R:3/1/2016-37) Later in his testimony, Dr. Tyre again opined that, "[I]t's likely that Mr. Mikulski will engage in a future act of sexual violence." (R:3/1/2016-102)

Dr. Tyre also explained that he scored Mikulski on various actuarial instruments. These instruments are tools that assist the doctor's clinical judgment in assessing a subject's risk to reoffend, but are not determinative of it. (R:3/1/2016-150; 153) On the RRASOR[2], Dr. Tyre scored Mikulski at five points. (R:3/1/2016-132) Dr. Tyre said that this was the maximum score for a person of Mikulski's age, and, of the men who score a seven in the study, 70% of them were reconvicted of a sex offense. (R:3/1/2016-142) Dr. Tyre did not disclose the future period over which the new offenses occurred. Dr. Tyre admitted, though, that one of the creators of the RRASOR, Dr. Hanson, had signed an affidavit asserting that the instrument should no longer be used because it makes individuals appear to be higher risk than current evidence suggests.

[2] Rapid Risk Assessment for Sex Offender Recidivism

(R:3/1/2016-188)

On the Static-99, Dr. Tyre testified that Mikulski scored a seven. (R:3/1/2016-140) This, according to Dr. Tyre, correlates to a reoffense rate of 52% after fifteen years. (R:3/1/2016-142)

Finally, Dr. Tyre scored Mikulski on the SSPI[3]. (R:3/1/2016-150) Dr. Tyre said that Mikulski had the "maximum" score. *Id.*

Then, for the third time, Dr. Tyre concluded that, "I think Mr. Mikulski is likely to engage in a future act of sexual violence." (R:3/1/2016-150)

Significantly, Dr. Tyre never offered an opinion that Mikulski was *more likely than not* to engage in a future act of sexual violence, nor did he ever acknowledge this requirement of the statute.

Mikulski called Dr. Lakshmi Subramanian as an expert witness. Dr. Subramanian testified that, "Under Wisconsin law a person's probability to commit another sexually violent offense should be more likely than not or should be 50 percent. *So more likely than not as being over 50 percent.*" (R:Tr. 3/2/2016-31) Dr. Subramanian explained that she initially believed that Mikulski's risk to reoffend was more likely than not; however, shortly before trial she became aware of some new research that prompted her to revisit the issue. Thereafter, Dr. Subramanian came to the conclusion that Mikulski's risk to

[3] Screening Scale for Pedophilic Interest

reoffend was, in fact, not more likely than not. (R:Tr. 3/2/2016-55, 61)

Argument

I The evidence was insufficient as a matter of law to establish that it was more likely than not that Mikulski would commit a crime of sexual violence in the future.

Concerning the third element of the commitment standard, in order to establish that Mikulski is a sexually violent person, the state was required to present evidence sufficient to establish that it was "more likely than not" that Mikulski would engage in a sexually violent act in the future.

The state's expert, Dr. Tyre, never acknowledged that the statute requires the risk to be "more likely than not", and three times he offered the opinion that Mikulski was merely "likely" to engage in a sexually violent act in the future.

On the other hand, Mikulski's expert, Dr. Subramanian, was clear in her opinion that Mikulski was not more likely than not to engage in a sexually violent act in the future.

Thus, there was no evidence in the record to establish the third element of the commitment standard.

A. Standard of appellate review

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* Sec. 980.01(7), Stats.; *see also, In re Commitment of Smalley, 2007 WI App 219, ¶ 3, 305 Wis. 2d 709, 712, 741 N.W.2d 286, 287* [“”Likely” in this context means “more likely than not. Sec. 980.01(1m).”]

Appellate review of the sufficiency of the evidence to support a SVP commitment order is the same as that 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).

The Wisconsin courts have never squarely addressed the question of whether expert testimony is absolutely necessary in order to support a finding of future dangerousness. *See, e.g., State v. Kienitz*, 227 Wis. 2d 423, 439-440, 597 N.W.2d 712 (1999), where the supreme court specifically declined to address the question of whether expert testimony is required to support a finding of future dangerousness.[4]

A review of Chapter 980, and a consideration of general principles of due process, though, strongly suggests that the finder of fact in a Chapter 980 proceeding is not free to make its own determinations about dangerousness in the absence of expert testimony.

Firstly, Sec. 980.31, Stats., which governs the appointment of examiners for the purpose of a SVP commitment proceeding, consistently speaks in terms of a "qualified licensed physician, licensed psychologist, or other

[4] "Because there was expert testimony on the issue of future acts of sexual violence in this case, we need not decide the broader question of whether expert testimony is required as a matter of law." *In re Commitment of Kienitz,* 227 Wis. 2d 423, 440, 597 N.W.2d 712, 720 (1999)

mental health professional" to examine the respondent, and to testify at the hearing.

Moreover-- though not on directly on the issue of future dangerousness-- the Seventh Circuit wrote, "Whether a legitimate mental health diagnosis must be based on the DSM *is a question for the members of the mental health profession,* and, therefore, one to which we do not address ourselves." *McGee v. Bartow*, 593 F.3d 556, 576 (7th Cir. Wis. 2010). (emphasis provided)

B. The state offered no expert opinion that Mikulski was more likely than not to engage in a future act of sexual violence.

Dr. Subramanian, who testified for Mikulski, was clear in her opinion that Mikulski was not "more likely than not" to reoffend. The doctor acknowledged the provision of § 980.01(1m) that "likely" in the definition of a sexually violent person, mean "more likely than not."

On the other hand, Dr. Tyre, for the state, never explicitly acknowledged that, in the definition of sexually violent person, the person must be "more likely than not" to engage in a sexually violent act in the future. Additionally, Dr. Tyre offered his opinion-- on three separate occasions-- that Mikulski was merely "likely" to engage in a sexually violent act in the future. In other words, this was not merely a single slip of tongue by

the doctor.

Moreover, although Dr. Tyre testified about his use of actuarial instruments to predict Mikulski's risk, the doctor was clear that the instruments merely assist the clinician in forming his clinical assessment as to risk. The instruments, in and of themselves, are not determinative of risk. Again, even after considering the scores on the actuarial instruments, Dr. Tyre was of the opinion that Mikulski was merely "likely" to engage in a sexually violent act in the future.

Thus, Dr. Subramanian's opinion that Mikulski is not "more likely than not" to engage in a sexually violent act is uncontracted in the record.

For this reason, the evidence was insufficient as a matter of law to support the jury's verdict finding that Mikulski was a sexually violent person.

Conclusion

It is respectfully requested that the court of appeals find that the evidence in the record was insufficient to support the jury's verdict; and, therefore, to reverse the judgment committing Mikulski as a sexually violent person. The matter should then be remanded to the circuit court with instructions to enter a judgment dismissing the petition.

Dated at Milwaukee, Wisconsin, this _____ day of December, 2016.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2595 words.

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Dated this _____ day of December, 2016:

_____

Jeffrey W. Jensen

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Respondent-Appellant's Appendix

A. Record on Appeal
B. Judgment

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an

administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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_____

Jeffrey W. Jensen