COURT OF APPEALS
DECISION
DATED AND FILED

January 6, 2000

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0611

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

IN RE THE COMMITMENT OF HARRY MONTEY:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

HARRY MONTEY,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: MARK A. FRANKEL, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

¶1 PER CURIAM. Harry Montey appeals from two orders, one requiring his civil commitment as a sexually violent person under WIS. STAT.

ch. 980 (1997-98),[1] and another denying his post-judgment motions. Montey contends: (1) ch. 980 may not apply to him; (2) the trial court erroneously denied his confrontation rights and, in violation of his right to silence, considered testimony that he declined to participate in an interview with a State's expert; and (3) the trial court erred when it denied his post-judgment motion claiming ineffective assistance of trial counsel. We reject Montey's arguments and affirm.

¶2 Montey was originally committed in 1980 under former WIS. STAT. ch. 975, the prior sex crimes commitment law. He was conditionally released in 1985, but that was revoked in 1991 and he was ordered returned to custody. A sexual predator petition under WIS. STAT. ch. 980 was filed in February 1995, when Montey was due to be released from the ch. 975 commitment. The trial court dismissed the petition and ordered Montey discharged from custody in March 1995, although he remained in custody during the State's appeal. We reversed the trial court and remanded the case for a final commitment hearing. The trial court ordered Montey committed as a sexual predator. Montey filed post-judgment motions, which were denied. He appealed and filed a motion to remand the case to the trial court to pursue post-judgment motions including an ineffective assistance of trial counsel claim. We granted the motion and Montey filed a second post-judgment motion alleging the trial court's denial of his constitutional right to confrontation and his right to remain silent. The trial court denied both motions and Montey filed an amended notice of appeal.

¶3 Montey first challenges the trial court's order requiring his civil commitment under WIS. STAT. ch. 980 by claiming that the ch. 980 petition was

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

improperly commenced. He argues that ch. 980 does not apply because a miscalculation of his mandatory release date required that he should have been released prior to the enactment of ch. 980. We decline to address this issue because the facts and arguments have not been sufficiently developed to allow us to make a reasoned determination. *See* ***Shannon v. Shannon***, 150 Wis. 2d 434, 446, 442 N.W.2d 25, 31 (1989).

¶4 In his brief, Montey suggests three potential methods of calculating his mandatory release date, acknowledges that two of those methods would make WIS. STAT. ch. 980 applicable, and argues, without citing authority, that "he believes" the third method is the appropriate method to calculate his mandatory release date. He provides no explanation for how the Department of Corrections calculated his release date or what errors were made. He cites no case law or administrative rules regarding the calculation of mandatory release dates. Montey's brief informs the court that counsel made no attempt to calculate Montey's mandatory release date and suggests that this court should do so. We cannot serve as both advocate and judge. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633, 642 (Ct. App. 1992). Montey appears to raise still another method for calculating his mandatory release date in his reply brief and again requests that this court determine the proper method of calculation. We do not, as a general rule, address issues raised for the first time in a reply brief, and we will not do so here. *See* ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508, 512 (Ct. App. 1981). In sum, Montey's contention that ch. 980 does not apply because of an error in calculating his mandatory release date fails because the issue was inadequately briefed.

¶5 Montey also argues that WIS. STAT. ch. 980 does not apply because it is unclear whether ch. 980 applies to a person who is confined under a WIS.

STAT. ch. 975 commitment. We disagree. The Wisconsin Supreme Court squarely rejected an argument that ch. 980 is inapplicable to persons committed under ch. 975 when it held that "chapter 975 committed persons clearly do 'fit' within the category of persons described in § 908.015(2)(a) in that they may be released on parole following a conviction for a sexually violent offense." ***State v. Post***, 197 Wis. 2d 279, 335, 541 N.W.2d 115, 135 (1995).

¶6 Montey next challenges the trial court's denial of his post-judgment motions, making several allegations of trial court error. He contends the trial court erred in ruling that he did not have a confrontation right at a WIS. STAT. ch. 980 trial, and he argues that this ruling affected the trial court's evidentiary rulings with respect to admitting the contents of his Department of Corrections (DOC) file, and that it also affected counsel's cross-examination of other witnesses. Although the court incorrectly concluded at trial that there were no confrontation rights in a ch. 980 civil proceeding, it recognized and corrected the error at the post-judgment hearing. The court then concluded that the DOC records were admissible under the public records exception to the hearsay rule, thus satisfying the confrontation clause, and that Montey had failed to show how he was prejudiced by the erroneous ruling—either by being kept from disputing the facts in the file or in counsel's cross-examination of witnesses.

¶7 With respect to admission of the DOC file, we review a trial court's decision to admit evidence for an erroneous exercise of discretion. *See* ***State v. Bellows***, 218 Wis. 2d 614, 627, 582 N.W.2d 53, 59 (Ct. App. 1998). On review, we examine the record to determine if the trial court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30, 36 (1998). In considering whether the

proper legal standard was applied, however, no deference is due. *See* ***Vogel v. Grant-Lafayette Elec. Coop.***, 195 Wis. 2d 198, 209, 536 N.W.2d 140, 144 (Ct. App. 1995), *rev'd on other grounds*, 201 Wis. 2d 416, 548 N.W.2d 829 (1996).

¶8 We have previously held that probation and parole files compiled by the DOC fall within the definition of public records, a hearsay exception under WIS. STAT. § 908.03(8). *See* ***State v. Keith***, 216 Wis. 2d 61, 77, 573 N.W.2d 888, 896 (Ct. App. 1997). Furthermore, because WIS. STAT. ch. 980 is a civil proceeding, the records may be used to establish factual findings made during investigations, as well as activities or observations made by DOC personnel. ***Id***. The public records exception to the hearsay rule is sufficient to satisfy the confrontation clause. *See* ***State v. Leis***, 134 Wis. 2d 441, 448-49, 397 N.W.2d 498, 501-02 (Ct. App. 1986). Therefore, we conclude the trial court did not erroneously exercise its discretion in admitting the DOC file over the confrontation objection, especially since the court ruled that the file was subject to hearsay and other evidentiary objections as to particular records.

¶9 To the extent Montey claims the trial court erred by considering inadmissible hearsay, we disagree. At the post-judgment hearing, the trial court stated that it did not consider the contents of the DOC file except for what the expert, Montey's parole agent, testified to. The parole agent was qualified as an expert for the purposes of offering an opinion on the risks Montey presented if released. It does not appear that Montey challenges that determination on appeal, and it was not unreasonable for the parole agent to rely on the contents of the DOC

file in forming his opinion.[2] *See* ***State v. Watson***, 227 Wis. 2d 167, 194-95, 595 N.W.2d 403, 415-16 (1999).

¶10 An expert's opinion testimony is admissible even though based in whole or in part on inadmissible hearsay, so long as the underlying materials were not admitted for their truth. ***Id***. In this instance, even assuming without deciding that some of the underlying materials were erroneously admitted for their truth, and were considered by the court, we conclude that such evidentiary admission constituted harmless error.

¶11 Evidentiary submissions are subject to harmless error analysis. Generally an error is harmless if there is no reasonable possibility that it contributed to the conviction or, in this case, the commitment. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222, 231-32 (1985). A "reasonable possibility" is one that is sufficient to undermine confidence in the outcome of the proceeding. *See* ***State v. Patricia A.M.***, 176 Wis. 2d 542, 556, 500 N.W.2d 289, 295 (1993). In this instance the trial court stated at the trial and the post-judgment hearing that it considered the parole agent's testimony only as a basis for the agent's opinion, not for the truth of the matters asserted. In addition to the parole agent, three psychologists offered opinions as to whether it was substantially probable that Montey would engage in future acts of sexual violence. The trial court discussed these three experts' testimony both at the trial's conclusion and at the dispositional hearing, but at no point indicated that it considered the parole agent's opinion in forming its conclusion. Consequently we conclude that any

[2] Montey contends, only in his reply brief, that trial counsel was ineffective for failing to object to the parole agent's designation as an expert, and that the State should have given him notice if it was intending to call the agent as an expert.

error committed in admitting erroneous evidence was harmless, because there is no reasonable probability that the error contributed to the court's judgment.

¶12 Montey contends that the trial court's erroneous confrontation ruling permeated the entire trial, affecting counsel's cross-examination of witnesses. He states that trial counsel failed to bring out errors in the State's witnesses' testimony, but fails to articulate any specific area of cross-examination that counsel could have explored or additional evidence that would have been elicited through different cross-examination. Because this allegation of error is wholly undeveloped, we decline to address it. *See* ***Shannon***, 150 Wis. 2d at 446, 442 N.W.2d at 31.

¶13 Montey asserts that in assessing his future dangerousness, the trial court violated his constitutional right to remain silent by drawing a prejudicial inference against him from an expert's testimony that Montey refused to be interviewed. Montey represents in his brief that although the trial court claimed at the post-judgment hearing that it did not rely on the expert's reference to Montey's refusal to be interviewed, it went on to say that it did take that information into account in assessing his future dangerousness. We have held that a defendant in a WIS. STAT. ch. 980 trial has the same constitutional right to remain silent as a defendant in a criminal trial. *See* ***State v. Zanelli***, 212 Wis. 2d 358, 372, 569 N.W.2d 301, 307 (Ct. App. 1997). Upon our review of the record, we are unable to find any indication that the trial court considered Montey's refusal to be interviewed when assessing his future dangerousness. Accordingly, we conclude that this claim is without merit.

¶14 Finally, Montey contends that the trial court erred when it denied his post-judgment motion claiming ineffective assistance of counsel. To establish

ineffective assistance of counsel, Montey must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not review both components if the defendant fails to make a sufficient showing on one of them. *See* ***id***. at 697. Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review de novo. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711, 715 (1985).

¶15 Montey raises the following allegations of deficient performance: (1) counsel failed to object to certain improper hearsay evidence—specifically admission of the DOC file and the parole agent's testimony about the file; (2) counsel failed to examine or investigate the DOC file prior to trial; (3) counsel failed to object to lack of notice regarding the State's use of the DOC file; (4) counsel failed to object to the parole agent's designation as an expert; and (5) counsel failed to object to the court's ruling regarding his confrontation rights. Even if these allegations did constitute deficient performance, we conclude Montey fails to make a sufficient showing of prejudice.

¶16 To establish prejudice under ***Strickland***, Montey must show that there is a reasonable probability that, but for the allegations of error, the result of the proceeding would have been different. *See* ***Strickland***, 466 U.S. at 694. More than mere speculation is required to establish prejudice; a defendant must affirmatively prove prejudice. *See* ***Pitsch***, 124 Wis. 2d at 641, 369 N.W.2d at 718. Montey fails to specifically demonstrate what, if any, evidence would have been excluded if additional objections had been made, that additional information would have been elicited if cross-examination had been conducted differently, that any expert's opinion would have been different or would have been weighed

differently, or how any part of the record that was admitted prejudiced him in any way. In short, Montey has failed to persuade us that but for the alleged errors, the result of the proceeding would have been different. Having failed to establish prejudice, Montey cannot prevail on an ineffective assistance of counsel claim.

¶17 In conclusion, we reject Montey's arguments and affirm.

By the Court.—Orders affirmed.

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