COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 00-0598 **Cir. Ct. No. 97CI0006**

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

IN RE THE COMMITMENT OF ROBERT FOWLER:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ROBERT FOWLER,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Robert Fowler appeals his Chapter 980 commitment as a sexually violent person. He submits that: (1) the petition seeking his commitment was filed untimely and the State failed to prove that he was within ninety days of release; (2) his diagnosis of "personality disorder (not otherwise

specific)" does not fall within the definition of a Chapter 980 mental disorder necessary for commitment; (3) the trial court erred in refusing to define the term "substantially probable" to the jury and this failure prevented the real controversy from being tried, or alternatively, that his attorney was ineffective for failing to object to the jury instruction or offer a jury instruction defining the term; and (4) the State improperly adduced expert testimony bearing on his credibility. We affirm.

I. BACKGROUND.

¶2 On October 19, 1989, Fowler was convicted of second-degree sexual assault and sentenced to eighty-four months' imprisonment. He was also placed on forty-eight months probation, to be served consecutively to his prison sentence for a robbery conviction. While on parole release, he was convicted of false imprisonment while armed and sentenced to three years' imprisonment. In 1994 and 1995, Fowler was evaluated to see whether he was a candidate for a Chapter 980 commitment. In both instances, he was found not to be an appropriate candidate. However, after another evaluation, on July 10, 1997, the State filed a Chapter 980 petition alleging that Fowler was a sexually violent person and sought his commitment as such.

¶3 Fowler was found to be a sexually violent person by a jury. After a dispositional hearing, the trial court committed him for treatment to the Wisconsin Resource Center, a secure institution.

II. ANALYSIS.

A. The petition was filed in a timely manner and the State proved Fowler was ninety days from release.

¶4 Fowler first argues that the petition seeking his commitment was not timely filed because it was not filed until a date after his mandatory release date for a sexually violent offense. He also submits that the State failed to prove it timely filed the petition within ninety days of his mandatory release date as is required by ***State v. Thiel***, 2000 WI 67, 235 Wis. 2d 823, 612 N.W.2d 94. We disagree with both contentions.

¶5 WISCONSIN STAT. § 980.02(2)(ag) (1997-98)[1] mandates a Chapter 980 commitment to be filed within ninety days of discharge or release of a person. The crux of Fowler's first argument is that the petition in this matter was not filed until July 10, 1997, long after the February 8, 1997 mandatory release date for his second-degree sexual assault conviction. Fowler correctly notes that on the date of the filing of the original petition, more than ninety days had passed since his mandatory release date for his second-degree sexual assault conviction. However, this problem was remedied by the State's filing of an amended petition on November 5, 1997, incorporating the false imprisonment while armed offense as "an additional sexually motivated predicate offense per [WIS. STAT. §] 980.01." This conviction had a mandatory release date of July 18, 1997. Fowler does not challenge the treatment of the false imprisonment conviction as being a "sexually motivated predicate offense"; rather, the focus of his argument begins with his observation that all that was holding him in prison was his concurrent sentence for

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

false imprisonment while armed.[2] Unlike the situation presented in ***State v. Keith***, 216 Wis. 2d 61, 573 N.W.2d 888 (Ct. App. 1997), where this court found Keith's commitment petition was valid because he was ninety days away from release from a consecutive sentence, Fowler submits that because he was serving a concurrent sentence, the holding in ***Keith*** is distinguishable.

¶6 As the State notes, the issue was put to bed in ***State v. Treadway***, 2002 WI App 195, ___ Wis. 2d ___, 651 N.W.2d 334. In ***Treadway***, this court determined that a Chapter 980 petition was timely filed when the ninety-day requirement was calculated from a sentence which ran concurrent to a discharged sentence for a sexually violent crime. ***Id.*** at ¶18. "In short, there is absolutely no indication that the legislature intended to predicate ch. 980 proceedings on whether a sexually violent offense was the last sentence ordered in a string of consecutive sentences. We conclude that this reasoning also applies to a set of concurrent sentences." ***Id.*** at ¶15 (citations omitted). Thus, the amended petition was timely filed.

¶7 Relying on ***Thiel***, Fowler next claims that the State failed to prove beyond a reasonable doubt that he was within ninety days of discharge. As a result, he requests a new trial. In ***Thiel***, our supreme court concluded that the legislature intended that the State prove a potential committee under Chapter 980 was within ninety days of discharge or release:

> A reading of the statutory language leads us to the inescapable conclusion that the legislature intended the State to prove its fulfillment of the 90-day requirement

[2] The State's amended petition seeking Fowler's commitment recites at some length that the facts surrounding this crime support its view that the false imprisonment while armed conviction was a sexually motivated crime.

> beyond a reasonable doubt before a person may be adjudged sexually violent. The words of the statutes clearly and unambiguously set forth the State's burden in proving this specific allegation.

Thiel, 2000 WI 67 at ¶19. However, the court went on to observe that conflicting evidence in the record prevented the court from relying on documentation reflecting his mandatory release date, thus compelling a reversal of Thiel's commitment. *See* ***id.*** at ¶29-38.

¶8 The problem presented in ***Thiel*** does not exist here because there was direct, uncontradicted, and unimpeached testimony that Fowler's mandatory release date from the false imprisonment while armed offense was July 18, 1997. First, an employee of the Racine Correctional Institution testified that Fowler's mandatory release date was July 18, 1997. Additionally, this witness submitted a document that reflected the calculations. Because July 10, 1997, the date of the filing of the original petition, is indisputably within ninety days of July 18, 1997, no argument can be successfully raised that the statutory requirement was not met, despite the fact that the jury did not make a finding that Fowler was within ninety days of his release. This is so because the record supports no other possible finding. Consequently, Fowler is not entitled to the relief he seeks on this issue.

B. Fowler's diagnosis of "personality disorder (not otherwise specified)" qualifies as a mental disorder.

¶9 Next, Fowler contends that his diagnosis of "personality disorder (not otherwise specified)" does not qualify as a Chapter 980 mental disorder permitting his commitment. To secure a sexually-violent-person-commitment under Chapter 980, the State is obligated to prove, among other things, that the person suffers from a mental disorder. WISCONSIN STAT. § 980.02(2) states:

> **Sexually violent person petition; contents; filing.**
>
> ….
>
> **(2)** A petition filed under this section shall allege that all of the following apply to the person alleged to be a sexually violent person:
>
> (a) The person satisfies any of the following criteria:
>
> 1. The person has been convicted of a sexually violent offense.
>
> 2. The person has been found delinquent for a sexually violent offense.
>
> 3. The person has been found not guilty of a sexually violent offense by reason of mental disease or defect.
>
> (ag) The person is within 90 days of discharge or release, on parole, extended supervision or otherwise, from a sentence that was imposed for a conviction for a sexually violent offense, from a secured correctional facility, as defined in s. 938.02 (15m), from a secured child caring institution, as defined in s. 938.02 (15g), or from a secured group home, as defined in s. 938.02 (15p), if the person was placed in the facility for being adjudicated delinquent under s. 938.183 or 938.34 on the basis of a sexually violent offense or from a commitment order that was entered as a result of a sexually violent offense.
>
> (b) The person has a mental disorder.
>
> (c) The person is dangerous to others because the person's mental disorder creates a substantial probability that he or she will engage in acts of sexual violence.

WISCONSIN STAT. § 980.01(2) defines mental disorder as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." Fowler argues that there is no nexus between his disorder and the commission of sexually violent acts. He contends, "such a nexus is necessary for Chapter 980 to be constitutional." Although Fowler acknowledges that ***State v. Adams***, 223 Wis. 2d 60, 588 N.W.2d 336 (Ct. App. 1998), controls and is adverse to his position, he states he has raised this issue in

order to preserve it. We are satisfied that the holding in ***Adams*** defeats his argument.

¶10 In ***Adams***, Rueben Adams challenged his commitment as a sexually violent person, claiming that his diagnosis of "antisocial personality disorder" did not fall within the statute's definition of mental disorder because not all persons diagnosed with "antisocial personality disorder" are predisposed to engage in acts of sexual violence. ***Id.*** at 63. This court determined that *Adams*'s reading of the statute, requiring the mental disorder to be one that generally predisposes those afflicted with acts of sexual violence, was incorrect.

> Thus, ***Post*** requires that the statutory focus be on *the* person who is the subject of the petition, and hinges its holding on the specific link between *that* person's mental disorder and the effect of *that* mental disorder on *that* person. Indeed, to conclude otherwise would be to hold that the legislature, inexplicably, chose to *exclude* from potential commitment *all* persons diagnosed solely with "antisocial personality disorder," regardless of their history of sex crimes, recidivism, denial, and refusal of treatment. This would be a dangerously absurd reading of the statute.

Adams, 223 Wis. 2d at 68 (citing ***State v. Post***, 197 Wis. 2d 279, 541 N.W.2d 115 (1995)). Likewise, Fowler's diagnosis of "personality disorder (not otherwise specified)" need not generally predispose people with the disorder to commit sexually violent acts in order to satisfy the statute. All that is needed is evidence that the diagnosis predisposed Fowler to commit acts of sexual violence. Such evidence was submitted to the jury. Thus, Fowler cannot defeat his commitment on this basis.

C. The trial court committed no error, and his attorney was not ineffective.

¶11 In Fowler's third argument he presents alternative claims. First, he seeks a new trial, stating that the trial court erred in failing to define the term

"substantially probable" found in the standard jury instructions dealing with sexually violent commitments. He argues that "substantially probable" was defined in ***State v. Curiel***, 227 Wis. 2d 389, 597 N.W.2d 697 (1999), as meaning "much more likely than not," and that the lack of such a definition prevented the real controversy from being tried. This is so, he submits, because the experts who testified all held different definitions of "substantially probable." Therefore, he seeks a new trial. Fowler also notes that his trial counsel failed to request a jury instruction defining the term, and did not object to the trial court's jury instructions. Accordingly, he also submits that he received ineffective assistance of counsel as a result of the omission. We disagree with both claims.

¶12 The instruction that Fowler belatedly seeks was not part of the standard jury instructions promulgated for use in a sexually violent commitment case at the time of his trial. Consequently, the trial court did not err in failing to give it. Without an objection to the trial court's instructions, Fowler has waived his right to bring this claim. *See* ***State v. Smith***, 170 Wis. 2d 701, 714, 490 N.W.2d 40 (Ct. App. 1992) (stating that a party who fails to object to a jury instruction, or lack thereof, at the instruction conference waives the right to challenge the instruction on appeal). Thus, we entertain this issue only in the context of his ineffective assistance of counsel claim.

¶13 In order to prevail on a claim of ineffective assistance of counsel, Fowler must show that his attorney's performance was deficient and that he was prejudiced as a result of his attorney's deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, he must show specific acts or omissions of his attorney that fall "outside the wide range of professionally competent assistance." ***Id.*** at 690. To show prejudice, he must demonstrate that the result of the proceeding was unreliable. ***Id.*** at 687. If he fails

on either prong – deficient performance or prejudice – his ineffective assistance of counsel claim fails. ***Id.*** at 697. We "strongly presume" counsel has rendered adequate assistance. ***Id.*** at 690.

¶14 Fowler's only claim of ineffective assistance of counsel is his attorney's purported failure to submit an instruction defining "substantially probable" or to object to the omission in the trial court's instructions. He argues that since his trial, the supreme court in ***Curiel***, defined "substantially probable" as meaning "much more likely than not." ***Curiel***, 227 Wis. 2d at 412-13. He also posits that ***State v. Zanelli***, 212 Wis. 2d 358, 569 N.W.2d 310 (Ct. App. 1997), which held that the pattern jury instructions containing no definition of "substantially probable," was overruled *sub silentio* by ***Curiel*** and ***State v. Kienitz***, 227 Wis. 2d 423, 597 N.W.2d 712 (1999). We disagree with his analysis.

¶15 Fowler's attorney's performance was neither deficient nor prejudicial. His attorney need not be clairvoyant when trying a case. Indeed, at the time of his trial, as Fowler concedes, trial courts were not required to define the phrase. Moreover, the case of ***State v. Matthew A.B.***, 231 Wis. 2d 688, 605 N.W.2d 598 (Ct. App. 1999), rejected the identical argument, ***id.*** at 716-17, finding no due process violation for failing to define "substantial probability."

D. The expert witnesses were entitled to give their assessment of Fowler's credibility.

¶16 In Fowler's final argument, he claims the "State improperly adduced expert testimony … about [his] credibility." He couples this argument with his contention that his attorney was ineffective for failing to object to this testimony. During the course of their testimony, two expert witnesses determined that several previous offenses committed by Fowler were sexually motivated because they

failed to believe Fowler's account of the offense. Fowler argues that the solicitation of this type of testimony runs afoul of the holding in ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984), prohibiting a witness from commenting on the veracity of a witness. Fowler acknowledges that similar testimony was permitted in ***State v. Watson***, 227 Wis. 2d 167, 595 N.W.2d 403 (1999), but there, he insists, the experts testified "to a reasonable degree of psychological certainty," whereas here the testimony consisted of "conjecture and suspicion." We disagree.

¶17 The trial court correctly reasoned that the experts were entitled to give their opinions under WIS. STAT. §§ 907.03 and 907.05, including opinions concerning the truthfulness of the subject of their examination. Further, this principle has been explored and endorsed in the context of a sexually violent person commitment in ***State v. Pharm***, 2000 WI App 167, 238 Wis. 2d 97, 617 N.W.2d 163. Inasmuch as the testimony was permissible, the attorney's failure to object did not constitute deficient performance. For the reasons stated, the trial court is affirmed.

By the Court.—Orders affirmed.

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