NO. 95-1067

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PETITIONER-APPELLANT,

V.

JOHN J. WATSON,

RESPONDENT-RESPONDENT.

ERRATA SHEET

Marilyn L. Graves
Clerk of Court of Appeals
P.O. Box 1688
Madison, WI 53701-1688

Court of Appeals District I
633 W. Wisconsin Ave., #1400
Milwaukee, WI 53203-1918

Court of Appeals District III
740 Third Street
Wausau, WI 54403-5784

Jennifer Krapf
Administrative Assistant
119 Martin Luther King Blvd.
Madison, WI 53703

Peg Carlson
Chief Staff Attorney
119 Martin Luther King Blvd.
Madison, WI 53703

Court of Appeals District II
2727 N. Grandview Blvd.
Waukesha, WI 53188-1672

Court of Appeals District IV
119 Martin Luther King Blvd.
Madison, WI 53703

Hon. Angela B. Bartell
Trial Court Judge
Dane County, City-County Bldg.
210 Martin Luther King, Jr. Blvd.
Madison, WI 53709

Judith Coleman, Trial Court Clerk
L.C. # 94 CF 2377
Dane County, City-County Bldg.
210 Martin Luther King, Jr. Blvd.
Madison, WI 53709

Richard D. Martin
Asst. State Public Defender
735 North Water St., Ste. 912
Milwaukee, WI 53202

Diane M. Nicks
District Attorney
City-County Bldg., Rm. 523
Madison, WI 53709-0001

Mary E. Burke
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

PLEASE TAKE NOTICE that the attached page three and pages twelve through sixteen are to be substituted for page three and pages twelve through sixteen in the above-captioned opinion which was released on December 11, 1997.

Dated this 12th day of December, 1997.

Watson's false imprisonment of the victim was sexually motivated within the meaning of the law.

The circuit court dismissed the State's petition, concluding that the sexual predator law is unconstitutional and that the State failed to establish probable cause to believe that Watson was a sexually violent person because the only evidence on that point—a psychologist's opinion—was based entirely upon inadmissible hearsay.

Since the circuit court's decision, the Wisconsin Supreme Court has upheld the sexual predator law against several constitutional challenges, including those Watson makes in this case, in ***State v. Carpenter***, 197 Wis.2d 252, 541 N.W.2d 105 (1995), and ***State v. Post***, 197 Wis.2d 279, 541 N.W.2d 115 (1995). The only remaining issue is whether the court erred in dismissing the petition for lack of probable cause on the sexual-motivation issue. We conclude that it did not. We therefore reverse the court's ruling on the constitutional issue but affirm its dismissal of the State's petition for lack of probable cause.

At the probable-cause hearing, the State called only one witness, Dr. Richard Althouse, a psychologist, and he offered testimony on both elements of the statute. He stated that, in his opinion, Watson suffers from the mental disorder of paraphilia, a condition involving uncontrollable urges for sexual contact with nonconsenting partners. He based that conclusion on two interviews with Watson and on his review of various files relating to Watson's conviction.

With respect to the issue at the heart of this appeal, Dr. Althouse testified that, in his opinion, Watson's false imprisonment of the victim was sexually motivated. The opinion came in response to a question on direct examination of whether, based on his training, education and experience, he had

Even giving the State the benefit of the doubt, the arguments it offers in favor of admissibility are unpersuasive.

The State first suggests that the statement is an "admission by a party opponent," citing § 908.01(4)(b)1, STATS. Section 908.01(4)(b)1 provides that any prior out-of-court statements made by a party opponent are not hearsay. Watson's alleged statement would fall under this rule. The State, however, must elicit testimony from someone who actually heard the statement or find another hearsay exception for the report and Dr. Althouse to avoid the problem of hearsay within hearsay. *Cf.* ***State v. Whiting***, 136 Wis.2d 400, 419-20, 402 N.W.2d 723, 731-32 (Ct. App. 1987). The presentence report merely recorded the statement as recounted by the victim, and Dr. Althouse relied upon the report, never having actually heard the statement from either the declarant or the victim.

The State next argues that the statement is admissible as a "present sense impression" under § 908.03(1), STATS., because it was "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." As Watson points out, however, the cases applying the rule involved situations in which the present-sense impression was communicated *to the witness testifying at trial*,[1] not to a nontestifying intermediary—or, as in this case through *two* nontestifying intermediaries. The State has not referred us to any cases applying § 908.03(1) to facts even remotely resembling those before us here. Nothing in the presentence report, or elsewhere in the record, suggests compliance with the requirement of

[1] *See*, *e.g.*, ***Hamed v. Milwaukee County***, 108 Wis.2d 257, 273 n.3, 321 N.W.2d 199, 207 (1982); ***Shoemaker v. Marc's Big Boy***, 51 Wis.2d 611, 616-17, 187 N.W.2d 815, 818-19 (1971); ***Rudzinski v. Warner Theatres, Inc.***, 16 Wis.2d 241, 248-49, 114 N.W.2d 466, 470 (1962).

§ 908.03(1) that the statement be made while, or immediately after, perceiving the event.

The State also argues that the presentence report qualifies as an "official government document" within the meaning of § 908.03(8)(c), STATS., which authorizes the admission of "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." The State likens the presentence report to "case records" maintained by the Department of Health and Social Services, which it says were held admissible in ***State ex rel. Prellwitz v. Schmidt,*** 73 Wis.2d 35, 242 N.W.2d 227 (1976), and police reports, which it says were allowed in ***Mitchell v. State,*** 84 Wis.2d 325, 267 N.W.2d 349 (1978).

In ***Prellwitz***, the issue was whether the department's records established that a probationer had not regularly reported his whereabouts to his agent and had not paid restitution, as required under the conditions of his probation—facts which are readily established by data recorded in the course of the department's daily operations. ***Prellwitz***, 73 Wis.2d at 40, 242 N.W.2d at 229. In this case, on the other hand, the portion of the presentence report at issue is not such a record: it is no more than a representation to a department employee of what one person said another person said. We do not see ***Prellwitz*** as lending significant support to the State's argument.

We think the same may be said—perhaps even more so—for ***Mitchell***. In that case, the question was whether the rules of evidence permitted the State to introduce a police report into evidence at a preliminary hearing. The charged offense was auto theft, and the trial court admitted two police reports prepared by the arresting officer. One was an "offense report" of the theft of the

car, and the other was the officer's description of his telephone conversation with the owner of the car. ***Mitchell***, 84 Wis.2d at 330, 267 N.W.2d at 352. The supreme court distinguished between "the details of which the officer had personal knowledge," and the "repetition of declarations made by [the victim] to the officer over the phone," and concluded that the public-records exception "does not allow admission of this second level of hearsay." ***Id***. "The admission of the police reports containing the declarations of [the victim] was … a violation of the hearsay rules." ***Id***. at 334, 267 N.W.2d at 354. The State has not persuaded us that the public-records exception to the hearsay rule applies to the victim's statement in this case.

Finally, the State argues that the victim's statement is admissible under the "residual" provisions of § 908.03(24), STATS., authorizing admission of "[a] statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness." According to the State, the victim's statement has such guarantees of trustworthiness because: (1) the statement was recorded in the presentence report, a document that "was carefully investigated and drafted"; (2) the statement is "consistent with the account of [the victim's] false imprisonment" as set forth in the criminal complaint; (3) the presentence report "is highly detailed and does not shy from rather sensitive topics," including information of a "sensitive, personal nature" which indicates that "accurate reporting constituted [the victim]'s only objective"; and (4) admission of the statement "conforms with the spirit of admitting the [presentence report] itself under the sec. 908.03(8) official records hearsay exception."

Again, we are not persuaded. First, we find nothing in the record to indicate the extent of the probation agent's investigation, or the degree of care

used in preparing the report. Second, Watson's purported statement is never mentioned in the criminal complaint. Nor do we see how the subject matter of the statement imbues it with a guarantee of trustworthiness. As to § 908.03(8), STATS., we have already concluded that it does not warrant admission of the statement.

The ***Mitchell*** court also considered § 908.03(24), STATS., and declined to apply the residual exception to the portion of the police report recounting the officer's telephone conversation with the victim. ***Mitchell***, 84 Wis.2d at 332-33, 267 N.W.2d at 353. The State argued that the conversation was admissible because it was used in a preliminary hearing—a probable-cause hearing governed by the same rules applicable to the hearing from which this appeal derives. The court rejected the argument, saying:

> The State suggests that [the victim]'s declarations to the police should be considered a residual hearsay exception under sec. 908.03(24), Stats., only for the purpose of a preliminary hearing and a finding of probable cause. However, this residual exception, by its form, applies to statements determined to have guarantees of trustworthiness comparable to the enumerated hearsay exceptions. The residual exception thus focuses, as do all of the enumerated hearsay exceptions, on the character of the statements and the circumstances under which they are made, not upon the type of judicial forum at which the statement is offered. We do not believe that restricting the forum at which such statements can be used provides the guarantees of trustworthiness contemplated by this rule. Statements made to the police over the telephone by the victim concerning the theft of an automobile have some guarantees of trustworthiness, but they do not have sufficient guarantees of trustworthiness to be admissible under the residual hearsay exception ….

Id. at 333, 267 N.W.2d at 333. We believe the same rationale applies here, and we conclude that the statement in the presentence report is not independently admissible under § 908.03, STATS.

While we may differ with the trial court as to the precise reasoning underlying its holding that the State had failed to establish probable cause that the predicate false imprisonment offense was sexually motivated, we are satisfied the court reached the proper result under applicable law.

Finally, because of the possibility that the dissenting opinion, by dwelling on Watson's past crimes over the past forty-five years, will lead to misperceptions of what this case is about, we feel constrained to discuss it briefly. As we have said, as part of the process of committing Watson as a sexual predator, the State had to show probable cause that a non-sex-related offense—a 1980 false imprisonment charge—was sexually motivated. It elected to do so through the testimony of Dr. Althouse, whose opinion was solely based on the statement Watson is alleged to have made to the victim.

This case has nothing to do with Watson's lengthy prior record. He has, obviously, done bad things in his life. But what he may have done in 1953 or 1971 did not contribute in any way to the formation of Dr. Althouse's opinion that the 1980 false imprisonment was sexually motivated. Nor was it based on the fact that, in addition to falsely imprisoning the victim in this case, Watson savagely beat her. He was charged and convicted of that offense, and it has nothing to do with the issues before us on this appeal.[2]

[2] It should be noted that the State never alleged that Watson sexually assaulted or had sexual contact with the victim in this case.