COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP970 **Cir. Ct. No. 2007ME344**

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

IN THE MATTER OF THE MENTAL COMMITMENT OF EZEKIEL G.:

DANE COUNTY,

PETITIONER-RESPONDENT,

V.

EZEKIEL G.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: DAVID G. DEININGER, Judge. *Affirmed.*

¶1 SHERMAN, J.[1] Ezekiel G. appeals an order extending his involuntary mental health commitment under WIS. STAT. ch. 51, and an order denying his motion for postconviction relief. This court affirms.

BACKGROUND

¶2 On May 29, 2009, Ezekiel was involuntarily committed under WIS. STAT. § 51.42 for a period of twelve months. In April 2010, Dane County petitioned for an extension of that commitment. The matter was tried to a jury. Prior to submitting the issue of Ezekiel's commitment extension to the jury, Dane County and Ezekiel's trial counsel agreed that the jury should be provided the following instruction on special verdict question 2, which asked the jury to decide whether Ezekiel was dangerous to himself or others:

> This is a recommitment proceeding. Therefore, the law provides that you may find that Ezekiel [] is dangerous to himself or others if you find that there is a substantial likelihood, based upon Ezekiel['s] [] treatment record, that he would be a proper subject for commitment if treatment were withdrawn.

¶3 The parties agreed that although the proposed language of the instruction was a modification of the standard jury instruction, WIS JI—CIVIL 7050, the language of the proposed instruction was a "customary instruction," and both declined including an instruction for the jury regarding the definition of dangerous.

¶4 The jury found Ezekiel to be mentally ill, dangerous, and a proper subject for treatment, and the circuit court entered an order extending Ezekiel's

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

commitment for an additional twelve months, commencing on June 14, 2010. Ezekiel moved the circuit court for postconviction relief. However, the court denied Ezekiel's motion. Ezekiel appeals.

DISCUSSION

¶5 To extend a WIS. STAT. ch. 51 commitment, the County needed to prove by clear and convincing evidence that Ezekiel was mentally ill, a proper subject for treatment, and dangerous. *See* WIS. STAT. § 51.20(1)(a), (13)(e). Ezekiel challenges the extension of his commitment on the ground that the jury was not properly instructed as to the dangerous requirement. He asserts that it was reversible error for the court not to have provided the jury with an instruction explaining the meaning of "dangerous" for purposes of extending his WIS. STAT. ch. 51 commitment.

¶6 The order at issue here extending Ezekiel's commitment expired in June 2011. Any issue relating to that order is therefore moot. An appellate court will generally not consider a case where the resolution of an issue will have no meaningful effect on the underlying controversy. ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425. However, we may do so if the issue: (1) is one of great public importance; (2) is one that has occurred frequently; or (3) is likely to arise again, but evade appellate review because the appellate review process cannot be completed, or even undertaken, in time to have a practical effect on the parties. ***State v. Morford***, 2004 WI 5, ¶7, 268 Wis. 2d 300, 674 N.W.2d 349.

¶7 Ezekiel has not asserted that any of those reasons justify consideration of his arguments despite the mootness of the issue at hand.

However, assuming arguendo that any one of them did, I would nevertheless affirm.

¶8 Ezekiel did not raise an objection to the jury instructions before the circuit court, and in fact, his trial counsel agreed that the jury should not be provided an instruction on a definition of the word "dangerous." The failure to object to proposed jury instruction at the instruction conference constitutes a forfeiture of any error in the instructions. WIS. STAT. § 805.13(3); ***State v. Cockrell***, 2007 WI App 217, ¶36, 306 Wis. 2d 52, 741 N.W.2d 267. "'The purpose of the rule [in § 805.13(3)] is to afford the opposing party and the [circuit] court an opportunity to correct the error and to afford appellate review of the grounds for the objection.'" ***Cockrell***, 306 Wis. 2d 52, ¶36. Accordingly, I conclude that Ezekiel's challenge on appeal to the jury instruction has been forfeited.

¶9 Despite his forfeiture of the issue, Ezekiel urges this court to reverse the order extending his commitment and remand the proceeding for a new trial in the interest of justice on the basis that the real controversy was not fully tried as a result of the circuit court's failure to instruct the jury in the meaning of "dangerous."

¶10 An appellate court has discretionary authority to grant a new trial in the interest of justice "if it appears from the record that the real controversy has not been fully tried." WIS. STAT. § 752.35. Appellate courts have exercised their power to reverse when the real controversy has not been fully tried in many different situations, including when there was an error in the jury instructions. *See* ***State v. Bannister***, 2007 WI 86, ¶41, 302 Wis. 2d 158, 734 N.W.2d 892 (2007).

We use this power sparingly, granting a new trial only in exceptional cases. ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶11 Ezekiel, however, has made no showing, aside from a conclusory assertion, that the real controversy was not fully tried, and I will not develop his argument for him. *See* ***Associates Fin. Servs. Co. of Wis., Inc. v. Brown***, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56 (appellate courts generally do not consider conclusory assertions and undeveloped issues.) I discern no reason for discretionary reversal and therefore decline to overturn the order extending Ezekiel's commitment in the interest of justice.

CONCLUSION

¶12 For the reasons discussed above, I affirm.

By the Court.—Orders affirmed.

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