COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 98-1030

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

IN RE THE COMMITMENT OF
GEORGE TAYLOR:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

GEORGE TAYLOR,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN and MEL FLANAGAN,[1] Judges. *Affirmed in part; reversed in part and cause remanded.*

[1] The Hon. Timothy G. Dugan presided over the trial in this matter. The Hon. Mel Flanagan decided the post-commitment motions.

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

¶1 PER CURIAM. George Taylor appeals from a post-commitment order denying his motion to vacate a Chapter 980 judgment. Taylor claims that: (1) he was denied effective assistance of counsel when his trial counsel failed to raise a challenge to the State's peremptory juror strikes; (2) the trial court's application of Chapter 980 violated his right to due process; (3) he was denied effective assistance of counsel because his counsel failed to request that a definition of "substantially probable" be included in the jury instructions; and (4) the evidence was insufficient to establish that his antisocial personality predisposed him to commit acts of sexual violence.

¶2 Because the interests of justice require us to remand this matter to examine the effect of the failure to raise a ***Batson v. Kentucky***, 476 U.S. 79 (1986) objection in the context of an ineffective assistance of counsel claim, we remand for further proceedings. But because the application of Chapter 980 did not deprive Taylor of his right to due process, because his trial counsel was not deficient for failing to request a definition of "substantially probable" and finally, because the evidence was sufficient to establish that his antisocial personality predisposes him to commit acts of sexual violence, we affirm.

I. BACKGROUND

¶3 On May 9, 1997, the State filed a petition seeking to commit Taylor under Chapter 980 as a sexually violent person. Subsequent to a finding of probable cause, a jury found Taylor to be a sexually violent person. A written judgment and order for commitment was entered. After a dispositional hearing on January 14, 1998, the trial court ordered secure institutional treatment. On March 8, 1999, Taylor moved to vacate the commitment. In two decisions dated

March 12, 1999, and July 9, 1999, the trial court denied his motion.[2] Taylor now appeals.

II. DISCUSSION

A. Voir Dire.

¶4 Although Taylor describes his first claim as a denial of means to obtain a meaningful review because of a refusal to record the jury selection, his claim is essentially an ineffective assistance of counsel claim for failure to assert a ***Batson*** objection based on gender.

¶5 Taylor's counsel requested that *voir dire* be recorded. The trial court denied the request, however, and jury selection occurred off the record. At the conclusion of *voir dire*, the trial court went back on the record and said, "Let's address the issue of strikes for cause." The State requested that several jurors should be struck for cause. Taylor's counsel voiced no objection and the challenged jurors were sequentially struck. Taylor's counsel expressly declined to request any strikes for cause. The record then reflects some lengthy remarks made by the trial court to the prospective jurors concerning their role and conduct. The peremptory strikes were then alternately made. All of the State's four strikes were of men. The jury was excused for a noon recess at which point the trial court

[2] Taylor proffered four bases for his motion to vacate: (1) the trial court refused to conduct the *voir dire* on the record; (2) trial counsel was ineffective for failing to insure that Taylor received a full complement of peremptory juror challenges; (3) trial counsel was ineffective for failing to request a jury instruction defining the statutory phrase "substantially probable"; and (4) trial counsel was ineffective for failing to argue that the phrase "substantially probable" was unconstitutionally vague. The trial court rejected bases (2), (3) and (4), but withheld its determination on basis (1), pending the supreme court's decision in ***State v. Erickson***, 227 Wis. 2d 758, 596 N.W.2d 749 (1999). On July 8, 1999, when the supreme court issue its decision in ***Erickson***, the trial court rejected Taylor's first basis for his motion because he had not made a showing of actual prejudice.

asked both counsel if they wanted to place anything on the record. Both counsel expressly declined.

¶6 We first shall address the trial court's refusal to record the *voir dire*. There is no dispute that, at the time of this trial, SCR 71.01 (1995-1996) did not require that *voir dire* "be reported." Under SCR 71.01(2)(f), the court had the discretion to have "any court activity or proceeding reported as necessary to ensure an adequate record."[3] The question then is whether the trial court properly exercised its discretion in denying counsel's request to record the *voir dire*.

¶7 We shall not reverse a discretionary determination by the trial court if the record shows that discretion was, in fact, exercised and we can perceive a reasonable basis for the court's decision. *See* ***Prahl v. Brosamle***, 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987). We need not agree with the trial court's exercise of discretion in order to sustain it. *See* ***Independent Milk Producers Co-op v. Stoffel***, 102 Wis. 2d 1, 12, 298 N.W.2d 102 (Ct. App. 1980).

¶8 When the trial court denied Taylor's request to record *voir dire*, it indicated that its "practice" was not to record jury selections. The trial court advised that "if a problem develops, we'll bring the court reporter out," and "we'll summarize at the close." Thus, the court provided a mechanism to address any objections that might be raised and to ensure an adequate record. No objections were raised to trigger this procedure. Thus, in common sense terms, we can find no fault with this exercise of discretion. Arriving at this conclusion, however, does not complete our analysis.

[3] Not long after the litigation in this matter, the supreme court modified SCR 71.01(2), to require that *voir dire* be on the record. The new rule was effective January 1, 1998.

¶9 We still must address Taylor's included claim alleging ineffective assistance of counsel for failing to make a ***Batson*** objection in order to guarantee Taylor's equal protection rights. In Taylor's post-commitment motion, among other arguments, he asserted that his "trial counsel was ineffective for failing to ensure that he received a full complement of peremptory challenges." He based his argument upon ***State v. Ramos***, 211 Wis. 2d 12, 564 N.W.2d 328 (1997) and ***State v. Ferron***, 219 Wis. 2d 481, 504-05, 579 N.W.2d 654 (1998). The trial court withheld its decision on this argument pending the supreme court's decision in ***State v. Erickson***, 227 Wis. 2d 758, 596 N.W.2d 749 (1999), *cert. denied,* 120 S. Ct. 987 (2000). ***Erickson*** did not involve a ***Batson*** claim, but did involve the issue of whether the accused received his full complement of peremptory strikes. In fact, ***Erickson*** had not. The supreme court analyzed the case as one presenting an ineffective assistance of counsel issue and refused to apply a "presumed prejudice" rule. It ruled that Erickson had failed to show actual prejudice. Here, the trial court used the same rationale to deny Taylor's ineffective assistance of counsel claim. In a succinctly worded order, it ruled:

> Based on this decision [***Erickson***], the respondent's remaining contention raised in his March 8, 1999 postcommitment motion (his allegation that trial counsel was ineffective for failing to ensure that he received a full complement of peremptory strikes) does not constitute a viable claim for relief as Taylor has not made a showing of actual prejudice.

¶10 Taylor mentions the ***Batson*** challenge for the first time in his appellate brief as a basis for asserting that counsel's performance fell short of protecting his right to a full complement of peremptory strikes. He points out that in ***State v. Jones***, 218 Wis. 2d 599, 604 n.3, 581 N.W.2d 561 (Ct. App. 1998), we stated that, "[t]he record documenting the questions and answers posed during jury

selection is essential to any meaningful review o[f a ***Batson***] issue." He also relies on ***State v. Perry***, 136 Wis. 2d 92, 111, 401 N.W.2d 748 (1987) and ***State v. DeLeon***, 127 Wis. 2d 74, 77, 377 N.W.2d 635 (1985), where the supreme court found that, "[w]here, as here, a portion of the record is lost through no fault of the aggrieved party, that party should not be made to bear the burden of this loss." Taking this case law, together with the fact that waiving a ***Batson*** objection can constitute ineffective assistance of counsel, *see* ***State v. Walker***, 154 Wis. 2d 158, 162, 453 N.W.2d 127 (1990), we conclude that the interests of justice require us to remand this matter to the trial court to conduct a hearing.

¶11 A ***Batson*** inquiry could have had an impact on the eventual peremptory strikes accorded the respective parties. The State used all four of its peremptory challenges to remove men from the panel, which presents a prima facie ***Batson*** issue. *See* ***State v. King***, 215 Wis. 2d 295, 572 N.W.2d 530 (Ct. App. 1997). Because this could have had an appreciable impact in an ineffective assistance of counsel claim, we remand to the trial court to conduct a hearing relative to the failure to raise a gender ***Batson*** inquiry, and its impact upon the jury selection. The hearing will provide an opportunity to determine why counsel failed to make a ***Batson*** objection and, if the failure to do so was deficient, the State will be afforded an opportunity to explain the basis for its removal of four men from the panel.

B. Substantial Probability Definition.

¶12 Taylor's second claim of error is that the trial court failed to define the term "substantially probable" in the jury instructions. We are not persuaded for two reasons.

¶13 First, it is axiomatic that to preserve a proposed trial court error for review, trial counsel, or the party, must object in a timely fashion with specificity to allow the court and counsel to review the objection and correct any potential error. Absent such a procedure, the administrative rule of waiver may be invoked. In criminal cases, however, the normal procedure is to address the consequences of the rule "within the rubric of the ineffective assistance of counsel." ***Erickson***, 218 Wis. 2d at 766. We follow that procedure here.

¶14 Neither Taylor nor his counsel challenged the adequacy of the jury instruction to ensure the protection of his due process rights until the post-commitment motion was filed. Thus, the substantive issue was waived. Nevertheless, Taylor, in his post-commitment motion, did allege that his counsel was ineffective for failing to request a definition for "substantially probable." Because criminal procedures are being applied to Chapter 980 petitions, *see* WIS. STAT. § 980.05(1m), we shall examine the issue in the context of a claim of ineffective assistance of counsel in another part of this opinion.

¶15 Second, assuming for the purposes of argument that Taylor did not waive any objection to the adequacy of WIS JI—CRIMINAL 252, we find no merit to his claim of a due process violation for vagueness. We reach this conclusion on the basis of several decisions.

¶16 In ***State v. Matthew A.B.***, 231 Wis. 2d 688, 605 N.W.2d 598 (Ct. App. 1999), Matthew raised the same issue Taylor does, asserting that the statute was unconstitutionally vague because, in the absence of a definition of "substantially probable," people of common intelligence are compelled to guess the term's meaning and differ as to its application. *See* ***id.*** at 716. In ***Matthew***, we stated that the same argument had been rejected by the Wisconsin Supreme Court

in ***State v. Curiel***, 227 Wis. 2d 389, 597 N.W.2d 697 (1999). We further declared that jury instruction WIS JI—CRIMINAL 2502 fully and fairly explained the applicable law and the trial court properly exercised its discretion in using it. *See* ***id.***

¶17 Other case law supports the conclusion that the failure to define the term "substantially probable" does not render the statute unconstitutionally vague. *See* ***State v. Marberry***, 231 Wis. 2d 581, 591-92, 605 N.W.2d 612 (Ct. App. 1999) (rejecting claim that the term "substantially probable" was unconstitutionally vague unless it was expressly defined); ***State v. Zanelli***, 212 Wis. 2d 358, 372-75, 569 N.W.2d 301 (Ct. App. 1997) (holding that the failure to define "substantially probable" in Chapter 980 cases is comparable to the failure to define "reasonable doubt" in criminal cases, because the United States Constitution neither requires a definition nor forbids one).

¶18 Lastly, in one further attempt to prove that the term "substantially probable" renders the statute unconstitutionally vague, Taylor argues that our supreme court held that the statute was only salvageable if a limiting definition was given, which was not done in the present case. *See* ***Curiel***, 227 Wis. 2d at 414-15. Taylor is wrong. The ***Curiel*** court referred to a dictionary's definition and found the term "substantially probable" to be unambiguous, and to mean "much more likely than not." *See* ***id.*** As so defined, the supreme court declared that the statute "is not so obscure that [individuals] of common intelligence must necessarily guess as to its meaning and differ as to its applicability." ***Id.*** at 415.

C. Ineffective Assistance.

¶19 Next, Taylor claims his trial counsel was ineffective for failing to request a definition of the phrase, "substantially probable," and for telling the jury during final argument that it was free to arrive at its own definition.

¶20 The analytical framework that must be employed in assessing the merits of a defendant's claim of ineffective assistance of counsel is well known. To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *See* ***id.*** at 697.

¶21 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. *See* ***id.*** To satisfy the prejudice prong, appellant must demonstrate that counsel's deficient performance was "so serious as to deprive the appellant of a fair trial, a trial whose results is reliable." ***Id.*** at 687. In other words, there must be a showing 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." ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶22 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). The trial court's determination of what the attorney did, or did not do, and the basis for the challenged conduct is factual and will be upheld

unless they are clearly erroneous. *See* ***id.*** at 634. The ultimate conclusion, however, of whether the conduct resulted in a violation of defendant's right to effective assistance of counsel is a question of law for which no deference to the trial court need be given. *See* ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987).

¶23 Taylor's ineffective assistance of trial counsel claim is essentially based upon counsel's failure to raise the previously discussed procedural due process issue of vagueness. This claim implicates WIS JI—CRIMINAL 2502, the same instruction examined in ***Zanelli***, 212 Wis. 2d at 372-75. In ***Zanelli***, by drawing an analogy to the absence of a definition for "reasonable doubt," we declared that the United States Constitution neither requires a definition for "substantially probable" nor forbids one. *See* ***id.*** Thus, it was not error to use the standard jury instruction employed at the time. In ***Matthew A.B.***, 231 Wis. 2d at 717, we reaffirmed our ***Zanelli*** analysis. Both cases were pre-***Curiel***. The law in effect at the time of this trial was ***Zanelli***; therefore, trial counsel's performance was not deficient for failing to request a definitional instruction. Taylor's claim for ineffective assistance of counsel fails.

D. Sufficiency of the Evidence—Antisocial Personality Disorder.

¶24 Lastly, Taylor claims that an antisocial personality disorder ought not be the basis for a Chapter 980 commitment because the disorder itself does not predispose persons to commit acts of sexual violence. Taylor develops his argument as follows. His commitment was based on the determination that he suffered from antisocial personality disorder, which no one disputed. Under ***State v. Post***, 197 Wis. 2d 279, 541 N.W.2d 105 (1995), because not all persons who commit sexually violent crimes can be diagnosed as suffering from mental

disorders, and because not all persons with a mental disorder are predisposed to commit sexually violent crimes, "persons will not fall within chapter 980's reach unless they are diagnosed with a disorder that has the specific effect of predisposing them to engage in acts of sexual violence." ***Id.*** at 306. Taylor then reasons that because there is no evidentiary support connecting antisocial personality disorder with sexually violent conduct, one cannot conclude that antisocial personality disorder has the "specific effect of disposing those who are afflicted by this condition to engage in acts of sexual violence." Thus, since there is no "nexus" as required by ***Post***, its application is unconstitutional. We reject this failed attempt at logic.

¶25 As can be reasonably implied from the dictates of ***Post*** quoted above, the essential "nexus" was not that between the disorder and the act of sexual violence, but rather between the disorder itself, and its specific effect upon the person subject to the petition, to predispose that person to sexual violence. *See* ***State v. Adams***, 223 Wis. 2d 60, 68, 588 N.W.2d 336 (Ct. App. 1998) (interpreting ***Post*** to mean that the focus is upon the person subject to the petition and the effect of the disorder on that person). Thus, it was the State's burden to demonstrate that the antisocial personality disorder that afflicted Taylor predisposed him to commit acts of sexual violence.

¶26 Both psychologists who testified at trial, Dr. Ronald Sindberg and Mr. Christ Yiannackkopolous, opined that Taylor had been suffering from antisocial personality disorder since 1974 and this disorder predisposed him to commit sexual acts of violence. They demonstrated a nexus between his particular mental disorder and Taylor's predisposition for sexual violence. This testimony presented by the State's witnesses was sufficient to support the jury's verdict.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

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