COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

Nos. 96-2861
97-1508

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

NO. 96-2861

STATE OF WISCONSIN,

PETITIONER -RESPONDENT,

V.

DONALD SAVINSKI,

RESPONDENT-APPELLANT.

NO. 97-1508

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD SAVINSKI,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Sheboygan County: JOHN B. MURPHY, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

BROWN, J. Donald Savinski claims that the pattern jury instruction for commitment as a sexually violent person under ch. 980, STATS., which was used at his trial does not adequately state the law because: (1) the use of the word "has" in both the present and past tense in the same sentence confused the jury, and (2) it did not contain language from ***State v. Post***, 197 Wis.2d 279, 541 N.W.2d 115 (1995), *cert. denied,* 117 S. Ct. 2507 (1997), which he claims "clarified" the definition of a sexually violent person. He argues that his counsel rendered ineffective assistance when he did not ask for an amendment to the pattern jury instruction. Also, Savinski argues that the State's experts improperly relied upon his previous sexual offense to establish his predisposition to commit future sexual offenses.

We reject both of Savinski's arguments. The standard jury instruction accurately states the definition of a sexually violent person; therefore, Savinski's counsel did not render ineffective assistance. Further, the State's experts did not rely solely on Savinski's prior bad act to establish that he was a sexually violent person. The State's experts testified that in their opinion Savinski suffers from pedophilia and is unable to control his pedophilia, and because he is unable to control his pedophilia, there is a substantial probability he

will commit sexually violent acts. This evidence satisfies the definition of a sexually violent person under ch. 980, STATS. We affirm.[1]

The pertinent facts are as follows. In 1983, Savinski was convicted of first-degree sexual assault for having sexual intercourse with his four and one-half year old daughter. The court sentenced him to an indeterminate term not to exceed twelve years.

Prior to Savinski's scheduled release in 1995, the State filed a petition for commitment alleging him to be a sexually violent person pursuant to ch. 980, STATS. At the close of his jury trial, the trial court gave the jury the standard jury instruction on commitment as a sexually violent person under ch. 980. Following its deliberations, the jury determined that Savinski was sexually violent, and the court then ordered that Savinski be committed to the Wisconsin Resource Center.

Savinski subsequently filed a postconviction motion claiming ineffective assistance of counsel. Following a ***Machner***[2] hearing, the court rejected Savinski's claim and denied the motion. Savinski appeals.

For Savinski to establish that he did not receive effective assistance of counsel, he must prove two things: (1) that his attorney's performance was deficient; and (2) that "the deficient performance prejudiced the defense." *See*

[1] Initially, Savinski appealed from the trial court's July 12, 1996 order committing him to a secure mental health facility. Savinski then asked us to remand the matter to the trial court so that he could pursue his ineffective assistance of counsel claim. We granted his motion, and upon remand, the trial court held a ***Machner*** hearing and denied his ineffective assistance of counsel claim. Savinski also appeals this order. Upon Savinski's motion, we consolidated both cases for disposition.

[2] ***State v. Machner,*** 101 Wis.2d 79, 303 N.W.2d 633 (1981).

Strickland v. Washington, 466 U.S. 668, 687 (1984). An attorney's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** To satisfy the prejudice prong, Savinski must demonstrate that his counsel's deficient performance was "so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *See* ***id.***

In assessing Savinski's claim, we need not address both the deficient performance and prejudice components if he cannot make a sufficient showing on one. *See* ***id.*** The issues of performance and prejudice present mixed questions of fact and law. *See* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). Although findings of historical fact will not be upset unless they are clearly erroneous, questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently of the trial court. *See* ***id.*** at 236-37, 548 N.W.2d at 76.

Section 980.01(7), STATS., defines a sexually violent person to mean:

> a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect or illness, and who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence.

We discern three elements from our reading of this statute. The person who is a candidate for commitment: (1) must have been previously convicted or found not guilty by reason of insanity or mental disease of a sexually violent offense; (2) must presently suffer from a mental disorder; and (3) the mental disorder must be

of such force that it makes it substantially probable that the person will engage in acts of sexual violence.

In 1995, the Wisconsin Criminal Jury Instructions Committee published WIS J I—CRIMINAL 2502, the pattern jury instruction for commitment as a sexually violent person under ch. 980, STATS. The relevant portion of the pattern instruction recognized the three-element dichotomy. This instruction was given at Savinski's trial, as follows:

> The first fact that must be established is that [Savinski] has been convicted of a sexually violent offense. [Savinski] has been convicted of 1st Degree Sexual Assault .... This is a "sexually violent offense."
>
> The second fact that must be established is that [Savinski] *suffers from* a mental disorder.
>
> ....
>
> The third fact that must be established is that [Savinski] is dangerous to others because he has a mental disorder which creates a substantial probability that he will engage in acts of sexual violence.
>
> If you are satisfied beyond a reasonable doubt that [Savinski] *has been* convicted of a sexually violent offense, that he *has* a mental disorder, and that he is dangerous to others because the mental disorder creates a substantial probability that he will engage in acts of sexual violence, you should find that [Savinski] is a sexually violent person. [Emphasis added.]

Savinski argues that because the word "has" appears in both the present and past tense in the final sentence—"*has been* convicted" and "*has* a mental disorder"—it is confusing; it "requires speculation by the jury to determine which words are in the present tense and which are past tense." Savinski claims that a jury could easily confuse the two tenses and fail to understand that in order to meet the legal definition of a sexually violent person, an individual must presently suffer from a mental disorder.

In rejecting Savinski's argument, the trial court said:

> I think this instruction does the trick. Now, it is true that you could be a little more particular and emphasize that the present tense really does mean the present tense, but I don't think ... juries are made up [of] idiots that don't realize that when you talk about the present ... that clearly you're talking about a present condition.
>
> … We are all versed well enough in our language that we recognize those things almost inherently.

We agree. The instruction is not confusing and it adequately states the definition of a sexually violent person. We reject Savinski's grammatical argument that the use of the auxiliary verbs "has" and "has been" in the same sentence is confusing. The auxiliary verb "has" is universally recognized by English speaking persons as referring to the present tense, and it is readily distinguishable from the auxiliary verb "has been."

Savinski also argues that ***Post*** contains important language which should have been included in the instruction. In ***Post,*** the supreme court upheld ch. 980, STATS., against constitutional attack, holding that it did not punish individuals for past crimes because the definition of a sexually violent person was based on a "current diagnosis of a present disorder suffered by an individual that specifically causes that person to be prone to sexually violent acts in the future." ***Post,*** 197 Wis.2d at 307, 541 N.W.2d at 124. Savinski contends that this language should have been included in the instruction because it "ingrains in the jury's mind the absolute procedural safeguard that a [person] in the Chapter 980 action shall not be committed based upon their prior bad acts."

We cannot agree. The instruction unambiguously told the jury that to meet the legal definition of a sexually violent person, it must first be established "that [Savinski] suffers from a mental disorder." It also informed the jury how it

must be convinced that Savinski is dangerous to others "because he has a mental disorder which creates a substantial probability that he will engage in acts of sexual violence." These sentences clearly and succinctly told the jury that a sexually violent person under ch. 980, STATS., must presently suffer from a mental disorder. And they also told the jury that the mental disorder must create a substantial probability that he "will engage" in acts of sexual violence. We conclude that the language said the same thing the language in ***Post*** says. Additional language from ***Post*** would have been tantamount to restating what was just told to the jury.

We note that since Savinski's trial, the Wisconsin Criminal Jury Instructions Committee has published new standard jury instructions in light of the supreme court's decision in ***Post***. The committee did not amend the instruction to add the language now requested by Savinski. *See* WIS J I—CRIMINAL 2502 (1996). This further persuades us that the instruction given to the jury adequately stated the law. *See* ***State v. Olson,*** 175 Wis.2d 628, 642 n.10, 498 N.W.2d 661, 667 (1993) ("[W]hile jury instructions are not precedential, they are of persuasive authority."). Therefore, because the pattern jury instruction adequately stated the law, Savinski's trial counsel did not render ineffective assistance when he did not ask to amend the instruction.

Finally, Savinski contends that we should reverse his commitment as a sexually violent person because it was based solely on his prior bad act. Specifically, he argues that the State's experts derived their diagnosis of a mental disorder solely from his past sexual offense, and then used his previous sexual offense to establish a predisposition to commit future sexually violent offenses. This, he contends, is nothing more than a circular argument of "once diagnosed a

pedophile ... always a pedophile" which punishes him for his past offense. We reject this argument.

It is true that both of the State's experts opined how pedophilia is a lifelong disorder and that there is no cure. But this is not a case where the two experts simply branded Savinski as having a current diagnosis of pedophilia based upon a prior act. One of the State's experts, Dr. Linda Terrian, testified that she arrived at her diagnosis after reviewing Savinski's records, administering a diagnostic test to Savinski and conducting a personal interview. The other witness, Dr. Ronald Sindberg, said that he based his diagnosis on Savinski's criminal and medical records, including the records of Terrian's diagnosis, and his interviews with the staff at the Wisconsin Resource Center. So, the current diagnosis was based not only on Savinski's past act, but also upon current diagnostic tests, an up-to-date interview and medical records.

Moreover, while the experts did say that pedophilia is not curable, they also testified that through treatment pedophiliacs can learn to control their pedophilia and thus substantially reduce the risk of committing sexually violent crimes. Here, however, the experts cited a number of independent factors, including Savinski's refusal to accept treatment, as demonstrating a present inability to control his pedophilia. Both experts concluded that because Savinski could not control his pedophilia, there was a substantial risk he would commit acts of sexual violence. Thus, the State's evidence that Savinski is a sexually violent person was not based solely on his prior bad act and we decline to disturb the jury's finding.

By the Court.—Orders affirmed.

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