

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 1, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP1886

Cir. Ct. No. 2008CI0004

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE COMMITMENT OF RANDY LEE SHEPARD:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

RANDY LEE SHEPARD,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
DAVID A. HANSHER and DENNIS R. CIMPL, Judges. *Affirmed.*

Before Kessler, Brennan and Brash, JJ.

¶1 PER CURIAM. Randy Lee Shepard appeals the circuit court’s order committing him under WIS. STAT. ch. 980 (2013-14)¹ and the circuit court’s order denying his postconviction motion. Shepard argues that he received ineffective assistance of trial counsel because his lawyer failed to object to the admission of hearsay evidence. We affirm.

¶2 To prove a claim of ineffective assistance of counsel, a defendant must show that his lawyer performed deficiently and that this deficient performance prejudiced him. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The test for deficient performance is whether counsel’s representation fell below objective standards of reasonableness. *State v. Carter*, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695. To show prejudice, “the defendant must show that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Id.*, ¶37 (citation omitted). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. *Strickland*, 466 U.S. at 697. Whether a lawyer’s conduct was deficient and whether the defendant was prejudiced by his lawyer’s deficient actions are questions of law. *State v. Nielsen*, 2001 WI App 192, ¶14, 247 N.W.2d 466, 634 N.W.2d 325.

¶3 Shepard argues that his lawyer should have objected to Dr. Cynthia Marsh’s testimony on cross-examination because she said, according to a prison conduct report, other inmates reported that Shepard had threatened to rape their

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

family members. Shepard contends that Dr. Marsh's testimony about what Shepard said to the other inmates was inadmissible hearsay.

¶4 Assuming for argument's sake that Dr. Marsh's testimony about the other inmates' comments in the conduct report was inadmissible hearsay, there is not a reasonable probability that the result of the trial would have been different if the testimony had been excluded. *See Carter*, 324 Wis. 2d 640, ¶37 (a defendant is prejudiced only if there is a reasonable probability that the result of the proceeding would have been different absent the alleged deficient performance). Dr. Marsh testified that Shepard was more likely than not to engage in future acts of sexual violence due to his mental disorder. Dr. Marsh was permitted to base *her opinion* that Shepard was likely to reoffend on prison conduct reports and other evidence that would not be admissible at trial. *See* WIS. STAT. § 907.03. The circuit court found the State's expert witnesses, including Dr. Marsh, more reliable than the defense witness, but the court made no mention of the specific allegation in the conduct report that Shepard threatened to assault other inmates' families. Because the record does not show that the circuit court relied on the inadmissible evidence in reaching its decision and there was ample other evidence to support the circuit court's decision, Shepard cannot show that there is a reasonable probability that the result would have been different if his lawyer had objected. Therefore, Shepard's claim that he received ineffective assistance of counsel is unavailing because he cannot show that he was prejudiced.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

