

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 22, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0006

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN THE MATTER OF THE MENTAL
COMMITMENT OF MISTY K.:**

LINCOLN COUNTY,

**PETITIONER-
RESPONDENT,**

v.

MISTY K.,

**RESPONDENT-
APPELLANT.**

APPEAL from an order of the circuit court for Lincoln County: J.
MICHAEL NOLAN, Judge. *Affirmed.*

¶1 HOOVER, P.J. Misty K. appeals a WIS. STAT. ch. 51.¹ commitment order based upon a jury verdict. She argues she was denied her right to a fair trial when the County elicited testimony from a clinical psychologist regarding the probable length of her treatment. Misty also argues that she was denied her right to a five-sixths verdict when the court instructed the jury on alternative statutory standards of dangerousness, but did not require that at least five members of the jury agree on one theory in determining the verdict. This court concludes that Misty failed to preserve these issues for review. In addition, this court rejects Misty's argument that her claimed errors entitle her to a new trial in the interest of justice. *See* WIS. STAT. § 752.35. The order is therefore affirmed.

¶2 The jury heard evidence of a series of incidents during the spring of 1999 involving Misty and the City of Merrill Police Department. The record indicates the first contact occurred on May 19 when police were dispatched to Misty's apartment in response to a report of a woman screaming. Misty led the officer into her bedroom, where he found recently burned ashes on the carpet. The officer also noticed that all the windows in the apartment were broken and that the big screen television was smashed. Misty's explanation for the screaming was that she was having a nightmare. Misty asked the officers to search her residence as she thought someone might have been in her apartment. They did not find anyone in the apartment.

¹ Under WIS. STAT. § 51.20(1)(a) 1 and 2, a person can be involuntarily committed for treatment if the individual is found to be mentally ill, a proper subject for treatment and dangerous. All statutory references are to the 1997-98 version unless otherwise noted.

¶3 On June 3, an officer responded to a report that Misty's vehicle was parked in an alley. The officer saw a stun gun on the dash of her vehicle. When questioned, Misty stated that she used the gun for protection.

¶4 On June 10, Misty alleged that she had been assaulted ten to fifteen times a day from December 1998 until June 10, 1999. Misty stated she was unable to see her assailants, but could detect their presence and movement when she used electrical means, such as a stun gun or electrical fire. After her stun gun was confiscated, she believed that igniting hair spray deterred her claimed attackers.

¶5 The next day, Misty again went to the police department. She claimed that she had heard chirping noises outside her bedroom window and that she was able to interpret the noises such that she could name her attackers. Officers searched the apartment, but they did not see any signs of forced entry or find any attackers.

¶6 On June 21, officers were again dispatched to Misty's apartment. She stated that when she awoke, she felt as if she was being assaulted. Misty could not identify who was assaulting her. When officers searched the residence, they did not find any evidence of an assault or an intruder.

¶7 Medical experts testified to Misty's mental condition. Dr. Sheldon Schooler, a family physician, believed Misty suffered from delusions that she was being assaulted. Dr. Chandra Shekar, a psychiatrist, testified that Misty had a bipolar disorder with manic episodes and psychotic symptoms. Shekar testified that the illness posed a risk of danger to Misty and others living in the same apartment building. Clinical psychologist Dr. Michael Galli also concluded that Misty suffered a delusional disorder. He believed Misty's use of fire and

electricity to ward off her imagined attackers posed a threat to herself and anyone who may have been living with her. In Galli's opinion, Misty's delusions would continue without the use of medication.

¶8 The jury reached a unanimous verdict finding that all three of the required elements for a commitment were proven by clear and convincing evidence. Specifically, the jury found that Misty was (1) mentally ill; (2) dangerous to herself or others; and (3) a proper subject for treatment. The court entered an order based on the jury's verdict, committing Misty involuntarily to the Community Board for Lincoln County based on the verdict. It is from that order that Misty appeals.

¶9 Misty argues that she was denied her right to a fair trial when the government elicited testimony from Galli, over her objection, indicating the probable length of her treatment. Misty argues that Galli's testimony may have encouraged the jury to render its verdict on an improper basis. The testimony was as follows:

Q: Given what you know, what would you anticipate the course of treatment to be?

A: Starting someone with delusional disorder on the appropriate medicine usually leads fairly quickly to some improvement.

I would guess that *within a week or so* she would be sufficiently stabilized on medication that they could begin either moving her back home, back out of the hospital or to a transitional living arrangement for another week or so (Emphasis added.)

The trial court sustained Misty's counsel's objection to "this line of questioning," but indicated that it would "allow it only as far as [it goes to] the fact that it is a treatable illness."

¶10 Misty complains that this testimony encouraged the jury to reach its verdict based on her anticipated brief commitment, rather than on whether she was a danger to herself or to others. Relying on *Delvaux v. Vanden Langenberg*, 130 Wis. 2d 464, 482, 387 N.W.2d 751 (1986) (it is improper to inform jury of effect of its verdict), Misty contends that determining the verdict on the length or duration of the treatment is an improper basis on which to render a verdict.

¶11 Although Misty did object, she did not specifically state the grounds of her objection. To preserve the issue of improperly admitted evidence, it is necessary to make a timely objection stating a specific ground. *See* WIS. STAT. § 901.03(1)(a) (If not apparent from context, specific ground of objection must be stated). By failing to alert the trial court to the specific basis for her objection, she failed to preserve the issue for appeal.

¶12 In addition, we reject Misty's assertion that Galli's testimony violates the prohibition against informing the jury about the effect of its verdict. Misty relies on *Delvaux* for her contention that the jury had no right to be informed of the effect of the verdict because it is the court's job to apply the relevant law to the facts of the case. *See id.* at 482-83. There is nothing improper, however, in asking Galli about the probable result of Misty's treatment. In order for Misty to be committed, the County must prove that her mental illness is treatable. *See* WIS. STAT. § 51.20(1)(a)1. Galli's testimony permitted the jury and the court to determine that Misty's condition was treatable and that she should be committed in order to receive such treatment. This court concludes that the *Delvaux* analysis is not applicable and that Galli's testimony was properly admitted.

¶13 Misty further claims that the County’s trial counsel engaged in prosecutorial misconduct by deliberately asking an open-ended question, thus inviting in improper evidence. This court disagrees. The question regarding the anticipated course of treatment properly asked for relevant evidence on direct examination; there was no prosecutorial misconduct.

¶14 Finally, even if Galli’s testimony was potentially erroneous, the verdict should not be overturned for that reason alone. Brief testimonial references to improper considerations may be rendered harmless by limiting jury instructions. *See In re D.S.P.*, 157 Wis. 2d 106, 117, 458 N.W.2d 823 (Ct. App. 1990). In this case, the court instructed the jurors “not to consider or concern yourselves with the duration of custody or any treatment that the Court might order as a result of your answers to the questions of the special verdict.” It is presumed that possible prejudice is “erased from the jury’s collective mind when instructions are properly given by the court.” *Id.* Because of the court’s instructions, Galli’s testimony was presumably not prejudicial.

¶15 Next, Misty contends that she was denied her right to a five-sixths verdict when the court did not require that at least five members of the jury agree on one particular theory of dangerousness. This court rejects her argument.

¶16 A verdict for involuntary commitment must be agreed upon by five-sixths of the jury. *See* WIS. STAT. § 51.20(11)(b). The jury’s verdict in this case was unanimous. Nonetheless, Misty asserts that she was deprived of her right to a five-sixths verdict because the court used a single verdict question. This question covered various dangerousness theories. The record, however, fails to reveal an objection to the form of the verdict. Under WIS. STAT. § 805.13(3), the “[f]ailure

to object at the conference constitutes a waiver of any error in the proposed instructions or verdict.” As a result, Misty has waived this issue. *See id.*

¶17 Even if Misty had not waived her right to raise this issue on appeal, the trial court did not err in drafting the special verdict. Misty’s complaint is that the special verdict contained only one question about the dangerousness element. It did not require that at least five members of the jury agree on one theory of dangerousness. Instead, the court instructed the jury regarding three different theories of dangerousness, thus allowing some jurors to find dangerousness by one theory and other jurors to find dangerousness by another. Misty argues that in order for her right to a five-sixths verdict to be upheld, the verdict must show that all five jurors agreed on the same theory.

¶18 To support her contention, Misty relies on *State v. Aimee M.*, 194 Wis. 2d 282, 533 N.W.2d 812 (1995). The *Aimee* case held that in cases involving children in need of protection or services (CHIPS), the special verdict used must contain a separate question on each statutory theory establishing juvenile court jurisdiction under WIS. STAT. § 48.13. *See id.* at 300-01. Our supreme court held that when § 48.13 was read as a part of the whole statutory scheme of the Children’s Code, it reflected a legislative intent to permit a court to exercise jurisdiction over a child only after a statutory basis for jurisdiction was proven. *See id.* at 297. The statutory theories under which a child may be adjudicated in need of court services are numerous and discrete. *See* WIS. STAT. § 48.13. For instance under, § 48.13(1), a child falls within the court’s jurisdiction if he or she is without a parent or guardian. Under § 48.13(8), however, the court is granted jurisdiction if a child receives inadequate care while the parent is missing, incarcerated, hospitalized or institutionalized. Thus, each distinct basis for adjudicating a child in need of protection or services has its own elements by

which the court's jurisdiction is established. *Aimee*, however, is distinguishable from the present case.

¶19 The legislative construction of WIS. STAT. ch. 51, the Mental Health Act, differs from that of the Children's Code. Under WIS. STAT. § 51.20(1)(a), there is only one basis for involuntarily committing a subject, involving three elements. The County must prove that the subject is mentally ill, dangerous to herself or others and the proper subject for treatment. See WIS. STAT. § 51.20(1)(a)1 and 2. The dangerousness element may be proven by presenting evidence of five types of behavior. See WIS. STAT. § 51.20(1)(a)2. It is the subject's dangerousness that is an element, and not each individual manner in which a person may manifest or present the danger. To hold that there are alternative elements of dangerousness is tantamount to suggesting that there are different grounds for ordering a ch. 51 commitment. Such an interpretation is contrary to 51.20(1)(a)'s plain language providing for only three elements.

¶20 By analogy, the courts have held that while the jury must unanimously agree that a defendant committed each element of the charged crime, there is no need for unanimity with respect to the underlying facts which prove any of several possible means of satisfying an element. See *Holland v. State*, 91 Wis. 2d 134, 143, 280 N.W.2d 288 (1979). In the present case, the jury unanimously agreed that the defendant was a danger to herself or others. It is not necessary for the jury to unanimously agree on which theory of dangerousness it used to determine that Misty was, in fact, dangerous.

¶21 In conclusion, this court holds that Misty waived her claims of error and the record fails to support the argument that she is entitled to a new trial in the interest of justice. In any event, admission of Galli's testimony was not error, and

any prejudicial effect was rendered harmless by admonitory jury instructions. *See In re D.S.P.*, 157 Wis. 2d at 117. The record also does not support the contention that Misty was denied her right to a five-sixths verdict when the court instructed the jury on several alternative statutory standards of dangerousness, but did not require that at least five members of the jury agree on one particular theory in determining the verdict. The trial court's use of a single verdict question addressed the question of dangerousness sufficiently to cover all material issues of the dangerousness element. This court concludes that the interests of justice do not require a new trial.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. § 809.23(1)(b)4.

