STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
Case No. 2024AP1315
Circuit Court Case No. 2023ME217

In the Matter of the Mental Commitment of M.D.S., Jr.

WAUKESHA COUNTY,
Petitioner-Respondent,

v.

M.D.S., Jr.,
Respondent-Appellant.

On Appeal from an Order of Commitment Entered in Waukesha County Circuit Court, the Honorable Paul Reilly Presiding.

RESPONSE BRIEF OF PETITIONER-RESPONDENT

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ISSUE PRESENTED

1. Did Waukesha County prove by clear and convincing evidence Shephard[1] is a danger to others under Wis. Stat. §51.20(1)(a)2.b.[2]?

   The circuit court answered yes. (R.47:35-36) (App.39-40).

POSITION ON ORAL ARGUMENT AND PUBLICATION

This case involves the application of well-settled law to unique facts. Neither oral argument nor publication is requested.

STATEMENT OF THE CASE AND FACTS

New Berlin police officers emergently detained Shephard on June 14[3] under Wis. Stat. §51.15. (R.2). The court held a probable cause hearing on June 19. (R.48). Shephard did not contest. *Id*. The court found probable cause and ordered a final hearing for June 27, before the Honorable Laura F. Lau. (R.48;9). Pursuant to Wis. Stat. §51.20(9)(a)1., Judge Lau appointed Dr. Michael Lace, psychologist, and Dr. Charles Rainey, psychiatrist, to examine Shephard. (R.10). Dr. Lace filed a Report of Examination on June 22, and Dr. Rainey filed a Report of Examination on June 23. (R.12;13). Both doctors opined Shephard was a danger to others under the second standard. (R.12:5;13:3).

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[1] For ease of reading, pursuant to Wis. Stat. §809.19(1)(g), the County refers to M.D.S. by the pseudonym "Shephard".
[2] Generally referred to as the second standard.
[3] All dates refer to 2023.

The Honorable Paul Reilly[4] concurrently held two hearings on June 27, a final hearing and a medication hearing. (R.25;26)(App.3-4). At the hearings, the parties stipulated Shephard was mentally ill and a proper subject for treatment. (R.47:3)(App.7). Shephard only contested dangerousness and asserted he would not object to an involuntary medication order if commitment was ordered. (R.47:3,35)(App.7,39).

Testimony

Alec Weitzer

Alec Weitzer testified about events that led to detention. (R.47:9-19)(App.13-23). Shephard "approached" Weitzer as Weitzer moved furniture into his family's apartment.[5] (R.47:10)(App.14). Shephard got in Weitzer's "personal space", "bugging" and "bothering" Weitzer. (R.47:11)(App.15). Shephard then attempted to follow Weitzer into the apartment. (R.47:11,13)(App.15,17). Weitzer "blocked" Shephard from entering the apartment. (R.47:13)(App.17). Shephard remained in Weitzer's "personal space". (R.47:11)(App.15). Shephard tried to put his "hands and arms" on Weitzer and "growl[ed]" while he made "weird noises". *Id*. Despite repeated attempts to stop his advances, Shephard continued "following" Weitzer. *Id*. As this continued, Weitzer told Shephard to "back up". *Id*. Shephard did not. (R.47:11-

[4] Judge Reilly presided as a reserve judge for Judge Lau. (R.47:1)(App.5).

[5] Shephard did not know Weitzer who did not reside at the apartment; however, Shephard did reside at that apartment complex. (R.47:10-11,17)(App.14-15,21).

12)(App.15-16). At one point, Weitzer feared Shephard "was going to charge at" him. (R.47:12)(App.16). Shephard "pushed" Weitzer and Weitzer "pushed" Shephard away. (R.47:12,16)(App.16,20). When Shephard "started making gun signs with his hands"[6], Weitzer called police. (R.47:13)(App.17). Shephard knew Weitzer called police. (R.47:14)(App.18). Shephard threatened a "showdown" with police, "kept making these gun signs", and made "biblical references" about a "demise". (R.47:14,17)(App.18,21). Weitzer then "ma[de] sure [Shephard] didn't go inside of his house and go to grab a weapon as he clearly stated". (R.47:17)(App.21). The events lasted "fifteen to twenty minutes". (R.47:13)(App.17).

Officer Lisette Ceballos

Officer Lisette Ceballos[7], a patrol officer, testified about Shephard's behavior at Waukesha Memorial Hospital during medical clearance. (R.47:5-8)(App.9-12). Shephard yelled, "fold[ed] out of his bed" with "clinched fists" and threatened nonexistent "biblical individuals". (R.47:6-7)(App.10-11). He then threatened to harm the Pope or a biblical prophet with a rifle. (R.47:7)(App.11).

[6] Shephard "had his index finger and middle finger pointed out with his thumb in the air and was also pulling his thumb down in the process". (R.47:14)(App.18).

[7] Officer Ceballos authored the Statement of Emergency Detention by Law Enforcement Officer. (R.2).

Dr. Darryl Kabins, M.D.

Dr. Darryl Kabins, the Medical Director[8] at the Waukesha County Mental Health Center, also testified. (R.47:21-29)(App.25-33). Shephard is schizophrenic. (R.47:23)(App.27). He has thought disorganization, paranoid delusions, and insufficient goal orientation. (R.47:22-23)(App.26-27). His delusions are evidenced by his belief that police are harassing him. (R.47:22)(App.26). While he cannot show how police are harassing him, he continues to monitor police, record police, and attempt to build a case against police harassment. (R.47:24)(App.28). Shephard feels the need to continue monitoring police and is "reluctant to come up with a plan to stay away from the police to avoid an altercation". *Id*. He created a YouTube channel called Wisconsin Operation Blue All. (R.47:28)(App.32). His posts confirm his paranoid delusions about police. *Id*. Shephard's delusions are also evidenced by his battle among unknown religious figures. (R.47:24)(App.28).

Shephard is "definitely" at an increased risk to harm others. (R.47:25)(App.29). He will "continue the behaviors that ultimately led to his detainment". (R.47:24)(App.28). "[H]is paranoid delusions have put himself in altercations with others that have led to reports of him pushing somebody and making statements about potentially dangerous things like standoffs". (R.47:22)(App.26).

Shephard did not present evidence. (R.47:2)(App.6).

[8] Dr. Kabins is licensed to practice medicine in the State of Wisconsin and a board-certified psychiatrist. (R.47:21)(App.25).

Ruling

The circuit court concluded "by clear and convincing evidence", and with "no question whatsoever", Shephard is dangerous to others based on reasonable fear under the second standard. (R.47:36)(App.40). It found the following:

> [I]f you look at the gun signals and the references, and I took Mr. Weitzer's testimony a little bit differently than how Attorney Ostrowski indicated that after [Shephard] tried to enter the apartment that apparently did not belong to him, and Mr. Weitzer was concerned about safety, it was at that point that [Shephard] started making gun signs with his hands and pointing the gun signs at Mr. Weitzer, making some biblical references and then saying 'it's going to be a showdown'.

(R.47:35-36)(App.39-40). Subsequently, the circuit court committed Shephard for a period of six (6) months. (R.25)(App.4).

ARGUMENT

Shephard is dangerous to others based on reasonable fear under the second standard. Shephard pushed Weitzer, he threatened to shoot Weitzer, and he threatened a showdown with police while expressing a demise. His acts and threats rise to the level of serious physical harm. Fear for Weitzer and police is reasonable. Shephard's acts and threats are caused by his delusions. He is much more likely than not to cause physical harm to others based on his behaviors.

I. Standards of review and legal principles connected with reasonable fear under the second standard.

When considering the sufficiency of the evidence, appellate courts apply a "highly differential standard of review". *Jacobson v. American Tool Cos., Inc.*, 222 Wis. 2d 384, 389, 588 N.W.2d 67 (Ct. App. 1998). A circuit court's findings of fact are not disturbed unless clearly erroneous. *Waukesha County v. J.W.J.*, 2017 WI 57, ¶15, 375 Wis. 2d 542, 895 N.W.2d 783. Appellate courts accept all reasonable inferences from those facts. *Winnebago County v. Christopher S.*, 2016 WI 1, ¶50, 366 Wis. 2d 1, 878 N.W.2d 109. Whether the facts satisfy the statutory standard is a question of law appellate courts review independently. *J.W.J.*, 2017 WI 57, ¶15.

To obtain civil commitment, the County must prove by clear and convincing evidence that the individual is mentally ill, treatable, and dangerous. *Langlade Cnty. v. D.J.W.*, 2020 WI 41, ¶29, 391 Wis. 2d 231, 942 N.W.2d 277.

Shephard does not challenge whether he is mentally ill or treatable. Shephard is schizophrenic with thought disorganization, paranoid delusions, and insufficient goal orientation. (R.47:22-23)(App.26-27). Shephard is improving on antipsychotic medication and is less agitated. (R.47:29)(App.33).

The County addresses whether it proved Shephard a danger to others based on reasonable fear under the second standard. To meet its burden, the

County must show Shephard is dangerous because he evidences

> a substantial probability of physical harm to other individuals as manifested by evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them, as evidenced by a recent overt act, attempt or threat to do serious physical harm.

Wis. Stat. §51.20(1)(a)2.b.

a. The test for reasonable fear is objective.

Shephard argues "commitment could be sustained only if [Shephard] placed Weitzer in 'reasonable fear of violent behavior and serious physical harm'" to him. (Resp't's Br. 14). The County disputes that offering. The test for reasonable fear is objective and the court focuses on the mental state and objective acts, attempts, or threats of Shephard. This standard was highlighted in *R.J. v. Winnebago County*, where the court held that the statute's purpose would be "manifestly defeat[ed]" if it focused on the subjective feelings of the threatened individual rather than the objective acts of the disturbed

person.[9] 146 Wis. 2d 516, 522, 431 N.W.2d 708 (Ct. App. 1988). (App.49). Additionally, the court noted that threats need not be made directly to the threatened person; threats to a third party are also considered: "We conclude that a showing can be made that others are placed in a fearsome position by a disturbed person's actions even if the person placed in that position has no subjective awareness of it". *Id*. at 523. (App.50).

In *Marathon Cnty v. D.K.*, 2020 WI 8, ¶¶31-38, 390 Wis. 2d 50, 937 N.W.2d 90, the Supreme Court of Wisconsin tackled reasonable fear under the second standard for the first time and upheld *R.J.*, noting the holding "is consistent with the plain language of" the statute.

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[9] R.J. attempted to persuade the court that the legislature is equally concerned about the mental state of those who are not the subject individual. *Id*. at 521. (App.48). The court emphatically rejected, stating:

> To construe the statute as R.J. requests would lead to an absurd result. It would place the focus not upon the disturbed person's acts but upon the effects of the acts. The evidence required would focus upon the subjective feelings of the threatened individual, not upon the objective acts of the disturbed person. R.J.'s reading would inevitably defeat the statute's purpose. No commitment could result from threats directed at those too young, too emotionally underdeveloped or too foolish to reasonably fear another. Nor could commitment result from menacing gestures made behind the back of a blind man, or from threats hurled into the wind. *We reject a statutory interpretation that leads to absurd results and manifestly defeats the purpose of the statute: adequate treatment for those who are mentally ill and who pose a danger.*

Id. at 522 (emphasis added). (App.49).

b. Reasonable fear does not necessarily create a substantial probability of physical harm to others.

As Shephard correctly notes, even if the County shows reasonable fear as evidenced by a recent act or threat, it must also prove "that it is much more likely than not that the individual will cause physical harm to other individuals".[10] (Resp't's Br. 16); *D.K.*, 2020 WI 8, ¶42. "In other words, evidence of a 'reasonable fear' is necessary but not automatically sufficient alone to conclude there is a 'substantial probability of harm' under" the statute. *Id.*, ¶43. Even so, a "'reasonable fear' may, and perhaps often will, establish a 'substantial probability'". *Id.*, ¶42.

II. Shephard is dangerous to others based on reasonable fear under the second standard of dangerousness.

The circuit court correctly concluded that Shephard is dangerous based on "others being placed in reasonable fear" under the second standard. (R.47:36)(App.40).

a. Shephard threatened to do serious physical harm to Weitzer and the police.

Shephard made legitimate threats. He threatened to shoot Weitzer "making gun signs with his hands" that were pointed toward Weitzer, he "pull[ed] a fake trigger" time and time again at Weitzer, and he stated "multiple times" there "was

[10] *D.K.* held that a substantial probability means much more likely than not. 2020 WI 8, ¶35.

going to be a showdown when the cops" arrived. (R.47:13-14,17)(App.17-18,21). The legitimacy of each threat is bolstered by Shephard's acts of aggression. Shephard attempted to follow Weitzer into Weitzer's family's apartment. (R.47:11,13)(App.15,17). At one point, Shephard put his "hands and arms" on Weitzer and at another point, Shephard "pushed" Weitzer and "put his hands on" Weitzer. (R.47:11,16)(App.15,20).

b. Fear is reasonable based on Shephard's acts and threats.

Shephard explains why Weitzer's responses did not show fear. (Resp't's Br. 14-15). His offering misrepresents the law, mischaracterizes the responses, and focuses in large part on Weitzer's responses prior to the threats.[11] As previously offered, the test for reasonable fear is objective and the court focuses on the mental state and objective acts, attempts, or threats of Shephard. *R.J.*, 146 Wis. 2d at 522. (App.49).

[11] While Weitzer—"a 300-pound guy"—"felt comfortable enough handling [his] own" when Shephard attempted to enter Weitzer's family's apartment, that quickly changed after Shephard threatened to shoot Weitzer. (R.47:13)(App.17). Once that happened, Weitzer immediately called police. *Id.* Weitzer then became laser focused on safety. He attempted to "gauge" if Shephard had weapons on him, he became "apprehensive" to get close to Shephard, and he "ma[de] sure [Shephard] didn't go inside of his house and go grab a weapon as he clearly stated". (R.47:13-14,17)(App.17-18,21). He also continuously told Shephard to "keep his distance from me". (R.47:18)(App.22).

i. Fear for Weitzer and police is reasonable.

As a kid, you point your fingers to show what you want; you may even point your fingers to play Cops and Robbers with your friends. Even adults use the behavior to express a playful tale, like "Gotcha"! On occasion, gun signs are construed as playful gestures. But Shephard did not simply point his fingers at Weitzer in a playful manner. Contrarily, Shephard's physical aggressions support the conclusion that the finger gun symbolized a weapon, and Weitzer was the target. For "fifteen to twenty minutes", Shephard got in Weitzer's "personal space", "bugging" and "bothering" Weitzer. (R.47:11,13)(App.15,17). Despite Shephard having never met Weitzer, he attempted to enter Weitzer's family's apartment. (R.47:10-11,13)(App.14-15,17). Shephard then tried to put his "hands and arms" on Weitzer. (R.47:11)(App.15). At another point, Shephard "pushed"[12] Weitzer and "put his hands on" Weitzer. (R.47:16)(App.20). Shephard was "unhinged" and without "much control over what he was doing". *Id.* He then fired, recoiled, fired, and recoiled his symbolized weapon repeatedly at Weitzer. (R.47:14,17)(App.18,21). If any doubt was left that Shephard was just "playing" with Weitzer, all doubt was removed when Shephard voiced his intent to get in a "showdown" with police while he "kept making these gun signs" and made "biblical references" about a "demise". *Id.* Based on those circumstances, the

[12] Not only does Shephard's physical aggressions support a finding that the finger gun was meant to symbolize a weapon, but the aggressive acts also themselves can be construed as acts to do serious physical harm.

circuit court did not err when it found that "Weitzer was concerned about safety". (R.47:36)(App.40).

Weitzer's "concern[s]" were not founded solely on his safety. *Id.* As the circuit court correctly finds, it was also based on Shephard "stating 'it's going to be a showdown'": implicating officer safety. *Id.* Put us in the shoes of police responding to this scene. There is a report of an individual "making gun signs with his hands", "pulling a fake trigger", and stating "multiple times" there "was going to be a showdown when the cops" arrived. (R.47:13-14,17)(App.17-18,21). The report details the individual has made "biblical references" about a "demise" and the reporter is unable to decern whether the individual is in possession of a weapon. *Id*. Police have mere moments to evaluate tense, uncertain, and rapidly evolving situations. While police in many ways are heroes, they are not robots without human senses and emotions. Shephard's behaviors objectively fuel fear.

Shephard's actions and threats constitute an objectively reasonable fear of violent behavior and serious physical harm to Weitzer and the police.

c. Shephard is "definitely" at increased risk of harm to others based on his acts and threats.

The County offered uncontroverted expert testimony from Dr. Darryl Kabins, the Medical Director at the Waukesha County Mental Health Center. He opined Shephard is "at definitely increased risk of harm" to others. (R.47:25)(App.29). He then explained his conclusion. Dr. Kabins opined

that Shephard's "paranoid delusions have put himself in altercations with others that have led to reports of him pushing somebody and making statements about potentially dangerous things like standoffs". (R.47:22) (App.26). Dr. Kabins testified that Shephard "keeps escalating" his attempts to monitor police and, of more concern, Shephard "continues to make statements that he'll continue the behaviors that ultimately led to his detainment". (R.47:24-25) (App.28-29). Those concerns intensified after review of Shephard's YouTube channel called Wisconsin Operation Blue All. Dr. Kabins testified,

> I haven't watched every video he has put on there, but I've watched several videos that he's placed on the past year where he's showing things that he is commenting on the videos that are proof of his beliefs.
>
> And when I watched the videos, I'm not seeing any of what he's reporting. He put a couple videos on of interactions with police officers, confronting them, and on the videos the police officers are calm and saying they don't really know what he's talking about. Which unfortunately then leads to him taking that as confirmation that they're part of the system, and, like, is ongoing proof to his paranoid beliefs. So, it does show signs based on his videos that go back over a year ago of his paranoid beliefs.

(R.47:28)(App.32). In other words, Shephard's paranoic police monitoring goes back over a year ago. Moreover, even after treatment since his detention, Shephard is "reluctant to come up with a plan to stay away from the police to avoid an altercation as he

feels like *he needs to keep doing that*". (R.47:24) (App.28).

Shephard faults the County because Dr. Kabins did not regurgitate statutory language when offered. (Resp't's Br. 16-18). Importantly, though, as the court noted in *D.K.*, "we have never required a mental illness expert to be clairvoyant". 2020 WI 8, ¶52. Additionally, the statute does not require certainty, but rather a "substantial probability". Wis. Stat. §51.20(1)(a)2.b. As a whole, Dr. Kabins' testimony supports a "legal" conclusion that it is much more likely than not that Shephard will cause harm to others. Shephard admitted as much: he needs to keep having altercations with police. (R.47:24)(App.28). Summarily, Dr. Kabins testified Shephard continued to escalate, stated he will continue the behaviors that led to the emergency detention, and he would not comply with a safety plan. (R.47:24-25)(App.28-29).

III. The circuit court did not err.

Shephard expressly raises only one issue on appeal: Did the County present sufficient evidence of dangerousness to support commitment? (Resp't's Br. 4). Yet in his brief, Shephard vaguely splashes erroneous exercises of discretion over the canvas of his sufficiency claim. (Resp't's Br. 15-18). He claims the circuit court erred when it applied an incorrect legal standard by using "or" instead of "and". (Resp't's Br. 15-16). He also claims the circuit court erred by not "mention[ing] the statutory requirement of a substantial probability". (Resp't's Br. 18).

Shephard's claims should not be considered as they are not developed. *See State v. Pettit*, 171 Wis.

2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (generally, appellate courts will not consider arguments that are not developed). To satisfy reasonable fear under the second standard, others must be placed in fear of both violent behavior *and* serious physical harm. Wis. Stat. §51.20(1)(a)2.b. (emphasis added). Shephard's criticism is the circuit court stated "or" instead of "and" when reciting the standard. (Resp't's Br. 15-16). Here, however, Shephard ignores that "magic words" are not necessary. *See D.K.*, 390 Wis. 2d. 50, ¶54 (clarifying that circuit courts are not required to regurgitate the statutory standard word for word). More importantly, Shephard fails to explain the legal significance between violent behavior and serious physical harm. Instead, he simply points out a conjunction slip and asks this court to reverse without further argument. Shephard's other criticism is the circuit court's failure to use "substantial probability" in its oral ruling. (Resp't's Br. 18). Here, however, Shephard ignores the circuit court's written use of "a substantial probability of physical harm to other individuals" in its Order of Commitment. (R.25) (App.3). In doing so, he fails to explain why the circuit court's written use is insufficient.

The circuit court did not err. Appellate courts "will affirm unless there is a clear showing of [an erroneous exercise] of discretion", *Totsky v. Riteway Bus Serv., Inc.*, 2000 WI 29, ¶46, 233 Wis. 2d 371, 607 N.W.2d 637, and will "look for reasons to sustain a [circuit court's] discretionary decision". *Farmers Auto. Ins. Ass'n v. Union Pac. Ry. Co.*, 2009 WI 73, ¶32, 319 Wis. 2d 52, 768 N.W.2d 596.

While the County agrees reasonable fear under the second standard requires fear of both violent behavior and serious physical harm, Weitzer's testimony, Dr. Kabins' testimony, and the circuit court's factual findings establish both requirements. Shephard did not challenge the circuit court's factual findings. The circuit court found:

> [I]f you look at the gun signals and the references, and I took Mr. Weitzer's testimony a little bit differently than how Attorney Ostrowski indicated that after [Shephard] tried to enter the apartment that apparently did not belong to him, and Mr. Weitzer was concerned about safety, it was at that point that [Shephard] started making gun signs with his hands and pointing the gun signs at Mr. Weitzer, making some biblical references and then saying 'it's going to be a showdown'.

(R.47:35-36)(App.39-40). Based on those factual findings, it is hard to fathom how a threat to shoot someone would place others in reasonable fear of serious physical harm and not in reasonable fear of violent behavior, or vice versa. It is even harder to imagine how a shootout with police at an apartment building would meet one requirement and not the other. The reasons to sustain the circuit court's discretionary decisions in this matter are bountiful.

Any error is harmless. Under Wis. Stat. §51.20(10)(c), the court shall, in every stage of the action, disregard any error or defect in the pleadings that does not affect the substantial rights of either party. 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. A reasonable possibility is a possibility that undermines confidence in the outcome. *Id*. Here, any threat to shoot someone with a firearm fuels fear of both violent behavior and serious physical harm. That fact, coupled with the circuit court's declaration that there was "no question whatsoever" that Shephard was dangerous, shows a simple conjunction slip does not undermine confidence in the outcome. (R.47:36)(App.40).

CONCLUSION

The County respectfully requests, based upon the record on appeal and the reasons set forth above in the arguments and legal authorities cited in this brief, that this appeal be dismissed.

Dated this 25th day of September, 2024.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 3,733 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with Wis. Stat. §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 Wis. Stat. §§809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings 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 of 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 25th day of September, 2024.

Electronically signed by:
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Assistant Corporation Counsel