STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2022AP000286

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

TREMPEALEAU COUNTY DEPARTMENT
OF SOCIAL SERVICES,

Petitioner-Respondent,

v.

C.J.,

Respondent-Appellant.

On notice of appeal from an order entered in the
Trempealeau County Circuit Court,
the Honorable Rian Radtke, presiding

BRIEF OF
RESPONDENT-APPELLANT

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CASES CITED

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ISSUES PRESENTED

1. This is an appeal of the 12-month extension of C.J.'s commitment. At the hearing, the county presented evidence that since his initial commitment, C.J. has been voluntarily taking his medication and has been stable. The county's expert gave no testimony that C.J. was likely to discontinue his medications, but nevertheless said he believed, based on hearsay, that C.J. was still experiencing hallucinations and "could act out some of what's in his head." C.J. testified that he knows he is mentally ill, that he can see how the medication is helping him, and that he intends to continue it when his commitment ends.

   Did the county prove by clear and convincing evidence that C.J. will become dangerous if his commitment is terminated?

   The circuit court extended the commitment; this Court should reverse.

2. The testimony at the hearing did not identify any of the statutory dangerousness standards, and the court, in its findings, also did not mention any.

   Did the court's recommitment of C.J. without reference to any statutory form of dangerousness violate *Langlade County v. D.J.W.*, 2020 WI 41, ¶40, 391 Wis. 2d 231, 942 N.W.2d 277, requiring the commitment be vacated?

The circuit court extended C.J.'s commitment; this Court should reverse.

POSITION ON ORAL ARGUMENT AND PUBLICATION

C.J. seeks neither oral argument nor publication. The issues can be presented in the briefing and the legal principles involved are well-settled.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Law enforcement detained C.J. in March, 2021. (2:1). A police report attached to the statement of emergency detention said that "Human Services" had requested that an officer do a welfare check on C.J. and his girlfriend. The officer had been told that C.J. told the girlfriend that he wanted to drive to Washington, D.C. to kill the president and vice-president. The officer also noted alleged and unspecified incidents of domestic violence and threats from C.J. to the girlfriend. When the officer located C.J. and the girlfriend, the girlfriend said that C.J. believed the president to be his father, and that he had been driving recklessly. (2:3-4). After he was taken to the hospital, C.J. made other seemingly delusional statements. (2:5). After a hearing the court ordered C.H. committed for six months. (32:1).

In September, the county petitioned to extend the commitment. (44; App. 3-5). The petition included a report from a psychiatrist, J. Scott Persing. (44:2-3; App. 4-5). The same report would be submitted as an exhibit at the recommitment hearing. (52).

The report describes C.J.'s behavior that led to the original commitment, along with his state of psychosis and his "disorganized thinking" at that earlier time. (52:1-2; App. 4-5). However, since his discharge from the hospital and his transfer to a group home, the report notes that C.J. "has not required assistance with urgent appointments, crisis services, or repeat psychiatric hospitalization," and that he administers his own medication voluntarily under supervision. (52:1; App. 4). It reports that in the interview with Persing, C.J. reported "that he has no issues with schizophrenia symptoms, specifically, delusions or hallucinations. He has no interest in harming himself [or] anyone else." (52:2; App. 5).

However, the report also notes that based on "informal communication with Dee Ann Anderson" (Anderson is a county health services employee) C.J. "continues to have ongoing psychotic symptoms" and that he has spoken of the radio telling him to do good and bad things to his girlfriend, and has also had delusions about doing illicit work for the government. (52:2; App. 5). The report concludes by opining that C.J.'s commitment should be extended for one year, though it does not identify any particular threat C.J. might pose. (52:2; App. 5).

Persing was one of two county witnesses at the extension hearing. (59:4; App. 9). Persing said that C.J. has paranoid schizophrenia. (59:8-9; App. 13-14). He noted that C.J. has had no significant problems while living in the group home. (59:9-10; App. 15-16). Persing said that C.J. feels that he does not need treatment: that the incident that led to his emergency detention "was a situational episode." (59:11; App. 16). He testified that as far as he knew, C.J. has been fully compliant with his treatment program. (59:11; App. 16). He noted that C.J. reports no delusions or hallucinations, but said without explanation that he nevertheless "believe[d] that he is experiencing symptoms." (59:11-12; App. 16-17).

Asked about his recommendation for an extension of commitment, Persing opined that "at this point he's not fully in remission in my opinion with regard to control of his symptoms" and that the symptoms would return if treatment were withdrawn. (59:12). After some confusion, Persing also opined that C.J. is incompetent to refuse medication. (59:14; App. 19).

The county then asked Persing if, in his opinion, C.J. would be a proper subject for commitment if treatment were withdrawn. (59:17; App. 22). He responded that C.J. would be. Asked to elaborate, he said that the "fact that he's not had his symptoms treated to baseline, that he is having these auditory hallucinations, as well, persisting makes me quite concerned that he could act out some of what's in his head about that." (59:17; App. 22).

On cross-examination, Persing was asked about symptoms of schizophrenia C.J. was exhibiting. He responded that C.J. has delusional beliefs about working for the government and receiving messages from the radio. (59:20; App. 25). He clarified that he had not personally observed *any* symptoms during his time with C.J., but had had them "reported to me by an unbiased source regarding these occurring and being forwarded out of concern that the patient would not volunteer the information himself." (59:20; App. 25).

The county then called Dee Ann Anderson. (59:22; App. 27). She gave general testimony about her role in the county health system, but after objections from C.J.'s counsel that she was not qualified to opine as an expert, the county ceased its efforts to have her testify about C.J.'s mental illness or possible dangerousness specifically. (59:31-32; App. 36-37).

C.J. testified. (59:32; App. 37). He explained that he is diagnosed with paranoid schizophrenia and takes Risperidone. (59:32; App. 37). He said that his symptoms had been alleviated while he was on the medication, that "from past experiences" he knew the medication was helping, and that "thus, I plan on continuing to take this medication even after commitment ends." (59:33; App. 38). He described his past symptoms as involving hearing voices and being "completely delusional" but repeated that these symptoms were no longer present, because the medication had alleviated them. (59:33-34; App. 38-39). He said Risperidone had given him no negative

side effects, though a previous medication, Haldol, had. (59:34; App. 39). He explained that he takes the Risperidone twice daily, and that he himself is responsible for administering it and for getting the medicine at the appropriate times. (59:34-35; App. 39-40). He said he had been hesitant to speak with Persing because he feared that Persing would present his past symptoms as symptoms he was presently experiencing. (59:35-36; App. 40-41). He said that if he were released from commitment, he would move back into the trailer that he owns and would continue picking up Risperidone from the pharmacy; he said he also hoped to resume his career. (59:36; App. 41). He again repeated that the medication was working, adding that "as saddening as it is that I suffer through something like this, I'm 100 percent certain I have a problem and that problem is offset[] by this medication." (59:36-37; App. 41-42).

The county argued that C.J.'s commitment should be extended because he would be a proper subject for commitment if treatment were withdrawn. It did not specify any statutory form of dangerousness it believed C.J. would satisfy; in fact it did not mention dangerousness. (59:40-41; App. 45-46). It said C.J.'s testimony that he is adhering to his medication regimen was not "convincing" and that "his treatment record does not support that finding." (59:41; App. 46). The county did not explain to what "treatment record" it might be referring; it had presented no evidence of any noncompliance by C.J.

C.J.'s counsel argued that the county had failed to meet its burden. (59:42-43; App. 47-48).

The circuit court ordered C.J.'s commitment extended. It summarized much of the evidence presented in its remarks. (59:44-47; App. 49-52). It said the information Persing testified to was not hearsay "as the doctor was relying on this information as part of making his opinions." (59:45; App. 50). Though the court mentioned the incident that led to C.J.'s commitment, and stated generally that he "could act on" his symptoms "and from the treatment record in the past that meant threats of harm to self and harm to others," it did not identify any particular standard of dangerousness it believed C.J. met. (59:44-45; App. 49-50). The court did not find C.J. incompetent to refuse medication, however. (59:46-47; App. 51-52).

C.J. appeals.

ARGUMENT

I. The county failed to meet its burden to prove C.J. is dangerous.

To obtain an extension of C.J.'s commitment, the county was obligated to show, by clear and convincing evidence, that he is mentally ill, a proper subject for treatment, and dangerous. See Wis. Stat. § 51.20(1)(a), (13)(e). Though this Court defers to the circuit court's factual findings unless they are clearly erroneous, whether the facts found meet the statutory standard

is a question of law for de novo review. *Waukesha Cnty. v. J.W.J.*, 2017 WI 57, ¶15, 375 Wis. 2d 542, 895 N.W.2d 783.

The county did not approach a clear and convincing showing that C.J. is dangerous. Its only substantive witness, Persing, noted that after the earliest days of his initial commitment, C.J. has been stable. Persing wrote that C.J. "has not required assistance with urgent appointments, crisis services, or repeat psychiatric hospitalization." (52:2; App. 5). He also observed that C.J. administers his own medication voluntarily under supervision. (52:1; App. 4). And in his interview, Persing detected "[n]othing at all" to make him believe C.J. is still exhibiting symptoms. (59:20; App. 25).

Persing's only indication that C.J. is experiencing any symptoms came in the form of hearsay: he said he had had symptoms "reported to me by an unbiased source regarding these occurring and being forwarded out of concern that the patient would not volunteer the information himself." (59:20; App. 25). It's unclear from the testimony who this unbiased source might be; Persing may have been referring to Dee Ann Anderson. But regardless of the source of this purported information it was clearly hearsay. And while an expert may rely on inadmissible evidence to form an "opinion or inference," Wis. Stat. § 907.03, the fact that an expert relied on otherwise-inadmissible evidence does not render that evidence admissible. *S.Y. v. Eau Claire County*, 156 Wis. 2d 317, 327-28, 457 N.W.2d 326 (Ct. App. 1990) ("While

experts may rely on inadmissible evidence in forming opinions… the underlying evidence is still inadmissible."); *State v. Coogan*, 154 Wis. 2d 387, 399, 453 N.W.2d 186 (Ct. App. 1990) (expert may not act as "a conduit for inadmissible evidence"). So the circuit court was incorrect when it said that because Persing relied on what he'd heard in forming an opinion, what he'd heard was not hearsay. (59:45; App. 50).

Moreover, even if Persing's claims that C.J. was still experiencing symptoms—hearing voices and holding delusional beliefs that he worked for the government—were admissible, they did not get the county any closer to meeting its burden to show C.J. was dangerous. As this Court has recently observed (in a case involving the same circuit court, same county, and same expert witness):

> In a recommitment hearing, there is a key distinction between describing behavior that is erratic, odd or even concerning, and evidencing specific behavior that is likely dangerous. As this court explained in *Winnebago County v. S.H.*, 2020 WI App 46, ¶17, 393 Wis. 2d 511, 947 N.W.2d 761, "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 in an extension hearing."

Trempealeau County Department of Social Services v. T. M. M., No. 2021AP100, unpublished slip. op. ¶12 (Wis. Ct. App. Nov. 12, 2021) (App. 60).

The government is not free to commit a person because the person is experiencing symptoms of mental illness; it must prove that the person is or will become dangerous. Under Wis. Stat. § 51.20(1)(am), the county didn't have to show that C.J. had committed a recent overt act indicating dangerousness, because he was under a commitment order. But it *did* have to show, by clear and convincing evidence, that the termination of that commitment order would render him dangerous.

This type of showing is often made by evidence that the respondent will not take necessary medication or cooperate with treatment if commitment is terminated. Here, the county presented no evidence that this was true. Rather, all the evidence provided by Persing showed that C.J. has voluntarily complied with his medication. What's more, C.J. himself testified that he understands that he has schizophrenia and that the medication he is taking helps him. He further testified to his intention to remain on the medication if his commitment was terminated. The county said this testimony was not "convincing," but it offered not a shred of evidence to the contrary.

At best, the county's case adduced some—very attenuated, hearsay—evidence that C.J. is not at "baseline"; that is, that he may still experience some

symptoms of schizophrenia. While the county and Persing may think it preferable that C.J. continue to be committed until he reaches this hypothesized "baseline," their wishes for C.J., however well-intentioned, are not a legal basis to continue to commit him against his will. Absent some showing that C.J. is likely to discontinue treatment, or that his alleged present symptoms make him dangerous, there are no grounds to continue to curtail his freedom. The county failed to establish that C.J. will become dangerous when his commitment expires; as such, the order for commitment must be reversed and the petition dismissed.

II. The court failed to identify any dangerousness standard; this independently requires that the extension of C.J.'s commitment be vacated.

In *Langlade County v. D.J.W.*, 2020 WI 41, ¶40, 391 Wis. 2d 231, 942 N.W.2d 277, our supreme court held that "going forward circuit courts in recommitment proceedings are to make specific factual findings with reference to the subdivision paragraph of § 51.20(1)(a)2. on which the recommitment is based."

The circuit court here did not comply with D.J.W.'s requirement. In part, this may be attributable to the county's failure to present adequate evidence. Persing's report did not mention dangerousness at all, much less specify any particular statutory form. His live testimony fared little better:

while he speculated that C.J. might "act out some of what's in his head," he offered no more specifics about how this might be dangerous. (59:17; App. 22). Nor did the county, in its closing, explain what sort of danger it thought C.J. might pose, or suggest what statutory standard it was proceeding under.

The closest the court came to identifying a statutory dangerousness standard was when it remarked that C.J.'s treatment records from the past involved "threats of harm to self and harm to others." (59:44-45; App. 49-50). This comment contains one element each of the first and second dangerousness standards, Wis. Stat. §§ 51.20(1)(a)2.a. & b. But the court did not further narrow the matter down in its remarks; nor did it explain how C.J. satisfied the other elements of those standards (i.e., manifesting a "substantial probability of physical harm" to either himself or to other people).

The court's passing remark did not satisfy the law as established in *D.J.W.* Its comment hinted at two statutory standards, but did not come close to fleshing out a finding of dangerousness under either. *See*, *e.g.*, *Outagamie County v. Melanie L.*, 2013 WI 67, ¶94, 349 Wis. 2d 148, 833 N.W.2d 607 ("These hearings cannot be perfunctory under the law.") Thought the county's failure of proof of dangerousness provides grounds enough to reverse the commitment order here, the circuit court's failure to identify a standard of dangerousness provides another independent and sufficient reason to do so.

CONCLUSION

C.J. respectfully requests that this Court vacate the extension of commitment and remand with directions that the petition be dismissed.

Dated this 27th day of May, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,492 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 27th day of May, 2022.

Signed:
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