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September 20, 2017

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

2017AP81-NM In re the commitment of Gregory H. Smith:
State of Wisconsin v. Gregory H. Smith (L.C. # 2015CI3)

Before Brennan, P.J., Brash and Dugan, 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).

Gregory H. Smith appeals an order committing him to the Wisconsin Department of Health Services as a sexually violent person. Smith's appellate counsel, Attorney Dennis Schertz, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS.

STAT. RULE 809.32 (2015-16).[1] Smith has not filed a response. Upon our review of the no-merit report and the record, we conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm the commitment order. *See* WIS. STAT. RULE 809.21(1).

In January 2001, Smith pled guilty to third-degree sexual assault. As reflected in the criminal complaint, he went to the home of a female acquaintance and demanded sex. When she did not cooperate, he choked her, bit her, and forced her to have both penis-to-vagina intercourse and mouth-to-penis sexual contact. The circuit court imposed and stayed an evenly-bifurcated ten-year term of imprisonment and imposed a five-year term of probation. Smith's probation was subsequently revoked. After serving his term of initial confinement, he was released to extended supervision, but his extended supervision was also revoked and he returned to prison. On August 19, 2015, before his anticipated release date of August 25, 2015, the State petitioned for Smith's commitment under WIS. STAT. ch. 980. *See* WIS. STAT. § 980.02(1m). Smith demanded a jury trial. The jury found Smith was a sexually violent person, and the circuit court committed him under WIS. STAT. § 980.06.

In the no-merit report, appellate counsel first examines whether Smith could challenge the sufficiency of the evidence presented at trial. The State was required to prove beyond a reasonable doubt that Smith: (1) was convicted of a sexually violent offense; (2) suffers from a mental disorder; and (3) is dangerous because he is more likely than not to engage in at least one future act of sexual violence because of the mental disorder. *See* WIS. STAT. §§ 980.01(7) and 980.05(3)(a); *see also* WIS JI—CRIMINAL 2502.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

When we review the sufficiency of evidence presented to support a WIS. STAT. ch. 980 commitment order, we use the same standard we apply when reviewing the sufficiency of evidence presented to support a judgment of conviction. *See* ***State v. Curiel***, 227 Wis. 2d 389, 418-19, 597 N.W.2d 697 (1999). Accordingly, we may not substitute our judgment for that of the trier of fact 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. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence presented at trial to find that the respondent was a sexually violent person, this court may not overturn the verdict. *See* ***id.***

At trial, a certified judgment of conviction established that Smith had been convicted of third-degree sexual assault in violation of WIS. STAT. § 940.225(3), which is a sexually violent offense pursuant to WIS. STAT. § 980.01(6)(a). Cedric Love, a probation and parole agent with the Department of Corrections, testified on the State's behalf about the multiple accusations of sexual assault levelled against Smith while he was under community supervision, the allegations underlying those accusations, his prison disciplinary record of seventeen misconduct reports, and his federal conviction for failure to register as a sex offender.

The State also presented the testimony of Dr. Melissa Westendorf, a psychologist with the Department of Corrections. She testified that Smith suffers from two mental disorders: (1) Sexual Sadism Disorder and (2) Other Specified Personality Disorder. She further testified that Smith exhibits a high degree of psychopathy, which she described as a "supercharged antisocial personality disorder." Westendorf next described the actuarial tools and the analysis she conducted to assess Smith's risk of committing future acts of sexual violence. Based on the

assessments and Smith's diagnoses, Westendorf opined to a reasonable degree of psychological certainty that Smith suffers from mental disorders that make it more likely than not he will commit a future act of sexual violence.

Smith presented two experts in his defense who reached conclusions different from those of Westendorf. The jury was free, however, to reject the expert opinions that Smith presented and to find that he was a sexually violent person based on the expert testimony and other evidence presented by the State. *See* ***State v. Owens***, 2016 WI App 32, ¶17, 368 Wis. 2d 265, 878 N.W.2d 736. Any challenge to the sufficiency of the evidence therefore would lack arguable merit.

We next consider whether Smith could pursue an arguably meritorious claim that the circuit court erroneously rejected his pretrial challenge to portions of the State's proposed expert testimony. Specifically, Smith sought to bar Westendorf from testifying about the results derived from two of the three actuarial instruments she used to measure Smith's risk to commit future acts of sexual violence. According to Smith, the two disputed instruments—the Static-99 and the Rapid Risk Assessment of Sex Offender Recidivism (RRASOR)—are outdated and therefore not scientifically reliable. The circuit court conducted a hearing and concluded that Westendorf's proposed expert testimony was admissible under WIS. STAT. § 907.02 and ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993).

Under the ***Daubert*** standard codified in WIS. STAT. § 907.02, the circuit court is required to ensure that an "expert's opinion is based on a reliable foundation and is relevant to the material issues.... The question is whether the scientific principles and methods that the expert relies upon have a reliable foundation 'in the knowledge and experience of [the expert's]

discipline.'" ***State v. Giese***, 2014 WI App 92, ¶¶17-18, 356 Wis. 2d 796, 854 N.W.2d 687 (citation omitted). The relevant factors for the circuit court's consideration include "whether the scientific approach can be objectively tested, whether it has been subject to peer review and publication, and whether it is generally accepted in the scientific community." ***Id.*** An appellate court reviews the circuit court's decision admitting or excluding expert testimony under the deferential erroneous exercise of discretion standard. *See* ***id.***, ¶16.

Here, the circuit court concluded that testimony regarding the Static-99 was admissible based on evidence showing that the instrument has been cross-validated in at least seventy studies in more than fifteen countries and that it is the subject of ongoing research, including a recent study showing it to be a better predictor of recidivism for prison populations than later-developed instruments. As to the RRASOR, the State demonstrated that the instrument has been cross-validated by at least thirty-five published and peer-reviewed studies and that research conducted within the previous five years produced results showing that the instrument remained a good predictor of sexual offense recidivism when considered in conjunction with other measures. Accordingly, the record shows that the circuit court reasonably exercised its discretion in admitting Westendorf's proposed expert testimony regarding the two challenged actuarial instruments. *See* ***id.*** Further appellate proceedings regarding this issue would be frivolous within the meaning of ***Anders***.

Last, we address appellate counsel's conclusion that no grounds exist to challenge the effectiveness of Smith's trial attorneys. To prevail on a claim that trial counsel was ineffective, a complainant must show both that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether

counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

In this case, Smith secured a ruling *in limine* prohibiting the State from referring to his lawyers as public defenders on the ground that such information was irrelevant, but one of Smith's own experts subsequently testified at trial that the expert became involved in the case at the request of lawyers from the Milwaukee public defender's office. Counsel did not object or otherwise move to limit the effect of this testimony. We have therefore considered whether Smith could pursue an arguably meritorious claim that his trial lawyers were ineffective in response to the testimony. We conclude he could not do so.

"[T]he test for whether counsel's performance was deficient is objective, not subjective." ***State v. Carlson***, 2014 WI App 124, ¶30, 359 Wis. 2d 123, 857 N.W.2d 446 (internal citation omitted). Accordingly, when considering the deficient performance prong of ***Strickland***, we "determine whether defense counsel's performance was objectively reasonable according to prevailing professional norms." *See* ***State v. Kimbrough***, 2001 WI App 138, ¶31, 246 Wis. 2d 648, 630 N.W.2d 752. Here, Smith's trial lawyers were objectively reasonable in focusing the jury's attention on the helpful testimony Smith's experts offered regarding Smith's risk to reoffend rather than drawing attention to irrelevant information about the status of defense counsel. As to the prejudice prong of ***Strickland***, courts around the country have concluded that brief references to lawyers as public defenders are not prejudicial. *See* ***State v. Denney***, No. 15-0318, 2016 WL 3269556, at *3 & n.1 (Iowa Ct. App. June 15, 2016) (collecting cases and reflecting that claims for relief based on references to defense lawyers as public defenders have been rejected by courts in Arkansas, Tennessee, Pennsylvania, Colorado, Minnesota, New

Jersey, California, Louisiana, and Ohio). A challenge to trial counsels' effectiveness would be frivolous within the meaning of ***Anders***.

Based on our independent review of the record, no other issues warrant discussion. We conclude that any further proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of any further representation of Gregory H. Smith on appeal. *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