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SUPREME COURT

STATE OF WISCONSIN

SUPREME COURT

Case No. 2022AP000817

In the Matter of the Mental Commitment of A.P.D.:
WINNEBAGO COUNTY,

Petitioner-Respondent,

v.

A.P.D.,

Respondent-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

A.P.D. disagreed with his diagnosis of bipolar disorder, and did not want to take the medication prescribed to him as a consequence. Winnebago County successfully continued his Chapter 51 mental commitment under the "fifth" statutory dangerousness standard, Wis. Stat. § 51.20(1)(a)2.e, despite the lack of any evidence or a specific finding by the circuit court that A.P.D's decision not to take the prescribed medication was because of his mental illness.

The issues presented are:

I. Did the County present sufficient evidence and did the circuit court make the specific findings of fact necessary to extend A.P.D.'s mental commitment?

II. Did the County present sufficient evidence for the circuit court to issue an involuntary medication order?

The circuit court and court of appeals held that there was sufficient evidence to extend the mental commitment and involuntary medication of A.P.D. The court of appeals further held that although the "circuit court [could] have made more findings," the "purpose of the [*Matter of Commitment of D.J.W.*, 2020 WI 41, ¶ 40, 391 Wis. 2d 231, 247, 942 N.W.2d 277, 285] directive was satisfied," because "A.P.D. had notice as to which dangerousness standard the County based its prosecution on, and the circuit court specifically indicated that it grounded its decision in" the fifth standard. (App. 18).

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REASONS FOR GRANTING REVIEW

This is a Chapter 51 recommitment case where the government at most proved that the Petitioner, A.P.D., disagreed with his doctor's diagnosis of bipolar disorder. At trial, the doctor's opinions often consisted solely of recitations of the applicable statutory definitions of mental illness and dangerousness, without an explanation of the facts that supported those opinions. Similarly, the circuit court's factual findings in many instances simply recited the relevant statutory provision, without making any findings of the facts underlying the opinion. Also, the basis for the court's conclusion that the petitioner was dangerous under the "fifth" standard for dangerousness was that the petitioner disagreed with his diagnosis, without any evidence that it the disagreement was because petitioner's mental illness made him incapable of expressing or applying an understanding of his condition and the benefits of treatment.

In 2020, this Court sent a clear directive to the circuit courts "to make specific factual findings with reference to the subdivision paragraph of § 51.20(1)(a)2. on which the recommitment is based." *Matter of Commitment of D.J.W.*, 2020 WI 41, ¶ 40, 391 Wis. 2d 231, 247, 942 N.W.2d 277, 285. And for the most part, the court of appeals has heeded this call. *See, e.g., Matter of Commitment of S.H.*, 2020 WI App 46, ¶ 17, 393 Wis. 2d 511, 523, 947 N.W.2d 761, 767. ("conclusory opinions parroting the statutory language without actually discussing dangerousness … are insufficient to prove dangerousness in an extension hearing;"); *In the Matter of the Mental Commitment of J.D.A.*, unpublished slip op., ¶ 17, Case No. 2021AP1148 (WI App. Dec. 15, 2021) (App. 54)

("Reciting the language of the statute without discussing the specific facts supporting its legal conclusions is insufficient to support recommitting a person.")

However, in its opinion below, the court of appeals took a step back. For instance, the court stated that "[t]he Record [*sic*] reflects that many of the questions the County asked 'parroted' the statutory language, but this is the nature of these types of cases." (Opinion, ¶ 26; App. 16-17). Similarly, the court held that although the "circuit court [could] have made more findings," the "purpose of the *D.J.W.* directive was satisfied," because "A.P.D. had notice as to which dangerousness standard the County based its prosecution on, and the circuit court specifically indicated that it grounded its decision in" the fifth standard. (Opinion, ¶ 28; App. 18).

Review is warranted to reiterate that the *D.J.W.* directive was not just about providing notice of the statutory definition being applied, but about ensuring that the definition was being applied correctly by requiring the court to make "specific factual findings." *See Matter of Commitment of M.W.*, 2022 WI 40, ¶ 41, 402 Wis. 2d 1, 18, 974 N.W.2d 733, 741 (Hagedorn, J., concurring) ("a circuit court can fall short of our *D.J.W.* directive by failing to make specific factual findings or by failing to state which dangerousness standard the recommitment is based on.") The court should further clarify that conclusory opinions and findings that simply recite the statutory language do not satisfy *D.J.W.*'s requirements

The need for a vigorous application of such a rule is seen with regard to two facts in this case. First, the

County presented no evidence supporting A.P.D.'s diagnosis for bipolar disorder. There was no evidence of the observed behaviors, testing, or other grounds for diagnosing A.P.D. with bipolar. In fact, there was no testimony describing bipolar disorder itself. There was only the doctor's conclusory diagnosis that A.P.D. suffered from bipolar disorder.

The court of appeals held that A.P.D. waived this argument by not raising it in the circuit court. However, insufficient evidence claims may be raised in the first instance in on appeal. *State v. Hayes*, 2004 WI 80, ¶ 54, 273 Wis. 2d 1, 24, 681 N.W.2d 203, 214. The court of appeals also held that it was proper for the circuit court to simply rely on the doctor's expertise. However, it is well-established that courts cannot rely solely on the conclusory opinions of experts; they must make their own findings based on facts in evidence. *See e.g., Conley Pub. Grp., Ltd. v. J. Commc'ns, Inc.*, 2003 WI 119, ¶ 51, n. 31, 265 Wis. 2d 128, 164–65, 665 N.W.2d 879, 897–98*State ex rel. Haskins v. Cnty. Ct. of Dodge Cnty.*, 62 Wis. 2d 250, 264, 214 N.W.2d 575, 582 (1974). Plus, given the significant liberty interests at stake, it is not too much to ask of doctors to have them show their work.

Second, there was no evidence or factual findings that A.P.D.'s disagreement with his diagnosis and the prescribed medications was "*because* of [his] mental illness." Wis. Stat. § 51.20(1)(a)2.e (emphasis supplied). "The fifth standard applies to mentally ill persons whose mental illness renders them incapable of making informed medication decisions[.]" *In re Commitment of Dennis H.*, 2002 WI 104, ¶ 33, 255 Wis. 2d 359, 382, 647 N.W.2d 851, 861. The court of appeals simply ignored this argument.

This Court once warned that mental commitment proceedings cannot become an "enforcement mechanism for a doctor's order that a competent patient disagrees with[.]" *In re Melanie L.*, 2013 WI 67, ¶ 93, 349 Wis. 2d 148, 190, 833 N.W.2d 607, 628 (citation and bracketing omitted). Review is warranted to reiterate that circuit courts must make specific findings of the facts required under the statutory standards, and do not just defer to a doctor's opinion that a person would be better off committed and medicated.

STATEMENT OF THE CASE

On December 8, 2021, the County filed an "Evaluation and Recommendation Regarding Recommitment and Petition for Recommitment," using Circuit Court form ME-945, 03/20. Although the form states that it "shall not be modified," the title of the Petition was modified to say that it also a petition "*for Involuntary Medication or treatment §51.20(1)(a); §51.61(1)(g), Wis. Stats.*" (R. 2:1) (italics in original).

The Petition asserts that A.P.D. was "dangerous because there is a substantial likelihood, based on the subject individual's treatment record, that the subject individual would be a proper subject for commitment if treatment is withdrawn." (R.2:1, ¶ 4). Attached to the Petition is an Addendum that repeats the quoted language and sets out each of the five statutory "dangerousness" standards in Wis. Stat. § 51.20(1)(a)2.a-e, with checkboxes next to each standard. Only the box next to the fifth standard is checked. (*Id.*)

To set out the "treatment summary and mental evaluation of the subject individual" that supports the

Petition, the Petition states "See attached December 15, 2021, report from Dr. George Monese." No such report is attached to the petition. However, a letter from Dr. Monese to the court dated November 12, 2021, and a document entitled "Request for an extension of a civil commitment and involuntary medication orders (§ 51.20(1)(a))" dated November 15, 2021 and amended on December 7, 2021, were filed the same day as the Petition. (R. 3-4).

The one-day trial was held on January 19, 2022. (R. 19). The County called Dr. Monese as its only witness, and did not introduce any medical records or other exhibits. Dr. Monese is a staff psychiatrist at the Wisconsin Resource Center. ("WRC"). (R. 19:3). He had been A.P.D.'s treating psychiatrist since "November last year." (Given the trial took place in January 2022, Dr. Monese perhaps meant November 2020 rather than November 2021).

Dr. Monese diagnosed A.P.D. with "bipolar disorder, most recent episode psychotic and manic." (R. 19:5). At no point did Dr. Monese explain when that "most recent episode" occurred or what A.P.D. did that was "psychotic and manic." In any event, Dr. Monese testified that A.D.P.'s mental illness impairs his "judgment, behavior, [and] capacity to recognize reality." (R. 19:5). Dr. Monese testified that it was his opinion that if treatment were withdrawn, A.P.D. would be a proper subject for commitment. (R. 19:6).

The County stated it wanted to ask Dr. Monese "some questions, specifically regarding the 'e' standard." According to Dr. Monese, A.P.D. was "unable" to make medication or treatment decisions

"because of his intrinsic mental health disorder." (R. 19:6).

The County next asked if A.P.D. had "demonstrated a substantial probability that he needs care or treatment to prevent further disability or deterioration." (R. 19:6-7). Dr. Monese answered affirmatively, and was asked whether there was "[a]nything in [A.P.D.'s] treatment history or recent acts or omissions that would support" his opinion. (R. 19:7). Dr. Monese stated that A.P.D. had responded well to treatment, as he had not had any "violent episodes" since his commitment. Specifically, Dr. Monese testified that before his commitment A.P.D. sent a threatening letter to a judge and spit at a "PS". (R. 19:8-9). However, according to Dr. Monese, A.P.D. denies that he has a mental illness and is not taking his medication voluntarily. (*Id*.)

When asked if it was his "medical opinion [that A.P.D. has] demonstrated a substantial probability that if left untreated he's likely to lack the services necessary for his health or safety," Dr. Monese responded "Yes" without any elaboration. (R. 19:9).

Dr. Monese agreed that if left untreated A.P.D. would "suffer severe mental, emotional, or physical harm resulting in his loss of ability to function independently within the community." He explained that "if [A.P.D.] is not getting treatment for his bipolar disorder, he's not going to avail himself of that because he lacks insight." (R. 19:9).

Dr. Monese opined that if A.P.D. were untreated "[i]t would lead to lack of volitional [control] so that in a way he may encounter certain situations that may pose a danger to himself, if he is manic and gets into

other people -- an argument and so on, he may get hurt as a result because you never know who you are dealing with." (*Id.*)

Dr. Monese testified that A.P.D. "is unable to give informed consent to receive medication, [and is] therefore incompetent." (R. 19:11). In response to the County's question of whether "the advantages, disadvantages, and alternative of accepting medication explained to [A.P.D.]," Dr. Monese responded "I tried to explain that to him today but to no avail." (R. 19:11).

The County rested after Dr. Monese's testimony. A.P.D. did not call any witnesses. The Court found A.P.D. dangerous, and ordered his commitment and involuntary medication orders extended for 12 months. (R. 14-15; App. 20-22).

A.P.D. appealed both order, and the court of appeals affirmed the orders in a decision dated November 16, 2022. The opinion, and additional facts germane to this petition, are discussed in context below.

ARGUMENT

I. The County failed to introduce clear and convincing evidence supporting a 12-month extension of A.P.D.'s mental commitment.

Wisconsin's involuntary commitment balances an individual's personal liberty interests with society's interest in providing mental health services to those who would otherwise be a danger to themselves or others. Thus, "[to] protect personal liberties, no person who can be treated adequately outside of a hospital,

institution or other inpatient facility may be involuntarily treated in such a facility." *Matter of Commitment of D.J.W.*, 2020 WI 41, ¶ 28, 391 Wis. 2d 231, 247, 942 N.W.2d 277, 285 (*quoting* Wis. Stat. § 51.001(2)). "[C]ommitment to a mental hospital produces a massive curtailment of liberty, and in consequence requires due process protection." *In re Mental Commitment of Christopher S.*, 2016 WI 1, ¶ 37, 366 Wis. 2d 1, 29, 878 N.W.2d 109, 122 (cleaned up).

When the government seeks to involuntarily commit a person for mental health treatment, or later extend the commitment, it must prove three elements.

> To prevail in a recommitment proceeding, the County must prove the same elements necessary for the initial commitment by clear and convincing evidence—that the patient is (1) mentally ill; (2) a proper subject for treatment; and (3) dangerous to themselves or others.

D.J.W., 2020 WI 41, ¶31 (*citing* Wis. Stat. § 51.20(1)(a), (13)(e).

"Whether facts satisfy the statutory standard must be reviewed independently of the determinations rendered by the circuit court." *D.J.W.*, 2020 WI 41, ¶47. Here, the County simply failed to introduce sufficient evidence that A.P.D. suffered from a mental illness or that he was "dangerous."

A. *The County failed to show that A.P.D. suffered from a mental illness.*

The only evidence that A.P.D. suffered from a "mental illness" was Dr. Monese's conclusory statement that A.P.D.'s "diagnosis is bipolar disorder, most recent episode psychotic and manic." (R. 19:5).

Dr. Monese's testimony did not provide any of the details necessary for the *court* to determine that A.P.D. does indeed suffer from bipolar disorder, such as an explanation of the criteria for the diagnosis and how A.P.D. met those criteria, and that A.P.D.'s specific symptoms meet the legal definition of "mental illness." Wis. Stat. § 51.01(13)(b). The court cannot defer this legal determination to the doctor.

The court of appeals rejected argument for two reasons, neither of which are valid. First, the court of appeals held that A.P.D. cannot "sandbag" the County by raising this issue for the first time on appeal. (Opinion, ¶ 11; App. 8-9). However, it is well-established that sufficiency of the evidence claims may be raised on appeal in the first instance. Wis. Stat. § 809.30(1)(h); "[A] challenge to the sufficiency of the evidence [may] be raised on appeal as a matter of right despite the fact that the challenge was not raised in the circuit court." *State v. Hayes*, 2004 WI 80, ¶ 54, 273 Wis. 2d 1, 24, 681 N.W.2d 203, 214.

The second rationale of the court of appeals below was that there was sufficient evidence for the circuit court to find the doctor, and thus his opinion, credible. (Opinion, ¶ 12; App. 9). However, Wisconsin courts have repeatedly admonished that whether a person meets a mental health standard created by statute is a legal question for the court to answer, not a medical question for a doctor. For instance, "[t]he determination of competency to stand trial is a judicial matter, and a finding is not to be made on the basis of rubber stamping the report of a psychiatrist." *State ex rel. Haskins v. Cnty. Ct. of Dodge Cnty.*, 62 Wis. 2d 250, 264, 214 N.W.2d 575, 582 (1974); *see also State v. Green*, 2022 WI 30, ¶ 13, 401 Wis. 2d 542, 551, 973

N.W.2d 770, 775. Similarly, "the standard rule is that insanity is a legal term, not a medical standard." S*torm v. Legion Ins. Co.*, 2003 WI 120, ¶ 41, 265 Wis. 2d 169, 197–98, 665 N.W.2d 353, 367. "[P]sychiatrists are not legal experts, they are medical experts[.]" *Roe v. State*, 95 Wis. 2d 226, 248, 290 N.W.2d 291, 302 (1980) (holding psychiatrists not competent to testify about defendant's specific intent).

This rule is in accord with the more general principal that courts cannot rely solely on the conclusory opinions of experts. "[A]n expert's opinion is not a substitute for a plaintiff's obligation to provide evidence of facts that support the applicability of the expert's opinion to the case." *Conley Pub. Grp., Ltd. v. J. Commc'ns, Inc.*, 2003 WI 119, ¶ 51, n. 31, 265 Wis. 2d 128, 164–65, 665 N.W.2d 879, 897–98, *abrogated on other grounds by Olstad v. Microsoft Corp.*, 2005 WI 121, ¶ 51, 284 Wis. 2d 224, 700 N.W.2d 139 (citations and quotation marks omitted). "An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process." *Mid-State Fertilizer Co. v. Exch. Nat. Bank of Chicago*, 877 F.2d 1333, 1339 (7th Cir. 1989).

In a similar vein, the Wisconsin Supreme Court has stressed that mental health "hearings cannot be perfunctory under the law. Attention to detail is important." *In re Melanie L.*, 2013 WI 67, ¶ 94, 349 Wis. 2d 148, 190, 833 N.W.2d 607, 628. And with respect to the "dangerousness" element, the court of appeals has observed that "conclusory opinions parroting the statutory language without actually discussing dangerousness … are insufficient to prove dangerousness in an extension hearing." *Matter of*

Commitment of S.H., 2020 WI App 46, ¶ 17, 393 Wis. 2d 511, 523, 947 N.W.2d 761, 767.

Here, the evidence at trial lacked the kind of details necessary for the court to determine that A.P.D. suffered from a mental illness. Whether a person is suffering a "mental illness" is given a specific legal definition applicable to involuntary commitment proceedings.

> "Mental illness", for purposes of involuntary commitment, means a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life, but does not include alcoholism.

Wis. Stat. § 51.01(13)(b). The only evidence offered by the County were conclusory opinions by Dr. Monese that just regurgitated portions of the statutory definition of "mental illness." In fact, the entire exchange took only a few questions:

> Q. Doctor, based upon your review of the records along with your knowledge of [A.P.D.], are you able to provide an opinion to a reasonable degree of medical certainty whether he suffers from a mental illness?
>
> A. Yes, he suffers from a mental illness.
>
> Q. And what is your diagnosis, sir?
>
> A. His diagnosis is bipolar disorder, most recent episode psychotic and manic.
>
> Q. And is that a disorder of either thought, mood, perception, orientation, or memory?
>
> A. Thought, mood, and perception.

> Q. And those are substantial disorders of those, Doctor?
>
> A. Yes.
>
> …
>
> Q. Doctor, … does the mental illness grossly impair [A.P.D.]'s judgment, behavior, capacity to recognize reality?
>
> A. Yes, definitely impairs those three domains, especially when off treatment.

(R. 19:5).

Without an explanation for *why* Dr. Monese was reaching these conclusions, the court did not have a basis for concluding that A.P.D. suffered from the applicable legal definition of "mental illness." *S.H.*, 2020 WI App 46, ¶ 17. The failure to explain APD's alleged mental illness infected other parts of trial, as explained below.

B. *The County failed to introduce sufficient evidence, and the circuit court failed to make the requisite findings, that A.P.D. was dangerous under the fifth standard.*

1. *The County was required to prove each element of the fifth dangerousness standard with clear and convincing evidence.*

A person cannot be committed to a mental institution and forced to take medication simply because they suffer from a mental illness. The due process clause requires the government to prove, with clear and convincing evidence, that the person's mental illness causes them to be dangerous to

themselves or others. *Foucha v. Louisiana*, 504 U.S. 71, 78 (1992).

The Supreme Court has left it to the states to define "dangerous" for the purpose of involuntary commitments. *State v. Post*, 197 Wis. 2d 279, 304, 541 N.W.2d 115, 123 (1995). Wisconsin has promulgated five alternative standards for dangerous. Wis. Stat. § 51.20(1)(a)2.a-e. Each of the five standards requires the finding to be based on "recent" behaviors, to ensure that the court is finding that the person is currently dangerous. "It is not enough that the individual was at one point dangerous." *D.J.W.*, 2020 WI 41, ¶34.

However, when a person has not recently engaged in any dangerous behaviors because they have been receiving treatment through a commitment, the recency requirement may be replaced with a showing that, based on the person's treatment history, there is a substantial probability the person would engage in those behaviors if treatment were withdrawn. 51.20(1)(am). In other words, the recommitment provision "recognizes that an individual receiving treatment may not have exhibited any recent overt acts or omissions demonstrating dangerousness because the treatment ameliorated such behavior, but if treatment were withdrawn, there may be a substantial likelihood such behavior would recur." *Matter of Commitment of J.W.K.*, 2019 WI 54, ¶ 19, 386 Wis. 2d 672, 692, 927 N.W.2d 509, 519.

At issue here is the fifth standard (which is also sometimes called "standard e," based on the subparagraph number). Under the fifth standard, an individual is dangerous if:

> [A]fter the advantages and disadvantages of and alternatives to accepting a particular medication or treatment have been explained to him or her and because of mental illness, [the individual] evidences either incapability of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives, or substantial incapability of applying an understanding of the advantages, disadvantages, and alternatives to his or her mental illness in order to make an informed choice as to whether to accept or refuse medication or treatment; and evidences a substantial probability, as demonstrated by both the individual's treatment history and his or her recent acts or omissions, that the individual needs care or treatment to prevent further disability or deterioration and a substantial probability that he or she will, if left untreated, lack services necessary for his or her health or safety and suffer severe mental, emotional, or physical harm that will result in the loss of the individual's ability to function independently in the community or the loss of cognitive or volitional control over his or her thoughts or actions….[.]

Wis. Stat. § 51.20(1)(a)2.e.

The supreme court has recognized that the fifth standard is "long and complex," and broken it into five elements. *In re Commitment of Dennis H.*, 2002 WI 104, ¶¶ 16-26, 255 Wis. 2d 359, 647 N.W.2d 851. But the basic premise of the provision is that a person can be a danger to themselves if they need treatment to avoid serious physical harm, but their mental illness perversely prevents them from recognizing this fact. *Id*. at ¶ 33.

Finally, a "determination of dangerousness is not a factual determination, but a legal one based on underlying facts." *D.J.W.*, 2020 WI 41, ¶47. "Whether facts satisfy the statutory standard must be reviewed

independently of the determinations rendered by the circuit court." *Id.* Still, as discussed in the following section, the circuit court's failure to make the requisite factual findings supporting a dangerousness determination is itself grounds for reversal of a recommitment order.

2. *The Circuit Court is obliged to make specific factual findings with reference to the commitment standard it is applying.*

County health departments and circuit courts have not always been clear on which of the five standards would apply if treatment were withdrawn, making it difficult to determine on review if the recommitment decision is based on sufficient evidence. For that reason, the supreme court has directed circuit courts to "to make specific factual findings with reference to the subdivision paragraph of § 51.20(1)(a)2. on which the recommitment is based." *D.J.W.*, 2020 WI 41, ¶40. The requirement serves two purposes: it "provides increased protection to patients to ensure that recommitments are based on sufficient evidence" and "will clarify issues raised on appeal of recommitment orders and ensure the soundness of judicial decision making, specifically with regard to challenges based on the sufficiency of the evidence." *D.J.W.*, 2020 WI 41, ¶40.

Confusingly, the County asserted in its closing argument that the County had proven A.P.D. dangerous under the recommitment standard and the fifth standard.

> [Dr. Monese] did find and believes [A.P.D.'s] dangerous to the two standards. First of all, the (am) standard, that if treatment were withdrawn, he would become a proper subject for

> commitment. Also, and perhaps even more importantly for this type of a proceeding, he also deems him dangerous under the "e" standard.

(R. 19:21).

However, they are not separate "standards." As discussed above, the recommitment provision simply allows the County to rely on A.P.D.'s treatment history rather than his recent acts and omissions when proving the fifth standard.

The circuit court, for its part, only referenced the fifth standard when finding that A.P.D. was dangerous:

> [A.P.D.] is dangerous pursuant to the standards under Chapter 51, specifically standard "e" which is that he is going to decompress if he does not continue taking his medication and taking treatment. And therefore, he would be dangerous to himself or to others.

(R. 19:25-26).

The court of appeals has held that *D.J.W.* requires the circuit court to make specific factual findings that support each of the elements of the fifth standard. "Reciting the language of the statute without discussing the specific facts supporting its legal conclusions is insufficient to support recommitting a person." *In the Matter of the Mental Commitment of J.D.A.*, unpublished slip op., ¶ 17, Case No. 2021AP1148 (WI App. Dec. 15, 2021) (App. 54). The court of appeals has similarly said that "conclusory opinions parroting the statutory language without actually discussing dangerousness … are insufficient to prove dangerousness in an extension

hearing." *Matter of Commitment of S.H.*, 2020 WI App 46, ¶ 17, 393 Wis. 2d 511, 523, 947 N.W.2d 761, 767.

However, the court of appeals held that "[t]he Record [*sic*] reflects that many of the questions the County asked 'parroted' the statutory language, but this is the nature of these types of cases." (Opinion, ¶ 26; App. 16-17). Similarly, the court held that although the "circuit court [could] have made more findings," the "purpose of the *D.J.W.* directive was satisfied," because "A.P.D. had notice as to which dangerousness standard the County based its prosecution on, and the circuit court specifically indicated that it grounded its decision in" the fifth standard. (Opinion, ¶ 28; App. 18).

As discussed in the following sections, for many of the elements of the fifth standard, the County failed to introduce sufficient evidence and/or the circuit court failed to make the requisite factual findings to support that element.

3. *The County failed to show, and the circuit court failed to find, that "<u>because of mental illness</u>" A.P.D. was unable to express or apply an understanding of the benefits of treatment.*

At the heart of the fifth standard is the reality that in some instances, a person's mental illness prevents them from understanding their need for treatment. "The fifth standard applies to mentally ill persons whose mental illness renders them incapable of making informed medication decisions[.]" *In re Commitment of Dennis H.*, 2002 WI 104, ¶ 33, 255 Wis. 2d 359, 382, 647 N.W.2d 851, 861. The *Dennis H* court

broke down the incompetency element of the fifth standard as follows:

> the person who is the subject of the commitment petition must be incompetent to make medication or treatment decisions, or, more specifically, must be unable, "*because of mental illness*," to make "an informed choice as to whether to accept or refuse medication or treatment." Wis. Stat. § 51.20(1)(a)2.e. This must be evidenced either by an "incapability of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives," or by a "substantial incapability of applying an understanding of the advantages, disadvantages, and alternatives to his or her mental illness." *Id.* This must occur "after the advantages and disadvantages of and alternatives to accepting a particular medication or treatment have been explained to him or her."

2002 WI 104, ¶ 21, 255 Wis. 2d 359, 376–77, 647 N.W.2d 851, 858–59 (emphasis added). Courts will find that the fifth standard has been met when, for instance, a person's mental illness has caused a break from reality that makes them incapable of understanding the doctor. *See, e.g., In the Matter of the Mental Commitment of B.A.G,* unpublished slip op., ¶¶19-20, Case No. 2018AP782 (WI App. July 26, 2018) (observing that schizophrenic committee was "constantly attending to internal stimuli" during his examination) (App. 59).

Here, the record is entirely devoid of any evidence that A.P.D.'s bipolar disorder caused him to be incapable of expressing or applying an understanding of his treatment options. First, there was no evidence of what bipolar disorder is, so it follows that there was no evidence that bipolar evidence caused A.P.D. to be incapable of making

rational medical decisions. Second, even if the court could take judicial notice that bipolar disorder involves episodes of mania and depression, there was no evidence that A.P.D. was experiencing any such episodes when he communicated his disagreement with his diagnosis, let alone that to the point that his symptoms were rendering him incapable of making his own decisions.

Regarding the testimony that was offered, this exchange occurred when the County turned towards the fifth standard.

> Q. First of all, Doctor, in your medical opinion, is [A.P.D.] competent to make medication or treatment decisions?
>
> A. He is unable to do that.
>
> Q. And would you say that's because of his mental illness?
>
> A. That is because of his intrinsic mental health disorder.

(R.19:6).

There are two important points about this exchange. First, whether A.P.D. was competent to make medical decisions needed to be tied to the actual statutory standards. *Melanie L.*, 2013 WI 67, ¶ 9 (Observing that "[m]edical experts must apply the standards set out in the competency statute."). Simply testifying that A.P.D. was incompetent does not suffice.

Second, Dr. Monese's claim that A.P.D.'s incompetence was "intrinsic" to A.P.D.'s mental health disorder, *i.e.* bipolar disorder, suggests that Dr. Monese believed that anyone with bipolar disorder is

incompetent to refuse treatment. Certainly, such an extraordinary claim should be backed up with actual evidence.

In addition to failing to show that A.P.D.'s disagreement with his diagnosis was "because of" his bipolar disorder, the County failed to show that the disagreement was evidence that A.P.D. had an "incapability of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives," or a "substantial incapability of applying an understanding of the advantages, disadvantages, and alternatives to his or her mental illness." Wis. Stat. § 51.20(1)(a)2.e. Here was the only testimony on that point:

> Q. Doctor, in your medical opinion is [A.P.D.] capable of expressing an understanding of the advantages and disadvantages and alternatives to undergoing treatment?
>
> A. He was unable to express an understanding of that and understanding of treatments that were offered to him.

(R.19:12).

Dr. Monese's testimony is limited to only whether A.P.D. could "express" an understanding of his treatment options. There was no testimony about A.P.D.'s ability to "apply" an understanding of his options. So only the "express" prong of the competency definition is at issue. However, there was no evidence supporting Dr. Monese's opinion that A.P.D. could not express himself. In fact, to the contrary, all of the evidence is that A.P.D. quite clearly expressed that he disagreed with his diagnosis, and did not want to take the medication prescribed.

Perhaps Dr. Monese thought that the fact that A.P.D. disagreed with him was proof enough that A.P.D. had an "inability" to express an understanding of the implications of treatment. Regardless, that is not the legal standard. When addressing the substantially similar involuntary medication statute, the Wisconsin Supreme Court agreed with an amicus's observation that the courts "cannot allow the involuntary medication hearing to drift into an enforcement mechanism for a doctor's order that a competent patient disagrees with or ignores." *Melanie L.*, 2013 WI 67, ¶ 93 (citation and bracketing omitted). Similarly, "[t]he focus of a hearing on the patient's right to exercise informed consent should not be upon whether the court, the psychiatrist or the County believes the patient's decision is the wrong choice. Rather, the focus must be upon whether the patient understands the implications of the recommended medication or treatment and is making an informed choice." *Matter of Virgil D.*, 189 Wis. 2d 1, 15, 524 N.W.2d 894, 900 (1994). There was simply no evidence that A.P.D.'s bipolar disorder caused him to be incapable of expressing or applying an understanding of his treatment options.

With respect to the court's obligation to make specific factual findings under *D.J.W.*, when ruling that A.P.D. was dangerous under the fifth standard, the court did not make any findings regarding A.P.D.'s capacity to express or apply an understanding of his treatment options. Accordingly, the circuit court violated *D.J.W. See J.D.A.*, Case No. 2021AP1148 (WI App. Dec. 15, 2021) at ¶ 17 (App. 54).

Later, when making a separate finding for an involuntary medication order, the court stated the following:

> due to [A.P.D.'s] mental illness, he's not competent to refuse the psychotropic medication or treatment because he's incapable of expressing an understanding of the advantages and disadvantages, substantially incapable of applying an understanding of the advantages and disadvantages to his condition to make an informed choice.

(R. 19:29).

Even if these "findings" can be attributed to dangerousness finding, they are insufficient. Indeed, they are not findings, so much as they are a recitation of the statutory standard. The point of *D.J.W.* was to ensure that the circuit courts were finding the facts necessary to support the standards.

4. *The County failed to show, and the court failed to find, that A.P.D needed treatment to prevent further disability or deterioration.*

One of the other elements of the fifth standard is that:

> the person must show a "substantial probability" that he or she "needs care or treatment to prevent further disability or deterioration." This must be "demonstrated by both the individual's treatment history and his or her recent acts or omissions."

Dennis H., 2002 WI 104, ¶ 23 (*quoting* Wis. Stat. § 51.20(1)(a)2.e). Here the recommitment provision kicks in, as the County can rely on just A.P.D.'s treatment record, and not also his recent acts and omissions.

> If the individual has been the subject of inpatient treatment for mental illness ... immediately prior to commencement of the proceedings as a result of ... a commitment or protective placement ordered by a court under this section ... the requirements of a … pattern of recent acts or omissions under par. (a)2.c. or e. … 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.

Wis. Stat. § 51.20(1)(am).

Regardless, the County failed to prove this element as it did not provide evidence of the baseline from which A.D.P. would deteriorate or decline. Again, there was absolutely no evidence of how A.D.P. experienced bipolar disorder, and how it affected his life. If, for instance, A.D.P. suffered from delusions as a result of his illness, the County might prove this with evidence of frequency, duration, and magnitude of delusions, how they were lessened with treatment, and how ending treatment would cause them to return. However, the County provided no such evidence. Accordingly, the County failed to prove this element with clear and convincing evidence.

The circuit court repeatedly found that A.P.D. would "decompress" if A.P.D. failed to receive his medications. (R. 19:24-16). Perhaps the court was thinking of the term "decompensate." Regardless, neither term appears in either the statute or Dr. Monese's testimony. The court failed to make the specific factual findings necessary under *D.J.W.*

II. Reversal of the commitment order requires reversal of the involuntary medication order.

All patients in Wisconsin have a right "to refuse medication and treatment," unless ordered otherwise by the court as part of mental commitment proceedings. Wis. Stat. § 51.61(1)(g)1. When the commitment is based on the fifth standard, "the court shall issue an order permitting medication or treatment to be administered to the individual regardless of his or her consent." Wis. Stat. § 51.61(1)(g)3m. Commitments under the other four standards requires a hearing on the person's competency to refuse medication or treatment. Wis. Stat. § 51.61(1)(g)3.

Here, A.P.D. was being committed under the fifth standard, and so the court was required to issue an involuntary medication order. Nonetheless, the court made a separate finding that A.P.D. was incompetent to refuse medication. Either way, the basis of the involuntary medication order is the commitment order, and the reversal of the latter requires reversal of the former as well.

CONCLUSION

For the reasons stated above, A.P.D. is entitled to reversal of the mental commitment and involuntary medication orders issued in this case.

Dated this 16th day of December, 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 (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 5,912 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, including 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 16th day of December, 2022.

Signed:

THOMAS B. AQUINO
Assistant State Public Defender