STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2023AP0200

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

WINNEBAGO COUNTY,

Petitioner-Respondent,

v.

J.L.C.,

Respondent-Appellant-Petitioner.

ON APPEAL FROM COMMITMENT AND
MEDICATION ORDERS OF THE
WINNEBAGO COUNTY CIRCUIT COURT,
THE HONORABLE TERESA S. BASILIERE, PRESIDING

WINNEBAGO COUNTY'S RESPONSE TO THE PETITION FOR REVIEW

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INTRODUCTION

This case involves six-month Wis. Stat. ch. 51 commitment and medication orders. J.L.C. is a prisoner at the Wisconsin Resource Center who suffers from schizophrenia. In August 2022, a jury found that he was a proper subject for commitment, and the circuit court then entered the six-month orders, which have expired.

The court of appeals properly applied this Court's precedents and dismissed this case as moot. On appeal, J.L.C. did not identify or argue any ongoing collateral consequences of the challenged orders. As a convicted felon and the subject of a guardianship, he is prohibited from possessing a firearm, which is one potential collateral consequence of a commitment order. Dismissal for mootness was correct.

In all, this Court should deny the petition for review for three reasons. First, the court of appeals correctly applied the mootness doctrine and dismissed this case. Second, there is no reason for this Court to consider mootness in a Wis. Stat. ch. 51 case when it did so twice recently, especially when J.L.C. did not identify or argue any ongoing collateral consequences in the court of appeals. Third, Winnebago County (the "County") would prevail on the merits in any event.

This Court should deny the petition for review.

ISSUES PRESENTED

1. Is this appeal moot?

The circuit court did not address this question.

The court of appeals answered yes.

If this Court takes jurisdiction of this case, the following merits issues are also presented.

2. In a commitment proceeding where the applicable standards are those in Wis. Stat. § 51.20(1)(a)2.d. and 2.e., an individual cannot be deemed dangerous and committed under Wis. Stat. ch. 51 if Wis. Stat. ch. 55 protective placement or protective services would meet their needs. *See Dane Cnty. v. Kelly M.*, 2011 WI App 69, ¶ 18, 333 Wis. 2d 719, 798 N.W.2d 697. This is referred to as the "ch[apter] 55 exclusion." *Id.*

Here, the circuit court instructed the jury as to the Wis. Stat. ch. 55 exclusion, and the jury found that J.L.C. was a proper subject for treatment, was dangerous to himself or others, and that clear and convincing evidence proved that he was dangerous under Wis. Stat. § 51.20(1)(a)2.d. and 2.e. The court entered commitment and medication orders.

Did the trial evidence show that Wis. Stat. ch. 55 protective placement or protective services would meet J.L.C.'s needs, making a Wis. Stat. ch. 51 commitment unavailable?

The circuit court entered Wis. Stat. ch. 51 commitment and medication orders after accepting the jury's verdict.

This court of appeals did not answer this question.

3. Did the County's closing arguments violate due process and, if they did, was any error harmless?

The circuit court overruled J.L.C.'s objections to the closing arguments.

The court of appeals did not answer this question.

REASONS THIS COURT SHOULD DENY THE PETITION

The petition for review does not present "special and important reasons" sufficient to warrant review. Wis. Stat. § (Rule) 809.62(1r). This Court should deny it for three reasons.

I. The court of appeals correctly held that this appeal is moot.

First, the court of appeals correctly held that this appeal is moot based upon this Court's precedents. There is no reason to take jurisdiction of the case when the mootness issue would be resolved the same way, is not novel, and would not develop or clarify the law, which is already sufficiently clear. *See* Wis. Stat. § (Rule) 809.62(1r)(c)1., 2.

The court of appeals correctly held that this appeal is moot because "J.L.C. does not identify any ongoing collateral consequences causally related to the expired initial commitment order in this appeal." *Winnebago Cnty. v. J.L.C.*, No. 2023AP0200, 2023 WL 5425244, ¶ 22 (Wis. Ct. App. Aug. 23, 2023) (unpublished).

The court first explained the background facts in detail, including J.L.C.'s criminal and medical history, the circumstances of the instant Wis. Stat. ch. 51 initial-commitment petition, and the August 2022 jury trial, which resulted in the court entering the challenged commitment and medication orders. *Id.* ¶¶ 1–16. Those facts will not be repeated here. The court's six-month commitment and medication orders expired prior to J.L.C. filing this appeal. *See id.* ¶ 16.

J.L.C. argued on appeal that: (1) the County failed to prove his dangerousness because the Wis. Stat. ch. 55 exclusion applies, and (2) his due process rights were violated by the County's closing arguments to the jury. *Id.*

The court of appeals determined that it need not resolve J.L.C.'s arguments because doing so "would have no practical effect on the underlying controversy." *Id.* ¶ 20 (citing *Portage Cnty. v. J.W.K.*, 2019 WI 54, ¶ 11, 386 Wis. 2d 672, 927 N.W.2d 509). "This is so for several reasons." *Id.*

"First, the six-month commitment orders under review in this initial commitment expired in February 2022," and "J.L.C. is no longer subject to these orders." *Id.* "And, although [this Court] concluded in *Marathon County v. D.K.*, 2020 WI 8, ¶ 25, 390 Wis. 2d 50, 937 N.W.2d 901, that appeals from expired initial commitment orders are not moot because of collateral consequences such as a firearms ban, that circumstance does not apply here for two reasons." *Id.* Namely, (1) "J.L.C. is also subject to a firearms ban under his guardianship order," which would remain in effect even if the challenged commitment and medication orders were vacated; and (2) "J.L.C. has been incarcerated for more than three decades after having been convicted of two counts of attempted first-degree murder, and as a convicted felon, he is prohibited from possessing firearms." *Id.* (citing Wis. Stat. § 941.29).

The court recounted that J.L.C. argued that this Court's decision in *Sauk County v. S.A.M.*, 2022 WI 46, 402 Wis. 2d 379, 975 N.W.2d 162, purportedly holds that "appeals from expired commitment orders are *never* moot due to their continuing collateral consequences." *J.L.C.*, 2023 WL 5425244, ¶ 21 (emphasis court's) (quoting J.L.C.'s Br.). The court rejected the argument, stating that "[n]ever is a strong word and one that the supreme court did *not* use in deciding *S.A.M.*" *Id.* "Rather, [this Court] concluded that when an appellant subject to an expired 'recommitment order' asserts that 'ongoing collateral consequences causally related to [the expired recommitment order] could be practically affected by a favorable decision,' the appeal is not moot." *Id.* (quoting *S.A.M.*, 402 Wis. 2d 379, ¶ 37).

J.L.C. did not identify "any ongoing collateral consequences causally related to the expired initial commitment order in this appeal," and is banned from possessing a firearm "under both the guardianship and the convicted felon statute," so his appeal is moot. *Id.* ¶ 22.

This analysis was correct, leaving no work for this Court to do or a sufficient reason to take this case. This Court would merely be repeating the analysis regarding J.L.C.'s failure to argue how ongoing collateral consequences prevent his case from becoming moot. The petition should be denied.

II. This Court should not revisit mootness when it recently resolved that issue in *D.K.* and *S.A.M.*, and J.L.C. did not identify or argue any ongoing collateral consequences of the challenged orders.

Second, there is no valid reason for this Court to take jurisdiction of this case when it recently resolved the mootness issue in *D.K.* and *S.A.M.* In those cases, unlike here, the party subject to a commitment identified and argued ongoing collateral consequences of the challenged orders.

In *Marathon County v. D.K.*, 2020 WI 8, 390 Wis. 2d 50, 937 N.W.2d 901, this Court focused on the collateral consequence of a firearms ban. Unlike J.L.C., D.K. specifically argued that his case was not moot because his "involuntary commitment order prohibit[ed] him from possessing a firearm, which would otherwise be his right." *Id.* ¶ 20. This Court observed that "[a]s a result of his civil commitment, D.K. is 'prohibited from possessing any firearm.' And the '[e]xpiration of the mental commitment proceeding [did] not terminate this restriction.'" *Id.* ¶ 25 (alterations in original) (quoting circuit court's order). Although D.K.'s "commitment ha[d] expired, [he] is still subject to the lasting collateral consequence of a firearms ban," which is "no minor consequence" in light of his Second Amendment rights. *Id.* "On appeal, a decision in D.K.'s favor would void the firearms ban and therefore have a 'practical effect,'" so his commitment "is not a moot issue because it still subjects him to the collateral consequence of a firearms ban." *Id.*

In *S.A.M.*, this Court addressed the collateral consequence of a firearms ban and other potential collateral consequences of a recommitment order. *See S.A.M.*, 402 Wis. 2d 379, ¶ 27. Unlike J.L.C., S.A.M. specifically argued that "three collateral consequences from his now-expired recommitment order render his appeal not moot: (1) [a] firearms ban; (2) the liability for the cost of his care while committed; and (3) the stigma associated with a mental-health commitment." *Id.* ¶ 19.

This Court explained that "an appeal from an order like S.A.M.'s is not moot when the direct or collateral consequences of the order persist and vacatur of that order would practically affect those consequences." *Id.* "[W]hether a collateral consequence renders an appeal not moot turns on the existence of a 'causal relationship' between a legal consequence and the challenged order." *Id.* ¶ 20.

This Court highlighted that in *D.K.* it "held that an appeal of an expired initial commitment order is not moot because the order collaterally subjects the committed person to a continuing firearms ban." *Id.* ¶ 21. Voiding the firearms ban would be a practical effect that has a causal relationship to the successful appeal of an expired initial commitment order, so the appeal is not moot. *See id.* The question before the Court in *S.A.M.*, however, was "whether that same rationale applies to recommitment orders." *Id.* ¶ 22.

This Court held that prevailing in a recommitment-order appeal would "practically alter a committed person's 'record and reputation' for dangerousness, a factor a reviewing court must consider when weighing a petition to cancel a firearms ban." *Id.* ¶ 23 (quoting Wis. Stat. § 51.20(13)(cv)1m.b.). An overturned recommitment order "might influence the reviewing court's weighing of whether restoring gun rights would be consistent with the 'public interest.'" *Id.* (quoting Wis. Stat. § 51.20(13)(cv)1m.b.). These "practical effects" are "no minor

consequence." *Id.* (quoting *D.K.*, 390 Wis. 2d 50, ¶ 25). The causal relationship between these effects and vacatur of an expired recommitment order renders such an appeal not moot. *Id.*

This Court also held that "a person's mandatory liability for the cost of the care received during a recommitment is a collateral consequence that renders recommitment appeals not moot." *Id.* ¶ 24. "Under Wis. Stat. § 46.10(2), a committed person like S.A.M. 'shall be liable for the cost of the care, maintenance, services and supplies' related to each commitment period." *Id.* (quoting Wis. Stat. § 46.10(2)). Therefore, "a direct causal relationship exists between vacating an expired recommitment order and removing the liability it creates, sufficient to render recommitment appeals not moot." *Id.*

This Court "refrain[ed] from addressing S.A.M.'s stigma argument" or any mootness exceptions. *Id.* ¶ 27 n.5.

Lower courts have not struggled to apply this Court's mootness precedents. Recently—in a case J.L.C.'s petition cites and that is in his appendix—the court of appeals carefully considered mootness based upon the collateral consequences that the petitioner argued in *S.A.M. See Winnebago Cnty. v. C.H.*, No. 2023AP0505, 2023 WL 5600087, ¶¶ 13–17 (Wis. Ct. App. Aug. 30, 2023); (Pet. 6; Pet. App. 55–67). The court of appeals had its doubts about whether any of the three collateral consequences applied in C.H.'s case, *see C.H.*, 2023 WL 5600087, ¶ 17, but the court nonetheless addressed the merits of the commitment order. *Id.* ¶¶ 18–25.

J.L.C.'s case should not get that benefit of the doubt. Unlike the parties in *D.K.* and *S.A.M.*, J.L.C. did not identify or argue *any* ongoing collateral consequences that he believes make his appeal non-moot. This is an important distinguishing factor in this case that weighs against taking

it: J.L.C. forfeited his mootness argument by not substantiating it. There is no further law-development function for this Court to engage in when it has already resolved mootness in Wis. Stat. ch. 51 commitment cases. *See* Wis. Stat. § (Rule) 809.62(1r)(a), (c).

III. If this appeal is not moot or is subject to a mootness exception, the County would prevail on the merits in any event.

Third, even if this appeal is not moot or is subject to a mootness exception, the County would nonetheless prevail on the merits, making further review unnecessary.

On appeal, J.L.C. raised two issues: (1) whether the Wis. Stat. ch. 55 exclusion applied; and (2) whether the County violated his due process rights by statements counsel made during rebuttal closing argument. *See J.L.C.*, 2023 WL 5425244, ¶ 1. J.L.C. would like to raise these issues in this Court. (Pet. 3–4, 16–23.)

The County would prevail on the first issue because the trial evidence showed that J.L.C. was not eligible for either protective placement or protective services under Wis. Stat. ch. 55. In *Fond du Lac County v. Helen E.F.*, 2012 WI 50, ¶ 13, 340 Wis. 2d 500, 814 N.W.2d 179, this Court explained that "ch. 55 was specifically tailored by the legislature to provide for long-term care of individuals with incurable disorders, while ch. 51 was designed to facilitate the treatment of mental illnesses suffered by those capable of rehabilitation."

The trial testimony concerning J.L.C.'s condition and treatment plan shows that Wis. Stat. ch. 51 offered the more-appropriate mechanism for treating him. Specifically, Dr. George Monese testified that J.L.C. is a proper subject for treatment because he has a "treatable condition," schizophrenia, that "cannot be cured, but it can be arrested so that he doesn't get worse." (R. 74:128.)

Dr. Monese testified that J.L.C.'s delusions and hallucinations are "significantly attenuated or controlled when he is taking treatment." (R. 74:185.) The auditory hallucinations, while still present, "have been attenuated" by treatment, including medication. (R. 74:146.)

No testimony was presented suggesting that J.L.C.'s schizophrenia and attendant symptoms are untreatable. Absent such evidence, there was no basis to conclude that the Wis. Stat. ch. 55 exclusion was applicable to J.L.C. Instead, the testimony of Drs. Monese and Yogesh Pareek and Nurse Judith Roberts, showed that J.L.C. was mentally ill, a proper subject for treatment, and a danger to himself or others. *See Langlade Cnty. v. D.J.W.*, 2020 WI 41, ¶ 29, 391 Wis. 2d 231, 942 N.W.2d 277.

The County would also prevail on the merits of the due-process issue. "[C]losing argument is improper when it so infects the trial with unfairness as to make the conviction a denial of due process." *State v. Adams*, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998). "Counsel is allowed considerable latitude in closing arguments, with discretion given to the trial court in determining the propriety of the argument." *State v. Burns*, 2011 WI 22, ¶ 48, 332 Wis. 2d 730, 798 N.W.2d 166. Counsel "may comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him and should convince the jurors." *Id.* (citation omitted). Counsel "should aim to 'analyze the evidence and present facts with a reasonable interpretation to aid the jury in calmly and reasonably drawing just inferences and arriving at a just conclusion upon the main or controlling questions.'" *Id.* (citation omitted). "It is impermissible, therefore, for" counsel "to suggest the jury reach its verdict by considering facts not in the evidence." *Id.*

The County's closing arguments did not "infect[ ] the trial with unfairness as to make the [jury's verdict] a denial of due process." *Adams*, 221 Wis. 2d at 19.

First, J.L.C. cannot rebut the presumption that the jurors followed the circuit court's instructions. *See State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). Specifically, regarding the County's references to the statutes and legal standards, the court instructed the jurors to "answer the questions in the verdict according to the evidence and *my instructions in the law*." (R. 74:155 (emphasis added).) Thus, despite the County's statements about the meaning of the law, the court made it clear to the jurors that only *its* recitation of the law was to be followed. And in overruling J.L.C.'s objection, the court correctly explained to the jury that what the County argued accurately reflected "the law." (R. 74:180.)

Second, the circuit court also instructed the jurors that the attorneys' arguments are "not evidence" and that "[i]f any remarks [by counsel] suggest certain facts not in evidence, disregard those suggestions." (R. 74:155.) To the extent that the County argued facts outside the trial record about his personal experience handling Wis. Stat. ch. 55 cases, the court instructed the jurors to disregard such extraneous remarks and consider only the evidence. This Court presumes that the instructions were followed. *See Truax*, 151 Wis. 2d at 362.

Third, even assuming that the closing arguments were erroneous, any error was harmless. Harmless-error principles apply in Wis. Stat. ch. 51 proceedings. "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings that does not affect the

substantial rights of either party." Wis. Stat. § 51.20(10)(c); *see also S.Y. v. Eau Claire Cnty.*, 162 Wis. 2d 320, 338–39, 469 N.W.2d 836 (1991); *D.S. v. Racine Cnty.*, 142 Wis. 2d 129, 135–36, 416 N.W.2d 292 (1987); *Sheboygan Cnty. v. M.W.*, 2022 WI 40, ¶ 64, 402 Wis. 2d 1, 974 N.W.2d 733 (Ziegler, C.J., dissenting).

"For an error 'to affect the substantial rights' of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." *Martindale v. Ripp*, 2001 WI 113, ¶ 32, 246 Wis. 2d 67, 629 N.W.2d 698 (citation omitted). "A reasonable possibility of a different outcome is a possibility sufficient to 'undermine confidence in the outcome.'" *Id.* (citation omitted). Thus, "the harmless error inquiry is whether it is beyond a reasonable doubt that the jury would have come to the same conclusion absent the error." *State v. Magett*, 2014 WI 67, ¶ 29, 355 Wis. 2d 617, 850 N.W.2d 42.

Here, any error in the circuit court's allowing the County's objected-to closing arguments was harmless. J.L.C.'s "substantial rights" were not affected because the result of the trial would have been the same without the statements that he argues violated due process. Wis. Stat. § 51.20(10)(c); *Martindale*, 246 Wis. 2d 67, ¶ 32. The County's arguments regarding the Wis. Stat. ch. 55 exclusion and what evidence was required to rebut it were made in passing as part of a comprehensive argument and rebuttal, and there is no "reasonable possibility" of a different trial outcome had the arguments not been made. *Martindale*, 246 Wis. 2d 67, ¶ 32. In short, the jury would have found J.L.C. to be the proper subject of a Wis. Stat. ch. 51 commitment even without the objected-to arguments.

The County would prevail on the merits even if this case is not moot or if there is an applicable mootness exception. Therefore, there is no valid reason for this Court to take jurisdiction of this appeal.

CONCLUSION

This Court should deny the petition for review.

Dated this 25th day of October 2023.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rule) 809.19(8)(b) and 809.62(4) for a response produced with a proportional serif font. The length of this response is 3198 words.

Dated this 25th day of October 2023.

Electronically signed by:

Clayton P. Kawski
CLAYTON P. KAWSKI
Assistant Attorney General

CERTIFICATE OF E-FILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 25th day of October 2023.

Electronically signed by:

Clayton P. Kawski
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