COURT OF APPEALS
DECISION
DATED AND FILED

June 21, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2010AP1106
2010AP1967

Cir. Ct. No. 2006CI1

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

IN RE THE COMMITMENT OF ALBERT M. VIRSNIEKS:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALBERT M. VIRSNIEKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Calumet County: PETER L. GRIMM, Judge. *Affirmed*.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 BRENNAN, J. Albert M. Virsnieks, *pro se*, appeals his commitment as a sexually violent person under WIS. STAT. ch. 980 (2009-10)[1] and an order denying his motion for post-commitment relief.[2] Because we conclude his claims are entirely without merit, we affirm.

BACKGROUND

¶2 Shortly before Virsnieks was to be released from prison in 2006, the State filed a petition alleging that he was eligible for commitment as a sexually violent person. At the time the petition was filed, Virsnieks was serving time after being convicted upon a no-contest plea to one count of burglary. A charge of second-degree sexual assault was dismissed as part of Virsnieks's plea agreement.[3]

¶3 At the jury trial on the State's WIS. STAT. ch. 980 petition, the State relied upon testimony from its expert, Dr. Cynthia Marsh. The defense relied upon the testimony of two experts: Dr. Charles Lodl and Dr. Sheila Fields. The experts' testimony is central to Virsnieks's appeal, and therefore, we set it forth in some detail.

---

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] The trial court's final written order denying Virsnieks's motion for post-commitment relief, while included in the State's appendix, is not included in the record. The file stamp on that document seems to indicate that it was filed after the record was transmitted to the court of appeals. However, the trial court's oral order denying the motion is set forth in the April 20, 2010 motion hearing transcript, which is included in the record. Furthermore, we take judicial notice of the written entry of judgment listed on CCAP, the online case management system provided by the Wisconsin Circuit Court Access Program. *See* ***State v. Virsnieks***, No. 2006CI01 (Calumet County); WIS. STAT. § 902.01.

[3] Judgment was entered in Calumet County Circuit Court Case No. 1999CF17.

Dr. Marsh

¶4 Dr. Marsh diagnosed Virsnieks with two mental disorders: (1) sexual sadism; and (2) personality disorder, not otherwise specified, with antisocial features.

¶5 Dr. Marsh testified that sexual sadism involves three basic components: (1) "intense sexual fantasies, urges, or behaviors that involve either the psychological or physical harm or humiliation of" a sexual partner; (2) "a history of that type of behavior for a minimum of six months"; and (3) "significant distress" in functioning due to actual sadistic behaviors or sadistic fantasies. Dr. Marsh testified that Virsnieks engaged in two assaults that led her to a diagnosis of sexual sadism.

¶6 The first assault Dr. Marsh described occurred in 1993 when Virsnieks assaulted his then-wife. When the assault began, the victim was holding a baby. The victim's young son was also present. Virsnieks threw the victim on the floor. He then tore hair from the victim's scalp and handed it to her young son, telling him to take it because it would be the only thing left of his mother. Virsnieks then told the boy to go outside.

¶7 Virsnieks then hit the victim until her shirt became bloodied. Although the victim detested the act of oral sex, Virsnieks forced her to perform oral sex on him. At one point he lost his erection. He hit the victim and said that he would hit her more if she failed to maintain his erection. He later forced vaginal intercourse on the victim. The initial physical and sexual assault lasted two hours. Virsnieks eventually allowed the victim to go to sleep but woke her during the night to force her to have vaginal intercourse again.

¶8 The victim's medical reports stated that she had twenty-five bruises on her face and legs and a possible hairline fracture on her face. Virsnieks was convicted of aggravated battery and fourth-degree sexual assault.

¶9 The second instance is Virsnieks's 1999 assault upon which the WIS. STAT. ch. 980 petition is predicated. The victim was Virsnieks's then-girlfriend. Dr. Marsh described the assault as follows.

¶10 While the victim was out having drinks with friends, Virsnieks broke into the victim's apartment with a key and a piece of wire. When the victim came home, Virsnieks was waiting for her. He said, "[a]ll you want to do is fuck, fuck, fuck, and now you're going to get it." Virsnieks then pushed the victim against the wall by her neck, choking her. They went to the bedroom where Virsnieks punched her in the vaginal area and started having sex with her. She cried and asked him to stop hurting her.

¶11 After Virsnieks finished having sex with the victim, she went to the bathroom to clean up. Virsnieks entered the bathroom and forced the victim to perform oral sex on him while she was sitting on the toilet. The victim bit his penis to try to get him to stop. Virsnieks was undeterred. He then made the victim turn around and forced vaginal sex from behind.

¶12 Virsnieks told police that all of the sexual activity was consensual, and that he was considering pressing charges against the victim because she bit him during oral sex.

¶13 Following the 1999 assault, Virsnieks pled no contest to one count of burglary. The State dismissed a charge of second-degree sexual assault as part of a plea agreement.

¶14 Dr. Marsh testified that Virsnieks's actions in 1993 and 1999 justified a diagnosis of sexual sadism:

> He inflicted violence and then continued to have sexual acts. There were multiple sexual acts. There was punching of the vaginal area. There were multiple bruises on the first victim. All of those things are considered sexually sadistic, and they are considered outside the normal realm over and beyond a normal rapist.

¶15 Based upon the above-described acts, Dr. Marsh also diagnosed Virsnieks with a personality disorder, not otherwise specified, with antisocial features. She believed that Virsnieks matched the characteristics of someone with a personality disorder, which

> [i]nvolves the way a person more or less views the world, how he responds in interpersonal relationships, his overall behavior pattern, the way he thinks, the way he expresses his emotions are all different from the general expectations of his own culture, and that pattern is enduring throughout his lifetime as an adult.

¶16 Dr. Marsh also testified regarding Virsnieks's score on two risk assessment instruments: the Rapid Risk Assessment for Sexual Offense Recidivism ("RRASOR") and the Static-99.

¶17 Virsnieks scored a three on the RRASOR, which placed him in a moderate or moderate-high risk range. Dr. Marsh testified that Virsnieks's RRASOR score is associated with about a twenty-four percent likelihood of being reconvicted of a new sexual offense within five years post-incarceration and about a thirty-six percent likelihood of being reconvicted of a new sexual offense within ten years post-incarceration.

¶18 Virsnieks scored a four on the Static-99. Dr. Marsh testified that, using the "high risk" sample group, this score correlates with a nineteen percent

likelihood of being reconvicted of a new sexual offense within five years post-incarceration, and a twenty-seven percent likelihood of being reconvicted of a new sexual offense within ten years post-incarceration.

¶19 Dr. Marsh testified that these lower-than-fifty-percent actuarial risk percentages do not mean that Virsnieks is unlikely to sexually reoffend. Dr. Marsh testified that the actuarial measures are generally more conservative than the actual rates of reoffending. She also testified that it is not clear how these risk assessment instruments apply to sexual sadists, like Virsnieks. She also explained that the actuarial measures did not account for Virsnieks's level of psychopathy.

¶20 Dr. Marsh also noted that other unfavorable information concerning Virsnieks also influenced her opinions. For example, Virsnieks had not done well on community supervision—he committed the 1993 assault while he was out on bond; he had a driving while intoxicated conviction while he was on supervision; he was convicted of possessing a weapon as a felon; and he committed the 1999 burglary while out on parole. Dr. Marsh also noted that while some individuals' level of dangerousness begins to diminish as they age, Virsnieks did not start committing serious crimes until he was in his thirties, and his criminal behavior has been escalating as he ages. Finally, Virsnieks completed no treatment programs, despite being recommended for the longest, most intensive sex offender treatment available in the Department of Corrections.

¶21 Considering all of the information available to her, including but not limited to the actuarial measures, Dr. Marsh opined that Virsnieks's mental disorders made it more likely than not that he would commit future acts of sexual violence.

Dr. Lodl

¶22 Dr. Lodl testified for Virsnieks. Dr. Lodl diagnosed Virsnieks with bipolar disorder and a personality disorder. He did not believe that these disorders predisposed Virsnieks to acts of sexual violence.

¶23 Like Dr. Marsh, Dr. Lodl scored Virsnieks on the Static-99, scoring him a three. Dr. Lodl testified that Virsnieks's score correlates with a six to sixteen percent likelihood of being reconvicted of a new sexual offense within five years post-incarceration, and about a sixteen to twenty-three percent likelihood of being reconvicted of a new sexual offense within ten years post-incarceration.

¶24 Also like Dr. Marsh, Dr. Lodl scored Virsnieks on the Psychopathy Checklist-Revised. Virsnieks had a score of twenty-five on that test. Dr. Lodl testified that Virsnieks's score was five points less than a definitive diagnosis of psychopathy, but that it is elevated enough so that it is something to "pay attention to here as part of a treatment program for him."

¶25 Dr. Lodl admitted to some unfavorable facts about Virsnieks. He admitted that the Static-99 does not take into account Virsnieks's poor performance on supervision or his relatively high psychopathy score. He also testified that he administered a questionnaire to Virsnieks called the Multiphasic Sex Inventory, which assesses a subject's sexual activities, problems, experiences, and deviant behaviors. Dr. Lodl testified that on this test, Virsnieks endorsed quite a number of distortions and justifications for sexually inappropriate behavior.

¶26 In the end, however, Dr. Lodl testified that he was unable to diagnosis Virsnieks with any disorder that predisposed him to acts of sexual violence. He testified that this fact "ended my look at Mr. Virsnieks right there."

Dr. Fields

¶27 Virsnieks also called Dr. Fields. Dr. Fields diagnosed Virsnieks with bipolar disorder. Dr. Fields believed that Virsnieks's bipolar disorder predisposed him to acts of sexual violence.

¶28 Dr. Fields scored Virsnieks on the Static-99, where he scored a four. Dr. Fields testified that, using the "high risk" sample group, this score correlates with a "high 20s" percentage likelihood of being reconvicted of a new sexual offense within ten years post-incarceration.

¶29 Dr. Fields scored Virsnieks on the Psychopathy Checklist-Revised, where he scored a twenty-four. Dr. Fields testified that Virsnieks's score "somewhat" increases the risk of reoffense "because psychopathy … raises the risk for violence, and it raises somewhat the risk for sexual [offenses]."

¶30 Dr. Fields conceded a variety of unfavorable facts about Virsnieks. She admitted that he did not do well on supervision. She agreed that the Static-99 does not account for an individual's psychopathy score or for a person's performance on supervision.

¶31 Ultimately, however, Dr. Fields testified that she did not believe that Virsnieks was more likely than not to engage in sexual violence in the future.

Jury's Verdict and Post-Trial Proceedings

¶32 Following the expert's testimony, the jury found Virsnieks to be "dangerous to others because he has a mental disorder which makes it more likely than not that he will engage in one or more future acts of sexual violence." The trial court entered judgment accordingly, committing Virsnieks to the Department

of Health and Family Services until such time as he is no longer a sexually violent person. Following the entry of judgment, Virsnieks, *pro se*, filed a post-commitment motion for relief, which the trial court denied following a hearing. Virsnieks appeals.

DISCUSSION

¶33 Virsnieks argues that his commitment under WIS. STAT. ch. 980 is improper because: (1) burglary is not a "sexually motivated offense"; (2) the trial court improperly permitted statements Virsnieks made during his plea hearing to be used against him; (3) Dr. Marsh's testimony was improperly based upon hearsay; (4) the issue of his mental health had been decided during his criminal case, and therefore, his civil commitment was barred by res judicata principles; (5) the jury did not have sufficient evidence on which to commit him; and (6) the cumulative effect of the above errors prevented him from receiving a fair trial.[4] We address each in turn.

I. Sexually Motivated Offense

¶34 Virsnieks first argues that the trial court erred in ruling that burglary is a sexually motivated offense because "a burglary charge alone" cannot constitute a sexually motivated offense. He goes on to contend that the State lost the opportunity to argue that the burglary was sexually motivated when it agreed to dismiss the sexual assault charge. Virsnieks is mistaken.

[4] To the extent that Virsnieks raises other issues throughout his brief that we do not address, we conclude that such issues are inadequately briefed and lack discernable merit. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶35 A WIS. STAT. ch. 980 petition must allege, among other things, that a "person has been convicted of a sexually violent offense."[5] WIS. STAT. § 980.02(2)(a)1. A "[s]exually violent offense" is defined, in relevant part, as "[a]ny crime specified in s. … 943.10 … that is determined, in a proceeding under [WIS. STAT. §] 980.05(3)(b), to have been sexually motivated." WIS. STAT. § 980.01(6)(b). Whether a person was "sexually motivated" is a question of fact for the jury. ***State v. Watson***, 227 Wis. 2d 167, 190, 595 N.W.2d 403 (1999). We will not overturn the jury's finding unless there is no credible evidence to sustain it. WIS. STAT. § 805.14(1).

¶36 Here, the question of whether Virsnieks's 1999 burglary (a crime set forth in WIS. STAT. § 943.10) was sexually motivated was plainly presented to the jury during a trial held pursuant to WIS. STAT. § 980.05(3)(b). Following a three-day trial, the jury was instructed, in relevant part:

> Before you may find that Albert Virsnieks is a sexually violent person, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements have been proved.
>
> One, that Albert Virsnieks has been convicted of a sexually violent offense.
>
> Albert Virsnieks was convicted of burglary in 1999. Burglary may be a sexually violent offense if it was sexually motivated. "Sexually motivated" means that one of the purposes for the offense was the actor's sexual arousal or gratification or the sexual humiliation or degradation of the victim.

[5] In lieu of alleging that a "person has been convicted of a sexually violent offense," a petition may also allege that a "person has been found delinquent for a sexually violent offense" or a "person has been found not guilty of a sexually violent offense by reason of mental disease or defect," neither of which is applicable here. *See* WIS. STAT. § 980.02(2)(a)2.-3.

> The crime of burglary is complete once entry is made. Therefore, the purpose must be determined at the time of entry.

¶37 The special verdict form explicitly asked the jury to determine the following: "Was Albert Virsnieks'[s] conviction for burglary in 1999 a sexually motivated offense?" The jury answered the question "yes."

¶38 There was sufficient evidence in the record to support the jury's verdict that Virsnieks's 1999 burglary was sexually motivated. The jury could have agreed with Dr. Marsh's testimony that Virsnieks was sexually motivated to commit the burglary based upon: Virsnieks's statements to the victim immediately after she entered the apartment that "[a]ll you want to do is fuck, fuck, fuck, and now you're going to get it"; Virsnieks's sexual assault of the victim immediately after she entered the apartment; and the fact that Virsnieks took nothing from the apartment.

¶39 In sum, Virsnieks's assertion that the jury could not have concluded that the burglary was sexually motivated because the sexual assault charge was dismissed is without merit. WISCONSIN STAT. § 980.01(6)(b) explicitly permits a jury to conclude that a burglary charge is sexually motivated if the facts support such a finding. It properly did so here.

II. Virsnieks's Statements During the Plea Hearing

¶40 Next, Virsnieks complains that he was prejudiced at trial when statements from his plea hearing were admitted into evidence. He contends that because he pled no contest the statements he made during the plea hearing were not admissible at a WIS. STAT. ch. 980 proceeding. However, he offers no case law demonstrating that a no-contest plea offers a defendant protection in a later ch.

980 prosecution, nor could he, because in fact the opposite is true. *Cf*. ***State v. Bollig***, 224 Wis. 2d 621, 627, 635-36, 593 N.W.2d 67 (Ct. App. 1999) (holding that a ch. 980 petition is not a direct consequence of a no-contest plea and, therefore, a defendant need not be notified of the possibility of a ch. 980 petition when pleading no contest).

¶41 Nor does Virsnieks identify with citations to the record those statements he contends should be omitted, other than generally arguing that "statements in the complaint, PSI reports and others" were impermissibly admitted into evidence. We do not consider arguments that are undeveloped and unsupported by citations to authority or the record. ***Lechner v. Scharrer***, 145 Wis. 2d 667, 676, 429 N.W.2d 491 (Ct. App. 1988).

¶42 Likewise, Virsnieks argues that the trial court erred in improperly excluding Wisconsin Jury Instruction SM-32A (2010), which he contends would have instructed the jurors that "they cannot use the plea, statement[s] in connection[s] with the plea or any statement made in court as admission collaterally against appellant in any civil action." (Brackets and formatting in Virsnieks's brief.) Again, Virsnieks is mistaken.

¶43 First, Virsnieks failed to object to the omission of Wisconsin Jury Instruction SM-32A at trial. Consequently, he has waived the issue. *See* WIS. STAT. § 805.13(3).

¶44 Second, Wisconsin Jury Instruction SM-32A is not an instruction to be given to a jury but is a comment for judges, discussing the similarities,

differences, and legal effects of no-contest and ***Alford*** pleas.[6] It provides no instruction for a jury. Consequently, Virsnieks's claim is without merit.

III. Dr. Marsh Relied on Hearsay Evidence

¶45 Virsnieks also argues that Dr Marsh, the State's expert, was permitted to rely on hearsay evidence, namely, police reports, medical reports, and presentence investigation reports, and this reliance denied Virsnieks of his right to confront the witnesses against him. Again, we conclude that Virsnieks has waived his claim because he failed to object to its admission before the trial court. *See* ***State v. Edwards***, 2002 WI App 66, ¶9, 251 Wis. 2d 651, 642 N.W.2d 537 ("parties waive any objection to the admissibility of evidence when they fail to [object] before the [trial] court.").

¶46 Regardless, Virsnieks's claim is meritless. It is well established that experts may rely on otherwise inadmissible evidence, such as hearsay, if the evidence is of the type experts typically rely on to form opinions. *See* WIS. STAT. § 907.03. Psychological experts regularly rely on police reports, medical reports, and presentence investigation reports in forming their opinions. *See* ***Watson***, 227 Wis. 2d at 194 ("[T]here can be no question that professionals in corrections, including clinical psychologists, routinely and reasonably rely on presentence investigations to evaluate persons in the corrections system and to form opinions."); *see also* ***State v. Weber***, 174 Wis. 2d 98, 105-08, 496 N.W.2d 762 (Ct. App. 1993) (psychiatrist was permitted to offer an opinion based on hearsay evidence contained in, among other things, police reports, a presentence

[6] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

investigation report, correction records, clinical service records, and treatment reports).

IV. Res Judicata

¶47 Virsnieks claims that in his 1999 burglary case a court-ordered evaluation found that he did not suffer from a mental disorder or illness. Citing the doctrine of res judicata, Virsnieks contends that the results of the court-ordered evaluation in 1999 preclude any finding now that he has a mental disorder for WIS. STAT. ch. 980 purposes. *See* ***Wickenhauser v. Lehtinen***, 2007 WI 82, ¶22, 302 Wis. 2d 41, 734 N.W.2d 855 (under the doctrine of claim preclusion, previously called res judicata, "a final judgment is conclusive in all subsequent actions between the same parties … as to all matters which were litigated … in the former proceedings") (quotation marks and citation omitted). However, in support of his assertion, Virsnieks cites to the 1999 sentencing transcript, which is not in the record. *See* WIS. STAT. RULE 809.19(1)(d) (requiring that all factual references be supported by citations to the record). Consequently, we cannot consider it. *See* ***Jenkins v. Sabourin***, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981).

¶48 Regardless, WIS. STAT. ch. 980 petitions concern the defendant's mental condition at the time of scheduled release, not at the time of sentencing. *See* ***State v. Treadway***, 2002 WI App 195, ¶17, 257 Wis. 2d 467, 651 N.W.2d 334. Because the issue of Virsnieks's mental condition in 2009 could not have been decided on the merits during his 1999 sentencing, the doctrine of res judicata is inapplicable. *See* ***Wickenhauser***, 302 Wis. 2d 41, ¶22.

V. Sufficiency of the Evidence

¶49 Virsnieks appears to challenge the sufficiency of the evidence to support the jury's verdict that he is a sexually violent person. More specifically, he contends that because the State's expert witnesses both testified that Virsnieks scored low on their actuarial tests, demonstrating a less than fifty percent chance that he is likely to sexually reoffend, the State could not demonstrate that it was "more likely than not" that Virsnieks would reoffend.

¶50 The standard of review for a challenge to the sufficiency of the evidence to sustain a jury verdict is set forth in WIS. STAT. § 805.14(1):

> No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.

¶51 In a WIS. STAT. ch. 980 proceeding, the State must prove beyond a reasonable doubt that the offender is a sexually violent person. WIS. STAT. § 980.05(3). "'Sexually violent person' means a person who has been convicted of a sexually violent offense … and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence." WIS. STAT. § 980.01(7). "'Likely'" means "'more likely than not,'" which means that the offender is more than fifty percent likely to commit another sexually violent offense. ***State v. Smalley***, 2007 WI App 219, ¶¶3, 10, 305 Wis. 2d 709, 741 N.W.2d 286 (citation omitted).

¶52 In other words, Virsnieks is correct that the jury must determine, based on the evidence and reasonable inferences therefrom, that Virsnieks is

"more likely than not" to commit another sexually violent offense. However, Virsnieks is mistaken that the experts' testimony regarding the actuarial tests are the gold standard for making that determination.

¶53 The jury had before it, and was permitted to consider, far more information than just the experts' actuarial test scores, when considering whether it was "more likely than not" that Virsnieks would commit another sexually violent offense, including: Virsnieks's psychopathy and sexual defiance, his failure to comply with treatment, his failures on supervision, and the escalation of his crimes as he has aged. Furthermore, the jury was permitted to consider Dr. Marsh's testimony that it was unclear how the actuarial measures applied to sexual sadists, and the testimony of all the experts that the actuarial measures may not account for Virsnieks's psychopathy.

¶54 In sum, the jury's verdict is supported by credible evidence in the record.

VI. Cumulative Effect of Trial Court's Errors

¶55 Finally, Virsnieks contends that the cumulative effect of the alleged errors above prevented the real controversy from being tried and deprived him of his right to a fair trial. However, we have rejected Virsnieks's various challenges to his conviction, and "[a]dding them together adds nothing. Zero plus zero equals zero." *See* ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976). Accordingly, we decline to exercise our discretionary authority under WIS. STAT. § 752.35 to grant Virsnieks a new trial.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.