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January 13, 2015

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

2014AP645-NM State v. Nathan Fleming (L. C. #2010CI1)

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

Counsel for Nathan Fleming filed a no-merit report concluding there is no arguable basis for appealing an order committing Fleming as a sexually violent person following a trial. Fleming filed a response challenging some of his counsel's conclusions and raising additional issues. Upon our independent review of the record, we conclude there is no arguable basis for appeal.

The no-merit report and response raise seven issues: (1) Did Fleming's acquittal on sexual assault charges preclude the State from pursuing a WIS. STAT. ch. 980¹ petition on the theory that Fleming's substantial battery conviction was sexually motivated? (2) Does 2011 Wisconsin Act 2, which modified the standard for admission of expert testimony, apply to this case? (3) Did the court improperly require Fleming to wear a restraint during the trial? (4) Was the State's expert testimony objectionable on the ground that it was inflammatory or hearsay? (5) Did the State present sufficient evidence to support the verdict? (6) Was Fleming's trial counsel ineffective for not objecting to one of the State's expert witnesses endorsing the victim's testimony and/or saying Fleming's account of the incident was unbelievable? (7) Was Fleming's counsel's closing argument deficient and prejudicial to his defense?²

Issue Preclusion

The predicate offenses that led to the WIS. STAT. ch. 980 petition were two counts of substantial battery in 2008. Fleming was charged with five counts of sexual assault and three counts of substantial battery. His defense was that the battery occurred after he had consensual sex with the victim. The jury acquitted Fleming of the sexual assault charges but convicted him of two counts of substantial battery. Fleming's trial counsel argued that the criminal trial jury must have believed Fleming's version, and therefore the doctrine of issue preclusion prohibits

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

² Fleming also raises an issue of ineffective assistance of counsel that we do not understand. He argues, "May 3, 2011, Decision: Judge gave right of way to introduce prior sexual history between plaintiff and respondent, did not agree with my testifying, which prejudiced the outcome." The May 3, 2011 decision denied the State's motion to exclude evidence of a prior relationship between Fleming and the victim. That decision was favorable to Fleming and therefore creates no basis for appeal. Fleming personally chose not to testify. We see no arguable basis for appeal.

retrial of the question whether the battery was sexually motivated. The circuit court correctly determined that issue preclusion does not apply in this case. Issue preclusion applies when an issue of fact is actually litigated and the determination is essential to the judgment. *State v. Miller*, 2004 WI App 117, ¶19, 274 Wis. 2d 471, 683 N.W.2d 485. The burden is on the party asserting issue preclusion to establish that it should be applied. *Id.* The question in the ch. 980 proceeding was whether the substantial battery charges were sexually motivated. That issue was not presented to the jury in the criminal case and was not essential to the jury's verdict on the battery charges. That the jury had a reasonable doubt regarding the sexual assault charges does not necessarily establish that the battery was not sexually motivated.

In his response to the no-merit report, Fleming also notes that the sentencing court did not require him to register as a sex offender. This registration would have been authorized under WIS. STAT. § 973.048, if the court determined the underlying conduct was sexually motivated. Section 973.048(a) provides that the court “may” order sex offender registration for battery. Fleming has not established that the sentencing court found the battery was not sexually motivated. The sentencing court's mere decision not to order sex offender registration does not establish that the issue was previously litigated or that deciding whether the battery was sexually motivated was essential to the sentencing.

Applicability of 2011 Wisconsin Act 2

The trial court correctly ruled that 2011 Wisconsin Act 2 and its modifications to expert opinion testimony did not apply in this case. The effective date for Act 2 was for actions commenced after February 1, 2011. This case was commenced by the filing of a petition on August 30, 2010. Therefore, the Act 2 changes do not apply to Fleming's case.

Requiring Fleming to Wear a Restraint

The circuit court required Fleming to wear a hidden restraint during the trial. Because Fleming's counsel did not object, the issue must be reviewed under the rubric of ineffective assistance of counsel. To establish ineffective assistance of counsel, Fleming would have to show both deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Fleming cannot meet his burden of establishing the prejudice prong on appeal. Nothing in the record suggests the device Fleming wore was visible to the jury or in any way contributed to the verdict. Counsel's failure to object does not undermine our confidence in the outcome. *See id.* at 694.

Evidentiary Issues

The State's witnesses testified regarding Fleming's past conduct, including three sexual assault charges that were plea bargained down to lesser offenses, as well as convictions for burglary, robbery, theft, kidnapping, and unlawful possession of a weapon. The no-merit report considers whether this testimony could have been excluded under WIS. STAT. § 904.03 on the ground that its probative value was substantially outweighed by its prejudicial effect. The statements were admitted without objection. Therefore, we must again consider whether the failure to object constituted ineffective assistance of counsel. We conclude Fleming cannot establish deficient performance or prejudice from his counsel's failure to object. A description of Fleming's past conduct was relevant as it relates to his antisocial personality disorder and not unfairly prejudicial. A witness also mentioned a temporary restraining order related to domestic abuse. That statement was an isolated remark in a lengthy trial. Counsel's failure to object does not undermine our confidence in the verdict.

The experts' testimony involved hearsay gleaned from various records. Most of the records were public records, and therefore admissible under WIS. STAT. § 908.03(8). See *State v. Keith*, 216 Wis. 2d 61, 77, 573 N.W.2d 888 (Ct. App. 1997). Those records that contained statements that might not qualify as public records were admitted without objection. Fleming's trial counsel made a conscious, strategic choice to allow admission of evidence of Fleming's lengthy record of misconduct because, consistent with the theory of a defense expert witness, counsel's approach to the case was to concede Fleming's personality disorder and establish that most prison inmates have the disorder but do not commit sexually violent acts. Fleming cannot prevail on appeal in any challenge to this strategy because counsel's strategic choices, made after a thorough investigation of the law and facts relevant to plausible options, are virtually unchallengeable. *Strickland*, 466 U.S. at 690.

Sufficiency of the Evidence

The record shows no arguable basis for challenging the sufficiency of the evidence to support the jury's verdict. The victim of the battery testified that Fleming came to her apartment where they consumed alcohol. She went to use the bathroom and, upon returning to the living area, found that Fleming had removed his pants. Fleming grabbed her and choked her until she was unconscious. She awoke to find Fleming had sexually assaulted her. She resisted Fleming, but he continued to choke and hit her, and he threatened to kill her. After the assault, Fleming forced her to take a shower. When Fleming left, the victim called 911 and was taken to the hospital.

Mary Dexter, a detective with the Barron County Sheriff's Department, testified she investigated the allegations, conducted a criminal history background and photographed the

victim's injuries. She discussed injuries to the victim's cheeks, left eye, shoulders, neck, head behind her ear, and bruising to a knee and thigh.

Psychologist Cynthia Marsh opined that Fleming was suffering from antisocial personality disorder and paraphilia, not otherwise specified. She concluded Fleming's conditions rose to the level of a mental disorder based on Fleming's criminal offenses, both sexual and nonsexual. She conducted a file review of over 1,000 pages including the victim's statements, presentence reports, legal records and social services records. In 1996, Fleming was convicted of battery. The State dismissed a sexual assault charge pursuant to a plea agreement. In 2004, Fleming was charged with two counts of first-degree sexual assault and false imprisonment. He pled no contest to a reduced charge of fourth-degree sexual assault. Marsh also reported on Fleming's history of drug and alcohol abuse. Marsh concluded the 2008 substantial batteries were sexually motivated. Applying risk assessment actuarial tools, Fleming's psychopathy, treatment progress, age and conduct reports, Marsh opined that Fleming's mental disorders made it more likely than not that he would engage in acts of sexual violence.

Psychologist William Merrick also opined that the substantial batteries were sexually motivated. He testified Fleming was suffering from an antisocial personality disorder that caused Fleming serious difficulty in controlling his behavior and predisposed him to acts of sexual violence. Based on Fleming's scores on the actuarial risk assessment instruments, his need for treatment, his reoffending and other adjustment problems on community supervision, Merrick also concluded Fleming was likely to commit acts of sexual violence.

Miranda Simpkins, a probation officer, testified regarding Fleming's history on supervision and described the presentence process. She described Fleming's violations and revocation from supervision, and his failure to follow through with sex offender treatment.

The defense called two expert witnesses. Psychologist Hollida Wakefield diagnosed Fleming with a personality disorder not otherwise specified with antisocial features. However, she did not believe these disorders predisposed him to commit sexually violent offenses because the vast majority of his misconduct was not sexual in nature. Wakefield offered no opinion whether Fleming's most recent battery conviction was sexually motivated. Wakefield also criticized the actuarial instruments used by the State's experts. She concluded that, although Fleming was generally a risk to reoffend, reoffending would not likely involve acts of sexual violence.

Psychologist James Peterson did not conduct an evaluation of Fleming, but testified as to controversy involving the diagnosis of paraphilia not otherwise specified, the characteristics of antisocial personality disorder, and actuarial instruments and their application to WIS. STAT. ch. 980 risk assessments.

After consultation with counsel and a colloquy with the court, Fleming declined to testify.

Construing the evidence, as we must, in the light most favorable to the verdict, the State presented sufficient evidence to support the verdict. *See State v. Treadway*, 2002 WI App 195, ¶33, 257 Wis. 2d 467, 651 N.W.2d 334. The jury could reasonably find the substantial battery was sexually motivated based on the testimony of the victim and the expert witnesses. The jury could also find, based on the expert witnesses' testimony, that Fleming has a personality disorder

that predisposes him to engage in sexually violent behavior and causes him serious difficulty controlling his behavior. The jury decides what weight to give the experts' diagnoses. *State v. Kienitz*, 227 Wis. 2d 423, 438, 597 N.W.2d 712 (1999). Finally, the jury could reasonably find, based on the experts' actuarial instruments, Fleming's mental disorder made it more likely than not that he would engage in future acts of sexual violence.

Vouching for the Victim's Credibility

In his response to the no-merit report, Fleming contends Marsh endorsed the victim's testimony and said Fleming's was unbelievable. That argument exaggerates Marsh's testimony. She testified that some of the actuarial instruments require consideration of accusations of sexual assault as well as convictions. Therefore, she was required to consider the allegations regardless of whether they were proven. She agreed that, if one gave credence to Fleming's criminal trial testimony, it may not be the case that battery was part of his arousal pattern. This testimony did not violate the rule set out in *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984), that a witness is not competent to testify "that another mentally and physically competent witness is telling the truth." Marsh did not say she found the victim's testimony more credible or make any reference to Fleming's testimony being unbelievable. Rather, consistent with the practice of expert witnesses, she based her opinion on facts provided by others as allowed by WIS. STAT. § 907.03 and as required by the directions for scoring some of the actuarial instruments.

Counsel's Closing Arguments

In his response to the no-merit report, Fleming criticizes his counsel's closing argument, in which she characterized the victim as "very weary, kind of worn, kind of a tired person ...

someone who likes to drink, someone whose life is probably as easy as we might enjoy.” Counsel also stated: “You heard testimony today that ... [Fleming] had ... in the past thought about sex for drugs. That if he wanted -- if he gave someone drugs then he could – he felt entitled to sex. We also know that he has a history of battery, perhaps a temper.” Fleming contends his counsel was ineffective because these statements would have caused the jury to see him as a “really bad person.” However, counsel’s strategy was to differentiate between a person whose antisocial personality disorder led to criminal activity and one whose disorder would lead to acts of sexual violence. The evidence of Fleming’s criminal history and the opinion of the psychologists, including his own expert witness, regarding his antisocial personality left counsel with little choice but to acknowledge his undesirable personality but argue the lack of nexus between his disorder and crimes of sexual violence.

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

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

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

Diane M. Fremgen
Clerk of Court of Appeals