COURT OF APPEALS
DECISION
DATED AND FILED

March 13, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2005AP2259 **Cir. Ct. No. 2004CI2**

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

IN RE THE COMMITMENT OF KENNETH A. ROBERTS:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

KENNETH A. ROBERTS,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Oneida County: MARK MANGERSON, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Kenneth Roberts, pro se, appeals a judgment and an order for commitment as a sexually violent person under WIS. STAT. ch. 980.[1] Roberts contends (1) the circuit court erroneously allowed hearsay evidence to be considered at his trial; (2) his trial counsel was ineffective and the public defender's office did not answer his plea for dismissal of counsel; and (3) ch. 980, as amended by 2003 Wis. Act 187, is inapplicable to him and, if applicable, is unconstitutional. We disagree and affirm the judgment and order.

¶2 The State filed a petition for civil commitment on July 8, 2004. Prior to trial, Roberts filed motions in limine seeking to exclude certain evidence relating to prior conduct in Oneida County, numerous cases in Michigan, Kansas and Oregon, and a Merrill police department incident report. The objection to the admissibility of the evidence was to the jury's consideration of the evidence, not to the use of the evidence by the State's two psychological experts, Sheila Fields, Ph.D., and Anthony Jurek, Ph.D., in forming their professional opinions. Roberts did not seek to bar the testimony of the State's two psychological experts in these motions.

¶3 A hearing was held on the motions in limine and the court ruled that some of the evidence would be admitted. For most of the evidence, however, the court withheld ruling until the questions and answers were elicited at trial, explaining the evidence would probably be admissible provided the State authenticated certain records, provided proper foundation, and identified applicable exceptions to otherwise inadmissible hearsay evidence.

[1] Citations to Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 After a three-day trial, the jury found that Roberts was a sexually violent person as alleged in the petition. Roberts filed motions after verdict and this appeal followed.

¶5 Roberts raises numerous challenges to evidence considered at trial, generally attacking this evidence as being "hearsay" and "inaccurate and false." The challenged evidence came in through the testimony of three of the State's witnesses: Lindsey Galvin, Sheila Fields, and Anthony Jurek.

¶6 Galvin was Roberts' probation and parole agent. She testified about exhibit number 4, a "case history print" concerning Roberts' conviction in a 1992 Michigan case. At the time, Roberts lived in Beaverton, Michigan. Galvin answered the following questions:

> Q: Do you recognize [exhibit number 4]?
>
> A: Yes.
>
> Q: Can you tell us what that is, please?
>
> A: This is a case history for Mr. Roberts from Beaverton, Michigan.
>
> Q: What is the charge there?
>
> A: I'm looking at a fourth degree – it says CSC-fourth degree, and I would believe that CSC is criminal sexual conduct fourth degree slash fourth coercion. There's a second count there of the same with attempt attached to it.

¶7 Defense counsel did not examine Galvin on this question. Roberts now argues on appeal that Galvin was mistaken. Roberts claims that if Galvin or the prosecutor "would have researched this they would have known in the state of Michigan [w]hen a charge is pled they list the original charge as count one and the pled charge as count two." Roberts provides no citation to authority in support of this claim aside from his own interpretation of the document and therefore it will

not be considered. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).[2]

¶8 Roberts also insists another statement by Galvin is false. Galvin testified about exhibit number 6, a report from Michigan concerning Roberts' conviction in another 1992 case. Galvin testified that "[t]his is again court paperwork for a case out of the State of Michigan out of Beaverton again and looking at assault and battery." Roberts did not object to this testimony at trial. The case in question was case No. 92SO504A, an assault and battery committed on March 18, 1992, to which Roberts pled guilty on April 22, 1992.

¶9 Roberts argues on appeal that Galvin's statement was false because there was never any such case against him in Michigan. However, the only evidence provided by Roberts that Galvin's statement was false is Roberts' conclusory statement in his brief to this court. Statements in briefs are not evidence. The argument will not be considered. Moreover, Roberts has waived his claim that the information was not properly produced during discovery by not objecting at trial. *See* ***State v. Pletz***, 2000 WI App 221, ¶¶21, 26, 239 Wis. 2d 49, 619 N.W.2d 97.

¶10 Roberts next challenges the testimony of Sheila Fields, Ph.D., on several grounds. The most persistent theme is that Fields made several statements in her WIS. STAT. ch. 980 report and her testimony about Roberts' prior criminal behavior that Roberts claims either did "not occur in any of the discovery such as police reports or any other discovery [acquired] by Mr. Roberts" or that

[2] Roberts also complains that Fields and Jurek made this alleged mistake. His arguments in this regard are equally unavailing.

"Mr. Roberts [has never] heard of this [before] nor does he know of it ever happening." Fields made a statement regarding allegations that Roberts touched several thirteen- to fifteen-year-old girls in public places in Washington. Fields also made a statement regarding allegations that Roberts stalked teenage girls, some of whom testified in an Oneida County case. Fields further made a statement that Roberts was sentenced for two counts of stalking on November 24, 1993, and allegations that Roberts was "touching 13-15 year old girls on their genitals, apparently over their clothing" in a pharmacy.

¶11 These statements were not made in Fields' court testimony but were only contained in her WIS. STAT. ch. 980 report. The ch. 980 report was admitted into evidence but was never seen by the jury. Roberts has neither linked the allegedly false statements in the ch. 980 report to the jury verdict, nor contended that Fields should be excluded entirely as a witness on grounds that there were elements in her ch. 980 report that Roberts considered false and inaccurate. Roberts cannot therefore be heard to object to the contents of Fields' ch. 980 report on appeal.

¶12 Roberts also objects to Fields' statement regarding Roberts' 1998 first-degree felony sexual assault conviction in Oneida County based on touching an eleven-year-old girl's buttocks in a swimming pool. Fields' statement was: "The way the girl describes it is he was using circular hand motions on her buttocks." Roberts does not deny the basic fact of the conviction, and in fact states in his reply brief that he "is not trying to give the impression that the sexual assault case itself is not damaging to his case." Roberts insists, however, that "although Mr. Roberts does not have a copy of the court transcripts of his criminal trial, the victim testified that Mr. Roberts had barely come into contact with her buttocks for just a seconds [sic] time." Roberts insists there is "a big difference in

the feeling of horror that can be put into the minds of the members of a jury between the idea that the contact was for just a second barely coming into contact with the victim, and fiendishly groping the victim." Again, Roberts provides no citation to the record on appeal or legal authority to support his contention, and it will not be considered. Moreover, we reject Roberts' contention that Fields' partial description of this incident would be more damaging to his case than the conviction itself for felonious first-degree sexual assault.

¶13 Fields also mentioned in her report allegations that Roberts may have committed burglaries in order to steal female underwear.[3] However, the jury also heard evidence that Roberts was never charged and Fields did not have enough evidence to support a pure diagnosis of fetishism. Roberts insists the "mentioning of them could enhance the [jury's] thinking that Mr. Roberts is a notorious sex offender who draws interest whether guilty or not." We are unpersuaded. Fields merely stated that there was a comment in the record that Roberts may have stolen women's underwear. Roberts' concerns were discredited by the thorough cross-examination by counsel.

¶14 Roberts also refers to statements in Fields' WIS. STAT. ch. 980 report and testimony about Roberts' stalking a family. This argument is inadequately developed and unsupported by citation to legal authority and will not be considered.

¶15 Reference was also made during Roberts' trial to letters Roberts wrote to a fourteen-year-old girl in Kansas. Roberts apparently objects that Fields

[3] Roberts claims this false information also found its way into Jurek's evaluation.

stated in her ch. 980 report that the letters were written while Roberts was at the Wisconsin Resource Center. However, the jury never heard Fields identify that venue as the place where Roberts wrote the letters. His argument will therefore not be considered.

¶16 Roberts also contends he "could not find a copy" of his consent to be interviewed by Fields, "nor does Mr. Roberts remember doing this." Roberts concedes in his reply brief that the State "is correct in [its] statement that Mr. Roberts did not submit any legal theory or authority to explain what relief he is seeking." We therefore will not reach this claim.

¶17 Roberts next claims that Fields testified outside the area of her expertise with regard to whether it is ever a misdemeanor to grab a child under the age of sixteen in the buttocks. Roberts states: "What makes Dr. Fields an expert witness when it comes to deciding whether a crime should be a misdemeanor or a felony? A misdemeanor is the charge that was pled to or no contest." Roberts did not object to the evidence at trial and has therefore waived the issue. *See* WIS. STAT. § 901.03(1)(a); *see also* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997).

¶18 Roberts next challenges the testimony of Anthony Jurek, Ph.D., on various grounds. Jurek provided additional expert testimony for the State at Roberts' trial and wrote a "Chapter 980 Special Purpose Evaluation" concerning Roberts. Roberts insists:

> [T]here are numerous references to inaccurate and false statements regarding accusation [sic] of Mr. Roberts touching 13, 14, and 15 year old girls in a store, exposing himself in a … store, an arrest date for sexual abuse 3rd degree. And a statement that Dr. Jurek makes concerning Mr. Roberts making a statement that "He" (Mr. Roberts)

> defined some sort of charge to accidentally bumping into a girl in a pharmacy.

¶19 Roberts contends that "[i]n the discovery that Mr. Roberts has there is no information in any police report, court reports or any other reports mentioning any of these allegations. Nor does Mr. Roberts have any knowledge of any of these things ever occurring." As mentioned previously, Roberts has waived his claim that information was not properly produced during discovery by not objecting at trial. *See* ***Pletz***, 239 Wis. 2d 49, ¶¶21, 26.

¶20 In addition, as with Fields' WIS. STAT. ch. 980 report, Jurek's report was admitted into evidence but not seen by the jury, and Roberts has not shown that he was harmed by it. Similarly, Roberts did not seek to exclude Jurek entirely as a witness from trial on the ground that his evaluation contained information that Roberts considered false and inaccurate. Roberts' motions in limine moved to exclude from trial evidence from the presentence investigation and Department of Corrections institutional prison records in the Oneida County case. The motions also sought to exclude evidence concerning the Michigan cases and the Oregon case. Jurek did not provide evidence at trial about any of these latter cases and did not refer to the Oneida County PSI or Corrections records. Therefore, it is difficult to discern what Roberts is complaining about.

¶21 Roberts next argues his counsel was ineffective. WISCONSIN STAT. ch. 980 respondents are afforded the same constitutional protections as criminal defendants. ***State v. Sorenson***, 2002 WI 78, ¶¶17-20, 254 Wis. 2d 54, 646 N.W.2d 354. After a criminal trial, a claim of ineffective assistance of counsel must be presented to the circuit court in a postconviction motion and the court

must hold a ***Machner***[4] hearing at which trial counsel is given the opportunity to testify about the representation. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 677, 681, 556 N.W.2d 136 (Ct. App. 1996).

¶22 Roberts filed motions after verdict in the circuit court but the motions did not contain any suggestion that Roberts was seeking relief on the grounds of ineffective assistance of trial counsel.[5] The court thus held no ***Machner*** hearing, and Roberts cannot raise the issue of trial counsel's alleged ineffectiveness on appeal. *See* ***Rothering***, 205 Wis. 2d at 677-78; *see also* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).[6]

¶23 Moreover, a hearing was apparently held on the motions after verdict, but the transcript of that hearing was not made part of the record on appeal. When the record is incomplete, we will assume the missing material supports the ruling under attack. *See, e.g.*, ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993).

¶24 Roberts also insists that he contacted the public defender's office demanding the dismissal of trial counsel. Roberts claims the court discussed this issue with trial counsel and Roberts "never received any relief from the Public

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[4] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

[5] The motions after verdict moved: "(1) To renew the respondent's trial motions to dismiss at the close of the plaintiff's evidence and at the close of all evidence on grounds of insufficiency of the evidence to support a verdict; (2) To set aside the verdict and to grant a new trial; (3) For judgment notwithstanding the verdict; and (4) To schedule a hearing for motions after verdict …."

[6] Roberts' claims would be barred by the waiver principle even if this court were to apply a civil rather than criminal procedure. *See, e.g.*, ***Gorton v. American Cyanamid Co.***, 194 Wis. 2d 203, 226-27 n.10, 533 N.W.2d 746 (1995).

Defenders office even after this discussion." Roberts states that he "could not find any case law or statutes that would give insight on the problem he had with the Public Defenders Office" but the failure to dismiss trial counsel "must fall under some statute or case law or guideline." We will not consider unexplained, underdeveloped, and unsupported arguments. ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

¶25 Roberts next argues WIS. STAT. ch. 980, as amended by 2003 Wis. Act 187, is inapplicable to him and, if applicable, is unconstitutional. Roberts is in error. In ***State v. Carpenter***, 197 Wis. 2d 252, 270-74, 541 N.W.2d 105 (1995), our supreme court held that ch. 980 does not violate the ex post facto or double jeopardy clauses of the United States and Wisconsin Constitutions. Roberts fails to cite ***Carpenter*** or offer any reason why ch. 980 as amended by 2003 Wis. Act 187 should be interpreted differently from ch. 980 before it was amended. The legislature provided that the changes it made to ch. 980 in Act 187 would "first apply to hearings, trials, and proceedings that are commenced on the effective date of this subsection." 2003 Wis. Act 187, § 8, *quoted in* ***State v. Tabor***, 2005 WI App 107, ¶2, 282 Wis. 2d 768, 699 N.W.2d 663. The effective date of the Act was April 22, 2004. *See* ***Tabor***, 282 Wis. 2d 768, ¶2. The petition for civil commitment was filed on July 8, 2004. Roberts was tried between June 1-3, 2005. Therefore, the amendments were applicable.

¶26 Finally, to the extent Roberts suggests he is entitled to a new trial in the interest of justice, it does not appear from the record that the real controversy has not been tried or that it is probable that justice miscarried. *See* WIS. STAT. § 752.35.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(b)5 (2005-06).