OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I/II

September 16, 2015

To:

Hon. Jeffrey A. Conen
Circuit Court Judge
Safety Building
821 W. State St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Russell D. Bohach
P. O. Box 485
Butler, WI 53007

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Matthew Tyler
Sand Ridge Secure Treatment Center
P.O. Box 800
Mauston, WI 53948

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

2013AP1577-NM In re the commitment of Matthew Tyler: State of Wisconsin v. Matthew Tyler (L.C. # 2008CI5)

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

Following a court trial, Matthew Tyler appeals from a judgment committing him as a sexually violent person under WIS. STAT. ch. 980 (2013-14).[1] Tyler's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32, and ***Anders v. California***, 386 U.S. 738

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted. The judgment of commitment was entered in 2010, and this is Tyler's second no-merit appeal. In 2012, on appellate counsel's motion, we dismissed the prior appeal, No. 2012AP217-NM, to enable counsel to decide how to proceed in light of previously missing transcripts. Appellate counsel eventually filed a new no-merit notice of appeal commencing the instant appeal.

(1967). Tyler filed a response to the no-merit report, and appellate counsel filed a supplemental no-merit report. We ordered counsel to file a second supplemental no-merit report addressing the issues raised in Tyler's response. Appellate counsel has now filed a second no-merit report and Tyler has responded. Upon consideration of the reports, Tyler's responses, and an independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

The no-merit and supplemental no-merit reports address (1) whether the evidence was sufficient to support the trial court's finding that Tyler is a sexually violent person, (2) if the trial court erred in denying Tyler's motion for summary judgment, (3) the propriety of the trial court's evidentiary rulings, and (4) whether trial counsel was ineffective.

We agree with appellate counsel's conclusion that sufficient credible evidence supports the trial court's finding that Tyler is a sexually violent person. The State was required to prove beyond a reasonable doubt that Tyler: (1) had been convicted of a sexually violent offense; (2) suffers from a mental disorder; and (3) is more likely than not, because of that mental disorder, to engage in at least one future act of sexual violence. *See* WIS. STAT. § 980.01(7); *see also* WIS JI—CRIMINAL 2502. A reviewing court may not reverse a commitment based on insufficient evidence unless the evidence, viewed most favorably to the State and the commitment, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found that the respondent was a sexually violent person beyond a reasonable doubt. ***State v. Kienitz***, 227 Wis. 2d 423, 434-35, 597 N.W.2d 712 (1999) (citation omitted). In reviewing the sufficiency of the evidence in a WIS. STAT. ch. 980 proceeding, we defer to the circuit court's assessment of the credibility of witnesses and its evaluation of the evidence. ***State***

v. Rachel, 2010 WI App 60, ¶20, 324 Wis. 2d 465, 782 N.W.2d 443. The no-merit report details the evidence supporting the trial court's finding on each element, and our reading of the trial transcripts confirms that, despite disagreement between the expert witnesses, there was sufficient evidence to find that Tyler is a sexually violent person.

We also agree with appellate counsel's conclusion that no issue of arguable merit arises from the trial court's denial of Tyler's motion for summary judgment. After his trial had commenced, Tyler moved for summary judgment under WIS. STAT. § 802.08, on the ground that there was insufficient evidence to establish that Tyler was a proper subject for commitment. The summary judgment motion consisted of conclusory allegations without supporting affidavits and failed to establish that there was no genuine issue of material fact and that Tyler was entitled to judgment as a matter of law. *See* § 802.08(2). The trial court acknowledged the deficiency of Tyler's filings but allowed additional argument. The court determined that summary judgment was inappropriate because the experts disagreed about whether Tyler was more likely than not to engage in at least one future act of sexual violence. Even assuming for Tyler's sake that summary judgment is available in a WIS. STAT. ch. 980 original commitment,[2] the conflicting expert reports established the existence of disputed material facts, and there is no arguably meritorious challenge to the trial court's decision.

Next, Tyler contends that the trial court erred by permitting the State's expert to answer questions about a number of uncharged allegations that Tyler had engaged in sexual misconduct. On direct examination, the State asked its expert, Dr. Anthony Jurek, if he had considered these

[2] In ***State v. Allison***, 2010 WI App 103, ¶17, 329 Wis. 2d 129, 789 N.W.2d 120, we held that summary judgment is not available in WIS. STAT. § 980.09 discharge proceedings.

allegations in concluding that Tyler is a sexually violent person. Trial counsel objected, asserting that at the probable cause hearing, Jurek testified that he did not rely on the uncharged allegations in arriving at his diagnosis or completing the actuarial instruments. Relying on ***State v. Franklin***, 2004 WI 38, 270 Wis. 2d 271, 677 N.W.2d 276, trial counsel argued that Jurek could not permissibly testify about instances of Tyler's prior conduct unless Jurek had considered them in reaching his expert opinions. We conclude that there is no arguably meritorious challenge to the trial court's ruling. ***Franklin*** stands for the proposition that the statute limiting the use of prior bad acts, WIS. STAT. § 904.04(2), does not apply to evidence offered in Chapter 980 proceedings. ***Franklin***, 270 Wis. 2d 271, ¶14. Further, it is undisputed that Jurek was aware of the prior allegations at the time of his report, and his trial testimony establishes that he did consider the allegations in reaching his ultimate conclusion. To the extent that Tyler believes Jurek's testimony deviated from that at the probable cause hearing, any discrepancy was brought to the trial court's attention. Any challenge to Jurek's purportedly inconsistent testimony went to the weight of that evidence, not its admissibility.

Tyler's response also questions the propriety of the court's pretrial ruling that psychologist Michael S. Kotkin, a proposed defense witness, would not be permitted to testify at trial. It is undisputed that Kotkin evaluated Tyler around the year 2000 as part of Tyler's underlying criminal case. The trial court determined that Kotkin's report from eight or nine years earlier which was prepared in anticipation of Tyler's sentencing was irrelevant to whether Tyler presently met the WIS. STAT. ch. 980 commitment criteria. The admissibility of evidence lies within the trial court's sound discretion. ***State v. Pepin***, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). Here, we conclude that the trial court "examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a

reasonable judge could reach." ***State v. Walters***, 2004 WI 18, ¶14, 269 Wis. 2d 142, 675 N.W.2d 778. There is no arguably meritorious challenge to the trial court's ruling that Kotkin's testimony was inadmissible.

On a related matter, we determine that Jurek's testimony concerning the presentence investigation report (PSI) which contained reference to Kotkin's evaluation does not give rise to a meritorious issue. As set forth in the second supplemental no-merit report, Tyler's assertion that he never specifically authorized Jurek to consider the PSI is irrelevant. Pursuant to WIS. STAT. § 972.15(4) and (6)(e), Jurek was explicitly authorized to use the PSI "and any information contained in it or upon which it is based … in any evaluation, examination, referral, hearing, trial … or other proceeding under WIS. STAT. ch. 980." [3]

The remainder of Tyler's asserted issues implicate the ineffective assistance of trial counsel either directly or indirectly, by virtue of counsel's failure to lodge a contemporaneous objection.[4] We normally decline to address claims of ineffective assistance of trial counsel if the issue was not raised by a postconviction motion in the circuit court. ***State v. Machner***, 92

[3] Tyler appears to argue that Jurek could not permissibly testify about statements in the PSI concerning Kotkin's evaluation, or, in the alternative, that Kotkin should have been allowed to testify in order to rebut the PSI author's statements. The trial court rejected Tyler's argument. Once again, no arguably meritorious issue arises from the trial court's discretionary decision that Kotkin could not testify at Tyler's WIS. STAT. ch. 980 trial. ***State v. Pepin***, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982).

Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether Tyler's ineffective assistance claims have sufficient merit to require appointed counsel to file a postconviction motion and request a ***Machner*** hearing. *See* ***State v. Allen***, 2010 WI 89, ¶88, 328 Wis. 2d 1, 786 N.W.2d 124 (broad scope of no-merit review suggests that we "should identify issues of arguable merit even if those issues were not preserved in the circuit court, especially where the ineffective assistance of postconviction counsel was the reason those issues were not preserved for appeal"). We agree with appellate counsel that the record does not support an arguable ineffective assistance of counsel claim.

Pointing to specific questions asked by trial counsel on direct and cross-examination, Tyler asserts that counsel was not sufficiently prepared or experienced. A defendant is entitled to a fair trial, not a perfect one, with an adequate lawyer, not the best one. ***State v. Hanson***, 2000 WI App 10, ¶20, 232 Wis. 2d 291, 606 N.W.2d 278. Further, Tyler does not explain and we cannot fathom how trial counsel's examination technique was arguably prejudicial. *See* ***State v. Davis***, 95 Wis. 2d 55, 60, 288 N.W.2d 870 (Ct. App. 1980) ("Self-serving assertions by a

[4] The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Id***. at 690. To satisfy the prejudice prong, the defendant must demonstrate that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id***. at 694. We need not address both prongs if the defendant fails to make a sufficient showing on either one. ***Id***. at 697.

defendant based on mere speculation cannot serve as the grounds for a finding of actual prejudice.").[5]

Tyler also asserts that trial counsel should have objected to Jurek's testimony about "recent changes… in risk assessments" such as extrapolation data that was not included in his "outdated" report. As stated in appellate counsel's second supplemental no-merit report, there is no statutory or case law prohibiting the use of extrapolation when determining risk assessment. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel is not ineffective for failing to raise a meritless claim). Additionally, trial counsel thoroughly cross-examined Jurek on the age of his report as well as his failure to file any updates, and both of Tyler's expert witnesses offered extensive testimony rebutting Jurek's methods and conclusions. Ultimately, the trial court permissibly accepted Jurek's opinion in finding that Tyler was a sexually violent person. *See* ***Plesko v. Figgie Int'l***, 190 Wis. 2d 764, 775, 528 N.W.2d 446 (Ct. App. 1994) (the court as the finder of fact is the ultimate arbiter of the credibility of the witnesses and of the weight to be given to each witness's testimony).

Relying on ***State v. Budd***, 2007 WI App 245, 306 Wis. 2d 167, 742 N.W.2d 887, Tyler asserts that trial counsel should have objected to Jurek's testimony about the Department of Corrections process for screening and referring inmates for WIS. STAT. ch. 980 commitments. Here, unlike ***Budd***, Jurek's brief testimony outlined in general terms the basic referral scheme and did not cite specific percentages in order to suggest that Tyler was part of a small group "of

[5] Similarly, Tyler's complaints that trial counsel did not communicate with him after the trial and that counsel "presented false billing records and did not provide trust account information" do not arguably establish constitutional prejudice.

the worst of all sex offenders by virtue of his appearing in court for ch. 980 proceedings." ***Budd***, 306 Wis. 2d 167, ¶¶15-16. Given these distinctions along with the fact that Tyler's trial was to a court rather than a jury, we conclude that Jurek's testimony did not run afoul of ***Budd***, and there was no basis for an objection. *See* ***Wheat***, 256 Wis. 2d 270, ¶14. Further, even if we assume that trial counsel had a basis for objecting under ***Budd***, this omission was not arguably prejudicial. Again, Jurek's testimony was brief, provided the context for his evaluation, and was presented to a factfinder already familiar with the statutory scheme for commitment proceedings.[6]

Our review of the record discloses no other potential issues for appeal.[7] Accordingly, this court accepts the no-merit report, affirms the commitment judgment and discharges appellate counsel of the obligation to represent Tyler further in this appeal.

Upon the foregoing reasons,

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

[6] Tyler asserts that, in the alternative, the trial court erred by preventing trial counsel from questioning Jurek about the actuarial instruments used by the End of Confinement Review Board (ECRB) in the screening process. Tyler argues that the sought-after testimony was admissible under WIS. STAT. § 901.07 (often called the rule of completeness), which permits the introduction by an adverse party of "any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously" with an admitted writing or recorded statement. We disagree. The information trial counsel sought to elicit was not part of a written or recorded statement and in any event was qualitatively different from and irrelevant to Jurek's general testimony about the referral process. *See* ***State v. Eugenio***, 219 Wis. 2d 391, 411-12, 579 N.W.2d 642 (1998) ("Under the rule of completeness the court has discretion to admit only those statements which are necessary to provide context and prevent distortion.").

[7] Specifically, we have reviewed Tyler's waiver of his right to a jury trial, the handling of additional evidentiary objections at trial, and closing arguments. To the extent Tyler's responses raise additional claims not specifically addressed in this opinion, we have considered but reject them as without arguable merit.

IT IS FURTHER ORDERED that Attorney Russell D. Bohach is relieved from further representing Matthew Tyler in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals