COURT OF APPEALS
DECISION
DATED AND FILED

August 13, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP918-FT **Cir. Ct. No. 2007ME21A**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN THE MATTER OF THE MENTAL COMMITMENT OF HEIDI G. H.:

SHEBOYGAN COUNTY,

PETITIONER-RESPONDENT,

V.

HEIDI G. H.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] Heidi G. H. appeals the orders extending her commitment due to mental illness and allowing for involuntary medication and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version.

treatment under WIS. STAT. §§ 51.20 and 51.61(1)(g)2. The orders were entered following a jury trial. Heidi's first complaint on appeal is that the verdict form asked only whether she was "dangerous to herself or to others." Heidi argues that dangerousness to herself, on one hand, and to other people, on the other hand, are separate grounds for a mental health commitment. Thus, she goes on, she has a due-process right not to be committed unless five-sixths of the jurors agree on one or the other of these grounds. Under the verdict form as written, however, the jury might have reached a five-sixths verdict when, for example, three jurors believed she was dangerous to herself, and two that she was dangerous to others. We affirm because we conclude that the different forms of dangerousness listed in § 51.20 do not constitute separate elements required for commitment. Rather, the element upon which five-sixths of the jury must agree is the overarching finding of dangerousness. We further conclude, in response to Heidi's second argument, that the jury heard sufficient evidence of Heidi's dangerousness that we must sustain its verdict.

¶2 The Sheboygan County Health and Human Services Department filed petitions in the circuit court for an extension of Heidi's commitment, and for involuntary medication and treatment, in July 2007. At the time, Heidi was residing at the Trempealeau County Health Care Center, having been committed there in January of that year. Heidi requested a jury trial, which was held in August. The jury heard testimony from Heidi, as well as from a psychiatrist, a social worker, and a nurse care manager, all of whom had experience with Heidi.

¶3 At the conclusion of testimony, the court held a brief jury instruction conference. The proposed instruction on dangerousness repeatedly referred to whether Heidi was "dangerous to herself or others." However, the definition of "dangerous to herself or others" referred only to probability of physical harm to

others and to others being placed in "reasonable fear of violent behavior and serious physical harm." This is the definition of dangerousness to others found at WIS. STAT. § 51.20(1)(a)2.b; the instruction did not incorporate the definition of dangerousness to oneself found in § 51.20(1)(a)2.a. Heidi's counsel questioned whether the "dangerous to herself" language was appropriate, but the court stated that it would remain in the instruction because it "recites the statutory language." Because the proceeding was one for an extension of commitment, the jury was also instructed that it could find Heidi dangerous to herself or others if there was a substantial likelihood that she would be a proper subject for commitment if her treatment were withdrawn. *See* § 51.20(1)(am).

¶4 The jury returned a verdict finding that Heidi was mentally ill, dangerous to herself or others, and a proper subject for treatment. *See* WIS. STAT. § 51.20(1)(a)1. and 2. The jury was unanimous on the first and third questions, but one juror dissented on the question of dangerousness. Heidi appealed.

¶5 WISCONSIN STAT. § 51.20(11) provides that if an individual subject to commitment demands a jury trial, the jury is to consist of six jurors, five of whom must agree to the verdict. The burden is on the petitioner to show all required facts by clear and convincing evidence. Section 51.20(13)(e). Heidi first argues that because the jury instruction referred both to dangerousness to self and dangerousness to others, there may not have been a five-sixths verdict on either

type of dangerousness.[2] She relies primarily on ***State v. Aimee M.***, 194 Wis. 2d 282, 533 N.W.2d 812 (1995). Aimee M.'s three children were alleged to be in need of protection or services under WIS. STAT. ch. 48. *See* ***Aimee M.***, 194 Wis. 2d at 288. There were two statutory grounds alleged in the petition for each of the three children: that they were neglected and that they were suffering from emotional damage for which Aimee and her husband were unwilling to provide treatment. *See* ***id.*** at 288-89; WIS. STAT. § 48.13(10) and (11). The trial court instructed the jury that it should find the children in need of protection and services if it concluded to a reasonable certainty that Aimee and her boyfriend had violated either of the statutory provisions. ***Id.*** at 289. The court supplied a verdict form asking only whether each of the children was in need of protection or services. ***Id.*** at 289-90. The jury answered "yes" for each child. ***Id.*** at 290.

¶6 On appeal, Aimee argued that the verdict form was inadequate for two reasons: it failed to ensure that five-sixths of the jury agreed to the same factual allegation; and it asked the jury to determine whether the children were in need of protection or services, which Aimee contended was a legal question for the court. ***Id.*** at 290-91. The supreme court agreed with her on both grounds. It noted that the scheme of WIS. STAT. ch. 48 requires that each statutory allegation be specifically supported in the petition. *See* ***Aimee M.***, 194 Wis. 2d at 296. The statute further requires a jury (or the court, if no jury trial is demanded) to "make

[2] The County points out that Heidi's counsel participated in the creation of the jury instructions and never asked that dangerousness to self and dangerousness to others be separated into separate verdict questions, and argues that we should therefore apply judicial estoppel against Heidi's claim. Heidi responds that her counsel did question whether dangerousness to self was at issue in the case, and argues that this is enough to preserve the issue for our review. We decline to apply judicial estoppel here because we do not conclude Heidi is trying to play "fast and loose" with the legal system. *See* ***Mrozek v. Intra Fin. Corp.***, 2005 WI 73, ¶23, 281 Wis. 2d 448, 699 N.W.2d 54. We choose instead to address the merits of Heidi's argument.

findings of fact … relating to the allegations of a petition." *See* ***id.*** Only if the allegations in the petition are proven by clear and convincing evidence does the court then move on to consider dispositional options. *See* ***id.*** at 297. Thus, the court held:

> Taken together, the requirements for particularized pleadings in the petition, the subsequent fact-finding hearing requiring the allegations to be proved by clear and convincing evidence, followed by the dispositional hearing where new evidence is limited to the issue of disposition, belies the county's assertion that the legislature intended the fact finder to lump all the jurisdictional grounds together and to consider them in the aggregate.

Id. The court went on to hold that the jury's role was limited to determining whether the allegations in the petition are true, and that after this, it was for the court to make the ultimate determination as to whether a child is in need of protection or services. ***Id.*** at 298-99.

¶7 In our view, there are two crucial differences between the statutory scheme at issue in ***Aimee M.*** and the one at issue here. First, the grounds for meeting the jurisdictional requirement of the CHIPS statute are numerous, diverse, and discrete. For example, a child who is without a parent or guardian comes within the statute, as does one whose parents are neglectful; but so does one who has not been immunized, or exempted from immunization, according to WIS. STAT. § 252.04. WIS. STAT. § 48.13(1), (10), (10m), (13). So does a child who is being physically or sexually abused, or a child in whose home methamphetamine is being manufactured, or a child who is abusing drugs and whose parents are not providing adequate treatment. Sec. 48.13(3), (11m); WIS. STAT. § 48.02(1)(a), (b), (g). Any of these factual predicates, if found by the jury, will support the court's legal determination that a child is in need of protection or services. *See* ***Aimee M.***, 194 Wis. 2d at 298-99. However, they are clearly distinct from one another, and a

verdict form that does not specify which of several is the basis for the CHIPS finding makes it impossible to determine which of these diverse findings the jury has made. *See* ***id.*** at 298.

¶8 Relatedly, the ultimate finding in a CHIPS case, that a child is in need of protection or services, is a legal conclusion that the court must draw from the jury's finding of certain facts. ***Id.*** Where, as in ***Aimee M.***, the verdict does not specify which factual ground the jury has relied on, the court has no factual basis from which to draw the required legal conclusion.

¶9 In a WIS. STAT. ch. 51 commitment, on the other hand, though there are five varieties of dangerousness described in the statute, each shares the essential similarity that the subject person is, for whatever reason, likely to do harm to somebody. This can be because the person has recently threatened or attempted suicide; threatened or attempted to do serious physical harm to others or behaved violently or homicidally; demonstrated impaired judgment such that there is a substantial probability of physical impairment or injury to self; or demonstrated an inability to satisfy basic needs for nourishment, medical care, shelter or safety such that death or serious physical problems will imminently ensue; or shown a lack of the ability to make an informed choice about treatment and will likely suffer severe harm as a result. *See* WIS. STAT. § 51.20(1)(a)2.a.-e. Though each type of dangerousness listed in the statute differs, the differences are far less pronounced than those among the CHIPS grounds discussed above. Where the CHIPS grounds represent legislative judgments about a wide array of parental behaviors that call for court intervention, the subdivisions defining what is "dangerous" involve significant overlap and gray area. Further, they each describe behaviors or tendencies that are obviously, commonsensically dangerous. Unlike the CHIPS statute, in which diverse concrete factual findings (such as

failure to immunize a child) lead to a finding of CHIPS simply because the statute requires it, the subdivisions of § 51.20(1)(a)2. describe behaviors that are, factually speaking, dangerous, regardless of the statutory scheme. We therefore conclude that "dangerousness" is a single element, upon with which the jury must agree. The five statutory definitions simply describe different ways in which a person may be dangerous; they do not constitute separate elements and as such do not require five-sixths of the jurors to agree on any one of them.

¶10 Though WIS. STAT. ch. 51 commitments are civil proceedings and not criminal, and though the associated jury trial right is statutory, rather than constitutional, we find support by analogy in the line of criminal cases running from ***Holland v. State***, 91 Wis. 2d 134, 280 N.W.2d 288 (1979), to ***State v. Derango***, 2000 WI 89, 236 Wis. 2d 721, 613 N.W.2d 833. ***Derango*** altered the holding of ***Holland*** somewhat to adhere to changing United States Supreme Court precedent. *See* ***Derango***, 236 Wis. 2d 721, ¶¶22-24. The rule in criminal cases is that jury unanimity is required "'only with respect to the ultimate issue of the defendant's guilt or innocence of the crime charged, and ... not ... with respect to the alternative means or ways in which the crime can be committed.'" ***Id.***, ¶14 (citation omitted). The first question a court asks, therefore, is whether the legislature created separate crimes or a single crime with multiple modes of commission. ***Id.*** As our preceding discussion suggests, we are convinced that in WIS. STAT. § 51.20, the legislature has created a single set of criteria for commitment, and that one of these elements is "dangerousness" which encompasses all of the various dangerous behaviors listed. Having concluded that there is but one "dangerousness" element, we next consider the "fairness and rationality of the legislature's choice to provide for a single offense with alternate modes of commission." ***Derango***, 236 Wis. 2d 721, ¶22. In criminal cases, we

begin with a "threshold presumption of legislative competence to determine the appropriate relationship between means and ends in defining the elements of a crime." ***Id.*** (citation omitted). We see nothing irrational or unfair about defining "dangerousness" in the way that the legislature has.

¶11 We also reject Heidi's analogy to ***State v. Marcum***, 166 Wis. 2d 908, 480 N.W.2d 545 (1992). That case involved six counts of sexual assault for separate incidents occurring over a span of two months. ***Id.*** at 912-13. The problem in that case was that on the verdict form, three of the counts were worded identically though they had different factual bases. ***Id.*** at 913. As a result of the nonspecific, multiple charges, the jury was allowed to consider the separately charged acts as alternative means of committing the same crime. ***Id.*** at 922. The prosecution was allowed to "have its cake and eat it too" by charging multiple acts and also potentially obtaining a conviction on a single charge even if the jurors were not unanimous about any particular incident. ***Id.*** at 923. There is simply no analogous problem here.

¶12 Heidi's second argument is that there was insufficient evidence of her dangerousness to sustain the jury's verdict. She acknowledges that our review of the jury's fact-finding is highly deferential: we do not reverse a verdict for insufficient evidence unless, "considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party." WIS. STAT. § 805.14(1). "To reverse, this court must conclude that there is such a complete failure of proof that the verdict must have been based on speculation." ***Nieuwendorp v. American Family Ins. Co.***, 191 Wis. 2d 462, 472, 529 N.W.2d 594 (1995).

¶13 The jury heard testimony that Heidi has achieved "very good results" within a restrictive setting but that she is likely to become uncooperative and stop taking medications if supervision is decreased. It further heard that when untreated, Heidi "can be very aggressive both verbally and physically" and that she engages in "not only verbally threatening behavior but physical aggression towards others by throwing objects and physical intimidation, striking out, that kind of thing." Heidi argues that the jury verdict must have been speculative because "there is no evidence describing what an 'attack' was [and] no evidence about the 'objects.' One would have to speculate to conclude that the objects thrown were capable of causing serious bodily harm." We note that the statute requires only "substantial probability of physical harm to other individuals as manifested by evidence of recent homicidal *or other violent behavior*." WIS. STAT. § 51.20(1)(a)2.b. (emphasis added). We conclude that the evidence adduced was sufficient to sustain a jury verdict of dangerousness.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.