COURT OF APPEALS
DECISION
DATED AND RELEASED

March 12, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to § 808.10, STATS., within 30 days hereof, pursuant to RULE 809.62(1), STATS.

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Nos. 94-3264
95-3433

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAYMOND L. MATZKER,

Defendant-Appellant.

APPEALS from a judgment and orders of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Raymond L. Matzker has appealed from a judgment and commitment order finding him to be a sexually violent person pursuant to § 980.05, STATS., and committing him to a secure mental health facility (court of appeals case No. 94-3264). He has also appealed from an order

denying his motion for a new trial based on ineffective assistance of trial counsel (court of appeals case No. 95-3433). These appeals were consolidated by this court on February 28, 1996. We affirm the judgment and the orders.

Matzker raises multiple issues in both appeals, which we will address seriatim. The first are in case No. 94-3264, and constitute various challenges to the constitutionality of ch. 980, STATS., also known as the sexual predator act. He alleges that the sexual predator act violates substantive due process, equal protection and double jeopardy protections, and that it constitutes an ex post facto law. All of these claims have been rejected by the Wisconsin Supreme Court. *See* ***State v. Post***, 197 Wis.2d 279, 293-94, 541 N.W.2d 115, 118 (1995); ***State v. Carpenter***, 197 Wis.2d 252, 258-59, 541 N.W.2d 105, 107 (1995). Based on the court's determination that the characteristics of ch. 980 are not sufficiently punitive as to render it punishment rather than a civil commitment, Matzker's claim that his commitment constitutes cruel and unusual punishment also fails. *See* ***Carpenter***, 197 Wis.2d at 272, 541 N.W.2d at 113. We therefore will not address these arguments further.

Matzker also contends that ch. 980, STATS., is overbroad and void for vagueness.[1] He contends that the statutory definitions set forth in § 980.01, STATS., are vague and ambiguous, that the definitions and statutory standards have little or no foundation in medical science and psychology, and that the statute contains insufficient criteria to guide the trial court and the jury.

[1] In his brief, Matzker does not differentiate the contentions that underlie his claims of vagueness and overbreadth. We therefore treat these claims as one.

However, the definitions and standards contained in ch. 980 have been found constitutionally sufficient by the Wisconsin Supreme Court in rejecting a claim that the sexual predator act violates substantive due process. The court specifically rejected a claim that the term "mental disorder" swept too broadly and did not adequately define who fell within its reach. *See* ***Post,*** 197 Wis.2d at 303-04, 541 N.W.2d at 122. It held that the statute as drafted was narrowly tailored to permit commitment only of those sexual offenders whose mental condition predisposed them to reoffend, *see* ***id.*** at 306-07, 541 N.W.2d at 123-24, and that the statutory definition and method for assessing future dangerousness was constitutionally sound, *see* ***id.*** at 311-13, 541 N.W.2d at 126. In addition, it rejected claims that the statute was unconstitutional because based on unsound theories regarding the viability of treatment. *See* ***id.*** at 310-11, 541 N.W.2d at 125-26. This reasoning compels rejection of Matzker's arguments concerning overbreadth and vagueness.[2]

Pursuant to ***Post***, 197 Wis.2d at 332-33, 541 N.W.2d at 134, we also reject Matzker's contention that introduction of psychiatric testimony and

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[2] Matzker also appears to contend that the State's burden of proof in the commitment proceedings is ambiguous. We disagree. The statute merely sets a likelihood or degree of risk which must be shown as a prerequisite to commitment, namely, a substantial probability that the person will engage in acts of sexual violence. Sections 980.01(7) and 980.05(5), STATS. It further requires that the State establish this substantial probability beyond a reasonable doubt. Section 980.05(3)(a). Matzker cites no authority for the proposition that this burden somehow renders the statute unconstitutionally vague.

Similarly, we reject his claim that the statute is vague as to what constitutes "acts of sexual violence" as used in the definition of "mental disorder" and "sexually violent person." We understand that standard to refer to sexually violent offenses as defined in § 980.01(6), STATS. *See* WIS J I—CRIMINAL 2502.

medical records in this case violated the physician-patient privilege afforded by § 905.04, STATS. Similarly, based on the reasoning of ***Post*** and ***Carpenter***, we reject his claim that the trial court erroneously refused to conduct a ***Miranda-Goodchild*** hearing[3] on the admissibility of statements made by him to treating physicians and psychologists.

Neither ***Miranda*** nor the constitutional right to remain silent is applicable here because this is a civil proceeding whose objective is treatment rather than punishment. *See* ***Carpenter***, 197 Wis.2d at 271, 541 N.W.2d at 112-13. Moreover, ***Miranda*** applies to custodial interrogation. *See* ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966). Matzker's objection is to the use of statements made by him to mental health professionals after his convictions and before the filing of this petition, related to mental health evaluations and placement decisions. Since they did not involve questioning by the police or agents of the police in connection with a criminal investigation or pending case, ***Miranda*** and Fifth Amendment protections are inapplicable. *See* ***State v. Pounds***, 176 Wis.2d 315, 321, 500 N.W.2d 373, 376 (Ct. App. 1993); ***State v. Knapp***, 111 Wis.2d 380, 386-87, 330 N.W.2d 242, 245-46 (Ct. App. 1983); *cf.* ***Schimmel v. State***, 84 Wis.2d 287, 297-98, 267 N.W.2d 271, 276 (1978) (statement made to Division of Corrections employee in connection with treatment program did not constitute custodial interrogation, even though defendant was incarcerated), *rev'd in part on other grounds by* ***Steele v. State***, 97 Wis.2d 72, 76, 294 N.W.2d 2, 3 (1980).

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[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis.2d 244, 133 N.W.2d 753 (1965).

Matzker's request for a ***Goodchild*** hearing on voluntariness was also properly denied. Before a court may conclude that a statement is involuntarily given, some affirmative evidence of improper police practices must be shown. *See* ***State v. Michels***, 141 Wis.2d 81, 90-91, 414 N.W.2d 311, 314 (Ct. App. 1987). Because there was no police involvement in the statements being challenged by Matzker, either directly or through individuals acting as agents for the police, and no evidence of improper or coercive practices, no basis existed to challenge Matzker's statements as involuntary.

We also reject Matzker's contention that this proceeding should have been dismissed because it was not commenced by a sworn petition. Matzker admits that ch. 980, STATS., does not state that a petition must be sworn. In addition, we reiterate that ch. 980 proceedings are civil rather than criminal. While criminal procedures are incorporated for certain stages of the proceedings, *e.g.*, § 980.05(1m), STATS., nothing in the statutory provisions indicate that criminal requirements as to sworn pleadings are applicable. We therefore apply the rules for civil pleadings, which need not be sworn unless required by a particular statute. *See* § 802.05(1)(a), STATS.

Matzker's final argument in case No. 94-3264 is that the trial court failed to adequately advise the jury that the term "acts of sexual violence" means acts which would constitute "sexually violent offenses." He also objects that the instructions informed the jury of the effect of its verdict by telling jurors that if they found that Matzker was not a sexually violent person, the petition would be dismissed and he would be placed on parole under the supervision of the

Department of Corrections. The jurors were further instructed that if they found Matzker to be a sexually violent person, the court would commit him to the custody of the Department of Health and Social Services for control, care and treatment until he was no longer sexually violent.

Because Matzker did not request a defining instruction on the meaning of "acts of sexual violence" and consented to the portion of the instructions informing the jury about the effect of its verdict, he has waived his right to review of those issues in his direct appeal of the judgment and commitment order. *See* ***State v. Schumacher***, 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988). However, these same arguments are raised in case No. 95-3433 as a basis for claiming ineffective assistance of trial counsel. The remainder of this decision will deal with that appeal.

To establish a claim of ineffective assistance, an appellant must show that counsel's performance was deficient and that it prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, an appellant must show that his or her counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. *See* ***id.*** Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight. *See* ***State v. Johnson,*** 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990). The case is reviewed from counsel's perspective at the time of trial, and the burden is placed upon the appellant to overcome a strong presumption that counsel acted reasonably within professional norms.

See ***id.*** at 127, 449 N.W.2d at 847-48. The appropriate measure of attorney performance is reasonableness, considering all the circumstances. *See* ***State v. Brooks***, 124 Wis.2d 349, 352, 369 N.W.2d 183, 184 (Ct. App. 1985).

Even if deficient performance is found, a judgment will not be reversed unless the appellant proves that the deficiency prejudiced his or her defense. *See* ***Johnson***, 153 Wis.2d at 127, 449 N.W.2d at 848. However, we need not address the prejudice prong of the test if deficient performance is not shown. *See* ***id.*** at 128, 449 N.W.2d at 848.

The question of whether there has been ineffective assistance of counsel is a mixed question of law and fact. *See* ***State ex rel. Flores v. State,*** 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994). An appellate court will not overturn a trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. *See* ***State v. Knight***, 168 Wis.2d 509, 514 n.2, 484 N.W.2d 540, 541 (1992). However, the final determinations of whether counsel's performance was deficient and prejudicial are questions of law which this court decides without deference to the trial court. *See* ***id.***

While Matzker claims that trial counsel was ineffective for failing to challenge the jury instructions on the ground that they did not define "acts of sexual violence," he did not question trial counsel concerning this issue at the hearing on ineffective assistance. ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979), requires the preservation of trial counsel's

testimony to determine whether a particular decision was a deliberate and reasonable trial strategy. Because Matzker did not question counsel concerning the reasons for her lack of objection, we will not address the matter further. *See* ***State v. Schultz***, 148 Wis.2d 370, 379 n.3, 435 N.W.2d 305, 309 (Ct. App. 1988), *aff'd*, 152 Wis.2d 408, 448 N.W.2d 424 (1989).

Matzker criticizes trial counsel's consent to informing the jury of the effect of its verdict on the ground that it runs afoul of the general rule which prohibits providing jurors with such information. However, this general rule does not apply in insanity defense cases which, with ch. 51, STATS., constituted the model for the instructions used in this case.[4] WISCONSIN J I—CRIMINAL 605 instructs the jury that if it finds a defendant not guilty by reason of mental disease or defect, he or she will be committed to the Department of Health and Social Services and will be placed in an appropriate institution until he or she is no longer a danger to self or others. This instruction reduces the risk that a jury will decline to return an insanity verdict, even though warranted by the evidence, because it is concerned that the defendant will be released to the endangerment of the public.

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[4] At the time of this trial, WIS J I—CRIMINAL 2501-2503, dealing with ch. 980, STATS., had not yet been drafted and published. Currently, WIS J I—CRIMINAL 2501 informs the jury in a ch. 980 case that "Wisconsin law provides that a person may be committed to the custody of the Department of Health and Social Services if the person is found to be a sexually violent person."

Trial counsel testified that she was similarly concerned that the jury would be reluctant to find that Matzker was not sexually violent if it believed that he would be released without supervision. She testified that she believed the jury would feel more secure in returning a finding that he was not a sexually violent person if it knew he would remain subject to supervision, as he would on parole. Because this was a reasonable tactic for counsel to choose in light of the jury's undoubted concern about the effect of finding that Matzker was not sexually violent, her actions did not constitute deficient performance. *See* ***State v. Felton***, 110 Wis.2d 485, 502, 329 N.W.2d 161, 169 (1983).[5]

Matzker next contends that trial counsel was ineffective because she failed to challenge the admissibility of testimony by the State's expert witnesses regarding the predictability of future dangerousness. He also contends that her performance was deficient because she failed to present expert witnesses on the reliability of the underlying science of predicting future dangerousness and failed to rely on learned treatises to challenge the State's experts on cross-examination.

Trial counsel did not render deficient performance by failing to challenge the admissibility of testimony by the State's experts. Admissibility of

[5] Matzker contends that counsel's decision could never be reasonable under the facts of his case because the evidence indicated that his prior adjustment on parole was poor. However, counsel emphasized in her closing argument that while Matzker had some adjustment problems while on parole, he had not reoffended when released. In any event, Matzker's parole adjustment does not render counsel's decision deficient because she could reasonably conclude that, based on his history, the jury would be even less likely to find that he was not sexually violent if they feared he would be released without supervision.

scientific evidence in Wisconsin is not conditioned upon its reliability. *See* ***State v. Peters***, 192 Wis.2d 674, 687, 534 N.W.2d 867, 872 (Ct. App. 1995). With some exceptions which are inapplicable here, scientific evidence is admissible if it is relevant, the witness is qualified as an expert, and the evidence will assist the trier of fact in determining an issue of fact. *See* ***id.*** at 687-88, 534 N.W.2d at 872. Because these tests were satisfied, no basis existed for trial counsel to challenge the admissibility of testimony by the State's experts.

We also reject Matzker's claim that trial counsel was ineffective for failing to present an expert witness to challenge the State's expert testimony. Trial counsel testified that she utilized the services of the State Public Defender's Client Services Coordinator, who is a member of the Wisconsin Sexual Offender Treatment Network, and a client services worker in the public defender's office to search for experts on the predictability of dangerousness and possible dispositional placements for Matzker. She testified that they were not able to find anyone to assist Matzker's case. She further testified that Dr. Charles Lodl, a psychologist described by counsel as defense-oriented, examined Matzker for purposes of the dispositional hearing, but that his testimony would not have been helpful to the defense because he believed that Matzker required inpatient treatment.

Matzker's complaint is that trial counsel did not sufficiently investigate to find the right expert. However, trial counsel's investigatory duty was to make a reasonable investigation or to make a reasonable decision that a particular investigation was unnecessary. *See* ***State v. Hubert***, 181 Wis.2d 333,

343-44, 510 N.W.2d 799, 803 (Ct. App. 1993). In light of the dead ends reached in searching for an expert who could offer useful testimony, trial counsel's failure to present an expert cannot be deemed unreasonable.[6] The fact that Matzker presented an expert at the ***Machner*** hearing does not alter this conclusion because counsel's activities must be judged at the time of trial, and Matzker has not shown that her efforts and conclusions were unreasonable.

Similarly, Matzker has failed to establish that trial counsel acted unreasonably by neglecting to use learned treatises directly or in cross-examination of the State's experts. Matzker's own expert testified at the ***Machner*** hearing that such treatises would contain information both helpful and harmful to Matzker's defense. Moreover, trial counsel testified that she was aware that a dispute existed as to the reliability and ethics of predicting future dangerousness, but that she chose not to pursue this issue in cross-examination or through the use of learned treatises. She testified that she did not believe that challenging the research upon which the State's experts relied to conclude that Matzker was substantially probable to reoffend would be fruitful in light of the fact that Matzker had seven prior convictions for sexual offenses against young boys. Because counsel could reasonably conclude, based upon Matzker's history, that challenging the underlying science of predictability would not have diminished the credibility of the State's witnesses, her decision not to

[6] Matzker criticizes counsel's lack of personal knowledge of the steps taken by the public defender's staff to obtain an expert witness. However, reliance on the efforts and conclusions of qualified staff does not constitute deficient performance by an attorney absent a showing that the staff's efforts were unreasonable and inadequate.

pursue these matters cannot be deemed unreasonable even if another lawyer would have chosen to do so.

We also reject Matzker's claim that trial counsel was ineffective for failing to pursue and uncover witness bias. Matzker premises this argument on the fact that using falsified credentials and an assumed identity, he previously served as director of the Winnebago Mental Health Institute. He contends that two of the witnesses who testified against him at trial were working at the institute during his masquerade, and therefore should have been questioned concerning bias toward him.

Matzker's argument fails because the evidence in the record does not establish that Dr. Thomas Michlowski, one of the witnesses apparently referred to by Matzker, was working at the institute during the time in question, or that he met Matzker before 1992. The other witness, Dr. Gay Anderson, testified that he was in training as a resident at the time, and that while Matzker was his boss, Anderson was under the control of the resident training program director and met Matzker very briefly on only one occasion.

It would be pure speculation to conclude from these simple facts that either expert was biased against Matzker. Because Matzker never identifies what additional evidence should have been uncovered or how it would have shown bias, a finding of ineffective assistance of trial counsel cannot be premised on this argument.

Matzker's final argument is that trial counsel rendered ineffective assistance when she conceded at the final commitment hearing that Matzker was a proper subject for commitment and failed to argue for supervised release. The record indicates that at the commitment hearing, counsel stated that Matzker would cooperate with parole conditions and treatment if released, that he had cooperated with the predisposition examination, that he had not committed any new crimes while previously on parole, and that the defense believed supervised release would work out. However, she further stated that Matzker realized that the trial court would be reluctant to release him because of his past record and was therefore willing to agree to inpatient commitment, to cooperate with that treatment and to seek release in six months. Counsel testified at the ***Machner*** hearing that she made this concession after discussing the matter with Matzker and obtaining his agreement. She testified that she recommended this action to him based on the predisposition report, his mental condition and his prior record, which was replete with instances of failing to cooperate with treatment and parole and absconding while on parole.

It thus is apparent that trial counsel's concession at the final commitment hearing was tactical and strategic, in effect making the best of a bad situation. A trial attorney may select a particular defense from the available alternative defenses. *See* ***State v. Hubanks***, 173 Wis.2d 1, 28, 496 N.W.2d 96, 106 (Ct. App. 1992). Based on Matzker's record, showing a willingness to cooperate with inpatient treatment could be deemed necessary to establish that in the future he would be able to comply with the conditions of supervised release.

Counsel's decision therefore was reasonable and provides no basis for relief on appeal.[7]

By the Court.—Judgment and orders affirmed.

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

[7] After counsel spoke at the final commitment hearing, Matzker spoke on his own behalf and requested immediate release. This fact did not render counsel's actions unreasonable, since it occurred after Matzker consented to her recommendation. Moreover, nothing in the record indicates that Matzker told her that he objected to her argument or that he asked her to alter her argument at the hearing.