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February 3, 2015

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

2014AP1650-NM State of Wisconsin v. Timothy F. Ripp (L. C. #2013CI1)

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

Counsel for Timothy Ripp filed a no-merit report concluding there is no arguable basis for Ripp to challenge a judgment committing him as a sexually violent person. Ripp was advised of his right to respond to the report and has not responded. Upon our independent review of the record, we conclude there is no issue of arguable merit for appeal.

In 1994, Ripp was convicted of attempted first-degree sexual assault and attempted kidnapping. The court sentenced him to ten years in prison on the attempted sexual assault charge, consecutive to a sentence he was then serving, and ten years' probation on the attempted

kidnapping charge, consecutive to the attempted sexual assault sentence. In 2005, as Ripp completed the attempted sexual assault sentence, the State unsuccessfully attempted to confine him as a sexually violent person. Ripp was released from prison to community supervision. Four months later, he was detained on a hold for having sexual contact without his agent's approval, being at a park in the company of a registered sex offender, threatening to kill his roommate, failing to provide true and accurate information to his agent, and possessing women's underwear, which was a part of his modus operandi in his previous sexual assaults. His probation on the attempted kidnapping charge was revoked, and he was sentenced to ten years in prison on the attempted kidnapping charge. As Ripp approached release on that sentence, the State filed another petition for confinement of Ripp as a sexually violent person.

At trial, the State presented two witnesses. Doctor Sheila Fields testified Ripp was suffering from three mental disorders, and had serious difficulty controlling his behavior. Based on the Static-99R actuarial instrument, as well as some "dynamic and idiosyncratic risk factors," she concluded Ripp was more likely than not to commit another sexually violent offense.

Doctor Christopher Tyre also diagnosed Ripp with multiple mental disorders and opined that these disorders caused Ripp serious difficulty controlling his behavior and predisposed him to acts of sexual violence. Based on Ripp's scores on actuarial risk assessment instruments, his elevated psychopathy, his reoffending and other adjustment problems on community supervision, Tyre concluded Ripp was likely to commit acts of sexual violence.

Ripp declined to testify on his own behalf after a colloquy with the court regarding his decision. Ripp presented no witnesses. The jury found the State had proven all of the elements necessary for commitment as a sexually violent person.

The no-merit report presents five potential issues: (1) whether the State's unsuccessful attempt to commit Ripp as a sexually violent person in 2005 bars the present proceeding; (2) whether the petition was timely and alleged a proper predicate offense; (3) whether the jury was properly instructed; (4) whether hearsay tainted the verdict; and (5) whether sufficient evidence supports the jury's verdict. Our independent review of the record confirms counsel's conclusion that none of these issues provide a basis for appeal.

The earlier finding that Ripp was not a sexually violent person did not preclude the State from filing a new petition. Neither claim nor issue preclusion applies because of the change in circumstances following revocation of Ripp's probation. *See* ***State v. Parrish***, 2002 WI App 263, ¶13, 258 Wis. 2d 521, 654 N.W.2d 273. In addition, neither the due process nor equal protection guarantees of the state or federal constitutions made it necessary for the State to prove that Ripp engaged in some sort of new, sexually violent conduct since the previous commitment trial. *See* ***State v. Bush***, 2005 WI 103, ¶¶21-39, 283 Wis. 2d 90, 699 N.W.2d 80; ***State v. Feldman***, 2007 WI App 35, ¶19, 300 Wis. 2d 474, 730 N.W.2d 440.

At the time the current petition was filed, Ripp had completed the attempted sexual assault sentence and was serving the attempted kidnapping sentence. Because he was discharged from the attempted sexual assault sentence, it could not serve as the offense that gave the court competency to proceed under WIS. STAT. § 980.02(1m) (2011-12),[1] which requires the petition to be filed before a person's release from prison for a sexually violent offense. However, the attempted kidnapping sentence could properly serve to satisfy that requirement if it was a

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

sexually motivated offense under WIS. STAT. § 980.01(6)(b). Based on a review of the attempted kidnapping charge, both Fields and Tyre concluded the attempted kidnapping was sexually motivated. While the petition cites both the attempted sexual assault and attempted kidnapping offenses as qualifying offenses under § 980.02(1m), its reliance on one offense that could no longer qualify would not justify dismissal of the petition. *See* ***State v. Spaeth***, 2014 WI 71, ¶34, 355 Wis. 2d 761, 850 N.W.2d 93.

The court instructed the jury that the State must prove three elements: (1) That Ripp has been convicted of a sexually violent offense. Attempted sexual assault is a sexually violent offense. Attempted kidnapping may be a sexually violent offense if it is sexually motivated; (2) That Ripp currently has a mental disorder; and (3) That Ripp is dangerous to others because he has a mental disorder that makes it more likely than not that he will engage in one or more future acts of sexual violence.

The no-merit report questions whether the attempted sexual assault conviction should have been considered by the jury because that sentence had been completed before the present WIS. STAT. ch. 980 petition was filed. We conclude the instruction correctly stated the law. The elements of ch. 980 commitments were changed by 2005 WI Act 434, removing the requirement that the State prove "the allegations in the petition," which included the requirement that the petition was filed within ninety days of the person's release from custody. By virtue of removal of that language, the jury is no longer restricted to considering only the offense that relates to the timing of the petition, but can consider any sexually violent offense to satisfy the first element. *See* WI JI—CRIMINAL 2502 (comment).

Even if the jury was not supposed to consider the attempted sexual assault conviction, there was no objection to the jury instruction. Therefore, any claim of error in the instruction must be considered under the rubric of ineffective assistance of counsel. To establish ineffective assistance, Ripp must show both deficient performance and prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish prejudice, Ripp would have to show a reasonable probability that, but for counsel's unprofessional error, the result of the trial would have been different. *See* ***id.*** at 694. A reasonable probability is one that would undermine our confidence in the outcome. ***Id.*** Ripp could not establish prejudice because, in light of the uncontested sexual motivation for the attempted kidnapping, there is no reasonable probability that a different jury instruction would have changed the outcome.

Both of the expert witnesses relied upon information from the Department of Corrections and the Department of Health Services. An expert may use inadmissible evidence to form an opinion, but the expert's use of the information does not turn otherwise inadmissible evidence into admissible evidence. ***State v. Watson***, 227 Wis. 2d 167, 198-99, 595 N.W.2d 403 (1999). Records prepared by DOC or DHS personnel were admissible under the hearsay exception for public records. WIS. STAT. § 809.03(8); ***State v. Keith***, 216 Wis. 2d 61, 77, 573 N.W.2d 888 (Ct. App. 1997). Other statements included Ripp's own statements to Fields, admissible as an admission by a party opponent. *See* WIS. STAT. § 908.01(4)(b). Because no objection was raised, other possible grounds for admitting hearsay statements were not considered. Counsel's failure to object would not meet the test for ineffective assistance of counsel because counsel could reasonably have concluded that objections or requests for limiting instructions would have provided little benefit and would only have highlighted the testimony. Ripp could not establish that counsel's failure to object would not constitute a reasonable strategy. Nor could he show

sufficient prejudice to undermine our confidence in the outcome. *See* ***Strickland***, 466 U.S. at 694 (1984).

Finally, the record discloses no arguable basis for challenging the sufficiency of the evidence to support the jury's verdict. The element that Ripp had been convicted of a sexually violent offense was not contested. At the time of his arrest, Ripp told officers he attempted to force the victim into his car and drive her to a quarry and sexually assault her. Even if the jury was not supposed to consider the attempted sexual assault, there was no denial of the obvious sexual motivation for the attempted kidnapping. The second element, that he had a mental disorder, was supported by both expert witnesses and was not contradicted by any defense witness. The final element, whether Ripp's mental disorders made it more likely than not that he would engage in future acts of sexual violence, was also supported by the experts' opinions and the actuarial risk assessment instruments.

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 Jefren Olsen is relieved of his obligation to further represent Ripp in this matter. WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals