STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case Number: 2023AP000863

In the matter of the mental commitment of A.P.D.:

WINNEBAGO COUNTY,
Petitioner-Respondent,
v.

A.P.D.,
Respondent-Appellant

BRIEF OF PETITIONER-RESPONDENT

On Appeal from an Order for Extension of Commitment and Involuntary Medication and Treatment Orders Entered in Winnebago County Circuit Court, The Honorable Scott C. Woldt, Presiding

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CATHERINE B. SCHERER,
Assistant Corporation Counsel
State Bar Number: 1026614
Attorney for Petitioner-Respondent

Winnebago County Office of Corporation Counsel
112 Otter Avenue
Oshkosh, WI 54901
(920) 236-4756
cscherer@winnebagocountywi.gov

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ISSUES PRESENTED

I. Does the uncontroverted and credible evidence admitted at trial, consisting of one expert in psychiatry who happens to be A.P.D.'s treating psychiatrist for several years, prove by clear and convincing evidence that A.P.D. would be the proper subject for commitment if treatment were withdrawn because he is currently dangerous under the E standard[1]?

A. The circuit court answered this in the affirmative.

II. Does the uncontroverted and credible evidence provided by the same expert prove by clear and convincing evidence that A.P.D. is incompetent to refuse medication and treatment?

A. The circuit court answered this in the affirmative.

[1] References to the E, or 5th , standard, or to subsection E throughout the brief are a common short form for the 5th of 5 standards of dangerousness found in Wis. Stat. § 51.20 (1)(a)2.e., and will be used herein.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The County does not request oral argument and publication of the court's decision in this matter.

STATEMENT OF THE CASE AND FACTS

This is an appeal from an Order of Extension of Commitment and Order for Involuntary Medication and Treatment for A.P.D. entered on January 10, 2023, in the circuit court for Winnebago County, following a court trial before the Honorable Scott Woldt. (13,12; App. 102-104.). A.P.D.'s 2022 commitment was affirmed on appeal by this court. *Winnebago County v. A.P.D., No. 2022AP817, unpublished slip op., (WI App November 16, 2022).* (22; App. 105).

On behalf of the State of Wisconsin Department of Health Services, the Winnebago County Office of Corporation Counsel (County) began the recommitment procedures to extend A.P.D.'s 2022 order of recommitment by filing a Petition for Recommitment and for Involuntary Medication and Treatment. (2; App. 112). The petition alleged A.P.D. would be a proper subject for commitment if treatment were withdrawn because he would become dangerous under the E standard. Wis. Stat. §§ 51.20(1)(am) and (a)2.e.. *Id.* In support of the petition, the County filed the Report of Examination prepared by Dr. George Monese, a staff

psychiatrist at the Wisconsin Resource Center[2] (W.R.C.) and also A.P.D's treating psychiatrist. (3).

The County called one witness to prove the allegations in the petition: Dr. Monese. He testified about every element of the recommitment and E standards. A.P.D. did not request an independent examination prior to the trial. He presented no witnesses in his defense. Thus, Dr. Monese's expert testimony about how A.P.D.'s condition met the recommitment and E standards was uncontroverted.

In their closings, both counsel argued for and against the E standard. (17:21: App. 140). In the brief, but legally sufficient, decision, the court found that the County met its burden of proof:

> I think the Department or W.R.C. has met their burden of proof in this matter under the E standard. Clearly – or the only testimony we have, which the Court finds to be credible, is that of Dr. Monese, who indicates that [A.P.D.] is suffering from bipolar disorder, which is a substantial disorder of thought, mood and perception, which grossly impairs his judgment, behavior, and ability to recognize reality when not under treatment; that if treatment were withdrawn, he would once again become a proper subject for commitment; that he doesn't have a proper understanding of the advantages and disadvantages of medication, which do have a therapeutic value and

[2] Established in 1983, the Wisconsin Resource Center (W.R.C.) is a leader in the development of innovative treatment methods for state prison residents in need of specialized mental health services. These services restore their potential to live a full, rewarding life in the community. W.R.C. is accredited by the National Commission on Correctional Health Care. W.R.C. is managed by the Department of Health Services in partnership with the Department of Corrections. *Wisconsin Resource Center*, https://www.dhs.wisconsin.gov/wrc/index.htm (last updated April 13, 2023).

> would not impair his ability to participate in future legal proceedings.
>
> I find that he's a proper subject for treatment and that he does not, as I said, understand the advantages and disadvantages of medication, and therefore, issue a medication order. I find that the least-restrictive placement at this point would be outpatient at W.R.C..

(17:21-22; App. 140-141).

The court found Dr. Monese to be credible, thereby adopting his testimony in full, and found A.P.D. dangerous under the recommitment and E standards. Pursuant to Wis. Stat. § 51.61(1)(g)(3m), which requires the court to issue an involuntary medication order when the E standard is met, the court also issued a separate involuntary medication or treatment order.

ARGUMENT

I. The testimony of Dr. George Monese created a record by which the court could find that the County proved by clear and convincing evidence that A.P.D. was mentally ill and would become the proper subject for treatment if treatment were withdrawn because he was dangerous under the E standard.

A. The law.

1. Applicable standards of review.

Review of an extension order presents a mixed question of fact and law. *Langlade County v. D.J.W.,* 2020 WI 41, ¶¶23-24, 391 Wis. 2d. 231, 942 N.W.2d

277. The appellate court will uphold the trial court's findings of fact unless clearly erroneous, but will review the trial court's decision de novo to determine whether those facts satisfy the statutory standard. *Id.* ¶24. A factual finding "is clearly erroneous if it is against the great weight and clear preponderance of the evidence." *Id.* This court then determines "whether the facts satisfy the statutory standard." *Id.,* ¶25. When assessing the circuit court's factual findings, the reviewing court must defer to its credibility determinations. *State v. Young*, 2009 WI App 22, ¶17, 316 Wis. 2d 114, 762 N.W.2d 736 (circuit courts make credibility determinations).

2. Sufficiency of the evidence of dangerousness in the recommitment context.

In this case, the trial court ordered an extension of A.P.D.'s initial commitment. (R. 13; App. 102). To extend a commitment, the circuit court must find the individual is mentally ill, a proper subject for treatment and dangerous. Sec. 51.20(1)(a)1-2, (13)(e), 13(g)3; *Waukesha County v. J.W.J.*, 2017 WI 57, ¶18, 375 Wis. 2d 542, 895 N.W.2d 783. Wis. Stat. § 51.20(1)(am) "recognizes that an individual receiving treatment may not have exhibited any recent overt acts or omissions demonstrating dangerousness because the treatment ameliorated such behavior." *D.J.W.,* 391 Wis. 2d 231, ¶33 (citation omitted). Therefore, dangerousness for extension orders "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).

The court explained that the logic for Wis. Stat. § 51.20(1)(am) standard is

> to avoid the 'revolving door' phenomena whereby there must be proof of a recent overt act to extend the commitment but because the patient was still under treatment, no overt acts occurred and the patient was released from treatment only to commit a dangerous act and be recommitted ... [in] a vicious circle of treatment, release, overt act, recommitment.

In re the Mental Condition of W.R.B., 140 Wis. 2d 347, 351, 411 N.W.2d 142 (1987). Rather than recent acts, the court refers to the requisite dangerousness for recommitments as "current" dangerousness. *Portage Cty. v. J.W.K.*, 2019 WI 54,386, Wis. 2d 672, 927 N.W. 2d 509 ¶24.

Relying on the recommitment standard in Wis. Stat. § 51.20(1)(am), the circuit court must find that the individual is still dangerous because if treatment is withdrawn, he would become dangerous as defined by one of the five criteria in Wis. Stat. § 51.20(1)(a)2. Thus, when extending a commitment relying on (am), the court must link that determination to one of the five dangerous criteria in Wis. Stat. § 51.20(1)(a)2. *D.J.W., ¶¶ 3, 32-34.* The *D.J.W.* court made clear that it wants courts to make that link by making "specific factual findings with reference to the subdivision paragraph of § 51.20(1)(a)2. on which the recommitment is based." *Id. at ¶40.* Thus,

it is imperative that the court make an explicit record about which of the five dangerousness standards apply.[3]

When reviewing the sufficiency of an expert's testimony in *Marathon Cty v. D.K.,* 2020 WI 8, ¶54, 390 Wis.2d 50, 937 N.W.2d 901, the Court observed that "*Melanie L.*[4] does not stand for the proposition that we require witnesses or circuit courts to recite magic words. Rather, it stands for the proposition that a medical expert's testimony and conclusions 'should be linked back to the standards in the statute.'"

3. The E Standard.

To find that A.P.D. was currently dangerous under subsection E, the court must find that the County proved by clear and convincing evidence the following five

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[3] The "*DJW* directive" arises from a case before the Court that presented "conflicting messages from the County and the court of appeals regarding the statutory basis for this commitment." ¶40. The purpose of the directive was twofold: "First, it provides clarity and extra protection to patients regarding the underlying basis for a recommitment." ¶42. "Second, a requirement of specific factual findings with reference to a subdivision paragraph of Wis. Stat. § 51.20(1)(a)2. 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." Reiterating its frustration with the lack of clarity about which of the 5 dangerousness standards the County relied on, the Court predicted, "In the future, such guesswork will be avoided by our newly instituted requirement for specific factual findings with reference to a subdivision paragraph of § 51.20(1)(a)2."

Refining its focus on the directive to the trial court to identify exactly what standard applies, the Court advised trial courts "to state each subdivision paragraph that is fulfilled[]" when multiple standards are alleged. *Id*. at ftnt 9.

[4] *In re Melanie L.*, 2013 WI 67, ¶54, 349 Wis. 2d 148, 833 N.W.2d 607

elements found in the subsection and summarized in *In re Dennis H.*, 2002 WI 104, ¶¶19-25, 255 Wis. 2d 359, 647 N.W.2d 851.

The first element is whether A.P.D. is mentally ill. *Id.* at ¶19. For purposes of involuntary commitment, Wisconsin Statutes define mental illness as "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 second element is whether A.P.D. is incompetent to make medication or treatment decisions. *Dennis H.* at ¶21. This requires proof that "because of mental illness," A.P.D. is unable to make "an informed choice as to whether to accept or refuse medication or treatment." Wis. Stat. § 51.20(1)(a)2.e., and *Dennis H.* at ¶21. Identical to the involuntary medication requirements found in Wis. Stat. § 51.61(1)(g)4, this must be proved by either 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 mental illness. *Id.* "This must occur after the advantages and disadvantages of and alternatives to accepting the medication or treatment have been explained to him … .".

Third, it must be proven that there is a substantial probability that A.P.D. "needs care or treatment to

prevent further disability or deterioration." *Id.* and *Dennis H.* at ¶22. "This must be 'demonstrated by both the individual's treatment history and his or her recent acts or omissions.'" *Id.*

Fourth, A.P.D. must evidence a "substantial probability that he or she will, if left untreated, lack services necessary for his or her health or safety." *Id.* and *Dennis H.* at ¶23.

Fifth, there must be a substantial probability that A.P.D. will, "if left untreated, … 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." *Id., Dennis H.* at ¶24.

"Only after each of these elements is proven may the person be considered 'dangerous' under the fifth standard." Id. at ¶ 25.

The Court in *Dennis H.* also identified what it described as an "explicit limitation" on the "reach" of the standard: If it is shown that "reasonable provision for the individual's care or treatment is available in the community and there is a reasonable probability that the individual will avail himself or herself of these services," then a substantial probability of suffering severe mental, emotional, or physical harm does not exist. *Id.* An alternative to this limitation, which is not mentioned in *Dennis H.* but is argued in A.P.D.'s brief, is the availability of protective placement or protective services

for the individual under Wisconsin Statutes Chapter 55. Wis. Stat. § 51.20(1)(a)2.e. ("or if the individual may be provided protective placement or protective services under ch. 55."). To be eligible for protective placement or services, A.P.D. would need to be found incompetent by a circuit court in a guardianship proceeding pursuant to Wis. Stat. § 55.08(2)(a). ("The individual has been determined to be incompetent by a circuit court or is a minor who is alleged to have a developmental disability and on whose behalf a petition for a guardianship has been submitted.")

B. Sufficient and compelling evidence exists in the record to show by clear and convincing evidence that A.P.D. would be the subject of a commitment if treatment were withdrawn because he is currently dangerous under the E standard.

There was uncontroverted testimony from an expert in psychiatry, Dr. Monese, that if treatment were withdrawn, A.P.D. would become the proper subject for commitment. (17:8; App. 127). In his Report of Evaluation filed with the court, he explained that A.P.D. would become dangerous under the E standard if treatment were withdrawn. (3; App. 115). His testimony at the trial was consistent with his request and was uncontroverted.

To begin, Dr. Monese is a highly experienced and qualified doctor of psychiatry. He is a board-certified

psychiatrist and received his training at the Medical College of Wisconsin, graduating in 2001. (17:5; App. 124). He has been licensed to practice medicine in Wisconsin since 1996. *Id*. He was board-certified in child and adult psychiatry in 2001 and 2006, respectively. (17:5-6; App.124-25). He has testified previously in Chapter 51 hearings. (17:6; App. 125).

Dr. Monese also knows A.P.D. well. By the date of the trial, he had cared for him at the W.R.C. for almost two years. *Id.* On cross-examination, he revealed that A.P.D. was also under his care in 2016 and 2017. (17:16; App. 135). He had seen him on the date of the Report of Evaluation, the day before the trial, and the day of the trial. *Id.* He affirmed that he was familiar with and had reviewed A.P.D.'s treatment records. His examination for the purpose of the recommitment hearing of A.P.D. included:

> Talking to the staff that take care of him, the frontline staff, security, social workers, psychologists, discussing him with the teaching service, reviewing all his medical records, and subsequently seeing him individually.

(17:7; App. 126).

1. The County proved A.P.D. was mentally ill, the first element of the E standard, through opinion testimony of the expert psychiatrist.

On appeal, and without any supporting evidence in the record, A.P.D. argues that his mental illness was not proven. This issue was forfeited by A.P.D. and should be

disregarded by this court. See *State v. Mercado*, 2021 WI 2, ¶35, 395 Wis. 2d 296, 953 N.W.2d 337 (recognizing that courts generally do not allow attorneys to "sandbag" the other side by not raising an issue below and then "alleg[e] reversible error upon [appellate] review."). At trial, A.P.D. never specifically argued that he was not mentally ill. If this court determines that A.P.D. did not forfeit this argument, then there is sufficient evidence to prove that A.P.D. was mentally ill. Based on his evaluation and additional work listed above, Dr. Monese affirmed that A.P.D. suffers from a mental illness. *Id.* He testified that he diagnosed A.P.D. with a "major mood disorder, i.e. bipolar disorder, most recent episode, severely depressed." *Id.* He testified that this diagnosis is a "clinically recognized mental illness" and methodically explained how this illness fits the statutory definition required for mental illness pursuant to Wis. Stat. § 51.01(13)(b). He testified that his illness was a substantial disorder of "thought and mood and perception" and grossly impairs his judgment, behavior, and capacity to recognize reality. (17:7-8; App. 126-27).

At trial, adversary counsel did not cross-examine the doctor about his diagnoses. Rather she asked questions about perceived errors in the Report, about guardianship, and medication issues. She did not provide contradicting testimony about the diagnoses from another expert witness. In her closing argument, she made only a broad statement that there was insufficient evidence, but

did not specifically argue that A.P.D.'s mental illness was not proven.

Opinion testimony of an expert, usually a psychiatrist, is essential, expected and required in a Chapter 51.20 proceeding. Wis. Stat. § 51.20(9)(a)5. The individual's treatment records "shall be available to the examiners." *Id.* A written report is required to be filed with the court. *Id.* The law explicitly requires the expert to render an opinion about mental illness in his report and testimony, if called as a witness:

> The report and testimony, if any, by the examiners shall be based on beliefs to a reasonable degree of medical certainty, or to the existence of the conditions described in sub. (1).

Id. Sub. (1), of course, is the section requiring the essential elements of an involuntary commitment case: mental illness, proper subject for treatment, and dangerousness.

Opinion testimony is admissible under Wis. Stat. § 907.02(1), when the following criteria are met:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

The facts or data an expert relies on in forming his opinion need not be admissible in evidence for the opinion to be admitted, if such facts are of a type reasonably relied on by other experts in the field. Wis.

Stat. § 907.03. Such inadmissible facts may be disclosed to the jury if the court determines that their probative value substantially outweighs their prejudicial effect. *Id.* "[M]edical experts may rely on the reports and medical records of others in forming opinions that are within the scope of their own expertise." *Enea v. Linn*, 2002 WI App 185, ¶16, 256 Wis. 2d 714, 650 N.W.2d 315. Importantly here, evaluating doctors can provide opinion testimony on the ultimate issue to be decided by the trier of fact. Wis. Stat. § 907.04. Mental illness is a medical determination. The Court in *Dennis H.* observed that "[w]hether a person is mentally ill is a medical judgment made by applying the definition of mental illness in Wis. Stat. § 51.01(13)(b)." *In re Dennis H.*, 2002 WI 104 ¶19, 255 Wis. 2d 359, 647 N.W.2d 851 (citation omitted).

Dr. Monese testified to a reasonable degree of medical certainty that A.P.D. was mentally ill and specifically what diagnoses A.P.D. held. In Dr. Monese's opinion, A.P.D.'s illness met the statutory definition of mental illness. Given the number of years he has been practicing, his many years of experience caring for A.P.D. and his coordination with other care providers at the W.R.C., Dr. Monese's opinion on this matter is highly credible. Had this been a jury trial and not a court trial before a judge who has decided Chapter 51 cases for 20 years, like Judge Woldt, certainly additional questions would have been asked of Dr. Monese to educate the jury more fully. However, in the absence of a challenge to the

diagnosis at trial, and when before an experienced jurist, basic testimony about a diagnosis from a psychiatrist, as provided by Dr. Monese, is legally sufficient.

C. The County proved the second through fifth elements of the E standard with clear and convincing evidence from the expert's opinion testimony.

The County proved the second element with Dr. Monese's testimony. First, he testified through his direct observations that A.P.D. was incompetent to make treatment decisions and refuse medication because "he lacks insight on a number of domains." (17:8; App. 127). Second, he testified that A.P.D.'s "mental health is having an impact on his ability to make decisions" about his treatment for "various different medical ailments." (17:11; App. 130). Third, he testified that he explained to A.P.D. the advantages, disadvantages, and alternatives to accepting psychotropic medication recommended by Dr. Monese. (17:13; App. 132). He also testified that A.P.D. was not "capable of understanding and expressing an understanding of those advantages, disadvantages, and alternatives." *Id.* Fourth, on cross examination, Dr. Monese explained that he informed A.P.D. of the purpose of his prescribed medications, side effects, risks, and alternatives and that at first, "he seemed agreeable, but then subsequently, he wouldn't follow through." (17:18-19; App. 137-38). While Dr. Monese acknowledged that A.P.D. had "made a lot of improvements in other

domains," he testified that in more than one and a half years, A.P.D. did not gain insight into his many serious medical needs. (17:19; App.138)

This testimony is sufficient to prove by clear and convincing evidence that A.P.D. is incompetent to refuse medication and treatment. The psychiatrist's testimony can be directly linked to the requirements for an involuntary medication order. Like the doctor in *Christopher S.*, his testimony closely tracked the statutory standard and helped the County meet its burden of proof. *In re the Mental Commitment of Christopher S.*, 2016 WI 1, ¶54, 366 Wis.2d 1, 878 N.W.2d 109. ("Because these statements mirrored the statutory standard, they met the statutory standard. Thus, the circuit court did not err when it concluded that the County proved by clear and convincing evidence that Christopher was incompetent to refuse psychotropic medication and treatment as required by Wis. Stat. § 51.61(1)(g)4.b.").

Next, the County also proved the third element of the E standard. Dr. Monese testified that there is a substantial probability that A.P.D. "needs care or treatment to prevent further disability or deterioration" because A.P.D.'s consistently denies that he is diagnosed with severe psychiatric and serious medical conditions. (17:14; App. 133). Dr. Monese referred to these denials as omissions and cited other omissions as follows:

- "He does not believe that he has a serious mental illness."

- "He does not believe that he has other serious medical conditions, including, but not limited to, metabolic syndrome. … He has a number of things going on there. Increased lipids, prediabetic, elevated blood pressure. He does not believe that he has extremely low vitamin D. He refuses treatment for all of those. He also refuses treatment even for basic removal of ear wax, which is making it difficult for him to hear."
- "…[H]e even refuses to participate in other psychosocial treatments in the unit."
- "He misses appointments and I have to go to the unit and actually see him rather than him coming to the clinic to see me."
- Referring to prescribed medications for his metabolic syndrome and low vitamin D deficiency, "[h]e was offered those medications by the primary care physician, including myself, and he said that he's not willing to take them."
- The consequence of not accepting medical treatment directly relates "to his psychiatric conditions as well. For example, people with very, very low vitamin D can become psychotic and extremely depressed. That's one example. They can hear voices because of their low vitamin D. People that have got metabolic syndrome, which can also be a side effect from some of the meds that he takes, can have other adverse events, including cardiac arrest from myocardial

> infraction, and many other complications, including stroke. So those are serious."

(17:14-16; App. 133-135).

As to the fourth and fifth elements, Dr. Monese testified that if A.P.D. was left untreated, there was a substantial probability that he would lack the services necessary for his health or safety, and he would suffer severe mental, emotional, or physical harm, resulting in the loss of his ability to function independently within the community. He opined that A.P.D.'s complete lack of insight into his psychiatric and medical conditions created this risk of lack of services and likelihood of future suffering. (17:16-17; App. 135-36).

The "explicit limitation" described by the Court in *Dennis H.* was addressed directly by Dr. Monese's testimony that A.P.D. would not avail himself of "reasonable provisions" in the community. While the question did not track the statutory language exactly, the meaning is clear in its context within the doctor's testimony, particularly considering his comment regarding A.P.D.'s failure "to avail himself in here at the Wisconsin Resource Center in our community." (17:17; App. 136).

A.P.D. goes to great lengths to argue that this limitation was not proven by the County because there was no evidence regarding the availability of protective placement or protective services under Chapter 55. His

argument, however, is misplaced and ignores *Dennis H.*, the statutory construction of the E standard, and the absence of any evidence that A.P.D. is even eligible for Chapter 55 placement or services. First, as noted above on pg. 9 of this brief, *Dennis H.* summarizes this limitation combining both alternatives.[5] This is the model the County followed when eliciting testimony from the expert. Next, concerning statutory construction, the "explicit limitation" consists of two alternate scenarios separated by the conjunction "or" as follows:

> The probability of suffering severe mental, emotional, or physical harm is not substantial under this subd. 2.e if reasonable provision for the individual's care or treatment is available in the community and there is a reasonable probability that the individual will avail himself or herself of these services ***or*** if the individual may be provided protective placement or protective services under ch. 55.

Wis. Stat. § 51.20(1)(a)2.e.(emphasis added). Based on the plain language of the statute, the County need only prove one of two of the alternatives, not both.

Lastly, in A.P.D.'s case, there is absolutely no evidence to suggest that he is eligible for Chapter 55 protections. Eligibility for both placement and services under this chapter requires first the existence of an incompetence finding by a circuit court. Wis. Stat. §§

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[5] Similarly, the jury instructions provide no distinction between the two alternatives for the jury to consider. See Wis JI-CIVIL 7050 ("and (3) There is no reasonable probability that (respondent) will avail (himself)(herself) of services in the community for care or treatment necessary to prevent (him)(her) from suffering severe mental, emotional, or physical harm").

55.08(1)(b) and (2)(a). Furthermore, even if a guardianship order existed, A.P.D.'s guardian would be prohibited from placing him at a psychiatric treatment facility, such as the W.R.C.. Wis. Stat. § 55.12(2). ("No individual who is subject to an order for protective placement or services may be involuntarily transferred to, detained in, or committed to a treatment facility for care except under s. 51.15 or 51.20."). According to a Wisconsin Attorney General's opinion, "It is clear that, for purposes of sec. 51.37(5), Stats., inmate transfers at least, the [Wisconsin Resource] Center meets the sec. 51.01(15) Stats., definition of a state treatment facility, notwithstanding the fact that it may also be a prison, under sec. 53.01, Stats." 71 OPAG 170, 1982 AGOP, p. 175. Therefore, protective placement is not an option for Wisconsin DOC inmates receiving psychiatric services at the W.R.C.

D. As a matter of law, the circuit court based its dangerousness determination upon a correct application of the facts to the E standard.

This court has observed that the E standard "addresses dangerousness arising from an inability to understand the advantages and disadvantages of a particular medication or treatment." See *Dane County v. Kelly M.*, 2011 WI App 69, ¶8, 333 Wis. 2d 719, 798 N.W.2d 697. In her dissent in *D.J.W.*, then Chief Justice Roggensack explains when the E standard applies to a mentally ill individual:

> I write in dissent not only because the majority errs but also because it is important for this court, and all Wisconsin courts who adjudicate civil commitments and recommitments under Wis. Stat. ch. 51, to recognize that there is a category of seriously mentally ill individuals whose symptoms are described in Wis. Stat. § 51.20(1)(a)2.e. They are dangerous to themselves because their illness prevents them from understanding the advantages and disadvantages of treatment and, as demonstrated by their treatment history, they need care or treatment to prevent further disability or deterioration and they have a substantial probability, if left untreated, of losing the ability to function independently in the community or of losing cognitive or volitional control over their thoughts or actions.
>
> These seriously mentally individuals often are very fragile, and when they do not receive the care they need, they are a significant danger to themselves even when not overtly suicidal.

Id. at ¶ 62-63.

Unlike individuals who are a danger to themselves or others, A.P.D.'s dangerousness stems from 1.) his inability to recognize that he needs treatment, 2.) the resulting threat to his medical conditions, and the debilitating condition of thought or action that will occur without medication compliance. These elements require an expert's testimony, not a lay person's observations of his actions or omissions. Thus, in E standard cases, expert testimony is both opinion and direct evidence. And when the testimony is credible, as in this case, the expert's testimony is sufficient to prove all elements of the commitment. Furthermore, in this case, Dr. Monese's testimony is largely based on his direct observations of A.P.D. as his treating psychiatrist.

Immediately following the testimony of Dr. Monese, the trial court explicitly stated that he relied on

the E standard to find that A.P.D. was dangerous. He explicitly found that the County met its burden of proof and points out that "…the only testimony we have, which the Court finds to be credible, is that of Dr. Monese, …". (17:21; App. 140). He found the County had proven through the doctor's testimony that A.P.D. is mentally ill, a proper subject for treatment and that if treatment were withdrawn, he would become a proper subject for treatment again. He found A.P.D. does not have "a proper understanding of the advantages and disadvantages of medication" and that A.P.D. does not "understand the advantages and disadvantages of medication…". (17:22; App. 141).

First, the circuit court clearly accepted the doctor's testimony as sufficient proof that A.P.D. was mentally ill. The record supports the significant amount of experience Dr. Monese has in the field of psychiatry, but also his long-term relationship with A.P.D. was evident. It is necessary for circuit courts to rely on the testimony of doctors because "[w]hether a person is mentally ill is a medical judgment made by applying the definition of mental illness in Wis. Stat. § 51.01(13)(b)." *In re Dennis H.*, 2002 WI 104 ¶19, 255 Wis. 2d 359, 647 N.W.2d 851 (citation omitted). The circuit court found Dr. Monese's opinion on this ultimate fact credible and A.P.D. failed to diminish his credibility at trial in any meaningful way. Reviewing courts will not overturn a circuit court's credibility finding unless it is clearly erroneous. *State v.*

Thiel, 2003 WI 111, ¶23, 264 Wis. 2d 571, 665 N.W.2d 305.

Similarly, the court reasonably relied on the doctor's credibility to make all of its findings. The court found the doctor to be credible and, as the only witness in the case, it is reasonable to infer that the court adopted the doctor's testimony in full. *State v. Martwick,* 2000 WI 5, ¶31 231 Wis.2d 801, 604 N.W.2d 552 ("If a circuit court fails to make a finding that exists in the record, an appellate court can assume that the circuit court determined the fact in a manner that supports the circuit court's ultimate decision."). Similarly, the law does not generally require the use of "magic words." See *State v. Brown*, 2020 WI 63, ¶27, 392 Wis. 2d 454, 945 N.W.2d 584. ("The law generally rejects imposing 'magic words' requirements." (citation omitted)).

The trial court provided this court and the litigants with notice of what dangerousness standard it relied on and its reasons for doing so. See *Sauk Cty. v. S.A.M., 2022 WI 46, ¶36, 402 Wis. 2d 379, 975 N.W.2d 162* (where the court recognized that even "[t]hough no witness recited the Third [dangerousness] Standard with exactness," the record showed "the circuit court, parties, and witnesses [were] all in accord regarding the statutory standards they were applying").

The court's opinion is short on applying facts to the individual elements, however, arguably the *D.J.W. directive* does not require such an application where it is abundantly clear what standard the County has alleged

and proceeded to prove using the statute as the framework for the expert's testimony. As explained above in footnote 3 of this brief, the *D.J.W. directive* was born out of concern and frustration by the Court that litigants did not have adequate notice of the specific dangerousness standard alleged in recommitment cases, and the resulting difficulty for reviewing courts when the courts did not state exactly what standard or standards they found were proven. Unlike *D.J.W.*, everyone in A.P.D.'s case had notice and the court was crystal clear that he believed the E standard applied. Considering the totality of the evidence, the trial court's findings were not clearly erroneous. *Marathon Cty. v. D.K.*, ¶ 51. ("We consider dangerousness evidence from commitment hearings as a whole.")

II. The requirements for an involuntary medication order are embedded in the E standard, and when proven, the court must enter an order pursuant to Wis. Stat. § 51.61.(13)(g)6r.

The requirements for the medication order did not need to be proven separate and apart from the dangerousness standard. In an E standard case the separate order is typically used to avoid confusion and is valid. Any findings by the court consistent with this order are not error.

III. If this court finds there was a *D.J.W.* error, it should also find that it was harmless.

If this court finds that the circuit court's failure to reference how specific facts applied to all five elements of the E standard was error, even after he clearly announced that the E standard had been proven, it should still affirm the recommitment decision because the inadvertence was harmless error. Wisconsin Statute § 51.20(10)(c) clearly states, "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." An error "affect[s] the substantial rights" of a party, if there is a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue. *State v. Dyess,* 124 Wis. 2d 525, 543, 547, 370 N.W.2d 222 (1985); see also *Town of Geneva v. Tills,* 129 Wis. 2d 167, 184-85, 384 N.W.2d 701 (1986). (extending the standard set in *Dyess* to civil cases as well as criminal cases).

A.P.D.'s substantial rights were not affected by the courts failure to recite how specific facts applied to each element of the E standard when he had just listened to all the uncontroverted testimony of the expert, found the expert to be credible and adopted the expert's opinion in its entirety. The record is clear. The county petitioned for recommitment and argued dangerousness under the E standard. The county methodically asked the doctor

pointed questions about each required element. The doctor's testimony was clear, related directly to each question, and ultimately was linked to each statutory requirement. Immediately after listening to the witness's testimony and the attorneys' arguments, the court concluded that A.P.D. was dangerous under the same standard argued by the county. It is abundantly clear that the court believed the county's witness to be credible and referenced the E standard in its findings. see, e.g*., Rock Cty. v. J.J.K*., No. 2020AP1085, unpublished slip op., (WI App April 29, 2020)[6] (reasoning a *D.J.W.* error was "harmless" when the circuit court transcript failed to identify the correct dangerousness standard because *D.J.W*. did not intend to "put form over substance in a manner that would require reversal on this record").

Any mistake the court may have made did not substantially affect A.P.D.'s rights. A.P.D. does not contend that the court's failure to specify the certain language after the close of arguments would have aided his defense or effected the ultimate outcome of the hearing. Rather, counsel elected to say nothing on the matter until an appeal in which he acknowledges that the circuit court relied on the E standard. Therefore, if this court finds the trial judge's failure to restate the facts immediately following a one-witness court trial, it should

[6] Pursuant to Wis. Stat. § 809.23(3)(b), this unpublished case is cited, not as precedent, but for its "persuasive value" only.

nonetheless disregard the error as harmless and uphold the commitment.

In the alternative, this court can affirm the commitment because A.P.D. forfeited the right to appeal the alleged *D.J.W.* violation. A.P.D. failed to raise the issue at the circuit court level. When A.P.D. did not allege a *D.J.W.* violation after the court's decision at the circuit court level, he effectively forfeited this issue. *State Farm Mut. Auto. Ins. Co. v. Hunt,* 2014 WI App 115, ¶32, 358 Wis. 2d 379, 856 N.W.2d 633 (citation omitted) ("Arguments raised for the first time on appeal are generally deemed forfeited."); *State v. Hubner*, 2000 WI 59, ¶11, 235 Wis. 2d 486, 611 N.W.2d 727 ("The [forfeiture] rule is not merely a technicality or a rule of convenience; it is an essential principle of the orderly administration of justice.").

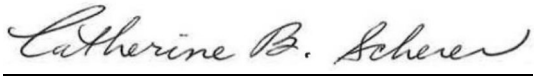
Any injustice A.P.D. may believe he incurred could have been mitigated or altogether avoided by simply asking for clarification from the circuit court following its ruling from the bench.

CONCLUSION

For the reasons stated above, the Court of Appeals should affirm the circuit court's orders for extension of commitment and involuntary medication and treatment.

Dated and filed electronically this 4th day of October 2023.

Respectfully submitted,



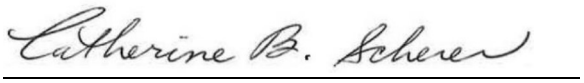
CATHERINE B. SCHERER,
Assistant Corporation Counsel
State Bar Number: 1026614
Winnebago County Office of Corporation Counsel
112 Otter Avenue
Oshkosh, WI 54901
(920) 236-4752
cscherer@winnebagocountywi.gov
Attorney for Petitioner-Respondent

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms with the Rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (c), The length of the brief is 6,180 words.

Dated this 4th day of October 2023.

Signed,



CATHERINE B. SCHERER,
Assistant Corporation Counsel for
Winnebago County