STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT II

Case No. 2022AP001730

In the matter of the mental commitment of L.A.T.:
KENOSHA COUNTY,

Petitioner-Respondent,

v.

L.A.T.,

Respondent-Appellant.

On Appeal from an Order of Extension of Commitment and Order for Involuntary Medication and Treatment Entered in the Kenosha County Circuit Court, the Honorable Jodi L. Meier, Presiding

---

REPLY BRIEF OF RESPONDENT-APPELLANT

KELSEY LOSHAW
Assistant State Public Defender
State Bar No. 1086532
loshawk@opd.wi.gov

TRISTAN S. BREEDLOVE
Assistant State Public Defender
State Bar No. 1081378
breedlovet@opd.wi.gov

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-3440

Attorneys for Respondent-Appellant

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

ARGUMENT

The circuit court erroneously relied on hearsay evidence, and, without that improper hearsay evidence, the county failed to meet its burden to establish by clear and convincing evidence that Linda was dangerous.

The court's error in admitting and relying on the hearsay evidence was prejudicial because without the evidence, the county failed to demonstrate that Linda[1] was dangerous. The commitment order must be vacated.

The county makes three main arguments in its response brief:

1. The circuit court did not err in admitting Dr. Bales's testimony over trial counsel's hearsay objections because evaluating doctors can rely on hearsay in forming their opinions.

2. Even if Dr. Bales's testimony had been excluded on hearsay grounds, there would still be sufficient grounds to commit Linda based on her own testimony.

[1] L.A.T. will hereinafter appear as "Linda," pursuant to Wis. Stat. § 809.19(1)(g).

3. There was sufficient evidence (even without Dr. Bales's objected to testimony) for recommitment because the county does not have to prove recent acts of dangerousness on recommitment.

These arguments all fail. As discussed below, the hearsay was relied on by the court in making its finding of dangerousness, not only by Dr. Bales in forming his opinion. Further, without the hearsay evidence there was not sufficient evidence that Linda was dangerous. Finally, while the county is correct there is no requirement that it prove a recent act or omission for recommitment, the county does still have to prove that the individual is *currently* dangerous. The county did not establish that here.

A. The evidence the circuit court relied on from Dr. Bales was hearsay evidence that should have been excluded.

Dr. Bales testified about an incident in January, 2022, where Linda allegedly yelled at her nurse practitioner's office. (105:13). He testified about an argument Linda had with her father in March, 2022, and about an incident where Linda threw a roll of tape. (105:13-14).[2]

[2] The county's brief (pages 8-9) mentions Dr. Bales's testimony about other times police were called but notes the circuit court did not rely on these incidents in finding dangerousness. The county is correct that they were not relied upon by the circuit court and additionally the testimony suffers from lack of specificity and is inadmissible hearsay.

Dr. Bales had no personal knowledge of any of these alleged events. He was not there to witness them and he never testified about statements Linda had made to him about them. Discussion of all of these allegations was hearsay. If the county wanted to rely on evidence that Linda had a verbal altercation amounting to dangerousness, it needed to provide witnesses who could testify about specific altercations actually happening. It could not simply rely on Dr. Bales repeating what he had seen in reports he reviewed.

The county cites Wis. Stat. § 907.03 to support its argument that the evidence was admissible because an expert may rely on inadmissible facts or data in forming his opinion. (County's Br. at 7). But that argument fails because that is not what happened here. The testimony was not used to show why Dr. Bales found Linda to be mentally ill, rather the circuit court relied on the events discussed by Dr. Bales as the basis for dangerousness. Specifically, the circuit court said it was finding Linda dangerous based on her throwing tape at her father, being accused of kicking someone, yelling at someone in her doctor's office, and because of a verbal argument in March, 2022. (105:89-90). The circuit court's rulings thus flowed directly from Dr. Bales's hearsay testimony. The circuit court used what Dr. Bales testified to as proof each of the alleged incidents actually transpired. This was inappropriate because while experts may rely on inadmissible evidence in forming opinions, the underlying evidence is still inadmissible. *Matter of S.Y.,* 156 Wis. 2d 317, 327-28,

457 N.W.2d 326 (Ct. App. 1990) (internal citations omitted).

B. There was insufficient evidence for recommitment without the hearsay evidence.

Next, the county claims that even without the inadmissible hearsay evidence, there was sufficient evidence to support Linda's recommitment because Linda testified about some of the incidents Dr. Bales mentioned. (County's Br. at 7-9). But the events Linda testified to did not amount to enough to find her dangerous.

Dr. Bales testified that Linda yelled and screamed at people at her nurse practitioner's office including within a foot of a person. (105:13). Linda testified staff was yelling at her for not wearing a mask correctly and she yelled back. (105:67-69). Regarding the original event precipitating commitment, Dr. Bales testified Linda threw a roll of tape at one of her parents. (105:11). Linda testified she and her parents had been arguing all day and she was taping up a box because she was moving out. She threw a half roll of masking tape (weighing no more than a few ounces) at her dad. (105:64-66). No evidence was provided that it hit him or he was injured. As for the event on March 10, 2022, Dr. Bales testified Linda and her father had argued that day and her father was concerned for her safety. (105:13). He confirmed there were no injuries and there was no physical assault. (105:13). Linda confirmed she and her dad had had a

verbal argument. (105:69). She never testified about making any threats or about any physical violence. Finally, the county asserts Linda provided evidence supporting dangerousness when she testified about being accused of kicking someone at Winnebago. (County's Br. at 9). But no evidence was provided that such an assault actually occurred and Linda denied that she ever kicked anyone. (105:72, 79).

The circuit court found dangerousness based on the following:

> "[T]here's a pattern here from this issue on October of 2021 that resulted in the initial Chapter 51 commitment order that Linda threw tape at her father missing his head…Linda herself talked about being accused of kicking someone at Winnebago…in January there was an incident at the doctor's office where whether it was about mask or something else for that matter Linda got about a foot away from somebody and was screaming and yelling at them…then in March there was some altercation. Sounds to be verbal." (105:89).

All of the testimony from Dr. Bales on these events was hearsay the circuit court never should have relied on. With Dr. Bales's testimony appropriately excluded, the only evidence remaining from Linda was that she had a verbal argument with her father in March, which was not physical or threatening, that she had thrown a half roll of masking tape at her

father, which did not hit him,[3] that she had been wrongly accused of kicking someone at Winnebago (with no evidence provided from staff that that accusation was actually made or substantiated), and that someone in her nurse practitioner's office had yelled at her for not properly wearing a mask and she had yelled back.[4]

The evidence provided by Linda was insufficient to establish that she was dangerous under the second standard, or in other words that if untreated, there would be a substantial probability Linda would harm others, as the circuit court found. Wis. Stat. § 51.20(1)(a)2. (105:89).

Evidence of verbal arguments with parents or with staff about how to properly wear a mask does not amount to dangerousness. And neither does throwing a half roll of masking tape in frustration. This is not the type of act that should result in the "significant deprivation of liberty" that comes with commitment.

---

[3] As discussed in her initial brief, evidence from Linda's original commitment about throwing tape cannot be used to establish dangerousness on recommitment because "[e]ach order must independently be based upon current, dual findings of mental illness and dangerousness," the "sufficiency of the evidence supporting prior orders has no impact on any subsequent order." *See Portage Cty. v. J.W.K.,* 2019 WI 54, ¶21, 386 Wis. 2d 672, 927 N.W.2d 509.

[4] Linda never testified that she was screaming and/or yelling a foot away from the individual as Dr. Bales testified. Because that testimony was hearsay, the only remaining evidence from Linda is that someone yelled at her and she responded.

See Addington v. Texas, 441 US 418, 425 (1979). Finally, evidence that an individual may have been accused of kicking someone with no evidence from staff about whether that accusation was actually made or substantiated, cannot form the basis for finding dangerousness. *See Winnebago Cty. v. L.F.-G.*, unpublished slip op., No. 2019AP2010 (Ct. App. May 20, 2020), ¶5 (App. 3-8) (an involuntary mental commitment cannot be based on assumptions or inferences).

A "substantial probability" is defined as "much more likely than not." *Marathon Cty v. D.K.,* 2020 WI 8, ¶35, 390 Wis. 2d 50, 937 N.W.2d 90. No evidence was ever provided that Linda threatened or harmed anyone. Linda's testimony did not establish that it was much more likely than not that she would harm others.

Thus, the evidence provided, without the hearsay, was insufficient to establish that Linda was dangerous making the recommitment order invalid.

C. The county must still prove dangerousness in order to recommit.

The county points out that Dr. Bales found there was "a substantial likelihood that the subject [Linda] would become a proper subject for commitment under [the second standard] if treatment were withdrawn." (County's Br. at 11; 105:91). It also points out that Wis. Stat. § 51.20(1)(am) states that for recommitment, no proof of recent overt acts or

omissions is required to show dangerousness. (County's Br. at 11-12).

Although the county does not have to demonstrate a recent act or omission for a recommitment, the county must still prove "current dangerousness" as measured by at least one of the five statutory standards of dangerousness. *J.W.K.,* 386 Wis. 2d 672, ¶24. In other words, while the county does not have the burden of introducing evidence of "recent" behavior demonstrating dangerousness, the county must still prove by clear and convincing evidence that the type of dangerous behavior the county has claimed would be substantially likely to recur if treatment were withdrawn. *Langlade Cty v. D.J.W.*, 2020 WI 41, ¶33, 391 Wis. 2d 231, 942 N.W.2d 277 (citing *J.W.K.,* 386 Wis. 2d 672, ¶19).

This court has recognized that the initial commitment standards and the "alternative evidentiary path" set out in Wis. Stat. § 51.20(1)(am) impose the same burden on the government: to prove there is a substantial probability or likelihood of harm to the individual or others before a commitment may be entered or extended. *See Waupaca County v. K.E.K.*, unpublished slip op., No. 2018AP1887 (Ct. App. Sept. 26, 2019), ¶39 (App. 9-33). *See also J.W.K.,* 386 Wis. 2d 672, ¶24 (discussing paragraph (1)(am) as a requirement to prove a substantial likelihood that "such behavior would recur.").

As aptly noted in *J.W.K.*, "[i]t is not enough that the individual was at one point a proper subject for commitment. The County must prove the individual 'is dangerous.'" *Id*. (emphasis in original). The fact Linda was committed in the past is not evidence she is currently dangerous. If this type of evidence was enough, no individual could ever meaningfully defend themselves against a petition to extend an involuntary commitment order.

Finally, the county notes that Dr. Bales testified he believed Linda would not pursue treatment if she was not under a commitment order. (County's Br. at 9 citing 105:19). But dangerousness cannot be based on the fact that a person with mental illness will not use medication if not committed. Rather, the county must prove by clear and convincing evidence that such a failure to medicate would result in the person being dangerous in one of the ways specified in Wis. Stat. § 51.20. That link was not made here. The fact that Dr. Bales is uncomfortable with Linda displaying symptoms of mental illness is irrelevant if that display does not amount to dangerousness.

If refusal to voluntarily comply with treatment was sufficient evidence of dangerousness, then all any petitioner would ever have to prove with regard to dangerousness is that the subject of an involuntary commitment petition will not voluntarily comply with treatment. This ignores the mandatory requirement that the county prove the individual is both mentally ill *and* dangerous as defined by Chapter 51. *See Winnebago Cty. v. L.F.-G.*, unpublished slip op., No.

2019AP2010 (Ct. App. May 20, 2020), ¶¶4-5, 7 (App. 3-8) (dangerousness cannot be established from mere fact individual may not continue to medicate without commitment).

CONCLUSION

For the reasons stated above and in her initial brief, Linda respectfully asks this Court to reverse the Order for Extension of Commitment and Order for Involuntary Medication and Treatment.

Dated this 21st day of July, 2023.

Respectfully submitted,

Electronically signed by Kelsey Loshaw
KELSEY LOSHAW
Assistant State Public Defender
State Bar No. 1086532
loshawk@opd.wi.gov

Tristan S. Breedlove
TRISTAN S. BREEDLOVE
Assistant State Public Defender
State Bar No. 1086532
breedlovet@opd.wi.gov

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-3440

Attorneys for Respondent-Appellant

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 2,090 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 21st day of July, 2023.

Signed:
Electronically signed by
Kelsey Loshaw
KELSEY LOSHAW
Assistant State Public Defender