COURT OF APPEALS
DECISION
DATED AND FILED

May 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2063 **Cir. Ct. No. 2016ME5**

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

IN THE MATTER OF THE MENTAL COMMITMENT AND INVOLUNTARY MEDICATION OF E.K.:

CRAWFORD COUNTY,

PETITIONER-RESPONDENT,

V.

E. K.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Crawford County: JAMES P. CZAJKOWSKI, Judge. *Affirmed.*

¶1 BLANCHARD, J.[1] This is an appeal from an involuntary civil commitment proceeding under WIS. STAT. ch. 51. E.K. appeals an order of the

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

circuit court extending involuntary commitment and extending involuntary administration of medication. Specifically, E.K. argues that Crawford County failed to meet its burden under WIS. STAT. § 51.61(1)(g)4. for an extension of an involuntary medication order and that the County should not have been permitted to call E.K., the subject of the proceeding, as a witness to testify against himself. For the following reasons, I affirm.

¶2 Pursuant to WIS. STAT. § 51.20(1), the County filed a petition for commitment/examination of E.K. The petition was supported by affidavits from E.K.'s mother and sister, and from a County clinical social worker. The petition alleged that E.K. was displaying signs of mental illness, was a proper subject for treatment, and was in need of involuntary treatment because he displayed a "substantial probability of physical harm," "impairment," or "injury" to himself and others in making "a recent threat to do serious physical harm" and showing "impaired judgment." *See* WIS. STAT. § 51.20(2)(b) and (c). More specifically on the last points, the affidavits included averments that E.K. had threatened to kill family members and others who disagreed with E.K.'s views on "population control."

¶3 A court commissioner held a probable cause hearing on the petition on March 21, 2016. The County called as a witness Dr. Jeremy Flagel, attending psychiatrist in the behavioral unit at Mayo Clinic Mental Health Systems, La Crosse, where E.K. was being treated. Dr. Flagel testified that E.K. suffers from schizophrenia and that this illness is treatable, and also testified regarding aspects of his "Report for Medication or Treatment and Request for Hearing," dated March 18, 2016. E.K.'s sister testified that E.K. had made threats to kill the sister, the sister's husband, and others who refused to sign a petition regarding "population control" authored by E.K. As E.K.'s sister was testifying, E.K. asked

to address the court. E.K.'s counsel called him as a witness and E.K. testified regarding his belief that he has a right to kill people "in self defense" because of his concerns regarding "overpopulation."

¶4 The commissioner found probable cause for a mental commitment. However, the commissioner did not enter an involuntary medication order at that time, because she was concerned that the County had not met its burden of demonstrating either that E.K. was "incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives[,]" *see* WIS. STAT. § 51.61(1)(g)4.a., or that E.K. was "incapable of applying an understanding of the advantages [and] disadvantages ... in order to make an informed choice as to whether to accept or refuse medication or treatment[,]" § 51.61(1)(g)4.b.

¶5 Dr. Flagel filed another physician's report the day after the probable cause hearing, and the circuit court held a hearing on medication the next day, March 23. At the March 23 hearing, Dr. Flagel testified regarding his most recent report and his conversations with E.K. regarding the advantages of, disadvantages of, and alternatives to, medication. E.K. again asked to testify, and his attorney called him as a witness to testify regarding his mental illness diagnosis and the authenticity of documents related to his emails and social media posts. The court determined that the County met its burden and entered an order for involuntary medication under WIS. STAT. § 51.61(1)(g)4.a., pending a final hearing.

¶6 The circuit court held a final hearing on March 30. Dr. Flagel again testified regarding his diagnosis of E.K., and again that E.K.'s illness was treatable. He also testified regarding E.K.'s progress on medication, his opinion that court-ordered medication was still necessary, and in support of the

conclusions in his court-ordered report dated March 25. Dr. Lisa Howell, a clinical health psychologist at the same Mayo Clinic also testified at the final hearing regarding her diagnosis of E.K. (schizophrenia), that schizophrenia is treatable "with … ongoing medications and therapy," and to the conclusions set forth in her court-ordered report. E.K.'s sister again testified regarding emails and threats from E.K.

¶7 The County called E.K. as a witness for the sole purpose of identifying an exhibit portraying a gun found on E.K.'s property. Neither E.K. nor his counsel objected to E.K. testifying, and E.K.'s counsel said later during the same hearing that she had planned to call E.K. to testify if the County had not called him.

¶8 The circuit court ordered a two-week involuntary commitment, citing a lack of specific testimony justifying a longer commitment. At the same time, the court extended for an additional two weeks the involuntary medication order that it had entered a week earlier. The court found that E.K. "is incapable of expressing an understanding of the advantages, disadvantages of accepting medication or treatment or the alternatives" and that he "is substantially incapable of applying an understanding of the advantages, disadvantages[,] and alternatives." However, in the court's written order for involuntary medication and treatment, the court found only that E.K. "is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives."

¶9 On April 7, the circuit court held an extension hearing pursuant to a petition filed by the County. Dr. Flagel testified again, reiterating many of the opinions that he had testified to in the earlier proceedings, as referenced above.

Both Dr. Flagel and the clinical social worker recommended six months of commitment. The social worker also testified that E.K. had made threats against staff and others while under commitment, and that E.K. needed medication. E.K.'s sister testified again to threats made by E.K. against E.K.'s sister, her husband, and others, as well as to the fact that she had obtained a restraining order against E.K. because she was afraid that he might harm her or her family members.

¶10 At the close of the sister's testimony, the County offered as an exhibit the threatening emails that formed one of the bases for the sister's fear of harm from E.K. E.K.'s counsel objected on the ground that the sister had not authenticated the offered exhibit. The Court sustained the objection.

¶11 The County called E.K. as a witness to authenticate the threatening emails to which E.K.'s sister had testified. After E.K. answered several questions pertinent to the need for his commitment and medication, E.K.'s counsel objected to E.K.'s testifying based on his Fifth Amendment right against compelled self-incrimination. E.K. stated: "I'll waive that. Yes, those are my emails." The court paused to consider the potential constitutional issue and arguments from counsel, and to conduct a brief colloquy with E.K. The exchange between the court and E.K. proceeded as follows:

> THE COURT: All right. Apparently [E.K.'s counsel] believes that the content of Exhibit Five may tend to incriminate [E.K.]. However, [E.K.] does have the right to ignore the advice of counsel and answer if he so chooses. So just so that we understand each other, your attorney has advised you not to answer questions put to you by [the County] regarding Exhibit Five as it may tend to incriminate you. You have indicated here that it is your intent to answer the questions despite the fact that your attorney has told you not to answer.

> [E.K.]: If I could reply briefly. I don't know if I should handle this, you know, whether I'm committed or not separately from my legal reform work.
>
> THE COURT: All I'm asking is do you wish to answer the question of [the County] or do you wish to refuse to answer on the ground that it may incriminate you.
>
> [E.K.]: I'll waive that and answer his question.
>
> THE COURT: All right.
>
> [E.K.]: I'm not going to worry about it.

Following the above exchange, E.K. gave testimony that helped provide authentication for a number of threatening emails that E.K. had sent both during and before his confinement, and for a picture of a gun found on his property. E.K. again testified to his belief that he could "legally kill" anyone who disagrees with his views on "population control."

¶12 The circuit court found that the County had established grounds to extend the commitment and the involuntary medication order. E.K. appeals this order, arguing that: (1) the County failed to meet its burden of proving that he was incompetent to refuse medication, which was necessary to justify an involuntary medication order under WIS. STAT. § 51.61(1)(g)4.; and (2) the County could not constitutionally call E.K. as a witness to testify against himself. Although it is not clear, it appears from the briefing that both of E.K.'s arguments pertain only to events at the April 7 extension hearing.[2]

[2] There have been additional proceedings regarding E.K.'s commitment and medication orders since the entry of the April 7 extensions, but E.K. does not argue that any of those details matter to any issue that E.K. raises on appeal.

¶13 I now address the first argument, after stating applicable legal standards.

¶14 The County bore the burden of proving by clear and convincing evidence that E.K. was incompetent to refuse medication. *See* WIS. STAT. § 51.20(13)(e); ***Virgil D. v. Rock Cty.***, 189 Wis. 2d 1, 12 n.7, 524 N.W.2d 894 (1994). I will not disturb a circuit court's factual finding unless it is clearly erroneous. ***K.N.K. v. Buhler***, 139 Wis. 2d 190, 198, 407 N.W.2d 281 (Ct. App. 1987). In addition, I accept reasonable inferences from the facts available to the circuit court. ***K.S. v. Winnebago Cty.***, 147 Wis. 2d 575, 578, 433 N.W.2d 291 (Ct. App. 1988).

¶15 To expand on references made above, the statutes governing orders for involuntary medication provide in pertinent part that "an individual is incompetent to refuse medication or treatment if, because of mental illness ... and after the advantages, disadvantages, and alternatives ... have been explained to the individual, one of the following is true:"

> a. The individual is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.
>
> b. The individual is substantially incapable of applying an understanding of the advantages, disadvantages, and alternatives to his or her mental illness ... in order to make an informed choice as to whether to accept or refuse medication or treatment.

WIS. STAT. § 51.61(1)(g)4.a. and b. I will refer to the first standard as "the sub. a. standard" and the second standard as "the sub. b. standard."

¶16 In his principal brief on appeal, E.K. argues that the County did not meet its burden because there was no testimony from a medical expert regarding

how the witnesses called by the County "probed the issue of whether [E.K.] can 'apply' his ... understanding to his ... own mental condition." *See* ***Outagamie County v. Melanie L.***, 2013 WI 67, ¶75, 349 Wis. 2d 148, 833 N.W.2d 607 (when a county seeks an involuntary medication order under the sub. b. standard, "it is the responsibility of medical experts who appear as witnesses for the county to explain how they probed the issue of whether the person can 'apply' his or her understanding to his or her own mental condition."). However, as E.K. correctly observes in his briefing, ***Melanie L.*** involved a challenge to an involuntary medication order pursuant to the sub. b. standard, the interpretation of which had "heretofore evaded review" by the supreme court. *See* ***id.***, ¶40. Unlike in ***Melanie L.***, the circuit court here entered the involuntary medication orders under the sub. a. standard, not under the sub. b. standard. Explicitly using the language in the sub. a. standard, following each of the proceedings discussed above the court made the specific finding that E.K, "is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives."

¶17 Observing at the extension hearing that it was entitled to "review its own file in this case," including the record from earlier related proceedings, the court based its findings in part on testimony from Dr. Flagel that he had discussed the advantages, disadvantages, and alternatives to medication or treatment but that, due to E.K.'s mental illness, E.K. "is incapable of expressing an understanding of" the advantages, disadvantages, and alternatives. For the first time in his reply brief, E.K. concedes that "[t]he County may well have met [its] burden for a medication order at the March 23rd medication hearing or even the March 30th final hearing" but argues that the circuit court was not permitted, at the April 7 extension hearing, to "incorporate previous testimony and adopt previous

findings." E.K. apparently intends to argue that it does not matter that only a week had passed between the final hearing and the extension hearing in this civil commitment proceeding. E.K. provides no legal support for whatever it is that he precisely means to argue along these lines, and otherwise fails to develop an argument. I therefore address this point no further because I would have to develop an argument for E.K. in order to address it. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 (court of appeals will not abandon neutrality to develop arguments for the parties).

¶18 In sum, E.K. has not provided me with any basis on which to conclude that the circuit court's findings on this issue are clearly erroneous and E.K. further provides me with no reasonable basis to reverse the circuit court's determination that the County met its burden for an involuntary medication order.

¶19 I now turn to E.K.'s challenge to the County calling E.K. as a witness at the April 7 extension hearing. As discussed above, the circuit court conducted a brief colloquy with E.K. and concluded that E.K. voluntarily waived his right not to testify. E.K. does not make specific arguments to the effect that the colloquy was defective or that E.K.'s purported waiver at the hearing was inadequate. Instead, he purports to make a broad argument that the County calling him as a witness necessarily infringed on his Fifth Amendment right against self-incrimination. As with his first argument, E.K. provides no legal support for this broad Fifth Amendment argument. To the contrary, E.K. concedes that there is no existing Wisconsin authority on "the issue of whether the county can call a Chapter 51 subject to testify against himself."

¶20 However, in E.K.'s favor, I assume without deciding that he had a Fifth Amendment right not to testify and that it was violated at the extension hearing, and review the case under a harmless error analysis.[3] *See* ***State v. Smith***, 2012 WI 91, ¶¶ 59-63, 342 Wis. 2d 710, 817 N.W.2d 410 (violation of defendant's constitutional rights subject to harmless error analysis); ***State v. Nelson***, 2014 WI 70, ¶43, 355 Wis. 2d 722, 849 N.W.2d 317 (denial of a defendant's right to testify subject to harmless error review.). Neither party argues harmless error, but on this record it is plain that the argument raised by E.K. is easily resolved based on harmless error analysis.

¶21 The test for harmless error is the same for civil proceedings, such as this, as it is for criminal proceedings—namely, whether the result would have been the same absent the error. *See* ***Hannemann v. Boyson***, 2005 WI 94, ¶57, 282 Wis. 2d 664, 698 N.W.2d 714. I consider the entire record to determine whether an error is harmless. ***State v. Patricia A.M.***, 176 Wis. 2d 542, 556-57, 500 N.W.2d 289 (1993).

¶22 E.K. asserts that, aside from E.K.'s testimony, "there was little evidence to support the extension of his commitment." E.K. cites only to a single statement from the circuit court in support of this assertion and otherwise fails to develop this concept as an argument or explain why the court should not have

[3] I also assume without deciding that E.K. did not forfeit or waive any right he might have had to remain silent because he voluntarily testified in the earlier commitment and involuntary medication proceedings when called by his own counsel. *See*, *e.g.*, ***State v. Ernst***, 2005 WI 107, ¶33, 283 Wis. 2d 300, 699 N.W.2d 92 (concluding that defendant waived right not to testify in evidentiary hearing when he offered an affidavit on the subject prior to the hearing) (quoting ***Mitchell v. United States***, 526 U.S. 314, 321 (1999)) ("No defendant can 'testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details.'").

credited the other evidence in support of the extension of E.K.'s commitment. In any case, however, based on the pertinent portions of the record, it is obvious that the result would have been the same whether or not the County called E.K. to testify at the extension hearing. The specific evidence that was authenticated in part due to E.K.'s testimony was merely cumulative of extensive, separate evidence; the authentication was far from essential to the County's proof.

¶23 Explaining further, in addition to E.K.'s testimony at the earlier proceedings, which E.K. does not suggest was inadmissible, the circuit court could also rely on the consistent, relevant testimony of Dr. Flagel, Dr. Howell, the County clinical social worker, and E.K.'s sister. Moreover, the court had before it a number of relevant exhibits, including E.K.'s petition regarding "population control," E.K.'s social media posts, emails sent by E.K. other than the emails that E.K. authenticated at the extension hearing, and reports from the doctors and the mental health supervisor. Therefore, I conclude that even without E.K.'s testimony at the extension hearing helping to provide authentication for some emails, the circuit court would have reached the same result.

¶24 For all of these reasons, I affirm the challenged circuit court order.

By the Court.—Order affirmed.

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