COURT OF APPEALS
DECISION
DATED AND FILED

January 17, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

Appeal No. 2007AP2011 **Cir. Ct. No. 2007ME14**

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

IN THE MATTER OF THE MENTAL COMMITMENT OF JENNIFER R.M.:

JACKSON COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JENNIFER R. M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Jackson County: GERALD W. LAABS, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Jennifer R.M. appeals an order committing her under WIS. STAT. ch. 51 after a jury trial. Jennifer R.M. argues that the circuit court erred by publishing the trial exhibits to the jury because those exhibits contained inadmissible, prejudicial information. She also argues that the special verdict question pertaining to dangerousness violated her right to due process because the question did not require five-sixths of the jurors to agree whether she was dangerous to herself or whether she was dangerous to others. We affirm the circuit court's order.

¶2 At trial, the witnesses included the police officer who responded to a mental health complaint about Jennifer R.M. and placed her under an emergency detention, a psychologist who evaluated Jennifer R.M., and a psychiatrist who also evaluated Jennifer R.M. The exhibits included the police officer's written report with attachments, the psychologist's written report, and two written reports by the psychiatrist. As part of its special verdict, the jury answered "Yes" to the following question: "Is Jennifer [R.M.] dangerous to herself or to others?"

¶3 For ease of discussion, we begin with the five-sixths issue because our analysis of that issue encompasses part of Jennifer R.M.'s argument regarding publication of the exhibits. We then address Jennifer R.M.'s remaining arguments regarding the exhibits.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Five-Sixths Issue

¶4 WISCONSIN STAT. ch. 51 sets forth several specific grounds on which a finding of dangerousness may be based. *See* WIS. STAT. § 51.20(1)(a)2. Pertinent here, those grounds include that a person is dangerous to herself under § 51.20(1)(a)2.a. and that a person is dangerous to others under § 51.20(1)(a)2.b.

¶5 In arguing that the special verdict violated her right to due process, Jennifer R.M. asserts that her situation is analogous to ***State v. Aimee M.***, 194 Wis. 2d 282, 533 N.W.2d 812 (1995), a case in which the supreme court held that circuit courts must submit a separate verdict question for each jurisdictional basis alleged in a CHIPS petition. ***Id.*** at 301. Jennifer R.M. also contends that a "specific finding of dangerousness" is essential to the constitutionality of WIS. STAT. ch. 51 under ***Lessard v. Schmidt***, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473 (1974), *judgment reentered*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded*, 421 U.S. 957 (1975), *reinstated*, 413 F. Supp. 1318 (E.D. Wis. 1976).

¶6 We will assume without deciding that Jennifer R.M. is correct that it was error to combine two grounds for dangerousness in a single special verdict question. We conclude, however, that any such error here was harmless. *See* ***Jackson v. State***, 92 Wis. 2d 1, 11-12, 284 N.W.2d 685 (Ct. App. 1979) (applying harmless error rule to violation of criminal defendant's right to unanimous jury verdict).[2]

[2] The supreme court has formulated the harmless error test in a variety of ways, but we need not list them all here. *See* ***State v. Anderson***, 2006 WI 77, ¶114, 291 Wis. 2d 673, 717 N.W.2d 74; *see also* ***State v. Mayo***, 2007 WI 78, ¶47, 301 Wis. 2d 642, 734 N.W.2d 115. Suffice (continued)

¶7 As we discuss below, based on the instructions the jury received and the evidence before the jury, no juror would have found that Jennifer R.M. was a danger to others without also finding that she was a danger to herself. It follows that all of the jurors must have agreed that Jennifer R.M. was a danger to herself.

¶8 The circuit court instructed the jury that it should find that Jennifer R.M. was dangerous to herself if she evidenced "a substantial probability of physical harm to herself as manifested by evidence o[f] threats of or attempts at suicide or serious bodily harm." The court also instructed the jury that it should find that Jennifer R.M. was dangerous to others if she evidenced "a substantial probability of physical harm to other individuals as manifested by evidence o[f] homicidal or other violent behavior, or by evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them as evidenced by an overt act or attempt or threat to do serious physical harm." We must presume that the jury followed these instructions. *See* ***State v. Deer***, 125 Wis. 2d 357, 364, 372 N.W.2d 176 (Ct. App. 1985) ("It is presumed that juries look to the plain meaning of the jury instructions and once instructed follow these instructions.").

¶9 The jury heard extensive testimony that Jennifer R.M. was dangerous to herself because she had threatened to commit suicide, and only minimal testimony that Jennifer R.M. might harm others. We describe that testimony in the following paragraphs.

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it to say that, whichever formulation we apply, the asserted error in Jennifer R.M.'s case was harmless.

¶10 The police officer who initiated Jennifer R.M.'s commitment testified that Jennifer R.M. admitted to him that she had threatened to kill herself the day before he made contact. When the officer asked Jennifer R.M. if she was still considering killing herself, she said she did not want to answer because she did not want to go to the psych ward. The officer also testified that, at one point, Jennifer R.M. admitted to him that she was thinking of harming someone else who she would not name.

¶11 The psychologist testified as follows about his interview of Jennifer R.M.:

> And at the time of the interview, which I believe was several days after she was initially hospitalized, she told me that she indeed was having more intense suicidal thoughts than she had when she was first admitted.
>
> And she also told me that if she—if she were to return to the community, she felt that she might, in fact, take her life.

The psychologist opined that, if her treatment were withdrawn, Jennifer R.M. might go into a "downward spiral" "possibly leading to more suicidal ideation and actually suicidal behavior." When asked to give his conclusion on whether Jennifer R.M. would be a substantial risk of harm to herself or to others, the psychologist answered: "Yes, I do feel it would be substantial. There would be the potential of substantial risk of harm *to herself*." (Emphasis added.)

¶12 The psychiatrist testified that Jennifer R.M. was subject to WIS. STAT. ch. 51 and hospitalization based on suicidal incidents, and that Jennifer R.M. told her friend that she wanted to kill herself. The psychiatrist further testified that Jennifer R.M. "talked about thoughts of suicide.... She [Jennifer R.M.] stated that … quote, I feel like killing me and maybe everyone will be

happy, end quote." When asked her professional opinion whether Jennifer R.M. was a danger to herself or others, the psychiatrist answered: "I do believe she's a danger if she does not receive continued treatment *because of the risk of suicidal thoughts returning*, and she has a temper problem as well which is an issue." (Emphasis added.) The psychiatrist further testified that, at the time she was admitted to the hospital, Jennifer R.M. was a substantial risk of harm to herself.

¶13 Notably, neither the psychologist nor the psychiatrist offered any specific opinion testimony that Jennifer R.M. was a danger to others. The closest either expert came to such testimony was the psychiatrist's testimony that Jennifer R.M. "has a temper problem as well which is an issue."

¶14 If anything, the expert testimony tended to show that Jennifer R.M. was *not* a danger to others. The psychologist testified that Jennifer R.M. gave no indication of homicidal thoughts. Asked to elaborate, he explained: "Well, she did not say anything to me that would indicate that she is harboring thoughts of harming other people, you know, or having any aggressive—or preoccupation with aggressive impulses or thoughts." The psychologist further testified that his report stated that Jennifer R.M. did not present with homicidal or violent tendencies. Similarly, the psychiatrist agreed that "no homicidal ideation was present at all" and explained that "no homicidal ideation" means "no hurting or killing anyone."

¶15 If our analysis stopped here, it would be clear that no juror would have concluded that Jennifer R.M. was dangerous to others and, therefore, that the jurors all necessarily agreed that Jennifer R.M. was a danger to herself. It is at this point in our discussion, however, that part of Jennifer R.M.'s argument that the

circuit court erred in publishing the exhibits to the jury becomes relevant. She points to the following information contained in the exhibits:

1. In the police officer's report, a third-party statement that Jennifer R.M. was "out of control with her emotions" and had "raised her hand" at the person making the statement.

2. The police officer's statement in his narrative that, when he took Jennifer R.M. into custody, she became very upset, screamed, and "at one point stated that she wanted to hurt me."

3. A sentence in one of the psychiatrist's reports that "if [Jennifer R.M.] returns to an unstructured living situation these symptoms will recur and she will again be suicidal and at risk for hurting others."

Jennifer R.M. argues that this evidence may have been seen by jurors as the "missing proof" of dangerousness to others.

¶16 Thus, Jennifer R.M. contends, it may be that one or more of the jurors found that she was dangerous only to herself while at the same time one or more of the remaining jurors found that she was dangerous only to others. We disagree.

¶17 Even with the evidence from the exhibits in the mix, no reasonable juror could have found that Jennifer R.M. was dangerous to others without also finding that she was dangerous to herself. If any juror believed that Jennifer R.M. was dangerous to others, that belief would have been based on the police officer's testimony that Jennifer R.M. admitted that she wanted to hurt someone else, the officer's statement that Jennifer R.M. at one point stated that she wanted to hurt the officer, and the psychiatrist's statement that Jennifer R.M. might be at risk for hurting others. Jennifer R.M. offers no logical reason why any juror would have

believed these statements but not believed the more numerous assertions of these same witnesses evincing the danger Jennifer R.M. posed to herself.

¶18 We conclude that it is not plausible that any of the jurors found that Jennifer R.M. was dangerous to others without also finding that she was dangerous to herself. Accordingly, the alleged error in the form of the special verdict was harmless.

Jennifer R.M.'s Remaining Arguments Regarding The Exhibits

¶19 Jennifer R.M. asserts that two additional pieces of information in the exhibits resulted in prejudicial error.

¶20 First, Jennifer R.M. points to a statement attached to the police officer's report. In this statement, Jennifer R.M. describes having seen her younger sister, then age 15, having sexual intercourse with an 18-year-old male. Initially, in briefing, Jennifer R.M.'s counsel misread the statement and discussed it as being a description by a third party of Jennifer R.M. having sex with the male. In her reply brief, counsel acknowledges that the Department's response brief correctly summarizes the statement as one made by Jennifer R.M. about her sister. Counsel contends that whether the jurors properly read the statement, or misread it as counsel did initially, the jurors may have been impermissibly motivated to take action to protect Jennifer R.M. from an undesirable living situation or the "arguably destructive, but not legally dangerous behavior of having intercourse and risking pregnancy at a young age," particularly in light of an additional statement by the psychologist that Jennifer R.M. "expresses desire to become pregnant and raise a child" and "refuses to use precautions to prevent pregnancy."

¶21 Second, Jennifer R.M.'s counsel complains of a portion of one of the psychiatrist's reports in which the psychiatrist addressed placement issues. Among other things, the psychiatrist referred to past sexual abuse and concluded that Jennifer R.M.'s return to her family's or sister's homes would not provide adequate safety. Jennifer R.M. argues that the jurors could have improperly relied on this information, basing their verdict on a "general concern" for her safety, rather than the required statutory ground for dangerousness.

¶22 We agree with Jennifer R.M.'s counsel that both pieces of information might have given some jurors an additional reason to think that Jennifer R.M. was in need of a protective placement. But we can say with confidence that the jurors would have found that Jennifer R.M. was a danger to herself even if they had not been exposed to this information. As recounted in the first section of this decision, the focus of the trial was the extensive evidence that Jennifer R.M. was suicidal. We conclude that the admission of this additional information, if error, was harmless.

By the Court.—Order affirmed.

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