MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Civil Commitment of:

M.B.,

Appellant,

v.

Richard L. Roudebush Veterans Affairs Medical Center,

Appellee

October 6, 2023

Court of Appeals Case No. 23A-MH-215

Appeal from the Marion Superior Court

The Honorable David Certo, Judge

Trial Court Cause No. 49D08-2207-MH-23721

Memorandum Decision by Chief Judge Altice
Judge May concurs.
Judge Foley dissents with separate opinion.

Altice, Chief Judge.

Case Summary

[1] M.B. appeals the trial court's denial of his request to terminate his involuntary commitment to the Richard L. Roudebush Veterans Affairs Medical Center (the Indianapolis VA). M.B. argues that the Indianapolis VA presented insufficient evidence to support a finding that he was gravely disabled.

[2] We reverse.

Facts & Procedural History

[3] M.B., currently age thirty-two, served in the Marine Corps from 2013 to 2014. Around the time of his discharge, he was diagnosed with schizophrenia. He receives VA benefits that are fully "service connected for a psychotic disorder." *Transcript* at 9, 24. He also receives social security benefits. Combined, M.B. receives approximately $4200 per month.

[4] On November 1, 2021, in Grant County, Indiana, the VA Northern Indiana Health Care System (the Marion VA) filed a Petition for Regular Commitment[1] of M.B., alleging that M.B. was suffering from a psychiatric disorder that disturbed his thinking, feeling, behavior, and ability to function, and that, due

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[1] Our Supreme Court has explained:

> In Indiana, an adult person may be civilly committed either voluntarily or involuntarily. Involuntary civil commitment may occur under four circumstances if certain statutorily regulated conditions are satisfied: (1) "Immediate Detention" by law enforcement for up to 24 hours; (2) "Emergency Detention" for up to 72 hours; (3) "Temporary Commitment" for up to 90 days; and (4) "Regular Commitment" for an indefinite period of time that may exceed 90 days.

Civil Commitment of T.K. v. Dep't of Veterans Affairs, 27 N.E.3d 271, 273 n.1 (Ind. 2015) (internal citations omitted).

to his condition, he posed a risk of harm to himself or others and had an inability to provide for his essential human needs, including food, clothing, and shelter. The accompanying Physician's Statement, prepared by Dr. Nelson Philip H. Silvestre, stated that M.B. was seeing and talking to demons, displayed sexually inappropriate behavior, had a history of aggressive behavior, was not compliant with medication, and was refusing a long-acting injection. Dr. Silvestre described M.B.'s thought processes as "Disorganized/Delusional" and his insight and judgment as "Little to poor/Impaired." *Appendix* at 13. Dr. Silvestre marked "No" as to whether "[t]his person can be relied upon to take medication as prescribed." *Id*. at 14.

[5] Following a hearing, the Grant County court issued an Order of Regular Commitment on November 9, 2021, finding by clear and convincing evidence that M.B. was suffering from a mental illness, was a danger to himself, and was gravely disabled as defined by statute. The court committed M.B. to the Marion VA and ordered that facility or the attending physician to submit a periodic report no later than November 9, 2022.

[6] On March 23, 2022, the Grant County court, on the Marion VA's petition, transferred M.B.'s commitment proceedings to a Marion County court, as M.B.

was living in Indianapolis,[2] and ordered that M.B.'s commitment was continued until further court order.

[7] On June 20, 2022, M.B. was placed on an emergency thirty-day detention, in which he received inpatient care at the Indianapolis VA through July 21. During that stay, he was put on "Clozapine or Clozaril," an "anti-psychotic that is used to treat Schizophrenia," and "the plan was for him to continue that on an outpatient basis after his admission." *Transcript* at 16.

[8] Less than two weeks later, M.B. was admitted for inpatient care on August 2, 2022. M.B. was "responding to internal stimuli, [] very aggressive, displaying a lot of psychotic behaviors, posturing towards staff, requiring seclusion." *Id*. M.B. was treated with injections of Invega Sustenna, an anti-psychotic medication, along with Seroquel, which is "used for Schizophrenia and to help with sleep." *Id*. at 15. He was released to outpatient care on August 30, 2022.

[9] On October 14, 2022, M.B. was admitted to the Indianapolis VA for thirty-two days. His symptoms included being "very verbally aggressive to others" and "a lot of agitation." *Id*. at 15. During his stay, his treatment continued with Invega Sustenna and Seroquel. As the medication "started to [] get into [his] system," M.S.'s exhibited decreased agitation and "his thought process was a

[2] The November 2021 Order of Regular Commitment did not specify the length of any inpatient stay, but referred to the ability of the facility to place M.B. on "out-patient status" and required him "to comply with conditions of out-patient release[.]" *Appendix* at 21.

little more clear," such that he was discharged on November 16 to an outpatient setting. *Id*.

[10] Meanwhile, on November 2, 2022, Dr. Sydney Waller, a physician at the Indianapolis VA, submitted a Periodic Report to the court stating that M.B. was currently receiving inpatient care at the Indianapolis VA, having been admitted October 14, 2022, and he "continues to be influenced by delusional ideas," and his insight and judgment "are considerably influenced by paranoia." *Appendix* at 33. The Periodic Report also stated that M.B. "remains gravely disabled and in need of injectable antipsychotic medication" and that he "has history of non-compliance with medications, which leads to decompensation and frequent hospitalizations." *Id*. The next day, the trial court issued an Order Continuing Regular Commitment Without Hearing.

[11] On November 21, M.B., as an outpatient, received an injection of Invega Sustenna at the Indianapolis VA's clinic and was due for the next one in a month. However, prior to the next scheduled injection, M.B. presented on his own to the Indianapolis VA on December 13 and met with Sarah Earles, R.N. (Nurse Earles). M.B. was agitated and exhibiting paranoia. Nurse Earles made a phone call to Tyler Voegtline, M.D., M.B.'s treating psychiatrist at the Indianapolis VA, so that M.B. could speak directly to Dr. Voegtline. During the phone call, Dr. Voegtline noticed that M.B.'s speech was "a bit slurred" and he was making "nonsensical statements" and not following "simple, conversational commands." *Transcript* at 12. Dr. Voegtline was concerned that M.B. was experiencing "a breakthrough" in his medication, such that it was

wearing off. *Id*. Therefore, Dr. Voegtline ordered that M.B. receive an injection that day and changed the frequency of his scheduled injections from every four weeks to every three weeks.

[12] On December 14, 2022, M.B., by counsel, filed a Motion for Court to Set Review Hearing, stating that, pursuant to statute, M.B. was entitled to a review hearing and further asking the court to "dismiss the involuntary civil commitment." *Appendix* at 36.

[13] The court held a review hearing on January 11, 2023. At the beginning of the hearing, the court took judicial notice, without objection, of previous commitments out of Marion County, including a ninety-day temporary commitment in Marion County that began on July 17, 2018, and a regular commitment in Marion County that began on May 28, 2019, and terminated on February 22, 2021.

[14] The Indianapolis VA presented the testimony of Dr. Voegtline and Nurse Earles. Dr. Voegtline, who began treating M.B. in September 2022, testified that M.B.'s diagnoses were schizophrenia and borderline personality disorder. Dr. Voegtline described M.B.'s symptoms to include responding to internal stimuli (hearing voices or seeing things) and having "delusional content." *Transcript* at 8. M.B. also had "ongoing paranoia about the VA medical system," believing people there were out to harm him, which was a "pretty persistent pattern of thinking for a number of years." *Id*. As to types of treatment, Dr. Voegtline testified that M.B. was at first on Clozapine, which

was stopped "because he just wasn't taking it" due to complaints that it made him excessively sedated. *Id*. at 23. M.B. was then switched to the injections of Invega Sustenna.

[15] When asked about M.B.'s "current level of insight into his mental health condition," Dr. Voegtline responded:

> A. I spoke with [M.B.] a couple of days ago [and] he told me that he did not have Schizophrenia and he did not suffer from a psychotic disorder. . . . [H]e has very little insight into his mental illness.
>
> Q. And, based on that insight, do you have any confidence that he will continue taking his medication in the absence of a commitment?
>
> A. In the absence of a commitment I believe that he would most like[ly] be lost to follow-up. He would probably get off the injection, and, and I'm basing this off of what [M.B.] has told me multiple times, that he does not want to be on this medication.

Id. at 16-17.

[16] Dr. Voegtline stated that M.B. told him that he did not want the Invega Sustenna injection because of experiencing a side effect called Apothesia, "or a sense of restlessness," but Dr. Voegtline did not believe that such side effect was in fact occurring. *Id*. at 17, 23. Dr. Voegtline testified that, based on his observations of M.B., "it is my clinical assessment that he [] may be exaggerating or feigning these symptoms to get off the medication." *Id*. at 19.

[17] Dr. Voegtline testified that, between November 2022 and his last visit with M.B. several days before the hearing, he had "observed improvement in [M.B.'s] overall well-being and ability to function" while being on Invega Sustenna. *Id.* At the recent appointment, M.B. appeared calm and not at all agitated and reported that he was able to take care of his daily activities. Dr. Voegtline testified that M.B. "appears well-groomed" and "doesn't appear malnourished." *Id*. at 20. In recent outpatient visits, Dr. Voegtline had not observed M.B. display aggressiveness or posturing toward anyone. *Id*. at 25. Dr. Voegtline did not consider M.B. to be a danger to himself or others but believed that M.B. was gravely disabled:

> A. I do believe that he is currently gravely disabled . . . based on his lack of ability to reason and his poor judgment and his lack of insight into his mental illness. [] I do think that these are things that are going to lead to further deterioration if he's not on a commitment.
>
> Q. Okay, and [] in, in an unmedicated state [] would he be able to meet his uh ADLs?[3]
>
> A. [I]t's been shown in the past that when he's off his medications, there's been times where he is in the same clothes for weeks. Not showering, you know, not taking care of hygiene, not eating on a regular basis, and these are periods where he has been off his medications. So, I do believe that his ADLs would, would likely suffer if he were to be off meds.

[3] ADLs refers to activities of daily life.

Id. at 20. Dr. Voegtline testified that, in the absence of medication, M.B. had a lot of interpersonal conflicts with those in the community, including acting aggressively, and that this would prevent M.B. from obtaining stable housing, and, further, if off mediation, Dr. Voegtline believed M.B. could not handle his finances or a job or otherwise function independently.

[18] On cross-examination, the following exchange occurred:

> Q. [W]hen we were talking about grave disability, most of your testimony, it seems to be centered around your concerns whether [M.B.] takes his medications or not if he was being released. Is that fair to say?
>
> A. [T]o a certain extent, yes. I mean, part of it, too is [] just engagement with therapy and other services at the VA. But, yeah, the medication is a big part of it.

Id. at 24. Dr. Voegtline asked the court to continue the regular commitment that was in place.

[19] Nurse Earles testified about some of her interactions with M.B. She recalled one day in October 2022, when M.B. was an inpatient, M.B. first refused to leave his room, then later approached the nurse station and hissed at the nurses, yelled "about all of the abuses that had been done to his family . . . he was angry with the VA . . . with everybody." *Id*. at 28. As a result, M.B. was put into seclusion and "given an injection to calm down." *Id*. Nurse Earles also testified that during M.B.'s November 21 visit to the outpatient clinic for his injection, he was cooperative and responded to questions but also told her that

he "didn't know why he needed his medications, they weren't doing anything for him, but he knew he needed to come in, so he would." *Id*. at 31.

[20] The next time Nurse Earles saw M.B. was on December 13. On that day, she heard a commotion in the hall and looked out of her office to see M.B. being accompanied by two police officers. He was not scheduled to come into the clinic that day, as his next injection was in about a week. M.B. was yelling at the officers that they were abusing him and that the V.A. was abusing him. At Nurse Earles's invitation, M.B. came into her office, and the officers left. Nurse Earles testified that M.B. "could not sit" because he was "too agitated," yelling about being a secret agent and that the police and VA were out to get him. *Id*. at 29. Nurse Earles asked M.B. if he would like to talk to Dr. Voegtline on the phone, and he said he would. She described that, as she was texting Dr. Voegtline, M.B. "was trying to reach over me to try to type on my computer," and when she told him that he needed to sit down, he began yelling at her, which could be heard by others even with her door closed. *Id*. The commotion was such that security was called.

[21] After talking to M.B., Dr. Voegtline changed the injection order to every three weeks, and as Nurse Earles went to obtain the medication, M.B. was volatile, yelling and jumping around. He would not divulge his social security number, which Nurse Earles needed, saying that it was "top secret information," and he became "more paranoid" when another nurse obtained his social security number from computer records. *Id*. at 30. He also attempted to interfere with Nurse Earles as she was typing in the information to obtain the medication. As

she was giving him the injection, M.B. screamed "Damn, that's some good sh*t" in her face, startling her. *Id*. After his shot, M.B. left the clinic in handcuffs.

[22] Nurse Earles's most recent interaction with M.B. was about five days prior to the hearing when he came to the clinic for an injection. She described that he "was subdued that day, answered my questions, [] no outbursts." *Id*. at 32. His behavior was "completely different" than when she last saw him on December 13. *Id*.

[23] M.B. testified next. M.B.'s counsel asked M.B. whether he would continue to take his medications if he were to be released from commitment, and, in part, the following exchange ensued:

> A. Yes, sir, I'm going to take my medication.
>
> Q. You are? Do you believe the medications have helped you?
>
> A. Uhm, I have my own feelings about that because – can I say what I need to say about that?
>
> Q. Yeah, this is your chance.
>
> A. Yeah, so, as far as them mentioning that – as far as what the doctor said about what the military did and what they said as far as why I was in, as far as medical, they said that I could've fought the diagnosis, that they weren't – that they didn't truly believe that I was mentally ill. So, that's what I heard when I was in the military, that's what they told me after uhm all was said and done with that case. Uhm, yeah, I'm going to continue

> taking the medication, it's just I have my own thoughts and feelings about that.
>
> Q. Okay. Is it more with the diagnosis that you're not sure you completely agree with the diagnosis more than anything?
>
> * * *
>
> A. Well, the thing is, I believe I have the wrong diagnosis because the things – there's things wrong with the stories that were told, and I have an explanation for that.

Id. at 36-37. Sensing that M.B. was getting into his "criminal case," counsel encouraged him not to discuss that and asked him questions about medications. *Id*. at 37. As to the Seroquel, M.B. said,

> A. I was taking the Seroquel, I ran out of Seroquel, but I didn't bother to tell the VA because no, I don't want to be on Seroquel and all these mental health medications that they have me on, but I'm taking them anyway. So, you know, I can be left alone because at the end of the day, I'm a grown man. I'm going to make my own decisions at the end of the day. It's all about me taking care of myself and being stable. That's – that's all the VA should be concerned with, and I swear they're making up stories and over-embellishing things[.]

Id. at 37-38.

[24] M.B.'s counsel asked about living accommodations, and M.B. testified he planned to stay at the motel a little longer and was coordinating with family

and the Indianapolis VA to help with housing. He expressed some frustration with housing:

> I had to get my own motel; the VA did not get me a motel. I was told by the – I called – I've been calling the White House VA Hotline for some time, and I've been telling them my problems, and yet the VA is not really taking care of that. They're more – the VA Roudebush and VA Marion that has me on committal, they're more concerned about me taking medications more than actually taking care of me and actually listening to my wants and needs. . . . I need the VA to stop giving me a hard time and leave me alone and stop coming up with all these stories to try to keep me on committal when I don't need committal.

Id. at 39. M.B.'s counsel moved to questions about his income:

> Q. And then let's talk about your income. How do you support yourself?
>
> A. Uhm, with my – the money that I get from the VA. I was supposed to get med boarded out the military, and the military lied and said I took Elavil for depression when I took it for sleep –
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> THE COURT: Mr. [B.]?
>
> A. – and they said I was a fraudulent enlistment because I didn't uh –
>
> THE COURT: [M.B.]?
>
> RESPONDENT [M.B.]: Yeah?

> THE COURT: I need you to answer the question your lawyer is asking, please, so we can save time.
>
> RESPONDENT [M.B.]: I'm trying to answer – I'm trying to answer it, sir.
>
> THE COURT: Please answer the question he's asking.
>
> RESPONDENT [M.B.]: Okay.

Id. at 40. M.B. confirmed he received a little over $4000 per month in VA benefits and social security. M.B. was asked if there was anything else he would like to share with the court and he replied:

> A. [T]here's some mistakes in the stories that were told that I have an explanation for . . . you know, they're saying about me as far as the VA . . . what I did at the VA, I wasn't screaming and yelling – she's making it seem like I'm yelling and screaming for no reason, and it's like, no, that's not the case. I wasn't just yelling and screaming just to be yelling and screaming. And not only that, I- uhm – there was times that I was getting mistreated by the uh VA police, and, I mean, because I've been getting mistreated by police.
>
> * * *
>
> A. And my mom made up lies, saying that I was mentally disabled when I had just gotten out of an options behavioral health hospital just to put me back in the VA – just to put me in a VA hospital[.] . . .
>
> * * *

> Q: Is there anything the judge needs to know as it pertains to your ability to function independently or make rational decisions?
>
> A. . . . I can take care of myself just fine because, I mean, the VA really hasn't been holding my hand like that. I mean, they had me go to – Indy group home and things didn't work out with that. But, above all, I've been handling my own just fine. I've been taking care of myself at the motel, and there's some things that happened, but I'm working through it. I'm feeding myself; I'm clothing myself; I'm bathing myself; I'm brushing my teeth; I'm eating every day if I haven't said that already. Oh, uhm, I'm getting rides to my appointments and wherever I need to go through Uber or Lyft, so I'm taking care of my basic necessities[.]

Id. at 41-42.

[25] On cross-examination, counsel asked M.B. whether he believed that he has schizophrenia:

> Uhm, I believe my diagnosis is wrong because I have – there's a story I need to tell about that, but this isn't – if this isn't the appropriate time, then okay, maybe we can talk about that some other time if you want because I have an explanation why I don't believe that I have schizophrenia.

Id. at 43. M.B. responded to questions concerning housing, stating that he previously was living in a group home, "which they kicked me out of prematurely," and, prior to that, he was living with his mother but they did not get along, stating, "My mom is very volatile. She's the one that's very aggressive and she's prone to make up lies and things like that." *Id*. at 43, 44.

[26] In closing argument, the Indianapolis VA urged that continuation of the commitment was "absolutely necessary" to ensure that M.B. "continues to receive the therapy and treatment that is allowing him to function in an outpatient setting" and avoid a return to the more restrictive inpatient setting. *Id*. at 45, 46. The Indianapolis VA argued that clear and convincing evidence had been presented that M.B. "has some significant impairments of judgment or reasoning that have impacted his ability to function independently, and in the absence of medication, he will not be able to do so," pointing out that M.B. did not believe that he has schizophrenia and has indicated an unwillingness to take medication. *Id*. at 45.

[27] M.B.'s counsel argued that, as to grave disability – at issue here – the hearing centered around the doctor's concerns if M.B. ceases to take his medications, but "that's all speculative," as M.B testified he was willing to take the medications. *Id*. at 47. Counsel pointed out that M.B. came to the VA on December 13 on his own accord and that all parties testified that M.B. had improved since his injections were changed to every three weeks. He also emphasized that M.B. has adequate income to support himself and that he has a plan to find housing. Therefore, he asked the court to terminate the commitment.

[28] The trial court explained that it had considered M.B.'s denial that he has schizophrenia, despite the documented medical history, and that M.B. "has documented difficulties in the past complying with medications." *Id*. at 48. The court expressed concern that M.B., if he did not take his medications, would

"likely . . . end up back in the hospital again with involuntary commitment or in police custody and I don't want those things for you." *Id*. The court then found, by clear and convincing evidence, that M.B. "is not a danger to himself or other people as long as he maintains his medication as prescribed" but "is gravely disabled because of his lack of insight and judgment," adding that M.B.'s "denial of the diagnosis contributes to that finding." *Id*. The court continued the regular commitment for a period of one year, clarifying to M.B., "you don't have to be hospitalized; you have to take your medication, so you don't get hospitalized." *Id*.

[29] M.B. now appeals the court's decision to continue the regular commitment.

Discussion & Decision

[30] M.B. asserts there was insufficient evidence to support his continued involuntary commitment. In *Civil Commitment of T.K.*, the Indiana Supreme Court stated:

> [T]he purpose of civil commitment proceedings is dual: to protect the public and to ensure the rights of the person whose liberty is at stake. The liberty interest at stake in a civil commitment proceeding goes beyond a loss of one's physical freedom, and given the serious stigma and adverse social consequences that accompany such physical confinement, a proceeding for an involuntary civil commitment is subject to due process requirements.

27 N.E.3d 271, 273 (Ind. 2015) (internal citations and quotations omitted).

[31] To satisfy due process, the facts justifying an involuntary commitment must be proved by clear and convincing evidence. *In re Commitment of G.M.*, 743 N.E.2d 1148, 1151 (Ind. Ct. App. 2001). The clear and convincing standard "is defined as an intermediate standard of proof greater than a preponderance of the evidence and less than proof beyond a reasonable doubt." *Commitment of B.J. v. Eskenazi Hosp.*, 67 N.E.3d 1034, 1038 (Ind. Ct. App. 2016) (citing *T.D. v. Eskenazi Midtown Cmty. Mental Health Ctr.*, 40 N.E.3d 507, 510 (Ind. Ct. App. 2015)). In order to be clear and convincing, the existence of a fact must be "highly probable." *Matter of Commitment of C.N.*, 116 N.E.3d 544, 547 (Ind. Ct. App. 2019). When we review a determination made under that clear and convincing standard, "we affirm 'if, considering only the probative evidence and the reasonable inferences supporting it, without weighing evidence or assessing witness credibility, a reasonable trier of fact could find [the necessary elements] proven by clear and convincing evidence.'" *A.S. v. Ind. Univ. Health Bloomington Hosp.*, 148 N.E.3d 1135, 1139 (Ind. Ct. App. 2020) (citing *T.K.*, 27 N.E.3d at 273) (internal quotation marks omitted).

[32] Ind. Code § 12-26-2-5(e) provides that, to have a person committed, "[t]he petitioner must prove by clear and convincing evidence that (1) the individual is mentally ill *and either dangerous or gravely disabled*, and (2) detention or commitment of that individual is appropriate. (Emphasis added). M.B. does not dispute that he is a person with mental illness. Instead, he claims only that

the temporary commitment is improper because the Indianapolis VA failed to prove he was "gravely disabled."[4]

[33] Gravely disabled is defined as:

> a condition in which an individual, as a result of mental illness, *is in danger of coming to harm* because the individual:
>
> > (1) is unable to provide for that individual's food, clothing, shelter, or other essential human needs; or
> >
> > (2) has a substantial impairment or an obvious deterioration of that individual's judgment, reasoning, or behavior *that results in* the individual's inability to function independently.

Ind. Code § 12-7-2-96 (emphases added).[5] M.B. argues that the Indianapolis VA proved neither of the statutory prongs and thus did not establish that he was gravely disabled.

[34] Here, days prior to the hearing, M.B. told Dr. Voegtline that he did not have schizophrenia and did not suffer from a psychotic disorder. M.B. testified at the hearing that his diagnosis is wrong and that he did not want to be on the mental health medications but was taking them anyway. He believed that the VA was

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[4] Dangerousness was not a basis of the commitment order, as the trial court specifically found that M.B. was not a danger to himself or others.

[5] Because this definition is written in the disjunctive, it is not necessary to prove both prongs to establish grave disability. *A.S.*, 148 N.E.3d at 1140; *W.S. v. Eskenazi Health, Midtown Cmty. Mental Health*, 23 N.E.3d 29, 34 (Ind. Ct. App. 2014), *trans. denied*.

"making up stories and over-embellishing things." *Transcript* at 38. He told Dr. Voegtline on repeated occasions that he did not want to take medication, and Dr. Voegtline testified that he believed that M.B. was exaggerating or feigning side effects to get off the medication. M.B. told Nurse Earles at the clinic that he did not know why he had to take the medications. When asked if he believed the medications were helping him, he responded "I have my own thoughts and feelings about that." *Id*. at 36. M.B. acknowledged that when he ran out of Seroquel, he did not tell the VA because he did not want to be on it. M.B. wanted the VA to "stop giving [him] a hard time and . . . stop coming up with all these stories to try to keep me on committal when I don't need committal." *Id*. at 39.

[35] The trial court found that M.B. was gravely disabled based on "his lack of insight and judgment" as well as "his documented difficulties in the past [with] complying with medications." *Id.* at 48. The court specifically noted that M.B.'s "denial of the diagnosis contributes to [the gravely disabled] finding." *Id*. We find that the record clearly supports the trial court's findings that M.B. has a lack of insight into his illness and the possibility – arguably, probability – exists that he will stop taking medications if not under a commitment. However, as M.B. correctly observes, our Supreme Court has held that "denial of illness and refusal to medicate, standing alone, are insufficient to establish grave disability because they do not establish, by clear and convincing evidence, that such behavior 'results in the individual's inability to function independently.'" *T.K.*, 27 N.E.3d at 276. Further, our court has recognized

that I.C. § 12-7-2-96 defining "gravely disabled" is written in the present tense, such that the trier of fact is required to assess the individual's state at the time of the hearing. *B.J.*, 67 N.E.3d at 1040 (Ind. Ct. App. 2016) (physician's testimony that patient's condition would deteriorate, and he would not be able to provide himself with food, clothing, and shelter if he "does not stick with the treatment [] plan," was insufficient to prove that patient was gravely disabled as it was based on patient's "hypothetical state based on future contingencies" as opposed to his present state at the time of the hearing).

[36] As to M.B.'s ability to function independently at the time of the hearing, M.B. argues that the witnesses were consistent that the injection treatment has led to improvement with his schizophrenia and his ability to function. There was no evidence M.B. had missed outpatient appointments for his injection, and, as M.B. emphasizes, in December 2022, he came on his own a week early to the hospital when the medication was wearing off. When asked if he would take his medication absent a commitment, M.B. testified that he would. He testified to having regular income of over $4000 per month from VA benefits and social security and to having current housing at a motel but working with the VA to find other, more permanent housing. When Dr. Voegtline last saw M.B. a few days before the hearing, M.B. appeared calm, well groomed, and not malnourished. Nurse Earles similarly testified that when she saw M.B. about five days prior to the hearing, he was subdued and appropriately answered questions. M.B. testified that he was able to function independently, feed and clothe himself, take care of hygiene, and use Uber or Lyft for appointments.

M.B. argues that because there was not clear and convincing evidence that he was not able to function independently, his commitment should be vacated. We agree.

[37] While M.B.'s testimony reflected disorganized thinking and a continued distrust, or paranoia, about the VA system or others, we cannot say that clear and convincing evidence was presented showing that, *as a result of* that impairment, he could not function independently or that he was unable to provide for his food, clothing, shelter, or other essential human needs.[6] Accordingly, we reverse the trial court's decision to continue M.B.'s regular commitment. *See In re Commitment of D.S.*, 109 N.E.3d 1056, 1060-61 (Ind. Ct. App. 2018) (evidence not sufficient to show patient was gravely disabled where patient denied her illness and refused to take medications but testified that she was able to work, pay bills, and live independently); *P.B. v. Evansville State Hosp.*, 90 N.E.3d 1199, 1204-05 (Ind. Ct. App. 2017) (evidence was not sufficient to support finding that patient was gravely disabled where, although patient did not want to take medications and was not always cooperative to hospital staff, there was no evidence presented that she had been unable to

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[6] *Contrast A.O. v. Cmty. Health Network, Inc.*, 206 N.E.3d 1191, 1194-95 (Ind. Ct. App. 2023) (evidence sufficient that A.O. was gravely disabled where there was "considerable, additional evidence" of A.O.'s "inability to function independently," beyond denial of illness and refusal to take medication, including that she "continues to believe she is God," was delusional and violent at the ER, and was diagnosed with a serious kidney condition, linked to agitation and pacing, found in people with untreated mental illness); *A.S. v. Indiana Univ. Health Bloomington Hosp.*, 148 N.E.3d 1135, 1141 (Ind. Ct. App. 2020) (evidence supported court's finding that patient was gravely disabled where patient was refusing meds, had not had "any continued or sustained outpatient treatment," and, in days before hearing, had been threatening towards staff and exhibited marginal hygiene).

function independently or provide for her own needs); *T.D.*, 40 N.E.3d at 512 (evidence was not sufficient to prove that patient was gravely disabled where patient, after prior commitment was terminated, was inconsistent with and did not want to take her medications and one incident occurred requiring emergency detention, but there was no evidence that she lacked shelter, personal grooming, or was malnourished).

[38] Judgment reversed.

May, J., concurs.

Foley, J., dissents with separate opinion.

Foley, Judge, dissenting.

[1] I must respectfully dissent. Viewing the evidence favorable to the judgment, I cannot say the trial court clearly erred in finding M.B. was gravely disabled.

[2] The majority correctly observes that the definition of grave disability is based upon the present circumstances, not "hypothetical . . . future contingencies." *Commitment of B.J. v. Eskenazi Hosp.*, 67 N.E.3d 1034, 1040 (Ind. Ct. App. 2016). Here, I believe the record demonstrated—by clear and convincing evidence—that M.B. was unable to function independently at the time of the hearing.

[3] M.B. had a long-term history of involuntary commitments with a need for inpatient hospitalization. Beginning in May 2019, M.B. was subject to involuntary commitment in 36 of the 44 months prior to the January 2023 hearing. *See* Tr. Vol. II pp. 4–5; Appellant's App. Vol. II pp. 8–10, 20–22. In the six months immediately preceding the hearing, M.B. required three separate periods of inpatient hospitalization. *See* Tr. Vol. II pp. 13 (October 14–November 16, 2022), 15 (August 2–30, 2022), 16 (June 20–July 21, 2022). M.B. demonstrated a consistent and prolonged failure to appreciate his diagnosis and continued hostility to his prescribed medication, which left M.B. unable to function independently.

[4] Less than 60 days prior to the hearing, M.B.'s prescription was modified to an injectable medication. M.B. received his first injection on November 21, 2022. The original prescription called for an injection every four weeks. On December 13—one prior week prior to his scheduled injection appointment—

M.B. appeared at the V.A. in an agitated state. He was given another injection and his prescription was modified to receive his injection every three weeks. In the week prior to his hearing, M.B. appeared for his next injection without incident. Dr. Voegtline testified that, as recently as a couple of days prior to the hearing, M.B. told him that M.B. did not suffer from schizophrenia or a psychotic disorder, and M.B. stated on multiple occasions that he did not want to be on his medication.

[5] In finding M.B. was gravely disabled, the trial court thoughtfully considered the evidence and gave the most weight to M.B.'s patterns of noncompliance, which led to periods of hospitalization. Reflecting on the evidence, the trial court said:

> I'm confronted today not just by [M.B.'s] denial that he has schizophrenia, but his long history of schizophrenia is documented in his medical records and testimony I received today, and his history of prior commitments and recent hospitalizations. [M.B.], if you don't take the medication as prescribed and work with the team to let them know how it affects you, you're likely going to end up back in the hospital again with involuntary commitment or in police custody and I don't want those things for you. I find, though, by clear and convincing evidence that [M.B.] is not a danger to himself or other people *as long as he maintains his medication as prescribed* and that he is gravely disabled because of his lack of insight and judgment and . . . documented difficulties in the past complying with medications and the resulting symptoms. His . . . denial of the diagnosis contributes to that finding. I, therefore, will find by clear and convincing evidence he is gravely disabled by his schizophrenia and especially will be unable to care for himself through the activities of daily living if he fails to comply with medication and will continue the regular commitment for a period of one (1) year. That said, [M.B.], you don't have to be

> hospitalized; you have to take your medication, so you don't get hospitalized.

Tr. Vol. II p. 48 (emphasis added). The trial court did not base its decision on mere speculation or otherwise fail to consider M.B.'s present circumstances, but rather weighed and balanced M.B.'s recent improvements against his nearly four-year history of involuntary commitment and inability to function independently.

[6] Based upon the evidence presented, I believe this case is more akin to *E.F. v. St. Vincent Hosp. & Health Care Ctr., Inc.*, where the patient had a history of not taking her medications, there was evidence the patient still had minimal insight into her diagnoses, and the physician "emphasized that [the patient's] improvement was 'a direct result of the medications' that she had been prescribed during her commitment[.]" 194 N.E.3d 1130, 1136–38 (Ind. Ct. App. 2022); *see also Golub v. Giles*, 814 N.E.2d 1034, 1039 (Ind. Ct. App. 2004) (identifying sufficient evidence of a grave disability where the patient had "a five-year history of mental illness requiring hospitalizations" and the physician testified the patient "would benefit from anti-psychotic drugs, but that he refused to cooperate with treatment").

[7] In light of our limited appellate role—and mindful that, in all commitment matters, the trial court may order outpatient services, set the case for frequent periodic review, and must discharge if there is no longer a grave disability, *see* I.C. §§ 12-26-14-1, -15-1(a), -12-7—I would not disturb the trial court's finding that M.B. was gravely disabled.

[8] For the foregoing reasons, I respectfully dissent.