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DISTRICT III

December 23, 2014

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

2013AP2332-NM State of Wisconsin v. Elijah Daniels (L.C. # 2010CI1)

Before Hoover, P.J., Stark and Hruz, JJ.

Counsel for Elijah Daniels has filed a no-merit report concluding there is no arguable basis for appealing a judgment committing Daniels as a sexually violent person under WIS. STAT. ch. 980 (2011-12).[1] Daniels filed a response in which he raises numerous issues, primarily regarding the credibility of witnesses, sufficiency of the evidence and effective assistance of

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

counsel. Upon our independent review of the record, we conclude there is no arguable basis for appeal.

The State presented sufficient evidence to support the jury's finding that Daniels is a sexually violent person. The State had to prove beyond a reasonable doubt that Daniels was convicted of a sexually violent offense, suffers from a mental disorder, and is more likely than not, because of that disorder, to engage in a future act of sexual violence. *See* ***State v. Harrell***, 2009 WI App 141, ¶3, 321 Wis. 2d 476, 774 N.W.2d 475. We must affirm the jury's verdict unless the evidence, viewed most favorably to the State, is so lacking in probative value and force that no trier of fact could reasonably have found Daniels to be a sexually violent person. ***Id.*** It is the jury's task to sift and winnow the credibility of the witnesses. ***State v. Curiel***, 227 Wis. 2d 389, 421, 597 N.W.2d 697 (1999).

The State established that Daniels had been convicted of four sexually violent offenses. Under WIS. STAT. § 980.01(6)(b), a "sexually violent offense" includes battery and false imprisonment if those crimes are determined to be sexually motivated. His probation officer detailed Daniels' criminal record, including a 1990 attempted sexual assault of an unconscious woman, a 1992 attempted sexual assault and battery, and false imprisonment associated with the 1992 crime. Psychologists Anthony Jurek and Sheila Shields opined to a reasonable degree of professional certainty that Daniels has a mental disorder that predisposes him to engage in sexually violent behaviors. Based on actuarial risk assessment instruments, both psychologists testified Daniels was more likely than not to reoffend.

In his reply to the no-merit report, Daniels challenges Jurek's testimony because Jurek had previously given different testimony in an earlier WIS. STAT. ch. 980 proceeding against

Daniels. At that time, Jurek testified he could not find Daniels to be a sexually violent person based on one diagnosis alone. However, in his testimony in the present case, Jurek concluded Daniels suffered from three mental disorders. The jury, not this court, determines the credibility of expert witnesses, the weight to be accorded their testimony and whether inconsistencies render the testimony unreliable. ***Curiel***, 227 Wis. 2d at 421.

Daniels faults his trial counsel for "not stressing this point to the jury." To establish ineffective assistance of counsel, Daniels must show both deficient performance and prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish prejudice, he must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** A reasonable probability is one that undermines our confidence in the outcome. ***Id.*** at 694. The inconsistencies in Jurek's testimony were called to the jury's attention. Daniels' counsel was not ineffective and our confidence in the outcome is not undermined by her failure to repetitiously stress the point.

Daniels also challenges Jurek's testimony that, at the time of Jurek's report, Daniels was in jail for a sexually violent offense. Daniels contends he was actually in jail on a probation violation related to his false imprisonment conviction, and he again faults his trial counsel for failing to object. Because Jurek concluded the false imprisonment was "sexually motivated," and the jury had the right to accept Jurek's testimony, *see* ***State v. Watson***, 227 Wis. 2d 167, 189-91, 595 N.W.2d 403 (1999), the record shows no valid basis for an objection, trial counsel was therefore, not deficient.

Daniels also faults his trial counsel for failing to object when Jurek told the jury that one of the bases for one of his diagnoses was Daniels' deceptiveness, as shown by his failure to pass

a polygraph test. Although Daniels' counsel did not make a contemporaneous objection, at a subsequent recess she moved for a mistrial. The trial court denied the motion, concluding the statement, in the context in which it was made, did not constitute a manifest injustice meriting a mistrial. The court reasoned that, because the statement was made in the context of explaining Daniels' diagnosis, not his credibility, it was not likely to prejudice the jury. Because the court addressed the issue and properly exercised its discretion by denying the motion for a mistrial, mention of the polygraph does not provide a basis for appeal, and Daniels was not prejudiced by his counsel's failure to lodge a contemporaneous objection.

Daniels also challenges the trial court's denial of a motion for a mistrial based on Fields' testimony that Daniels was not currently receiving sex offender treatment. The court sustained the objection and ordered the jury to disregard the testimony. Because a mistrial is disfavored and potential prejudice is presumptively erased when admonitory instructions are properly given by the trial court, the record shows no basis for appeal on that issue. *See* ***State v. Collier***, 220 Wis. 2d 825, 837, 584 N.W.2d 689 (Ct. App. 1998).

Daniels raises several issues related to voir dire. He contends his trial counsel impermissibly denied him a chance to participate. However, Daniels admits he deferred to his counsel's expertise after he was asked for his input. Daniels also contends the jury pool was tainted by statements made by a juror that he could not be impartial because his ex-wife had been assaulted. The court struck that juror for cause and appropriately determined that the remaining jurors were impartial. Finally, Daniels contends without detail that he was denied a fair trial because members of the jury knew or were related to each other. That is not uncommon in small communities. The record discloses no arguable basis for challenging the trial court's determination that the jurors were impartial.

Daniels raises a number of issues related to the court's management of the trial proceedings and statements made by the prosecutor. He notes the trial court allowed a judge who happened to be present in the courtroom to spin the tumbler to randomly select the two alternate jurors. That judge was the prosecutor in Daniels' first WIS. STAT. ch. 980 trial. Because the identity of the person spinning the tumbler would have no bearing on which jurors were chosen, there is no basis for appeal.

Daniels contends the State confused the jury during voir dire by giving the names of people who would either testify or whose names would come up during the trial. He contends the jury may have understood the names to be those of former victims. The record discloses no reason to believe the jury would have construed the statement in that manner. The prosecutor properly identified individuals whose names would come up during the trial to allow the jurors an opportunity to identify any bias that might result from their association with those individuals.

Daniels next faults the prosecutor for incorrectly suggesting that both of Daniels' Wisconsin sexual assaults occurred in the same county. That error was made during opening statements and was corrected by evidence of Daniels' complete criminal record. Daniels was not prejudiced by the misstatement.

Daniels next contends the trial court's opening instructions were confusing. The court gave the standard instructions and there is no basis for believing they confused the jury.

Daniels argues his trial counsel should have called his former parole agent to testify. Neither Daniels nor the record reveals whether the agent, who had since retired, was available to testify or the content of his proposed testimony. The State called Daniels' current parole agent

whose testimony included reading the official reports compiled by Daniels' former agent. The record discloses no prejudicial effect from the failure to call the former agent.

Finally, Daniels contends his trial should have been postponed so that one of his expert witnesses could testify in person rather than by video conference. While having his witness testify in person may have been preferable, the scheduling of expert witnesses and the weather do not always cooperate. A defendant is entitled to a fair trial, not a perfect one. ***State v. Disch***, 119 Wis. 2d 461, 469, 351 N.W.2d 492 (1984).

Our independent review of the record discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Dennis Schertz is relieved of his obligation to further represent Daniels in this matter. WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals