STATE OF WISCONSIN
COURT OF APPEALS OF WISCONSIN
DISTRICT III

In the matter of the mental commitment of C.J.A.:

OUTAGAMIE COUNTY,

Petitioner-Respondent,

v. Appeals Case No.:2022AP230
Circuit Court Case No.:16ME157

C.J.A.

Respondent-Appellant.

BRIEF OF THE PETITIONER-RESPONDENT, OUTAGAMIE COUNTY

APPEAL FROM AN ORDER OF EXTENSION OF COMMITMENT AND ORDER FOR INVOLUNTARY MEDICATION AND TREATMENT ENTERED IN THE CIRCUIT COURT FOR OUTAGAMIE COUNTY, THE HONORABLE TIMOTHY A. HINKFUS, PRESIDING

OUTAGAMIE COUNTY CORPORATION COUNSEL
Attorney for the Petitioner-Respondent
Sally M. Paul
Assistant Corporation Counsel
320 South Walnut Street
Appleton, WI 54911
(920)832-1522
(920)832-2160/fax
State Bar No.: 1098306

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III. STATEMENT ON ORAL ARUGMENT AND PUBLICATION

Based on the designation of this case pursuant to Wis. Stat. § 752.31(2), and based on the nature of the issues asserted, Outagamie County believes Wis. Stat. § 809.23(1)(a) suggests this opinion should be published for two reasons.

First, this case involves the application of established rules of law to a factual situation significantly different from those in published opinions, to wit, whether temporarily extending a Chapter 51 commitment past expiration is permitted to satisfy a request by the committed individual for an independent evaluation on a petition for recommitment. Second, a decision from this Court will modify or clarify an existing rule regarding admission of hearsay evidence from the treatment record for a Chapter 51 recommitment hearing.

The Petitioner-Respondent is not requesting oral argument but would defer to the Court if the Court determines oral argument to be necessary.

IV. STATEMENT OF ISSUES

A. Did the Circuit Court lose competency to hold a recommitment hearing when it granted a temporary extension of the Chapter 51 commitment order to accommodate Catherine's[1] request for an independent evaluation?

Answer: The Circuit Court did not address this issue as it was not raised at any time prior to this Appeal; Outagamie County believes this Court should answer "no".

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[1] Pursuant to WIS. STAT. § 809.19(1)(g), and consistent with Respondent-Appellant's Brief, C.J.A. will be referred to by the pseudonym Catherine.

B. Was it a plain error for the Circuit Court to permit testimony regarding Catherine's treatment record?

Answer: The Circuit Court did not address this issue as it as it was not raised at any time prior to this Appeal; Outagamie County believes this Court should answer "no".

V. STATEMENT OF CASE AND FACTS

A. Facts

Catherine is an individual that has been suffering from mental illness and receiving services through Outagamie County to aid in her treatment for many years. (*See* R. 276 at 7–8, 26, 42–43; Pet'r-Resp't's App. at 26–27, 45, 61–62.) She initially began receiving services in 2012 following criminal charges that were filed against her for battery or threat to a judge. (R. 276 at 8–9, 43; Pet'r-Resp't's App. at 27–28, 62.) During the criminal proceedings she was found incompetent to stand trial but was restored to competency following hospitalization at Winnebago Mental Health and after starting psychotropic medication. (R. 276 at 8; Pet'r-Resp't's App. at 27.) Catherine then accepted a plea deal for her criminal charges, and she was placed on probation with a requirement that she follow through with mental health treatment. (R. 276 at 8, 54; Pet'r-Resp't's App. at 27, 73.) When Catherine's probation ended she stopped following through with treatment and decompensated. (R. 276 at 11, 43; Pet'r-Resp't's App. at 30, 62.)

Approximately 10 months after stopping treatment, the County began receiving reports from Catherine's family that she was irritable, delusional, and making homicidal threats toward the same judge again, and that they were fearful of her. (R. 276 at 11–12; Pet'r-Resp't's App.

at 30–31.) This led to a 72 hour hold and eventually a six-month commitment under Wis. Stat. § 51.20. (*See* R. 276 at 12–13; Pet'r-Resp't's App. at 31–32.) Catherine has been under a Chapter 51 commitment since that time (R. 276 at 13; Pet'r-Resp't's App. at 32) and the recommitment order which Catherine is currently appealing stemmed from that initial commitment order.

Although Catherine has been relatively compliant with her treatment conditions while under the Chapter 51 commitment, she continues to lack insight and awareness "into her mental illness and [her] need for psychotropic medication." (R. 276 at 15; Pet'r-Resp't's App. at 34.) Catherine verbalized to her caseworker on many occasions that she (Catherine) has never been delusional, she has never had hallucinations, she has never been dangerous, and she does not find any benefit to her medications. (R. 276 at 16, 21–22; Pet'r-Resp't's App. at 35, 40–41.) Catherine's caseworker also testified that the County received correspondence from Catherine's family about her "raging" behavior shortly after her treating doctor reduced the frequency with which Catherine received injectable medication. (R. 276 at 18; Pet'r-Resp't's App. at 37.)

Catherine's treating doctor, Doctor Bales, reported that Catherine does not believe she has a mental illness and she tends to focus on the side effects rather than the benefits of her medication. (R. 276 at 27; Pet'r-Resp't's App. at 46.) Doctor Bales also reported that Catherine receives injectable antipsychotics because she has refused or has been unreliable with oral medication. (R. 276 at 27; Pet'r-Resp't's App. at 46.) In addition, Catherine has continually perseverated on ideas that a judge in Outagamie County and other legal actors are part

of a conspiracy working against her. (R. 276 at 16–17, 28, 35, 49–58, 62–64; Pet'r-Resp't's App. at 35–36, 47, 54, 68–77, 81–83.)

B. Procedural History

Catherine was initially involuntarily committed under Chapter 51 of the Wisconsin Statutes in September of 2016. (R. 77, 78.) Her most recent commitment was due to expire on August 18, 2021. (R. 246.) Outagamie County filed a timely Petition for Recommitment on July 15, 2021, and a hearing was scheduled for the Circuit Court to hear the petition on August 13, 2021. (R. 237, 246.) Counsel was appointed for Catherine five days after the County's petition was filed. (R. 238.) The following day Catherine's counsel petitioned, and the court permitted him, to withdraw due to an "irreparable breakdown in the attorney-client relationship." (R. 241, 243.) Thereafter, new counsel was appointed for Catherine on August 2, 2021. (R. 244.)

Eight days later, and only three days prior to the hearing, Catherine requested an independent evaluation and agreed to "waive all applicable time limits for holding the hearing to allow for an evaluation." (R. 247; Pet'r-Resp't's App. at 12–13.) She further requested that the court "set the hearing out by 30–45 days to allow for completion of the evaluation" stating that the "independent evaluation is necessary in order to support [her] position that she is not in need of a Chapter 51 Commitment." (R. 247; Pet'r-Resp't's App. at 12–13.) Following her request, the County entered into a stipulation with Catherine to extend her commitment for 60 days while she sought an independent evaluation. (R. 250, 252; Pet'r-Resp't's App. at 14–17.) Pursuant to the request initiated by Catherine, the Circuit Court appointed Doctor James Black to conduct an independent evaluation

and temporarily extended Catherine's commitment to October 17, 2021. (R. 255, 256; Pet'r-Resp't's App. at 18–19.) Another hearing was then scheduled for October 14, 2021. (R. 258.)

Neither party has disputed or is disputing that the first two elements for a commitment under Wis. Stat. § 51.20(1) were met: Catherine is mentally ill and she is the proper subject for treatment. (*See* Resp't-Appellant's Br. at 9.) The sole dispute was whether Catherine is dangerous under one of the five standards in Wis. Stat. § 51.20(1). (*See* Resp't-Appellant's Br. at 9.)

At the hearing on October 14, 2021, the County called two witnesses, Katie Chaganos, a clinical therapist and caseworker for Outagamie County (R. 276 at 5–6; Pet'r-Resp't's App. at 5–6) and Doctor Marshall Bales, Catherine's treating physician. (R. 276 at 25–26; Pet'r-Resp't's App. at 25–26.) Catherine called herself and Doctor James Black to testify. (R. 276 at 37, 47; Pet'r-Resp't's App. at 56, 66.) At the hearing, neither party asserted that the court lacked competency to hold the hearing or make orders regarding Catherine's commitment. In addition, neither party objected to the testimony of any of the witnesses as being inadmissible hearsay. After testimony and oral argument, the Circuit Court recommitted Catherine for a period of one year and signed an order for involuntary medication. (R. 276 at 82–85; Pet'r-Resp't's App. at 101–104; R. 264, 265.) The Circuit Court found the element of dangerousness was satisfied because, based on Catherine's treatment record she would become the proper subject for commitment again under the second and third standards of dangerousness. (*See* R. 276 at 86; Pet'r-Resp't's App. at 105.) Catherine appeals that order.

VI. STANDARD OF REVIEW

Whether a Circuit Court lost competency to hold a hearing is a question of law that is reviewed independently on appeal. *Vill. of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 7, 273 Wis. 2d 76, 681 N.W.2d 190. Likewise, the issue of whether an objection was properly preserved for appeal is a question of law that is also reviewed independently on appeal. *State v. Mercado*, 2021 WI 2, ¶ 32, 395 Wis. 2d 296, 953 N.W.2d 337. If the issue was properly preserved for appeal, then the reviewing court generally leaves the decision on the admissibility of the hearsay evidence within the discretion of the trial court and upholds it unless it is "manifestly wrong and an abuse of discretion." *Badger Produce Co. v. Prelude Foods Int'l, Inc.*, 130 Wis. 2d 230, 235, 387 N.W.2d 98 (Ct. App. 1986).

VII. ARGUMENT

This Court should affirm the Circuit Court's Order of Extension of Commitment and Order for Involuntary Medication and Treatment for two reasons. First, Catherine's last commitment order did not expire prior to a final hearing because she agreed to temporarily extend the commitment order for 60 days to accommodate her request for an independent evaluation. Although Catherine argues that this temporary extension violated her due process rights, it actually protected her due process rights by affording her additional time to secure a witness for the final hearing that would testify in her favor. Moreover, because the temporary extension was granted by the Circuit Court at Catherine's request, she should be judicially estopped from

arguing that the Circuit Court lacked competency to hold the final recommitment hearing.

Second, the Circuit Court did not permit inadmissible hearsay regarding Catherine's treatment record at the final hearing as Wis. Stat. §51.20(1)(am) allows dangerousness to be proven on a recommitment petition based on the treatment record. Moreover, Catherine forfeited her objections to the court's competency and admission of hearsay testimony because she failed to raise either argument at trial.

A. The Circuit Court did not lose competency to hold a final hearing because Catherine agreed to temporarily extend her commitment; Moreover, Catherine forfeited any argument as to the Circuit Court's competency by failing to raise it as an issue prior to this appeal.

This Court should hold that the Circuit Court did not lose competency to hold a final hearing on the County's recommitment petition for Catherine. When the Circuit Court granted Catherine's request for an independent medical evaluation, the final hearing was not simply delayed in a "confused blunder" as Catherine contends. (*See* Resp't-Appellant's Br. at 14.) Rather, her commitment order was temporarily extended an additional 60 days, as was clearly outlined in the stipulation that she and her attorney signed as well as the order signed by the Court. (*See* R. 250, 252, 256; Pet'r-Resp't's App. at 14–17, 19).

Nonetheless, Catherine forfeited any right to challenge the Circuit Court's competency to hold a final hearing because she failed to raise it as an issue before the Circuit Court. Catherine's argument calls into question the Circuit court's statutory competency, or authority to

decide an issue when a statutory mandate, such as a timeframe to hold a hearing, is violated. *See State v. Sanders*, 2018 WI 51, ¶ 22, 381 Wis. 2d 522, 912 N.W.2d 16. Wisconsin law is clear that issues of statutory competency may be forfeited or waived if not raised before the Circuit Court. *Id.* ¶ 24. Because Catherine failed to raise any argument before the Circuit Court that it lacked competency to hold the final recommitment hearing, she forfeited the ability to raise the argument on appeal; thus this Court should not entertain her argument regarding lack of competency any further.

1. The Circuit Court did not lose competency over the recommitment petition because the delay was a reasonable extension caused solely by Catherine's conduct and manipulation.

Even if this Court overlooks Catherine's forfeiture of the competency issue, any delay of the recommitment hearing was a reasonable extension caused by Catherine's actions. Thus, if this Court does entertain Catherine's argument regarding competency, then the doctrine of judicial estoppel prevents her from arguing that the recommitment hearing could not be delayed because she convinced the court to grant the extension and she alone benefitted from the delay.

Circuit Courts generally lose competency to hold a final hearing on a petition for recommitment under Chapter 51 of the Wisconsin Statutes if the final hearing is not held before the last (re)commitment order expires. *See G.O.T.* v. *Rock. Cty.*, 151 Wis. 2d 629, 633, 445 N.W.2d 697 (Ct. App 1989). However, just as with a final commitment hearing, a hearing on a recommitment petition may be delayed as otherwise permitted by statute. *See* Wis. Stat. § 51.20(8)(bg)–(bm) (permitting a final hearing or probable cause hearing to be delayed 90 days pursuant to a settlement agreement); Wis. Stat. § 51.20(10)(e)

(permitting a delay of a final hearing by 7 days at the request of the detained individual or their attorney); Wis. Stat. § 51.20(11)(a) (permitting an extension of a final hearing when a demand for jury trial is made more than five days after detention); Wis. Stat. § 51.20(10)(d) (extending the time to hold a final hearing when the court issues a detention order for the subject individual when her or she fails to appear at the hearing). In addition, reasonable delays of the final hearing have been permitted when the delay is caused by the conduct of detained individual. *See Cty. of Milwaukee v. Edward S.,* 2001 WI App 169, ¶ 9, 247 Wis. 2d 87, 633 N.W.2d 241.

As explained by the court in *Edward S.,* reasonable delays of the final hearing may be permitted because strict construction of the time limits would enable detained individuals to manipulate the judicial system to delay a final hearing and ultimately secure dismissal of the action. *See id.* ¶¶ 7–9. To reach this conclusion, the court in *Edward S* distinguished the facts in that case from those in *State ex rel. Lockman v. Gerhardstein*, 107 Wis. 2d 325, 320 N.W.2d 27 (Ct. App. 1982), where the trial court was prohibited from holding a final hearing after the fourteen-day limit had expired. *See Edward S.*, 2001 WI App 169, ¶¶ 7–9. The cases are distinguishable because in *Lockman* the final hearing was delayed beyond the fourteen-day time limit based on a request by the State when one of its witness was unavailable for the originally scheduled hearing, 107 Wis. 2d at 326–327; whereas in *Edward S.* the detained individual requested the delay after firing his lawyer the day before the fourteen-day time limit was set to expire, 2001 WI App 169, ¶¶ 2–3, 7–9. In upholding the hearing delay in *Edward S.* the court explained that the cases deserved different treatment because in

Lockman it was the State's actions that created the need for delay and caused the detained individual further deprivation of liberty; but in Edward S. it was not the State, but instead the detained individual's own actions that caused further deprivation of liberty when the hearing was delayed. *Id.* ¶¶ 7–8.

Like *Edward S.*, Catherine's recommitment hearing was delayed solely by her action to seek an independent evaluation days before the hearing was originally scheduled to occur and her commitment was set to expire. Although Catherine attempts to distinguish her case from *Edward S.* by noting that the County stipulated to the delay, (*See* Resp't-Appellant's Br. at 15), she ignores the fact that the delay in *Edward S.* also appears to have been done by stipulation of the parties. *See* 2001 WI App 169, ¶ 3 ("On August 12, 1998, Edward S. fired his attorney. [C]easing representation, [Edward S.'s attorney] entered into a stipulation to adjourn the final hearing ..."). The stipulation likely was not referenced elsewhere in *Edward S.*, because it was not relevant to the decision whether the other party stipulated to adjourning the hearing; what was relevant was whose action created the need for the matter to be adjourned. Thus, although the County stipulated to the adjournment in this case, it does not change the fact that the County did not create the need for delay — Catherine did.

In addition, the County was prepared to proceed to the recommitment hearing as initially scheduled, and it did not stipulate to the delay to "make things easier" as Catherine contends. (*See* Resp't-Appellant's Br. at 15.) The County neither needed nor requested an evaluation from Doctor Black, and the County's position was not enhanced or supported by Doctor Black's report or testimony. It would

have been much easier for the County to object to Catherine's request and demand that the Court proceed with the recommitment hearing as initially scheduled.

Instead, the County agreed to adjourn the hearing, recognizing that given the significant liberty interests at stake for Catherine it was important for her right to due process to have additional time to secure an expert witness who ultimately testified in her favor and aided in her defense. Had the County and court denied Catherine's request for additional time, she would have been deprived of the opportunity to fully litigate her defense. Given the significant liberty interests at stake it is difficult to comprehend how granting Catherine's request for an adjournment to prepare her defense caused her to suffer any harm. Nonetheless, because Catherine requested the adjournment in this case, any injury Catherine suffered was at her own hands, as was the case in *Edward S.* Catherine she should not now benefit on appeal after she persuaded the Circuit Court and County to consent to the adjournment.

Moreover, it is difficult to understand why the State Public Defender's Office is taking this position on appeal as strict adherence to timelines by their clients will not further their clients' interests going forward. Detained individuals frequently choose to waive timelines and request adjournment of final commitment and recommitment hearings so that they can adequately prepare their defense. For example, a detained individual may request additional time to obtain an independent evaluation in hopes of securing a doctor to testify in opposition to the county, as was the case here. Other times detained individuals may request a delay to secure new counsel, as was the case

in *Edward S.*, 2001 WI App 169, ¶ 3. Alternatively, a detained individual may request additional time to adequately review the treatment records, or for many other reasons that frequently arise during litigation. If this Court adopts Catherine's position, then it is very likely that counties will not stipulate to requests for delay for any reason, and courts will not grant such requests. Consequently, detained individuals will routinely be denied reasonable opportunities to prepare their defense in favor of adherence to draconian timelines. This will not promote justice or due process, and instead will significantly increase the number of individuals appealing Chapter 51 (re)commitments orders.

2. Catherine should be judicially estopped from arguing that the delay she requested was unreasonable and not permitted by Chapter 51 of the Wisconsin Statutes because permitting her to do so will lead to an absurd result.

Catherine should be judicially estopped from arguing that the length of delay was unreasonable and not permitted by statute. Invoking judicial estoppel will prevent Catherine from creating an absurd result by taking a certain position before the Circuit Court, which was advantageous to her at that time, and then arguing against that same position on appeal after the trial court was persuaded to adopt it.

In addition to permitting reasonable extensions of final hearings, the court in *Edward S.* also judicially estopped the detained individual from arguing that the delay was not permitted by statute. 2001 WI App 169, ¶¶ 10–12. Generally, courts invoke the doctrine of judicial estoppel to prevent manipulation of the judicial process when the following elements are present: (1) the litigant's latter position is clearly

inconsistent with the earlier position; (2) the facts at issue are the same in both cases; and (3) the litigant convinced the first court to adopt its position. *State v. Petty*, 201 Wis. 2d 337, 347–348, 548 N.W.2d 817 (1996).

The elements for the application of judicial estoppel are present in this case. Catherine's positions here are clearly inconsistent: during litigation she requested in writing that "the hearing be set out by 30–45 days to allow for completion of the [independent] evaluation" and she "waive[d] all applicable time limits for holding the hearing to allow for an evaluation." (R. 247; Pet'r-Resp't's App. at 12.) Now on appeal Catherine argues that the Circuit Court lacked authority to grant her request to delay the hearing and that the length of extension was unreasonable because Doctor Black's evaluation could have been conducted in twelve days. (Resp't-Appellant's. Br. at 14–16.) In addition, the facts at the Circuit Court level and on this Appeal have not changed, and Catherine clearly persuaded the Circuit Court to adopt her position as her recommitment order was temporarily extended, an independent evaluation was ordered, and the final recommitment hearing was adjourned approximately sixty days. (R. 255, 256; Pet'r-Resp't's App. at 18–19; Resp't-Appellant's App. at 21).

Despite the presence of all of the required elements, Catherine argues that judicial estoppel does not apply here because she did not intend to manipulate the system with her requested extension. (*See* Resp't-Appellant's. Br. at 15.) But similarly to *Edward S.*, Catherine is particularly familiar with commitment proceedings as she has been under a commitment order for many years, which makes her well-versed in the rules. *See Edward S.*, 2001 WI App 169, ¶ 10. Moreover,

an attempt to manipulate and play "fast and loose" with the judicial system is the only logical conclusion that can be reached by the very nature of Catherine's argument on appeal. She persuaded the Circuit Court to adjourn the recommitment hearing so that she could obtain an independent evaluation, which resulted in her securing a witness for her defense. She now uses that same adjournment as an attack on the court's competency simply because she disagrees with the Circuit Court's decision to ultimately extend her commitment for another twelve months.

There is no doubt that Catherine's position regarding the court's competency to hold the final hearing would be completely different had the court agreed with Catherine and denied the County's petition for recommitment. This is evident by the fact that Catherine raises the issue of competency for the first time on appeal. Thus, Catherine is clearly taking inconsistent positions before the Circuit Court and this Court in an attempt to manipulate the judiciary to her whims, and she should be judicially estopped from doing so.

B. This Court should not address whether the Circuit Court permitted inadmissible hearsay because Catherine forfeited the issue when she failed to object to any testimony at trial as inadmissible hearsay; Moreover, Catherine has not proven that plain error exists to overcome the forfeiture on appeal.

Catherine cannot argue on appeal that the Circuit Court permitted inadmissible hearsay because she forfeited the issue by failing to raise any objection to it at trial. It is a fundamental rule of law that issues not raised before the Circuit Court are forfeited and are not considered on appeal. *See State v. Huebner*, 2000 WI 59, ¶¶ 10–11, 235 Wis.2d 486, 611 N.W.2d 727. The forfeiture rule is intended to

ensure efficient and fair conduct before the Circuit Courts in many ways:

(1) It reduces the need for appeal by providing Circuit Courts with an opportunity to address or avoid error. *Id.* ¶ 12 (citing *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (Wis. 1999));
(2) It gives "parties and the trial judge notice of the issue and a fair opportunity to address the objection." *Huebner*, 2000 WI 59, ¶ 12 (citing *Erickson*, 227 Wis. 2d at 766);
(3) It "encourages attorneys to diligently prepare for and conduct trials." *Huebner*, 2000 WI 59, ¶ 12 (citing *Vollmer v. Luety*, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (Wis. 1990)); and
(4) It "prevents attorneys from 'sandbagging' errors or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal." *Huebner*, 2000 WI 59, ¶ 12 (citing *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 895, 111 S. Ct. 2631, 115 L. Ed. 2d 764 (1991), and *Vollmer*, 156 Wis. 2d at 11).

Catherine clearly forfeited any objection to hearsay testimony. During the entire course of testimony taken on October 14, 2021, Catherine's only objection was as to the relevancy of going so far back in her treatment record. (R. 276 at 10; Pet'r-Resp't's App. at 29.) Catherine made no objection that testimony as to the treatment records was inadmissible hearsay. It is imperative that this Court enforce the forfeiture rule here to ensure efficient and fair conduct before the Circuit Courts. Had Catherine raised her objections to the hearsay testimony at trial, the County would have had a fair opportunity to respond and explain why a hearsay exception applied or that the testimony was not otherwise inadmissible. Moreover, had Catherine raised a timely objection at trial, the Circuit Court may have sustained it and completely mitigated the need for this Appeal. The County also would have had the fair opportunity to rephrase a question or introduce

other evidence proving dangerousness. Because Catherine chose to forfeit her objection at trial, she should not now be able to raise it on appeal as a surprise to the County and Circuit Court. Such conduct should be discouraged by reviewing courts because it runs contrary to promoting efficient and fair conduct at trial.

1. Catherine cannot overcome her forfeiture of hearsay testimony on plain error grounds because no plain error exists here.

Catherine cannot overcome her failure to object to hearsay testimony at trial through the plain error doctrine simply because there was no plain error. There are three exceptions to the general rule that issues not raised at trial are forfeited on appeal: (1) when there was ineffective assistance of counsel, (2) reversal is in in the interest of justice, or (3) the reviewing court finds plains error. *State v. Mercado*, 2021 WI 2, ¶ 37, 395 Wis. 2d 296, 953 N.W.2d 337. The only exception Catherine alleges applies here is plain error. (*See* Resp't-Appellant's Br. at 21–24.)

Plain error is a doctrine used sparingly to afford relief to a party that failed to object to an evidentiary error at trial when the error itself is fundamental, obvious, and substantial. *See State v. Jorgensen*, 2008 WI 60, ¶¶ 21–23, 310 Wis. 2d 138, 754 N.W.2d 77. There is no bright-line test to determine whether plain error exists; rather it is a fact-specific inquiry looking at the quantum of evidence properly admitted and the seriousness of the error. *Id.* ¶ 22. In addition, the party wishing to overcome the forfeiture has the burden of proving that there was plain error. *See id.* ¶ 23. Although plain error is not limited to constitutional errors, consistent with using the doctrine sparingly, courts in Wisconsin have consistently used a constitutional error

analysis to determine whether to invoke the doctrine. *Id.* ¶21 (quoting *State v. King*, 205 Wis. 2d 81, 91, 555 N.W.2d 189 (Ct. App. 1996)); thus the doctrine has generally been limited to situations where a basic constitutional right was not afforded to the accused.

Catherine does not allege that admission of hearsay testimony regarding her treatment records deprived her of any constitutional right. She also cited no case law applying the plain error doctrine to hearsay statements not objected to at trial, and the County believes that no such case law exists based on its own research. Moreover, admitting testimony regarding Catherine's treatment records was not a fundamental, obvious, or substantial error because Wis. Stat. § 51.20(1)(am) expressly allows dangerousness to be proven through the treatment record.

Although the rules of evidence, which generally prohibit hearsay testimony, apply to (re)commitment hearings, Wis. Stat. § 51.20(10)(c) acknowledges that Chapter 51 may contain unique exceptions to the general rules of evidence; Wis. Stat. §51.20(1)(am) contains one of those unique exceptions. During an initial commitment the county must prove all elements of Wis. Stat. § 51.20(1)(a) with clear and convincing evidence, and the dangerousness element must be proven by the detained subject's recent acts or omissions. *See* Wis. Stat. §51.20(1)(a)–(e); 51.20(13)(e); *Portage Cty. v. J.W.K.*, 2019 WI 54, ¶ 17, 386 Wis. 2d 672, 927 N.W.2d 509. On a petition for recommitment, the county must prove the same elements with the same quantum of proof. *Waukesha Cty. v. J.W.J.*, 2017 WI 57, ¶ 20, 375 Wis. 2d 542, 895 N.W.2d 783.

However, the legislature recognized that an individual's behavior may improve while receiving treatment under a commitment but that

individual may still be dangerous because he or she is likely to discontinue treatment once no longer committed. *See J.W.K.*, 2019 WI 54, ¶ 19. Thus, to avoid the "'revolving door' phenomena" and "a vicious circle of treatment, release, overt act, recommitment" the legislature created an alternate method in Wis. Stat. § 51.20(1)(am) to prove dangerousness on recommitment. *Waupaca Cty. v. K.E.K.*, 2021 WI 9, ¶ 36, 395 Wis. 2d 460, 954 N.W.2d 366 (*quoting State v. W.R.B.*, 140 Wis. 2d 347, 351, 411 N.W.2d 142 (Ct. App. 1987)).

Wis. Stat. § 51.20(1)(am) states that if immediately prior to commencement of extension proceedings the individual is already under commitment, then:

> the requirements of a recent overt act, attempt or threat to act under par. (a) 2. a. or b., pattern of recent acts or omissions under par. (a) 2. c. or e., or recent behavior under par. (a) 2. d. may be satisfied by a showing that there is a substantial likelihood, based on the subject individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn.

(emphasis added); *See also J.W.K.*, 2019 WI 54, ¶ 19. In upholding the constitutionality of Wis. Stat. §51.20(1)(am) the Supreme Court of Wisconsin said that this alternate path to proving dangerousness "give[s] counties a more realistic basis by which to prove current dangerousness when it is likely the committed individual would discontinue treatment if no longer committed." *K.E.K.*, 2021 WI 9, ¶ 5. Thus, because the testimony Catherine objects to in this Appeal are statements regarding the content of the treatment record and Wis. Stat. § 51.20(1)(am) permits dangerousness to be proven from the treatment record, those statements are not inadmissible

hearsay; or if admission of those statements was an error, it was not a fundamental, obvious, or substantial one.

Finally, admitting the unobjected to hearsay statements was not a fundamental, obvious, or substantial error because they were not just statements regarding the treatment record; they were also statements relating to the history of the case and facts that had been testified by witnesses at earlier hearings. Because a recommitment hearing is not a new proceeding and the court continues to receive evidence in the same case, it is not an error for the court to hear testimony from witnesses to provide the court with context for the proceedings. *See J.W.K.*, 2019 WI 54, 386 Wis. 2d 672, 927 N.W.2d 509 ("Because a recommitment hearing is not 'an entirely new proceeding' the 'Circuit Court continues to receive evidence in the same case' and may rely on 'the individual's present condition and past response to treatment'". (*Quoting State ex rel. Serocki v. Circuit Court for Clark Cty.*, 163 Wis. 2d 152, 159–160, 471 N.W.2d 49 (Wis. 1991)).

2. If a fundamental, substantial, and obvious error exists, Catherine still should not prevail on appeal because the error was harmless.

If Catherine overcomes her burden to prove that the error was fundamental, substantial, and obvious, her argument on appeal still fails because any error was harmless. If an appellant establishes an error which was not objected to at trial is fundamental, substantial, and obvious, then the burden shifts to the State to prove that the error was harmless. *Jorgensen,* 2008 WI 60, ¶ 23. An error is harmless when

the State shows that the same result would have occurred absent the error. *See id.* ¶ 23. The following factors have been identified to help determine whether an error was harmless: (1) the frequency of the error; (2) the importance of the erroneously admitted evidence; (3) the presence or absence of evidence corroborating or contradicting erroneously admitted evidence; (4) whether the erroneously admitted evidence duplicates untainted evidence; (5) the nature of the defense; (6) the nature of the State's case; and (7) the overall strength of the State's case. *Id.*

Despite Catherine's argument to the contrary, the County's theory of the case was not centered on Catherine threatening a judge. (*See* Resp't-Appellant's. Br. 20.) Rather, the County's theory of the case was that Catherine continues to lack insight into her mental illness, she has stated she will stop taking her medication, and she continues to perseverate on conspiracy theories regarding involving various legal actors. (R. 276 at 15–17, 21–22, 27–28, 33–34, 72–79; Pet'r-Resp't's App. at 34–36, 40–41, 46–47, 52–53, 91–98.) This was all based on testimony from the County's witnesses based on their personal knowledge of this case and interactions with Catherine. It was based on those current circumstances in consideration with Catherine's history of decompensating following the cessation of treatment, that the County believes Catherine still poses a danger to herself or others.

While the County's theory of the case focused on Catherine's present circumstances and current dangerousness, Catherine's defense focused substantially on proving that she is not dangerous because she never threatened a judge. (*See* R. 276 at 49–53; Pet'r-Resp't's App. at 68–72.) Catherine has disputed that allegation since her initial

commitment, *See Outagamie Cty v. C.J.A.*, 2018 WI App 16, ¶ 9, 380 Wis.2d 282, 913 N.W.2d 533 (unpublished); Pet'r-Resp't's App. at 8, and she is using this Appeal to continue waging her attack on the initial commitment.

However, Catherine fails to recognize that her commitment did not and does not hinge on whether she threatened a judge as it was not the only evidence of dangerousness. *See C.J.A.*, 2018 WI App 16, ¶¶ 9–10; Pet'r-Resp't's App. at 8–9. Other testimony as to dangerousness that was testified to at the initial commitment hearing included: testimony from an officer that on multiple visits to Catherine's home after her medication order expired she displayed delusional thought processes, an angry tone, and ravings about people in the legal system. *C.J.A.*, 2018 WI 16, ¶¶ 3, 10; Pet'r-Resp't's App. at 4, 8. In addition, the County had testimony that it received multiple reports from Catherine's family members that they were concerned for their safety as a result of Catherine's decompensating mental health. *C.J.A.*, 2018 WI 16, ¶¶ 10; Pet'r-Resp't's App. at 8. All three of the County's witnesses also testified that they believed Catherine's mother was fearful of her, and Catherine's mother acknowledged that she reached out to the County to get medicine for the terrible stress Catherine was experiencing. *C.J.A.*, 2018 WI 16, ¶ 10; Pet'r-Resp't's App. at 8–9. Thus, because Catherine's defense focused on disproving that she ever threatened a judge and ignored any other pattern or evidence of dangerousness, the nature of her defense tends to support a harmless error finding, if any error at all.

The sole purpose of using Catherine's treatment record was to show that she had a pattern of decompensating when not under court

order to undergo treatment, what the decompensation looks like, and why it is likely to recur if the commitment is not extended. Although the County concedes that Catherine's behavior has improved since she has been under a commitment, the strength of the County's case is strong in light of Wis. Stat. § 51.20(1)(am). The County provided substantial evidence that Catherine will become a proper subject for commitment again if treatment is withdrawn.

Clinical therapist Katie Chaganos provided the following testimony supporting the conclusion that Catherine lacks insight into her mental illness and will stop taking psychotropic medication if treatment is withdrawn: Ms. Chaganos testified that she meets with Catherine monthly and Catherine tells her at almost every meeting that she [Catherine] "has never been delusional, never had hallucinations, and never been dangerous" and that she "does not find any benefit to the medication." (R. 276 at 14–16; Pet'r-Resp't's App. at 33–35.) Ms. Chaganos also testified that at almost every meeting Catherine continues to perseverate on conspiracy theories regarding her prior divorce hearing and child custody case and that she is unable to redirect Catherine from the subject. (R. 276 at 16–17; Pet'r-Resp't's App. at 35–36.) Ms. Chaganos also relayed that when changes were recently made to Catherine's medication, the County received correspondence from Catherine's family that she was "raging." (R. 276 at 18; Pet'r-Resp't's App. at 37).

In addition, Doctor Bales, Catherine's treating physician, testified that Catherine has to take injectable medication because she tends to refuse or is not reliable with taking her antipsychotic medication. (R. 276 at 27; Pet'r-Resp't's App. at 46.) He also

corroborated Ms. Chaganos' testimony that Catherine does not believe she has a mental illness, she sees no benefit to her medication, and that in his monthly meetings with her she continues to perseverate on conspiracy theories regarding various actors in the legal system. (R. 276 at 27–28; Pet'r-Resp't's App. at 46–47.) Doctor Bales also stated that he "definitely believe[s] that [Catherine] will stop getting mental healthcare, [and] stop taking medications for her mental health condition." (R. 276 at 30; Pet'r-Resp't's App. at 49.) When and if that happens he testified that over the course of a few months Catherine "will become increasingly irritable, paranoid, accusatory and hostile, irrational and ultimately … she will become either dangerous or endangered." (R.276 at 30–31; Pet'r-Resp't's App. at 49–50.) He further testified that she has traditionally exhibited dangerousness under the second standard when not committed. (R. 276 at 31; Pet'r-Resp't's App. at 50.)

Moreover, Catherine's own testimony corroborated Ms. Chaganos and Doctor Bales' testimony. Although Catherine initially stated on direct examination that she had no objection to taking medication and that she would voluntarily seek medical help if not court ordered, (R. 276. 48–49; Pet'r-Resp't's App. at 67–68), later on cross-examination she would not affirmatively say that she believed she suffered from a mental illness or that she would voluntarily take psychotropic medication. (*See* R. 276 at 61–62; Pet'r-Resp't's App. at 80–81.) Catherine's testimony also showed the court that she is still obsessed with conspiracy theories relating to a judge and other actors in the legal system. (R. 276 at 49–57, 62–64; Pet'r-Resp't's App. at 68–76; 81–83.) What is more, and perhaps the strongest argument against

Catherine's argument that the court's reliance on hearsay testimony was plain error, is that much of Catherine's own testimony was hearsay. (R. 276:49–50, 52–53, 60, 63; Pet'r-Resp't's App. at 68–69, 71–72, 79, 82.)

Thus, it is evident in light of the foregoing factors, specifically the theory and strength of the County's case, the nature of Catherine's defense, and other corroborating or contradicting evidence, that if any error occurred, it was harmless. Therefore, the Circuit Court's ruling to recommit Catherine and order the use of involuntary medication should be affirmed.

C. This appeal is not moot and would not become moot if Catherine's recommitment order expires prior to a decision from this Court.

The County agrees with Catherine that this Appeal is not currently moot because the recommitment order that is the subject of this Appeal has not expired. In addition, based the recent decision by the Wisconsin Supreme Court in *Sauk County v. S.A.M.*, 2022 WI 46, ¶ 27, 975 N.W.2d 162, the County also agrees with Catherine that even if her recommitment order expires before this Court issues a decision, this Appeal still would not be moot.

VIII. CONCLUSION

For the preceding reasons, this Court should affirm the Order of Extension of Commitment and Order for Involuntary Medication and Treatment entered on October 18, 2021, by the Outagamie County Circuit Court.

Dated this 7th day of September 2022.

Respectfully submitted,

OUTAGAMIE COUNTY CORPORATION COUNSEL
ATTORNEYS FOR PETITIONER-RESPONDENT
OUTAGAMIE COUNTY

BY: *Electronically Signed by Sally M. Paul*

Sally M. Paul
Assistant Corporation Counsel
Outagamie County Corporation Counsel
320 S. Walnut Street
Appleton WI 54911
(920) 832-1522
State Bar No. 1098306

IX. CERTIFICATION OF LENGTH

I certify that this brief and appendix conforms with the rules contained in Wis. Stat. § 809.19 (8) (b), (bm) and (c) for a brief produced with proportional serif font. The length of this brief is six thousand seven hundred and seventy-one (6,771) words.

Dated this 7th day of September, 2022.

OUTAGAMIE COUNTY CORPORATION COUNSEL
ATTORNEYS FOR PETITIONER-RESPONDENT
OUTAGAMIE COUNTY

By: *Electronically Signed by Sally M. Paul*
Sally M. Paul
Assistant Corporation Counsel
Outagamie County Corporation Counsel
320 S. Walnut Street
Appleton WI 54911
(920) 832-1522
State Bar No.: 1098306