STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT II

Case No. 2023AP000460

In the Matter of the Mental Commitment of D.E.S.:
WINNEBAGO COUNTY,

Petitioner-Respondent,

v.

D.E.S.,

Respondent-Appellant.

Appeal of Involuntary Commitment and Medication Orders entered in Winnebago County Circuit Court, the Hon. Teresa Basiliere, Presiding

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REPLY BRIEF

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AMENDED STATEMENT OF ISSUES

While preparing this reply brief, counsel for D.E.S. realized that the brief-in-chief erroneously listed the second issue as a sufficiency-of-the evidence claim, a vestige of an early draft of the brief that counsel neglected to change. D.E.S. did not raise an insufficient evidence claim in the Argument section of the brief. A correct Statement of the Issues is as follows:

I. Whether a doctor's testimony describing allegedly dangerous behavior by D.E.S. was inadmissible hearsay when the only basis for the doctor's testimony were medical records that were not introduced into evidence.

II. Whether the involuntary medication order should be reversed because it is based on a commitment order that should be reversed.

The circuit court admitted the doctor's testimony over D.E.S.'s hearsay objection.

ARGUMENT

I. The County's only evidence that D.E.S. was "dangerous" was based on inadmissible hearsay.

A. Dr. Anderson's hearsay testimony based on records not introduced into evidence was offered for the truth of the matter asserted: that D.E.S. engaged in aggressive and violent behavior.

The County boldly claims that Dr. Anderson's second-hand testimony – such as her assertion that "per the records," D.E.S. shoved a staff member (R. 34:12-13; App. 5-6) – was not hearsay because it was not offered for the truth of the matter asserted. (County Br. at 7). The County argues the testimony was instead only offered to show the basis of Dr. Anderson's opinion. (*Id.*)[1]

If that truly had been the County's purpose in offering this testimony, it failed to tell the circuit court. D.E.S. repeatedly raised hearsay objections to testimony by Dr. Anderson that was based on her review of unadmitted records. At no point does the County respond that the testimony was being offered for a non-hearsay purpose, or otherwise warn the court that it should not consider the testimony for its substantive value. And the circuit court clearly used Dr. Anderson's testimony for the truth of the matter asserted, explicitly ruling that D.E.S. was dangerous

[1] The County does not argue, and thus waives any claim, that Dr. Anderson's testimony qualifies for any of the potential hearsay exceptions flagged by D.E.S. in the brief-in-chief. *State v. Anker*, 2014 WI App 107, ¶ 13, 357 Wis. 2d 565, 573–74, 855 N.W.2d 483, 487.

"because [he] evidences a substantial probability of physical harm to other individuals, based upon the incident that was testified to, where there was a shoving of a staff member." (R. 34:43; App. 12).

The Wisconsin Supreme Court soundly rejected a similar argument that an expert's hearsay testimony about certain facts were introduced for the "limited purpose" of explaining the expert's opinion in *State v. Kleser*, 2010 WI 88, ¶ 92, 328 Wis. 2d 42, 81, 786 N.W.2d 144, 163 (2010). There, an expert's testimony about the underlying offense in a juvenile reverse waiver hearing was supposedly only offered "for the limited purpose of determining whether the transfer would depreciate the seriousness of the offense." *Id*. In rejecting this argument, the Court first articulated the basic rule that "Wis. Stat. § 907.03 is not a hearsay exception, and it does not render the underlying inadmissible testimony admissible." *Id*. (citations omitted); *see also Id*. at n. 9.

The Court then explained how the expert's testimony regarding the facts of the offense was indeed offered for the truth of the matter asserted.

> Although the circuit court was asked to make a narrow legal determination about the seriousness of the offense, the court's determination was based on the purported "facts" of the offense as Dr. Beyer described them. Dr. Beyer acted as a conduit through which Kleser put these facts into evidence.

Id. at ¶ 92. (citation omitted). The Court reiterated that while the details of the offense are relevant at reverse waiver hearings, "[t]hese details … may reach the trier of fact only in accordance with the

rules of evidence, whether through the testimony of the defendant, the testimony of another person with personal knowledge of the events, or a recognized exception to the hearsay rule." *Id*. at ¶ 93.

Similarly, while D.E.S.'s recent acts and treatment record are relevant – and indeed, necessary – for a determination of dangerousness, they can only be introduced through the rules of evidence, not through the "conduit" of Dr. Anderson's expert testimony.

There may be instances where out-of-court allegations about an individual's conduct were in fact introduced to explain the basis for an expert's opinion, and not for the truth of the allegations. In the unpublished case the County relies upon, the court observed that "in reaching its conclusion to extend I.R.T.'s commitment, the circuit court did not rely on the underlying hearsay facts; instead, it relied on the opinion testimony of Piering as to I.R.T.'s dangerousness." *Matter of Commitment of I.R.T.*, unpublished slip op., ¶ 12, Case No. 2020AP996 (WI App. Nov. 24, 2021) (cited by the County for persuasive value only) (App. 157). To the extent that the circuit court made any factual findings[2] about specific instances of conduct or treatment, it appears that the court relied on other witnesses or evidence that was not objected to, such as reports submitted to the court. Thus, it appears that the hearsay testimony complained about in I.R.T. truly was not introduced for the truth of the matter asserted.

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[2] The circuit court's decision predated *Matter of Commitment of D.J.W.*, 2020 WI 41, ¶ 47, 391 Wis. 2d 231, 942 N.W.2d 277, and thus was not subject to the court's directive to "make specific factual findings[.]" *I.R.T.*, ¶ 13 n. 5.

But, as noted above, here the circuit court's dangerousness finding was explicitly "based upon the incident that was testified to, where there was a shoving of a staff member." (R. 34:43; App. 12). The testimony was hearsay evidence, and should have been excluded.

B. Section 907.03 authorizes "disclosure" of inadmissible facts relied upon by experts for limited purposes, not admission of those facts for their substantive value.

The County seems to suggest that if this matter had been tried to the jury, Dr. Anderson's testimony regarding the record of D.E.S.'s behavior could be disclosed under Wis. Stat. § 907.03, and so it was admissible in this bench trial. County Br. at 6-7. The operative sentence of Section 907.03 reads as follows:

> Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion or inference substantially outweighs their prejudicial effect.

Wis. Stat. § 907.03.

This provision does not authorize admission of facts relied upon by experts as substantive evidence. Instead, it allows inadmissible facts to be "disclosed" to the jury for the limited purpose of "assisting the jury to evaluate the expert's opinion or inference" so long as the probative value "substantially outweighs" any prejudicial effect.

This distinction was discussed in *State v. Heine*, 2014 WI App 32, ¶ 12, 354 Wis. 2d 1, 12, 844

N.W.2d 409, 415. The court observed that Wis. Stat. § 907.03 was substantially similar to Rule 703 of the Federal Rules of Evidence, and that according to the Supreme Court Rule 703 an inadmissible laboratory report relied upon by an expert "could be 'disclosed' to the factfinder 'to show that the expert's reasoning was not illogical, and that the weight of the expert's opinion does not depend on factual premises unsupported by other evidence in the record—not to prove the truth of the underlying facts.'" 2014, WI App 32, ¶ 12 (*quoting Williams v. Illinois,* 567 U.S. 50, 78 (2012)). More recently the Wisconsin Supreme Court observed that "the facts or data upon which an expert bases her opinion may be introduced under Wis. Stat. § 907.03, but only for the limited purpose of assisting the factfinder in determining an expert's credibility. Evidence brought in for that purpose does not transform into admissible hearsay for subsequent use at trial." *State v. Thomas*, 2023 WI 9, ¶ 46, 405 Wis. 2d 654, 685, 985 N.W.2d 87, 102 (citation omitted).

Accordingly, even if Dr. Anderson's hearsay testimony had been "disclosed" under this provision of Section 907.03, it could not be relied upon by the factfinder for its substantive value.

C. If Dr. Anderson's testimony regarding D.E.S.'s behavior was not admitted for the truth of the matter asserted, then there was no substantive evidence of D.E.S.'s behavior from which the circuit court could make the requisite "specific findings of fact."

One implication of the County's claim that Dr. Anderson's testimony regarding the record of D.E.S.'s

behavior was only admitted to support the basis of her *opinion* is that then there would be no evidence of the *fact* of the behaviors itself. For example, if Dr. Anderson's testimony that she reviewed records indicating that D.E.S. shoved a staff member was only introduced for the limited purpose of showing the basis for her opinion, and not its substantive value, then there was simply no evidence that D.E.S. shoved a staff member.

It should go without saying, but a party cannot satisfy its burden of proof through opinion evidence alone. "[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).

If there was any doubt that a doctor's bare opinion on dangerousness was insufficient to support a judicial determination of dangerousness, it was laid to rest in *Matter of Commitment of D.J.W.*, 2020 WI 41, ¶ 47, 391 Wis. 2d 231, 942 N.W.2d 277. The supreme court directed "circuit courts in recommitment proceedings … to make specific factual findings with reference to the subdivision paragraph of § 51.20(1)(a)2. on which the recommitment is based." *Id*. A court cannot make a factual finding without evidence of facts. Any factual finding

"unsupported by the record" is by definition "clearly erroneous." *Royster-Clark, Inc. v. Olsen's Mill, Inc.*, 2006 WI 46, ¶ 11, 290 Wis. 2d 264, 272, 714 N.W.2d 530, 534.

D. The "treatment record" alternative to recency sets a legal standard for commitment, not a rule of evidence.

The County argues that the option under Wis. Stat. § 51.20(1)(am) to prove dangerousness based on a person's "treatment record" instead of a recent act authorized Dr. Anderson to review D.E.S.'s treatment records and then testify about them in court. (County Br. at 12). As discussed above, Section 907.03 does allow Dr. Anderson to review the treatment records when formulating her opinion. However, to satisfy its burden the County still needs to introduce the facts of the "treatment record," and for the expert to explain why those facts show a substantial likelihood that the individual will become dangerous.

To be clear, the rules of evidence are flexible enough that it should not be difficult for the County to introduce an individual's treatment history. For instance, properly authenticated medical records typically fall within the hearsay exception for records made "in the course of a regularly conducted activity[.]" Wis. Stat. § 908.03(6). *Pophal v. Siverhus*, 168 Wis. 2d 533, 546, 484 N.W.2d 555, 559 (Ct. App. 1992). The County can introduce records of relevant "acts, events, conditions, opinions, or diagnoses," provided that the County can show that the records were "made at or near the time by, or from information transmitted by, a person with knowledge." Wis. Stat. § 908.03(6).

In addition, the County may be able to introduce the evidence and findings from prior commitment hearings. A witness's testimony at a prior hearing would be admissible under Wis. Stat. § 908.045(1), provided the witness is beyond service, cannot recall the subject of the testimony, or is otherwise unavailable. Wis. Stat. § 908.04. A petitioner could also seek admission of a judge's factual findings from prior commitment hearings, under principles of judicial notice, Wis. Stat. § 902.01, and issue preclusion. *See In re Est. of Rille ex rel. Rille*, 2007 WI 36, ¶¶ 36-39, 300 Wis. 2d 1, 19, 728 N.W.2d 693, 702.

When the rules of evidence are properly applied, a commitment hearing looks something like this: Evidence of the person's "recent" acts and/or treatment record is introduced, either through first-hand accounts or through one of the many exceptions to the rule against hearsay. The expert then explains how the person's acts or treatment record supports the expert's diagnosis of a mental illness and/or opinion that the person fits one or more definition of dangerousness. The court, armed with both the factual and expert opinion evidence, then makes specific factual findings explaining why the person is or is not dangerous under one of the standards.

E. The County failed to meet its burden of proving that Dr. Anderson's hearsay testimony was harmless.

To meet its burden of proving that the introduction of the hearsay evidence was harmless, the County must show that there is not a "reasonable possibility that the error contributed to the outcome of the action or proceeding[.]" *Martindale v. Ripp*,

2001 WI 113, ¶ 71, 246 Wis. 2d 67, 106, 629 N.W.2d 698, 715 (citation and quotation mark omitted).

The County cannot meet this burden for the simple reason that the circuit court explicitly ruled that D.E.S. was dangerous "because [he] evidences a substantial probability of physical harm to other individuals, based upon the incident that was testified to, where there was a shoving of a staff member." (R. 34:43; App. 12). There is no question that the hearsay evidence "contributed" to the outcome of the proceeding, because the circuit court said that it did.

Nonetheless, the County claims that it can meet its burden because there is "other credible and admissible evidence of dangerousness[.]" (County Br. at 18).

First, to the extent that the County is asking this court to deem Dr. Anderson a "credible" witness, "[t]he determination of credibility is not within the scope of appellate review." *Day v. State*, 92 Wis. 2d 392, 402, 284 N.W.2d 666, 671 (1979). This court cannot act as a backup factfinder, making credibility determinations about witnesses and their testimony that the trial court did not make. Also, even if Dr. Anderson's testimony were credited, she was simply repeating the allegations of unknown, out-of-court declarants. There is no basis for concluding the *declarants* were credible.

Second, much of the evidence that the County relies upon was not, in fact, "admissible." The County first relies on Dr. Anderson's very general testimony that D.E.S. had an increase in threatening and dangerous behavior when not medicated.

(County Br. at 19, citing R. 34:11). When the County asked Dr. Anderson to elaborate, she revealed that she was referring to a single incident that she herself did not observe. (R. 34:11). D.E.S. then raised a hearsay objection that the court overruled. (R. 34:11-13). Thus, this first bit of testimony relied upon by the County was based on hearsay and should have been excluded.

The County next cites Dr. Anderson's testimony that when D.E.S. is not medicated "he will become violent, he will become more violent." (County Br. at 19, citing R. 34:15). However, this is some of the hearsay testimony that D.E.S. is arguing was erroneously admitted, because it was based on Dr. Anderson's review of records and conversations with other staff members rather than her first-hand observations. (R.34:15; D.E.S. Brief at 23-24).

Finally, the County relies on two instances of Dr. Anderson mentioning in passing that D.E.S. had engaged in "violent" and "aggressive" behavior. (County Br. at 19-20, quoting R. 34:17, 20). Although D.E.S. did not specifically object to these statements, by this point in the proceedings Dr. Anderson had already established that she had no personal knowledge of any of these incidents, and the court had overruled D.E.S.'s hearsay objections. Clearly, any further objection would have been futile. *State v. Matson*, 2003 WI App 253, ¶ 32, 268 Wis. 2d 725, 742, 674 N.W.2d 51, 59.

The County also claims that any error was harmless because "[w]hile the [circuit] court chose to find D.E.S. dangerous under the B standard, the record is clear that she could have also found him

dangerous under the E standard to support her conclusion that the county proved by clear and convincing evidence that there was a substantial likelihood, based on the treatment records, that D.E.S. would be a proper subject for commitment if treatment were withdrawn." (County Br. at 21-22). There are two problems with the County's argument.

First, the argument is foreclosed by *D.J.W.*'s mandate 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. Neither the court's findings from the bench nor its written order refer to the E standard. Nor did the court make specific factual findings that referenced the E standard in substance, in contrast to how its finding that D.E.S. shoved a staff member was a "recent overt act" was a reference to the B standard. (R. 34:41).

Second, because the circuit court did not make any findings with respect to the E standard, the County relies on Dr. Anderson's testimony, much of which was the hearsay testimony that is the subject of this appeal. The County argues that it "methodically elicited testimony from Dr. Anderson concerning every element of the E recommitment standards." (County Br. at 19). Instead of comparing the testimony to the elements, the County simply cites pages 9-20 of the trial transcript. (*Id.*) But it in those pages are where D.E.S. made the hearsay objections at issue here. For instance, when the County elicited from Dr. Anderson that D.E.S. "demonstrated a substantial probability that he needs care or treatment to prevent further disability or deterioration" – one of the elements under the E

standard -- she explained that the basis for this conclusion was the shoving incident that was the subject of the hearsay objection. (R. 34:10-13).

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

For the reasons stated in the brief-in-chief, if the commitment order is vacated then the involuntary medication order must be reversed as well.

CONCLUSION

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

Dated this 14th day of August, 2023.

Respectfully submitted,

Electronically signed by Thomas B. Aquino

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CERTIFICATIONS

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 2,976 words.

Dated this 14th day of August, 2023.

Electronically signed by Thomas B. Aquino
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