**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 30, 2007**

**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. 2005AP1352**

**Cir. Ct. No. 2004CI1**

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

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**IN RE THE COMMITMENT OF WALTER E. SPRINGER:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**WALTER E. SPRINGER,**

**RESPONDENT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Oneida County: ROBERT A. KENNEDY, JR., Judge. *Affirmed*.

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

¶1 PER CURIAM. Walter Springer appeals a judgment, entered on a jury's verdict, committing him as a sexually violent person pursuant to WIS. STAT.

ch. 980.[1] He also appeals an order denying his motion for postcommitment relief. Springer raises four claims of error: (1) the court improperly polled the jury; (2) he was denied the right to be present at trial; (3) he was denied the right to testify; and (4) an expert from the Department of Health and Family Services improperly accessed his presentence investigation reports. We reject Springer's arguments and affirm the judgment and order.

## Background

¶2 In 1994, Springer was convicted of two counts of second-degree sexual assault. His presumptive mandatory release date was in January 2001, but the Parole Commission deferred his release until the mandatory date of May 16, 2004. On May 5, 2004, the State filed its WIS. STAT. ch. 980 petition.

¶3 Following various pretrial motions not at issue on appeal, the court set the matter for trial. Just before the start of trial, Springer asked to be returned to the Wisconsin Resource Center. He did not wish to be in the courtroom and he explained that he did not wish to stay in the county jail because of the jail personnel's lack of training relevant to mental health issues. Springer's attorney was concerned about proceeding without his client present and the State objected to proceeding in Springer's absence.

¶4 The court made a preliminary ruling in chambers that Springer could absent himself from trial but stated, "if he is not going to be there from minute one he is waiving his right to testify in the case." Back in the courtroom, Springer's

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

request was addressed again. The court allowed Springer to remain in the jail during trial, and proceeded without him. The jury returned a verdict finding Springer sexually violent.

¶5 After the court had read the verdict, Springer's attorney requested a jury poll. The court told the jury the poll's purpose was to check in case "the wrong piece of paper was signed," then asked the foreperson, "[D]id you vote in favor of the State?" When the foreperson said yes, the court asked "whether or not this is the right piece of paper." Springer's counsel objected, suggesting the poll question should more closely track the verdict question. The court then asked each juror if "Walter Springer is a dangerous person at this point?" All twelve jurors answered yes.

¶6 Springer brought a postcommitment motion seeking a new trial, raising the four issues he now raises on appeal. The court denied his motion. Springer appeals. Additional facts will be set forth in the discussion as necessary.

## Discussion

### I. Jury Polling

¶7 Springer complains the court failed to conduct a meaningful jury poll. Specifically, he contends the poll question as to whether he was "a dangerous person at this point" is insufficient to confirm the verdict.

¶8 "The purpose of jury polling is to test the uncoerced unanimity of the verdict by requiring jurors to take individual responsibility and state publicly that they agree with the announced result." ***State v. Raye***, 2005 WI 68, ¶18, 281

Wis. 2d 339, 697 N.W.2d 407. The right to a jury poll is absolute; unless the right is waived, its denial mandates reversal.[2] ***Id.***, ¶20. WISCONSIN JI—CRIMINAL 522 provides a suggested format for jury polling, asking each juror by their number or name, "Is this your verdict?" to obtain either a yes or a no answer. However, there is no rule expressly requiring a jury poll to conform to the recommended question.

¶9 Here, although we are perplexed by the court's phrasing of its poll question, we conclude the purpose of polling was fulfilled and there is no doubt the verdict was unanimous.[3] At the time of polling, the court had just read the verdict aloud and in the jury's presence. The jury was present as the court started its polling by asking if the foreperson had voted for the State and whether the court had the correct verdict in front of it. It was evident that the jury knew what was being asked of it.

¶10 Moreover, there was no objection to the form of the second question. Counsel only objected to the question of whether the jurors had voted for the State. When the question was rephrased to ask if Springer was dangerous, counsel merely asked the court to address jurors specifically by name. He did not object to the question's content. This constitutes waiver. *See* ***Raye***, 281 Wis. 2d 339, ¶20; ***State v. Cydzik***, 60 Wis. 2d 683, 696, 211 N.W.2d 421 (1973); ***State v. Brunette***, 220 Wis. 2d 431, 456, 583 N.W.2d 174 (Ct. App. 1998).

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[2] Like the State, we assume without deciding that the right to poll the jury, a right in criminal trials, extends to defendants in WIS. STAT. ch. 980's civil proceedings.

[3] Indeed, Springer does not challenge the unanimity of the result.

## II. Springer's Absence from Trial

¶11 Springer claims the trial court failed to require Springer's presence at trial. *See* WIS. STAT. § 971.04(1). He contends that § 971.04 applies because WIS. STAT. § 980.05(1m) states: "At the trial to determine whether the person who is the subject of a petition under s. 980.02 is a sexually violent person, all rules of evidence in criminal actions apply. All constitutional rights available to a defendant in a criminal proceeding are available to the person."

¶12 WISCONSIN STAT. § 971.04(1) is not a rule of evidence. It is a rule of criminal procedure. However, WIS. STAT. ch. 980 proceedings are civil in nature. ***State v. Rachel***, 224 Wis. 2d 571, 573, 591 N.W.2d 920 (Ct. App. 1999). "[W]hen the legislature intended for criminal safeguards to apply to ch. 980 proceedings it said so. It has not said so with regard to rules of procedure." ***Id.*** at 574. Thus, § 971.04(1) does not mandate Springer's appearance at trial. Rather, he is allowed to appear by counsel, consistent with the rules of civil procedure.

¶13 Springer argues the right to be present is a constitutional right and therefore still within the ambit of WIS. STAT. § 980.05(1m). However, an individual is permitted to waive a right by his or her actions. Voluntary absence from proceedings, coupled with a failure to assert a right to be present, can constitute waiver even if there is no explicit waiver on the record. ***State v. Divanovic***, 200 Wis. 2d 210, 220, 546 N.W.2d 501 (Ct. App. 1996).

¶14 Here, Springer was adamant about his refusal to be present for trial. He never attempted to return at any stage of the proceedings. On appeal, he does not assert he wished to return, only that his absence is now an error and he should have been forced to attend trial. We discern no error from Springer's voluntary absence. *See* ***Taylor v. United States***, 414 U.S. 17, 20 (1973).

## III. Right to Testify

¶15 Springer complains the trial court made him waive his right to testify in exchange for granting his request to be absent from the courtroom. Specifically, Springer protests the following exchange between him and the court:

> COURT: If you do not start the case with us by being in the courtroom, although you can come back, you cannot testify. I don't think that it is fair to do it that way where you're not here in the beginning you come in later and testify.
>
> So you're giving up your right to testify by not starting with us. Okay. And I think that he has to understand that he has the right to remain silent. Also got the right to testify. But you can waive the right to testify if that's what you want to do. Have you thought about that?
>
> [SPRINGER]: Um-hum.
>
> COURT: How do you want to handle that issue?
>
> [SPRINGER]: I am not going to.

¶16 "[E]very criminal defendant is privileged to testify in his own defense, or to refuse to do so." ***State v. Weed***, 2003 WI 85, ¶37, 263 Wis. 2d 434, 666 N.W.2d 485 (citation omitted). A circuit court should conduct a colloquy with a defendant to ensure the defendant is knowingly and voluntarily relinquishing a right to testify. ***Id.***, ¶40. In determining whether a waiver of the right to testify is knowing and voluntary, the colloquy should inquire whether a defendant is aware of the right to testify and has discussed that right with counsel. ***Id.***, ¶43. Whether a waiver is knowing and voluntary is a mixed question of fact and law. ***State v. Arredondo***, 2004 WI App 7, ¶12, 269 Wis. 2d 369, 674 N.W.2d 647.

¶17 The colloquy here does not satisfy ***Weed*** because it does not ascertain whether Springer ever discussed with counsel his right to testify. Nevertheless, we may apply a harmless error analysis to the question of Springer's waiver. ***State v. Flynn***, 190 Wis. 2d 31, 24-56, 527 N.W.2d 343 (Ct. App. 1994). We uphold a verdict in light of an error if it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *See* ***id.*** We conclude any error here was harmless.

¶18 First, Springer clearly had no wish to testify, repeatedly insisting he be allowed to leave the courtroom for the trial's duration. As is the case with the right to be present, waiver can be inferred from voluntary absence. *See* ***Taylor***, 414 U.S. at 20; ***Maine v. Chasse***, 750 A.2d 586, ¶11 (Me. 2000) (defendant "cannot avoid the consequences of his voluntary absence from trial by declaring prejudice after the fact").

¶19 Second, neither Springer nor his trial attorney testified at the postcommitment motion hearing. Thus, while the colloquy did not inquire whether Springer had a discussion with his attorney about testifying, Springer cannot show—nor does he assert—that such a conversation never took place.

¶20 Third, the colloquy that did occur supports the conclusion that Springer's waiver of his right to testify was voluntary. Springer asserts his statement, "I am not going to," meant he was not going to handle the question of testifying, not that he would not actually testify. But the court's conclusion immediately following that statement was "Okay. He is not going to testify. Okay." Neither Springer nor his attorney objected to or attempted to correct this conclusion. Moreover, the court permitted the State to question Springer about his

waiver, asking if he was threatened or coerced into giving up his right to testify. Springer answered he was not.

¶21 Fourth, although the court erred by stating Springer was foreclosed from changing his mind and returning to assert his right to testify, this is not a reversible error here. Springer never attempted to return to testify and he does not argue on appeal that he wanted to testify. Indeed, he does not even identify what testimony he would have given.

¶22 Finally, we are not convinced the court was premising the choice to be absent on Springer surrendering the right to testify. Rather, the court was merely pointing out the obvious; that Springer could not assert his right to testify if he refused to come into the courtroom.

¶23 Based on the forgoing, we conclude Springer has made no showing that his failure to testify even remotely contributed to the verdict against him. There is no basis for reversal relating to his failure to testify.

**IV. Use of the Presentence Investigation Report**

¶24 Two professionals testified against Springer and in support of commitment. One was Dr. Dale Bespalec, a psychologist employed by the Department of Corrections. Bespalec had evaluated Springer's eligibility for WIS. STAT. ch. 980 commitment based, in part, on two presentence investigation reports. Because the release of a PSI is limited in the absence of court authority,

*see* WIS. STAT. § 972.15(4), Bespalec testified he had obtained a ***Zanelli***[4] order to view the PSIs.

¶25 Doctor Sheila Fields, who routinely conducts ch. 980 examinations for the Department of Health and Family Services, also evaluated Springer for purposes of the commitment trial. Fields stated her evaluation was based on DOC and Wisconsin Resource Center records, including:

> (a) demographic background …; (b) legal history; (c) DHFS placement during his years of incarceration; (d) history under supervision; (e) social adjustment; (f) mental status including formal diagnoses; (g) substance abuse history; (h) sexual history; (i) treatment records, including treatment outcomes[;] (j) plethysmographs and resulting reports[; and] (k) discharge options.

¶26 Springer did not object to anyone's use of his PSIs at trial but, in the postcommitment motion, he stated it was unclear if Fields had relied on the reports. He then argued that he was entitled to a new trial because there was no order granting Fields or anyone else from DHFS access to the PSIs.

¶27 First, there is no evidence that Fields actually used the PSI. Although she stated she used DOC records that had been made available to her, she provided a detailed list of the information she used from those records. The PSIs are not mentioned. Second, even if Fields had used the PSI, there was no objection at trial. The issue is therefore waived. ***State v. Gilles***, 173 Wis. 2d 101, 115, 496 N.W.2d 133 (Ct. App. 1992). Finally, Springer claims entitlement to a new trial for the alleged failure to obtain a ***Zanelli*** order. However, he offers no

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[4] *See* ***State v. Zanelli***, 212 Wis. 2d 358, 569 N.W.2d 301 (Ct. App. 1997) and ***State v. Zanelli***, 223 Wis. 2d 545, 589 N.W.2d 687 (Ct. App. 1998).

legal authority or analysis explaining why a new trial is the appropriate remedy. *See* WIS. STAT. § 809.17(2)(e). We therefore need not address the issue further.

*By the Court.*—Judgment and order affirmed.

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