COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP803 **Cir. Ct. No. 2007CI5**

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

IN RE THE COMMITMENT OF DAVID WILLIE MCLEMORE:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DAVID WILLIE MCLEMORE,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: WILLIAM W. BRASH and T. CHRISTOPHER DEE, Judges. *Affirmed*.

Before Blanchard, Kloppenburg, and Fitzpatrick, JJ.

¶1 PER CURIAM. David Willie McLemore appeals a circuit court order denying his Chapter 980 petition for discharge, as well as an order denying his motion for postdisposition relief.[1] McLemore argues that he received ineffective assistance of counsel because his attorney failed to object at two points during the discharge trial. Because we conclude that McLemore's attorney was not ineffective, we affirm the circuit court's orders.

BACKGROUND

¶2 In 2010, McLemore was committed under Chapter 980 to the Sand Ridge Secure Treatment Center ("Sand Ridge"). In late 2014, the circuit court granted McLemore a discharge trial, which was conducted in March 2015.[2]

¶3 At the discharge trial, the State presented the testimony of Dr. Sharon Kelley, a psychologist at Sand Ridge. Dr. Kelley testified that McLemore suffered from antisocial personality disorder, which predisposed him to engage in acts of sexual violence. She also testified that McLemore was more likely than not to commit a sexually violent offense if released. McLemore declined to participate in an interview with Dr. Kelley, and also did not pursue treatment while at Sand Ridge. Accordingly, Dr. Kelley relied on McLemore's file as the basis for her conclusions, including his record of rule violations and conduct reports while at Sand Ridge, as well as earlier Chapter 980 reports prepared by two other doctors who did not testify at the trial. At various points

[1] The Honorable William W. Brash presided over the petition for discharge. The Honorable T. Christopher Dee presided over the post-adjudication motion.

[2] The circuit court specifically stated that it was granting McLemore a discharge hearing. However, it is apparent from the proceedings that followed that the circuit court actually granted McLemore a discharge trial.

during the trial, Dr. Kelley was asked to refer to and comment on these reports. McLemore's attorney did not object to Dr. Kelley's testimony about these reports, nor did he object when the State moved the reports into evidence.

¶4 To support his petition for discharge, McLemore presented the testimony of a psychologist, Dr. Courtney Endres. Dr. Endres relied on much of the same background material as Dr. Kelley. Although she indicated agreement with McLemore's initial diagnosis of anti-social personality disorder, she concluded that he no longer met the diagnostic criteria. Specifically, Dr. Endres did not think that McLemore's rule violations while at Sand Ridge were significant enough to warrant the continued diagnosis. She concluded that McLemore was no longer a sexually violent person requiring commitment.

¶5 During closing arguments, the State pointed to McLemore's many rule violations and argued that McLemore was "doing everything he possibly could" and "pretty much all [he could] do in a secured setting like Sand Ridge to exhibit antisocial personality disorder." McLemore's attorney did not object to these arguments.

¶6 The circuit court denied McLemore's discharge petition, concluding that the State satisfied its burden of demonstrating that McLemore continued to meet the definition of a sexually violent person. McLemore then filed a motion for postdisposition relief, arguing that he received ineffective assistance of counsel at the discharge trial, due to his attorney's failure to make the specified objections.

The circuit court denied this motion after a ***Machner***[3] hearing. McLemore now appeals.

DISCUSSION

¶7 To establish ineffective assistance of counsel, McLemore must show that his attorney's performance was deficient and that such performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In order to establish deficient performance, a defendant must establish that counsel's conduct falls below an objective standard of reasonableness. ***Id.*** at 687-88. To establish prejudice, McLemore must show "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *See* ***State v. Lepsch***, 2017 WI 27, ¶48, 374 Wis. 2d 98, 892 N.W.2d 682 (quoted source omitted). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (quoted source omitted). We need not address both components of the analysis if the defendant makes an inadequate showing on one. ***Strickland***, 466 U.S. at 697.

¶8 Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact. *See* ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). We affirm the circuit court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and of prejudice are questions of law that we review without deference to the circuit court. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). "[T]he circumstances of

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

the case and the counsel's conduct and strategy" are considered findings of fact. ***State v. Jenkins***, 2014 WI 59, ¶38, 355 Wis. 2d 180, 848 N.W.2d 786. We then review independently the legal question of whether counsel's performance "falls below the constitutional minimum." ***Erickson***, 227 Wis. 2d at 768.

Was McLemore's Attorney Ineffective For Failing To Object To The Earlier Chapter 980 Reports From Other Doctors?

¶9 McLemore argues that his attorney rendered deficient performance by failing to object to Dr. Kelley's testimony about the reports from other doctors prepared in 2011 and 2013. At the ***Machner*** hearing, the attorney explained that he did not see any basis for objecting. The attorney believed that these reports were relevant to the question of whether there had been any change since McLemore's initial Chapter 980 commitment, and that these reports were admissible. The circuit court agreed that the reports were admissible and on that basis determined that the attorney's failure to object was not deficient performance. *See* ***State v. Maday***, 2017 WI 28, ¶55, 374 Wis. 2d 164, 892 N.W.2d 611 ("Counsel's performance cannot be considered deficient for failing to object to admissible evidence.").

¶10 McLemore argues that the reports from 2011 and 2013 were not relevant to any issue. We disagree. Evidence is relevant if it has any tendency to make a fact of consequence to the determination of an action more or less probable. *See* WIS. STAT. §§ 904.01-02 (2015-16).[4] The issue for the discharge trial was whether McLemore "meets the criteria for commitment as a sexually

[4] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

violent person." WIS. STAT. § 980.09(3). As explained above, both experts' conclusions drew on McLemore's file, which included the prior Chapter 980 reports. As part of the basis for the experts' opinions on an issue of consequence, these reports easily meet the low threshold for relevance. The fact that these reports were two to four years old does not affect the analysis, because McLemore's past mental condition is relevant in evaluating whether he continues to be a sexually violent person requiring commitment. *See* ***State v. Alger***, 2015 WI 3, ¶¶32-34, 360 Wis. 2d 193, 858 N.W.2d 346 (explaining that a Chapter 980 discharge petition "is necessarily tied to the underlying petition for commitment" and that the record typically includes annual reexamination reports and any progress treatment reports).

¶11 McLemore also argues that the use of these reports means that Dr. Kelley improperly based her testimony on inadmissible hearsay. At the outset, we note that experts are generally permitted to base their opinions on inadmissible evidence, including hearsay. *See* WIS. STAT. § 907.03. However, McLemore argues that the State used these reports improperly to bolster Dr. Kelley's testimony, in violation of our decision in ***Walworth Cty. v. Therese B.***, 2003 WI App 223, ¶9, 267 Wis. 2d 310, 671 N.W.2d 377. In the ***Therese B.*** case, we explained that due process requires that an expert witness must do more than simply summarize the findings and opinions expressed by others. ***Id.***, ¶1. Instead, an expert must reach "an independent opinion … after a disinterested review of all relevant records." ***Id.*** The record establishes that Dr. Kelley satisfied this standard. While she considered the past reports as part of her assessment, her findings and opinions explicitly expressed her own judgment, after her independent review.

¶12 Finally, McLemore contends that, even if Dr. Kelley could testify about these past Chapter 980 reports, his attorney should have objected to the admission of these reports on hearsay grounds. The State contends that the records were admissible either as records of regularly conducted activity under WIS. STAT. § 908.03(6), as health care records under § 908.03(6m), or under the residual exception to the hearsay rule set forth in § 908.03(24). If the reports were admissible, the attorney's failure to make a hearsay objection was not deficient performance. *See* ***Maday***, 374 Wis. 2d 164, ¶55 (failing to object to admissible evidence is not deficient performance).

¶13 We need not resolve the issue of whether the reports themselves were properly admitted because, assuming without deciding that the failure to object was deficient performance, McLemore still must establish prejudice. McLemore argues that the circuit court's decision that he is still a sexually violent person rested on the fact that the State was able to present evidence from three doctors, while McLemore only had one expert. However, the only record support that McLemore points to is the circuit court's statement that it reached its determination after reviewing the exhibits.

¶14 This general language about the circuit court's consideration of the record is not sufficient to show that McLemore was prejudiced by the admission of these reports. To the contrary, the circuit court's lengthy explanation of its ruling makes clear that its determination rested on reports of the two testifying doctors as well as their testimony at the discharge trial. The court explained that this underlying information included "a lot of other historical information that was supplied with regards to other contacts, other events, other allegations as they relate to Mr. McLemore." The court noted the "tremendous divergence" between the conclusions of Dr. Kelley and Dr. Endres based on the same underlying

conduct and information, and thoroughly explained its determination that Dr. Kelley's analysis and conclusions were sufficient to satisfy the State's burden. In the absence of any showing that the circuit court relied on the other two doctors' reports as substantive grounds for its determination, we can presume that any error in admitting these reports was harmless. *See* ***Thomas v. State***, 92 Wis. 2d 372, 391, 284 N.W.2d 917 (1979) (failing to object to inadmissible evidence is harmless error in a bench trial unless it clearly appears to have affected the court's finding). Accordingly, McLemore has not shown a reasonable possibility of a different result if these reports had not been admitted into evidence. *See* ***Lepsch***, 374 Wis. 2d 98, ¶48.

Was McLemore's Attorney Ineffective For Failing To Object To The State's Closing Argument?

¶15 McLemore contends that his attorney should have objected to the State's argument that he was doing "pretty much all a person can do in a secured setting … to exhibit antisocial personality disorder." At the ***Machner*** hearing, McLemore's former attorney testified that he did not object to this assertion because it was argument at a bench trial and, as such, was not "so over the top and so contrary to the facts" as to warrant objection. The circuit court concluded that this failure to object was not deficient performance because the objection would not have been sustained. The court explained that, although the statement "may not have been literally true," it was "acceptable hyperbole." We need not dwell on whether the attorney's failure to object amounted to ineffective assistance of counsel. The State's remarks during closing argument do not strike us as objectionable but, even if they were, the fact that this was a bench trial weighs heavily against any finding that McLemore was prejudiced by these remarks.

Do The Alleged Deficiencies Of McLemore's Attorney, Taken Together, Undermine Confidence In The Outcome?

¶16 McLemore's last argument is that, even if we conclude that each individual failure to object did not amount to ineffective assistance of counsel, we can still require a new discharge trial based on the cumulative effect of these failures. *See* ***Thiel***, 264 Wis. 2d 571, ¶59. We reject this argument. The circuit court's determination that McLemore remained a sexually violent person rested on a careful comparison of the competing testimony from Dr. Kelley and Dr. Endres. We have already concluded that Dr. Kelley's testimony was not objectionable; even if we were to accept McLemore's remaining arguments about his attorney's deficient performance, McLemore has not shown that these alleged errors had any effect on the circuit court's decision, either individual or cumulative. In short, nothing plus nothing is nothing.

CONCLUSION

¶17 Because we conclude that McLemore's attorney was not ineffective, the circuit court properly denied McLemore's motion for postdisposition relief. We therefore affirm this order, as well as the order denying McLemore's petition for discharge.

By the Court.—Orders affirmed.

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