COURT OF APPEALS
DECISION
DATED AND FILED

October 16, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2652 **Cir. Ct. No. 2009CI1**

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

IN RE THE COMMITMENT OF JAMES R. BIRKETT:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JAMES R. BIRKETT,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: AMY SMITH, Judge. *Affirmed*.

Before Sherman, Kloppenburg and Reilly, JJ.

¶1 PER CURIAM. James Birkett appeals a judgment of the circuit court, which committed him as a sexually violent person under WIS. STAT. ch. 980

(2011-12),[1] and an order denying his post-commitment motion. On appeal, Birkett argues that he received ineffective assistance of trial counsel, that the circuit court erred in admitting certain evidence, and that he was denied a fair trial because of prosecutorial misconduct. Birkett argues that the real controversy was not fully tried and requests that we use our discretionary authority under WIS. STAT. § 752.35 to reverse the circuit court. For the reasons set forth below, we affirm the judgment and the order of the circuit court.

BACKGROUND

¶2 Birkett was convicted of several sexually violent offenses. The state filed a petition for involuntary commitment pursuant to WIS. STAT. ch. 980. The court found probable cause that Birkett was a sexually violent person, and Birkett requested a jury trial. Birkett now challenges several aspects of the jury trial on appeal.

Dr. Craig Rypma's opinions in other cases involving a sexually violent person

¶3 Birkett makes several arguments with respect to the State's use of other unrelated sexually violent person cases in which Birkett's sole expert witness, Dr. Craig Rypma, had given expert psychological opinions about the respondents. Birkett argues that his trial counsel rendered ineffective assistance when he failed to file a motion in limine or to object to the State's use of the unrelated cases, that the circuit court erred in admitting evidence regarding those cases, and that the prosecutor engaged in misconduct when he introduced such

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

evidence. For the reasons set forth below, we reject Birkett's arguments with respect to the unrelated cases.

¶4 Rypma testified at Birkett's trial that he did not believe Birkett had a disorder predisposing him to commit acts of sexual violence. On cross-examination, the State elicited testimony about six other cases where Rypma had testified that there was no predisposing condition, but where the court or jury ultimately found the respondent to be a sexually violent person. The State also introduced psychological reports prepared by Rypma in the other cases. In its closing argument, the State argued that Rypma's failure to find a predisposing disorder in any of the six other cases was indicative of his bias in favor of the defense.

¶5 We will first address Birkett's argument that his counsel was ineffective for failing to file a motion in limine or to object to the evidence regarding the unrelated cases. A claim of ineffective assistance of counsel has two parts: (1) deficient performance by counsel and (2) prejudice resulting from that deficient performance. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12.

¶6 At the postconviction ***Machner***[2] hearing in the circuit court, Birkett's trial attorney David M. Rolnick testified that he considered objecting to the evidence regarding the unrelated cases during cross-examination, but made a "strategic choice" against objecting because "making a fuss about it would just drill it into the minds of the jury." He did not want the jury to focus on "how

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

many sex offenders ... are out there and how many different horrible things they have done." Rolnick also testified that, prior to trial, he had received notice from the State that it planned on introducing the reports that Rypma generated in the unrelated cases. Rolnick predicted that the State would use this evidence, and any corresponding line of questioning, as an attempt to impeach Rypma and to show a bias toward finding that people do not have predisposing diagnoses. In preparation for trial, Rolnick rehearsed with Rypma what types of questions he might be asked in relation to the unrelated cases, in order to head off what Rolnick anticipated would be a "bias attack" waged by the State against Rypma.

¶7 At the ***Machner*** hearing, the circuit court found that Rolnick was credible, and concluded that he made a "tactical decision" not to object. The court further concluded that the State's use of the other cases was fair impeachment, and that any concern the court had about potential prejudice to Birkett was "tempered" by an effective direct examination of Rypma by Rolnick. We agree.

¶8 In light of the above, and employing the highly deferential standard applicable to counsel's strategic decisions, we are satisfied that Rolnick's decision not to object or file a motion in limine was a reasonable one that did not render his performance deficient. *See* ***State v. Domke***, 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364. Because we have concluded that Birkett's ineffective assistance claim fails on the deficient performance component, we need not address prejudice. *See* ***State v. Snider***, 2003 WI App 172, ¶20, 266 Wis. 2d 830, 668 N.W.2d 784.

¶9 Next, we address Birkett's argument that the circuit court erred in allowing Rypma's testimony about unrelated cases to be admitted. As discussed above, no objections were made at trial to the testimony and, thus, the issue is

waived on appeal. *See* ***State v. Huebner***, 2000 WI 59, ¶¶10-11, 235 Wis. 2d 486, 611 N.W.2d 727. Birkett's prosecutorial misconduct argument also fails because, as discussed above, we have concluded that the State's use of the unrelated cases was fair impeachment. In addition, the prosecutor gave advance notice to Birkett's counsel that it intended to use Rypma's reports from the unrelated cases and, thus, it was not a surprise to Birkett or to Rypma when questions about those cases arose at trial.

Testimony of Department of Corrections agents

¶10 Birkett argues that Rolnick rendered ineffective assistance of counsel when he failed to object to testimony of two probation agents, Amy Bell and Lynn Vogel, that Birkett was and continues to be at high risk to reoffend. Birkett argues that he did not receive advance notice that the State would elicit such testimony, and that the testimony was improper expert opinion testimony from a lay witness.

¶11 Rolnick conceded at the ***Machner*** hearing that "clearly there was testimony that got in that should not have. I should have objected." We will assume then, without deciding the issue, that the opinion testimony from Bell and Vogel was inadmissible and that Rolnick's failure to object constituted deficient performance. We turn, then, to the second prong of the test for ineffective assistance of counsel, which is whether Birkett suffered any prejudice from Rolnick's failure to object. *See* ***Swinson***, 261 Wis. 2d 633, ¶58. We conclude that he did not.

¶12 Despite the lack of notice regarding the opinion testimony from Bell and Vogel, Rolnick did what the circuit court described as a "superb" job of cross-examining these witnesses, and was able to utilize their testimony in a way that

was helpful to Birkett's defense. In addition, as the circuit court pointed out, this case was not one that turned on a "battle of the experts." The record contains ample facts about the gravity of the original crime, Birkett's failure to complete sex offender treatment, and his history of prison conduct reports pertaining to sexually deviant behavior. Even without the opinion testimony of Bell and Vogel, the jury would have had a sufficient factual basis for drawing an inference that Birkett was more likely than not to engage in future acts of sexual violence and, thus, fit the definition of a sexually violent person. *See* WIS. STAT. § 980.01(7).

Evidence of the court's probable cause determination

¶13 Birkett argues that his trial counsel was ineffective for failing to object to expert testimony, proffered by the State, that a court had found probable cause to believe that Birkett was a sexually violent person. Specifically, one of the State's experts, Dr. Christopher Tyre, answered in the affirmative when asked on direct examination, "it goes without saying we would not be in here in front of a jury, would we, unless the Judge had found probable cause at that hearing?"

¶14 Birkett argues that this testimony was improper under ***State v. Budd***, 2007 WI App 245, 306 Wis. 2d 167, 742 N.W.2d 887. In ***Budd***, we concluded that expert testimony regarding the screening process for WIS. STAT. ch. 980 cases was irrelevant, and we concluded that admission of the testimony was not harmless error. ***Budd***, 306 Wis. 2d 167, ¶1; *see also* ***State v. Sugden***, 2010 WI App 166, ¶46, 330 Wis. 2d 628, 795 N.W.2d 456 (testimony regarding the pre-petition screening process was not relevant and should not have come before the jury).

¶15 Similar to our conclusion in ***Budd*** and ***Sugden*** that expert testimony on the screening process was improper, we conclude that the expert testimony on

probable cause in this case improperly took away from the jury the question of whether the defendant met the statutory criteria for commitment. Thus, Rolnick's failure to object constituted deficient performance. However, Birkett fails to persuade us that the deficiency was unfairly prejudicial and, thus, his ineffective assistance of counsel argument fails. *See* ***Swinson***, 261 Wis. 2d 633, ¶58. As stated above, the numerous facts in the record about Birkett's history of obsessive and sexualized behavior would have provided a sufficient basis on which the jury could conclude, even without the objectionable testimony, that Birkett was a sexually violent person. *See* WIS. STAT. § 980.01(7).

Plain error and discretionary reversal

¶16 Birkett argues that we should grant relief on the basis of plain error because his counsel's failure to object in all the ways discussed above had the cumulative effect of depriving him of a fair trial and due process of law. *See* WIS. STAT. § 901.03(4). Alternatively, Birkett requests discretionary reversal on the basis that the real controversy was not fully tried. *See* WIS. STAT. § 752.35. We reject both of these arguments.

¶17 To invoke the doctrine of plain error, a defendant bears the burden of showing that the error is fundamental, obvious, and substantial. ***State v. Jorgensen***, 2008 WI 60, ¶23, 310 Wis. 2d 138, 754 N.W.2d 77. Birkett argues that WIS. STAT. ch. 980 cases are driven by expert opinions and that his defense was fundamentally damaged when his expert was allowed to testify about unrelated cases and when two of the State's lay witnesses were allowed to give expert opinions. However, because we have concluded that none of the disputed testimony prejudiced Birkett, we decline to invoke the plain error doctrine and, for the same reason, decline to exercise our power of discretionary reversal.

By the Court.—Judgment and order affirmed.

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