COURT OF APPEALS
DECISION
DATED AND FILED

April 12, 2022

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2020AP2032 **Cir. Ct. No. 2016ME157**

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

IN THE MATTER OF THE MENTAL COMMITMENT OF C. J. A.:

OUTAGAMIE COUNTY,

PETITIONER-RESPONDENT,

V.

C. J. A.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Outagamie County: TIMOTHY A. HINKFUSS, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings.*

Before Stark, P.J., Hruz and Dugan, JJ.

¶1 STARK, P.J. Catherine[1] appeals from an order extending her involuntary commitment and an order for involuntary medication and treatment, both entered pursuant to WIS. STAT. ch. 51 (2019-20).[2] Catherine argues that she was denied due process because she was not given particularized notice as to which standards under WIS. STAT. § 51.20(1)(a)2. the Outagamie County Department of Health and Human Services ("the County") intended to prove at trial in support of its petition to extend her commitment. In addition, Catherine argues that the special verdict presented to the jury did not fairly present the question of whether she was currently dangerous. Finally, Catherine argues that her appeal is not moot because exceptions to the doctrine of mootness apply.

¶2 We elect to address the issues in this case because they meet several exceptions to the mootness doctrine, including that they are likely to recur, should be decided to avoid uncertainty, and are almost certain to evade review. We determine that the general notice Catherine received regarding the County's petition for recommitment, together with Catherine's knowledge of her own behavior and commitment history, provided sufficient notice of the relevant facts and the dangerousness standards that the County intended to prove, and an adequate opportunity to develop a defense. Additionally, Catherine fails to specify how her claimed lack of notice affected her ability to defend against the recommitment petition or what she would have done differently if she had received more specific notice.

[1] For ease of reading, we refer to the appellant in this confidential matter using a pseudonym, rather than her initials.

[2] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

¶3 We conclude, however, that the circuit court misstated the statutory test when it added language to the special verdict question concerning dangerousness. The addition resulted in an inquiry that did not properly reflect the focus of a WIS. STAT. ch. 51 recommitment proceeding: i.e., whether the individual is currently dangerous. Accordingly, we affirm the court's decision regarding notice, but we reverse on the issue of the special verdict question. We remand for the court to conduct a new trial with jury instructions and a special verdict that properly characterize the dangerousness inquiry, as specified in this opinion.

BACKGROUND

¶4 Catherine was first committed under WIS. STAT. ch. 51 in 2016 after her paranoia, mania, and delusions caused her mother and sister to fear for their safety. In addition, Catherine's social worker testified that she had requested Catherine be detained after she made threats toward a local judge. Catherine's examining physician, Dr. Marshall Bales, confirmed at the commitment hearing that his diagnosis of Catherine as detailed in his report was "schizoaffective disorder, manic, with psychotic features." Bales was also asked: "based on your conversations with [Catherine] was it clear to you that in her—the disorganized thoughts that she expressed that there was kind of an underlying theme of animosity and agitation toward the legal system?" Bales responded: "Oh, it's pronounced. It's delusional. It's distinctive. And it's—it's all over in the records for both recently and for years." Bales further testified he believed Catherine's condition was "going to spiral in a dangerous direction," and that "she needs care or treatment to prevent further disability or deterioration."

¶5 The circuit court concluded that Catherine was dangerous under WIS. STAT. § 51.20(1)(a)2.b. based on the substantial probability of harm to persons in the legal system whom Catherine had threatened. The court also concluded, based on Bales' report, that "there exists a substantial probability that if left untreated, [Catherine] will lack the services necessary for health and safety and will suffer severe emotional, mental, or physical harm that will result in the loss of her ability to function independently in the community." Finally, the court determined that Catherine had limited insight into her illness and required an order for involuntary medication and treatment.

¶6 Catherine has been under commitment continuously since 2016. During the recommitment hearings that occurred in 2018 and 2019, the circuit court concluded Catherine was dangerous based on similar or identical behaviors to those underlying her initial commitment.[3]

¶7 As relevant to this appeal, an extension of Catherine's commitment was set to expire on May 8, 2020. The County petitioned to extend Catherine's commitment for an additional year on March 4, 2020. The petition was supported by a social worker's letter explaining, in part, that Catherine was in outpatient treatment for schizophrenia, and discussing the nature of that treatment. The letter also stated that Catherine lacked insight into her mental illness and that "it is

[3] Although the appellate record does not contain a transcript of Catherine's 2017 recommitment hearing, the later recommitment transcripts sufficiently recount any relevant history that occurred during that period.

In addition, even though the appellate record contains transcripts from Catherine's prior commitment and recommitment hearings, which include the circuit court's oral rulings, it does not include any of the corresponding final orders. Accordingly, we consider the evidence from those hearings in our discussion, but we cannot consider the specifics of the final orders, beyond acknowledging their existence.

believed" she would "decompensate" and "become a proper subject for a [WIS. STAT.] Chapter 51 commitment" if she were not recommitted. Catherine, represented by counsel, requested a jury trial, and the circuit court ultimately scheduled the trial for August 18, 2020.[4]

¶8 Prior to trial, Catherine filed a motion in limine requesting that "the Petitioner be ordered to select which standard of 'dangerousness' under WIS. STAT. § 51.20(1)(a)2. it believes the Respondent evidences, and that Petitioner be precluded from presenting evidence as to other standards of dangerousness." At an August 5, 2020 pretrial conference, the County argued that the standards it pursued would be based on the doctors' testimony at trial and that none of the standards were mutually exclusive. As a result, the County argued, none of the evidence would be relevant to only one of the standards, and the County would be "handcuff[ed]" if it was restricted in advance to using evidence in support of only previously identified dangerousness standards at trial.

¶9 In response, Catherine's counsel argued that the County "may be right if we are talking generally about all jury trials under [WIS. STAT.] Chapter 51. But we are talking about [Catherine] in this case." Catherine pointed out that the doctors' reports had already been filed and the County had had a chance to review them, meaning that it had some idea of the doctors' possible testimony at trial. She argued that permitting the County to present evidence regarding her dangerousness under any and all of the statutory standards would be "unduly prejudicial" to her and that she should be given at least some guidance on

[4] Catherine's commitment expired on May 8, 2020, but both parties stipulated to delaying her jury trial until August, 18, 2020, as a result of the COVID-19 pandemic.

the County's intent. The circuit court denied Catherine's motion, reasoning that the doctors' reports had already been filed and were accessible to Catherine and her counsel, that "the standards are not mutually exclusive," and that declining to require the County to select a standard ahead of time would prevent potential issues at trial.

¶10 Following the close of evidence, the circuit court held a jury instruction and verdict conference, during which it informed the parties that it had added language to question two of the special verdict. The original proposed special verdict question was taken from the form recommended in WIS JI—CIVIL 7050 (2020), the standard jury instruction at the time, and read: "[I]s the subject dangerous to herself or to others?" The court changed the special verdict question, adding the modifier "if not recommitted" to the recommended verdict question. Accordingly, the final form of question two of the special verdict submitted to the jury read: "Is [Catherine] dangerous to herself or to others if not recommitted?" The County approved this language, but Catherine objected, claiming that the additional language misstated the standard and failed to convey the primary question: whether Catherine was currently dangerous. She argued that while the jury instructions properly described the statutory dangerousness standards, the special verdict did not and was, therefore, incorrect.

¶11 The circuit court overruled Catherine's objection, noting, "I think this is the first time in 13 years I've ever deviated from pattern jury instructions. But that pattern jury instruction was really aimed at a commitment as opposed to a recommitment. To me, [that] makes all the difference." The court also quoted language from the Wisconsin Judicial Benchbooks, stating:

> If there is a substantial likelihood based on the subject's individual treatment record that the individual would be a

> proper subject for commitment if treatment were withdrawn, then—and I stress this—the subject is considered dangerous.
>
> So if [she's] not—if she's not recommitted, the [C]ounty's position is she's dangerous. And that's what the case law holds. And that's what that decision holds—held. And that's—that's in the jury instructions.

See WISCONSIN JUDICIAL BENCHBOOKS: PROBATE, GUARDIANSHIP, AND MENTAL HEALTH, MH 1-42 (2020). The court ultimately read the instructions and modified special verdict question to the jury. The jury answered "yes" to all three questions on the special verdict: whether Catherine was mentally ill; whether she was dangerous to herself or others if not recommitted; and whether she was a proper subject for treatment. Catherine now appeals.

DISCUSSION

I. Mootness

¶12 The recommitment order at issue in this appeal expired on August 18, 2021. As a result, we would ordinarily decline to consider the issues before us as moot. "An issue is moot when its resolution will have no practical 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. Moot appeals are generally dismissed, but courts have discretion to decide them under "exceptional or compelling circumstances." ***City of Racine v. J-T Enters. of Am., Inc.***, 64 Wis. 2d 691, 702, 221 N.W.2d 869 (1974).

¶13 The parties ask us to consider the issues on appeal because they fit into exceptions to the doctrine of mootness. There are several established exceptions under which this court may elect to address moot issues: (1) the issue

is of great public importance; (2) the constitutionality of a statute is involved; (3) the issue arises often, making a definitive decision necessary to guide circuit courts; (4) the issue is likely to arise again and needs to be resolved to avoid uncertainty; and (5) the issue is "likely of repetition and evades review." *See* ***Marathon Cnty. v. D.K.***, 2020 WI 8, ¶19, 390 Wis. 2d 50, 937 N.W.2d 901.

¶14 We agree with both parties that the issues in this appeal fit into several established exceptions to the mootness doctrine. Whether Catherine has the right to more specific notice of the County's basis for her recommitment is an issue of great public importance because it directly implicates the due process rights of persons subject to WIS. STAT. ch. 51 proceedings. Additionally, the issue is certain to recur but will likely evade review given the relatively brief duration of recommitment orders.

¶15 The proper form of the special verdict question is an issue that will likely recur in future recommitment trials, and we should, therefore, resolve the issue to prevent uncertainty.[5] Further, this issue is of great public importance because the question of dangerousness is the cornerstone of the jury's analysis in a recommitment hearing. Therefore, that analysis directly impacts whether a subject individual's liberty interest will be affected by an extension of his or her commitment. This issue is also likely to evade review because, as noted above, commitments last for relatively short periods of time and the appellate process can

[5] The Wisconsin Supreme Court recently mandated that dangerousness findings in WIS. STAT. ch. 51 recommitment proceedings be made with particularity and reference to the particular subsection(s) of WIS. STAT. § 51.20(1)(a)2. under which they are made. ***Langlade Cnty. v. D.J.W.***, 2020 WI 41, ¶¶40, 42, 391 Wis. 2d 231, 942 N.W.2d 277. This new case law has not yet been addressed in the context of a verdict question, and thus it contributes to the uncertainty that prompts us to address this issue under an exception to the mootness doctrine.

be lengthy. Because both issues raised in this appeal fit into exceptions to the mootness doctrine, we elect to decide them on their merits.

II. Due Process

¶16 Catherine argues that she was deprived of her due process right to the particularized notice necessary for her defense when the circuit court rejected her motion requesting that the County specify the dangerousness standard or standards under WIS. STAT. § 51.20(1)(a)2. that it intended to prove at trial.[6] A procedural due process analysis involves a two-part inquiry. We first ask "whether there exists a liberty or property interest which has been interfered with by the [County]." *See* ***State v. Stenklyft***, 2005 WI 71, ¶64, 281 Wis. 2d 484, 697 N.W.2d 769 (citation omitted). If so, we consider "whether the procedures attendant upon that deprivation were constitutionally sufficient." *See* ***id.*** Due process determinations are questions of law that we decide de novo. ***Waukesha Cnty. v. S.L.L.***, 2019 WI 66, ¶10, 387 Wis. 2d 333, 929 N.W.2d 140.

¶17 There is no question that the first part of the above inquiry is met. "The United States Supreme Court 'repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.'" ***Langlade Cnty. v. D.J.W.***, 2020 WI 41, ¶42, 391 Wis. 2d 231, 942 N.W.2d 277 (quoting ***Addington v. Texas***, 441 U.S. 418, 425 (1979)). Catherine's argument centers around the second inquiry. She contends that constitutionally sufficient notice is notice that sets forth the

[6] Although Catherine also requested in her motion in limine that the circuit court limit the County to only presenting evidence related to the dangerousness standards she asked it to select prior to trial, she does not raise arguments related to this requested limitation on appeal.

particular basis for the extension of a commitment in order to allow the subject to prepare a defense. *See* ***State v. VanBronkhorst***, 2001 WI App 190, ¶15, 247 Wis. 2d 247, 633 N.W.2d 236. She argues that because the dangerousness standards under WIS. STAT. § 51.20(1)(a)2. are distinct, the facts or defenses relevant to one standard may not be relevant to another. Catherine therefore contends that advance particularized notice of the specific standards that the County intended to prove at trial was necessary to allow her to prepare a meaningful defense. Absent such notice, Catherine asserts her right to due process was violated.[7]

¶18 We conclude, for several reasons, that in the recommitment context, the County provided constitutionally sufficient notice by notifying Catherine that it intended to prove she was currently dangerous under the general dangerousness standards in WIS. STAT. § 51.20(1)(a)2., and the County was not required to notify Catherine of the specific standard it intended to prove and argue at trial. First, Catherine was provided the notice required by statute. Every person subject to a recommitment proceeding must be provided with a petition for the extension of his or her commitment and a notice of the time and place of the final hearing. WIS. STAT. §§ 801.14(1), 51.20(10)(a). In addition, the County must provide that individual with its recommendation regarding commitment, which includes a general recommendation as to whether the subject is mentally ill, a proper subject for treatment, and dangerous. Sec. 51.20(13)(g)2r. Catherine does not argue that

[7] Catherine also raises several arguments as to why the circuit court's reasoning in denying her motion was faulty, contending that none of its reasons overcame her right to notice. However, Catherine then discounts her own arguments, stating, "But the circuit court's specific errors are irrelevant, as the question before this Court is whether, not why, Catherine was deprived of her due process right to notice." Because we conclude that Catherine was given sufficient notice, we agree that we need not address her arguments as to the court's reasoning.

the County failed to provide her with this general notice as required by statute, and she admits that no Wisconsin statute required the County to give her advance notice of the specific dangerousness standards under § 51.20(1)(a)2. that it intended to prove at trial. She nevertheless contends that the lack of more particularized notice impacted her right to constitutionally sufficient notice.

¶19 In making this argument, Catherine ignores that in addition to the notice she was provided as required by statute, she had other notice of the dangerousness standard or standards the County would likely attempt to prove at trial. All of the dangerousness standards under WIS. STAT. § 51.20(1)(a)2. center on a committed individual's history of mental illness, dangerous behavior, and treatment. Because Catherine was the subject of the recommitment proceedings at issue in this case, she and her counsel were aware prior to trial of her own mental illness diagnosis, her prior and current behaviors, and the dangerousness standards under which she was previously committed.

¶20 Specifically, Catherine was aware of the basis for her initial commitment and for her three prior recommitments, including the basis for the earlier findings that she was dangerous. In addition, because Catherine's recommitments were all based on substantially similar or identical dangerous behavior caused by her mental illness, she would have been aware that the County would likely seek her recommitment on the same or similar grounds to those that provided the basis for her previous commitments. Knowledge of her initial commitment and the events that led to it would also have aided Catherine in being prepared to address any argument relating back to that commitment under the dangerousness standards in conjunction with WIS. STAT. § 51.20(1)(am).

¶21 Moreover, reports from examining doctors are required to be submitted prior to a final recommitment hearing or trial, and defense counsel must be given access to reports from examining physicians forty-eight hours in advance of a final hearing or trial. *See* WIS. STAT. § 51.20(10)(b). The examining doctors' reports here were all filed more than forty-eight hours before the recommitment trial. These reports gave Catherine and her counsel further advance notice of the evidence the County intended to present concerning her mental illness, supervision, and treatment, as well as her current dangerousness.

¶22 Catherine and her counsel would have known at the time of the recommitment trial whether she was taking her medication as prescribed or willingly participating in treatment, both from her personal knowledge and from reports filed prior to the hearing. *See* WIS. STAT. § 51.20(10)(b). They would also have known from the same sources how Catherine had responded to supervision and treatment since the most recent commitment order. In addition, they would have known from the reports and Catherine's medical and treatment records, as well as from their own knowledge whether Catherine had committed any recent act, or made any overt threat, that might be claimed to give rise to a different dangerousness allegation than made previously.

¶23 Finally, Catherine fails to identify how her claimed lack of notice affected her ability to defend against the recommitment petition and what, if anything, she would have done differently if the County had provided her with more specific advance notice—either in terms of her arguments, her witnesses, or her trial strategy. Catherine only states generally that she would have had the opportunity to focus on the particular dangerousness standards at issue in preparing for trial and cross-examination and she would have been able to fully present her side of the story. She does not, however, point to concrete examples of

how the lack of notice caused her to be underprepared in terms of her specific defense at trial, or in what way it interfered with her ability to fully present her side of the story. Catherine does not argue, for example, that any of the standards argued by the County were unexpected based on her commitment history and past actions, such that she was not be prepared for cross-examination or was unable to call necessary witnesses. As a result, Catherine's argument is undeveloped.

¶24 A number of recent unpublished appellate decisions have addressed this issue, concluding there is no requirement that an individual be provided with particularized notice as to which standard of dangerousness a county intends to prove in support of its petition for the individual's recommitment.[8] *See, e.g.*, ***Trempealeau Cnty. v. B.K.***, No. 2020AP1166, unpublished slip op. ¶16 (WI App July 27, 2021); ***Milwaukee Cnty. v. T.L.R.***, No. 2018AP1131, unpublished slip op. ¶15 (WI App Dec. 4, 2018); ***Winnebago Cnty. v. D.D.A.***, No. 2020AP1351, unpublished slip op. ¶¶13-14 (WI App Dec. 23, 2020). These opinions persuasively support our conclusion that general notice to the effect that one or more of the standards under WIS. STAT. § 51.20(1)(a)2. will be pursued at trial is sufficient and notice of the exact standard prior to trial is not required.

¶25 In reply, Catherine addresses two cases in which the appellants' notice challenges failed, in part because they did not specify what they would have done differently had they been given more particular advance notice. *See* ***D.D.A.***, No. 2020AP1351, ¶14; ***Sheboygan Cnty. v. M.W.***, No. 2021AP6, unpublished slip op. ¶8 (WI App May 12, 2021). Catherine argues "these cases do *not* say that

[8] Unpublished opinions authored by a single judge and issued on or after July 1, 2009, may be cited for their persuasive value. *See* WIS. STAT. RULE 809.23(3)(b).

such a showing is required" and she characterizes the failure to elaborate on what would have been done differently as a harmless error issue. But here we are considering the second prong of our two-part due process inquiry: whether the procedures attendant upon the deprivation of Catherine's liberty interest were constitutionally sufficient. Catherine fails to develop any argument as to how the notice provided to her was insufficient to meet due process requirements, a necessary analysis. She contends specific advance notice of the dangerousness standards the County intended to pursue should have been provided, but she fails to show how the purportedly inadequate notice impacted her defense in any way, leaving her claim undeveloped.

¶26 Catherine also argues that this court's decision in ***B.K.*** characterized notice of the dangerousness standards as notice of a "trial strategy or specific approach," instead of notice of a basic element the County would need to prove at a final hearing. Catherine therefore contends that ***B.K.*** did not address the issue she raises. ***B.K.*** generally concluded, however, that no requirement existed that a person be given specific notice of the dangerousness standards the county intended to prove at trial, that this approach was sensible in the context of a mental commitment, and that the subject individual's due process right to notice had not been violated. ***B.K.***, No. 2020AP1166, ¶15. For all of the above reasons, we conclude that Catherine's due process rights were not violated and that the notice she received was constitutionally sufficient.

III. Special Verdict

¶27 Catherine next argues that when the circuit court added the language "if not recommitted" to the dangerousness question on the special verdict form, it improperly changed the question of whether Catherine was *currently* dangerous to

whether she would *become* dangerous if not recommitted. This, Catherine argues, is an error of "constitutional magnitude."

¶28 "[T]he content of the special verdict remains within the discretion of the circuit court." ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2008 WI 22, ¶12, 308 Wis. 2d 103, 746 N.W.2d 762. "This court will not interfere with the special verdict submitted, so long as all material issues of fact are covered by appropriate questions, and so long as the form correctly and adequately covers the law that applies to the case." ***Id.*** (citations omitted). Whether a special verdict reflects an accurate statement of the law is a question of law that we review de novo. ***City of Milwaukee v. NL Indus.***, 2008 WI App 181, ¶83, 315 Wis. 2d 443, 762 N.W.2d 757. We consider special verdicts in tandem with the associated jury instructions. ***Z.E. v. State***, 163 Wis. 2d 270, 276, 471 N.W.2d 519 (Ct. App. 1991).

¶29 We agree with Catherine that the special verdict question regarding dangerousness was confusing and failed to ask the jury to determine whether Catherine was currently dangerous. In a WIS. STAT. ch. 51 proceeding, a petitioner has the burden to prove by clear and convincing evidence that a subject individual is mentally ill, a proper subject for treatment, and dangerous. *See* WIS. STAT. § 51.20(1)(a), (13)(e). A petitioner may prove that a person is dangerous and warrants commitment under any of the five standards set forth in § 51.20(1)(a)2.a.-e. or, in the case of a recommitment, under those five standards in combination with § 51.20(1)(am). ***Portage Cnty. v. J.W.K.***, 2019 WI 54, ¶18, 386 Wis. 2d 672, 927 N.W.2d 509.

¶30 Importantly, in a recommitment proceeding, the County has the burden of proving that Catherine is *currently* dangerous under WIS. STAT. § 51.20(1)(a)2. *See* ***D.J.W.***, 391 Wis. 2d 231, ¶34. Under § 51.20(1)(am), if the

individual who is the subject of extension proceedings is under a commitment "immediately prior" to the extension proceedings, then the petitioner may, as an alternative to the options outlined in § 51.20(1)(a)2.a.-e., prove dangerousness by showing "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." Sec. 51.20(1)(am); *see also* ***J.W.K.***, 386 Wis. 2d 672, ¶19. In essence, this provision removes the requirement that the petitioner show recent acts or omissions in order to establish dangerousness in a recommitment proceeding, which can be difficult to show for a person whose symptoms are being effectively managed by his or her medication and treatment. *See* ***J.W.K.***, 386 Wis. 2d 672, ¶19.

¶31 While WIS. STAT. § 51.20(1)(am) may alter the type of evidence required, "[t]he alternate avenue of showing dangerousness … does not change the elements or quantum of proof required. It merely acknowledges that an individual may still be dangerous despite the absence of recent acts, omissions, or behaviors exhibiting dangerousness." ***J.W.K.***, 386 Wis. 2d 672, ¶24. Therefore, under any of the five base standards in conjunction with § 51.20(1)(am), the County is still required to prove the person is *currently* dangerous, despite the fact that the person's supervision and treatment have been effective such that no recent dangerous acts have occurred. ***J.W.K.***, 386 Wis. 2d 672, ¶24.

¶32 The unmodified verdict question, as taken from the standard jury instruction at the time of trial, i.e., "Is the subject dangerous to herself or to others?" asks whether the subject individual is currently dangerous. The circuit court's addition of the language "if not recommitted" plainly modified the question by directing the jury to consider future events—i.e., whether Catherine would become dangerous in the future if she were not recommitted. We agree

with Catherine that this language gave the jury conflicting and confusing information about whether it was supposed to consider Catherine's present status or to conduct a forward-looking analysis, the latter of which could be based on any number of considerations divorced from the statutory focus on current dangerousness. The jury should only have determined if Catherine was currently dangerous.

¶33 The statutory distinction between basing a commitment on an individual's current dangerousness rather than a possibility that they might become dangerous in the future is one grounded in constitutional principles. The United States Supreme Court has recognized that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." ***Addington***, 441 U.S. at 425. It has further held that a commitment cannot continue after the constitutional basis for it ceases to exist; and as such any findings of mental illness and dangerousness must be current, not retrospective. *See* ***Foucha v. Louisiana***, 504 U.S. 71, 77-78 (1992). By that same token, a commitment cannot be valid if it occurs *before* the constitutional basis for it exists. If an individual is not yet dangerous, they fit into the well-established principle that "there is no constitutional basis for confining … persons involuntarily if they are dangerous to no one." ***O'Connor v. Donaldson***, 422 U.S. 563, 575 (1975).

¶34 The Wisconsin statutory scheme in WIS. STAT. § 51.20 reflects these constitutional principles. The recommitment analysis narrowly assesses current dangerousness based on recent acts, or specific instances of past dangerous behavior. The Supreme Court has recognized previous acts of violent behavior as being "an important indicator of future violent tendencies." *See* ***Heller v. Doe***, 509 U.S. 312, 323 (1993); *see also* ***Kansas v. Hendricks***, 521 U.S. 346, 357 (1997). This statutory scheme prevents an individual from losing their liberty

based on some dangerous event that might happen, or is likely to happen, but for which there is no basis in concrete acts.

¶35 Although we consider the special verdict question in conjunction with the jury instructions, doing so does not remedy the defect in the special verdict question in this case. *See* ***Z.E.***, 163 Wis. 2d at 276. The jury instructions listed the dangerousness standards under WIS. STAT. § 51.20(1)(a)2., using language describing current dangerousness. However, because the special verdict question asked the jury to assess future dangerousness—an analysis that is not part of the standards under § 51.20(1)(a)2.—the jury instructions only served to confuse, rather than clarify the ultimate question for the jury.

¶36 The County argues that the added language comports with WIS. STAT. § 51.20(1)(am), which is a future-looking inquiry that asks the jury to consider whether there is a substantial likelihood that a person would be a proper subject for commitment if treatment were withdrawn.[9] The County fails to discern, however, that the question of whether 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" under § 51.20(1)(am) is a very different question from the language at issue in the circuit court's modified special verdict question, which asked whether Catherine would be dangerous to herself or to others "if not recommitted." Although the "proper subject for commitment" language is the analysis conducted under § 51.20(1)(am),

[9] The County also seems to assert that Catherine argues the controversy in this case was not fully tried. Catherine does not, however, make that contention in her brief-in-chief and she explicitly rejects the notion that she does so in her reply brief. Accordingly, we decline to address the County's arguments on that issue.

the overarching question under § 51.20(1)(am) is still whether the person is *currently* dangerous, and the circuit court's modified language failed to reflect this nuance. This new language diverts from the analysis under para. (am), which intentionally focuses on specific past actions and a person's treatment record as a predictor of whether they will become a proper subject for commitment if treatment is withdrawn—addressing persons who have not recently committed dangerous acts because they are currently being medicated. Without the narrow focus of para. (am) on specific past treatment history and concrete dangerous acts, a jury could decide that Catherine would be dangerous if not recommitted for any number of improper reasons that are not a part of the analysis under § 51.20: including the jury's perception of her disorder generally, behavioral history that was not dangerous or exhibited by specific acts, or speculation on her character alone. The court's proposed addition opens the door too widely to any number of considerations divorced from the proper statutory analysis, and on which it is improper to base a commitment.

¶37 In addition, WIS. STAT. § 51.20(1)(am) asks the jury to determine whether there is a "substantial likelihood" the person would become a proper subject for commitment if treatment were withdrawn, while the special verdict language at issue removed that key modifying language, further distorting the proper dangerousness analysis.

¶38 We reject the County's assertion that we can infer the jury understood the special verdict question simply because it did not submit any questions to the circuit court during its deliberation. The special verdict question was misleading and an incorrect statement of the law, even if the jury was unaware that it was performing a misguided analysis.

¶39 In addition, the standard presented in the modified special verdict question makes it difficult for a reviewing court to determine the statutory basis for the jury's decision. Requiring the jury to determine the specific basis for a committee's current dangerousness comports with the specificity requirements in ***D.J.W.***—which require that the exact standard supporting a recommitment under WIS. STAT. § 51.20(1)(a)2. be clear. ***D.J.W.***, 391 Wis. 2d 231, ¶40.

¶40 We note that the Wisconsin Civil Jury Instruction Committee recently created a recommended special verdict form for recommitment cases, set forth in WIS JI—CIVIL 7050A (2021). The new verdict question asks, "Is (respondent) dangerous to [(himself) (herself)] or to others?" If the jury answers that question "yes," the verdict form then lists the standards under WIS. STAT. § 51.20(1)(a)2.a.-e., allowing the jury to select one or more of those standards on its own or in combination with § 51.20(1)(am), as the basis for its determination of dangerousness. We recommend that in future jury trials in recommitment proceedings, circuit courts use a special verdict question with this level of specificity so that the jury conducts the proper statutory analysis, and so it may clearly specify the basis for its determination of current dangerousness in order to avoid confusion.

¶41 For all the foregoing reasons, we conclude that the special verdict question regarding dangerousness improperly stated the legal standard at issue, was misleading, and was therefore inherently prejudicial to Catherine. Accordingly, although we affirm the circuit court's decision regarding notice, we reverse and remand for a new trial using an appropriate special verdict question as outlined in this opinion.

By the Court.—Orders affirmed in part; reversed in part and cause remanded for further proceedings.

Recommended for publication in the official reports.