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18-P-1338 Appeals Court

IN THE MATTER OF J.D.

No. 18-P-1338.

Suffolk. November 7, 2019. - January 30, 2020.

Present: Agnes, Sullivan, & Blake, JJ.

Practice, Civil, Civil commitment.

Petition for civil commitment filed in the Central Division of the Boston Municipal Court Department on March 9, 2016.

The case was heard by Sally A. Kelly, J.

Chetan Tiwari for the respondent.
LaRonica Lightfoot, Assistant Attorney General, for the petitioner.

BLAKE, J. Following a two-day hearing pursuant to G. L. c. 123, §§ 7 and 8, a judge of the Boston Municipal Court (BMC) entered an order that involuntarily civilly committed J.D. to the Dr. Solomon Carter Fuller Mental Health Center (Solomon Carter) for a period not to exceed six months. The Appellate Division of the BMC affirmed the commitment order and dismissed

J.D.'s appeal. This appeal followed. J.D. argues that the evidence was insufficient to prove both that discharging him from Solomon Carter would create a likelihood of serious harm and that there was not a less restrictive alternative to the commitment.[1] We affirm.

Background. Prior to J.D.'s divorce from L.D. in June of 2014, L.D., his then wife, gave birth to a child; C.E., rather than J.D., was listed as the father on the child's birth certificate. On June 17, 2014, L.D. filed a paternity action, pursuant to G. L. c. 209C, against C.E in the Probate and Family Court. On October 22, 2014, J.D. sought to intervene in that case, asserting that, pursuant to G. L. c. 209C, § 6, he was the presumed father of the child because he and L.D. had been married at the time of the child's birth.[2]

Then, on October 24, 2014, J.D. took his own genetic marker test that indicated that there was a zero percent probability that he was the child's biological father. The proceedings continued, and on January 22, 2015, J.D.'s motion to intervene

[1] J.D. does not make any argument concerning the issue of the sufficiency of the evidence that he suffered from a mental illness. Therefore we do not consider it.

[2] Pursuant to G. L. c. 209C, § 6 (a), "a man is presumed to be the father of a child and must be joined as a party if: (1) he is or has been married to the mother and the child was born during the marriage, or within three hundred days after the marriage was terminated by death, annulment or divorce."

was allowed. A probate judge ordered genetic marker testing through the Department of Revenue, and on June 8, 2015, the results again indicated that there was zero percent probability that J.D. was the child's biological father. C.E. took a genetic marker test on April 29, 2015; the test indicated there was a 99.99 percent probability that he was the child's biological father. Accordingly, a paternity judgment entered on January 7, 2016, adjudicating C.E. the child's biological father.

On September 14, 2015, after the genetic marker tests, but before the adjudication of paternity, C.E. applied for and was granted an abuse prevention order against J.D., pursuant to G. L. c. 209A (209A order).[3] C.E. indicated that J.D. had called and threatened to kill him. J.D. called a second time on October 28, 2015, and threatened to kidnap the child, which caused C.E. to further fear for his safety and that of his child.[4] Thereafter, J.D. was charged in the Quincy District Court with violating the 209A order based on the October 28,

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[3] It was issued by the same judge of the Probate and Family Court who presided over the paternity action.

[4] C.E. reported that J.D. called him and insisted that he was the child's father and said he was coming to take the child. J.D. also sent an e-mail to C.E.'s attorney contending, among other things, that his child had been kidnapped by the court. This e-mail contained a photograph of the child.

2015 threat.[5] The 209A order was extended twice until March 27, 2017.

Despite three genetic marker test results, J.D. continued to contend that he was the child's father. On December 11, 2015, J.D. contacted L.D. and angrily told her that he still believed that he was the child's father and that he was going to get her back "by any means necessary." After that, L.D. obtained a 209A order against J.D.[6] On January 21, 2016, J.D. called L.D. and posted on Facebook that he was "going to get [his child] back." Subsequently, J.D. was charged in the Brookline District Court with violating the 209A order.[7]

On February 19, 2016, during the proceedings in Quincy District Court, J.D. was referred to Solomon Carter for an inpatient forensic evaluation and psychiatric assessment to evaluate his competence to stand trial. See G. L. c. 123, § 15 (b). At that time, J.D. was found to be "suffering from a

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[5] We note that a return of service was not filed with respect to this 209A order until March 29, 2016. It is unclear, however, whether J.D. had knowledge of the order prior to that date. It is not disputed that he was charged with violating this order prior to the filing of the return of service.

[6] This 209A order was not entered in evidence at the hearing on objection of J.D., but it was referred to several times by treatment providers, L.D., and the BMC judge.

[7] At the same time, J.D. also had an active harassment prevention order against him pursuant to G. L. c. 258E. It does not appear that the 258E order involved L.D. or C.E.

delusional disorder with unrelenting behavior focused around the child." While in the facility in early March, J.D. called L.D., continuing to assert that he was the child's father and that he and L.D. should never have divorced. L.D. told J.D. not to contact her and reported the telephone call to police.

On March 9, 2016, Solomon Carter petitioned to commit J.D. involuntarily for up to six months pursuant to G. L. c. 123, §§ 7 and 8.[8] On the same day, J.D. appeared in Quincy District Court and was found competent to stand trial for the charge of violating C.E.'s 209A order; he was held without bail at Solomon Carter pending disposition of the commitment petition.[9]

In May, 2016, a judge of the BMC held a two-day hearing on Solomon Carter's petition, at which L.D., C.E., Dr. Marco Caicedo,[10] a board-certified psychiatrist, and Susan Squiers, a

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[8] The petition stated that the defendant was suffering from "[d]elusional [d]isorder, evidenced by paranoia, delusions and poor judgment and no insight," and that he posed a substantial risk of harm to others. The petition further stated that without adequate treatment in a hospital setting, the defendant's symptoms were "very likely to persist which [would] predispose him to continue the behaviors that place others in fear and risk of harm."

[9] Again, we note that J.D.'s counsel at the commitment hearing called into question the validity of the 209A orders. However, the question before the BMC judge was not his guilt with respect to violating those orders, but whether his conduct and condition supported an order of involuntary commitment.

[10] Dr. Caicedo treated J.D. for approximately one week before the hearing, as the initial psychiatrist was unavailable due to a medical leave.

clinical social worker at Solomon Carter and a member of the defendant's treatment team, testified.[11]

Discussion.[12] Standard of review. We review the hearing judge's findings of fact for clear error. This is because the judge, having presided over the hearing, was in the best position to weigh the evidence and to assess witness credibility. Matter of D.K., 95 Mass. App. Ct. 95, 100 (2019). We "scrutinize without deference the propriety of the legal criteria employed by the trial judge and the manner in which those criteria were applied to the facts." Matter of A.M., 94 Mass. App. Ct. 399, 401 (2019), quoting Iamele v. Asselin, 444 Mass. 734, 741 (2005).

Statutory framework. General Laws c. 123, §§ 7 and 8, address the long-term commitment of persons with mental illness. "Under § 7 (a), the superintendent of any facility may petition the District Court for the commitment of any patient already at the facility. . . . Section 8 (a) provides that no person shall be committed unless the District Court finds after a hearing that '(1) such person is mentally ill, and (2) the discharge of such person from a facility would create a likelihood of serious harm.'" Matter of N.L., 476 Mass. 632, 634 (2017).

[11] J.D. testified on his own behalf at the hearing.

[12] J.D.'s discharge from Solomon Carter does not make this matter moot. See Matter of F.C., 479 Mass. 1029 (2018).

Additionally, the petitioner must show that there is no less restrictive alternative to hospitalization. Newton-Wellesley Hosp. v. Magrini, 451 Mass. 777, 780 n.8 (2008), citing Commonwealth v. Nassar, 380 Mass. 908, 917-918 (1980). "Likelihood of serious harm" is defined as "(1) a substantial risk of physical harm to the person himself as manifested by evidence of, threats of, or attempts at, suicide or serious bodily harm; (2) a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them; or (3) a very substantial risk of physical impairment or injury to the person himself as manifested by evidence that such person's judgment is so affected that he is unable to protect himself in the community and that reasonable provision for his protection is not available in the community." G. L. c. 123, § 1; Pembroke Hospital v. D.L., 482 Mass. 346, 347 (2019). As to the likelihood of serious harm to others, "the Legislature's use of the word 'homicidal,' and phrases such as 'violent behavior' and 'serious physical harm' signifies an intent that evidence of conduct reflecting a substantial level of force and intensity be presented." Matter of G.P., 473 Mass. 112, 126 (2015). Under either definition, the petitioner must show that the risk of harm is imminent, that is, "that the harm will materialize in

the reasonably short term -- in days or weeks rather than in months." Id. at 128. In order to justify commitment under these sections, the petitioner must prove each of the statutory prerequisites beyond a reasonable doubt. Id. at 119, citing Abbott A. v. Commonwealth, 458 Mass. 24, 40-41 (2010).

Likelihood of serious harm. J.D. claims that the evidence was insufficient to prove beyond a reasonable doubt that he posed a likelihood of serious harm to L.D., C.E., or the child. This claim requires us to "apply principles regarding the temporal nature of evidence upon which this probabilistic assessment may rely." Matter of D.K., 95 Mass. App. Ct. at 95. In doing so, we recognize that "[i]t is neither possible nor appropriate to try to establish a set of definite temporal boundaries for such evidence; the assessment of risk is a probabilistic one, and necessarily must be made on the basis of the specific facts and circumstances presented." Matter of G.P., 473 Mass. at 125.

Here, J.D. continued to believe that he was the child's father despite three genetic marker tests to the contrary. Indeed, it is the nature of the delusional disorder itself which supports the finding that J.D. posed a likelihood of serious harm to others if he were not committed. It is true that recent dangerous overt acts or omissions are relevant in showing the risk of harm. However, some recent manifestation of dangerous

behavior is not a requisite element of proof. Commonwealth v. Rosenberg, 410 Mass. 347, 363 (1991) (no requirement that "likelihood of serious harm" be established by evidence of recent overt dangerous act). L.D. expressed that she was "really scared" that she would not be able to protect herself and her child as J.D. threatened to get "his child back by any means necessary." This fear was supported by J.D.'s ongoing belief that he was the child's father, his inability to comply with court orders not to contact and to stay away from L.D., as highlighted by the telephone call he placed to her during his hospitalization. Indeed, this call was evidence that J.D. could not be stabilized, even in a facility.

The finding that J.D. posed a likelihood of serious harm was further supported by the testimony of C.E., who described J.D.'s persistent efforts to gain custody of the child, as well as his laser focus on the child, including recounting the number of days that "his [child]" had been "kidnapped by the court." Despite the issuance of orders of protection against him, J.D.'s behavior continued to escalate.

Additionally, the treatment notes of the Solomon Carter staff cautioned that J.D. posed a risk of danger to the child and others. On March 4, 2016, the psychiatrist noted that J.D. did not "appear able to refrain from integrating undesirable information and facts into his delusional structure," and that

"his delusion [was] likely to expand and he remain[ed] a significant risk of harm to . . . the objects of his delusion."

Dr. Caicedo was unequivocal in his opinion that J.D. suffered from a delusional disorder that would continue if not treated.[13] Furthermore, Susan Squiers described J.D.'s steadfast belief that he was the child's father and his insistence that the genetic marker tests were forged. Importantly, she testified that J.D. would not allow Solomon Carter to consult with his outside medical providers, thereby hindering his care.[14] As to J.D.'s argument that Dr. Caicedo declined to give an opinion whether J.D. posed a substantial risk of serious physical harm to L.D., C.E., or the child, this is not dispositive. "[T]he law 'does not give the opinion of experts . . . the benefit of conclusiveness, even if there is no

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[13] Further, Dr. Caicedo testified that J.D. suffered from a delusional disorder, with his primary delusion being his belief that he was the child's biological father. On the morning of the hearing, J.D. stated for the first time that he believed he was not the child's father, but that he would persist in his efforts to gain custody. Dr. Caicedo described J.D.'s poor insight into his own mental health and opined that J.D.'s delusions would not subside, but merely change over time. That Dr. Caicedo testified that J.D. was not homicidal or suicidal does not alter the result. Here, the question is whether Solomon Carter proved that others were placed in reasonable fear of violent behavior and serious physical harm. See G. L. c. 123, § 1.

[14] J.D. suggested he needed to speak with his attorney prior to allowing Solomon Carter to contact his outside providers. While this request was appropriate, J.D. did not provide a release, even after speaking with his attorney in late February.

contrary opinion introduced at the trial.'" Commonwealth v. DelVerde, 401 Mass. 447, 450-452 (1988), quoting Commonwealth v. Lunde, 390 Mass. 42, 47 (1983). The finding that J.D. posed a substantial risk of serious physical harm was ultimately for the judge to make after considering all of the evidence, including J.D.'s previous threats to kill C.E. and kidnap the child. See Matter of G.P., 473 Mass. at 117 ("If the judge finds, based on the evidence presented, that . . . there is a 'likelihood of serious harm' . . . the judge may order the respondent committed"); Nassar, 380 Mass. at 916 ("This is a determination to be made in the first instance by the trial judge").

J.D.'s contention that the evidence lacked specificity and was too remote is belied by the record. Notably, in the context of an involuntary civil commitment proceeding, "'imminent' does not mean 'immediate.'" Matter of G.P., 473 Mass. at 128. Solomon Carter was required to prove and did prove that there was "a substantial risk that the harm will materialize in the reasonably short term." Id. In addition to J.D.'s unwavering belief that he was the child's father and his threats to others in pursuit of his quest for custody, J.D. refused to accept treatment for his delusions, and did not allow Solomon Carter to communicate with his outside providers. Further evidence of the imminence of harm stemming from J.D.'s delusion was his belief that a parent-child bond had to occur prior to the child turning

age twenty-four months. This child was twenty-one months at the time of these proceedings. And, as is the case here, "[t]he more serious or the more numerous" the prior bad acts or harmful conduct, "the more significance they would carry in making a positive risk assessment about the likelihood of harm." Id. at 126. The evidence here showed that over a course of approximately two years, J.D. made multiple threats of harm to L.D., C.E., and the child.

Less restrictive alternative. J.D. contends that the evidence was also insufficient to prove that no less restrictive alternative to hospitalization existed for him. See Newton-Wellesley Hosp., 451 Mass. at 780 n.8. To the contrary, the evidence of J.D.'s refusal to accept treatment and the likely continuation of his delusions and behavior that created a reasonable fear of harm to others supported the conclusion that there was not a less restrictive alternative. Dr. Caicedo opined that delusional disorders do not go away without treatment, but merely change over time. In its petition, Solomon Carter stated that "without adequate treatment in a hospital setting, [J.D.'s] symptoms are very likely to persist which will predispose him to continue the behaviors that place others in fear and risk of harm."

J.D.'s amenability to treatment is essential to whether he could have been placed in a less restrictive setting. J.D.'s

refusal to provide releases, his violation of court orders, and his communication with L.D. during his hospitalization support the finding that he was not amenable to treatment such that he could be placed in a less restrictive setting. See Nassar, 380 Mass. at 917-918. Moreover, in a civil proceeding, a negative inference may be drawn from J.D.'s refusal to provide releases. See Singh v. Capuano, 468 Mass. 328, 333 (2014) (adverse inference drawn from defendant's failure to testify is permissible in civil abuse prevention proceeding); Millennium Equity Holdings, LLC v. Mahlowitz, 456 Mass. 627, 643-644 (2010) (negative inference may be drawn from refusal to testify in abuse of process claim); Automobile Insurers Bur. of Mass. v. Commissioner of Ins., 430 Mass. 285, 290 (1999) (judge may draw negative inference from failure to comply with discovery order in State Commissioner of insurance case); Shafnacker v. Raymond James & Assocs., 425 Mass. 724, 734-735 (1997) (negative inference may be drawn against corporate entity from witness's refusal to testify on basis of privilege under Fifth Amendment to the United States Constitution in securities arbitration proceeding); Custody of Two Minors, 396 Mass. 610, 617 (1986) (permitting adverse inference from failure to testify in child custody case); A.P. v. M.T., 92 Mass. App. Ct. 156, 166 (2017) (adverse inference may be drawn against defendant for failure to testify at proceeding on issuance of harassment prevention

order); Mass. G. Evid. §§ 1106, 1115(g) (2019). J.D. demonstrated an inability to overcome his compulsions and acted on his delusions. The evidence sufficed to show that there was no less restrictive alternative to his commitment at Solomon Carter.

Decision and order of the Appellate Division affirmed.