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July 8, 2015

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

2015AP37-NM

In re the commitment of Eric A. Kerscher:
State of Wisconsin v. Eric A. Kerscher (L.C. #2008C11)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Eric A. Kerscher appeals from an order denying his petition for discharge from his commitment as a sexually violent person under WIS. STAT. ch. 980 (2013-14).¹ Appellate counsel, Russell D. Bohach, filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Kerscher was notified of his right to respond but he has not done so. This court has considered the no-merit report and independently reviewed the

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

record. Because we conclude that no arguably meritorious issue could be raised on appeal, we summarily affirm the order. *See* WIS. STAT. RULE 809.21(1).

Kerscher was committed as a sexually violent person in 2010 after serving a prison sentence for the predicate offense, the 1995 first-degree sexual assault of a child. In 2013 he filed a petition pursuant to WIS. STAT. § 980.09 for discharge from his commitment at Sand Ridge Secure Treatment Center. On November 6, 2013, a jury determined that he remained a sexually violent person. This no-merit appeal followed.

The no-merit report considers a single issue: whether Kerscher could raise an arguably meritorious challenge to the sufficiency of the evidence that he was a sexually violent person. We agree with counsel that he could not.

When a person committed as sexually violent petitions for discharge from the commitment, “the [S]tate has the burden of proving by clear and convincing evidence that the person meets the criteria for commitment as a sexually violent person.” WIS. STAT. § 980.09(3). The State must prove that the person: (1) was convicted of a sexually violent offense, (2) has a mental disorder, and (3) is dangerous to others because the mental disorder makes the person more likely than not to reoffend. *See* WIS. STAT. § 980.02(2)(a)1., (b), (c); WIS JI—CRIMINAL 2506.

We view the evidence supporting the commitment order most favorably to the State and the commitment. *State v. Kienitz*, 227 Wis. 2d 423, 434, 597 N.W.2d 712 (1999). We must uphold the commitment unless the evidence “is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found [the defendant to be a sexually violent person] beyond a reasonable doubt.” *Id.* (alteration in

original; citation omitted). It is for the jury to weigh the evidence, assess the credibility of the witnesses, and resolve any conflicts in the testimony. *Id.* at 435.

If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find [that the defendant is a sexually violent person], an appellate court may not overturn a verdict even if it believes the trier of fact should not have found [the defendant to be a sexually violent person] based on the evidence before it.

Id. at 434-35 (alteration in original; citation omitted).

The parties stipulated to the underlying conviction, establishing the first element. To establish the second element, the State called psychologist James Harasymiw, Ph.D. He opined that Kerscher suffers from antisocial personality disorder, a diagnosis with which Kerscher's expert, forensic psychologist Hollida Wakefield, agreed. Although she did not believe it predisposed him to commit sexually violent offenses, the jury reasonably could have found that Kerscher has a mental disorder.

For the third element, the jury heard the testimony of Harasymiw, Wakefield, and psychologist James Tomony, Ph.D., a treatment evaluator at Sand Ridge,. Tomony testified that Kerscher refused to consent to treatment while at Sand Ridge, received behavior reports, including two in 2013, and committed a series of rules violations, one just two days before trial. He testified that, in the eyes of the treatment team, Kerscher's failure to address the factors that led to his previous offense demonstrated no gain in preventing future sex offenses.

Harasymiw opined that Kerscher has difficulty controlling his behavior and holds a worldview supportive of sexual offending, which, combined with his antisocial personality disorder, predisposes him to commit acts of sexual violence. He testified that Kerscher scored as

“high risk” to reoffend on the RRASOR (Rapid Risk Assessment for Sex Offense Recidivism) actuarial instrument and is two decades away from the age at which sex offenses show any significant decrease. While Harasymiw opined that Kerscher’s refusal to accept treatment neither increases nor decreases his risk for future offending, it was his professional opinion that Kerscher is more likely than not to reoffend.

Wakefield testified about the actuarial instruments she used to evaluate Kerscher. She also testified that, while she found Kerscher’s recent “fairly serious” rule violation “concerning,” she did not believe his mental disorder predisposed him to commit sexually violent offenses, that he is a sexually violent person, or that he is more likely than not to reoffend.

Harasymiw testified that he did not endorse the use of two of the actuarial instruments Wakefield used. He said the “psychometric properties” of one are “pretty uncertain” and not viewed with confidence by the majority of professionals in the field, and the other was developed for a different purpose and produces “absurd” results in this application.

The evidence presented at trial is sufficient to support the jury’s verdict. Kerscher could not mount an arguably meritorious appellate challenge to the jury’s credibility assessments. “The credibility, sufficiency and weight of expert evidence are for the fact finder to determine.” *Tony Spsychalla Farms, Inc. v. Hopkins Agric. Chem. Co.*, 151 Wis. 2d 431, 441, 444 N.W.2d 743 (Ct. App. 1989).

Our independent review of the record discloses no other potentially meritorious issues warranting additional discussion. Any further proceedings would be without arguable merit within the meaning of *Anders* and WIS. STAT. RULE 809.32.

IT IS ORDERED that the order denying Kerscher's petition is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Russell D. Bohach is relieved of any further representation of Eric A. Kerscher on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals