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**DISTRICT I**

December 4, 2013

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You are hereby notified that the Court has entered the following opinion and order:

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2013AP792-NM

In re the commitment of Jude Vincent Balistreri: State of  
Wisconsin v. Jude Vincent Balistreri (L.C. #2009CII)

Before Curley, P.J., Fine and Kessler, JJ.

Jude Vincent Balistreri appeals from an order committing him to a secure mental health facility as a sexually violent person. Appellate counsel, Attorney Leonard D. Kachinsky, has filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967) and WIS. STAT.

RULE 809.32 (2011-12).<sup>1</sup> Upon our independent review of the record, as mandated by *Anders*, we conclude that no arguably meritorious issues exist. We therefore summarily affirm the order.

In 1985, after a period of drinking, Balistreri wanted to visit a female friend at her apartment. She did not answer the door, so Balistreri broke into the building through a basement window. He then broke into the wrong apartment, walked into its bedroom, and stumbled on a bed. He observed the apartment's seventy-year-old female occupant in bed. When she began to moan and groan, he struck her about the head and chest, bit her, and put one of his fingers into her vagina. When she stopped moving, he took off his pants and inserted his penis into her vagina. When he stopped, he noticed blood on his hands, washed up, then observed some keys hanging on the wall, including keys to his friend's apartment. Balistreri attempted to use the keys to enter his friend's apartment, but she would not let him in, and Balistreri left the building.

Balistreri was charged with two counts of first-degree sexual assault and one count of second-degree murder. In exchange for his guilty pleas to one count of first-degree sexual assault and one count of second-degree murder, the additional sexual assault charge was dismissed. Balistreri was sentenced to fifteen years' imprisonment for the assault and a consecutive twenty years' imprisonment for the murder. His mandatory release date was February 19, 2009; the State filed the underlying commitment petition on February 13, 2009.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Counsel addresses three issues in the no-merit report. The first of these is whether sufficient evidence supports the trial court's conclusion that Balistreri was sexually violent.<sup>2</sup> In order to commit Balistreri as a sexually violent person under WIS. STAT. ch. 980, the State had to show that Balistreri: (1) had been convicted of a sexually violent offense; (2) has a mental disorder; and (3) is dangerous to others because he has a mental disorder that makes it more likely than not he will engage in one or more future acts of sexual violence. See WIS JI—CRIMINAL 2502; WIS. STAT. § 980.02(2) (2009-10).

“We utilize the criminal standard of review to determine whether there is sufficient evidence to prove a person was a sexually violent person subject to commitment.” *State v. Kienitz*, 227 Wis. 2d 423, 434, 597 N.W.2d 712 (1999). We view the evidence in the light most favorable to the decision, and if more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the factfinder. See *State v. Poellinger*, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). The decision ““will be overturned only if, viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt.”” *State v. Alles*, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation omitted). “This court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with

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<sup>2</sup> Balistreri waived his right to a jury trial. He signed a written waiver, and the trial court conducted a personal colloquy to ensure that Balistreri was knowingly, intelligently, and voluntarily waiving his right to a jury trial. See *State v. Anderson*, 2002 WI 7, ¶11, 249 Wis. 2d 586, 638 N.W.2d 301.

the laws of nature or with fully-established or conceded facts.” *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

A “[s]exually violent offense’ includes any crime specified in WIS. STAT. §§ 940.225(1), (2), or (3).” *See* WIS. STAT. § 980.01(6)(a). One of the State’s trial witnesses was Balistreri’s probation/parole agent, Charles Laskey-Castle, who testified that Balistreri was convicted in 1985 for first-degree sexual assault, contrary to WIS. STAT. § 940.225(1)(a) (1985-86).

A “[m]ental disorder’ means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence.” WIS. STAT. § 980.01(2). The State called Dr. Christopher Tyre. Tyre, a psychologist, explained that he diagnosed Balistreri with antisocial personality disorder with narcissistic traits. Tyre was also concerned about Balistreri’s high degree of psychopathy, which suggests a tendency to persist in criminal behavior long after the typical decline in antisocial personality disorder individuals. Though Balistreri had no specific sexual disorders, like any type of paraphilia, Tyre explained that Balistreri’s disorder caused him to be unable “to regulate or conform his behavior to the rules that govern his conduct at the time” and to “disregard[] the rights and rules of others.” He further opined that Balistreri’s disorder caused him to lack control over his sexual desires, thereby establishing a nexus between Balistreri’s mental disorder and likelihood of re-offense. *See State v. Laxton*, 2002 WI 82, ¶22, 254 Wis. 2d 185, 647 N.W.2d 784.

To show that Balistreri was more likely than not to engage in future acts of sexual violence, the State relied on testimony from Laskey-Castle, Tyre, and Dr. Richard Elwood. Laskey-Castle reviewed Balistreri’s criminal history for the court. Balistreri’s record of sexual

offenses<sup>3</sup> went back to at least 1966, when he was convicted of sexual intercourse with a child. In 1983, Balistreri was convicted of fourth-degree sexual assault, though Balistreri contended that the intercourse was consensual. There was also his previously mentioned 1985 conviction for sexual assault and murder. Balistreri was also investigated in April 1985 for second-degree sexual assault involving a sixteen-year-old girl, though evidently no charge was issued in that matter. Balistreri adjusted poorly to both supervision or probation and incarceration.

In 1996, Balistreri sent a letter to his teenage daughter, containing a letter for her to give to her teenage friend. The letter contained inappropriate, sexually explicit themes. Laskey-Castle described the contents as “dating profile questions for a teenage girl from an adult male ... [and] positives of a younger person receiving instruction on love from an older person.” Balistreri also indicated in the letter to the girl that he wanted “a meaningful and lasting relationship with someone.” In 2006, Balistreri sent sexually explicit letters to his teenage great-niece, putting her into the sexual scenes he had composed and resulting in a four-year restraining order against him.

Laskey-Castle also testified about Balistreri’s conditions of supervision, imposed when he was released from prison and sent to Sand Ridge Treatment Center during the pendency of the commitment petition. Balistreri was prohibited from having contact with any women other than Sand Ridge or Department of Corrections staff and his attorneys, thus prohibiting him from

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<sup>3</sup> Balistreri’s criminal record also includes operating a motor vehicle without the owner’s consent, escape, disorderly conduct, criminal trespass to a dwelling, obstruction, battery, theft, and attempted burglary.

contacting his daughter. He was also not allowed to keep sexually explicit material upon his transfer to Sand Ridge.

Tyre testified about Balistreri's reactions to the supervision terms. Tyre thought it troubling that Balistreri continued, even through the trial proceedings, to insist that his explicit material be returned to him at Sand Ridge, even after Laskey-Castle explained to Balistreri that the material was counterproductive to treatment goals. The no-contact provision had been imposed in light of Balistreri using his past letter writing "to channel sexually explicit and inappropriate material to minors." Tyre testified that Balistreri, by protesting the conditions, was disregarding any notion of developing "adequate psychological therapeutic controls" over his sexual desires and noted that there was no evidence Balistreri was going to "age out" of his proclivities. Tyre also explained the scoring and methodology of certain actuarial instruments that placed Balistreri in the upper ends of the instruments' scales, indicating greater likelihoods of sexual recidivism than those with lower scores.

Elwood, also a psychologist, testified generally consistent with Tyre's opinions. He too diagnosed Balistreri with antisocial personality disorder with narcissistic features, though he added borderline intellectual functioning to the diagnosis. Though borderline intellectual functioning is not itself considered a major mental disorder, Elwood noted that it has been associated with increased sexual recidivism. Elwood noted that there was no indication that then-sixty-six-year-old Balistreri's "acting out or antisociality" had decreased with age, as is often expected. Elwood explained that it was notable that Balistreri had been terminated by staff from his sex offender treatment programs: those removed by staff were at greater risk for re-offense than individuals who simply quit the treatment of their own accord. Like Tyre, Elwood testified about Balistreri's various actuarial scores and their meaning. Elwood also testified

about his extrapolation techniques for predicting behavior beyond what the actuarial tools predict. Like Tyre, Elwood testified there was a nexus between Balistreri's mental disorder and the likelihood he would re-offend.

Balistreri called Dr. James M. Peterson to testify in rebuttal.<sup>4</sup> Peterson was not asked to evaluate Balistreri, but was called to cast doubt on the reliability of the actuarial tools the State's experts rely on. Peterson also questioned the link between antisocial personality disorder and likely re-offense.

The trial court concluded that many facts were undisputed, including the fact that Balistreri had been convicted of a sexually violent offense and that he had a mental disorder. The only real question was whether Balistreri was sexually violent—that is, whether he was dangerous to others because the disorder made him more likely than not to engage in future acts of sexual violence.

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<sup>4</sup> It appears that much of the delay in this case was occasioned by Balistreri's attempts to find an expert to support his case. The probable cause hearing on the petition was held on February 25, 2009, when Balistreri waived statutory time requirements. Dr. Sheila Fields was originally appointed by stipulation at Balistreri's request, shortly after the probable cause hearing. At a November 19, 2009 status hearing, defense counsel asked for time to have another doctor's examination. In May 2010, defense counsel moved to withdraw; that motion was granted and successor counsel appointed.

In September 2010, a new examiner, Dr. Jeanette Lytton, was appointed to evaluate Balistreri. On November 29, 2010, successor counsel asked the trial court to order Peterson to evaluate Balistreri at county expense. The trial court declined, but counsel asked for additional time anyway because Balistreri's family might pay to retain Peterson. However, they were unable to do so. In March 2011, defense counsel asked the trial court for more time to try to obtain funding for an expert witness; counsel ultimately secured those funds from the public defender, retaining Peterson as an expert, but not as an examiner. The matter was set out further to await copies of Peterson's materials. In October 2011, the matter was adjourned again on the defense's request, and finally proceeded to trial beginning March 27, 2012.

The trial court concluded that the evidence in that regard was overwhelming. It generally disregarded Peterson's testimony: beyond the fact that he did not examine Balistreri, the trial court noted that Peterson admitted using the same actuarial tables the State's experts did. Further, Peterson was not very familiar with the requirements of Wisconsin law compared to the State's experts and their ability to relate their testimony to the applicable legal framework.

The trial court explained that there was no evidence of any diminishment of Balistreri's behaviors. He had not successfully completed any treatment and lacked insight into his behaviors and offenses. It observed that Balistreri's actuarial scores, while only part of the equation, were all consistent in putting him in higher-risk groups. It noted that testing had shown that Balistreri was simply not aroused by what Tyre had called "normal adult sexual interactions." It noted that Balistreri had a persistent disregard for the consequences of his actions—despite appearing to understand the nature of the Chapter 980 proceedings, Balistreri continued his preoccupation with reacquiring his sexually explicit material and access to his relatives, even when it was explained to him why those things had been discontinued.

Based on all the testimony, the trial court concluded that Balistreri's mental disorder did in fact make him sexually violent and more likely than not to commit a future act of sexual violence. Our review of the record as a whole satisfies us that there is no arguable merit to a challenge to the sufficiency of the evidence necessary to support that conclusion.

Counsel addresses two other procedural matters in the no-merit report. The first is whether new evidentiary standards for expert testimony should have applied to Balistreri's case. With 2011 Wis. Act 2, the legislature enacted new standards for the admission of expert



testimony—the so-called *Daubert*<sup>5</sup> standards. The legislature made the new standards applicable to civil cases commenced on or after February 1, 2011. As noted above, the State filed its petition in this matter in February 2009.

While Balistreri’s trial counsel attempted to argue for the retroactive application of the act—including petitioning for an interlocutory appeal, which we denied<sup>6</sup>—there is no arguable merit to an equal protection due process challenge to the trial court’s refusal to apply the new law retroactively. Though Balistreri asserted that the new law created two new arbitrary classes based solely on the enactment’s effective date, new legislation will always result in two separate classes of citizens: those subject to the new law and those subject to the old law. *See, e.g., Dobbert v. Florida*, 432 U.S. 282, 301 (1977) (state “obviously had to draw the line at some point” between those subject to new legislation and those subject to old legislation). There is no arguable merit to a constitutional challenge.

There is also no arguable merit to a claim that the trial court erroneously exercised its discretion in denying Balistreri a thirty- to forty-five-day adjournment after the bench trial began. When Laskey-Castle began testifying about Balistreri’s record, he relied on an exhibit—a grid that he had created to help himself prepare for trial. The State was given a copy—it is not wholly clear when—and provided the defense with a copy that morning. Balistreri asked for the lengthy adjournment to review the “new” evidence. The trial court granted an early break of the morning’s proceedings which, coupled with the lunch break, gave Balistreri about two and a half

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<sup>5</sup> *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

<sup>6</sup> *See State v. Balistreri*, No. 2011AP1352-LV, unpublished slip op. & order (July 8, 2011).

hours to review the document. The trial court otherwise denied the motion, explaining that all of the information in that particular document was about Balistreri himself. After the break, Balistreri acknowledged that the exhibit was a summary of his convictions and that he was familiar with the material contained therein. We discern no error in the trial court's denial of the adjournment.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Leonard D. Kachinsky is relieved of further representation of Balistreri in this matter. *See* WIS. STAT. RULE 809.32(3).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*