STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2022AP001226 - FT

In the matter of the mental commitment of L.A.R.,

MARATHON COUNTY DEPARTMENT OF SOCIAL SERVICES,

Petitioner-Respondent,

v.

L.A.R,

Respondent-Appellant.

On Appeal from an Order of Commitment and Order for Involuntary Medication Entered by the Marathon County Circuit Court, the Honorable Lamont Jacobson

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BRIEF OF RESPONDENT-APPELLANT

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ISSUES PRESENTED

> Did Marathon County present sufficient evidence to establish that L.A.R. was dangerous under Wis. Stat. § 51.20(1)(a)2.d., as required to involuntarily commit her?

The circuit court found that L.A.R. was dangerous under Wis. Stat. § 51.20(1)(a)2.d. on the basis that L.A.R.'s recent behavior might provoke another person to harm her. This Court should reverse.

STATEMENT OF THE CASE AND FACTS

On January 18, 2022, Marathon County filed a Statement of Emergency Detention, alleging that there was a "substantial probability of [L.A.R.] physically harming herself or others." (2). The specific allegations were that L.A.R. had:

> driven erratically because she believed someone had stolen and was driving her vehicle while she herself was driving her vehicle, she has an inability to understand her vehicle needs gas to operate and is not battery powered otherwise the result is her being out in the cold in possibly dangerously cold temperatures and wind chills, she has knocked on the door of strangers and accused them of lying about who they are, and she has physically attacked her daughter.

(2). On January 20, 2022, a court commissioner found probable cause that L.A.R. met the standards for commitment. (34:23).

The circuit court scheduled a final hearing and appointed two experts to conduct examinations of L.A.R. (11:1-2). the examining psychiatrist, Dr. Marshall Bales, filed a report on January 24, 2022. (14:1). In his report, Dr. Bales opined that L.A.R. was mentally ill and dangerous. Dr. Bales checked the dangerousness standards under (2)—"A substantial probability of physical harm to other subjects as manifested by evidence of recent homicidal or other violent behavior, or by evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them, as evidenced by a recent overt act, attempt or threat to do serious physical harm."—and (4)—"Behavior manifested by recent acts or omissions that, due to mental illness, the subject individual is unable to satisfy basic needs for nourishment, medical care, shelter or safety without prompt and adequate treatment so that a substantial probability exists that death, serious physical injury, serious physical debilitation or serious physical disease will imminently ensue unless the subject individual receives prompt and adequate treatment for this mental illness." (14:4).[1]

The report contained the following basis for Dr. Bales's dangerousness opinion: "[L.A.R.] was assaultive to her daughter, putting her in fear and

[1] *See* Wis. Stat. § 51.20(1)(a)2.b. & 2.d.

causing her pain. She admitted to it, and her daughter verified it. In addition, she has had erratic behavior while manic and psychotic. She has not been suicidal, though." (14:5).

Psychologist Dennis Elmergreen examined L.A.R. on January 24, 2022, and filed a report. (15:1). Based on his 15-minute examination of L.A.R., Dr. Elmergreen opined that L.A.R. suffered from mental illness and was dangerous because she "would present a substantial probability of physical impairment or injury to himself/herself or other individuals due to impaired judgment." (15:1, 3).[2]

The commitment hearing was held on February 2, 2022. (35:1). The county called three witnesses: Dr. Bales, Dr. Elmergreen, and L.A.R.'s daughter, L.J. (36:3, 15, 20). Dr. Bales testified that he spoke with L.A.R. for "at least half an hour" on video-conferencing, reviewed the emergency detention document and spoke with L.A.R.'s husband and daughter. (35:5). He described L.A.R. as "fully cooperative," but "very tearful, very emotional." According to Dr. Bales, L.A.R. confirmed that she had run out of gas because she thought she was driving an electric car, and that she had "an altercation with her daughter." However, Dr. Bales believed L.A.R. was downplaying everything because she focused on her feeling that her family was rejecting her. (35:5-6). Dr. Bales diagnosed L.A.R. as having bipolar disorder with manic psychotic features. He acknowledged that

[2] *See* Wis. Stat. § 51.20(1)(a)2.c.

she'd had this diagnosis for about thirty years with no prior commitments. (35:6, 11-12).

As to his opinion of dangerousness, Dr. Bales testified as follows:

> Well, I verified the assault of her daughter and I spoke to the daughter, and [L.A.R.] also admitted that there had been an altercation. That daughter did fear for her safety. That being said, I think the main dangerousness here is under Standard 4. I could also defend Standard 5, but I only checked Box 4.
>
> She has run out of gas in bitter cold weather, she has been just unable to care for her basic needs. Her home has got tape on outlets and I am told -- and now I have not seen the home, but I'm told it's in disarray. She's being maintained in this home through the help of her husband who is making sure the bills get paid and I think the daughters check on her as well, but I'm really concerned about her ability to care for her basic needs.
>
> And this all came to the surface when she had been running out of gas, thinking her car is an electric car, and just -- they found her knocking at random people's homes in the cold and then she presents very, very vulnerable.

(35:7-8). Dr. Bales also explained that he had checked the box for dangerousness standard 2 ("A substantial probability of physical harm to other subjects as manifested by evidence of recent homicidal or other violent behavior, or by evidence that others are placed

in reasonable fear of violent behavior and serious physical harm to them, as evidenced by a recent overt act, attempt or threat to do serious physical harm.") because of the altercation between L.A.R. and L.J. (25:8-9).

Dr. Bales testified that L.A.R. had gone some time without treatment. (35:12). However, he explained that the local crisis response team had evaluated L.A.R.'s living situation two months prior and had not found dangerousness. (35:12-13). He further testified that he was not aware of L.A.R. having been hospitalized for any injuries, such as frostbite or hypothermia, or anyone else having been hospitalized due to injuries caused by L.A.R. (35:14). L.A.R.'s daughter did not sustain any injuries as a result of the altercation. (35:14).

The County's next witness, Dr. Elmergreen, explained that he spoke with L.A.R. by telephone and reviewed records. (35:16-17). He diagnosed her as having bipolar disorder 1, manic, unspecified. (35:18). Dr. Elmergreen stated that it was "very difficult to -- to have a conversation with her" on the telephone. (35:17). As to dangerousness, he testified, "Well, at the time her judgment was highly impaired, so I said yes because of the impaired judgment." (35:18).

The County's last witness, L.J., testified that L.A.R. is her mother, and that she had concerns about L.A.R. based on L.A.R.'s recent behavior and mental health. (35:21). L.J. testified that on January 14, 2022, she went to her mother's house. (35:21). L.A.R. was

concerned that someone had broken into the house and accused L.J. of working for the police. (35:22). L.A.R. cornered L.J. in the office near the front door and demanded L.J. take her to L.J.'s work to prove she did not work for the police. (35:22). L.J. testified that she tried to get past L.A.R. and that, "[L.A.R.] pulled my hair, she punched me a few times, and she tried ripping my glasses off me saying, why are you wearing glasses, you don't need glasses, you have LASIK." (35:23). L.J. then ran to her car and locked the door. (35:23). L.A.R. tried to get in the car but could not open the door, and ultimately L.J. drove away. (35:23-24).

As to the January 14 incident, L.J. testified that she did not suffer any major injuries, "just some discomfort shortly after the fact." (35:25). L.J. further testified that she feared for L.A.R.'s safety because she "has very delusional thinking." L.J. described three instances when L.A.R. ran out of gas and it was very cold outside. (35:24). L.J. then described an instance in October 2021 when L.A.R. "said she started a fire in her house and she had the Fire Department come there." (35:24). L.J. also stated that "this fall sometime" L.A.R. flooded a room in the house by leaving the water running. (35:24).

The county argued that it had met its burden to demonstrate by clear and convincing evidence that L.A.R. was dangerous under Wis. Stat. § 51.20(1)(a)2.b. Specifically, the county contended it had proven a "substantial probability of physical harm to other subjects as manifested by evidence of recent homicidal or other violent behavior." (35:27).

The circuit court found that L.A.R. "suffers from bipolar with manic." (35:33). As to dangerousness, the court stated that it was relying on L.J.'s testimony. The court determined that contrary to the county's argument, the facts of the January 14 incident did not meet the requirements under Wis. Stat. § 51.20(1)(a)2.b. However, the court concluded that the county had established dangerousness under subd. 2.d.:

> Three occasions of running out of gas in cold weather with the explanation that there was a belief that the car was an electric vehicle would seem to maybe make sense with one out of gas situation, not three. A fire being started and resulting in the Fire Department being called, and then there is a flood in the house, and apparently these were all in the recent past at a time where both doctors are testifying that [L.A.R.] is delusional, so if I pull the incident of January 14th over to the (d) standard, view that as a recent act that occurred due to mental illness, and then with that consider the running out of gas multiple times, the need to call the Fire Department, the flood in the house, apparently a house that's in disarray, and I think collectively then, considering all of that information, that aggressive behavior toward another one, another individual, could carry over into aggressive behavior when cars run out of gas or the Fire Departments arrive, and I think then there is clear and convincing evidence that there is a substantial risk of danger to herself based upon all of those facts being considered together.

(35:32).

The court entered an order for commitment and, on the basis of the doctors' testimony, an order authorizing involuntary medication during the commitment.[3] (35:33; 25; 26). L.A.R. appeals.

ARGUMENT

The evidence was not sufficient to prove that L.A.R. was dangerous under Wis. Stat. § 51.20(1)(a)2.d.

Reversal is warranted because the evidence presented by the county was insufficient to prove that L.A.R. was dangerous under subd. 2.d.

For an initial commitment the government must prove by clear and convincing evidence that the person to be committed is (1) mentally ill, (2) a proper subject for treatment, and (3) dangerous under one of five distinct, detailed standards of dangerousness. Wis. Stat. § 51.20(1)(a). For purposes of this appeal, L.A.R. does not challenge the sufficiency of the evidence of the first two elements.

Whether the county has met its burden is a mixed question of law and fact: first, appellate courts will uphold a circuit court's findings of fact unless they are clearly erroneous, and second, appellate courts

[3] L.A.R. does not separately challenge the medication order. However, the medication order is only effective during a lawful commitment. *See* Wis. Stat. § 51.61(1)(g)3. Therefore, reversal of the commitment will also necessitate reversal of the medication order.

review independently whether the facts satisfy the statutory standard. *Id.*, ¶¶24, 25.

The fourth dangerousness standard, subd. 2.d., provides that an individual is dangerous if he or she:

> Evidences behavior manifested by recent acts or omissions that, due to mental illness, he or she is unable to satisfy basic needs for nourishment, medical care, shelter or safety without prompt and adequate treatment so that a substantial probability exists that death, serious physical injury, serious physical debilitation, or serious physical disease will imminently ensue unless the individual receives prompt and adequate treatment for this mental illness.

Wis. Stat. § 51.20(1)(a)2.d.

Here, the circuit court found the following facts:

- L.A.R. "was aggressive toward [L.J.] to the point of chasing her out to the car" and "some apparent contact . . . occurred . . . ."
- On three occasions, L.A.R. ran out of gas in the cold weather due to her "belief that the car was an electric vehicle . . . ."
- "A fire being started and resulting in the Fire Department being called . . . ."
- "[T]here [was] a flood in the house . . . ."
- L.A.R.'s house was "apparently . . . in disarray."

(35:32).

On that basis, the court reasoned that L.A.R. was dangerous to herself because she was mentally ill and might provoke another individual to harm her. Specifically, the court stated: "aggressive behavior toward . . . another individual, could carry over into aggressive behavior when cars run out of gas or the Fire Departments arrive and I think then there is clear and convincing evidence that there is a substantial risk of danger to herself based upon all of those facts being considered together." (35:32-33).

The circuit court specifically concluded that these facts did not meet the standard under § 51.20(1)(a)2.b. or c., which cover situations in which there is "a substantial probability" of "physical harm" or "physical impairment or injury" to self or other individuals. Rather, the court determined that the facts met subd. 2.d., which requires that there is risk to L.A.R. herself. *See*, Wis. Stat. § 51.20(1)(a)2.d. ("[A] substantial probability exists that death, serious physical injury, serious physical debilitation, or serious physical disease will imminently ensue unless the individual receives prompt and adequate treatment.").

The testimony during the final hearing did not establish that "death, serious physical injury, serious physical debilitation, or serious physical disease" would ensue if L.A.R. were not committed. Instead, the testimony established that L.A.R. had called the fire department on one occasion, flooded a room in her home by leaving the water running on another occasion, and had run out of gas three times while it

was cold. (35:24). There was no evidence of any of these incidents causing any kind of harm to L.A.R., much less evidence that they put her in situations that were deadly or had the potential to cause her serious physical injury, debilitation or disease.

Further, this Court has held that evidence of behavior which might provoke another individual to harm the subject of the petition for commitment is not evidence of dangerousness. In *Milwaukee Cty. v. Cheri V.*, No. 2012AP1737, unpublished slip op., ¶2 (WI App Dec. 18, 2012) (App. 10-16), the county presented testimony that Cheri V. sought treatment in a mental health facility because she believed she was being followed by people on Facebook. Cheri V. believed that these people were trying to hurt her and that they were "checking themselves in" to the facility as well. *Id.* (App. 11). A registered nurse testified that Cheri V. was "very upset, very angry" and started confronting other patients and "finger pointing." *Id.*, ¶3. (App. 12). The nurse stated that as a result, she became concerned for Cheri V.'s safety and that of the other patients, and put Cheri V. in restraints. *Id.* (App. 12).

In reversing the circuit court's dangerousness finding and commitment order, this Court stated that "yelling at and pointing a finger at another person, irrespective of how dangerous that other person might be, does not, unless there is evidence that the subject of a potential commitment order is trying to goad that other person in order to have that person kill or harm the subject (as in 'suicide by cop') is not" sufficient

evidence of any of the dangerousness standards. *Id.*, ¶7. (App. 16). The court specifically found that evidence of potential provocation to others provided "no evidence implicating" subd. 2.d. *Id.* (App. 16). Therefore, evidence that L.A.R. might get herself into a situation where she provokes another individual to harm her cannot support a conclusion that she is dangerous under Wis. Stat. § 51.20(1)(a)2.d.

This Court should reverse the order for commitment because the county failed to meet its burden to prove L.A.R. was dangerous by clear and convincing evidence.

Further, this Court should not affirm the commitment order on the basis that L.A.R. is dangerous under any of the other dangerousness standards because doing so would violate *D.J.W.* In *Langlade County v. D.J.W.*, 2020 WI 41, 391 Wis. 2d 231, 942 N.W.2d 277, our supreme court mandated that going forward, circuit courts make "specific factual findings with reference to the subdivision paragraph of Wis. Stat. § 51.20(1)(a)2. on which the recommitment is based." *Id.*, ¶40. The court explained that the purpose of this requirement is twofold: (1) to provide "clarity and extra protection to patients regarding the underlying basis for a recommitment[,]" because in mental commitment proceedings, "such an important liberty interest [is] at stake[;]" and (2) to "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." *Id.*, ¶¶42-44 (citations omitted).

An argument by the county that L.A.R. should have been found dangerous under another subdivision paragraph of § 51.20(1)(a)2. would run afoul of the supreme court's mandate in *D.J.W.* Therefore, this Court should not affirm the commitment order on the basis that there was sufficient evidence to prove that L.A.R. was dangerous under any other dangerousness standard.

If this Court concludes that the county failed to prove L.A.R. was dangerous under subd. 2.d., it should reverse the commitment and involuntary medication orders. *See D.J.W.*, 391 Wis. 2d 231, ¶40.

CONCLUSION

For the reasons stated above, this Court should reverse the circuit court's commitment order.

Dated this 13th day of September, 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 2,906 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 13th day of September, 2022.

Signed:
Electronically signed by
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