COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0991-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AARON J. LINDH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: ROBERT R. PEKOWSKI, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

¶1 PER CURIAM. Aaron Lindh appeals a judgment convicting him of several felonies, and from an order denying his postconviction motion. The issue is whether the court erred by allowing one of the State's expert witnesses to testify. We conclude that the court did not err, and we affirm.

¶2 Lindh's trial focused on whether he was not responsible for his conduct because he suffered from a mental disease or defect under WIS. STAT. § 971.15 (1999-2000).[1] Patricia Jens, a psychiatrist retained by the State, reviewed various forms of documentary evidence, but did not examine Lindh. Several days before trial, the State provided Lindh with a letter from Jens, briefly stating her conclusion that he did not suffer from a mental disease or defect at the time of his criminal conduct. Lindh's attorney also interviewed Jens by phone. Lindh moved to exclude her as a witness, but the trial court allowed her testimony. On appeal, Lindh argues that Jens should not have been allowed to testify because the State did not comply with certain provisions of WIS. STAT. § 971.16. His arguments raise issues of statutory interpretation, which are questions of law we review independently. ***State v. Sweat,*** 208 Wis. 2d 409, 414-15 ¶6, 561 N.W.2d 695 (1997).

¶3 Lindh first argues that Jens should not have been permitted to testify unless she had personally examined Lindh. The argument is based on a phrase in WIS. STAT. § 971.16(4), which provides in relevant part: "The state may summon [an expert] to testify, but that witness shall not give testimony unless not less than 3 days before trial a written report of his or her examination of the defendant has been transmitted to counsel for the defendant." Lindh argues that this sentence requires the witness to conduct a personal examination. We disagree. The statute requires only that a report of such an examination be transmitted if an examination has occurred. The language of the statute may well reflect an assumption that most experts will conduct a personal examination, but the text cannot reasonably

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

be read as requiring one. Here Lindh's crime occurred more than ten years before Jens became involved. Therefore, she stated she had little reason to conduct an interview.

¶4 Lindh next argues that Jens's letter did not contain sufficient information to satisfy the requirement that she provide a report under WIS. STAT. § 971.16(3) and (4). We reject this argument because neither of those subsections required Jens to provide a report of any kind. Subsection (3) expressly applies to experts appointed under sub. (2), which covers court appointment of independent experts. Jens was not appointed under sub. (2), and therefore sub. (3) did not apply to her. Nor did sub. (4) require her to submit a report unless, as we discussed above, she had personally examined Lindh. However, Jens did provide a written statement of her opinion, and defense counsel also conducted a telephone interview of her prior to trial.

¶5 Lindh's brief-in-chief hints at, but does not squarely raise, an argument that his constitutional right to confront witnesses was violated. Although the summary of Lindh's argument makes that assertion, and the text of his argument provides a general discussion of confrontation law, the brief contains no argument specifically relating that law to the facts of his case, or arguing for an extension of that law. Instead, he relies on the confrontation principles to support his interpretation of WIS. STAT. § 971.16. Lindh does not squarely discuss the confrontation issues until his reply brief. Ordinarily, we do not consider arguments raised for the first time in a reply brief. *See* ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981). Under these circumstances, we will simply note that Lindh's argument is, essentially, that his confrontation right is violated unless there is some type of discovery or preliminary report from the expert. Here, he had both.

By the Court.—Judgment and order affirmed.

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