COURT OF APPEALS DECISION DATED AND FILED

December 16, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP153

Cir. Ct. No. 2001CI4

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

IN RE THE COMMITMENT OF TOMMIE L. MITCHELL:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

TOMMIE L. MITCHELL,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM W. BRASH, III, Judge. *Affirmed*.

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

¶1 KESSLER, J. Tommie L. Mitchell appeals from a judgment and commitment order finding him to be a sexually violent person under WIS. STAT.

ch. 980 (2001-02).[1] He seeks a new trial on grounds that the trial court erroneously exercised its discretion when it allowed "the [S]tate's witnesses to give hearsay testimony concerning the facts of two alleged sexual incidents of which Mitchell was never charged nor convicted." We reject his argument because the record reflects that Mitchell was indeed charged and convicted of crimes in connection with both of those incidents. We affirm the judgment and order.

BACKGROUND

¶2 In 1991, Mitchell was convicted of first-degree sexual assault for an assault that took place in October 1988, in violation of WIS. STAT. § 940.225(1)(b) (1989-90). He was sentenced to an indeterminate term of twenty years in the Wisconsin State prisons. Shortly before he was to be released in July 2001, the State filed a petition to commit him as a sexually violent person under WIS. STAT. ch. 980.

¶3 After numerous delays, the case proceeded to trial before a jury in March 2007. At trial, the State introduced testimony from probation and parole agent Rebecca Mahin concerning numerous sexual assaults committed by Mitchell. Her testimony included details of two incidents at issue in this appeal, which occurred on January 10 and July 3, 1990. Mahin said the incidents that occurred on those dates led to the convictions detailed in a Judgment of

[1] For reasons not germane to this appeal, it took six years for this case to proceed to a jury trial. A series of attorneys represented Mitchell at the trial court level, and he is represented by new counsel on appeal.

All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

Conviction in Milwaukee County Circuit Court case number 1990CF903994, which was marked as Exhibit 2 and ultimately admitted into evidence ("Exhibit 2"). Mahin did not indicate the source of each detail of her testimony concerning those incidents, but testified that in general, as Mitchell's probation and parole agent, she kept track of records concerning his criminal history.

¶4 Mahin testified that on January 10, 1990, Mitchell entered the home of a seventeen-year-old woman and forced her to have penis-to-vagina sexual intercourse. Next, Mahin testified that on July 3, 1990, Mitchell entered a woman's home and told her he wanted "some pussy." Mahin said that when the woman told Mitchell she was menstruating, he "place[d] his hand into her vaginal area to determine if that was true." Mahin said the victim distracted Mitchell and she was able to run away. Mahin testified that all of the assaults she testified about also involved Mitchell stealing property from the victims. Later, two psychologists testified about Mitchell and included general references to these and other sexual assaults.

¶5 The jury found Mitchell to be a sexually violent person. The trial court entered a judgment and order committing Mitchell to institutional care in a secure mental health facility. This appeal follows.

DISCUSSION

¶6 Mitchell argues he is entitled to a new trial because the trial court erroneously allowed Mahin to testify about the January 10 and July 3, 1990 incidents, and then allowed two psychologists to mention the incidents generally and to offer opinions that were based in part on the incidents. He argues the testimony was improper because he was never charged or convicted in connection with the January 10 and July 3, 1990 incidents. We reject Mitchell's argument

because the record establishes that he *was* convicted of crimes in connection with the two incidents he challenges on appeal.

¶7 In its brief, the State asserted that Mitchell was charged and convicted in connection with the January 10 and July 3, 1990 incidents, in Milwaukee County Circuit Court case number 1990CF903994. Mitchell did not file a reply brief and therefore did not respond to the State's assertion that he was convicted of crimes in connection with the incidents that form the basis for his challenge on appeal. By order dated November 25, 2008, we obtained and have made part of the appellate record Exhibit 2, which provides more specific information concerning the convictions.

I. The January 10, 1990 incident.

¶8 Exhibit 2 indicates that Mitchell was convicted of second-degree sexual assault in connection with the January 10, 1990 incident. Mitchell argues evidence concerning the January 10 incident was improperly admitted because he was never charged and convicted in connection with that incident. Because the record belies that assertion, we reject his argument. In addition, we note that trial counsel never objected to the testimony, so any potential challenge was waived. *See* ***State v. Edwards***, 2002 WI App 66, ¶9, 251 Wis. 2d 651, 642 N.W.2d 537 ("Wisconsin case law has repeatedly held that parties waive any objection to the admissibility of evidence when they fail to do so before the [trial] court.").

II. The July 3, 1990 incident.

¶9 Exhibit 2 indicates that Mitchell was convicted of robbery in connection with the July 3, 1990 incident. Mahin testified that during the course of the incident, Mitchell touched the woman's "vaginal area."[2] On appeal, Mitchell objects to testimony concerning this incident on grounds that he was never charged or convicted in connection with it. He is incorrect. He was convicted of robbery in connection with the incident. Thus, we reject his argument.

¶10 To the extent Mitchell is attempting to argue that Mahin should not have been able to testify about Mitchell touching the woman's vaginal area, we further reject his argument. Trial counsel did not seek to exclude that aspect of the testimony, and did not object to the testimony at trial. Trial counsel did file a general motion in limine, seeking to exclude "any alleged sexual or other conduct or misconduct that has not been proven beyond a reasonable doubt or admitted to by the Respondent." However, at the hearing on the motion in limine, only one issue was ultimately presented to and decided by the trial court: whether the jury could hear evidence that the July 3, 1990 victim said she had seen Mitchell a week or so prior to the July 3 incident when he tried unsuccessfully to break into her home.[3] Trial counsel unsuccessfully argued that the attempted break-in evidence

[2] One source of this information, according to one psychologist's Chapter 980 Special Purpose Evaluation, was a July 26, 1991 presentence investigation.

[3] The transcript of the argument on the motion in limine does not actually state that the attempted break-in evidence involved the July 3, 1990 victim, but the facts are the same as those discussed in the Chapter 980 Special Purpose Evaluation, which states that the July 3 victim "told the Presentence Investigation agent that she recognized the subject as being the same individual who tried to get in her home the week before by removing a porch screen."

should not be admitted because Mitchell was never charged or convicted of attempting to enter the woman's home sometime in June 1990. By failing to object to the testimony concerning Mitchell's actions during the July 3 incident, Mitchell waived any challenge to that testimony. *See* ***Edwards***, 251 Wis. 2d 651, ¶9.

¶11 For the foregoing reasons, we reject Mitchell's challenge to the testimony concerning the January 10 and July 3, 1990 incidents. The judgment and order are affirmed.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.