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DISTRICT IV

June 7, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2017AP1336 In re the Commitment of Lawrence L. White: State of Wisconsin v. Lawrence L. White (L.C. #2015CI1)

Before Lundsten, P.J., Blanchard and Fitzpatrick, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Lawrence White appeals a circuit court order committing him, after a jury trial, to a secure mental health facility as a sexually violent person under WIS. STAT. ch. 980.[1] White contends that the circuit court erroneously exercised its discretion in permitting a witness to read statements from a Department of Corrections conduct report during the witness's testimony. Based upon our review of the briefs and record, we conclude at conference that this case is

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We reject White's arguments and affirm.

White pled no contest to one count of second-degree sexual assault of a child and was sentenced to five years of initial confinement and four years of extended supervision. Before White was released from prison, the State petitioned to have White committed as a sexually violent person under WIS. STAT. ch. 980. After a two-day trial, a jury found that White was a sexually violent person, and the circuit court entered an order of commitment. White appeals.

White's arguments on appeal relate to testimony from White's parole agent, Melissa Wiernik. Wiernik testified about White's disciplinary history while incarcerated, which included four major conduct reports and seven minor conduct reports. White focuses on Wiernik's testimony about one particular report arising from an anonymous letter to a social worker at the prison. The writer threatened to "slap the shit" out of the social worker and "spit in her face if he ever s[aw] her at Wal-Mart." Wiernik testified that prison officials determined that White authored this letter after comparing the handwriting to another form that White had completed.

White argues that the circuit court erroneously exercised its discretion in allowing Wiernik to testify about this report over his attorney's objection. *See* ***State v. Franklin***, 2004 WI 38, ¶6, 270 Wis. 2d 271, 677 N.W.2d 276 ("whether evidence is admissible is a discretionary decision of the circuit court," which we review "under the erroneous exercise of discretion standard"). Specifically, White argues that Wiernik's testimony about the report does not fit within the business records exception to the hearsay rule.

The insurmountable problem with this line of argument is that, although White's attorney objected to the testimony, he never made a *hearsay* objection. White contends that even though

the trial attorney never used the word "hearsay," the context of the objection made clear that he was objecting on hearsay grounds. We disagree that this is a fair characterization of the transcript.

White's attorney made two objections during Wiernik's testimony about the conduct report. First, when Wiernik began to quote the threatening language purportedly written by White, White's attorney stated: "Objection. Could she let us know what she's reading from." The circuit court sustained this objection by instructing the prosecutor to lay a foundation before eliciting Wiernik's testimony about the report. Thus, the first objection had nothing to do with any hearsay issue.

After the prosecutor attempted to lay a foundation for the report that had been prepared by a person other than Wiernik, the prosecutor asked Wiernik what the report said about the incident with the social worker, an apparent reference to what another person concluded as to whether White made the threat directed at the prison social worker. White's attorney then objected on the ground that "the rules of evidence require [Wiernik] to testify from memory." White's attorney further stated: "If she needs to refresh her recollection, [the State] can ask her to refresh her recollection but otherwise she can't sit up there and read." We understand this objection to be a suggestion that Wiernik should have to testify from her memory of the report, rather than reading the report. But whether Wiernik testified from memory or read from the report has no effect on whether the contents of the report are hearsay. Thus, this second objection also did not suggest a hearsay problem.

White argues that the circuit court's reason for overruling this second objection "has nothing to do with the business records exception to the hearsay rule." This argument does not

help White because the attorney's objection was not based on hearsay. We therefore conclude that White has forfeited his argument that the contents of the report were inadmissible hearsay. *See* ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 ("[A] mere failure to object constitutes a forfeiture of the right on appellate review.").

In his reply brief, White argues that, even if we conclude that his trial attorney failed to make a hearsay objection, we should nonetheless address his hearsay arguments on the merits. White contends that to do otherwise will only invite an additional round of post-commitment litigation based on ineffective assistance of counsel. To the extent that White is suggesting that his trial attorney's failure to object amounted to ineffective assistance of counsel, we can easily reject that argument. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if defendant makes an inadequate showing on one. ***Id.*** at 697.

Here, White cannot establish prejudice.

First, to the extent the issue is the part of the report quoting White's threat, the threat is not hearsay because it was not offered for the truth of the matter asserted. There was no assertion of historical fact in the threat.

Second, regardless of admissibility, we conclude that the admission of this one threat did not affect the verdict. As the State points out, Wiernik's testimony about the conduct report was a minimal part of the two-day trial, and neither party referred to that testimony during opening statements or closing arguments. We are confident that admission of the testimony did not affect the outcome of this proceeding.

Upon the foregoing reasons,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals