IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of M. M.,
a Person Alleged to have a Mental Illness.

STATE OF OREGON,
Respondent,

v.

M. M.,
Appellant.

Multnomah County Circuit Court
16CC03648; A162483

Connie L. Isgro, Judge pro tempore.

Submitted August 29, 2017.

Joseph R. DeBin and Multnomah Defenders, Inc., filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Nathan Riemersma, Assistant Attorney General, filed the brief for respondent.

Before Egan, Presiding Judge, and DeHoog, Judge, and Aoyagi, Judge.

EGAN, P. J.

Reversed.

EGAN, P. J.

Appellant in this civil commitment case appeals a judgment committing him to the jurisdiction of the Mental Health Division for a period not to exceed 180 days. *See* ORS 426.130. On appeal, appellant asserts that the trial court plainly erred by failing to advise him of possible outcomes of the proceeding as required by ORS 426.100(1).[1] The state responds that the trial court did not commit plain error when advising appellant of the possible results of the commitment hearing. As explained below, we reverse.

"ORS 426.100(1) requires a trial court conducting a civil commitment hearing to advise the allegedly mentally ill person of the reason for, nature of, and possible results of the hearing, as well as the person's rights to subpoena witnesses and be represented by counsel, including appointed counsel." *State v. M. L. R.*, 256 Or App 566, 569, 303 P3d 954 (2013). The statute provides:

> "At the time the person alleged to have a mental illness is brought before the court, the court shall advise the person of the following:
>
> "(a) The reason for being brought before the court;
>
> "(b) The nature of the proceedings;
>
> "(c) The possible results of the proceedings;
>
> "(d) The right to subpoena witnesses; and
>
> "(e) The person's rights regarding representation by or appointment of counsel."

ORS 426.100(1).

To comply with ORS 426.100(1), "a court must either advise the allegedly mentally ill person directly" of the required information, or "conduct an examination on the record to determine whether a valid waiver of the right to be advised has been knowingly and voluntarily made." *State v. M. T.*, 244 Or App 299, 302-03, 258 P3d 1288 (2011) (internal quotation marks omitted). We have explained that:

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[1] Appellant also raises an additional assignment of error challenging the trial court's determination that he had a mental illness. In light of our disposition of this case, we do not address that assignment.

> "ORS 426.130 establishes the possible results of a civil commitment hearing. If, following the presentation of evidence, a trial court determines that the allegedly mentally ill person is not mentally ill, 'the person shall be discharged forthwith.' ORS 426.130(1)(a). If, on the other hand, the court determines that the person is mentally ill, there are three possible results. If the person 'is willing and able to participate in treatment on a voluntary basis' and 'will probably do so,' the court '[s]hall order the release of the [person] and dismiss the case.' ORS 426.130(1)(b)(A). Alternatively, the court 'may order conditional release,' ORS 426.130(1)(b)(B), or 'may order commitment of the individual to the [Oregon Health Authority],' ORS 426.130(1)(b)(C). If the court orders conditional release or commitment, the court shall establish a period of conditional release or commitment not to exceed 180 days. ORS 426.130(2)."

Id. at 305 (first and second brackets in original).

In this case, at the beginning of the commitment hearing, the court gave appellant the following information regarding the possible results of the hearing:

> "So, the State has to prove to me both that a person is having mental health problems and that because of those mental health problems the person's a danger to himself, others or can't take care of himself.
>
> "If after I hear the evidence here today and if I decide that has not been proven to me by clear and convincing evidence, then I'll dismiss the notice of mental illness. And that's the piece of paper that's keeping you in the hospital.
>
> "* * * * *
>
> "On the other hand, if after hearing the evidence today if I determine the State had proven to me by clear and convincing evidence that you're mentally ill as I described then I could commit you to the Oregon Health Authority for a period not to extend 180 days.
>
> "And that means you'd go back to the hospital and you would stay there and continue in treatment.
>
> "And at such time as the doctors thought you were ready to go, you could be discharged."

According to appellant, the trial court failed to satisfy the requirements of ORS 426.100(1) because it did not inform

him of additional possible results of the commitment hearing. In particular, appellant argues that the court should have advised him of the possibility of voluntary treatment or conditional release. In appellant's view, that failure was plain error that we should exercise our discretion to correct. The state responds that, under our decision in *State v. J. D. C.*, 226 Or App 563, 204 P3d 162 (2009), a trial court does not commit plain error by providing advice like that given here. We agree with appellant.

Whether the trial court committed plain error in failing to advise appellant of all of the possible results of the proceedings depends on whether the error was one of law, whether the error was "apparent" so that the legal point is obvious and not reasonably in dispute, and whether the error appears on the record so that we "need not go outside the record or choose between competing inferences to find it, and the facts that comprise the error are irrefutable." *State v. Brown*, 310 Or 347, 355, 800 P2d 259 (1990). Generally, however,

> "[a] civil commitment has serious consequences, and the purpose of ORS 426.100(1) is to ensure that, before an allegedly mentally ill person suffers those consequences, he or she receives the benefit of a full and fair hearing; if a court does not provide a person with *all* of the information required by ORS 426.100(1), the person does not receive that benefit. Thus, failure to provide a person with all of the information required by ORS 426.100(1) constitutes an egregious error that justifies plain error review."

M. L. R., 256 Or App at 570-71 (emphasis added; citation omitted).

In *J. D. C.*, we considered whether the trial court's failure to advise the allegedly mentally ill person of all potential outcomes of the hearing was plainly erroneous, and concluded that that point was "open to reasonable debate." 226 Or App at 569. We explained:

> "On one hand, the statute directs that an allegedly mentally ill person be informed of the possible 'results' of the proceedings, and the statute provides only a handful of possibilities, which a trial court could easily communicate. On the other hand, the court is required only to give 'general

> and comprehensible information' about each item in the statute, and the sufficiency of the advice is evaluated as a whole ('taken together'). In general, the proceedings result in some form of commitment or some form of release, and the court's advice alerted appellant to those possibilities. Therefore, we cannot conclude that the trial court's failure to enumerate every possible result of appellant's hearing was an error 'not reasonably in dispute.'"

Id. at 569-70.

However, in light of developments in the law since *J. D. C.* was decided, we now conclude that the trial court's error in failing to advise appellant of all the possible results of the proceedings is not reasonably in dispute. Although the court is required only to give general and comprehensible information about the possible results of the hearing, that information must include all of those possible results, including voluntary treatment and conditional release, in order for the person alleged to have a mental illness to be able to adequately protect his or her interests and receive the benefit of a full and fair hearing.

In particular, in *M. T.*, we explained that the statutorily required "[i]nformation about the possible results of the proceedings is essential to an allegedly mentally ill person's ability to prepare for and participate in a commitment hearing." 244 Or App at 305. That information is

> "basic information about what is at stake for the person, information that will affect the person's assessment about how much, and in what manner, to prepare for the hearing. Importantly, it includes information about possible results—voluntary treatment and conditional release—that can be secured only with the cooperation of the allegedly mentally ill person. Without notice of those possible results, a person is not in a position to adequately protect his or her interests."

Id. And, as we acknowledged in *J. D. C.*, the trial court could easily communicate those enumerated possible results to a person alleged to have a mental illness.

In light of that discussion in *M. T.*, it is no longer reasonably in dispute that, under ORS 426.100(1), a trial court is required to advise a person alleged to have a mental

illness of all the possible results of the proceeding. Indeed, in *State v. P. M. W.*, 281 Or App 377, 381 P3d 1102 (2016), the appellant asserted that the trial court had committed plain error where, as here, it advised her of only two possible results of the proceedings. Citing our decision in *M. T.*, we reversed the judgment of commitment. Likewise, in this case, the trial court's failure to advise appellant of all of the possible results of the proceedings was plain error.

Furthermore, we reject the state's contention that we should not exercise our discretion to consider the error and, instead, conclude that it is appropriate to exercise our discretion to correct the trial court's plain error. *See Ailes v. Portland Meadows, Inc.*, 312 Or 376, 382 n 6, 823 P2d 956 (1991). As we have explained, "plain error review of violations of ORS 426.100(1) is justified by the nature of civil commitment proceedings, the relative interests of the parties in those proceedings, the gravity of the violation, and the ends of justice." *State v. S. J. F.*, 247 Or App 321, 325, 269 P3d 83 (2011). For those reasons, in this case we exercise our discretion to address and correct the trial court's plain error in failing to fully advise appellant of the possible results of the proceedings as required by ORS 426.100(1)(c).

Reversed.