

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 2, 2014

Diane M. Fremgen
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. 2014AP955

Cir. Ct. No. 2013ME260

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN THE MATTER OF THE MENTAL COMMITMENT OF ZACHARY W.:

MARATHON COUNTY,

PETITIONER-RESPONDENT,

v.

ZACHARY W.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County:
JILL N. FALSTAD, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Zachary W. appeals a WIS. STAT. ch. 51 involuntary commitment order, arguing the circuit court erroneously instructed the jury to consider multiple definitions of the term “drug.” We affirm.

BACKGROUND

¶2 On August 14, 2013, Zachary’s father, stepmother, and aunt petitioned the Marathon County Circuit Court for examination under WIS. STAT. ch. 51, alleging Zachary was drug dependent, dangerous to himself, and a proper subject for treatment because he was huffing gasoline on a consistent basis. The petition alleged Zachary’s parents had found him unconscious on their property several times in the month prior to filing the petition, that Zachary was stealing gasoline from any source available, and that he had been living in the woods after “being removed from his parents’ house.” The circuit court ordered a hearing and determined there was probable cause to believe the allegations of the petition. It set a date for a final hearing and appointed two physicians to examine Zachary.

¶3 Zachary’s father, stepmother, aunt, and three physicians testified at his jury trial. Keith W., Zachary’s father, testified Zachary had been huffing gasoline for two to three years, on and off. He described finding Zachary “in the trim shed with a pop bottle half full of gas, passed out, with his eyes rolled back, white, in his head.” Both Keith and Laurie W., Zachary’s stepmother, described their efforts to keep gasoline away from Zachary: they had resorted to locking it up, hiding it, and storing it in their bedroom closet, to no avail.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶4 To involuntarily commit Zachary under WIS. STAT. ch. 51, the County needed to prove by clear and convincing evidence that Zachary was drug-dependent, dangerous to himself or others, and a proper subject for treatment. *See* WIS. STAT. §§ 51.20(1)(a), 51.20(13)(e). Relevant to this appeal are the jury instructions and evidence pertaining to the drug dependency requirement. At trial, both parties elicited testimony regarding whether gasoline is a drug—a term undefined in chapter 51.

¶5 In examining the physicians, Zachary focused on a definition of “drug” taken from WIS. STAT. § 450.01(10):²

(10) “Drug” means:

(a) Any substance recognized as a drug in the official U.S. pharmacopoeia and national formulary or official homeopathic pharmacopoeia of the United States or any supplement to either of them;

(b) Any substance intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease or other conditions in persons or other animals;

(c) Any substance, other than a device or food, intended to affect the structure or any function of the body of persons or other animals; or

(d) Any substance intended for use as a component of any article specified in pars. (a) to (c) but does not include gases or devices or articles intended for use or consumption in or for mechanical, industrial, manufacturing or scientific applications or purposes.

Zachary also used the definition of drug from WIS. STAT. § 961.01(11), which substantially mirrors that in WIS. STAT. ch. 450.³ In contrast, the County used the

² WISCONSIN STAT. ch. 450 is titled, “PHARMACY EXAMINING BOARD.”

³ WISCONSIN STAT. ch. 961 is called the “UNIFORM CONTROLLED SUBSTANCES ACT,” and section 961.01(11) provides:

(continued)

third definition of drug from the Merriam-Webster dictionary where drug is defined as “something and often an illegal substance that causes addiction, habituation, or a marked change in consciousness.”

¶6 Doctor Sheldon Schooler, one of the two court-appointed physicians who had examined Zachary, opined that Zachary did not meet the definition of drug-dependent under Wisconsin law.⁴ Schooler explained, “It’s my opinion that there is no substance of gasoline that can be classified as a drug. To the best of my knowledge, there is no substance contained in gasoline that has ever been proven to provide any therapeutic benefit either to humans or to animals.”

¶7 Doctor John Coates, the other court-appointed physician, was asked whether Zachary was using gasoline as a drug. Coates replied, “Yeah. He’s basically displacing the oxygen in his lungs with the fumes of gasoline. So, I

(a) “Drug” means any of the following:

A substance recognized as a drug in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States or official National Formulary or any supplement to any of them.

A substance intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in humans or animals.

A substance other than food intended to affect the structure or any function of the body of humans or animals.

A substance intended for use as a component of any article specified in subd. 1., 2., or 3.

“Drug” does not include devices or their components, parts or accessories.

⁴ While “drug” is undefined by WIS. STAT. ch. 51, “drug-dependent” is defined in WIS. STAT. § 51.01(8) as “a person who uses one or more drugs to the extent that the person’s health is substantially impaired or his or her social or economic functioning is substantially disrupted.”

mean, gasoline is a drug, it's a chemical.” Later, on cross-examination, Coates testified,

You are asking me, is gasoline a drug? And I say, well, it's not a drug. It's not one of the FDA approved medications you use to treat anything. So, I guess if you're using that term “drug,” it's a chemical. It's a chemical substance and that's what drugs are.

During redirect examination, the County asked Coates whether gasoline would meet the Merriam-Webster's dictionary definition of drug, “as something, and often an illegal substance that causes addiction, habituation, or a marked change in consciousness.” Coates answered, “[t]he way he was using it then, yes. That would meet the definition.”

¶8 At the conclusion of testimony, the court excused the jury and allowed the parties to argue about the definition of “drug.” Zachary argued the court ought to use one of the definitions found in other chapters of the Wisconsin Statutes to instruct the jury. The County acknowledged “that Chapter 450 of the Wisconsin Statutes, the definition of drug contained in that statute does not – gasoline is not included in that definition.” Nevertheless, it argued neither of the statutory definitions Zachary offered applied to the facts of his particular situation. Instead, the County asserted the Merriam-Webster dictionary definition would better assist the trier of fact.

¶9 The court decided to allow both parties' definitions in, “for whatever use [the jury] may think it might be beneficial to them.” The court reasoned, “Because based on the testimony here, where he loses consciousness which would be a lack of oxygen to the brain, that would be affecting his bodily function. Consciousness if nothing else. Gasoline does have some [e]ffect on the body.” The court said it would instruct the jury that when there is a legal definition in the

statutes, that definition is prioritized. Upon the jury's return, the court gave the following instruction:

[I]n the law, legal terms are to be given the meaning set forth in the statute. Chapter 51, however, does not define the meaning of the term "drug." Accordingly, the court has permitted the introduction of a definition contained elsewhere in the statutes and has also taken judicial notice of another given in the Merriam-Webster dictionary. It's basically up to you to consider those and the arguments of attorneys and the evidence in deciding this case.

¶10 In its closing, the County argued, "What [WIS. STAT. ch. 51] does define is the term 'drug-dependent,' ... mean[ing] a person that uses one or more drugs to the extent that the person's health is substantially impaired, or his or her economic functioning is substantially disrupted." The County claimed the definitions Zachary offered were not tailored to the purpose of chapter 51, and were inapplicable to Zachary's situation. The County urged the jury to think about the way Zachary was using gasoline. It argued the evidence showed Zachary was using gasoline "to create marked change in [his] consciousness."

¶11 Zachary attacked the County's use of the Merriam-Webster dictionary definition, arguing the instant proceeding was a legal one, and a statutory definition ought to be used. He argued gasoline was a chemical, and not a drug, as statutorily defined. Zachary's counsel emphasized that Dr. Coates and the County had agreed that gasoline did not fit the definition of drug taken from WIS. STAT. ch. 450. Zachary asserted there was no testimony or evidence that gasoline was a "substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease," nor did it meet the other prongs of the definition of drug from chapter 450.

¶12 At the conclusion of the trial, the jury found Zachary was drug-dependent, dangerous to himself, and a proper subject for treatment. The circuit court ordered involuntary commitment, and Zachary now appeals.

DISCUSSION

¶13 Zachary argues the circuit court erroneously instructed the jury by allowing it to consider multiple definitions of the term “drug.” Zachary asserts because WIS. STAT. ch. 51 does not define “drug,” it is unclear whether he could be found drug-dependent for inhaling gasoline. He argues the court’s failure to construct a single definition allowed the jury to decide a question of law and “pick whatever definition of drug it liked and make the commitment decision accordingly.”

¶14 Circuit courts have broad discretion when it comes to instructing juries. We will affirm a circuit court’s jury instructions as “long as the selected instructions fully and fairly inform the jury of the relevant law,” *Green v. Smith & Nephew AHP, Inc.*, 2001 WI 109, ¶25, 245 Wis. 2d 772, 629 N.W.2d 727, and “assist the jury in making a reasonable analysis of the evidence.” *State v. Fonte*, 2005 WI 77, ¶9, 281 Wis. 2d 654, 698 N.W.2d 594 (citation omitted). If the overall meaning communicated by the instructions correctly states the law, we will not reverse. *Fischer v. Ganju*, 168 Wis. 2d 834, 850, 485 N.W.2d 10 (1992).

¶15 We independently review challenges to jury instructions that involve the construction of statutory terms. *State v. Hubbard*, 2008 WI 92, ¶22, 313 Wis. 2d 1, 752 N.W.2d 839. When interpreting a statute, we begin with the language of the statute and give it its common, ordinary, and accepted meaning, except that technical or specially defined words are given their technical or special definitions. *State v. Harmon*, 2006 WI App 214, ¶10, 296 Wis. 2d 861, 723

N.W.2d 732 (citations omitted). Nontechnical words in statutes are given their ordinary and accepted meanings when not specifically defined, and those definitions may properly be ascertained from a recognized dictionary. *State v. Morse*, 126 Wis. 2d 1, 4, 374 N.W.2d 388 (Ct. App. 1985). We examine the context in which statutory language is used, and we interpret it reasonably to avoid absurd or unreasonable results. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. We also consider the scope and purpose of the statute. *Id.*, ¶48.

¶16 The circuit court observed WIS. STAT. ch. 51’s legislative policy referred to the prevention of drug abuse. That policy employs broad language in describing its intention to assure “the provision of a full range of treatment and rehabilitation services ... for all mental disorders and developmental disabilities and for mental illness, alcoholism and other drug abuse.” See WIS. STAT. § 51.001. The court also noted that while chapter 51 does not define “drug,” it does define “drug-dependent.” As mentioned above, WIS. STAT. § 51.01(8) provides, and the jury was instructed, that, “‘Drug dependent’ means a person who uses one or more drugs to the extent that the person’s health is substantially impaired or his or her social or economic functioning is substantially disrupted.”

¶17 The jury heard testimony that Zachary had been huffing gasoline for two to three years; that he had been found, on more than one occasion, passed out with gasoline nearby; that he was not employed; that he was aware of the health consequences of huffing; and that being kicked out of the house did not inspire a change in his behavior. The evidence at trial overwhelmingly indicated Zachary was using gasoline in a manner consistent with the definition of someone “drug-dependent.” This court is satisfied the circuit court’s instruction was tailored to

the evidence presented at trial and consistent with the purpose of WIS. STAT. ch. 51.

¶18 Zachary argues the court should have instructed the jury only with a definition constructed from the two statutory ones he offered because those definitions “represent[ed] the legal and commonsense definition of the term whereas the county’s definition was not a legal or prevalent commonsense definition and its use in WIS. STAT. ch. 51 proceedings would lead to absurd results.” We reject that argument for several reasons.

¶19 First, Zachary provides no authority to support his proposition that the court was required to construct a single definition or that submitting several definitions for the jury’s consideration was erroneous. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may decline to consider arguments that are not supported by legal authority). He provides ample authority regarding the standard of review and the process of statutory interpretation; what he fails to supply is any authority for his specific contention that the court was required to construct a single definition when none was provided in the chapter at issue.

¶20 Second, even assuming, without deciding, that the court erred in submitting multiple definitions to the jury, the question is then whether the alleged error was prejudicial and necessitates a new trial. A jury instruction error is prejudicial if it appears that the result would have been different had the error not occurred or if the erroneous instruction probably misled the jury. *Estate of Plautz v. Time Ins. Co.*, 189 Wis. 2d 136, 153, 525 N.W.2d 342 (Ct. App. 1994) (citation omitted). We see no prejudice here. If giving multiple definitions for the jury to consider was, in fact, an error, there is nonetheless no basis for a new trial because

any error actually benefitted Zachary. If the court was to instruct on a single definition, it should have used the broader Merriam-Webster definition. As explained in the remaining portion of this opinion, a narrow definition of “drug” does not fit the scope and purpose of WIS. STAT. ch. 51. When a word is used in a statute but is not specifically defined, the common and approved usage of the word or phrase applies. *Propp v. Sauk Cnty. Bd. of Adjustment*, 2010 WI App 25, ¶16, 323 Wis. 2d 495, 779 N.W.2d 705; *see also Sullivan Bros., Inc. v. State Bank of Union Grove*, 107 Wis. 2d 641, 646, 321 N.W.2d 545 (Ct. App. 1982). Because chapter 51 does not define “drug,” it was appropriate to consult a dictionary for a definition that contained the common and approved usage of the word in light of the statute. *Propp*, 323 Wis. 2d 495, ¶16; *see also Morse*, 126 Wis. 2d 1, 4.

¶21 The circuit court’s decision to provide the jury with a broader dictionary definition of the term “drug” comports with the legislature’s clear intent to secure treatment for people abusing drugs to the point of endangering themselves or others. The County argues, and we agree, in light of the evidence presented at trial, that its Merriam-Webster definition provides a fair, plain, and reasonable meaning of “drug,” appropriate in the treatment-oriented context of WIS. STAT. ch. 51. In contrast, as the County pointed out, Zachary’s statutory definitions come from regulation-oriented chapters that were not enacted for a purpose relating to treatment. The County’s definition assisted the jury in making a reasonable analysis of the evidence, *see Fonte*, 281 Wis. 2d 654, ¶9, by providing a definition of drug that reflected its common, ordinary, and accepted meaning—a meaning reflecting the context and the purpose of chapter 51. *See Kalal*, 271 Wis. 2d 633, ¶46.

¶22 By submitting several definitions for the jury to consider in light of the evidence and their own commonsense, Zachary was given the benefit of the

jury's consideration of its narrow, technical definitions of "drug." Whether giving multiple definitions was error, that decision did not result in prejudice that could justify a new trial. The result would not have been different had the circuit court instructed the jury on a single definition of "drug," because, had it done so, it should have used the Merriam-Webster definition.

¶23 Lastly, Zachary cautions that the "overbroad" Merriam-Webster definition will lead to absurd results in the form of WIS. STAT. ch. 51 commitments for the abuse of any substance with the potential to be addictive—substances such as caffeine, nicotine, and sugar. This contention ignores the safeguards securely in place in chapter 51. Before a person can be involuntarily committed for treatment for a developmental disability, alcohol or drug abuse, or for mental illness, chapter 51 requires a rigorous process to thoroughly ascertain whether involuntary commitment is necessary. *See* WIS. STAT. § 51.20. The process includes a three-party petition for examination alleging personal knowledge of specific harmful behaviors that need to be addressed, a hearing to verify the allegations, examination by two court-appointed physicians, and a final hearing on the allegations with proof by clear and convincing evidence that a person is dangerous to him or herself or others and is a proper subject for treatment. *See* WIS. STAT. §§ 51.20(1)(a), 51.20(7), 51.20(9), 51.20(10), 51.20(13)(e). Abusing one's body and mind by inhaling gasoline vapors to the point of unconsciousness cannot seriously be compared to someone "addicted" to sugar, nicotine, or caffeine.

¶24 The circuit court's jury instruction on the word "drug" reflected WIS. STAT. ch. 51's intention to address real-life substance abuse. Providing a narrow definition of "drug" in accordance with the strict regulatory sense of the word would not have fit the evidence presented at Zachary's trial, nor the overarching

purpose of chapter 51. The circuit court's jury instructions fully and fairly informed the jury of the law and assisted the jury in making a reasonable analysis of the evidence; therefore, there are no grounds for reversal.

By the Court.—Order affirmed.

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

