COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2658 **Cir. Ct. No. 2007CI2**

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

IN RE THE COMMITMENT OF SCOTT MAHER:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

SCOTT MAHER,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Columbia County: DANIEL GEORGE and TODD J. HEPLER, Judges. *Reversed and cause remanded for further proceedings*.

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Scott Maher appeals an order that denied his petition for discharge or supervised release from a Chapter 980 commitment, and a subsequent order denying his motion for a new trial.[1] The sole issue on appeal is whether Maher was denied the effective assistance of counsel at his discharge hearing when his attorney failed to object to purported hearsay testimony from both the State's expert witness and his own expert witness regarding prior psychological evaluations of Maher that had been performed by other experts. For the reasons discussed below, we reverse and remand with directions that Maher be provided with a new hearing on his discharge petition.

BACKGROUND

¶2 By an opinion issued on April 3, 2014, amended by errata on May 1, 2014, this court concluded that Maher had made sufficient allegations in his petition for discharge to warrant an evidentiary hearing on whether either Maher's own condition or the body of professional knowledge and research used to evaluate mental disorders and dangerousness had changed since Maher's initial commitment, such that Maher "does not meet" the criteria for a sexually violent person under Chapter 980.[2] *See* WIS. STAT. § 980.09(1) and (2) (2011-12)[3]; ***State v. Ermers***, 2011 WI App 113, ¶¶36-38, 336 Wis. 2d 451, 802 N.W.2d 540.

[1] The Honorable Daniel George entered the order denying Maher's petition for discharge or for supervised release. The Honorable Todd J. Hepler entered the order denying Maher's motion for a new trial.

[2] WISCONSIN STAT. § 980.09(2) has since been amended and now requires the court to deny the petition unless "the record contains facts from which a court or jury would likely conclude the person no longer meets the criteria for commitment." 2013 Wis. Act 84, § 23. Here, we apply the pre-Act 84 standard.

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

Accordingly, on remand, the circuit court held an evidentiary hearing at which the State bore the burden of establishing by clear and convincing evidence that Maher is currently a sexually violent person because he: (1) committed a sexually violent offense; (2) currently has a mental disorder affecting emotional or volitional capacity that predisposes him to engage in acts of sexual violence and causes serious difficulty in controlling behavior; and (3) is dangerous because the mental disorder makes it more likely than not that he will engage in future acts of sexual violence. *See* WIS. STAT. §§ 980.09(3); 980.01(2) and (7); WIS JI—CRIMINAL 2506.

¶3 There were only two witnesses at the evidentiary hearing. We summarize their testimony in some detail in order to place Maher's current evidentiary challenges in context.

¶4 Dr. Richard Elwood, a psychologist employed by the Wisconsin Department of Health Services, testified for the State. Elwood diagnosed Maher with two mental disorders: antisocial personality disorder and "[o]ther specified paraphilic disorder with pedophilic and hebephilic features," although he did not diagnose pedophilia—and hebephilia (that is, sexual attraction to teenagers) is not a separate disorder under the DSM. Elwood opined that both disorders predisposed Maher to engage in acts of sexual violence. A major factor in Elwood's diagnoses was Maher's criminal history, which included Maher having vaginal intercourse with a 13-year-old girl when he was 18; having sexual contact with a 14-year-old girl when he was 20; and having vaginal and anal intercourse with a 6-year-old girl and anal intercourse with a 4-year-old boy when he was 26.

¶5 Elwood concluded that Maher was more likely than not to commit another sexually violent offense over his lifetime. There were several components

to Elwood's analysis. First, Elwood determined that Maher's score on the STATIC-99R recidivism risk assessment tool associated Maher with a "high-risk" subgroup of offenders who had a 42% rate of recidivism over a 10-year period. Elwood stated that, if the 10-year rate were extrapolated over the course of Maher's lifetime, the risk of recidivism might exceed 50%, although Elwood cautioned that he could not reach this 50%-lifetime conclusion within "a reasonable margin of error." Separately, Elwood considered studies that had found higher rates of recidivism for offenders who had both a high score on the Hare Psychopathy Checklist-Revised (PCL-R) and a diagnosis of a sexual deviance that qualifies as a paraphilia. Elwood noted that prior evaluators had scored Maher in the moderate to high range on the PCL-R, and that Maher's score on the Screening Scale for Pedophilic Interests (SSPI) strongly indicated pedophilic and hebephilic interest. Elwood cited one study in which offenders with deviance and psychopathy like Maher had about a 54% risk of committing another sexual offense within 20 years.

¶6 Forensic psychologist Hollida Wakefield testified for the defense. Wakefield concurred with Elwood's diagnosis of antisocial personality disorder, but disagreed with Elwood's opinion that the disorder predisposed Maher to commit sexually violent offenses in particular. Wakefield also found insufficient evidence to diagnose Maher with a paraphilia. Wakefield stated that only about half of the people who commit sexual offenses against prepubescent children do so based upon pedophilia (as opposed to other antisocial motives), and explained that she could not determine that Maher was sexually attracted to prepubescent children in the absence of other evidence such as any admission of such attraction, any PPG results showing arousal patterns, or other factors such as the possession of child pornography or additional victims beyond those in the index offenses.

Wakefield further noted that, since the time of Maher's original commitment, a DSM-5 task force had explicitly considered whether hebephilia qualified as a separately diagnosable paraphilia under the DSM-5, and had concluded that it did not.

¶7 Wakefield questioned whether it was appropriate to place Maher in the "high-risk/high-needs" subgroup for the STATIC-99R as Elwood had done because at least one study had shown that the criteria for placement in subgroups for that assessment tool were not supported by empirical data. Using the more general "routine" and "aggregate" reference subgroups for the STATIC-99R, Wakefield found that Maher's score correlated to recidivism rates of 15% and 23%, respectively. Wakefield further determined that Maher's score on another instrument, the Multi-Sample Age-Stratified Table of Sexual Recidivism (MATS-1), correlated to a recidivism rate of 25.5% after 8 years.

¶8 Wakefield also disagreed with Elwood's opinion that Maher presented an increased risk of recidivism based upon a combination of high psychopathy and sexual deviance for two reasons. First, as factual premises, Wakefield viewed Maher's PCL-R score as being in the moderate rather than high range, and she had not concluded that Maher was sexually deviant. Second, she questioned the empirical basis for the purported link between elevated recidivism rates and high PCL-R scores in conjunction with sexual deviancy. Accordingly, Wakefield concluded that Maher was not more likely than not to sexually reoffend.

¶9 On this appeal, Maher challenges defense counsel's failure to raise hearsay objections when the prosecutor elicited testimony from Elwood and Wakefield that: (1) affirmed that all of the prior experts who had performed

annual examinations on Maher had reached the conclusion that Maher met the criteria for commitment; (2) affirmed that every expert other than Wakefield who had examined Maher had concluded that Maher's antisocial personality disorder predisposed him to commit sexually violent acts; (3) affirmed that every prior expert who had utilized the STATIC-99R had placed Maher in the "high risk" comparison subgroup; (4) noted that Wakefield was not aware of any other expert who had ever provided a favorable opinion for Maher; (5) relayed specific details about Maher's past offenses that were included in a report from 2004; and (6) relayed contradictory statements that Maher had made to another expert about information that was utilized in an actuarial test.

¶10 Defense counsel testified that he did not object to any of the questions or testimony about information or opinions included in prior evaluations of Maher because: (1) counsel believed that the reports were admissible under a hearsay exception because Wakefield had reviewed and considered those reports in the process of forming her own expert opinion; (2) counsel knew that all of the evaluations were in the court file and presumed that the judge had already read all of them anyway; and (3) counsel's strategy was to have Wakefield explain why her opinion differed from those of prior evaluators.

¶11 In its closing argument, the State asserted that the court could take judicial notice of all of the exhibits from Maher's original commitment trial. The State noted that all five of the Department of Corrections evaluators who had evaluated Maher had agreed that Maher had at least two mental disorders that predisposed him to engage in acts of sexual violence, and proceeded to provide the court with summaries of each of those reports setting forth additional and far more detailed information about each evaluator's diagnoses and opinions than what had been elicited in testimony from either Elwood or Wakefield.

¶12 In its bench ruling, the circuit court stated that it had reviewed the parties' written arguments, together with the testimony and evidence submitted at the hearing. The circuit court did not indicate whether it was, in fact, taking judicial notice of the prior annual examination reports in the file as the State had requested. However, the court listed the facts that Elwood's placement of Maher in the STATIC-99R "high risk/high need" subgroup was consistent with multiple prior evaluations, and that Elwood's diagnosis of paraphilia was consistent with multiple prior examinations as being among "a number of matters that were of significance to the Court" in evaluating the credibility of Elwood's opinion.

STANDARD OF REVIEW

¶13 Claims of ineffective assistance of counsel present mixed questions of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's factual findings regarding what actions counsel took unless those findings are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to have effective assistance of counsel is ultimately a legal determination, which this court decides de novo. ***Id.***

DISCUSSION

¶14 A claim of ineffective assistance of counsel has two parts: (1) deficient performance by counsel and (2) prejudice resulting from that deficient performance. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. To prove deficient performance, a defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms and show that his or her attorney made errors so serious that he or she was essentially not functioning as the counsel guaranteed the defendant by the Sixth

Amendment of the United States Constitution. ***Id.*** To prove prejudice, the defendant must additionally show that counsel's errors rendered the resulting conviction unreliable in light of the other evidence presented. ***Id.*** We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. ***Id.***

Counsel's Performance

¶15 The first step in determining whether counsel's performance was deficient is to determine whether, as Maher asserts, the challenged prior evaluations are comprised of inadmissible hearsay or otherwise inadmissible evidence.

¶16 Hearsay is defined as an out-of-court statement—that is, an oral or written assertion or nonverbal conduct intended as an assertion—offered in evidence "to prove the truth of the matter asserted," other than a prior inconsistent statement by a witness or an admission by a party opponent. *See* WIS. STAT. § 908.01. Hearsay is generally not admissible unless it falls within one of the statutory exceptions set forth in the rules of evidence. WIS. STAT. § 908.02.

¶17 The evaluations contain three categories of information pertinent here: (1) the opinions of prior evaluators; (2) statements made by the victims; and (3) statements made by Maher himself. None of these people testified and, thus, all three categories are plainly comprised of out-of-court statements.

¶18 The State argues that the challenged opinions of the prior evaluators and statements from the victims and Maher contained in the prior evaluations were not hearsay because they were not offered for the truth of the matter asserted, but rather for the permissible purposes of showing the basis for Elwood's expert

opinion and of impeaching Wakefield's expert opinion. The State also asserts that the reports containing the statements were a proper subject for judicial notice.

¶19 We first address the statements of the victims and Maher. The State correctly points out that expert witnesses may base their opinions on inadmissible evidence, including hearsay. *See* WIS. STAT. § 907.03. And, courts have the discretion to admit otherwise inadmissible evidence in order to assist the fact-finder in evaluating the expert's opinion—although, any such evidence "may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that [its] probative value … substantially outweighs [its] prejudicial effect." *See* ***id.*** Here, Elwood and Wakefield explained how the statements by the victims and by Maher cited in prior evaluations affected their respective evaluations of Maher. Thus, while there may be other reasons why these statements by the victims and Maher were admissible, at a minimum they were admissible under § 907.03. Accordingly, in the remainder of our discussion, we focus our attention on the prior evaluators' opinions about Maher.

¶20 As to the expert opinions, the State again asserts admissibility under WIS. STAT. § 907.03. We are not persuaded.

¶21 Elwood testified that he had *reviewed* the reports of prior evaluators in Maher's file. However, Elwood did not at any point testify that he had *relied* on the prior evaluators' opinions to form his own opinion. To the contrary, aside from accepting two prior evaluators' calculations of Maher's score on the PCL-R without re-scoring that instrument himself, Elwood testified that he had independently evaluated Maher and administered and scored all of the other instruments on which he relied in order to reach his own diagnoses and opinions. Therefore, the ultimate opinions of prior evaluators were not necessary to

understand how Elwood reached his own opinion. Rather, the only apparent purpose of introducing testimony that prior evaluators had reached the same or substantially similar opinions about Maher's dangerousness as did Elwood was to bolster Elwood's opinion that Maher was more likely than not to commit future acts of sexual violence—that is, to prove the truth of the matter asserted. We therefore conclude that evidence of the prior evaluators' opinions was not admissible under WIS. STAT. § 907.03 to show the basis for Elwood's opinion.

¶22 We understand the State to also be arguing that the prior expert opinions were admissible to impeach defense expert Wakefield's opinion that Maher was not sufficiently dangerous. In that regard, we first note that the case law the State relies on is not applicable.

¶23 The State relies on ***Karl v. Employers Insurance of Wausau***, 78 Wis. 2d 284, 254 N.W.2d 255 (1977). ***Karl*** explains that, when an expert witness relies upon otherwise inadmissible evidence, "'fair play' requires that the opponent may show that the data relied on did not support the conclusions of the testifying expert, or that the data relied on contained information ignored by the testifying expert." ***Id.*** at 300. Here, however, Wakefield did not rely on the opinions of any of the prior evaluators in forming her own opinion. Instead, she rejected those opinions. Thus, the State's reliance on ***Karl*** is misplaced.

¶24 More to the point, we reject the proposition that evidence of the prior evaluators' opinions was admissible to impeach Wakefield. The disputed prior opinions relate to Maher's condition during different periods of time and the opinions were reached using several diagnostic tools that had since been revised. The prior opinions were not used in any specific way to undercut Wakefield's

analyses. In short, the prior evaluators' opinions were not directly relevant to the credibility of Wakefield's assessment of Maher at the time of this trial.

¶25 We turn our attention to an argument made by the prosecutor before the circuit court to the effect that the court could take judicial notice of the prior evaluators' opinions. We requested supplemental briefing on this topic. In its supplemental brief, the State fails to support the view that the circuit court either actually did or could have taken judicial notice of the prior expert opinions. Having reviewed the supplemental arguments of the parties, we now conclude that the prior expert opinions are plainly not adjudicative *facts* that are "generally known within the territorial jurisdiction" of the court or are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *See* WIS. STAT. § 902.01(2). Indeed, we observe, expert opinions in Chapter 980 cases typically are disputed. Thus, we have no reason to suppose it was proper for the circuit court to take judicial notice of the prior expert opinions.

¶26 Accordingly, we are unable to discern any basis on which the opinions of the prior evaluators could have been admitted into evidence. Thus, we turn our attention to whether there was, nonetheless, a valid strategic reason for trial counsel's failure to object to the evidence. We conclude that none of the three reasons trial counsel offered for failing to object were objectively reasonable and we do not otherwise discern an objectively reasonable basis for the omission. *See* ¶10, *supra*.

¶27 First, as noted in the background section, trial counsel believed that the reports were admissible under a hearsay exception because Wakefield had reviewed and considered those reports in the process of forming her own expert

opinion. However, as we have explained, Wakefield did not rely on the prior opinions in forming her own opinion.

¶28 Second, Maher's trial counsel explained that he did not object to testimony about the prior evaluations because he knew that all of the evaluations were in the court file and he presumed that the judge had already read the evaluations. The problem with this justification is that counsel never attempted to verify his assumption that the judge read the evaluations. And, neither party points to anything in the record indicating that the judge did read the evaluations prior to the trial. Furthermore, even assuming that the judge had read the evaluations, counsel could have objected and asked the judge to disregard the prior opinions. There are many situations in which a court, acting as fact-finder, will have knowledge of evidence that has been ruled inadmissible, and we think it obvious that courts, even better than jurors, are generally able to set aside inadmissible evidence. In short, counsel's assumption that the court was already aware of the opinions of prior evaluators should have prompted trial counsel to request the court not to consider those opinions, and then to object to testimony about them.

¶29 Trial counsel's third strategy justification for failing to object was that he wanted to give Wakefield an opportunity to explain why her opinion differed from those of prior evaluators. We agree with Maher, however, that it made no sense to pit Wakefield against additional experts if that could have been avoided. Then, Wakefield could have focused solely on explaining why her opinion differed from that of Elwood.

¶30 In sum, we conclude that trial counsel performed deficiently in failing to object to hearsay testimony about the opinions of prior evaluators.

Prejudice

¶31 The State offers two theories for why Maher was not prejudiced by the hearsay testimony about the opinions of prior evaluators.

¶32 First, apparently assuming for the sake of argument that the prior evaluators' opinions were inadmissible, the State argues that we should presume "that a circuit court will disregard any evidence improperly admitted." We often make such assumptions in favor of circuit courts, but here we know that the circuit court did not disregard the evidence. The circuit court plainly relied on the prior opinions, characterizing the consistency of Elwood's opinion with those of prior evaluators as "of significance."

¶33 Second, the State contends that "there is nothing in the record that remotely suggests that [the testimony about the prior opinions] had any effect on the outcome of the trial." However, as we have just explained, the circuit court stated that it found the consistency of Elwood's opinion with the prior opinions significant.

CONCLUSION

¶34 We conclude that both elements of Maher's claim for ineffective assistance of counsel have been satisfied, and that Maher is entitled to a new hearing on his petition for discharge or supervised release in which prior evaluators' opinions are not admitted into evidence or considered by the court. Accordingly, the circuit court's orders denying Maher's petition for discharge or supervised release from a Chapter 980 commitment and his motion for a new trial are reversed, and the matter is remanded for additional proceedings consistent with this opinion.

By the Court.—Orders reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).