STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2022AP000623

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*In the matter of the mental commitment of T.J.M.:*
MARATHON COUNTY,

Petitioner-Respondent,

v.

T.J.M.,

Respondent-Appellant.

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On Appeal from Order of Involuntary Commitment and Involuntary Medication and Treatment Entered in Marathon County Circuit Court, the Honorable Suzanne C. O'Neill, Presiding.

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# REPLY BRIEF OF RESPONDENT-APPELLANT

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### I. The recommitment and associated involuntary medication order must be reversed because the circuit court failed to specify which standard of dangerousness it was relying on.

The County advances three responses to Trevor's[1] claim that the circuit court violated the mandate of *Langlade Cty. v. D.J.W.*, 2020 WI 41, ¶3, 391 Wis. 2d 231, 942 N.W.2d 277, by failing to make specific factual findings in reference to one or more of the statutory standards of dangerousness. First, the County argues that the circuit court "cited" applicable standards. Second, it argues that the court "referenced" dangerousness in its written order. Third, it argues that any error was harmless.

First, the court did not "cite" any statutory standard of dangerousness. (*See* Resp. Br. at 9). The court did not provide any statutory citations at all. The County's assertion that the court made statements, "echoing the statutory language of Wis. Stat. 51.20(1)(a)2.a." and "51.20(1)(a)2.c.," is a more arguable characterization of the court's comments. (*See* Resp. Br. at 9-10). However, it still

[1] A pseudonym for T.J.M. is used for anonymity and readability. This brief is being filed by successor counsel for T.J.M, following predecessor's departure from the State Public Defender's office.

misses the mark because the word "echo" evokes a word-for-word reflection, whereas the court did not state the full language from any subdivision paragraph. Instead, the court's ruling used language from more than one standard and did not directly link the legal standard to any specific fact or facts. For example, the court found that Trevor presented a risk of "physical harm to himself." (R.107:26; A-App.26). This is part of the standard in Wis. Stat. § 51.20(1)(a)2.a. However, the standard contains a further element: "as manifested by evidence of recent threats of or attempts at suicide or great bodily harm." The court did not link its finding to a threat of or attempt at suicide or great bodily harm. (*See* R.107:26; A-App.26).

Trevor does not argue for "magic words," (see Resp. Br. at 8-9); he simply argues for what *D.J.W.* entitles him to—a citation to the legal standard that is being used to deprive him of his liberty. It is not too much to require a court to identify a legal standard.

Second, the County argues that the pro forma court order sufficed to meet *D.J.W.*'s mandate. (Resp. Br. at 11-12). The form contains pre-printed text alongside checkboxes. Two checkboxes are marked on Trevor's order: first, "a substantial probability of physical harm to himself or herself," and second, "a substantial probability of physical impairment or injury to himself or herself or other individuals due to impaired judgment." (R.101:1-2; App.3-4). As for the first box, this pro forma language is not sufficient because, as noted above, Wis. Stat.

§ 51.20(1)(a)2.a., contains a further element: "as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm." It would not be sufficient for a court to find a risk of "harm" without finding that the risk was based on a threat of or attempt at suicide or serious bodily harm.

Check boxes on a pro forma court form are not a substitute for an in-court, on-the-record finding. *D.J.W.* requires not just a statutory reference, but "specific *factual findings with reference* to the subdivision paragraph of Wis. Stat. § 51.20(1)(a)2. on which the recommitment is based.… *D.J.W.*, 391 Wis. 2d 231, ¶3. (emphasis added). In other words, factual findings, alone, are not sufficient. A legal citation, alone, is not sufficient. Instead, the law requires factual findings with reference to the legal standard.

Third and finally, the error is not harmless. The question of whether a *D.J.W.* violation can be harmless error does not appear to have been answered in a published decision. Trevor does not concede that the harmless error doctrine applies. However, this Court does not need to make a bright line ruling because even if the harmless doctrine applies, it applies on a case-by-case basis.

In *Barron County v. K.L.*, No. 2021AP000133, unpublished slip op. (WI App Aug. 9, 2022) (App.3-23), this Court deemed a *D.J.W.* error harmless where the subject of the recommitment did not challenge the sufficiency of the evidence to support the circuit court's

determination of dangerousness, and as it was clear from the record on which subdivision paragraph the court had based its determination of dangerousness. *Id.*, ¶¶36-42.[2]

By contrast, in *Trempealeau County v. C.B.O.*, No. 2021AP001955, unpublished slip op. (WI App Aug. 30, 2022) (App.24-51), the error was not harmless where the subject *did* challenge the sufficiency of the evidence and the record was *not* clear as to which standard the court based its determination of dangerousness. *Id.*, ¶31[3]. Here, Trevor does challenge the sufficiency of the evidence and it is not clear which standard the court based its finding of dangerousness on. The County fails to prove harmless error.

## II. The evidence presented was insufficient to support a finding of dangerousness.

At the recommitment hearing, the County did not reference any subdivision paragraph of Wis. Stat. § 51.20(1)(a)2.a.-e., nor use the statutory language from any one of those provisions. (*See* R.107:24; A-App.30). On appeal, the County asserts that the evidence met Wis. Stat. § 51.20(1)(a)2.a. or c., through the lens of the recommitment standard, Wis. Stat. § 51.20(1)(am). (Resp. Br. at 17-21).

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[2] An unpublished opinion issued on or after July 1, 2009, that is authored by a single judge may be cited for its persuasive value. Wis. Stat. § 809.23(3)(b).

[3] In C.B.O., the court also relied on the fact that the county did not argue harmless error. Here, the County does argue it.

The evidence did not meet either of these standards. The evidence consisted of testimony that: Trevor was inconsistent with his medications and had used marijuana while on medication (R.107:15; A-App.21); he denied being mentally ill in the past (R.107:8; A-App.14); he made threats toward treatment providers at some unspecified time in the past (R.107:16; A-App.22); he made a suicide attempt at some unknown time in the past (R.107:10; A-App. 16); he had auditory hallucinations at some unspecified time in the past (R.107:5; A-App.11); he drank a dangerous amount of water in 2018 (R.107:5, 11; A-App.11, 17); and he had recently made a statement that "he understand[s] why people commit suicide." (R.107:22; A-App.28).[4]

The bulk of this evidence involved outdated (or undated) alleged acts. Trevor does not argue that the County could not meet its burden without proof of "recent" acts or omissions. (*See* Resp. Br. at 16-17). However, the remoteness of any alleged dangerous behavior directly bears on the likelihood of reoccurrence if treatment were withdrawn. A suicide attempt that took place twenty years prior is

[4] Dr. Coates testified that Trevor made unspecified suicidal statements over the last few days, was refusing to take medication, and had been evicted, but the court ruled that this testimony was not admissible for the truth of the matter asserted. (R.107:5-6; A-App.11-12). To the extent the County asks this Court to rely on this testimony, this Court should decline to override the circuit court's evidentiary ruling in this regard. (Resp. Br. at 19, n.2).

not as relevant as an attempt that took place a year prior.

Dr. Coates' testimony that, as a statistical matter, people with Schizophrenia are at greater risk of death, is too generalized to be probative. *See D.J.W.*, 391 Wis. 2d 231, ¶53 (finding insufficient this line of testimony from Dr. Coates because his "testimony on this subject relied only on generalized propositions with regard to people with schizophrenia, not anything specific to D.J.W.").

The evidence showed that Trevor was not dangerous. He had not exhibited any recent psychotic behavior. (R.107:15; A-App.21). He had not made any recent attempts at self-harm. (R.107:18; A-App. 24). There was no evidence that he had ever harmed others. (R.107:12; A-App. 18). He'd had no issue with water consumption since the single incident in 2018. (R.107:12; A-App 18). He testified that he would like to take medication voluntarily, and that he would follow through with any appropriate voluntary treatment plan. (R.107:20-21; A-App. 26-27).

Because the County failed to prove that Trevor was dangerous, it did not meet its burden of proof to show by clear and convincing evidence that Trevor would be a proper subject for commitment if treatment were withdrawn.

## CONCLUSION

For the reasons stated herein and in T.J.M's Appellant's Brief, this court should reverse the recommitment order and the order for involuntary medication and treatment.

Dated this 1st day of September, 2022.

Respectfully submitted,

*Electronically signed by Colleen Marion*
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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 1,403 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 1st day of September, 2022.

Signed:
*Electronically signed by*
*Colleen Marion*
COLLEEN MARION
Assistant State Public Defender