



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](http://www.wicourts.gov)

**DISTRICT III**

August 29, 2017

To:

Hon. William M. Gabler, Sr.  
Circuit Court Judge  
Eau Claire County Courthouse  
721 Oxford Avenue  
Eau Claire, WI 54703-5496

Susan Schaffer  
Clerk of Circuit Court  
Eau Claire County Courthouse  
721 Oxford Avenue, Ste. 2220  
Eau Claire, WI 54703-5496

Gary King  
District Attorney  
721 Oxford Ave  
Eau Claire, WI 54703

Dennis Schertz  
Schertz Law Office  
P.O. Box 133  
Hudson, WI 54016

Thomas H. Bush 136414  
Sand Ridge Secure Treatment Center  
P.O. Box 800  
Mauston, WI 53948

Criminal Appeals Unit  
Department of Justice  
P.O. Box 7857  
Madison, WI 53707-7857

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

---

2016AP100-NM

State v. Thomas H. Bush (L. C. No. 1997CII)

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

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Counsel for Thomas Bush has filed a no-merit report concluding there is no arguable basis for challenging an order denying Bush's petition for discharge and alternative request for supervised release from his commitment as a sexually violent person pursuant to WIS. STAT.

ch. 980 (2015-16).<sup>1</sup> Bush filed a response challenging both the sufficiency of the evidence to support the jury's verdict and the effectiveness of his trial counsel. Upon our independent review of the record as mandated by WIS. STAT. RULE 809.32, we conclude there is no arguable merit to any issue that could be raised on appeal.

Bush was initially committed in 1997, but his commitment was reversed because of a prejudicial jury instruction. Bush was retried and committed again in 2000. Following the denial of periodic petitions for discharge or supervised release, Bush filed the present motion for discharge and requested a jury trial. After a trial, the jury found the State had met its burden of proving, by clear and convincing evidence, that Bush continues to meet the criteria for commitment as a sexually violent person. After a subsequent hearing, the circuit court denied Bush's alternative request for supervised release.

The record discloses no arguable basis for challenging the sufficiency of the evidence to support the jury's finding. This court must sustain the finding if the evidence, viewed most favorably to the verdict, establishes by clear and convincing evidence that: (1) Bush was convicted of a qualifying offense; (2) he has a qualifying mental disorder; and (3) he is dangerous to others in that his mental disorder makes it more likely than not that he will engage in future acts of sexual violence. *See State v. Burgess*, 2002 WI App 264, ¶23, 258 Wis. 2d 548, 565 N.W.2d 81; WIS. STAT. §§ 980.01(7) and 980.09.

Sufficient evidence supports the jury's verdict. A psychologist, Dr. James LeClair, testified regarding Bush's most recent treatment progress report—a report prepared by a member

---

<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

of Bush's treatment team reflecting the consensus of the team. Doctor LeClair noted that although he neither interviewed Bush for the report nor wrote the original draft of the report, he had reviewed the report. Doctor LeClair testified at length about the contents of the report, noting Bush was in phase two of a three-phase treatment track utilized at Sand Ridge Secure Treatment Center.<sup>2</sup> Doctor LeClair ultimately opined that Bush had not made significant progress in treatment.

Doctor Sheila Fields, the psychologist who prepared Bush's annual reevaluation report, testified about Bush's lengthy criminal history, including his 1988 conviction for attempted second-degree sexual assault of an elderly nursing home patient. Doctor Fields opined that Bush suffered from pedophilia, unspecified paraphilic disorder and antisocial personality disorder, all three mental health diagnoses predisposing Bush to sexual violence under WIS. STAT. ch. 980. Doctor Fields testified Bush had "not quite demonstrated significant progress in treatment." She further indicated that Bush's unwillingness to participate in a "sexual fantasies and thoughts" polygraph hindered her ability to ascertain whether Bush had been controlling his deviant fantasies, as he claimed. Doctor Fields nevertheless concluded that, after utilizing various risk assessments, and considering the effects of aging, Bush's risk of reoffending "may approach 50 percent" but did not clearly exceed 50 percent. Thus, Dr. Fields opined, to a reasonable degree of psychological certainty, that the sixty-seven-year-old Bush had met the criteria for discharge because he was "not more likely than not to commit further sexually violent acts." Another psychologist, Dr. Craig Rypma, likewise opined, to a reasonable degree of psychological

---

<sup>2</sup> A fourth phase is intended to be completed during supervised release.

certainty, that Bush was not more likely than not to commit a sexually violent offense in the future.

Although both Drs. Fields and Rypma opined that Bush met the criteria for discharge, the jury “was free to weigh the expert[s’] testimony when it conflicted and decide which was more reliable; to accept or reject the testimony of any expert, including accepting only parts of an expert’s testimony; and to consider all of the non-expert testimony” in deciding whether it was more likely than not that Bush would commit future acts of sexual violence. *See State v. Kienitz*, 227 Wis. 2d 423, 441, 597 N.W.2d 712 (1999). Viewing the evidence in the light most favorable to the jury’s verdict, there is ample evidence to support the verdict, given Bush’s criminal history; his failure to reach the third phase of treatment after nearly two decades at Sand Ridge, and his recent refusals to submit to polygraph testing.

Any challenge to Bush’s waiver of his right to testify would lack arguable merit. Here, the circuit court engaged Bush in an on-the-record colloquy, discussing with him both his right to testify and his right to not testify. After indicating that he had sufficient time to discuss his rights with counsel, Bush confirmed he was waiving his right to testify, and the circuit court found Bush’s decision to be free, voluntary, intelligent and knowing. There is no arguable merit to challenge this waiver.

There is likewise no arguable basis for challenging the order denying Bush’s alternative motion for supervised release. *See* WIS. STAT. § 980.09(4). This court undertakes an independent review of the record to determine whether sufficient evidence supports the circuit court’s conclusion regarding supervised release. *State v. Brown*, 2005 WI 29, ¶5, 279 Wis. 2d

102, 693 N.W.2d 715. However, we defer to the circuit court's credibility determinations in evaluating the evidence. *Id.*, ¶44.

Bush had the burden of proving by clear and convincing evidence that he met the criteria for supervised release. *See* WIS. STAT. § 980.08(4)(cj). In making this determination, the circuit court may consider the person's mental history and current mental condition, where the person will live, how the person will support himself or herself, and what arrangements are available to ensure that the person has access to and will participate in necessary treatment. WIS. STAT. § 980.08(4)(c). The circuit court may not authorize supervised release unless, based on all of the reports, file records, and evidence presented, the court finds that all of the following criteria are met: (1) the person is making significant progress in treatment and the person's progress can be sustained while on supervised release; (2) it is substantially probable that the person will not engage in an act of sexual violence while on supervised release; (3) treatment that meets the person's needs and a qualified provider of the treatment are reasonably available; (4) the person can reasonably be expected to comply with his or her treatment requirements and with all of his or her conditions or rules of supervised release that are imposed by the court or by the department; and (5) a reasonable level of resources can provide for the level of residential treatment, supervision, and ongoing treatment needs that are required for the safe management of the person while on supervised release. WIS. STAT. § 980.08(4)(cg). Based on the evidence adduced at trial, the circuit court found that Bush had not met his burden of proving he has made significant progress in treatment as contemplated under § 980.08(4)(cg). The record supports this conclusion.

The record discloses no arguable basis for challenging the effectiveness of Bush's trial counsel. To establish ineffective assistance of counsel, Bush must prove that his attorney's

representation was both deficient and prejudicial to his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance is based on an objective standard of reasonableness as measured against prevailing professional norms. *Id.* at 688. To establish prejudice, Bush must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is one that undermines our confidence in the outcome. *Id.* at 694.

The no-merit report addresses whether trial counsel was ineffective by failing to object on hearsay grounds to Dr. LeClair's testimony regarding Bush's treatment progress. Because this testimony was admissible under the hearsay exception for statements made for purposes of medical diagnosis or treatment, WIS. STAT. § 908.03(4), trial counsel was not deficient by failing to raise a meritless objection. *See State v. Maloney*, 2005 WI 74, ¶37, 281 Wis. 2d 595, 698 N.W.2d 583.

The no-merit report also questions whether trial counsel was ineffective by failing to object to Dr. LeClair's testimony based on a violation of WIS. STAT. § 980.031(5). That statute provides, in relevant part: "No licensed physician, licensed psychologist, or other mental health professional who is expected to be called as a witness by one of the parties or by the court may testify at any proceeding under this chapter unless a written report of his or her *examination* has been submitted to the court and to both parties at least 10 days before the proceeding." (Emphasis added.) As noted above, Dr. LeClair testified regarding Bush's treatment progress report and explained that he had not examined Bush for the report. Because Dr. LeClair did not examine Bush, he had no examination report to submit. In his response, Bush appears to claim his trial counsel was ineffective by failing to challenge Dr. LeClair's testimony that he did not interview Bush for the progress treatment report. Bush, however, indicates an interview with

Dr. LeClair occurred *after* the progress treatment report was filed. Therefore, we discern no issue of arguable merit as to these claims regarding Dr. LeClair's testimony.

Bush claims his trial counsel was ineffective by failing to challenge the admission of any evidence regarding his progress in treatment, as treatment progress is not a criterion for discharge but, rather, for supervised release. Under WIS. STAT. § 904.01, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." That treatment progress is not a delineated factor in discharge determinations does not mean it is not a relevant consideration, as such evidence relates to whether one remains sexually violent. Because evidence of Bush's treatment progress was relevant to the discharge determination and not otherwise excludable under WIS. STAT. § 904.03,<sup>3</sup> the claim that trial counsel was ineffective by failing to object to this evidence lacks arguable merit.

Bush also faults his trial counsel for failing to stipulate that he was convicted of a sexually violent offense and that he was diagnosed with qualifying mental illnesses. In a WIS. STAT. ch. 980 proceeding, evidence that the respondent engaged in inappropriate sexual behavior is not offered to prove commission of a particular act. Rather, the evidence is offered to show a substantial probability that he or she will act in conformity with his past behavior in the future, making him dangerous. The United States Supreme Court has recognized, "[p]revious instances of violent behavior are an important indicator of future violent tendencies." *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997). Here, the State was entitled to prove its case by evidence

---

<sup>3</sup> WISCONSIN STAT. § 904.03 governs the exclusion of relevant evidence on grounds of prejudice, confusion or waste of time.

of its own choice, and it is speculative to suggest the State would have agreed to a stipulation if offered, especially when the nature of Bush's underlying crimes and mental illnesses were relevant to determining whether the remaining criterion for discharge was satisfied. Any claim that trial counsel was ineffective in this regard therefore lacks arguable merit.

Bush also claims his trial counsel was ineffective by failing to challenge the circuit court's decision to permit exhibits related to his treatment progress in the jury room. Whether an exhibit goes to the jury room is a matter within the circuit court's discretion. See *State v. Larsen*, 165 Wis. 2d 316, 321-22, 477 N.W.2d 87 (Ct. App. 1991). A circuit court's decision whether to send exhibits to the jury during deliberations is guided by three considerations: (1) "whether the exhibit will aid the jury in proper consideration of the case"; (2) "whether a party will be unduly prejudiced by submission of the exhibit"; and (3) "whether the exhibit could be subjected to improper use by the jury." *State v. Jensen*, 147 Wis. 2d 240, 260, 432 N.W.2d 913 (1988). As noted above, Bush's treatment progress is relevant to determining whether Bush remains sexually violent. The circuit court noted the treatment progress reports were discussed at trial. The court further indicated it did not think the jury could "make any mischief of any of this." Because the circuit court properly exercised its discretion when sending the exhibits to the jury room, any claim that trial counsel was deficient by failing to object to the court's decision to do so would lack arguable merit.

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 Dennis Schertz is relieved of his obligation to further represent Bush in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

---

*Diane M. Fremgen*  
*Clerk of Court of Appeals*