COURT OF APPEALS
DECISION
DATED AND FILED

November 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1638-FT **Cir. Ct. No. 2012ME87A**

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

IN RE THE COMMITMENT OF MICHAEL H.:

OUTAGAMIE COUNTY,

PETITIONER-RESPONDENT,

V.

MICHAEL H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed*.

¶1 STARK, J.[1] Michael H. appeals an order of the circuit court, entered on a jury verdict, involuntarily committing him to the custody of Outagamie County for the purposes of mental health treatment. Michael argues the County failed to meet its burden of proving he is "dangerous," pursuant to WIS. STAT. § 51.20(1)(a)2. We disagree and affirm the commitment order.

BACKGROUND

¶2 We take the following facts from the jury trial. In April 2012, Michael was diagnosed with a mental illness, a "psychotic disorder," and he became a patient at Theda Clark Hospital in Appleton. Sometime after that episode, Michael moved to Minnesota. In February 2013, Michael returned to Appleton for a family visit. When he arrived on the weekend, his mother, Debbie, noticed Michael was exhibiting some of the symptoms he had shown the previous April.

¶3 On Monday, February 11, 2013, Michael was babysitting his five-year-old niece. He became concerned that one of his sisters was in danger, so he walked with his niece approximately two miles in the cold and snow to his other sister's work to demand a car. He later asked Debbie to take him to the hospital because he could not sleep and "things weren't right in his head." Debbie took Michael to Theda Clark, but the hospital did not admit Michael because he refused medication, "he hadn't threatened to hurt anybody or himself and he didn't have insurance." After they returned home, Michael told Debbie that she and his father

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). Furthermore, this is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

should sleep somewhere else because "people were after [Michael] and they would also be after [them.]"

¶4 On Tuesday, Michael attended a family birthday dinner. Afterward, he asked Debbie to take him to the hospital. Debbie reminded Michael he had refused medication the previous day; however, she drove Michael to Theda Clark and dropped him off. Michael was not admitted, and his father picked him up.

¶5 On Wednesday, Michael requested to go to the hospital because he was having trouble sleeping. His sister took him to St. Elizabeth's Hospital, but he was not admitted.

¶6 On Thursday, Michael took his niece to lunch at McDonald's. The family became worried when the two were gone for four or five hours and Michael could not be reached by phone. Eventually, Michael and his niece returned to Debbie's house. When he arrived, Michael told Debbie he was upset because he purchased a new cell phone at Wal-Mart and believed it had been "planted" in the store for him to purchase so that he could be tracked. He had thrown the cell phone out of the car window and returned to purchase another phone. Michael again told Debbie "people were after him" and "nobody's safe."

¶7 On Friday, Michael asked to go to the hospital, complaining he could not think straight and he felt lonely. Debbie took Michael to St. Elizabeth's.

¶8 At St. Elizabeth's, nurse Jessalynn Hietpas testified she asked Michael "what brought them in this evening and was told that he was having increasing depression and suicidal ideation." Specifically, Michael told Hietpas "he was feeling suicidal but had no plan as to how he would harm himself and

denied wanting to harm anyone else." Hietpas left the room to call the county crisis worker so that Michael could be evaluated.

¶9 When Hietpas left the room, Debbie testified she asked Michael,

> [W]hat were your plans? What were you thinking? He said it's too hard to explain. It's too long. I can't explain it to you. I don't know. We sat there for a few more minutes and all of a sudden he got up off the bed, grabbed his jacket, and said I'm out of here and he ran.

Michael left the hospital, and Debbie called the police. Debbie testified this was the first time Michael had ever admitted to having suicidal thoughts.

¶10 Officer Joanna Kolosso found Michael sitting on a park bench. Michael was cooperative, and he denied making comments about suicide or wanting to harm himself. Michael told Kolosso he wanted to be admitted to Theda Clark instead of St. Elizabeth's. Because Theda Clark did not accept voluntary admissions, Kolosso returned Michael to St. Elizabeth's to be evaluated by the crisis worker.

¶11 Back at the hospital, nurse Hietpas testified Michael told her that "he was feeling depressed, and he stated there were weird things happening, and … [w]hen asked if he felt like he was a harm to himself or others, he said he was feeling suicidal and thought as though there w[ere] people out to get him." When the corporation counsel asked Hietpas if she "took [Michael's] threat of suicide seriously," Hietpas responded, "yes."

¶12 Officer Kolosso testified she decided to prepare an emergency detention for Michael. She explained that to detain an individual, he or she needed to be dangerous. Kolosso believed Michael was dangerous because he told the hospital staff he was having suicidal thoughts and because the previous day he

disappeared with his niece for an extended period of time. Kolosso also testified that, after she filled out the emergency detention form, Michael reviewed it and told Kolosso that "he never said anything about wanting to commit suicide. He just said that he wanted to harm himself." Kolosso explained, "In my mind wanting to harm yourself is a threat."

¶13 While under detention, Michael was evaluated by two court-appointed doctors. Only one, Dr. Indu Dave, testified at trial. Dave testified Michael was not very cooperative during the interview and had a hard time talking due to the side effects of medication. Dave explained Michael was experiencing paranoia, believed people were out to get him, and told Dave he had not slept for the past five days because of his paranoia. Michael was also angry that he was being medicated, but he did not make any threats while Dave was interviewing him.

¶14 Dave opined Michael suffered from a treatable psychotic disorder, not otherwise specified. Dave agreed Michael would benefit from psychotropic medication to clear his thinking and decrease his paranoia. As to dangerousness, the County elicited the following testimony from Dave:

> Q Doctor, based upon your evaluation, do you have an opinion with regard to whether Michael [H.] is a danger to himself or others under the present circumstances?
>
> A He could without treatment.

¶15 The jury found Michael suffered from a treatable mental illness and is dangerous, pursuant to WIS. STAT. § 51.20(1)(a)2. Following the jury's verdict, the court committed Michael for six months. The court also found Michael incompetent to refuse medication.

DISCUSSION

¶16 To place an individual under a WIS. STAT. ch. 51 commitment, the County must prove by clear and convincing evidence that an individual has a mental illness, is a proper subject for treatment, and is dangerous. *See* WIS. STAT. § 51.20(1)(a), 51.20(13)(e). On appeal, Michael does not dispute the jury's findings on the first two elements; he concedes he has a mental illness and is a proper subject for treatment. Michael argues the County failed to meet its burden of proving he is "dangerous," pursuant to § 51.20(1)(a)2.

¶17 WISCONSIN STAT. § 51.20(1)(a)2. outlines five definitions of, or means of proving the individual is, dangerous. At trial, the court instructed the jury on three definitions—specifically, § 51.20(1)(a)2.a., c., and d. On appeal, the parties agree that only the definitions in § 51.20(1)(a)2.a. and c. are applicable.[2] Therefore, the evidence at trial needed to show by clear and convincing evidence that:

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[2] Michael explains WIS. STAT. § 51.20(1)(a)2.d. is not applicable because, if the individual is found to be dangerous based on the definition in § 51.20(1)(a)2.d., the court may only authorize a commitment of up to forty-five days, *see* § 51.20(13)(g)2., and, in this case, the court ordered a six-month commitment. The County does not dispute Michael's argument that, given the length of the commitment, § 51.20(1)(a)2.d. no longer applies. *See* ***Charolais Breeding Ranches v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Additionally, the County's appellate arguments focus only on the remaining two definitions of dangerousness.

We also observe that the comment to WIS JI—CIVIL 7050 (2013), which is the substantive jury instruction for a mental health commitment, explains that, "If a judge instructs using two or more of the different definitions of 'dangerous' and one of the definitions used [is] WIS. STAT. § 51.20(1)(a)2.d.," the special verdict question "Is _____ dangerous to (himself)(herself) or to others?" "should be broken into subdivisions which separately relate to the specific definition of dangerous." The comment explains that the court should do this because the maximum length of the commitment changes if it is based on the dangerous definition in § 51.20(1)(a)2.d. *See* WIS JI—CIVIL 7050 (2013). No party raises any argument about the adequacy of the court's instructions or the form of the verdict and, therefore, we do not address these issues. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

> [Michael] is dangerous because he … does any of the following:
>
> a. Evidences a substantial probability of physical harm to himself … as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm.
>
> ….
>
> c. Evidences such impaired judgment, manifested by evidence of a pattern of recent acts or omissions, that there is a substantial probability of physical impairment or injury to himself …. The probability of physical impairment or injury is not substantial … if reasonable provision for the subject individual's protection is available in the community and there is a reasonable probability that the individual will avail himself … of these services ….

WIS. STAT. § 51.20(1)(a)2.a., c.

¶18 Michael argues the evidence presented at trial was insufficient to support the jury's "dangerous" finding under either definition. When reviewing whether the evidence was sufficient to support the jury's determination that Michael is "dangerous," we give the jury's verdict considerable deference. *See* ***Richards v. Mendivil***, 200 Wis. 2d 665, 671, 548 N.W.2d 85 (Ct. App. 1996). We will not overturn a jury verdict if, viewing the evidence in the light most favorable to the verdict, it is supported by credible evidence. ***Id.***

¶19 At the outset, we observe Dr. Dave's expert opinion that Michael "*could*" be dangerous without treatment was, by itself, insufficient to establish Michael is dangerous under either WIS. STAT. § 51.20(1)(a)2.a. or c. *See* ***Pucci v. Rausch***, 51 Wis. 2d 513, 519, 187 N.W.2d 138 (1971) ("court has often said an expert opinion expressed in terms of possibility or conjecture is insufficient"; "'Might' or 'could' is not sufficient and does not reach the certitude required."). Accordingly, we will not consider Dr. Dave's opinion in our sufficiency of the evidence analysis.

¶20 We then turn to Michael's first argument that the remaining evidence was insufficient to support a determination that he is dangerous under the definition in WIS. STAT. § 51.20(1)(a)2.a. Under that definition, the State is required to prove by clear and convincing evidence that Michael is dangerous because he "[e]vidences a substantial probability of physical harm to himself … as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm." ***Id.*** Because Michael did not attempt suicide or attempt to inflict serious bodily harm, the only way the evidence could support the jury's determination that he is dangerous under § 51.20(1)(a)2.a. was through evidence of recent threats of suicide or serious bodily harm.

¶21 Michael argues the County failed to prove he made any threats. He contends "[t]he only 'threats' the [C]ounty had to offer was a statement Michael made in response to a question by the emergency room nurse"—specifically, an admission he was having suicidal thoughts followed by a statement that he had no plan for acting on those feelings. Michael argues his admission to having suicidal thoughts cannot constitute a "threat." He observes that the common definition of a "threat" is "an expression of an intention to inflict injury on another." ***State v. Perkins***, 2001 WI 46, ¶43, 243 Wis. 2d 141, 626 N.W.2d 762.[3] Michael argues a statement about a thought only becomes a "threat" when it conveys an intention to

[3] In ***State v. Perkins***, 2001 WI 46, ¶16, 243 Wis. 2d 141, 626 N.W.2d 762, our supreme court determined what constitutes a "threat" for purposes of a criminal statute. After recognizing the common definition of a "threat" was "an expression of an intention to inflict injury on another[,]" the court concluded "the definition of threat for the purposes of a statute criminalizing threatening language is much narrower." ***Id.***, ¶43. It determined a "threat" for purposes of a criminal statute was "a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm …." ***Id.***, ¶29. On appeal, Michael does not argue we should rely on the criminal definition of a "threat" for purposes of a WIS. STAT. ch. 51 mental health commitment.

act. He asserts his admission did not constitute a threat because there was no evidence that he intended to act on his thoughts.

¶22 In response, the County misconstrues Michael's reliance on ***Perkins*** to be an argument that we should adopt the criminal definition of "threat" for purposes of a WIS. STAT. ch. 51 mental health commitment. The County urges us to adopt the common definition of "threat" and it advances several dictionary definitions of the word, which are consistent with that common definition. However, it is clear that Michael relies on ***Perkins*** only for the common definition of "threat" and he does not argue we should adopt the criminal definition of the word. We agree with the parties that the common definition of "threat" is most appropriate for a chapter 51 mental health commitment and, because we are bound by our supreme court, we take the common definition of "threat" from ***Perkins***. *See* ***State v. Carviou***, 154 Wis. 2d 641, 644-45, 454 N.W.2d 562 (Ct. App. 1990) (court of appeals bound by supreme court precedent).

¶23 The County then argues that, under the common definition of the word, Michael's "acknowledgement of suicidal ideations and/or thoughts of self harm" constituted "threats." The County also argues that Michael's admission of suicidal thoughts combined with the other evidence presented at trial sufficiently support a determination that Michael was threatening to harm himself.

¶24 We disagree with the County that an admission of a thought, by itself, amounts to a "threat" under the common definition of the word. As stated in ***Perkins***, a "threat" is an expression of an intention to inflict harm. ***Perkins***, 243 Wis. 2d 141, ¶43. Thoughts, by themselves, do not constitute threats because they are not an expression of an intention to inflict harm. If thoughts could constitute threats, the legislature would have provided that dangerousness may be proven

through evidence of "recent *thoughts* of … suicide or serious bodily harm." Instead, WIS. STAT. § 51.20(1)(a)2.a. requires evidence of recent threats before the individual may be considered dangerous for purposes of a mental health commitment.

¶25 That being said, we agree with the County that Michael's admission of suicidal thoughts combined with the other evidence presented at trial sufficiently support a determination that Michael was threatening to harm himself. After Michael admitted to having suicidal thoughts and stated he had no plan to act on his thoughts, his mother nevertheless asked him, "[W]hat were your plans? What were you thinking?" Michael responded, "[I]t's too hard to explain. It's too long. I can't explain it to you. I don't know." It is reasonable for the jury to infer from Michael's response that he did have a plan to harm himself and simply would not articulate it to his mother because the plan was "too long" and "too hard to explain." Further, after the officer filled out the emergency detention paperwork, the officer testified Michael reviewed it and told her "he never said anything about wanting to commit suicide. He just said that he wanted to harm himself." The combination of the admission of suicidal thoughts, Michael's response that his plans were "too hard to explain" and "too long," and Michael's statement to the officer that he wanted to harm himself sufficiently support the jury's determination that Michael was threatening, or "expressing an intention to inflict," suicide or serious bodily harm. Thoughts of suicide together with a statement Michael wanted to cause harm to himself could reasonably lead a jury to believe the threat was of serious bodily harm.

¶26 Michael emphasizes that he told the nurse he did not have a plan to harm himself and that he did not actually articulate a plan in his response to his mother's question. However, Michael overlooks that we must construe every

reasonable inference in favor of the jury's determination. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990). As previously stated, it is reasonable for the jury to infer from Michael's response to his mother that he had a plan to harm himself but it was too complicated to describe. Further, although Michael told the nurse that he had no plans to harm himself, the jury had the right to disbelieve Michael's statement. *See* ***Ruiz v. State***, 75 Wis. 2d 230, 234, 249 N.W.2d 277 (1977).

¶27 Michael next argues the evidence was insufficient to support a determination that he is dangerous under the definition outlined in WIS. STAT. § 51.20(1)(a)2.c. However, § 51.20(1)(a)2. provides that an individual is "dangerous" if he or she meets "any" of the five definitions of dangerous. Because we have already concluded the evidence sufficiently supports a determination that Michael is dangerous under § 51.20(1)(a)2.a., we need not consider whether the evidence was also sufficient to support a determination that Michael is dangerous under § 51.20(1)(a)2.c. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("cases should be decided on the narrowest possible ground").

¶28 Because the evidence sufficiently supports the jury's determination that Michael is dangerous pursuant to WIS. STAT. § 51.20(1)(a)2.a., we affirm the court order committing Michael for purposes of mental health treatment.

By the Court.—Order affirmed.

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