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March 19, 2019

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

2018AP658-NM In re the commitment of Nathan Fleming: State of Wisconsin v. Nathan Fleming (L.C. # 2010CI1)

Before Lundsten, P.J., Sherman and Blanchard, 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).

Attorney Jeffrey Jensen has filed a no-merit report seeking to withdraw as appellate counsel for Nathan Fleming in this appeal from the order denying Fleming's petition for discharge from commitment under WIS. STAT. ch. 980 (2017-18).[1] *See* WIS. STAT. RULE 809.32;

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Anders v. California, 386 U.S. 738, 744 (1967). The no-merit report addresses: (1) the sufficiency of the evidence to support the jury's determination that Fleming is a sexually violent person; and (2) whether Fleming's discharge trial counsel was ineffective by failing to object to the admission of photographs. Fleming was sent a copy of the report, and has filed a response arguing that his discharge trial counsel was ineffective. Upon reviewing the entire record, as well as the no-merit report and response, we agree with counsel's assessment that there are no arguably meritorious appellate issues.

In August 2016, Fleming petitioned for discharge from his commitment as a sexually violent person under WIS. STAT. ch. 980. The circuit court granted a trial on the petition, and the trial was held before a jury. At trial, the State presented testimony by a State psychologist who evaluated Fleming and by the victim of the substantial battery that was the underlying offense for Fleming's commitment. The State also presented a 911 recording of the victim's call following the attack and photographs of the victim's injuries. Fleming presented testimony by his own evaluating psychiatrist. The jury found that Fleming is a sexually violent person, and the court denied the petition for discharge.

The first issue addressed in the no-merit report is whether the evidence was sufficient to support the jury's verdict. *See* ***State v. Brown***, 2005 WI 29, ¶¶42-46, 279 Wis. 2d 102, 693 N.W.2d 715 (applying sufficiency of the evidence test in WIS. STAT. ch. 980 context). Evidence is sufficient to support an order as to a ch. 980 commitment "'unless the evidence, viewed most favorably to the state and the [commitment], 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]'" according to the applicable burden of proof. *See*

State v. Marberry, 231 Wis. 2d 581, 593, 605 N.W.2d 612 (Ct. App. 1999) (bracketed material in original; quoted source omitted).

If a person committed under WIS. STAT. ch. 980 petitions for discharge and the court holds a hearing on the petition, as here, the State has the burden to prove by clear and convincing evidence that the petitioner meets the criteria for commitment as a sexually violent person. *See* WIS. STAT. § 980.09(3). Those criteria are: (1) the person has been convicted of a sexually violent offense; (2) the person has a mental disorder—that is, a congenital or acquired condition affecting the person's emotional or volitional capacity—predisposing the person to engage in sexual violence; and (3) the person is dangerous because his or her mental disorder makes it more likely than not that he or she will engage in sexual violence. *See* WIS. STAT. §§ 980.01(1m), (2), (6), and (7); 980.06.

At the jury trial, the State presented testimony by the victim of the substantial battery that served as Fleming's underlying conviction that Fleming had choked her to the point of unconsciousness and sexually assaulted her. She testified that, during the assault, Fleming hit her in the face, and that, when she regained consciousness and tried to fight him off, Fleming repeatedly choked her to the point of unconsciousness. The State played the 911 recording of the victim's call following the assault, and also showed the jury pictures of the victim's injuries that the victim stated were the result of Fleming's attack, although she did not remember how all of them occurred. On cross-examination, the victim acknowledged that Fleming had been acquitted of the sexual assault at trial.

The State also presented testimony by a psychologist employed by the Sand Ridge Secure Treatment Center Evaluation Unit. The State psychologist testified as to the methodology she

employed to evaluate Fleming and that, to a reasonable degree of professional certainty, she believed that Fleming suffered from a mental disorder that predisposed him to engage in sexual violence and that he was more likely than not to reoffend.

Fleming presented testimony from a psychiatrist who had evaluated Fleming. Fleming's psychiatrist testified that, to a reasonable degree of professional certainty, she believed that Fleming no longer suffered from a mental disorder that predisposed him to engage in sexual violence and that he was not more likely than not to reoffend.

Because there was sufficient evidence at trial that, if deemed credible by the jury, satisfied all of the criteria to find that Fleming is a sexually violent person, it would be wholly frivolous to argue that the evidence was insufficient to support the jury verdict. *See* WIS. STAT. §§ 980.01(1m), (2), (6), and (7); 980.06; *see also* ***Marberry***, 231 Wis. 2d at 593.

Next, the no-merit report addresses whether there would be arguable merit to a claim of ineffective assistance of counsel for failing to object to the State's introduction of photographs of the victim's injuries. No-merit counsel asserts that the photographs were irrelevant because the only issue at the discharge hearing was whether Fleming's condition had changed such that he no longer had a mental condition making it more likely than not that he will commit a crime of sexual violence. *See* WIS. STAT. § 904.02 (only relevant evidence admissible). No-merit counsel opines, however, that it would be frivolous to argue that Fleming was prejudiced by counsel's deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (claim of ineffective assistance of counsel must show that counsel's performance was deficient and also that the deficient performance prejudiced the defense). No-merit counsel states that it would be

impossible to show prejudice because the effect of the photographs on the jury could not be quantified.

Fleming argues in his no-merit response that his discharge trial counsel was ineffective by failing to object to the victim's testimony and the admission of the 911 recording and the photographs of the victim's injuries. He argues that the evidence served no purpose except to create animosity towards him on the part of the jury. He reiterates no-merit counsel's position that the only issue for the jury to decide was whether he had a mental condition that made it more likely than not that he would commit a crime of sexual violence. He argues that the victim's testimony, the 911 recording, and the photographs caused the jury to be biased against him.

We conclude that a claim of ineffective assistance of counsel on this basis would lack arguable merit. At the outset, it is not correct that the only issue before the discharge hearing jury was whether Fleming's condition had changed such that he no longer had a mental disorder making it more likely than not that he would commit a crime of sexual violence. Rather, at Fleming's discharge trial, the State had the burden to prove by clear and convincing evidence that Fleming: (1) had been convicted of a sexually violent offense; (2) had a mental disorder that predisposed him to engage in sexual violence; and (3) was dangerous because his mental disorder made it more likely than not that he will engage in sexual violence. *See* WIS. STAT. §§ 980.09(3); 980.01(1m), (2), (6), and (7); 980.06. Thus, the first element the State had to prove was that Fleming had been convicted of a sexually violent offense. In this case, that required the State to prove that the substantial battery Fleming committed was sexually motivated. *See* § 980.01(6)(b); WIS JI—CRIMINAL 2506.

Moreover, in opening statements, Fleming's discharge trial counsel argued to the jury that the first issue it would have to decide was whether Fleming had been convicted of a sexually motivated offense. Counsel argued that Fleming went to trial on the charges against him of sexual assault and substantial battery, and that the jury acquitted him of the sexual assault but convicted him of the substantial battery. Counsel argued that there were different versions of the facts of that case, and that ultimately the jury would have to decide if the evidence was strong enough to find that the crime was sexually motivated. In closing arguments, Fleming's discharge trial counsel reiterated that the first element the jury had to find was whether or not the substantial battery was sexually motivated. Counsel argued that Fleming had been acquitted of the sexual assault charge, and asked the jury to consider that in its determination. Thus, an issue in dispute at the discharge trial was whether or not Fleming's underlying substantial battery was sexually motivated. The State introduced testimony by the victim, and the corroborating 911 recording and photographs of the victim's injuries, to establish that the substantial battery was sexually motivated. The evidence presented by the State was relevant to an issue in dispute, and Fleming's discharge trial counsel therefore did not perform deficiently by failing to object.

Upon our independent review of the record, we have found no other arguable basis for reversing the order denying Fleming's petition for discharge. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Therefore,

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jeffrey Jensen is relieved of any further representation of Nathan Fleming in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals