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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP1944

In re the Commitment of Jon F. Winant:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

JON F. WINANT,

Respondent-Appellant.

APPEAL FROM THE JUDGMENT OF COMMITMENT UNDER CHAPTER 980, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DAVID A. HANSHER, PRESIDING, AND ORDER DENYING POST-COMMITMENT MOTION, THE HONORABLE TIMOTHY WITKOWIAK, PRESIDING

BRIEF OF PETITIONER-RESPONDENT

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STATE OF WISCONSIN

C O U R T O F A P P E A L S

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BRIEF OF PETITIONER-RESPONDENT

ISSUE PRESENTED

Did trial counsel's failure to object to the admission of a Veterans Administration social worker's report on

Wis. Stat. § 908.03(4) grounds deny Winant effective assistance of counsel?

The circuit court answered: No (78:1).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State believes that neither oral argument nor publication is necessary. The parties have fully developed the arguments in their briefs and the issues presented involve the application of well-settled legal principles to the facts.

SUPPLEMENTAL STATEMENT OF FACTS

The State will supplement Winant's statement of the case and the facts as appropriate in its argument.

ARGUMENT

Even if trial counsel was deficient for failing to assert a hearsay objection to the Veterans Administration social worker's report, the evidence referenced in the report was otherwise admissible and did not prejudice Winant.

A. Summary of argument.

On appeal, Winant claims that his trial counsel rendered ineffective assistance when he failed to object on hearsay grounds to the admission of the Veterans Administration social worker's report ("V.A. report"). Winant's brief at 1. The V.A. report contained Winant's admissions to the social worker that he had engaged in

inappropriate conduct with A.G., his daughter's 14-year-old half-sister. Winant's brief at 4.

Winant specifically contends that a social worker's report does not fall within the hearsay exception related to statements made for purposes of medical diagnosis for treatment. Wis. Stat. § 908.03(4). In addition, Winant argues that trial counsel should have asserted a hearsay objection to the admission of other documents related to Winant's revocation because they contained information from the V.A. report. Winant asserts that trial counsel's failure to object to the admission of these documents constitutes deficient performance and that the performance prejudiced him. Winant also submits that the circuit court should not have denied his postconviction claim without an evidentiary hearing and requests this court to remand the matter for a *Machner*[1] hearing. Winant's brief at 11-16.

The State's position is that (a) trial counsel may have entered a proper objection to the V.A. report's admission on foundation grounds; but that (b) the information contained within the V.A. report was properly admitted through other documents. Because this information was properly admitted in a different form, the admission of the V.A. report was cumulative and did not prejudice Winant. In addition, the challenged evidence itself forms only a small part of the evidence that supported Winant's commitment. As such, the admission of the evidence that Winant challenges did not prejudice Winant. A remand for a *Machner* hearing is unnecessary.

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[1] *State v. Machner,* 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

B. General discussion of legal principles guiding review of ineffective assistance of counsel claims.

A person subject to a Chapter 980 commitment has a statutory right to counsel. Wis. Stat. § 980.03(2)(a). The Wisconsin Supreme Court has concluded "that a statutory provision for appointed counsel includes the right to *effective* counsel." *See In Interest of MD(S)*, 168 Wis. 2d 995, 1005, 485 N.W.2d 52 (1992) (termination of parental rights proceedings).[2]

In alleging ineffective assistance of trial counsel, a committed Chapter 980 patient must prove that trial counsel's performance was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If a court concludes that the patient has not established one prong of the test, the court need not address the other. *Id*. at 697.

To prove deficient performance, the patient must show that his counsel's representation "fell below an objective standard of reasonableness" considering all the

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[2] In *State ex rel. Seibert v. Macht,* 2001 WI 67, ¶ 12, 244 Wis. 2d 378, 627 N.W.2d 881, *as corrected*, 2002 WI 12, ¶ 2, 249 Wis. 2d 702, 639 N.W.2d 707 (per curiam), the supreme court held that a Chapter 980 litigant has a constitutional right to counsel. That holding relied upon Wis. Stat. § 980.05(1m), which provided, "All constitutional rights available to a defendant in a criminal proceeding are available to the person." The legislature subsequently repealed that language. 2005 Wis. Act 434, § 101. Although it is unclear whether a constitutional right to effective assistance of counsel in Chapter 980 cases remains after Wis. Stat. § 980.05(1m)'s repeal, the State acknowledges that Winant has a statutory right to effective assistance of counsel.

circumstances. *Id.* at 688. Said another way, the patient must demonstrate that specific acts or omissions of counsel fell "outside the wide range of professionally competent assistance." *Id.* at 690. A court should presume that counsel rendered adequate assistance. *Id.*

To demonstrate prejudice, the patient must affirmatively prove that the alleged deficient performance prejudiced his defense. *Id.* at 693. The patient must show something more than that counsel's errors had a conceivable effect on the proceeding's outcome. *Id.* Rather, the patient must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *see also State v. Carter*, 2010 WI 40, ¶ 37, 324 Wis. 2d 640, 782 N.W.2d 695. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 792 (2011).

When a Machner hearing is unnecessary. A circuit court may deny a postconviction motion alleging ineffective assistance of counsel without a hearing unless the motion alleges sufficient facts to entitle a defendant to relief. The circuit court may still deny the hearing if the record conclusively demonstrates that a defendant is not entitled to relief. A circuit court must exercise its independent judgment and support its decision denying a hearing through a written decision based upon a review of the record and pleadings. *State v. Allen,* 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433.

If a circuit court improperly denies the defendant a hearing on a claim of ineffective assistance of counsel, a reviewing court will remand the matter for a *Machner*

hearing. The lack of a hearing prevents an appellate court from reviewing trial counsel's performance. *State v. Curtis*, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998).

Standard of review. A claim of ineffective assistance of counsel is a mixed question of law and fact. *Carter*, 324 Wis. 2d 640, ¶ 19. While this court must uphold the circuit court's findings of fact unless clearly erroneous, the ultimate determination of whether counsel's assistance was ineffective presents a legal question, which this court reviews de novo. *Id.*

C. Winant's trial counsel did not perform deficiently.

The State's position is that trial counsel entered a proper foundation objection to the admission of the V.A. report. Trial counsel did fail to object on the grounds that the report did not fall within the hearsay exception for statements made for purposes of treatment or diagnosis. Wis. Stat. § 908.03(4). Although the V.A. report itself may have been improperly admitted, the information within the V.A. report was properly incorporated into certain DOC reports that were properly admissible as a public report. Wis. Stat. § 908.03(8).

1. Winant's counsel objected to the admissibility of the V.A. report.

Winant alleges that trial counsel failed to properly object to the admission of Exhibit 26, a report that a Veterans Administration social worker prepared following a session with Winant. Winant contends that trial counsel's conduct constitutes deficient performance. Winant's brief at 11-14. Based upon its review of the record, the State's

position is that (a) trial counsel may have properly objected to the admission of the report on foundational grounds; but (b) trial counsel's failure to object on Wis. Stat. § 908.03(4) grounds was not deficient because the record may have been admissible on other grounds.

The challenged statements and their admission at trial. The V.A. report summarized a conversation between social worker Raymond Konz and Winant. Winant disclosed information regarding his recent contact with A.G., a 14-year-old female, who was in his car. The relevant portion of the statement reads as follows:

> During session [patient] reported that he has feelings of shame and guilt specifically to recent event where he had engaged in old behavior this last weekend. He had his daughter's 14 year old half-sister in his car, with his hand on her leg, offering her money. When asked what her reply was and what occurred he stated that she said nothing and "just left the car." He also stated that he called her the next day to ask her if she was mad with him.
>
> When I questioned if, just being with a minor wasn't a violation of his probation, he stated that it was but so is using prostitutes. I encouraged him to discuss with his probation officer and sexual offender's therapist and he stated that he did talk to some supportive friends.
>
> I stated that he needed to report this but he stated that he would go back to jail; furthermore, he stated that he needed to be able to discuss this in therapy without fear of disclosure.

(112:Ex. 26.)[3]

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[3] Exhibits appear in the record as (107) and (112). The State will use the notation "Ex. X:Y" with X representing the exhibit number and Y representing the page number within the exhibit.

The State introduced this report through a Wisconsin Department of Corrections (DOC) probation agent, Rebecca Mahin (101:67-69). Trial counsel timely objected to the admission of the V.A. report on the grounds of physician-patient privilege (101:68).[4] Trial counsel also objected on foundation grounds.

> MR. JENSEN: I object. This is apparently privileged information under the physician patient privilege.
>
> MS. BUNCH: These are treatment records, Judge. They come in.
>
> MR. JENSEN: Right. They are treatment records from the veteran's administration for something -- we don't know what because there's no foundation.
>
> MS. BUNCH: There has been foundation actually. She [Mahin] testified that he was there for sex offender treatment in the community while on probation.[5]
>
> THE COURT: Okay. The objection's overruled. Accepted.

(101:68 (footnote added).)

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[4] The circuit court properly overruled trial counsel's objection on privilege grounds. Under the physician-patient privilege, a patient generally has the right to prevent disclosure of confidential communications made for purposes of diagnosis or treatment. Wis. Stat. § 905.04(2). But under Wis. Stat. § 905.04(4)(a), no privilege exists for communications and other information relevant to an issue in a Chapter 980 proceeding. *See State v. Zanelli*, 212 Wis. 2d 358, 376-77, 569 N.W.2d 301 (Ct. App. 1997).

[5] In its response to Winant's postcommitment motion, the State explained that at trial, it asserted that the V.A. report was admissible as a treatment record under Wis. Stat. § 908.03(4). The State also provided an alternative explanation for the admissibility of the V.A. report (73:9-10).

Postcommitment proceedings. Winant asserted that trial counsel should have objected to the admissibility of the V.A. report on the grounds that the social worker's statements were inadmissible under the hearsay exception providing for statements made for purposes of treatment or medical diagnosis (105:8-9). In making this argument, Winant relied upon *State v. Huntington*, 216 Wis. 2d 671, 695, 575 N.W.2d 268 (1998), in which the court declined "to apply the hearsay exception for statements made for medical diagnosis or treatment, Wis. Stat. § 908.03(4), to statements made to counselors or social workers." Winant also argued that trial counsel should have asserted a hearsay objection to the admissibility of his statements to the social workers that appeared in the DOC documents related to his revocation (105:10).

In concluding that trial counsel's performance was not deficient, the circuit court held that (a) Winant's statement to the V.A. social worker was a statement of a party opponent; and (b) the V.A. report fell within the public records exception under Wis. Stat. § 908.03(8) (78).

The State agrees with the circuit court that a statement of a party opponent that falls within a public record may be admissible evidence. But the admission of the V.A. report still required the report's proponent to lay a proper foundation for its admissibility.

In Winant's case, the State could have laid the foundation for the V.A. report's admission through the testimony of the social worker or another Veterans Administration employee. *See, e.g.,* Wis. Stat. §§ 908.03(6) and 909.015(1), (7). Alternatively, the social worker's report could also have been admissible if it had been properly self-

authenticated. *See, e.g.,* Wis. Stat. § 909.02(11) (self-authenticated patient health care records).

Here, trial counsel objected to the V.A. report's admissibility based on a lack of foundation (101:68). Based upon its review of the record, the State cannot reasonably assert that a proper foundation had been established for the V.A. report's admissibility. As offered, the V.A. report was not self-authenticating. And the State does not believe that the DOC employee's testimony provided an adequate foundation for a report prepared by a different agency. For these reasons, the State does not rely upon the circuit court's reasoning in opposing Winant's request for relief.

Winant's claim on appeal: Admissibility of the V.A. Report as a statement for purposes of treatment or diagnosis. Relying upon *Huntington*, 216 Wis. 2d 671, Winant asserts that trial counsel's failure to object to the V.A. report constitutes deficient performance. In making his argument, Winant overlooks *State v. Domke*, 2011 WI 95, 337 Wis. 2d 268, 805 N.W.2d 364. Domke raised an ineffective assistance of counsel challenge, asserting that trial counsel's failure to object to the admission of a social worker's report constituted deficient performance. The supreme court held that *Huntington's* holding is well settled law. That is, a social worker's report does not constitute a statement for purposes of treatment or diagnosis under Wis. Stat. § 908.03(4). *Huntington* provided a clear basis for Domke's trial counsel to object to the admission of the social worker's report. Failure to do so constituted deficient performance. *Domke*, 337 Wis. 2d 268, ¶¶ 44-46.

Based upon *Huntington,* 216 Wis. 2d 671, and *Domke*, 337 Wis. 2d 268, the State agrees that Winant's statement to

the social worker is inadmissible under Wis. Stat. § 908.03(4).

This does not end the analysis. The V.A. report may have been admissible on other grounds. For example, the V.A. report constitutes a health care record under Wis. Stat. § 146.81(4). Under this section, "'patient health care records' means all records related to the health of a patient prepared by or under the supervision of a health care provider . . . ." *Id*. By statute, a health care worker includes a social worker or professional counselor. Wis. Stat. § 146.81(1)(hg). Here, the social worker prepared the V.A. report as part of Winant's treatment. The report itself contains the words "medical records" and "progress notes." (112:Ex. 26). Under the circumstances, the V.A. report qualifies as a patient health care record.

As a patient health care record, the V.A. report may be admissible under Wis. Stat. § 908.03(6m). Under this section, a circuit court may admit a patient health care record if a custodian or other qualified witness establishes a foundation for its admissibility under Wis. Stat. § 908.03(6). Alternatively, it is admissible without an authentication witness if the party offering the report satisfies the authentication requirements in Wis. Stat. § 908.03(6m)(b). These rules require the proponent of the patient health care record to provide a certified copy of the record to the other party at least 40 days prior to trial. *Id*.

Here, it is not certain whether the V.A. report had been properly self-authenticated and admissible as a patient health care record. Should this court order remand, the State believes it would be appropriate for the circuit court to

determine whether the State could have established a proper foundation on different grounds.

2. To the extent that the V.A. social worker's report of Winant's statements appeared in reports of state agencies, at least some of the agencies' reports are admissible as public records under Wis. Stat. § 908.03(4).

Winant asserts that trial counsel was deficient for failing to object to the admission of certain DOC reports that contained the V.A. social worker's summary of Winant's statements. Winant's brief at 13. DOC incorporated Winant's statements to the V.A. social worker into three documents: (1) Amended Notice of Violation and Receipt (112:Ex. 27); (2) Violation Investigation Report (112:Ex. 28); and (3) Revocation Summary dated September 1, 1999 (112:Ex. 29). The State offered these reports through Agent Mahin. Trial counsel did not object to the admission of these reports. The circuit court admitted them (101:69-70, 76-77, 78-79). The State submits that the revocation summary, including those portions that incorporated the V.A. social worker's report, were admissible under the public record exception to the hearsay rule. *See* Wis. Stat. § 908.03(8).

a. General legal principles guiding the admission of evidence under Wis. Stat. § 908.03(8).

Wisconsin Stat. § 908.03(8) provides in relevant part:

> **908.03 Hearsay exceptions; availability of declarant immaterial.** The following are not excluded by the

> hearsay rule, even though the declarant is available as a witness:
>
> **(8)** PUBLIC RECORDS AND REPORTS. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law, or (c) in civil cases and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

To the extent that the record or report sets forth (a) activities of the office or agency, or (b) matters observed pursuant to a duty imposed by law, hearsay statements within those reports must also fall within a hearsay exception to be admissible. *See* Wis. Stat. § 908.05. But if a report or record is the product of an investigation made pursuant to authority granted by law under Wis. Stat. § 908.03(8)(c), factual findings that incorporate hearsay information are admissible.

> Investigators commonly interview lay people who may have personal knowledge or hearsay information that is helpful. Private experts are often used as well. When such third party statements are later incorporated into the investigative report, they represent additional layers of hearsay. If the inquiry was carried out with lawful authority, Wis. Stat. § 908.03(8)(c), encompasses the additional layers of hearsay. The trial judge may exclude them if the sources of information or other circumstances indicate a lack of trustworthiness in such statements.

See Daniel D. Blinka, 7 Wisconsin Practice Series: Wisconsin Evidence, § 803.8 at 787 (3d ed. 2008). Wisconsin Stat. § 908.03(8)(c) also encompasses opinions and conclusions contained within an authorized report that are fairly based upon an investigation. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170 (1988); *see also State v. Cardenas-Hernandez*,

219 Wis. 2d 516, ¶ 15, 579 N.W.2d 678 (1998) ("Wisconsin courts look to federal cases interpreting and applying the federal rules of evidence as persuasive authority").

To establish a report's admissibility under Wis. Stat. § 908.03(8)(c), the proponent must show that the report (1) contains factual findings; and (2) is based upon an investigation made pursuant to legal authority. The opponent of the evidence bears the burden of demonstrating that the evidence lacks trustworthiness. *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 143 (2d Cir. 2000). In assessing the report's trustworthiness, a court will consider (a) the timeliness of the investigation; (b) the investigator's skills or experience; (c) whether a hearing was held; and (d) possible bias when reports are prepare in anticipation of litigation. *Id*. at 143; *Rainey*, 488 U.S. at 168 n.11.

This court has recognized that probation and parole files fall within the hearsay exception for public records. "[S]ince ch. 980 is a civil proceeding, the records may be used to establish factual findings made during investigations, as well as activities or observations made by DOC personnel. . . . The only foundation required to introduce DOC records is that they be identified by a competent witness." *State v. Keith*, 216 Wis. 2d 61, 77, 573 N.W.2d 888 (Ct. App. 1997).

b. Winant's revocation summary is admissible as a public report under Wis. Stat. § 908.03(8)(c).

Several DOC documents, including the amended notice of violation and receipt (112:Ex. 27), the violation investigation report (112:Ex. 28), and the revocation

summary, that incorporated Winant's statements to his V.A. social worker (112:Ex. 29). These reports satisfied the requirements for the admissibility of a public record under Wis. Stat. § 908.03(8)(c). The State offered these reports through DOC agent Rebecca Mahin, who was certainly competent to identify them based on her review of the file (101:69-70, 76-79).

First, these DOC reports contain factual findings of Winant's probation agent. Winant's probation agent received information from the V.A. social worker regarding Winant's admissions concerning his conduct towards A.G., the 14-year-old girl. The probation agent initiated an investigation. He prepared a document titled "Violation Investigation Report" that identified the alleged violations of the rules of supervision. The report also details the investigation that the agent conducted on the merits of the allegations, including a home search, an interview with Winant, and an interview with A.G. and A.G.'s mother (112:Ex. 28). The agent subsequently prepared the Amended Notice of Violation and Receipt (112:Ex. 27), and Violation Investigation Report (112:Ex. 28).

The agent then prepared a revocation summary (112:Ex. 29). The revocation summary outlines Winant's underlying offenses and his adjustment to supervision, including his treatment and compliance with the rules. The summary itself contains information regarding Winant's statements to the V.A. social worker and probation agent as well as a summary of the agent's interview with A.G., who described Winant's inappropriate statements and behavior to her. The revocation summary then addresses the agent's recommendations regarding revocation of supervision (112:Ex. 29:1-5).

Second, DOC prepared the Violation Investigation Report and Revocation Summary pursuant to investigative authority imposed under the law. When Winant allegedly violated the conditions of his supervision in 1999, DOC was authorized to investigate the alleged violations. Wis. Stat. §§ 304.06(3) & 973.10 (1999-2000). DOC promulgated administrative rules intended to carry out its statutory duties to investigate violations of supervision. *See* Wis. Admin. Code § DOC 331.03 (June 1998). Wis. Admin. Code § DOC 331.03(2) requires the agent to investigate the facts underlying the investigation and meet with the client to discuss the allegations. If the agent determines the allegation is unfounded, the agent may take no action. But if the agent substantiates the violations, the agent may pursue a number of options including revocation. Wis. Admin. Code § DOC 331.03(3). Finally, an agent must prepare a report that documents the facts underlying the allegation, the agent's investigatory efforts and conclusions, the client's statement to the agent, any recommendations, and provide other information. Wis. Admin. Code § DOC 331.03(4).

The investigation reports (112:Exs. 27:2-4, 28) and the revocation summary (112:Ex. 29), constitute factual findings made pursuant to lawful investigative authority. Any findings contained within these documents, including Winant's admissions to the V.A. social worker fall within the realm of admissible hearsay under Wis. Stat. § 908.03(8)(c).

Winant has not alleged that the statements attributed to him in the V.A. report lack trustworthiness. He cannot. The circumstances surrounding the V.A. social worker's report of Winant's admissions support their trustworthiness. Winant made these statements to a social worker during treatment. The social worker timely documented the

admissions and reported them to Winant's agent, who promptly investigated the allegations (112:Ex. 29:3-4). The report reflects that the agent sought to independently corroborate the information contained within the V.A. report. He spoke with A.G., A.G.'s mother, and Winant (112:Ex. 29:3-4). An administrative law judge ("ALJ") conducted a hearing on the allegations. The ALJ issued a decision finding that Winant had violated the conditions of his supervision. Those violations included his inappropriate contact with A.G., which Winant acknowledged through his counsel (112:Ex. 30:2-3). The findings that DOC made regarding Winant's admissions to the V.A. social worker were trustworthy and, therefore, admissible as a public record.

D. Even if trial counsel's performance was deficient, trial counsel's performance did not prejudice Winant.

For several reasons, trial counsel's failure to seek to exclude Winant's statements to the V.A. social worker did not prejudice Winant. First, the V.A. report was merely cumulative as other evidence regarding Winant's conduct with A.G. was properly admitted. Second, even if the V.A. report was not itself admissible, the experts could reasonably rely upon the information contained in the V.A. report to formulate their opinions regarding Winant's diagnosis and risk to reoffend. Third, Winant's statement to the V.A. social worker was only one piece of evidence that supported his commitment. Thus, there was no reasonable likelihood that trial counsel's failure to object affected the outcome of Winant's case.

1. Winant's conduct towards A.G. was properly admitted through other means.

a. The ALJ's decision revoking Winant's supervision includes admissible factual findings related to his conduct towards A.G.

In this case, the State also offered the ALJ's decision revoking supervision based in part on Winant's conduct towards A.G. (101:79-82). The circuit court admitted the ALJ's decision along with the accompanying order revoking supervision (101:82; 112:Exs. 30, 31).

The ALJ's decision does not reference the V.A. report. Instead, the ALJ made factual findings based upon A.G.'s and A.G.'s mother's statements to the agent regarding Winant's sexually inappropriate conduct and comments. In addition, the decision also incorporates Winant's admissions, through his counsel, regarding Winant's conduct toward A.G. (112:Ex. 30:2-3). *See* Wis. Stat. § 908.01(4)(b)4. (admission of a party's agent such as an attorney constitutes an admission of a party opponent).

The ALJ's decision constitutes a public record within Wis. Stat. § 908.03(8)(c). The decision contains the ALJ's factual findings regarding Winant's violations of supervision as it related to A.G. The ALJ is obligated to preside over revocation proceedings and issue a decision that is subject to judicial review. Wis. Stat. §§ 227.47(1), 304.06(3), (3e) & 973.10 (1999-2000). Since the circuit court properly admitted the ALJ's decision containing detailed factual findings related to Winant's interaction with A.G., any error in

admitting other documents containing this information was cumulative and did not prejudice Winant.

b. Properly admitted DOC treatment records include Winant's admissions regarding his contact with A.G.

DOC psychologist Christopher Tyre testified as an expert witness at Winant's trial (101:100-208). Dr. Tyre reviewed Winant's DOC file as part of his evaluation, including records of his mental health treatment while incarcerated (101:104). At trial, Dr. Tyre authenticated a progress note that was generated during Winant's DOC group therapy from August 2004 through July 2005 (101:117; 107:Ex. 41). The progress note addressed Winant's disclosures of his sex offender history during treatment. In an entry dated February 15, 2005, DOC staff documented Winant's disclosures regarding his contact with A.G. Winant discussed how he propositioned her with money and groomed her by giving her money and paying for outfits. Winant also explained how he disclosed this information to his V.A. social worker who subsequently reported it to his probation agent (101:120; 107:Ex. 41:3).

While the progress note is hearsay, it is properly admissible as a record of a regularly conducted activity and a patient health care record. *See* Wis. Stat. § 908.03(6) & (6m). The record references Winant's disclosures to DOC staff during treatment regarding his conduct toward A.G. that resulted in his revocation. In light of the admission of this information from a properly admitted source, the

admission of the challenged V.A. report and DOC documents did not prejudice Winant.

2. Whether or not the V.A. report was admissible, the State's expert could rely upon the information related to Winant's contact with A.G. in opining that Winant met the criteria for a Chapter 980 commitment.

Both the State and defense experts properly considered Winant's conduct towards A.G. in developing their opinions regarding Winant's diagnosis and risk for reoffense. The exclusion of the VA report would not have prevented the experts from considering the report in formulating their opinions. Thus, the admission of the V.A. report and DOC investigation reports containing the challenged information did not prejudice Winant.

In offering an opinion, expert witnesses may rely upon inadmissible evidence if it is the type that experts in the field rely upon in forming an opinion or inference. Wis. Stat. § 907.03 (2009-2010)[6]; *see also State v. Watson*, 227 Wis. 2d 167, 195, 595 N.W.2d 403 (1999) (reaffirming prior case law allowing experts to rely upon otherwise inadmissible

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[6] Through 2011 Wis. Act 2, the legislature amended provisions governing the admissibility of expert testimony. Although Winant's trial occurred after Act 2's amendments to Wis. Stat. ch. 907, those changes did not apply to Winant's trial. *In re the Commitment of Alger*, 2015 WI 3, ¶ 4, __ Wis. 2d __, __ N.W.2d __. Act 2 added a sentence to Wis. Stat. § 907.03 that creates a presumption against the admissibility of the underlying facts: "Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion or inference substantially outweighs their prejudicial effect."

hearsay data to formulate their opinions). A circuit court has "latitude to determine when the underlying hearsay may be permitted to reach the trier of fact through examination of the expert—with cautioning instructions for the trier of fact to head off misunderstanding—and when it must be rigorously excluded altogether." *Id.* at 200-01. In a bench trial, appellate courts presume that the circuit court knows "what testimony is competent and will disregard extraneous matter." *State v. Cathey*, 32 Wis. 2d 79, 90, 145 N.W.2d 100 (1966).

Dr. Tyre, who had extensive experience conducting sex offender evaluations, performed a special purpose evaluation of Winant (101:100-04). Dr. Tyre opined that (1) Winant had a mental disorder predisposing him to engage in acts of sexual violence (101:129-32); and (2) Winant's disorder made it more likely than not that Winant would commit a future act of sexual violence (101:175). Dr. Tyre memorialized his opinions in a report and an addendum (101:130; 107:Exs. 47, 48).

In conducting his evaluation, Dr. Tyre reviewed a wide variety of DOC files, including Winant's institutional mental health treatment records, and law enforcement records (101:104). Tyre considered Winant's inappropriate contact with A.G. and the fact that it resulted in his revocation of supervision (101:111-12; 107:Exs. 48:4 & 6). Winant's conduct with A.G. occurred after he completed sex offender treatment and while on supervision (101:120, 192-93; 107:Ex. 47:6 & 9). This behavior supported Tyre's opinion regarding diagnosis and Winant's risk of engaging in future acts of sexual violence (102:89-91; 107:Ex. 47:9).

Winant called psychologists Richard Elwood and Craig Rypma as expert witnesses. As part of their evaluations, both psychologists documented the incident concerning Winant's efforts to groom A.G. (107:Exs. 59:7, 60:2). On cross-examination, both psychologists also testified that they were aware of Winant's behavior involving this child (102:48-50; 79-80). *See* Wis. Stat. § 907.05 (disclosure of underlying facts on cross-examination proper).

Each expert considered the records documenting Winant's contact with A.G. important. Each noted it in his respective report and acknowledged it in his testimony. This demonstrates that the State's and the defense's experts routinely consider and rely upon this type of information in formulating their opinions in Chapter 980 cases. Because the experts reasonably relied upon this information, the admission of the challenged V.A. report and DOC records documenting this incident did not prejudice Winant in his bench trial.

3. The evidence that Winant challenges is but one tile in the mosaic of evidence that resulted in his commitment.

Three experts, psychologists Tyre, Elwood, and Rypma testified at Winant's trial.[7] Dr. Tyre and Dr. Elwood

[7] Based upon the circuit court's credibility findings, the State will not reference Dr. Rypma's testimony in this analysis. The circuit court observed: "I've had Dr. Rypma before, and I believe in my previous case I didn't find his testimony to be very credible" (102:98). Later, the circuit court stated "I hereby reject Dr. Rypma's contrary testimony" with respect to Rypma's conclusion that Winant lacked a mental disorder (104:3). It also found "Dr. Tyre's testimony to be more credible than Dr. Rypma's" with respect to the risk assessment (104:5).

reviewed Winant's extensive and varied sex offense history that included both reported and unreported offenses (101:104-12; 102:60; 107:Exs. 48:1-2, 60:1[8]). His earlier offenses included the forcible abduction and sexual assault of adult women involving violence and threatened use of weapons. At age 43, Winant was convicted of two counts of child enticement involving three different teenage girls. In each case, Winant initiated contact with these females and offered them money for sex (107:Exs. 48:2-5, 60:2). Winant reported that he was obsessed with having sex with adolescents and that his primary sexual fantasy revolved around girls from puberty to age sixteen (101:176-77; 107:Ex. 48:6). In addition, Winant had admitted to sexually assaulting prepubescent children, including a 4-year-old and a 10-year-old (102:72).

With respect to diagnosis, Dr. Tyre and Dr. Elwood concluded that Winant had mental disorders that predisposed him to engage in acts of sexual violence. Both diagnosed Winant with paraphilia not otherwise specified ("NOS"), and a personality disorder NOS with antisocial features (101:135-38, 143-46; 102:65, 76, 88-91). Paraphilia NOS is characterized by "intense, recurring sexual fantasies, or urges involving children or other non-consenting persons for at least 6 months that cause marked distress or interpersonal difficulty" (107:Exs. 60:3, 47:2, 48:6-7). Personality Disorder NOS with antisocial features describes an enduring pattern of behavior that results in disregard for the rights of others. Winant's sexual assaults, lying, and lack of remorse support this diagnosis (107:Exs. 60:3, 47:2, 48:7).

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[8] With respect to exhibit 60, the page number refers to the page number of Dr. Elwood's report.

The circuit court considered both experts' opinions and its own review of the record to support its finding that Winant suffered from a mental disorder that predisposes Winant to engage in future acts of sexual violence (104:4-5). In reaching this conclusion, the circuit court considered Winant's conduct as a whole:

> The respondent's history is replete of acts of committing sex offenses, lying, absconding and lack of remorse . . . he admits numerous horrendous and perverted acts of sexual offenses.
>
> . . . the record I find is clear that he has committed rapes and abductions of female strangers and child enticement . . . .

(104:4.) Winant's effort to groom A.G. is but one incident among his extensive history that supported the circuit court's finding that Winant has a qualifying mental disorder for purposes of Chapter 980.

Dr. Tyre and Dr. Elwood applied similar methodologies in assessing Winant's risk of reoffense (104:5). But they reached different conclusions. Dr. Tyre concluded that Winant was more likely than not to commit a future act of sexual violence (101:175-76, 178-79; 107:Exs. 47:2, 48:7-10). In assessing Winant's risk to reoffend, Dr. Tyre considered a variety of information. Dr. Tyre used several actuarial instruments to assess how Winant's risk of reoffense compares to reoffense rates for groups of known sex offenders. Winant's score on the Static-99 and MNSOST-R was similar to those offenders who reoffended at a rate greater than 50% as measured by re-arrest or re-conviction (101:166-69; 107:Ex. 48:8-9). In addition, Dr. Tyre also reviewed Winant's behavior pattern, which included convictions on four separate occasions for sexual offending

behavior (107:Ex. 48:9). Finally, Dr. Tyre also determined that Winant's increased age and participation in sex offender treatment had not reduced Winant's risk of reoffense (102:91-93; 107:Ex. 48:9-10).

Dr. Elwood initially concluded that Winant was a sexually violent person (102:61). He later changed his assessment—concluding that the evidence does not establish that his risk of reoffending exceeds 50 percent (102:61, 65, 68). Elwood's opinion regarding risk changed based on his knowledge of the effect of aging and completing treatment on sex offender recidivism (102:62, 66-68, 81-82). Elwood stated that had Winant not completed treatment, he would still meet criteria for commitment (102:84). Elwood noted that Winant's sexual interests have not diminished: "I have no good reason to believe that sexual attraction in a mature male to young adolescents will resolve by itself" (102:78). Elwood reiterated "I think Mr. Winant poses a substantial risk to reoffend. Absolutely." (102:83). While Elwood was certainly aware of Winant's conduct towards A.G. (102:80; 107:Ex. 60), it did not form a cornerstone of his assessment of Winant's risk.

The circuit court also found beyond a reasonable doubt that Winant is more likely to engage in future acts of sexual violence (104:5). Winant displayed a cycle of failing to respond to treatment and reoffending (104:5). The circuit court ultimately declined to adopt Dr. Elwood's position that Winant's advancing age decreased Winant's risk below the threshold, finding that such information is of limited probative value in this case (104:7).

The circuit court based its commitment decision upon Winant's record as a whole, not just Winant's admission

regarding the incident with A.G. to the V.A. social worker. Even if trial counsel objected to the admission of this evidence, it is not reasonably likely that the results of the proceeding would have been any different. Winant has failed to demonstrate that the admission of his statement to the V.A. social worker prejudiced him.

CONCLUSION

For the above reasons, the State respectfully requests this court to affirm the judgment of commitment and the circuit court's denial Winant's motion for postconviction relief.

Dated this 11th day of March, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,112 words.

Dated this 11th day of March, 2015.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 11th day of March, 2015.

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