COURT OF APPEALS
DECISION
DATED AND FILED

May 5, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2576

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

FREDERICK WRIGHT,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Frederick Wright appeals from a trial court order finding him to be a sexually violent person under Chapter 980, STATS. Wright also appeals from a trial court order denying his motion for postdisposition relief. Wright claims that the trial court erred because: (1) Wright's counsel was ineffective; (2) the trial court erroneously admitted the testimony of the State's

expert witnesses; (3) there was insufficient evidence to support the trial court's findings that Wright is a sexually violent person; and (4) Wright was denied his substantive due process rights under the federal and state constitutions. We reject Wright's claims and affirm the trial court's orders.

I. BACKGROUND.

Wright was born on April 19, 1977. On August 2, 1993, Wright was adjudicated delinquent for committing a first-degree sexual assault of a child, in violation of § 948.02(1), STATS. As a result of that adjudication, the trial court committed Wright to one year of probation with placement at Homme Home. After an extension of the probation, the trial court ordered a change in placement to Ethan Allen School for Boys at Wales, to expire August 2, 1995. On July 31, 1995, the State filed a petition, pursuant to Chapter 980, STATS., alleging that Wright is a sexually violent person within the meaning of § 980.01(7), STATS. Following a hearing, the trial court found probable cause to believe that Wright is a sexually violent person, ordered Wright to be detained and evaluated, and ordered a trial in the matter.

Prior to trial, Wright filed various motions, including a motion to suppress, a motion to dismiss, and evidentiary motions. At the beginning of the trial, the trial court denied Wright's motions, and accepted a stipulation that Wright had been adjudicated delinquent for the sexually violent offense of first-degree sexual assault of a child. The court then proceeded with the trial to determine the remaining issues of whether Wright has a mental disorder, and if so, whether that mental disorder creates a substantial probability that Wright will engage in acts of sexual violence.

During the trial, Dr. Thomas Speaker and Dr. Craig Monroe testified as expert witnesses for the State. Dr. Speaker testified that, as a member of the Sexually Violent Persons Act Committee at Ethan Allen School, he conducted a psychological assessment of Wright to determine if Wright should be referred for commitment as a sexually violent person. Dr. Speaker testified that, based on his treatment and evaluation of Wright, he diagnosed Wright as suffering from anti-social personality disorder and sexual disorder NOS (not otherwise specified). Dr. Speaker further testified that both disorders fit the definition of a "mental disorder" contained in Chapter 980, STATS., and that, because of the disorders, Wright has a high probability of acting out in a sexually violent manner in the future. Dr. Speaker also testified that a number of particular risk factors make it substantially probable that Wright will engage in future acts of sexual violence. On cross-examination, Dr. Speaker acknowledged that "the science of prediction of behavior is not very good." However, on redirect, Dr. Speaker testified that, although no one can predict the future with absolute certainty, the risk factors "demonstrate a high correlation of recurrence." On cross-examination, Dr. Speaker also testified that Wright does have "the volitional capacity to choose whether or not to engage in [sexually violent] conduct." But, Dr. Speaker stated that fact did not change his judgment that Wright was predisposed to commit future acts of sexual violence. Dr. Speaker explained that although Wright had "demonstrated the ability to avoid acting out in a secure setting" where he would likely be caught and punished, Dr. Speaker believed it was substantially probable that Wright would commit acts of sexual violence if released into a non-secure setting.

Dr. Monroe testified that, pursuant to his responsibilities as a licensed psychologist at the Mendota Mental Health Institute, he evaluated Wright

to determine whether Wright was a sexually violent person. Dr. Monroe testified that, after evaluating Wright, he also diagnosed Wright as having an anti-social personality disorder. Dr. Monroe also testified that he concurred with Dr. Speaker's diagnosis of sexual disorder NOS. Dr. Monroe testified that these disorders predisposed Wright to engage in future acts of sexual violence, even though they did not mean that the likelihood of his reoffending was certain. Dr. Monroe also testified in detail regarding a number of risk factors which made it substantially probable that Wright would engage in future acts of sexual violence. Finally, Dr. Monroe concurred with Dr. Speaker's view that, although Wright had the ability to choose not to commit acts of sexual violence in controlled settings, it is substantially probable that Wright, if released into the community, or even a less-structured setting, would commit future acts of sexual violence.

Dr. Kenneth Smail testified as an expert witness for Wright. Dr. Smail testified that he is a clinical psychologist, and that he had also evaluated Wright. Dr. Smail testified that he diagnosed Wright was having anti-social personality disorder, but that he did not believe that disorder made it substantially probable that Wright would engage in future acts of sexual violence. Dr. Smail based his view on the fact that Wright had the capacity to choose whether or not to engage in sexually violent behavior, and therefore, that his capacity to control his behavior was not impaired. Dr. Smail also testified that his conclusions were based in part on a risk factor analysis.

Finally, Wright testified that, although he had not requested treatment at the Wisconsin Resource Center, he now wanted to participate in a treatment program.

At the close of the hearing, the trial court found that the State had met its burden of proof that Wright had been convicted of a sexually violent offense, and that Wright has a mental disorder which creates a substantial probability that he will engage in acts of sexual violence. The trial court then entered an order adjudicating Wright as a sexually violent person and committing him to the custody of the Department of Health and Social Services. Following the trial, Wright filed a motion for postdisposition relief alleging, among other things, ineffective assistance of counsel. The trial court held an evidentiary ***Machner*** hearing, and allowed Wright's counsel to testify, but allowed Wright to present the testimony of another attorney, Walter H. Isaacson, only as an offer of proof. The trial court then denied Wright's motion and Wright now appeals.

II. ANALYSIS.

A. Ineffectiveness claim.

Wright claims that the trial court erred by not finding that his trial counsel was ineffective. Apparently, to date, no published Wisconsin case has decided whether or not an individual who is the subject of commitment proceedings under Chapter 980, STATS., has the right to effective assistance of counsel. The Wisconsin Supreme Court, however, has held that a statutory provision for appointed counsel includes the right to effective counsel. ***A.S. v. State***, 168 Wis.2d 995, 1004-05, 485 N.W.2d 52, 55 (1992). Chapter 980 provides that an indigent subject of a commitment proceeding has the right to appointed counsel. Section 980.03(2)(a), STATS. Therefore, we conclude that Wright had the right to effective assistance of counsel during his commitment proceeding.

The familiar two-pronged test for ineffective assistance of counsel claims requires defendants to prove (1) deficient performance and (2) prejudice.

Strickland v. Washington, 466 U.S. 668, 690 (1984); ***State v. Johnson***, 133 Wis.2d 207, 216-17, 395 N.W.2d 176, 181 (1986); *see also* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996) (holding ***Strickland*** analysis applies equally to ineffectiveness claims under state constitution). To prove deficient performance, a defendant must show specific acts or omissions of counsel which were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. A defendant's contention will fail if counsel's conduct was reasonable, given the facts of the particular case, viewed as of the time of counsel's conduct. ***Id***. We will "strongly presume" counsel to have rendered adequate assistance. ***Id***.

To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.*** at 687. In order to succeed, "The defendant 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." ***Id***. at 694**.** If this court concludes that the defendant has not proven one prong, we need not address the other prong. See ***id***. at 697. On appeal, the trial court's findings of fact will be upheld unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). But proof of either the deficiency or the prejudice prong is a question of law which this court reviews *de novo*. ***Id.*** at 634, 369 N.W.2d at 715.

Wright claims that his counsel was ineffective for failing to attack the risk factor analysis used by the State's expert witnesses. Wright argues that "an effective attack on the risk factor analysis as utilized by the State's experts would have revealed there is no generally accepted scientific validation" for the

risk factor analysis because "there is overwhelming evidence the empirical research does not support either the ability to predict the future dangerousness [sic], nor the ability to predict future acts of sexual violence." In denying Wright's postdisposition motion, the trial court acknowledged that an attack can be made on the risk factor analysis, but concluded that Wright's counsel was not deficient for failing to make such an attack. We agree.

Although Wright's counsel testified at the ***Machner*** hearing that he could not specifically recall the details of his trial strategy, the trial transcript clearly reveals the nature of counsel's strategy. Wright's counsel essentially chose to argue that because Wright, according to the States' expert and his own expert, has the volitional capacity to choose, in certain situations, whether or not to engage in sexually violent behavior, he does not have a "mental disorder," as that term is defined in § 980.01(2), STATS. As Wright's counsel at the ***Machner*** hearing stated, Wright's trial counsel "basically took the position that the particular mental disorder was not a disorder because it didn't affect the volitional capacity of Mr. Wright." Given this trial strategy, it was reasonable for Wright's trial counsel to choose not to pursue an alternate theory of defense, based on an attack on the risk factor analysis.

Wright's mistaken position on appeal, as stated in his reply brief, is that:

> A defense counsel must attack each part of the State's case in a way which [exposes] weaknesses which exist in order to contest the State's attempts to prove its allegations. The decision to contest in only one area seemingly is more out of a lack of effort, than out of a tactical decision [sic].

Wright is wrong. Wright's counsel was not obligated to pursue every possible theory of defense, or to attack every part of the State's case. To the contrary, trial counsel may, on the basis of a considered judgment, select a particular theory of defense from among alternate defenses that are available. *See* ***State v. Felton***, 110 Wis.2d 485, 501-02, 329 N.W.2d 161, 169 (1983). The defense selected need not be the one that in hindsight looks best to an appellate court, because 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." *See* ***id.*** at 502, 329 N.W.2d at 169. Therefore, we conclude that Wright's counsel was not deficient, and hence, not ineffective, for failing to attack the State's experts' use of the risk factor analysis.

B. Admission of State's expert witnesses' testimony.

Wright claims that the trial court erred by admitting the testimony of Dr. Speaker and Dr. Monroe because neither expert was qualified to testify that it was substantially probable that Wright would engage in future acts of sexual violence. Wright's claim is primarily based on the fact that Dr. Speaker testified that "the science of prediction of future behavior is not very good." This fact, however, did not warrant exclusion of either Dr. Speaker's or Dr. Monroe's testimony.

In ***State v. Peters***, 192 Wis.2d 674, 534 N.W.2d 867 (Ct. App. 1995), this court stated:

> [T]he rule remains in Wisconsin that the admissibility of scientific evidence is not conditioned upon its reliability. Rather, scientific evidence is admissible if: (1) it is

> relevant, § 904.01, STATS.[1]; (2) the witness is qualified as an expert, § 907.02, STATS.[2]; and (3) the evidence will assist the trier of fact in determining an issue of fact, § 907.02. ***State v. Walstad***, 119 Wis.2d 483, 516, 351 N.W.2d 469, 486 (1984). If these requirements are satisfied, the evidence will be admitted.
>
> Moreover, scientific evidence is admissible under the relevancy test regardless of the scientific principle that underlies the evidence. ***Id.*** at 518-19, 351 N.W.2d at 487. As our supreme court noted in ***Walstad***:
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> > The fundamental determination of admissibility comes at the time the witness is 'qualified' as an expert. In a state such as Wisconsin, where substantially unlimited cross-examination is permitted, the underlying theory or principle on which admissibility is based can be attacked by cross-examination or by other types of impeachment. Whether a scientific witness whose testimony is relevant is believed is a question of credibility for the finder of fact, but it clearly is admissible.
>
> ***Id.***

Peters, 192 Wis.2d at 687-88, 534 N.W.2d at 872 (footnotes omitted and footnotes added). Dr. Speaker and Dr. Monroe clearly were both qualified expert witnesses whose testimony was relevant and assisted the trier of fact in determining issues of fact. The fact that Dr. Speaker acknowledged that "the science of prediction of future behavior is not very good" relates to the reliability, rather than the admissibility, of Dr. Speaker's and Dr. Monroe's testimony. The trial court could have relied on Dr. Speaker's statement as a basis to disbelieve his, or

[1] Section 904.01, STATS., states: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

[2] Section 907.02, STATS., states: "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."

Dr. Monroe's, testimony, but the statement does not make either expert's testimony inadmissible. Therefore, the trial court properly admitted Dr. Speaker's and Dr. Monroe's testimony.

C. Sufficiency of the evidence.

Wright claims that the evidence was insufficient to support the trial court's findings that he is a sexually violent person, because there was insufficient evidence to show that Wright has a mental disorder which creates a substantial probability that he will engage in acts of sexual violence. Wright's argument has two prongs: (1) the trial court's finding of fact that Wright has a mental disorder, as defined by § 980.01(2), STATS., "affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence" is clearly erroneous because Wright has the ability to choose, under certain circumstances, whether or not to commit acts of sexual violence; and (2) the trial court's finding of fact that Wright's mental disorder creates a substantial probability that he will engage in acts of sexual violence is clearly erroneous because Dr. Speaker's admitted that the science of prediction of future behavior is "not very good." The trial court's findings of fact will be upheld unless they are clearly erroneous. Section 805.17(2), STATS. We conclude that the trial court's findings are not clearly erroneous.

Wright first argues that, because he has the volitional capacity, under certain circumstances, to choose whether or not to engage in acts of sexual violence, the trial court's finding that he has a mental disorder, as defined by § 980.01(2), STATS., "affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence" is clearly erroneous. Determining whether the trial court's finding was clearly erroneous requires us to

interpret § 980.01. Statutory interpretation involves a question of law which we determine independently of the trial court, while benefiting from its analysis. *See* ***State v. Szulczewski***, ___ Wis.2d ___, ___, 574 N.W.2d 660, 662 (1998). The principal objective of statutory interpretation is to ascertain and give effect to the intent of the legislature. ***Id.*** at ___, 574 N.W.2d at 664. To achieve this goal, we first resort to the plain language of the statute itself. ***Lake City Corp. v. City of Mequon***, 207 Wis.2d 155, 162, 558 N.W.2d 100, 103 (1997). For purposes of statutory interpretation or construction, the common and approved usage of words may be established by consulting dictionary definitions. *See* § 990.01(1), STATS.; ***State v. Sample,*** ___ Wis.2d ___, ___, 573 N.W.2d 187, 192 (1998).

Section 980.01(2), STATS., defines a "mental disorder" as "a congenital or acquired condition *affecting* the emotional or volitional capacity that *predisposes* a person to engage in acts of sexual violence." (Emphasis added.). The word "affect" means "to produce an effect upon, or to produce a material influence upon or alteration in." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 35 (1976). The word "predispose" means "to dispose in advance, make susceptible." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1786 (1976). Therefore, by the plain meaning of the statute, a mental disorder is not necessarily limited to a definition of a "congenital or acquired condition" which destroys a person's volitional capacity, making it certain that the person will engage in acts of sexual violence. To the contrary, a mental disorder can be defined as a condition which merely "affects," or "produces a material influence upon," a person's volitional capacity, which "predisposes" the person, or makes them more "susceptible," to engaging in acts of sexual violence. Of course, according to § 980.02(2)3(c), STATS., in order to be found to be a "sexually violent person," a person's mental disorder must "create a substantial probability

that he or she will engage in acts of sexual violence." But the threshold, according to § 980.01, in order to be found to have a "mental disorder," requires only that a person must merely have a condition which "affects" the emotional or volitional capacity that "predisposes" a person to engage in sexual violence.

In the instant case, both Dr. Speaker and Dr. Monroe testified that Wright's volitional capacity, although not completely impaired, was certainly affected in a manner that predisposed Wright to commit acts of sexual violence. Both doctors testified that although Wright had shown an ability to avoid engaging in sexual violence while in a highly controlled and structured setting, Wright's mental disorders of anti-social personality disorder, and sexual disorder NOS, made it substantially probable that Wright would commit acts of sexual violence if released into a less-structured setting, or into the community. Therefore, the trial court's finding that Wright has a mental disorder, as defined by § 980.01, STATS., was not clearly erroneous.

With regard to Wright's second argument, the trial court's finding that Wright's mental disorder creates a substantial probability that Wright will engage in acts of sexual violence was supported by an overwhelming amount of evidence. Both Dr. Speaker and Dr. Monroe testified that there is a substantial probability that Wright will engage in acts of sexual violence, and both doctors supported their testimony at length and in detail. The fact that Dr. Speaker made a single comment that "the science of prediction of future behavior is not very good," is of marginal significance given both doctors' testimony as a whole, particularly when viewed against the backdrop of Wright's previous conduct. Therefore, the trial court's finding that there is a substantial probability that Wright will engage in acts of sexual violence is also not clearly erroneous. Thus,

there was sufficient evidence to support the trial court's finding that Wright is a sexually violent person within the meaning of Chapter 980, STATS.

D. Constitutional substantive due process claims.

Finally, Wright claims that he has been denied his constitutional rights to substantive due process under both the federal and state constitutions, because he has been committed for having a personality disorder, as opposed to a mental illness, for which there is no effective treatment. In ***State v. Post***, 197 Wis.2d 279, 301-17, 541 N.W.2d 115, 122-28 (1995), the Wisconsin Supreme Court rejected a similar claim, and held that commitment proceedings under Chapter 980, STATS., do not violate the constitutional right to substantive due process for either of the reasons that Wright advances. Therefore, we conclude that Wright's constitutional rights have not been violated.

III. CONCLUSION.

In sum: (1) Wright's counsel was not ineffective for choosing not to attack the risk factor analysis used by the State's expert witnesses; (2) the trial court properly admitted the testimony of those witnesses; (3) there was sufficient evidence to support the trial court's findings that Wright is a sexually violent person; and (4) Wright was not denied his substantive due process rights under either the federal or state constitutions. Therefore, we affirm the trial court's order finding Wright to be a sexually violent person, and we affirm the trial court's order denying Wright's motion for postdisposition relief.

By the Court.—Orders affirmed.

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