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DISTRICT III

March 8, 2022

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

2019AP1121-NM State of Wisconsin v. Steven L. Collins (L. C. No. 2011CI1)

Before Stark, P.J., Hruz and Gill, 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).

Steven Collins appeals an order committing him as a sexually violent person pursuant to WIS. STAT. ch. 980 (2019-20).[1] Attorney Michael Covey has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32. Collins was advised of his right to respond to the no-merit report and has filed a response raising multiple issues. Counsel has filed

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

a supplemental no-merit report addressing Collins' claims. Having independently reviewed the entire record as mandated by ***Anders v. California***, 386 U.S. 738, 744 (1967), we conclude that there is no arguable merit to any issue that could be raised on appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

In January 2011, the State filed a petition to commit Collins as a sexually violent person under WIS. STAT. ch. 980. Following a probable cause hearing in July 2011, the circuit court determined there was probable cause to believe that Collins was a sexually violent person within the meaning of WIS. STAT. § 980.01(7).[2] Numerous delays subsequently ensued, and a jury trial on the State's petition did not take place until May 2017.[3] The jury failed to reach a unanimous decision, however, and the court declared a mistrial.

A second jury trial on the State's petition was held on April 30 and May 1, 2018. At trial, the State introduced a certified copy of a judgment showing that Collins had been convicted of second-degree sexual assault by use of force in 2005. The State also relied on the testimony of psychologist Anthony Jurek, and various reports that Jurek had prepared regarding Collins since 2010 were introduced into evidence.

[2] Although the probable cause hearing did not take place within ten days of Collins' then-scheduled release date, as required by WIS. STAT. § 980.04(2)(b)2., the circuit court found that there was good cause to exceed the ten-day time limit based on scheduling difficulties and Collins' desire to have an attorney represent him during the probable cause hearing. In any event, the failure to comply with a time limit set forth in WIS. STAT. ch. 980 "is not grounds for an appeal or grounds to vacate any order, judgment, or commitment issued or entered under [ch. 980]." WIS. STAT. § 980.038(5).

[3] WISCONSIN STAT. § 980.05(1) states that a trial to determine whether an individual is a sexually violent person "shall commence no later than 90 days after the date of the probable cause hearing." However, during his probable cause hearing, Collins waived the ninety-day time limit for holding his trial. And, again, the failure to comply with the ninety-day time limit would not provide grounds to vacate Collins' commitment order. *See* WIS. STAT. § 980.038(5).

Jurek testified, to a reasonable degree of psychological certainty, that Collins suffered from a mental disorder that predisposed him to commit acts of sexual violence—specifically, antisocial personality disorder with paranoid features. Jurek also opined that Collins' mental disorder made it more likely than not that he would commit a future act of sexual violence. In other words, Jurek believed that Collins' risk of reoffense was "greater than 50 percent." Jurek explained that his opinion regarding Collins' risk of reoffense was based, in part, on scores that he had assigned to Collins on two actuarial risk assessments—the STATIC-99 and the STATIC-99R.

The defense called two expert witnesses to testify at Collins' trial—psychologists Courtney Endres and Sheila Fields. Endres opined that Collins did not suffer from a qualifying mental disorder for purposes of WIS. STAT. ch. 980. Endres also testified that she had evaluated Collins' risk of reoffense using the STATIC-99R and the VRS-SO and that Collins' scores on those assessments corresponded to a sixteen-percent risk of reoffense. Endres therefore opined, to a reasonable degree of psychological certainty, that Collins did not meet the criteria for commitment as a sexually violent person.

Fields likewise opined that Collins did not meet the criteria for commitment as a sexually violent person. Unlike Endres, Fields agreed with Jurek that Collins suffered from a qualifying mental disorder—namely, antisocial personality disorder. However, after scoring Collins on the STATIC-99R and the VRS-SO, Fields concluded that Collins' risk of committing a future act of sexual violence was only forty-seven percent. Fields therefore opined that it was not more likely than not that Collins would commit a future act of sexual violence.

The jury ultimately found that Collins was a sexually violent person for purposes of WIS. STAT. ch. 980. The circuit court therefore entered an order committing Collins to the Wisconsin Department of Health Services for control, care, and treatment.

The no-merit report asserts that there are no issues of arguable merit with respect to jury selection, opening statements, or the jury instructions. Having independently reviewed the record, we agree with counsel that any argument regarding these issues would lack arguable merit, and we therefore do not address them further.[4]

The no-merit report also addresses whether the evidence was sufficient to support the jury's verdict. We agree with counsel that any challenge to the sufficiency of the evidence would lack arguable merit. To prove that Collins was a sexually violent person, the State needed to prove beyond a reasonable doubt that, at the time of trial: (1) Collins had been convicted of a sexually violent offense; (2) Collins had a mental disorder—that is, a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence and causes serious difficulty in controlling behavior; and (3) Collins was dangerous to others because his mental disorder made it more likely than not that he would engage in one or more future acts of sexual violence. *See* WIS JI—CRIMINAL 2502 (2021).

As to the first of these elements, it was undisputed at trial that Collins had been convicted of a sexually violent offense in 2005. With respect to the second element, both Jurek and Fields testified that Collins had a qualifying mental disorder—specifically, antisocial personality

[4] Although the no-merit report does not address the issue, our independent review of the record also confirms that there would be no arguable merit to a claim that Collins did not knowingly, intelligently, and voluntarily waive his right to testify at trial.

disorder. As for the third element, Jurek opined that Collins' mental disorder made it more likely than not that he would commit a future act of sexual violence. This evidence was sufficient to support the jury's determination that Collins was a sexually violent person. Stated differently, we cannot conclude that the evidence introduced at Collins' trial, when viewed most favorably to the State and the commitment, was 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 Collins to be a sexually violent person beyond a reasonable doubt. *See* ***State v. Kienitz***, 227 Wis. 2d 423, 434, 597 N.W.2d 712 (1999).

In his response to the no-merit report, Collins contends the evidence at trial was insufficient to support a determination that he suffered from antisocial personality disorder. He notes that on cross-examination, Jurek conceded that an individual cannot be diagnosed with antisocial personality disorder unless there is "evidence of a conduct disorder prior to age 15." Jurek also acknowledged that Collins' first juvenile adjudication occurred when he was sixteen years old. Collins therefore asserts that Jurek's own testimony shows Collins did not meet the criteria for a diagnosis of antisocial personality disorder.

This claim lacks arguable merit because, on redirect examination, Jurek clarified that even though Collins' first juvenile adjudication did not occur until age sixteen, there was other evidence of a conduct disorder before Collins reached age fifteen. Jurek explained that a conduct disorder "means that you are breaking major rules that apply to juveniles by doing things that might be grounds for … sanctions of some kind." He also testified that a "formal adjudication" is not required to diagnose an individual with a conduct disorder. Jurek then explained that Collins' records showed that "prior to the age of 14, when he came up to Madison, … he was

already identified as being habitually truant." Jurek opined that Collins' habitual truancy "was evidence of difficulty keeping his behavior within normal expectations."

Jurek's testimony regarding Collins' habitual truancy was based on a presentence investigation report (PSI) completed in 2005, which stated Collins had reported that he stopped attending school at age fourteen. Jurek also relied on a 1993 reception center admission report, which stated Collins was a "chronic truant while in Chicago and Madison." Collins asserts that if Jurek had reviewed Collins' school records, he would have learned that these statements were inaccurate. This claim lacks arguable merit. In support of his assertion that he was not habitually truant at age fourteen, Collins has submitted what appears to be a copy of a record from the Chicago public school system documenting "excessive absences" as of October 1991. In October 1991, Collins was fifteen years old. A record showing that Collins was habitually truant at age fifteen does not disprove the assertion in the 2005 PSI that he was habitually truant at age fourteen.

Collins also argues the evidence was insufficient to establish that he suffered from antisocial personality disorder because, according to the fifth edition of the Diagnostic and Statistical Manual (DSM-5), that diagnosis requires a determination that an individual meets at least three out of seven listed criteria. Collins notes that neither Jurek nor Fields expressly testified that he met at least three of those criteria. This claim lacks arguable merit because both Jurek and Fields testified, as a general matter, that Collins qualified for a diagnosis of antisocial personality disorder. The fact that neither Jurek nor Fields fully described the basis for that diagnosis did not prevent the jury from relying on their testimony in order to conclude that Collins suffered from a qualifying mental disorder.

Collins further argues that the evidence was insufficient to establish that he was more likely than not to commit a future act of sexual violence because "[a]ccording to the assessment tools and numbers," none of the three experts found that Collins' likelihood of committing a future act of sexual violence exceeded fifty percent. Again, this claim lacks arguable merit. Jurek testified that Collins' score on the STATIC-99R corresponded to a 30.7 percent risk of rearrest or reconviction for a sexual offense within five years and a 42.8 percent risk of rearrest or reconviction for a sexual offense within ten years. Jurek explained, however, that these percentages underestimated Collins' actual risk of committing a future act of sexual violence because: (1) the actuarial assessments evaluate an individual's risk of rearrest or reconviction, but the risk of actually committing a new offense is higher because many offenses are not reported to authorities; and (2) Wisconsin law requires a consideration of risk over the offender's entire lifetime, not just a period of five or ten years. Jurek also noted that Collins had completed sex offender treatment during a prior incarceration, but he had nevertheless reoffended following his release. Based on these factors, Jurek opined that despite Collins' scores on the actuarial assessments, it was more likely than not that Collins would commit a future act of sexual violence. Jurek's testimony was sufficient to support the jury's determination regarding Collins' risk of reoffense.

Collins also asserts that Jurek falsely testified "that Collins was convicted in 1990 of a sexual crime." When asked at trial whether there were "other sexual crimes" for which Collins had been convicted, besides his 2005 conviction, Jurek responded: "Yes, there were. He was also convicted back in 1990. He had a case in 1994. He entered a no contest plea to a second degree sexual assault charge. And that involved, I believe, a 15-year-old female when he was 17 years old." As Collins' correctly notes, there is no evidence in the record indicating that he was

convicted of a sexual offense in 1990. Collins therefore contends that he was prejudiced by Jurek's "false and misleading" reference to a 1990 conviction.

Any claim that Collins was prejudiced by Jurek's brief, single reference to a 1990 conviction would lack arguable merit. First, it is not clear that Jurek intended to refer to two separate convictions—one in 1990 and one in 1994—in the portion of his trial testimony quoted above. Instead, it appears Jurek may have simply misspoken when he initially referred to a conviction occurring during the year 1990. Second, Jurek later testified that Collins had only two convictions for prior sex offenses—apparently referring to the 1994 conviction and the 2005 conviction. Third, there was no other reference to a 1990 conviction during Collins' trial. On this record, and in the context of the entire trial, any error occasioned by Jurek's brief reference to a 1990 conviction was harmless and would not entitle Collins to relief. *See* WIS. STAT. § 980.038(6) ("The court shall, in every stage of a proceeding under this chapter, disregard any error or defect in the pleadings or proceedings that does not affect the substantial rights of either party.").

Collins next contends that Jurek relied on false information to support his opinions regarding Collins' mental disorder and risk of reoffense. During his trial testimony, Jurek stated that Collins had been charged with a sexual assault in 2000 against a victim who was a stranger, but the charge had subsequently been dismissed. Jurek's report shows that his belief regarding the 2000 sexual assault charge was based on information from the 2005 PSI, which stated that Collins had been charged with first-degree sexual assault in 2000 but the charge was later dropped due to inconsistencies in the accuser's statements.

Contrary to the information in the 2005 PSI, Collins asserts that he was never charged with sexual assault in 2000, that "there was never a dismissed charge," and that the sexual assault allegation "was proven untrue on September 3, 2019." Be that as it may, Collins does not claim that he was not arrested in 2000 based on an allegation that he had committed a sexual assault. To the contrary, Endres' report expressly states that "sexual assault allegations were made against" Collins in 2000, but "following the police investigation, it was decided that criminal charges would not be pursued." During his trial testimony, Jurek explained that for the purposes of his opinion, it did not matter whether Collins had been formally charged with a sexual assault in 2000 because "an arrest alone is sufficient." Under these circumstances, there would be no arguable merit to a claim that Collins is entitled to relief because Jurek incorrectly stated that Collins had been charged with—rather than arrested for—sexual assault in 2000.

Collins next argues that Jurek's testimony regarding an alternative mental disorder "should have been excluded pursuant to" ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579, 582 (1993). Under the ***Daubert*** standard, as codified in WIS. STAT. § 907.02(1), expert testimony is admissible if it will assist the trier of fact to understand the evidence or to determine a fact in issue and if "the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case." *See* § 907.02(1).

There would be no arguable merit to a claim that Jurek's testimony regarding an alternative diagnosis was inadmissible under WIS. STAT. § 907.02(1) and ***Daubert***. On redirect examination, the State asked Jurek to discuss a condition known as "other specified personality disorder with antisocial features." Over Collins' objection, Jurek testified that diagnosis is assigned "when an individual meets all the criteria for an antisocial personality disorder" but "we

don't have evidence that before the age of 15 there was a conduct disorder." Jurek never testified, however, that he had diagnosed Collins with other specified personality disorder with antisocial features. There is nothing in the record to suggest that Jurek's general testimony regarding that mental disorder was unreliable or otherwise inadmissible under § 907.02(1) and ***Daubert***.

Relatedly, Collins suggests that the prosecutor committed misconduct during his closing argument by inviting the jury to consider Jurek's testimony regarding other specified personality disorder with antisocial features when determining whether Collins suffered from a qualifying mental disorder. However, the prosecutor's argument in that regard was consistent with WIS JI—CRIMINAL 2502 (2021), which states that when assessing whether an individual suffers from a mental disorder for purposes of WIS. STAT. ch. 980, a jury is "not bound by medical opinions given by witnesses, or by labels or definitions used by witnesses, relating to what is or is not a mental disorder." Moreover, it is well accepted that a trier of fact may accept some portions of an expert witness's testimony while rejecting others. ***State v. Owen***, 202 Wis. 2d 620, 634, 551 N.W.2d 50 (Ct. App. 1996). The jury could therefore properly consider Jurek's testimony regarding other specified personality disorder with antisocial features and make its own determination, based on the other evidence admitted at trial, as to whether Collins qualified for that diagnosis. Any claim of prosecutorial misconduct on these grounds would therefore lack arguable merit.

Collins next claims, without further elaboration, that his trial attorney was constitutionally ineffective. Having independently reviewed the record, we agree with appellate counsel that any claim that Collins' trial attorney was ineffective would lack arguable merit. Collins may intend to argue that his trial attorney was ineffective by failing to procure school

attendance records that would have shown that he was not habitually truant before age fifteen. However, the supplemental no-merit report explains that neither Collins nor his family possess these records, and that appellate counsel spent "several months" unsuccessfully attempting to obtain the records from the Dane County juvenile court system, Dane County social workers, the Wisconsin Department of Corrections, and the Chicago public school system. We agree with appellate counsel that there would be no merit to a claim that Collins' trial counsel "was ineffective for failing to obtain potentially exculpatory school attendance records when [appellate counsel] failed to obtain these records after months of work."

Finally, Collins makes a conclusory assertion that the circuit court "erred when it placed time restraints on … his attempt to retain a private attorney." Our independent review of the record does not reveal any issue of arguable merit in this regard. Collins, who was represented by appointed counsel, filed a pro se motion in July 2014 seeking a continuance of ninety days so that he could attempt to retain a private attorney. During a hearing on July 28, 2014, the circuit court granted the defense's request to adjourn the scheduled jury trial for other reasons. The court informed Collins that he could hire a private attorney at any point, but that the court would not "continue to give adjournments to hire a private attorney when you have a very skilled, very experienced attorney sitting next to you that's telling me he's prepared to go forward and represent you."

Collins did not raise the issue of retaining private counsel again until a hearing on April 3, 2018. At that point, following numerous delays and a May 2017 trial that resulted in a deadlocked jury, Collins' second trial had been scheduled to take place on April 30 and May 1, 2018. During the April 3 hearing, the circuit court again informed Collins that he was welcome to hire a private attorney if he had the funds to do so. However, the court stated that it was not

willing to "grant a continuance for a different attorney to get brought up to speed." The court noted that Collins' case had been pending since 2011 and that his appointed attorney had already represented him at the first jury trial and was "successful enough to end up with a hung jury." The court further stated that it could not "imagine" that any private attorney could be as familiar with the case as Collins' appointed attorney or would be better able to represent Collins at trial. The court therefore made a reasoned decision not to delay Collins' trial any further so that he could attempt to retain a private attorney. As such, there would be no arguable merit to a claim that the court erroneously exercised its discretion by denying Collins' request for a continuance. *See* ***State v. Wright***, 2003 WI App 252, ¶49, 268 Wis. 2d 694, 673 N.W.2d 386 (circuit court exercises discretion in determining whether to grant a continuance).

Our independent review of the record discloses no other potential issues for appeal.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Michael Covey is relieved of further representing Steven Collins 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