COURT OF APPEALS
DECISION
DATED AND FILED

January 21, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1488

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

IN THE MATTER OF GREGORY R., ALLEGED TO BE MENTALLY ILL:

DANE COUNTY,

PETITIONER-RESPONDENT,

V.

GREGORY R.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

DEININGER, J.[1] Gregory R. appeals an order committing him for

[1] This appeal is decided by one judge pursuant to § 752.31(2)(d), STATS.

outpatient treatment for four months.[2] He claims the evidence presented at his commitment hearing was insufficient for the jury to find him dangerous within the meaning of § 51.20(1)(a)2, STATS. Gregory also claims that his trial counsel was ineffective because he waived one of the four peremptory strikes to which Gregory was entitled. We conclude that the jury's finding that Gregory is dangerous to himself or others is supported by credible evidence. We also conclude that Gregory's trial counsel's performance was not deficient for waiving one of the peremptory strikes, and therefore it did not constitute ineffective assistance of counsel. Accordingly, we affirm the order of commitment.

BACKGROUND

Dane County deputies arrested Gregory at the Dane County Airport for violating an anti-harassment injunction obtained by an airline that had formerly employed him. Two days later, the Dane County Sheriff's Department filed a statement of emergency detention, alleging that Gregory was mentally ill and dangerous. As evidence of Gregory's dangerousness, the statement of emergency detention cited numerous incidents dating back to 1990, including an incident two weeks earlier in which Gregory had been arrested for entering a locked vehicle and obstructing an officer. After a probable cause hearing, Gregory was ordered detained for examination, and a trial was scheduled to determine Gregory's mental condition, treatability and dangerousness.

[2] Although Gregory R.'s original commitment has expired, he was recommitted for twelve months on February 19, 1998.

Gregory requested a jury trial. Prior to jury selection, the trial court advised the parties that it intended to seat an alternate with the six-member jury. The court then informed the parties that, because an alternate would be added,

> you're entitled to an extra peremptory strike which would mean we would put 15 jurors in the box, or you can waive your extra peremptory and we'll call 13, and after you take your strikes, there will be an extra juror in the box.

After the County's corporation counsel agreed to waive the fourth peremptory strike, Gregory's trial counsel also agreed to waive the fourth peremptory strike.

At trial, the County, in order to establish Gregory's dangerousness, relied principally on the recent incident in which Gregory had been arrested for entering a locked vehicle and for obstructing an officer. A Madison police officer testified that she had observed Gregory standing by the open driver's door of a vehicle from which an alarm was sounding. The officer saw Gregory cross the street and enter a van. As the officer approached the van, she observed Gregory engage the power door locks. The officer asked Gregory if he was the owner of the car, or if he knew the owner. The officer testified that Gregory rolled down the van window four or five inches and said that he was a "Fenske" guard, and then rolled the window up. The officer recognized "Fenske" as the name of a private security company whose guards are sometimes armed.[3] The officer testified that she identified herself as a police officer and ordered Gregory out of the van, but Gregory refused to obey.

[3] Gregory disputed this detail of the officer's account. He testified that he told the officer "I am with Fenwick," which he testified was "an international security consortium of private individuals."

According to the officer, Gregory then started the van's engine, and the officer moved to the rear of the van to get the license number. The backup lights came on; the officer pounded on the van and ordered Gregory to stop and get out of the van. Gregory started to back up, forcing the officer to step back. The officer moved to the front of the van, again identified herself as a police officer, and again ordered Gregory to stop and get out of the van. Gregory moved the van forward, disregarding the officer's continuing shouts to stop. The officer testified that when she drew her weapon and aimed at Gregory, he stopped momentarily. But when the officer re-holstered her weapon, Gregory began again to move forward in the van. The officer testified that she grabbed the front of the van because she was concerned that she might be run over if Gregory accelerated rapidly. At this point, two other police squads arrived and blocked the van so that Gregory could not drive away. The other officers were also unsuccessful in getting Gregory to get out of the van. At one point, Gregory reclined in the seat with his arms folded over his chest. Ultimately, one of the other officers broke the van window, and Gregory was forcibly removed from the van and arrested.

A citizen witness corroborated the officer's account of the events preceding Gregory's arrest.[4] The witness also testified that she was afraid that Gregory would run over the officer, or that the officer would shoot Gregory.

Three experts testified regarding Gregory's mental condition. The County called the Director of Hospital Inpatient Psychiatric Services at the University of Wisconsin Hospital, where Gregory had been detained and treated. The County also called a psychiatrist and a psychologist who had been appointed

[4] The citizen witness did not testify about Gregory's statement to the officer that he was a Fenske guard, presumably because she was too far away to hear Gregory.

by the court to examine Gregory. Each expert testified that Gregory suffered from a mental illness that grossly impaired his judgment, and that he was a proper subject for treatment because mood-stabilizing medication would likely alleviate the symptoms of his mental illness. Each expert also testified that Gregory's symptoms would likely persist if not treated.

The jury found Gregory mentally ill and a proper subject for treatment. In response to the question, "Is Gregory R[] dangerous to himself or others?" the jury answered "yes." The trial court ordered that Gregory be committed for treatment for four months.[5]

Gregory moved the trial court for postconviction relief, alleging that the evidence was insufficient to support the jury verdict finding him dangerous, and alleging that his trial counsel was ineffective because he waived Gregory's fourth peremptory strike without a tactical reason. At the postconviction hearing, Gregory's trial counsel testified as follows regarding his reasons for waiving the fourth peremptory strike:

> Q Did you have a particular reason for agreeing to go with the thirteen and three?
>
> A Well, when the Judge gave us the option, I felt that thirteen and three was satisfactory, and so I joined Mr. Strebe in that election.
>
> Q Did you have any particular tactical reason for making that decision?
>
> A Well, the option was given. Mr. Strebe elected it. I considered it briefly and felt that it was satisfactory that we'd end up with six jurors and one alternate, and either way, fifteen minus four each or thirteen minus three each, would land us with the same number of jurors.

[5] Gregory's commitment was later extended an additional twelve months.

The trial court denied Gregory's motion for postconviction relief, and this appeal followed.

ANALYSIS

a. Sufficiency of the evidence of Gregory's dangerousness.

Involuntary civil commitment under § 51.20, STATS., requires proof of three elements: 1) that the individual is mentally ill, drug dependent, or developmentally disabled; 2) that the individual is a proper subject for treatment; and 3) that the individual is dangerous to himself or others. The County bears the burden of proving the elements required for a civil commitment by clear and convincing evidence. *See* § 51.20(13)(e), STATS. For the purpose of this appeal, Gregory does not dispute that he is mentally ill, or that he is a proper subject for treatment, as required by § 51.20(1)(a)1, STATS. He contends, however, that the evidence introduced at his final hearing is insufficient to establish that he is dangerous to himself or others, as required by § 51.20(1)(a)2.

Dangerousness, for the purpose of civil commitments, is defined in § 51.20(1)(a)2, STATS. Under § 51.20(1)(a)2.b, an individual is dangerous to others if he

> [e]vidences a substantial probability of physical harm to other individuals as manifested by recent 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 a recent overt act, attempt or threat to do serious physical harm.

Under § 51.20(1)(a)2.c, an individual is dangerous to himself or herself if he or she

> [e]vidences 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 or herself.

Our review of a jury's fact-finding is highly deferential:

> No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.

Section 805.14(1), STATS. We are particularly deferential when the jury's finding has the approval of the trial court. *See* ***Kuklinski v. Rodriguez***, 203 Wis.2d 324, 331, 552 N.W.2d 869, 872 (Ct. App. 1996). Under these circumstances, "[t]he verdict may not be overturned unless 'there is such a complete failure of proof that the verdict must be based on speculation.'" ***Id***. (citing ***Coryell v. Conn***, 88 Wis.2d 310, 315, 276 N.W.2d 723, 726 (1979)). We conclude, in light of the deferential standard of review we must apply, that the evidence of Gregory's dangerousness is sufficient to support the jury's verdict.

The County presented credible evidence from which the jury could find that Gregory was dangerous to others. The jury could conclude from the officer's testimony, as corroborated by the citizen witness, that the officer was placed in reasonable fear of violent behavior and serious physical harm, as evidenced by Gregory's overt act of driving the van in the direction of the officer. The officer testified that she was afraid Gregory might run her over as he attempted to leave the scene. The citizen witness also testified that she was afraid the officer would be run over. Although Gregory testified that he did not intend to hurt the officer, and the officer testified that Gregory did not move the van rapidly, the jury could conclude that the officer's fear was reasonable under the circumstances, given Gregory's unwillingness to communicate with the officer,

and his persistent disobedience of the officer's orders. Thus, the jury could conclude that Gregory's behavior constituted an overt act that evidences a substantial probability that he will cause physical harm to others. *See* § 51.20(1)(a)2.b, STATS.

There was also credible evidence from which the jury could find that Gregory was dangerous to himself. The jury may well have concluded that the episode with the van, followed closely by the episode at the airport, constituted a pattern of recent acts demonstrating that Gregory had such impaired judgment that there was a substantial probability of physical impairment or injury to himself. *See* § 51.20(1)(a)2.c, STATS. Gregory's persistent defiance of the officer's order to leave the van, and his attempts to drive away, forced the police to take extraordinary steps to take Gregory into custody. A jury could find that the officers' actions, including the drawing of the officer's service weapon and the forcible removal of Gregory from the van, posed a substantial probability of injury to Gregory.

We conclude, therefore, that there was credible evidence from which the jury could find that Gregory was dangerous to himself or others within the meaning of § 51.20(1)(a)2, STATS.

b. Ineffective assistance of counsel for failing to object to the waiver of the fourth peremptory strike.

Section 51.20(11), STATS., provides for a six-member jury when a jury trial is requested for a final commitment hearing. Each party is entitled to three peremptory strikes when a six-member jury is used. *See* § 805.08(3), STATS. As the trial court correctly informed the parties, however, because an alternate was to be seated with the jury, each side was entitled to an additional peremptory

strike. *Cf.* § 805.08(3). On appeal, Gregory first contends that the trial court violated his due process rights by allowing Gregory's trial counsel to waive the additional peremptory strike.

Gregory argues that § 805.08(2)-(3), STATS., does not provide for a party's waiver of peremptory strikes in a civil trial. By contrast, as Gregory points out, Wisconsin statutes explicitly provide for the waiver of peremptory strikes in criminal trials. *See* § 972.04(2), STATS. Gregory contends that, in light of the difference between the criminal and civil statutes relating to peremptory strikes, we should interpret the civil statute to preclude the waiver of peremptory strikes, and thus conclude that the trial court erred in permitting the waiver.

We note initially that many procedural rights are waivable in both civil and criminal trials. For example, Gregory could have waived his right to a jury trial in his civil commitment hearing. In fact, in civil commitments under § 51.20, STATS., the subject must specifically request a jury trial in writing. *See* § 51.20(11). In light of the fact that Gregory's right to a jury trial is presumed waived, absent a written request, it would be peculiar if Gregory's right to a specific number of peremptory strikes could not also be waived. We need not decide this issue, however, because Gregory did not object to the waiver of the peremptory strikes at trial. As Gregory concedes, because he failed to object to the waiver procedure at trial, he may not directly raise that objection on appeal. *See* ***Suhayasik v. Milwaukee Cheese Co***., 132 Wis.2d 289, 392 N.W.2d 98 (Ct. App. 1986).

Gregory next contends, however, that his trial counsel was ineffective for failing to object to the waiver of the additional peremptory strike. As in a criminal case, an individual subject to a civil commitment hearing is

entitled to the effective assistance of counsel. *See* ***State ex rel. Memmel v. Mundy***, 75 Wis.2d 276, 282-84, 249 N.W.2d 573, 576-77 (1977). To prevail on his claim of ineffective assistance of counsel, Gregory must show both that 1) his counsel's performance was deficient, and 2) that the deficient performance was prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Pitsch***, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). We need not address both prongs of this test if we conclude that Gregory's claim of ineffective assistance falls short on either one. *See* ***Strickland***, 466 U.S. at 697.

Trial counsel's performance is deficient when it falls "outside the wide range of professionally competent assistance." ***Id***. at 690. The question is not one of trial counsel's motives or general competency during trial. *See* ***State v. Felton***, 110 Wis.2d 485, 499-500, 329 N.W.2d 161, 167-68 (1983). The question, rather, is whether trial counsel made an informed and reasoned choice among available alternatives. *See* ***id***. at 516, 329 N.W.2d at 175.

Gregory contends that his trial counsel's performance was deficient because he agreed to the waiver of the fourth peremptory strike without a tactical reason for doing so. At Gregory's postconviction hearing, his trial counsel testified that he was aware that Gregory was entitled to a fourth peremptory strike, and that he considered the issue briefly before deciding to agree to the waiver of the fourth strike. The reason Gregory's trial counsel gave for agreeing to the waiver was essentially that he felt that three peremptory strikes for both sides was "satisfactory."

Gregory's trial counsel did not cite any tactical advantage to be gained by waiving the fourth peremptory strike, and his explanation for making that decision is terse. Nevertheless, counsel's decision was not based on ignorance

or inadvertence. Nor did counsel's decision disadvantage Gregory or benefit the County. Gregory's trial counsel knew the law, considered Gregory's options, and concluded that Gregory's interests would be sufficiently protected if both Gregory and the County were limited to three peremptory strikes.[6] "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." ***Strickland***, 466 U.S. at 690. Accordingly, we must conclude that Gregory's trial counsel made an informed and reasoned choice among the alternatives, and that his decision does not fall "outside the wide range of professionally competent assistance." ***Id***.

Because we conclude that Gregory's trial counsel's performance was not deficient, we need not consider whether Gregory was prejudiced by his performance. We note, however, that two recent opinions of this court reach opposite conclusions on the question of whether prejudice to a defendant must be presumed when the defendant's right to peremptory strikes is impaired by the deficient performance of counsel. *See* ***State v. Clemons***, No. 97-0940-CR, unpublished slip op. (Wis. Ct. App. Aug. 11, 1998); ***State v. Head***, No. 98-0280, unpublished slip op. (Wis. Ct. App. July 28, 1998). We also note that the issue is pending before our supreme court. *See* ***State v. Erickson***, No. 98-0273-CR (Wis. Ct. App. Sept. 9, 1998) (cert. granted Oct. 14, 1998).

[6] In ***State v. Ramos***, 211 Wis.2d 12, 564 N.W.2d 328 (1997), the supreme court held that defense counsel's use of a peremptory strike to remove a juror who should have been dismissed for cause impaired the defendant's right to uninhibited exercise of his statutorily authorized peremptory strikes. Defense counsel's performance was not at issue in ***Ramos***, and the court did not address the present circumstances, where Gregory's counsel knowingly waived one peremptory strike while retaining parity with the County in the number of strikes exercised peremptorily.

CONCLUSION

For the foregoing reasons, we conclude that there was credible evidence from which the jury could find that Gregory was dangerous to himself or others within the meaning of § 51.20(1)(a)2, STATS. We also conclude that Gregory's trial counsel was not ineffective for agreeing to waive the fourth peremptory strike. Accordingly, we affirm the order of commitment.

By the Court.—Order affirmed.

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