

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 9, 2002**

Cornelia G. Clark  
Clerk of Court of Appeals

**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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 00-2199**  
**STATE OF WISCONSIN**

Cir. Ct. No. 99-CI-1

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN RE THE COMMITMENT OF SHELDON K. MILLER:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**v.**

**SHELDON K. MILLER,**

**RESPONDENT-APPELLANT.**

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APPEAL from orders of the circuit court for La Crosse County:  
MICHAEL J. MULROY, Judge. *Affirmed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Sheldon Miller appeals an order committing him as a sexually violent person under WIS. STAT. ch. 980, and a later order denying his motion alleging ineffective assistance of counsel. The issues are whether his trial

counsel was ineffective and whether the court erred in certain evidentiary rulings. We affirm.

¶2 Miller first argues that his trial counsel was ineffective in several ways. To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if defendant makes an inadequate showing on one. *Id.* at 697. To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.* We affirm the trial court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

¶3 Miller argues that his trial counsel was ineffective by failing to investigate an issue and call a certain witness related to his visitors list while incarcerated. One of the State's witnesses testified that certain names on his visitors list may have been children who were previously Miller's victims, or their parents. Miller argues that his trial counsel should have further investigated this issue and called one of the people on the list as a witness who would have refuted the State's implication. We conclude that Miller was not prejudiced by counsel's performance. In rendering its decision at the end of trial, the court did not mention or rely on the visitors list issue in any way. Accordingly, there is little reason to think the issue affected the court's decision.

¶4 Miller next argues that his counsel was ineffective by failing to obtain an additional expert witness. His trial counsel testified that although he originally believed an expert would be necessary to undermine the testimony of the court-appointed expert, this became less important after the court-appointed expert's report was favorable to Miller. Accordingly, we conclude that counsel's performance was not deficient. In addition, we do not believe Miller has demonstrated that he was prejudiced by the absence of an additional expert, in light of the favorable testimony that was presented by the court-appointed expert.

¶5 Miller argues that the court erred by not permitting him to continue cross-examining the State's expert witness when the trial resumed after a one-month adjournment. The adjournment occurred after Miller sought a mistrial on the ground that the expert had unexpectedly used certain assessment tools not previously disclosed to him. The court denied the request for a mistrial, a decision Miller does not address on appeal. In renewing this motion the following day, Miller noted that an alternative would be for the court to grant a continuance of the trial, "to allow us to fully prepare to rebut the last-minute testimony." The court granted this request. When the trial resumed, the court denied Miller's request to continue cross-examining the expert. We conclude that the court did not erroneously exercise its discretion. The purpose of the adjournment, as requested by Miller, was not to permit further cross-examination, but to permit him to prepare rebuttal testimony. In addition, the State advised the court that the expert's testimony or conclusions had not been changed by information Miller sent her during the adjournment.

¶6 Miller argues that the court erred by continuing to bar his proposed expert from testifying, as a sanction for the fact that Miller did not provide her name as a witness within the time set by the court. We conclude that this was a

proper exercise of discretion, and if not, the error was harmless. As discussed above, there was already an expert who testified in Miller's favor, the court-appointed expert.

¶7 Finally, Miller argues that the court erred in denying his objection to the appearance as a witness by a probation and parole agent who was not named on the State's witness list, thereby impeding Miller's ability to conduct meaningful cross-examination. However, Miller does not specify how his cross-examination might have been different if he had more notice.

*By the Court.*—Orders affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

