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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP002026

In the Matter of the Condition of H.I.B.:

WAUPACA COUNTY,

Petitioner-Respondent,

v.

H.I.B.,

Respondent-Appellant.

PETITION FOR REVIEW

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ISSUE PRESENTED

> At HIB's recommitment trial, a doctor opined that HIB was currently dangerous because she would be unable to care for herself if she were not under a commitment. The county presented evidence that HIB had a history of being hospitalized when she did not take her medications and she once became dehydrated while doing yardwork on a hot summer day. Is this sufficient evidence to prove that HIB is dangerous, as defined by Wis. Stat. §§ 51.20(1)(am) and (1)(a)2.d.?

A jury found HIB was dangerous to herself or others. The circuit court entered orders for involuntary recommitment and involuntary medication and treatment based on the jury's findings.

Though it called this case a "close call," the court of appeals rejected HIB's insufficiency argument and affirmed the circuit court. *Waupaca Cnty v. H.I.B.,* No. 2021AP2026, ¶22, unpublished slip op. (WI App Apr. 7, 2022) (App. 3-16).

CRITERIA FOR REVIEW

It is undisputed that HIB has done well under her Chapter 51 commitment and is living a stable, engaged and "wildly independent" life. (273:55). In this respect, the commitment has achieved its goal of "re-integration of the committed individual into

society." *Fond du Lac Cnty v. Helen E.F.,* 2012 WI 50, ¶29, 340 Wis. 2d 500, 814 N.W.2d 179 (the involuntary commitment statute is designed to accommodate short-term interventions to stabilize the mentally ill individual). Because HIB is doing so well, medical professionals consider a continuation of her commitment – and forced medication – in her best interest. But only if the county can prove that there is a substantial probability of imminent death or serious physical harm without the commitment can the government constitutionally force HIB to continue the commitment against her will.

Because the county presented zero evidence that being under the commitment prevented death or serious physical harm, the lower court decisions in this case are in direct conflict with *Langlade County v. D.J.W.*, 2020 WI 41, 391 Wis. 2d 231, 942 N.W.2d 277. *D.J.W.* held that "[i]nability to care for oneself does not equate with a 'substantial probability' that 'death, serious physical injury, serious physical debilitation, or serious physical disease' would ensue if treatment were withdrawn." *Id.,* ¶53. The evidence in this case is suggestive that HIB may not take her pychotropic medication and therefore have an "inability to care for oneself" on some levels, but no reasonable view of the evidence supports a finding that she is dangerousness under the Fourth Standard. This case is therefore in direct conflict with controlling opinions issued by this Court and review is warranted under Wis. Stat. § (Rule) 809.62(1r)(d).

A decision by this Court will also help develop and clarify the law as it implicates the application of a legal doctrine that is routinely applied in Chapter 51 cases. Due to often profound negative side effects, it is not unusual for mentally ill individuals to wish to discontinue or take a break from powerful psychotropic medications. *See D.J.W.,* 391 Wis. 2d 231, ¶43 n.7 (cleaned up) (the "administration of psychotropic drugs is no small matter…antipsychotic medication is powerful enough to immobilize mind and body, has a profound effect on the thought processes of an individual and has a well-established likelihood of severe and irreversible adverse side effects"). When not compliant with a prescribed medication regime, these individuals may become more difficult to deal with or even psychotic. But mental illness is not synonymous with dangerousness. A mentally ill but non-dangerous person has a statutory and constitutional right to be free from involuntary commitment – and by extension a right to be free from being forcibly medicated. This is true even if others are made more comfortable by the person's commitment or believe that the person has a better quality of life while committed. *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975).

This court should take review and hold that being noncompliant with prescribed medications alone – even if it results in the return of disorganized thought or even psychosis – does not prove, by clear and convincing evidence, that death or serious physical harm will imminently ensue without a commitment. Review is warranted under Wis. Stat.

(Rule) 809.62(1r)(c) and because of the constitutional implications under (1r)(a) as well.

Lastly, this Court should take review to clarify that although there is a deferential standard of review when evaluating a challenge to the sufficiency of the evidence in a recommitment jury trial, the threshold of evidence required to meet a legal standard is the same for jury trials and court trials. The court of appeals decision went to great lengths to sustain the verdict in this case, hypothesizing on the assumptions and conclusory testimony that the jury may have used to support its verdict. H.I.B., slip op., ¶¶24-30. But the deferential standard of review with respect to a jury's fact finding doesn't create a lessor legal standard. Just as "reliance on assumptions concerning a recommitment at some unidentified point in the past, and conclusory opinions parroting the statutory language without actually discussing dangerousness are insufficient to prove dangerousness at an extension hearing" when the court is a fact finder, the same must be true when the case is tried to a jury. *Winnebago Cnty. v. S.H.*, 2020 WI App 46, ¶17, 393 Wis. 2d 511, 947 N.W.2d 761. This court should take review to reiterate that the verdict must be based on articulable facts and inferences therefrom, not conclusory testimony or assumptions drawn from facts not in evidence, even when the factfinder is a jury. Review is therefore warranted under Wis. Stat. § (Rule) 809.62(1r)(c).

STATEMENT OF THE CASE

HIB is a 74-year-old woman with a treatable mental illness who has been receiving services from Waupaca County under a Chapter 51 commitment. (273:52). In May of 2021, Waupaca County petitioned to extend HIB's Chapter 51 mental commitment for another year and the court ordered Dr. Marshall Bales to conduct an examination of HIB in advance of the hearing recommitment. (244). Unlike years prior, HIB did not consent to the extension and requested a jury trial. (246).

At the trial held June 16, 2021, social worker Cary Ogden, Dr. Marshall Bales, medical tech Renee Mykisen and HIB herself testified. (273:51-85).

Ms. Odgen testified that HIB participates in Waupaca County's Community Support Services program. (273:51). Ms. Odgen indicated HIB's treatment services began after police contact in 1997. (273:52). Ms. Odgen testified HIB receives visits from case workers two times a day to remind her to take her medications, but she otherwise does her own cooking, cleaning, laundry and grocery shopping and takes care of herself. (273:53, 59). Ms. Odgen acknowledged that HIB has been doing very well under the commitment and conceded that she was "wildly independent." (273:55).

Ms. Odgen indicated that although HIB stated that she would like services to continue if she were not under a commitment, she did not wish to continue with two prescribed medications. (273:54). Ms. Odgen

explained that when HIB has stopped taking medication in the past, she became "unlike [HIB]." (273:54). More specifically, she became paranoid, drank more alcohol than was normal for her and refused to leave her home or let people in. In 2017 or 2018, HIB discontinued her medications and "her condition deteriorated to the point it affected her health." (273:60). HIB went to a "stabilization facility in order to return home." (273:60).

When discussing HIB's treatment history, Ms. Odgen indicated that there were times that HIB was "threatening in the community to others" but Ms. Odgen did not describe any specific threatening acts or behaviors. (273:54). On cross, Ms. Odgen confirmed that she had not observed any threatening or concerning behaviors. (273:59).

Dr. Marshall Bales testified HIB has been diagnosed with schizoaffective disorder. (273:64). He mentioned that her mental health records contained "a number of dangerous incidents which have occurred through the years" but did not described any. (273:64). In Dr. Bales opinion, if HIB discontinued receiving treatment and medications, her disorders of mood, thought and perception would become worse and "her judgment, behavior, capability to recognize reality or her ability to meet the ordinary demands of life" would be impaired. (273:66). Dr. Bales opined that HIB "has been in danger or dangerous in many ways, many times over decades of time. And plain and simple, she gets dangerous without the very careful structure provided by the Waupaca County DHS." (273:67).

Dr. Bales concluded that without treatment, HIB would become dangerous under any of the standards but "most imminently" would become dangerous "under [the] ability to care for herself" standard. (273:67, 75).

When Dr. Bales interviewed HIB in preparation for the recommitment hearing, he observed that HIB appeared paranoid and delusional, a bit manic, irritable, labile and unstable. (273:65). HIB reported to Dr. Bales that she did not believe that she was mentally ill and did not want mental health services. (273:68, 70). HIB glared at Dr. Bales and bared her teeth during the interview, however Dr. Bales testified that he did not feel threatened. (273:81).

Dr. Bales believed that HIB was not capable of expressing an understanding of the advantages and disadvantages of accepting treatment because she does not have insight into her illness and denies being mentally ill. (273:71).

Renee Mykisen, who had worked as HIB's medical tech for the last twenty years, testified that HIB owned her own house and had historically lived by herself but her son was currently living with her. (273:86). Ms. Mykisen described HIB as a hard worker who does everything around the house, including mopping floors, cleaning, and mowing the lawn. (273:86). Although Ms. Mykisen had assisted her in the past, HIB currently does her own grocery shopping. (273:87).

Ms. Mykisen testified that in 2018 HIB was doing a lot of yard work on a "really hot" summer day and did not take breaks or sufficiently take meals and hydrate while she was working. (273:89-90). HIB was subsequently hospitalized and "got very, very sick." (273:89). Ms. Mykisen did not specify if HIB's sickness was related to her mental condition or her physical state. Ms. Mykisen mentioned there were other times in which HIB had been admitted to a treatment facility after not taking medication, but no details about what incidents, if any, triggered these visits. (273:90).

Ms. Mykisen testified that she never observed any trouble with alcohol use or abuse in the twenty years she worked with HIB, but "there had been talk that she had been using it" at different times. (273:91).

Last, HIB herself testified. She explained that her son and grandson were living with her and they help her when she cannot do things herself. (272:93). She testified that she does the laundry, shopping, cleaning, – does everything for herself – and recently went to her granddaughter's wedding in Alabama. (273:94). HIB identified her multiple medications and explained that she would forget to take them if the county didn't remind her to do so. (273:95). HIB testified that she had requested the monitoring services in the past and that she would voluntarily continue them if not ordered to do so by the court. (273:95, 96). HIB testified that she would continue taking medications if her doctor recommended them.

(273:96). HIB also stated that does not believe she has a mental illness. (273:98).

Both Ms. Odgen and Ms. Mykisen testified that Waupaca County's health and medication monitoring services would be available to HIB even if she were not under a commitment. (273:57, 87).

After testimony closed, the jury was instructed on the law governing recommitment proceedings, including what constitutes the fourth standard of dangerousness as defined by Wis. Stat. §§ 51.20(1)(am) and (1)(a)2.d. (262:10-11). By special verdict the jury found that HIB was mentally ill, a danger to herself or others and a proper subject for treatment. (263; App. 3). As a result, the court entered orders to involuntarily recommit HIB and forcibly medicate her. (264; 265; App. 4-6).

This appeal follows.

ARGUMENT

This Court should take review to clarify the Fourth Standard of dangerousness as well as the standard of review in mental commitment jury trials.

A. Standard of review

The issue on appeal would require this Court to interpret and apply the "dangerous" standard in Wis. Stat. § 51.20(1)(a)2.d. and to determine whether the evidence was sufficient to support the jury's

verdict. Both are questions of law. *Outagamie County v. Michael H.*, 2014 WI 127, ¶21, 359 Wis. 2d 272, 856 N.W.2d 603. When reviewing a challenge to the sufficiency of the evidence in a jury trial, however, appellate courts will review evidence in the "light most favorable to the verdict." *Id.*

This Court should take review and hold that this deferential standard of review doesn't alter what the county must present to establish dangerousness when the case is tried to a jury. Simply because a mentally ill person chose to exercise her right to a jury trial cannot mean that the county's burden is reduced. Whether it is tried to a court or a jury, the county has the burden of proving each element, including dangerousness, by clear and convincing evidence. *D.J.W.*, 391 Wis. 2d 231, ¶31. This evidence cannot be a simple parroting "she is dangerous" or vague references to being sick. (*See infra at* I.B.). The law requires a factual basis from which a factfinder can draw inferences to conclude dangerousness; inferences that are not supported by facts are contrary to law. *See S.H.,* 393 Wis. 2d 511, ¶17, (parroting language from the statute and unsupported assumptions is not sufficient evidence of dangerousness); *see also Winnebago Cnty. v. L.F.-G.,* No. 2019AP2010, ¶¶4, 7, unpublished slip op. (WI App May 20, 2020) (App. 19-21) and *Portage Cnty. v. C.K.S.*, No. 2021AP1291, unpublished slip op.*,* (WI App. Nov. 24, 2021) (App. 22-31)[1] (both finding insufficient evidence of

[1] Cited for its persuasive value pursuant to Wis. Stat. § (Rule) 809.23(3)(b).

dangerousness due to the lack of evidence supporting the expert's legal conclusion of dangerousness).

This court should take review and clarify that deference to the jury's fact finding role doesn't alter the county's burden to present clear and convincing evidence of dangerousness.

B. Under the Fourth Standard of dangerousness, there was insufficient evidence to sustain the recommitment.

Dangerousness under the Fourth Standard requires proof that due to mental illness, an individual is

> unable to satisfy basic needs for nourishment, medical care, shelter or safety without prompt and adequate treatment so that a substantial probability exists that death, serious physical injury, serious physical debilitation, or serious physical disease will imminently ensue unless the individual receives prompt and adequate treatment for this mental illness. No substantial probability of harm under this subd. 2. d. exists if reasonable provision for the individual's treatment and protection is available in the community and there is a reasonable probability that the individual will avail himself or herself of these services…

Wis. Stat. § 51.20(1)(a)2.d.

This Court should take review to address and clarify what "unable to satisfy basic needs for nourishment, medical care, shelter or safety without

prompt and adequate treatment so that a substantial probability exists that death, serious physical injury, serious physical debilitation, or serious physical disease will imminently ensue" means. *Id.* In *D.J.W.,* 391 Wis. 2d 231, ¶53, this Court held that "inability to care for oneself does not equate with "a substantial probability" that "death, serious physical injury, serious physical debilitation, or serious physical disease will imminently ensue." In other words, in order to meet this standard, there must be some evidence that demonstrates that serious physical injury, debilitation or disease, including death, will be the result of withdrawing treatment. In this case, the county did not present any evidence of physical harm that HIB has experienced in the past or that might recur in the future if she were not under commitment and forcibly medicated. Because there was *no* evidence of serious physical harm or medical testimony outlining what serious physical harm might ensue, the verdict cannot be sustained.

Just as "inability to care for oneself" cannot be equated with imminent physical harm, this Court should hold that failure to take psychotropic medications as prescribed – even if it results in going to the hospital – similarly does not automatically equate with a substantial probability that death or serious physical injury, debilitation, or disease will imminently ensue. Medical management of mental illness is complex and while periods of instability and hospitalization are not ideal, many patients find psychotropic medications are also not ideal. Simply being psychotic does not mean one is dangerous.

Simply going to the hospital – particularly when mental health is at issue – does not mean serious physical harm or death was a concern.

The fact that HIB has had a history of hospitalizations does not establish dangerousness under the Fourth Standard. Mentally ill individuals often go in and out of hospitals or institutions during periods of instability. This shows they have a treatable mental illness, not that they are dangerous. *See L.F.-G.,* No. 2019AP2010, ¶7 (explaining L.F.-G's acutely psychotic state when untreated showed she was a proper subject for treatment, but not dangerous); *see also D.J.W.,* 391 Wis. 2d 231, ¶¶80, 84, 85 (J. Roggensack, dissenting) (describing evidence of DJW's prior hospitalizations when he discontinued medications but this fact was not enough for *D.J.W.* to conclude that DJW was dangerous). Simply because HIB has struggled with her medication levels in the past does not make her dangerous.

To be sure, it is possible that the treatment records could indicate that certain individuals would become suicidal, homicidal or otherwise violent if they didn't take their psychotropic medications. One could also imagine a situation in which the medical evidence might demonstrate that the lack of psychotropic medication would trigger a vegetative state, requiring IV's, feeding tubes or other medical interventions to restore physical health. But this is a far cry from evidence presented in the instant case.

Here, the county presented evidence that without medication, one time, HIB compulsively did yard work on a hot summer day to the point where she became dehydrated and that she was subsequently "very very sick." (273:89-90). But there was no evidence that the illness was related to the dehydration or, indeed, that it was a physical illness at all. The county failed to "connect[] the dots" that HIB would "repeat [the] cycle (end of commitment/going off medication/dangerous behavior/recommitment) if her commitment order were not extended." *S.H.,* 393 Wis. 2d 511, ¶15. This court should take review to clarify that the county must present evidence of *physical* harm to support a Fourth Standard dangerousness finding.

The strongest evidence of HIB's potential danger to herself was the medical expert's repeated testimony that HIB has been and would become "dangerous." (273:64, 66-67). But simply uttering the word dangerous repeatedly is not evidence of dangerousness. Without specific evidence of what dangerous behaviors occurred in the past, or how and when they manifested it is impossible to evaluate how dangerous they were or whether these may recur without continued treatment. The jury must be presented with specific and articulable facts from which the legal conclusion of dangerousness may be drawn. That did not happen in this case.

In this case, the county presented zero evidence that any physical injury, debilitation or disease much less *serious* physical harm would result from not

taking medications. To the extent that the court of appeals held that serious phusical harm could be inferred from evidence of dehydration or occasionally skipping meals, this is an unreasonable inference. Serious physical harm or death is generally not the result of occasionally skipping meals or becoming dehydrated on a hot summer day. To be sure, the county did present evidence that supports the conclusion that there is substantial probability that HIB will become delusional or even psychotic without treatment. But this is not dangerousness. Because the Constitution and Wis. Stat. § 51.20(1)(a)(2) requires evidence of dangerousness in order to forcibly treat someone against her will, this Court should take review and reverse.

CONCLUSION

For the reasons stated above, this Court should take review and reverse the order extending her involuntary commitment and the order for involuntarily medication and treatment.

Dated this 9th day of May, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 2,410 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 9th day of May, 2022.

Signed:

FRANCES REYNOLDS COLBERT
Assistant Public Defender