COURT OF APPEALS
DECISION
DATED AND FILED

August 25, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP2083 **Cir. Ct. No. 2008CI2**

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

IN THE MATTER OF THE COMMITMENT OF JOHN L. PHILLIPS:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JOHN L. PHILLIPS,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Brown County: MARC A. HAMMER, Judge. *Affirmed*.

Before Stark, P.J., Hruz, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. John Phillips appeals an order adjudging him to be a sexually violent person under WIS. STAT. ch. 980 and an order denying his

motion for a new trial based on ineffective assistance of counsel.[1] On appeal, Phillips asserts he is entitled to a new trial because his attorney rendered ineffective assistance by: (1) failing to object to expert testimony regarding what Phillips labels an "extrapolation formula" describing Phillips' risk to reoffend; and (2) failing to object to a psychologist's testimony, given in the context of her diagnosis of antisocial personality disorder, regarding Phillips' history of deception and lying, and to closing argument based on that testimony. We conclude Phillips' trial counsel did not perform deficiently in either respect, and we therefore affirm.

BACKGROUND

¶2 On September 8, 2008, the State filed a petition alleging Phillips was a sexually violent person within the meaning of WIS. STAT. § 980.01(7). An assistant state public defender was appointed on October 24, 2008, to represent Phillips, and he filed motions in limine in November 2009. Two of these motions sought to prohibit the State from offering evidence regarding "extrapolation" of lifetime risk from temporally limited risk estimates derived from actuarial instruments.[2]

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

[2] The first motion sought to exclude "any testimony or reference to research on extrapolation of actuarially based risk percentages … that purports to assess lifetime recidivism risk by arithmetical manipulation of the reported Static-99 risk percentages, such as by doubling the reported 5-year followup risk percentage." The second motion sought to exclude "any opinion testimony (or argument) regarding extrapolating or modifying risk estimates to account for purported underreporting of uncharged sexual offenses" unless such an opinion was based on scientific research or clinical expertise and held to a reasonable degree of scientific certainty.

¶3 Following a series of adjournments,[3] the assistant state public defender retired and withdrew from the representation. The attorney who would ultimately serve as Phillips' trial counsel was then appointed. It does not appear the motions in limine were ever addressed. The jury trial commenced on August 20, 2013, and ended the following day. At the conclusion of trial, the jury found that Phillips was a sexually violent person, and the circuit court ordered him committed to the Department of Health Services.

¶4 At trial, the State presented expert testimony from two psychologists, Dr. Anthony Jurek and Dr. Lakshmi Subramanian. They completed initial evaluations of Phillips in 2008 and 2012, respectively, and also filed supplemental reports in anticipation of trial.[4] Both doctors concluded Phillips suffered from antisocial personality disorder. In addition, Jurek diagnosed Phillips with paraphilia, not otherwise specified, and Subramanian diagnosed Phillips with pedophilia, sexually attracted to females, nonexclusive type. Both doctors testified these conditions predisposed Phillips to engage in acts of sexual violence. Both doctors also testified as to their opinion, based on actuarial estimates of risk and other factors, that Phillips was more likely than not to engage in future acts of sexual violence. Doctor Craig Rypma testified on Phillips' behalf and concluded

[3] Phillips represents that both parties requested delays to allow for the resolution of a criminal case that was also pending against Phillips.

[4] Doctor Jurek completed an initial evaluation on August 2, 2008, in which he concluded Phillips did not meet the criteria for commitment as a sexually violent person. Shortly thereafter, Jurek was contacted by the institution in which Phillips was incarcerated. Jurek was told that Phillips, who was previously convicted of having sexual contact with a fourteen-year-old, was planning to have sexual contact with an eleven-year-old female upon his release. Based upon this information, Jurek changed his opinion of Phillips' status, as reflected in a report dated August 27, 2008.

Phillips did not have a mental disorder that predisposed him to commit acts of sexual violence. Phillips decided not to testify.

¶5 Phillips filed a postcommitment motion seeking a new trial. Among other things, he argued he was denied the effective assistance of trial counsel because his trial attorney failed to object to Dr. Jurek's "extrapolation testimony"; that is, Jurek's testimony that Phillips' risk to reoffend was higher than indicated by the actuarial instruments, because risk estimates derived from those instruments were limited both temporally and in how they counted subsequent "offenses" among the evaluation groups. Phillips also argued his trial counsel was ineffective because he failed to object to Dr. Subramanian's testimony that Phillips' history of deceptive behavior and lying was one basis for her diagnosis of antisocial personality disorder; trial counsel also failed to object to that portion of the prosecutor's closing argument in which this testimony was highlighted.

¶6 The circuit court held a ***Machner*** hearing, at which Phillips' trial counsel testified.[5] Phillips also testified, but was not asked about his decision to forgo testifying in his defense. After hearing the testimony, the circuit court rejected Phillips' ineffective assistance of counsel challenges to the commitment order. It concluded the "concept of extrapolation" had a sufficient basis to support Dr. Jurek's expert opinion, and that trial counsel had a strategic reason for both refusing to object and cross-examining Jurek on the matter. The circuit court further concluded Dr. Subramanian's testimony regarding Phillips' past deception and lying was "a function of the diagnosis" only and was not impermissible commentary on another witness's truthfulness. Phillips now appeals.

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

DISCUSSION

¶7 To prevail on an ineffective assistance of counsel claim, Phillips must demonstrate both deficient performance on the part of his trial counsel and prejudice arising from that deficient performance. *See* ***State v. Thayer***, 2001 WI App 51, ¶14, 241 Wis. 2d 417, 626 N.W.2d 811. These issues present mixed questions of fact and law. ***Id.*** We will not disturb the circuit court's findings of historical fact unless those findings are clearly erroneous. ***Id.*** However, whether counsel's conduct constitutes deficient performance, and whether the defendant was prejudiced, are questions of law, which we review independently of the circuit court. ***State v. Sanchez***, 201 Wis. 2d 219, 236-37, 548 N.W.2d 69 (1996).

¶8 To prove deficient performance, the defendant must establish "that counsel's representation fell below an objective standard of reasonableness." ***Strickland v. Washington***, 466 U.S. 668, 688 (1984). Under this standard, counsel's errors must have been "so egregious that the attorney was not functioning as the defendant's counsel as guaranteed by the Sixth Amendment." ***State v. Lombard***, 2004 WI 95, ¶49, 273 Wis. 2d 538, 684 N.W.2d 103. Judicial scrutiny of counsel's performance is highly deferential. ***Strickland***, 466 U.S. at 689. We make every effort to eliminate "the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Id.*** In other words, we indulge "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." ***Id.***

¶9 Here, Phillips argues his trial counsel performed deficiently in two respects. First, Phillips asserts his trial counsel should have objected on foundation grounds to Dr. Jurek's general "extrapolation" testimony, as well as to

Jurek's use of a "mathematical formula" to estimate Phillips' lifetime reoffense risk. Second, Phillips asserts trial counsel should have objected to Dr. Subramanian's testimony regarding Phillips' history of "deception and lying." For the following reasons, we conclude trial counsel's performance was constitutionally adequate in both instances. We therefore need not address prejudice. *See* ***State v. Elm***, 201 Wis. 2d 452, 462, 549 N.W.2d 471 (Ct. App. 1996).

I. Dr. Jurek's testimony

¶10 Phillips faults his trial counsel for "failing to object to extrapolation testimony that used a numerical formula." To determine whether trial counsel performed deficiently by failing to object, we must first determine whether the evidence was properly admitted under the governing standard at the time. *See* ***id.*** The admissibility of expert testimony at Phillips' trial was governed by WIS. STAT. § 907.02 (2009-10), which provided, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[6]

¶11 At trial, Dr. Jurek testified he scored Phillips a "5" on the Static 99, which is an actuarial instrument designed to measure an individual's risk of

[6] As both Phillips and the State observe, WIS. STAT. § 907.02 was amended in 2011. *See* 2011 Wis. Act 2, §§ 34m, 37. However, Phillips concedes that because the amendments first apply to actions or special proceedings commenced on or after February 1, 2011, the trial in the present case was properly conducted under the previous statute because the petition was filed in 2008.

sexually reoffending. Jurek testified that individuals with this score in evaluation groups reoffended at a rate of thirty-three percent over five years, thirty-eight percent over ten years, and forty percent over fifteen years. Jurek further testified that he was required to assess Phillips' lifetime risk of reoffending for purposes of WIS. STAT. ch. 980, whereas recidivism data for the Static 99 were available only for a maximum of fifteen years. When asked whether a person's risk to reoffend would increase over a period exceeding fifteen years, Jurek responded that it depended on the age of the subject:

> If I'm dealing with an older person, if I'm dealing with somebody who's 65, 10 years would probably cover it, but if I'm dealing with the younger individual I have to consider the question, you know, [does] 15 years of followup cover their … remaining life? Now, with an individual who is 35 to 36 years old, which I believe is the case of Mr. Phillips, there's a good many years after he runs out that 15-year clock that he could still potentially re-offend.

¶12 Doctor Jurek further opined that the Static 99 likely understated the risk of reoffense because it undercounted the number of actual offenses among the evaluation groups:

> Q. As you understand an analysis under Chapter 980, are you to be concerned with the risk for the Respondent being rearrested or reconvicted or are you to be concerned with his risk of simply re-offending?
>
> A. The question is whether they also commit an additional offense. The problem is that all of these instruments are based upon public records. They only indicate offenses that had resulted in a referral to the criminal justice system, somebody has to report this, and in the earlier versions of [the] STATIC 99 … it has to be a conviction. Just getting arrested, getting referred isn't enough. You actually have to convict the individual, and there's a lot of data that makes it very clear that [a large] number of sexual offenses go unreported.

> Q. You indicated there's research in the field of psychology on that issue?
>
> A. Yes, there is, as recently as July of last year. There was a national crime victim survey report that indicated approximately 60 percent of sexual offenses go unreported.
>
> Q. Do you then consider the percentages you gave for those various actuarials to be underestimates or conservative estimate[s] for risk of re-offending?

At this point, Phillips' trial counsel objected that the question called for speculation. The objection was overruled, and Jurek continued:

> A. I consider them to offer at best a very conservative estimate. They certainly indicate the risk of an individual being probably convicted again, maybe arrested again, but there's a good possibility that if you're asking do they indicate the chance that he also commit[s] any sexual offense, they need to be considered an underestimate.

Considering the actuarial results and other factors, Jurek concluded that Phillips was more likely than not to engage in future acts of sexual violence.

¶13 During cross-examination, Phillips' trial counsel questioned Dr. Jurek about his 2013 supplemental report. In it, Jurek discussed an updated version of the Static 99, the Static 99R. Jurek scored Phillips a "5" on the Static 99R, and observed that individuals with the same score in a "high risk/need" subgroup reoffended at a rate of 25.2 percent after five years and 35.5 percent over ten years. Phillips' trial counsel then elicited the following testimony:

> Q. So … it sounds like your estimation of re-offense rate using these statistical protocols … would be substantially less than more likely than not. 25.2 percent, 35.5 percent?
>
> A. Well, you can't use any one score as a direct indicator what a person's risk is. There are limitations on what any single score can give you, and as I mentioned earlier, these are reported

re-offense rates. They're not actual re-offense rates and the timeframe to follow up is limited.

….

Q. But, Doctor, … how are we supposed to reconcile that … you're talking here about a re-offense rate of 25.2 percent and 35.5 percent over 5 and 10 years? You're extrapolating this from a STATIC [99R] but then it sounds like you're saying we shouldn't pay attention to that. We should assume that the re-offense rate is over 50 percent. I mean, … what am I missing? Seriously?

A. I'm saying when you look at that number it's important to have an understanding of how the instruments are constructed, what data they are based on, and what period of followup occurred and that's going to make a difference in terms of how you apply it to an individual. It is very difficult to know how many offenses occurred that aren't documented. So there has to be some subjective judgment in that. That being said, a score of five with that indication of 25.2 percent in my opinion over [five] years of followup is sufficient to indicate the potential for a lifetime risk of re-offense of genuine re-offense, not offenses that come to the attention of the criminal justice system[,] of 50 percent or greater.

….

Q. But it sounds, tell me if I'm wrong, it sounds like you're asking the jury to lay [the actuarial risk estimate] aside and just to trust you when you say that, no, it's really greater than 50 percent. Do I state that accurately?

A. No. What I'd say is this. You need to use that number as a starting point and be aware of how limited it is, that it relates only to offenses that show up in the official record and it relates only to offenses [that] occurred over a brief period of time rather than an entire lifetime that individual might be at risk.

¶14 On redirect examination, the State further questioned Dr. Jurek about his interpretation of the actuarial instruments and Phillips' risk to reoffend:

> Q. And then, lastly, again, as to the percentages, [defense] counsel had asked particularly using the most recent evaluation, using the most recent figures from the STATIC 99R, the re-offense rates were 25.2 percent at 5 years and 35.5 percent at 10 years. Do you recall counsel asking you questions about moving beyond that number [sic]?
>
> A. I do.
>
> Q. And do you believe that the research is sufficient to give you a scientific basis to go beyond those numbers?
>
> A. Yes, I do.
>
> Q. And that's based on the amount of time, the 10 years versus lifetime?
>
> A. That's correct. It would be really an error on my part … not to raise those issues and somehow suggest that this is the true rate of re-offense because it would be a disservice to the data.
>
> Q. And, likewise, the issue of underreporting of offenses?
>
> A. That's correct, the same issue there.
>
> Q. And, again, you look at things beyond just the actuarial assessment?
>
> A. I do.

¶15 Phillips asserts Dr. Jurek's testimony regarding the limitations of the Static 99 instruments was objectionable on foundation grounds. Phillips characterizes Jurek's testimony as stating that "Phillips' Static 99 scores corresponded to an over 50 percent lifetime risk of sexual reoffense even though it was only 25.2 percent over 5 years." Phillips argues Jurek "essentially claimed that he could double a 5 year risk to reach a sufficient lifetime risk to qualify for [WIS. STAT.] Chapter 980 commitment." Phillips contends there was "no foundation for such a drastic statistical jump *except for the high number of unreported offenses from crime victim surveys*." (Emphasis added.)

¶16 Any assertion that the challenged testimony elicited on either direct or redirect examination was objectionable on foundation grounds is baseless. As Phillips partially concedes, there was an adequate foundation for Dr. Jurek's testimony that the Static 99 instruments underestimated lifetime reoffense risk, both because of their limited time frame and because a significant number of sexual offenses go unreported. Although Phillips faults Jurek for failing to establish "the reliability and application" of the national crime victim survey report to Phillips' case, it is apparent Jurek was discussing the shortcomings of the actuarial instruments as a general matter with respect to the relevant WIS. STAT. ch. 980 commitment criteria. Notably, Phillips states he "does not dispute … the general principle that actual risk might be higher tha[n] actuarials in any given case." Jurek's testimony on this point was admissible because it assisted the trier of fact in understanding Jurek's rationale for concluding it was likely that Phillips would commit a sexually violent offense during his lifetime.

¶17 We also conclude Phillips' trial counsel did not perform deficiently when cross-examining Dr. Jurek about the 2013 supplemental report or otherwise in his addressing the issue of Jurek's "extrapolation." Contrary to Phillips' belief, Jurek did not arrive at his assessment of Phillips' risk by applying a "specific multiplier" to Phillips' score on the Static 99R. Even if Jurek had testified to that effect, such testimony would only have played into trial counsel's strategy. At the ***Machner*** hearing, Phillips' trial counsel explained that his goal was to trap Jurek into articulating, numerically, how he arrived at his conclusion that Phillips was likely to commit a sexually violent offense. Trial counsel explained that this strategy, if successful, would have portrayed Jurek as "[o]ver confident, far too specific, so specific that[,] … ironically, it would make [him] unbelievable." In short, trial counsel wished to use the "extrapolation" testimony *against* Jurek.

Phillips' trial counsel ably implemented this strategy at trial, in particular during his cross-examination of Jurek. The fact that trial counsel was ultimately unsuccessful in his reasonable, strategic attempt to elicit a precise numerical basis for Jurek's opinion does not establish he performed deficiently. "An appellate court will not second-guess a trial attorney's 'considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.'" ***Elm***, 201 Wis. 2d at 464 (quoting ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983)).

II. Dr. Subramanian's testimony

¶18 Phillips next argues that certain of Dr. Subramanian's testimony violated the rule set forth in ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984), that "[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." ***Id.*** at 96. Expert testimony is objectionable if it "conveys to the jury the expert's own beliefs as to the veracity of another witness," and such testimony "does not assist the fact-finder" because it impermissibly usurps their role. ***State v. Pittman***, 174 Wis. 2d 255, 268, 496 N.W.2d 74 (1993). "To determine whether expert testimony violates [the ***Haseltine***] standard, this court will examine the testimony's purpose and effect." ***Pittman***, 174 Wis. 2d at 268 (citing ***State v. Jensen***, 147 Wis. 2d 240, 254-55, 432 N.W.2d 913 (1993)). Whether a witness's testimony violates the ***Haseltine*** rule is subject to de novo review. *See* ***State v. Huntington***, 216 Wis. 2d 671, 697, 575 N.W.2d 268 (1988).

¶19 Doctor Subramanian testified she diagnosed Phillips with pedophilia, sexually attracted to females, nonexclusive type, and with antisocial personality disorder. Subramanian explained that individuals with antisocial

personality disorder "display a pervasive pattern of disregard for or violation of the rights of others as indicated by certain, specific behaviors." She continued:

> Mr. Phillips' lengthy history of engaging in behaviors that are grounds for arrest. [sic] He also has a history of deceptive or conning and manipulative behavior. His treatment providers have talked about a persistent problem with honesty within the treatment setting. In the past Mr. Phillips has lied about his alcohol use, he has lied about his offensive behaviors. In the past, Mr. Phillips has engaged in an inappropriate action and has tried to pin that action onto somebody else.

Examples of this last behavior included Phillips falsely attempting to implicate another patient in a medication distribution scheme and writing a threatening letter to a judge that was signed with another patient's name.

¶20 Phillips' trial counsel cross-examined Dr. Subramanian with respect to one of the examples of deceptive behavior she cited, the letter to a judge. After trial counsel produced a photocopy of the letter, Subramanian agreed that the letter did not include a signature, but rather the other patient's name was typed at the top of the letter. During the redirect examination, Subramanian clarified that because Phillips had been convicted of a crime as a result of the letter, it made no difference whether Phillips had signed another patient's name or typed the name. Subramanian testified that her concern about Phillips' veracity was based on "the extensive review of his records and the number of examples I came across where he has engaged in deception and lying."

¶21 In this case, we conclude there was no basis for Phillips' trial counsel to object to, or move to strike, Dr. Subramanian's testimony regarding Phillips' history of deception. The testimony was elicited for the proper purpose of supporting Subramanian's diagnosis of antisocial personality disorder. Moreover, Phillips did not testify at trial, so Subramanian's testimony could not,

in any conceivable way, have been construed as opining on whether "another mentally and physically competent witness is telling the truth." *See* ***Haseltine***, 120 Wis. 2d at 96. In ***Haseltine***, this court concluded a psychologist's opinion that there "was no doubt whatsoever" that the complainant was an incest victim went too far because it was "an opinion that she [the complainant] was telling the truth." ***Id.*** Here, the outcome of the trial did not hinge on Phillips' credibility.

¶22 Phillips asserts that although he was not a sworn witness at his trial, "his truthfulness was at issue since he, in effect, testified through an expert [Dr. Rypma] that interviewed him." This is a distorted and incorrect view of the trial process. Phillips did not "testify through" Rypma; rather, Rypma's conclusions were based, in part, on a personal interview with Phillips. Rypma's credibility, not Phillips' credibility, was therefore key to the trial defense.

¶23 Phillips argues that the result of Dr. Subramanian's testimony, provided during the State's case-in-chief, was that "Philips [sic] was [labeled] a liar … before it was even set in stone that Phillips would not testify in his own behalf and before [Dr.] Rypma testified on Phillips' behalf."[7] This argument assumes that but for Subramanian's testimony, Phillips may have testified. However, Phillips has cited nothing in the record to that effect, nor has he cited any legal authority for the proposition that expert testimony such as that offered by Subramanian is objectionable merely because it may impact a defendant's decision to testify. As we have suggested, a ***Haseltine*** issue might arguably have arisen if Phillips had testified, because, while it is clear that the purpose of the testimony

[7] We find no merit to the suggestion that Dr. Subramanian's testimony was inappropriate simply because it preceded Dr. Rypma's testimony.

was not to comment upon Phillips' truthfulness, it is not clear whether that would have been the testimony's *effect*. *See* ***State v. Smith***, 170 Wis. 2d 701, 718, 490 N.W.2d 40 (Ct. App. 1992). We need not address that issue here under the facts of this case. Rather, it is sufficient for our purposes to hold that because Phillips did not testify, and because there is no evidence that Subramanian's testimony in any way affected his decision not to do so, there was no ***Haseltine*** violation, and consequently the testimony was not objectionable.

¶24 As Phillips points out, his trial counsel also did not object to the following portion of the prosecutor's closing remarks: "What's the Respondent's history on telling the truth? According to the treatment evaluators, not good. According to even Dr. Rypma, common symptom[s] or characteristics of those with antisocial personality disorder [are] lying and deceit." Again, this statement was fair argument in the context of urging the jury to accept the diagnosis of antisocial personality disorder. Moreover, trial counsel articulated at the ***Machner*** hearing a reasonable, strategic basis for declining to object to this line of argument. Trial counsel testified that, in his experience, jurors understand the difference between argument and evidence (and they were instructed accordingly in this case), jurors often take a "dim view of objections" during closing argument, and any objection might have done more harm than good by further highlighting the testimony.

By the Court.—Orders affirmed.

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