COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1325 **Cir. Ct. No. 2017ME29**

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

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

CHIPPEWA COUNTY,

PETITIONER-RESPONDENT,

V.

M. M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Chippewa County: STEVEN H. GIBBS, Judge. *Reversed.*

¶1 STARK, P.J.[1] M.M. appeals an order, entered on a jury verdict, for involuntary commitment pursuant to WIS. STAT. ch. 51. He contends that

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Chippewa County failed to present sufficient evidence to prove he was dangerous to himself pursuant to WIS. STAT. § 51.20(1)(a)2.c. We agree and reverse the order.

BACKGROUND

¶2 M.M. was taken into custody under a statement of emergency detention on March 2, 2017. At the March 16, 2017 jury trial, M.M.'s mother testified that, at some point prior to his emergency detention, M.M. was injured while working and began to experience physical problems and pain. M.M. began living with his mother because he needed transportation to his employment and medical appointments. M.M. stopped working after Christmas, and he began to experience progressively worse pain and developed insomnia. M.M.'s mother testified that in January, M.M. accused other persons living in M.M.'s mother's home of using drugs and of poisoning him.

¶3 In February, M.M.'s mother observed that her son's condition had worsened and that he became agitated. M.M. also isolated himself in his room due to his continued fears he was being poisoned. On March 2, M.M. called 911 and was taken to an emergency room after he claimed to have been poisoned. After it was determined the poisoning claims were unsubstantiated, M.M was referred to "behavioral health" and ultimately detained. M.M.'s mother testified that she would help him access services in the community if he was not committed. She also testified that M.M. told her before the hearing that he "would never hurt [her] or anyone."

¶4 The County called three doctors to testify at the trial.[2] Doctor Michael Lace, a psychologist appointed to examine M.M., testified that he diagnosed M.M. with a treatable mental illness—specifically, "either a severe or acute mood episode exacerbation or a manic episode or a brief psychotic reaction." During the examination, Lace described M.M. as being in an agitated mood with disorganized, profane, and "very, very, very loud" speech. In addition, Lace noted that M.M. displayed "aggressive, verbal behavior, physically a bit of boundary breaking in terms of physical boundaries." Lace specified:

> I was seated and he would get up and stand sort of very close and standing above me and looking down at me and so forth. I never felt in danger to the point that I needed to end the interview, but there was definitely some … discomfort on my part.

¶5 When asked if M.M.'s behavior during the examination caused him to feel intimidated, Dr. Lace answered, "Um, yes, at times but not to the—it was in my comfort zone." He clarified that "I think many people who may have not had much experience with that would have ended the evaluation there," and that "it would be much more intimidating for somebody who's not used to" that type of behavior.

¶6 Doctor Lace opined to a reasonable degree of professional certainty that M.M. was dangerous because he "would have likely been a danger indirectly to himself and more—perhaps more directly to others." According to Lace, it

> [w]ould be hard to imagine in the state that I saw [M.M.] in that he would be able to maintain his own safety. If he were to communicate in the way that he did with me, I think he'd place himself in danger very quickly, …

[2] The reports of the examining doctors were entered into evidence.

> physically from somebody else believing that they were in danger to protect themselves ....
>
> ….
>
> At least the way that he was with me would … put him quickly into a dangerous situation if he were to behave that way with other people in the community.

¶7 When asked if M.M. was neglecting to take care of himself, Dr. Lace explained that M.M.'s "type of paranoia can … put somebody indirectly in danger but [sic] either not taking his medication or becoming aggressive toward people that he imagines to be out to hurt him in some way." Lace also predicted that if M.M. was not medicated, he "could see [M.M.] being assaulted by somebody who was meaning to protect himself believing that he was going to be aggressive on them."

¶8 Doctor Gail Tasch, a psychiatrist, testified she examined M.M. and diagnosed him with schizophrenia, bipolar disorder or substance-induced psychosis. Tasch described M.M. as a "very psychotic man," including that he was rambling, saying nonsensical things, and exhibiting "remarkably impaired" and abnormal thought processes.

¶9 Regarding dangerousness, Dr. Tasch opined to a reasonable degree of professional certainty that M.M. represented a substantial risk to himself or others because he has psychotic thinking. She explained that, in her opinion, if his mental illness was not treated, he "would most likely require inpatient care again" and that "[s]omebody might call the police." When asked if she believed M.M. or another would suffer injury as a result of this lack of treatment, Tasch explained "[t]here's a potential for injury" because M.M.'s beliefs that someone was drugging him could cause him to "act out in such a way that would put himself and others at risk." Tasch acknowledged that M.M. never made any threats to her

and she had no knowledge that he had ever threatened or attempted to physically harm anyone else.

¶10 Doctor Patrick Helfenbein, a psychiatrist and treating physician for M.M. after his hospitalization, testified that when he first met M.M., he observed M.M. appeared disheveled, wore dirty clothes, and "had a very intense irritable mood," that "[a]ccelerated between being angry, euphoric, depressed[,] very rapidly." M.M.'s speech was also loud, rapid and pressured, and he made several "very bizarre" somatic complaints to Helfenbein. Helfenbein observed that when M.M. first arrived, other patients personally told Helfenbein that they were scared of M.M. and that they desired to leave.

¶11 Doctor Helfenbein diagnosed M.M. with type one bipolar affective disorder in a manic phase. He also opined that there was a substantial probability of harm to M.M. or others due to M.M.'s impaired judgment if M.M. was not treated. In support, Helfenbein explained that "others would perceive [M.M.] as being violent" if he were placed in the community, and that "if I saw him on the street, I would perceive him as being a dangerous individual."

¶12 When asked on cross-examination if he had received information about M.M. being disruptive in the community prior to hospitalization, Dr. Helfenbein answered that he "heard some unsubstantiated things." These things included that M.M. had been in jail a few times and that M.M. was "involved in a gang rape of his sister," the latter of which Helfenbein conceded he did not know was true. Counsel for M.M. also asked Helfenbein if he "believe[d] [M.M.] [was] in danger because other people might react poorly to him," to which Helfenbein responded: "That's theoretical. He would be very disruptive in the

community … so that's why I'm guessing … people would perceive him as being dangerous."

¶13 In a special verdict, the jury found that M.M. was mentally ill, was a proper subject for treatment, and was dangerous.[3] *See* WIS. STAT. § 51.20(1)(a)1.-2. The circuit court entered orders on the verdict imposing a six-month term of involuntary commitment and involuntary medication. M.M. now appeals the involuntary commitment order.[4]

DISCUSSION

¶14 For a person to be involuntarily committed, a petitioner must prove by clear and convincing evidence that the person in question is mentally ill, a proper subject for treatment, and dangerous. WIS. STAT. § 51.20(1)(a), (13)(e). When reviewing whether the evidence was sufficient to support a jury verdict, we view the evidence in the light most favorable to sustaining the verdict. ***Outagamie Cty. v. Michael H.***, 2014 WI 127, ¶21, 359 Wis. 2d 272, 856 N.W.2d 603. It is the role of the jury, not an appellate court, to balance the credibility of the witnesses and the weight to be given to their testimony. ***Id.*** If there is any

[3] One juror, out of six total, dissented on the question of whether M.M. was mentally ill. The special verdict was unanimous on the other two questions.

[4] The County argues that this appeal is moot because M.M.'s commitment order expired on September 15, 2017, while this appeal was pending. The record supports this assertion, and M.M. does not contend his commitment otherwise has been extended. However, we disagree with the County that resolution of this appeal will have no practical effect on the underlying controversy. *See* ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425. The commitment order states that it continues to affect M.M. even though the actual commitment has now expired, and the County does not argue otherwise. We are thus not presented with a "purely academic" question, and we conclude this appeal is not moot. *See* ***id.***

credible evidence, under any reasonable view, that permits an inference supporting the jury's verdict, we will not overturn that verdict on appeal. ***Id.***

¶15 M.M. argues only that the County failed in its burden to prove by clear and convincing evidence that he was dangerous. The County sought to prove M.M. was dangerous under WIS. STAT. § 51.20(1)(a)2.c., and the jury was instructed that, to find M.M. was dangerous, the County had to show he

> [e]vidence[d] such impaired judgment, manifested by … recent acts or omissions, that there is substantial probability of physical impairment or injury to himself.[5] The probability of physical impairment or injury is not substantial if reasonable provision for [M.M.]'s protection is available in the community and there is a reasonable probability that [M.M.] will avail himself of these services.

See ***id.*** A "substantial probability" in the context of a WIS. STAT. ch. 51 commitment is defined as "much more likely than not." *See* ***State v. Curiel***, 227 Wis. 2d 389, 414, 597 N.W.2d 697 (1999).

¶16 According to M.M., the doctors' opinions that he was a danger to himself were based on "speculation … that someone *else* would mistakenly perceive him as a threat and someone *else* would hurt him in a misguided action of self-defense." M.M. contends that, as a matter of law, these opinions only supported inferences that it was possible M.M. would suffer harm and, therefore, conclusions based on these inferences fell below the level that such harm would "much more likely than not" occur. *See* ***id.***

[5] The jury instruction here was slightly modified from WIS. STAT. § 51.20(1)(a)2.c., which defines dangerousness to also include a "substantial probability of physical impairment or injury to himself or herself *or other individuals*." (Emphasis added.) The record does not reflect the reason for the modification, but no argument is made that the circuit court erred in modifying the instruction.

¶17 In response, the County relies on the testimony of Drs. Lace, Helfenbein and, to a lesser extent, Tasch in arguing that the evidence showed M.M. was dangerous. We must assume the jury credited the doctors' expert opinions that there was a substantial probability of physical injury or impairment to M.M. and favorably weighed them in reaching its finding on dangerousness. *See* ***State v. Kienitz***, 227 Wis. 2d 423, 440, 597 N.W.2d 712 (1999). However, the facts in the record do not support the doctors' opinions, nor could the jury draw a reasonable inference of dangerousness from them, as they provide no clear and convincing evidence of a "substantial probability" of physical impairment or injury to M.M.

¶18 We first observe that the evidence undisputedly shows M.M. never made either direct or indirect threats to himself or others. There was no evidence presented indicating M.M had ever expressed suicidal thoughts, or either attempted or threatened to harm himself. Both Drs. Lace and Tasch denied that M.M. made direct threats to them during their examinations. Doctor Helfenbein also acknowledged that he never observed M.M. act violently or threaten violence under his care. It is also undisputed, based on testimony from M.M.'s mother, that M.M. had been employed and had received shelter with his mother before he was hospitalized, that he did not threaten his mother, and that M.M. isolated himself in his room in response to his fears of poisoning. Further, there is no evidence that prior to his commitment, M.M. harmed, intimidated or made threats to others in the community, provoking reprisals.

¶19 Instead, the County argues that evidence of dangerousness here stems from the doctors' opinions that M.M. caused "trepidation" when he interacted with others. The County emphasizes that Dr. Lace testified M.M. made him feel "uncomfortable" during the examination due to M.M.'s "aggressive

stance" and failure to respect personal boundaries. While Lace explained that he only felt discomfort, he explained that, objectively, M.M.'s actions would cause other people to feel threatened. The County also cites Dr. Helfenbein's statement that M.M.'s behavior prior to treatment made others fearful, as well as Helfenbein's opinion that, if M.M. interacted with others, they would perceive M.M. as threatening. Doctor Tasch's opinion that M.M.'s "acting out" would put him at risk similarly implicates that others would be fearful of, and feel threatened by, M.M.'s demeanor.

¶20 We reject the County's argument that the doctors' testimony that others might perceive M.M. as being threatening constitutes clear and convincing evidence that M.M. is a danger to himself. The County cites no legal authority in support of its apparent position that M.M. causing others in the community to feel uncomfortable or fearful, without any evidence of threats or physical acts by M.M. toward others, or by others to M.M., translates into a "substantial probability" that *someone else* would attack and harm M.M. No evidence was introduced showing M.M.'s behavior had ever provoked a defensive physical response from any individual.

¶21 The doctors acknowledged as much in their opinions. Doctor Lace merely stated that M.M.'s mental illnesses would place others "indirectly" in danger, based upon the "uncomfortable" behavior Lace witnessed during the examination. Doctor Tasch noted only that there was a "potential for injury" due to M.M.'s impaired judgment. Also, Dr. Helfenbein conceded that a defensive-injury scenario based upon others construing M.M. as violent was only "theoretical." In fact, Helfenbein admitted he was only "guessing" that others would perceive M.M. as dangerous.

¶22 The notion that others *could* seek to defend themselves from M.M. while he was in the community is not necessarily unreasonable. However, to commit M.M., the County was required to clearly and convincingly show a "substantial probability"—meaning "much more likely than not"—that M.M. would suffer physical impairment or injury for that reason. *See* ***Curiel***, 227 Wis. 2d at 414; *see also* WIS. STAT. § 51.20(13)(e). It failed to do so. We thus cannot conclude the evidence was sufficient to prove M.M. was dangerous to himself under WIS. STAT. § 51.20(1)(a)2.c. merely because his mental illnesses would cause others to perceive him as behaving abnormally and they may respond in a way that could potentially injure M.M. We therefore reverse the commitment order.

By the Court.—Order reversed.

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