COURT OF APPEALS
DECISION
DATED AND FILED

June 10, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1948 **Cir. Ct. No. 2011CI1**

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

IN RE THE COMMITMENT OF JAMIE LANE STEPHENSON:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JAMIE LANE STEPHENSON,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dunn County: ROD W. SMELTZER, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Jamie Stephenson appeals a judgment and commitment order for a sexually violent person, and an order denying

postdisposition relief. Stephenson claims he is entitled to a new trial because his trial counsel was ineffective by failing to object to the State's expert witness's hearsay testimony. We reject his argument and affirm.

¶2 The trial commenced on June 14, 2012, during which Dr. Lakshmi Subramanian testified Stephenson suffered from a mental disorder for purposes of WIS. STAT. ch. 980;[1] with a diagnosis of alcohol abuse, in a controlled environment; and personality disorder not otherwise specified with antisocial features. She also testified that Stephenson was more likely than not to commit an act of sexual violence in the future.

¶3 Stephenson takes issue with several statements by Dr. Subramanian that discussed other reports. Stephenson claims the statements were "offered, as hearsay, through the testimony of Dr. Subramanian, to which defense counsel did not object."

¶4 First, when Dr. Subramanian was discussing the bases for her opinion, she was asked by the State, "[D]o you have an opinion as to whether you believe Dr. Westendorf's[2] opinion about the likelihood of Mr. Stephenson reoffending is consistent or inconsistent with your findings and conclusions?" Dr. Subramanian replied, "It's consistent with my findings and conclusions."

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

[2] Doctor Melissa Westendorf testified at the probable cause hearing that she diagnosed Stephenson with personality disorder, not otherwise specified, with borderline and antisocial traits. She also testified this was a qualifying diagnosis under WIS. STAT. § 980.01, and that Stephenson was more likely than not to engage in future acts of sexual violence.

Dr. Subramanian then noted some similarities and differences between her methods and those of Dr. Westendorf.

¶5 Second, Dr. Subramanian noted that Dr. Michael Simpson, a psychologist who performed a psychosocial evaluation of Stephenson, had stated Stephenson "should be viewed as a high risk individual who is opportunistic and willing to take advantage of any situation that presents itself for sexual gratification." Doctor Subramanian then testified that she did not score Stephenson based upon Dr. Simpson's analysis alone:

> I tend to be cautious about … going by the opinion of other professionals. I think the opinion should be considered because some of them may have had access to information that I did not.
>
> On the other hand, if they have made a statement, but I do not find information to support that statement, then I'm merely left with a statement and nothing to back that up. So I would not use a statement stated by somebody else unless I can find some evidence to back that up.

¶6 Third, Dr. Subramanian noted that in materials she relied upon to reach her opinion, there was a reference made by another examiner, a probation and parole agent, that "Stephenson lacked insight." The agent's statement, which was made in a presentence report, was "consistent" with Dr. Subramanian's independent conclusion that Stephenson lacks remorse.

¶7 The circuit court found the State met its burden of showing Stephenson suffered from a mental disorder under WIS. STAT. ch. 980, and it was more likely than not that he would engage in future acts of sexual violence if not committed. Stephenson moved for a new trial on the ground that he was denied effective assistance of counsel when his trial attorney failed to object to

Dr. Subramanian's testimony concerning the opinions of professionals who did not testify at trial.

¶8 At the motion hearing, trial counsel testified that she did not object to the alleged hearsay testimony because such testimony is commonly allowed by trial courts in WIS. STAT. ch. 980 proceedings, and also because it was a trial to the court, and the court would have been "able to listen to the testimony and sift out any relevant/irrelevant, admissible/inadmissible testimony." She also testified she believed Dr. Subramanian "was testifying about evidence that she relied upon in rendering her opinions and even if it had been inadmissible evidence, it wasn't admitted for the truth and it was evidence that she was relying upon."

¶9 The circuit court denied the motion, concluding the statements were properly admitted as a basis for Dr. Subramanian's expert opinion. The court also found Stephenson was not prejudiced, in any event. Stephenson now appeals.

¶10 Trial counsel is presumed to have rendered effective assistance. To establish deficient performance, the defendant must conclusively show that counsel's representation fell below an objectively reasonable standard of representation. *See* ***State v. Domke***, 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364. A defendant must affirmatively prove prejudice. Prejudice occurs when the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceedings would have been different. *See* ***State v. Erickson***, 227 Wis. 2d 758, 769, 596 N.W.2d 749 (1999).

¶11 If the defendant fails on either prong—deficient performance or prejudice—the ineffective assistance of counsel claim fails. "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant

makes an insufficient showing on one." ***Strickland v. Washington***, 466 U.S. 668, 697 (1984). Thus, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." ***Id.***

¶12 Here, we need not reach the issue of whether counsel's performance was deficient, because Stephenson has failed to affirmatively prove that he suffered prejudice by his attorney's failure to object. He merely submits there is a reasonable probability that the outcome of this trial would have been different if not for the improper hearsay testimony from the State's witness. We conclude Stephenson's prejudice argument is conclusory and undeveloped. Therefore, we will not further consider the argument. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

By the Court.—Judgment and order affirmed.

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