COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1944 **Cir. Ct. No. 2008CI1**

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

IN RE THE COMMITMENT OF JON F. WINANT:
STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JON F. WINANT,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

Before Curley, P.J., Brennan and Bradley, JJ.

¶1 BRADLEY, J. Jon F. Winant appeals the trial court's judgment and commitment order, entered after a bench trial, where the trial court found that

Winant was a sexually violent person pursuant to WIS. STAT. § 980.01 (2011-12).[1] Winant also appeals the postcommitment order summarily denying his claim of ineffective assistance of counsel. Winant claims his trial counsel gave him ineffective assistance because trial counsel failed to: (1) object when the State asked the trial court to admit as exhibits the Notice of Violation and Receipt, the Violation Investigation Report, and the Revocation Summary; and (2) object on hearsay grounds when a Department of Corrections agent testified about a note from a social worker reporting that Winant admitted to propositioning a fourteen-year-old girl. He asks us to reverse and remand for a ***Machner*** hearing.[2] Because the record conclusively demonstrates that Winant's trial counsel was not ineffective, we affirm.

BACKGROUND

¶2 In February 2008, the State filed a WIS. STAT. ch. 980 petition against Winant, who was scheduled to be released after serving his sentence for convictions on child enticement. Winant had been paroled from the sentence in February 1997, but in 1998 and 1999, Winant repeatedly violated his parole and probation by soliciting prostitutes, having unsupervised contact with A.G. (who was under the age of eighteen), possessing cocaine, and refusing to give his parole agent a written statement of the July 1999 contact with A.G. After a hearing before an Administrative Law Judge, Winant's parole and probation was revoked and Winant returned to prison to complete his sentence. In anticipation of

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

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

Winant's release, the State filed the ch. 980 petition, and a commitment trial was held in August 2012.

¶3 At trial, the State called three witnesses: (1) Jennifer Sieker, who simply testified about Winant's mandatory release date; (2) Rebecca Mahin, a Department of Corrections employee who was assigned as Winant's parole agent; and (3) Dr. Christopher Tyre, a psychologist from the Department of Corrections.

¶4 When Mahin testified, the prosecutor asked about a note in a document labeled "MEDICAL RECORD," made by Veterans Administration social worker Raymond Kronz, whom Winant saw for sex offender treatment during Winant's parole in 1999. The prosecutor asked Mahin to read the note out loud and Winant's attorney objected, asserting physician-patient privilege and lack of foundation. The State argued the note was admissible as a treatment record and the trial court agreed. Mahin then read the note:

> During session, patient reported that he has feelings of shame and guilt specifically to recent event where he had engaged in old behavior this last weekend. He had … 14-year-old [A.G.] in his car with his hand on her leg offering her money.
>
> When asked what her reply was and what had occurred, he stated that she said nothing and, quote, just left the car. He also stated that he called her the next day to ask her if she was mad with him.

This document was marked as Exhibit 26 and admitted into evidence.

¶5 Mahin testified that this incident violated Winant's parole and triggered revocation of his parole and probation. Mahin next identified the Department of Corrections Notice of Violation and Receipt, Violation Investigation Report, and Revocation Summary. The Notice of Violation and Receipt alleged that Winant violated conditions of parole on six different

occasions. The Notice described the violation with the fourteen-year-old girl, A.G.:

> On 7/1/99, Mr. Winant's agent received a telephone call from Raymond Konz, a Social Worker from the Veterans Administration in regards to a possible probation/parole violation by Mr. Winant. According to Mr. Konz's [report], Mr. Winant reported that he has feelings of shame and guilt specifically to a recent event in which Mr. Winant engaged in old behaviors over the last weekend. According to Mr. Winant he had … 14-year-old … [A.G.] in his car, put his hand on her leg, and offered her money. Due to the seriousness of this allegation Mr. Winant was immediately placed into custody, with the assistance of the Oak Creek Police Department, so that the agent could investigate the allegations.

The Notice was marked as Exhibit 27 and admitted into evidence without objection.

¶6 The Violation Investigation Report set forth the violations Winant committed between January of 1998 and July of 1999, set forth a basis for the allegations, and described the actions the agent took to investigate the alleged unsupervised contact with A.G. In addition to containing the identical paragraph quoted above from Exhibit 27, this Report explained that:

- With the help of police, the agent searched Winant's home and vehicles and found several pictures of A.G., condoms, and cocaine residue.

- The agent spoke with A.G.'s mother who said she had seen Winant alone with A.G. in his vehicle.

- The agent spoke with A.G. who said Winant offered her "$100 a week when she was alone in the vehicle with him"; she "has been

alone in the car with Mr. Winant on numerous occasions"; and he took her shopping. A.G. reported Winant has been bothering her for about a year. When Winant asked her for a hug and a kiss after shopping, she refused, but he hugged her anyway. She also said Winant asked her "about sex and if she has ever had sex with her boyfriends, questioning her on how far she has gone with a boy."

- Winant refused to give a written statement about A.G., but told his agent that he "'messed up again' and probably would be going back to prison. He admitted to having sexual contact with prostitutes. He further stated that he is attracted to teenage girls because they 'are fresh, firm and smooth'. When the agent attempted to question Mr. Winant about the contact with [A.G.] he refused to talk about the contact, stating he was 'looking out for his best welfare' and 'doesn't care who he has to drag through the mud to protect himself from going to prison.'"

This Report was marked as Exhibit 28 and admitted into evidence without objection.

¶7 The Revocation Summary summarized the initial child enticement charges, Winant's parole, and the events leading to revocation of parole. It contained the same paragraph we quoted from Exhibit 27 and the same information we set forth from Exhibit 28. It provided an analysis concluding: (1) confinement was necessary to protect the public; (2) Winant needed correctional treatment; and (3) not revoking parole would "unduly depreciate the seriousness of the violations." The Revocation Summary was marked and admitted as Exhibit 29 without objection. In the trial transcript, Winant's attorney

explained why he did not object to the Revocation Summary: "Well, and I didn't object to the -- to the chronological summaries of his behavior while on probation because I agree it is a business record and it is relevant."

¶8 Dr. Tyre testified that he was asked to do a special purpose evaluation of Winant to determine if he was currently a sexually dangerous person, and to do so he reviewed all of Winant's records, including the incident with A.G. Dr. Tyre's opinion was that:

> Mr. Winant suffers from both paraphilia not otherwise specified and personality disorder not otherwise specified with anti-social features, both of which are understood to be mental disorders as defined within Chapter 980. So congenital or acquired conditions affecting his emotional or volitional capacity predisposing him to acts of sexual violence. And that they make it likely understood to mean more likely than not that he will engage in a future act of sexual violence.

¶9 Winant called two witnesses: Dr. Craig Rypma and Dr. Richard Elwood. Dr. Rypma testified he conducted an evaluation of Winant and in his opinion:

- Winant has bipolar disorder, adult anti-social behavior, panic disorder with agoraphobia, and polysubstance abuse—none of which are a mental condition that predisposes him to commit acts of sexual violence.
- Winant does not have paraphilia.
- Paraphilia not otherwise specified is not a diagnosis under the DSM.
- A person over the age of sixty has a nearly zero risk of recidivism.

- Winant is "not more likely than not to commit a future act of sexual violence."

- Acting on an attraction to adolescent females is a crime but the attraction would not "be considered a psychological dysfunction, a psychological disorder."

¶10 Dr. Elwood testified that in 2009, he was asked to evaluate Winant and after a review of all his records, he performed a risk assessment and prepared a report for the court. In that report, Dr. Elwood diagnosed Winant with paraphilia not otherwise specified, and believed Winant was more likely than not to reoffend. In July 2012, Dr. Elwood was again asked to evaluate Winant. In the new report, Dr. Elwood found Winant still suffered from paraphilia not otherwise specified, but also had hebephilia (sexual attraction toward young adolescents) and exhibitionist features. Dr. Elwood noted that Winant's treating psychiatrist had diagnosed Winant with panic disorder and bipolar disorder. Dr. Elwood testified that his opinion on Winant's risk of reoffending had changed. Based on recent research on effectiveness of treatment (which Winant received while in prison) and his age of sixty-two, Dr. Elwood "cannot clearly show that he poses a risk exceeding 50 percent." As a result, Dr. Elwood told the trial court:

> Insofar as I am unable to establish clearly to a reasonable degree of psychological certainty that his risk is beyond 50 percent, I cannot say with reasonable professional certainty that he meets the criteria as a sexually violent person.

¶11 Dr. Elwood testified on cross-examination that paraphilia not otherwise specified is a recognized diagnosis in the DSM, and he would "[m]ost emphatically" disagree with Dr. Rypma's testimony to the contrary. He also conceded on cross-examination that Winant "poses a substantial risk to reoffend,"

but he does not "have sufficient evidence to where I can to a reasonable degree of certainty say that his risk exceeds 50 percent."

¶12 The trial court issued an oral ruling finding that Winant's "mental disorder predisposes him to engage in future acts of sexual violence and the [S]tate has proven beyond a reasonable doubt that [Winant] is a sexually violent person as defined in Chapter 980." In its decision, the trial court specifically ruled:

- "The court first finds and accepts the testimony of Doctors Tyre and Elwood that [Winant] suffers from two mental disorders. Paraphilia not otherwise specified and personality disorder not otherwise specified, with anti-social features. And I hereby reject Dr. Rypma's contrary testimony."

- The court found paraphilia not otherwise specified is a recognized diagnosis in the DSM-IV.

- Winant's "history is replete of acts of committing sex offenses, lying, absconding and lack of remorse." In Winant's personal maintenance program contract, "he admits numerous horrendous and perverted acts of sexual offenses."

- The "record I find is clear that he has committed rapes and abductions of female strangers and child enticement, all which support the not otherwise specified diagnosis."

- "I find he's still also suffering from these two mental disorders and they exist even to this date."

- He is more likely than not to engage in future acts of sexual violence if he is released.

- "[H]e has failed to respond to treatment in the past and has shown by his reoffending the first time he was released from prison and by -- and reoffended involved a sexual act. He was put back in prison. He was treated, released and sexually offended again. He was revoked a third time and that was based upon his own report."

Winant filed a postcommitment motion asserting ineffective assistance of counsel. The trial court denied the motion without a ***Machner*** hearing. Winant now appeals.

DISCUSSION

¶13 Winant claims that his trial counsel gave him ineffective representation when trial counsel did not object to Exhibits 27, 28 and 29 and did not object on hearsay grounds to Exhibit 26. He also asserts the trial court should have held a ***Machner*** evidentiary hearing on his claims. *See* ***id.***, 92 Wis. 2d at 804 (hearing to determine whether trial counsel gave defendant ineffective assistance). We disagree.

¶14 To establish constitutionally ineffective representation, Winant must show: (1) deficient representation; and (2) resulting prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient representation, he must point to specific acts or omissions by his lawyer that are "outside the wide range of professionally competent assistance," *see* ***id.*** at 690, and to prove resulting prejudice, he must, in the context of this case, show that what his trial counsel did deprived him of a fair trial, *see* ***id.*** at 687. To establish prejudice,

Winant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *See* ***id.*** at 694. We do not need to address both ***Strickland*** factors if Winant does not make a sufficient showing on either one. *See* ***id.*** at 697.

¶15 The trial court must hold an evidentiary hearing on an ineffective assistance claim only if Winant "'alleges sufficient material facts that, if true, would entitle the defendant to relief.'" *See* ***State v. Love***, 2005 WI 116, ¶26, 284 Wis. 2d 111, 700 N.W.2d 62 (citation omitted). If the postconviction motion does not set out sufficient facts, or is only conclusory, or if the record otherwise conclusively demonstrates that Winant is not entitled to relief, the trial court has the discretion to deny the claim without a hearing. *See* ***id.*** We review *de novo* whether Winant is entitled to an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

A. *Exhibits 27-29*.

¶16 Winant claims his trial counsel provided ineffective assistance by not objecting to Exhibits 27, 28 or 29, the Notice of Violation and Receipt, the Violation Investigation Report and the Revocation Summary, respectively. Winant acknowledges that these exhibits were admissible under WIS. STAT. § 908.03(8) as public records of the Department of Corrections; however, he argues the hearsay statements within the documents—specifically the statements Winant made to Konz about propositioning fourteen-year-old A.G.—were inadmissible because they constituted hearsay within hearsay. We reject Winant's claims.

¶17 Winant's trial counsel's failure to object to these exhibits based on the hearsay each contained was not ineffective assistance because these exhibits were admissible under the "public record and reports" exception to the hearsay rule, WIS. STAT. § 908.03(8), which provides:

> PUBLIC RECORDS AND REPORTS. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law, or (c) in civil cases and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

¶18 WISCONSIN STAT. ch. 980 is a civil proceeding, and therefore, Department of Corrections records "may be used to establish factual findings made during investigations, as well as activities or observations made by DOC personnel" under WIS. STAT. § 908.03(8), as long as a competent witness identifies the record. *See* ***State v. Keith***, 216 Wis. 2d 61, 77, 573 N.W.2d 888 (Ct. App. 1997). Department of Corrections' agent Mahin was certainly competent to identify the records here.

¶19 We are not persuaded by Winant's complaint about the hearsay within the challenged exhibits because documents admitted under WIS. STAT. § 908.03(8) necessarily include "statements" from "sources" and therefore contain layers of hearsay. Section 908.03(8) authorizes admission of factual findings that incorporate hearsay when a report or record is the product of an investigation done by a public office or agency, pursuant to a duty imposed by law, unless the sources of information are not trustworthy. Section 908.03(8) "'is based upon the assumption that public officers will perform their duties, that they lack motive to falsify, and that public inspection to which many such records are subject will

disclose inaccuracies.'" *See* ***Bridgeway Corp. v. Citibank***, 201 F.3d 134, 143 (2d Cir. 2000) (discussing federal counterpart to the Wisconsin statute) (citation omitted). "'Factual finding' includes not only what happened, but how it happened, why it happened, and who caused it to happen." ***Id.*** (citation and one set of quotation marks omitted).

¶20 The three documents Winant challenges here all satisfy the requirements of WIS. STAT. § 908.03(8), and therefore were properly admitted. Each document resulted from Winant's parole agent investigating Konz's report that Winant's conduct violated his parole. The parole agent was obligated by law to investigate the alleged violations. *See* WIS. STAT. §§ 304.06(3) & 973.10 (1999-2000); WIS. ADMIN. CODE § DOC 331.03(1) (parole agents are required to investigate the facts of alleged violation and meet with the client to discuss). Winant's agent conducted an investigation, spoke with Winant, spoke with A.G. and A.G.'s mother, and concluded the conduct warranted revocation. As a result, the agent was required to prepare a report documenting the facts underlying the violation, describing the agent's investigation and conclusions, and reporting the client's statement and any recommendations. *See* WIS. ADMIN. CODE § DOC 331.04. The investigation resulted in the documents Winant challenges: the Violation Investigation Report, Revocation Summary, and Notice of Violation and Receipt. The hearsay within these reports contains the factual findings the agent substantiated during the investigation, including what happened, how it happened, why it happened, and who caused it to happen. *See* ***Bridgeway Corp.***, 201 F.3d at 143. The hearsay to which Winant objects falls within the factual findings of what happened, and therefore was admissible under this hearsay exception, unless Winant, as the opponent of the information, demonstrates that the sources upon which the report is based were untrustworthy. *See* ***id.***

¶21 We see nothing suggesting the hearsay within these documents was untrustworthy. Konz, as a social worker for the Veterans Administration, is certainly trustworthy as he has a duty to keep accurate records of treatment sessions. The statements Winant made to Konz were against his own interest and therefore carry circumstantial guarantees of trustworthiness. *See* ***State v. Buelow***, 122 Wis. 2d 465, 476-77, 363 N.W.2d 255 (Ct. App. 1984) (The rationale for admission of statements against interest is that they possess circumstantial guarantees of trustworthiness based on the assumption that people do not falsely make damaging statements about themselves unless true.). In addition, the statements were Winant's own admissions, and technically not hearsay at all. *See* WIS. STAT. § 908.01(4)(b)1. ("A statement is not hearsay if … [t]he statement is offered against a party and is … The party's own statement."). Winant does not deny making the statement to Konz or claim Konz's note about his account was inaccurate. Rather, Winant acknowledged the statement by refusing to put it in writing because, as he told the investigating agent, he was "looking out for his best welfare" and "doesn't care who he has to drag through the mud to protect himself from going to prison."

¶22 We determine that if Winant's trial counsel had objected to these reports based on the hearsay each contained, the objection would have been overruled and the reports would have been admitted as public records pursuant to WIS. STAT. § 908.03(8). Winant's trial counsel, therefore, cannot be found ineffective because any objection would have been unsuccessful. *See* ***State v.***

Cummings, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) (failure to raise nonmeritorious issue was not ineffective assistance).[3]

B. *Mahin's testimony on Exhibit 26*.

¶23 Winant also argues his trial counsel should have objected on *hearsay* grounds when the prosecutor asked Mahin what the social worker's note said about Winant's account of propositioning A.G. Winant contends if his trial counsel had objected on the correct grounds, Mahin would not have been able to read the social worker's note into evidence and Exhibit 26 would have been excluded. As we have seen, Winant's counsel objected on other grounds and the trial court admitted Exhibit 26 as a treatment record. Exhibit 26, however, should not have been admitted under the medical treatment exception, WIS. STAT. § 908.03(4),[4] to the hearsay rule because ***State v. Huntington***, 216 Wis. 2d 671,

[3] Even if the trial court elected to redact the portions of these reports that Winant challenges, the same information was admitted into evidence both in the Administrative Law Judge's opinion revoking Winant's parole and probation, and as the basis for the expert witnesses' opinions. The ALJ's decision did not reference Konz's report, but instead was based on A.G.'s and A.G.'s mother's statements made directly to the parole agent as well as Winant's own admissions and the admissions Winant made through his attorney with regard to what happened with A.G. The expert witnesses relied on the interaction with A.G. in order to form opinions as to whether Winant was a sexually violent person. Thus, even if Winant had been able to exclude Konz's report to the parole agent, the trial court would have had the same information through additional admissible sources. Accordingly, Winant was not prejudiced when trial counsel did not object to the admission of these reports.

[4] WISCONSIN STAT. § 908.03(4) provides:

> STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

695, 575 N.W.2d 268 (1998), held the hearsay exception for medical diagnosis or treatment cannot be used to admit statements made to social workers. ***Id.*** at 695.

¶24 We hold, however, that Winant's trial counsel's failure to object on *hearsay* grounds was not ineffective assistance. A hearsay objection would not have resulted in this information being excluded from the record. Even if the trial court sustained a hearsay objection to the social worker's note, substantially the same information properly came into evidence via Exhibits 27, 28 and 29; therefore, Winant cannot prove prejudice.

¶25 Further, as the trial court's decision explained, the record is replete with evidence supporting Winant's commitment. Accordingly, even if Winant's trial counsel had successfully excluded Exhibit 26 on hearsay grounds, the result of the proceeding would not have been different.[5]

C. ***Machner*** *hearing*.

Winant also contends that the trial court should have held a ***Machner*** hearing to allow his trial lawyer to testify. As we have seen, however, the record here "'conclusively demonstrates that the defendant is not entitled to relief.'" *See* ***Love***, 284 Wis. 2d 111, ¶26 (citation omitted). Thus, remand for an evidentiary hearing is not warranted.

[5] The State argues this information also would have been admitted under WIS. STAT. § 908.03(6m), the patient health care record exception to the hearsay rule, because Konz's report was a health care record under WIS. STAT. § 146.81(4), and a health care worker includes a social worker or professional counselor under § 146.81(1)(hg). The State contends if Winant had objected on hearsay grounds, it could have laid a foundation to admit Konz's report as a health care record. Because we have disposed of this issue on other grounds, we need not address this issue. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate court should decide case on narrowest possible grounds).

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.