COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1860 **Cir. Ct. No. 2016GN18A**

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

IN THE MATTER OF THE GUARDIANSHIP AND PROTECTIVE PLACEMENT OF R. M. C.:

SAUK COUNTY,

PETITIONER-RESPONDENT,

V.

R. M. C.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Sauk County: MICHAEL P. SCRENOCK, Judge. *Affirmed*.

Before Lundsten, P.J., Kloppenburg and Fitzpatrick, JJ.

¶1 KLOPPENBURG, J. After a one-day jury trial, the circuit court entered orders for guardianship and protective placement for R.M.C. R.M.C.

appeals, arguing that he is entitled to a new trial for any of the following reasons: (1) the circuit court erred in providing the jury an inaccurate and incomplete jury instruction as to incompetency because the jury instruction failed to include the statutory definition of a phrase in one of the elements of incompetency; (2) R.M.C.'s trial counsel rendered ineffective assistance by failing to object to the jury instruction; or (3) we should exercise our discretionary reversal authority under WIS. STAT. § 752.35 (2015-16) because a new trial is warranted in the interest of justice.[1] We take R.M.C. to concede Sauk County's argument that R.M.C. forfeited his *direct* challenge to the accuracy and completeness of the jury instruction based on his attorney's failure to object, because R.M.C. does not refute that argument in his reply brief. Accordingly, we address only the second two issues. As to ineffective assistance of counsel, we conclude that R.M.C. fails to show that his trial counsel's alleged deficient performance as to the jury instructions prejudiced his defense, because he fails to point to any evidence that including the statutory definition of the phrase at issue here would have undermined our confidence in the outcome of the trial. We also conclude that R.M.C. fails to show that he is entitled to a new trial in the interest of justice. Accordingly, we affirm.[2]

¶2 In addition, although our resolution of this appeal does not require an assessment of the pattern jury instruction's use of alternative language regarding a phrase in the second element of incompetency, we comment on the

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] The court-appointed Guardian ad Litem for R.M.C. joins in Sauk County's arguments on appeal.

alternative format in that part of WIS JI—CIVIL 7060 (2013) and also found in another related incompetency instruction.

BACKGROUND

¶3 In June 2016, Sauk County Department of Human Services detained R.M.C., a seventy-one year-old man, on an emergency protective placement. The County also filed petitions for permanent guardianship and protective placement for R.M.C., alleging that R.M.C. was incompetent due to alcohol-related dementia and other disorders. The circuit court conducted a jury trial, at which three police officers, a Sauk County Department of Human Services social worker, a psychologist, and R.M.C. testified. The parties agreed to the jury instructions to be given by the court and to the following three-question verdict:

> Question 1: Is [R.M.C.] incompetent at the time of this hearing?
>
> Question 2: If you answer question 1 "yes," then answer this question: Is his condition permanent or likely to be permanent?
>
> Question 3: If you answer question 2 "yes," then answer this question: Is [R.M.C.] in need of protective placement?

¶4 The jury answered yes to each question, and the circuit court issued orders for guardianship and protective placement for R.M.C.

¶5 R.M.C. filed a postdisposition motion to vacate the guardianship and protective placement orders and for a new trial, based on what he asserted was an inaccurate and incomplete jury instruction on the first verdict question, incompetency. The circuit court issued a written decision concluding that the jury instruction correctly stated the law and denied the motion. R.M.C. renews his jury instruction argument on appeal.

¶6 We will relate additional facts, particularly as to the challenged jury instruction and the testimony presented at trial, in the discussion that follows.

DISCUSSION

¶7 "A circuit court has broad discretion in deciding whether to give a particular jury instruction. A circuit court appropriately exercises its discretion in administering a jury instruction so long as the instruction as a whole correctly states the law and comports with the facts of the case." ***Kelly v. Berg***, 2015 WI App 69, ¶15, 365 Wis. 2d 83, 870 N.W.2d 481 (internal quotation marks and citations omitted). "If the overall meaning communicated by the instructions was a correct statement of the law, no grounds for reversal exist." ***Fischer v. Ganju***, 168 Wis. 2d 834, 850, 485 N.W.2d 10 (1992). Whether the jury instructions are a correct statement of the law is a legal question that we review de novo. ***State v. Neumann***, 179 Wis. 2d 687, 699, 508 N.W.2d 54 (Ct. App. 1993).

¶8 The failure to timely object to a jury instruction results in the forfeiture of any challenges to the instruction. *See* WIS. STAT. § 805.13(3); *see also* ***State v. Austin***, 2013 WI App 96, ¶20, 349 Wis. 2d 744, 836 N.W.2d 833. However, an alleged error in a jury instruction that has been forfeited by trial counsel's failure to object may be reviewed as a claim of ineffective assistance of counsel or by way of our discretionary reversal authority under WIS. STAT. § 752.35. *See* ***Austin***, 349 Wis. 2d 744, ¶20 (addressing use of ineffective assistance of counsel claim to challenge jury instructions); ***State v. Beasley***, 2004 WI App 42, ¶17 n.4, 271 Wis. 2d 469, 678 N.W.2d 600 (addressing request for discretionary reversal to challenge jury instructions).

¶9 R.M.C. argues that he is entitled to a new trial for any of the following reasons: (1) the circuit court erred in providing the jury an inaccurate

and incomplete jury instruction as to incompetency because the jury instruction failed to include the statutory definition of a phrase in one of the elements of incompetency; (2) R.M.C.'s trial counsel rendered ineffective assistance by failing to object to the jury instruction; or (3) we should exercise our discretionary reversal authority under WIS. STAT. § 752.35 because a new trial is warranted in the interest of justice.

¶10 R.M.C. devotes much of his briefing to supporting the argument that he is entitled to a new trial because the incompetency jury instruction given by the circuit court was inaccurate and incomplete. In response, the County argues that R.M.C. forfeited his right to directly challenge the alleged jury instruction error on appeal because he did not object to the jury instruction at trial. In reply, R.M.C. does not refute the County's argument, and we deem him to have conceded the point. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in reply brief to an argument made in response brief may be taken as a concession). Moreover, we observe that the record shows that R.M.C.'s trial counsel approved of the jury instruction given by the circuit court. Accordingly, consistent with the law set forth above, we proceed to examine R.M.C.'s challenge first as a claim of ineffective assistance of counsel and then as a request for discretionary reversal under WIS. STAT. § 752.35.

A. Ineffective Assistance of Counsel

¶11 R.M.C. argues that his trial counsel's failure to object to the incompetency jury instruction constituted deficient performance which prejudiced his defense because the jury was given an inaccurate and incomplete instruction of the law as to incompetency. More specifically, R.M.C. argues that the jury

instruction should have included the statutory definition of a phrase in one of the elements of incompetency.

¶12 To succeed on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999); *see also* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If we conclude that a defendant fails to prove prejudice, we may dispose of the defendant's ineffective assistance claim on that ground alone. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990); *see also* ***Strickland***, 466 U.S. at 697. To prove prejudice, a defendant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694. Whether counsel's performance was prejudicial is a question of law that we review de novo. ***Johnson***, 153 Wis. 2d at 128.

¶13 We first review the pertinent elements for guardianship due to incompetency, the pattern jury instruction, and the instruction given by the circuit court, along with the instruction that R.M.C. argues should have been given. We then explain why R.M.C. fails to show that he was prejudiced by his trial counsel's failure to argue for the instruction R.M.C. now insists should have been given.

¶14 As the circuit court notes in its decision, the legislature has in WIS. STAT. § 54.10(3)(a)[3] set forth the elements that must be proven, by clear and convincing evidence, in order for a circuit court to find an individual a proper subject for guardianship due to incompetency, and these elements form the basis for Question 1 on the verdict form: "Is [R.M.C.] incompetent at the time of this hearing?" R.M.C.'s appeal focuses on the second element of incompetency:

> [B]ecause of an impairment, the individual is unable effectively to receive and evaluate information or to make or communicate decisions to such an extent that the individual is unable to *meet the essential requirements for his or her physical health and safety*.

WIS. STAT. § 54.10(3)(a)2. (emphasis added). The "meet the essential requirements for his or her physical health and safety" portion of this second element of incompetency is defined in WIS. STAT. § 54.01(19) as "perform those actions necessary to provide the health care, food, shelter, clothes, personal

[3] The four elements that must be proven for a guardianship are:

(1) "[t]he individual is aged at least 17 years and 9 months old";

(2) "[f]or purposes of appointment of a guardian of the person, because of an impairment, the individual is unable effectively to receive and evaluate information or to make or communicate decisions to such an extent that the individual is unable to meet the essential requirements for his or her physical health and safety";

(3) "[f]or purposes of appointment of a guardian of the estate, because of an impairment, the individual is unable effectively to receive and evaluate information or to make or communicate decisions related to the management of his or her property or financial affairs" if the "individual has property that will be dissipated in whole or in part," the "individual is unable to provide for his or her support," or the "individual is unable to prevent financial exploitation"; and

(4) "[t]he individual's need for assistance in decision making or communication is unable to be met effectively and less restrictively through appropriate and reasonably available training, education, support services, health care, assistive devices, or other means that the individual will accept."

hygiene, and other care without which serious physical injury or illness will likely occur."

¶15 The pertinent pattern jury instruction regarding the second element of incompetency is reasonably read as setting up the WIS. STAT. § 54.10(3)(a)2. language and its WIS. STAT. § 54.01(19) definition as *alternatives*, rather than explaining that one defines the other. The pattern instruction provides:

> That because of (impairment), (individual) is unable to effectively receive and evaluate information or to make or communicate decisions to such an extent that (he) (she) cannot (meet the essential requirements for (his) (her) physical health and safety) (perform those actions necessary to provide the healthcare, food, shelter, clothes, personal hygiene, and other care without which serious physical injury or illness will likely occur).

WIS JI—CIVIL 7060. Indeed, the Civil Jury Instructions Preface explains that alternative words and phrases appear in parentheses. *See* WIS JI—CIVIL , Vol. I at xix ("When there are alternative words or phrases which may be employed, the user is alerted by italics, parentheses, or brackets.").

¶16 The instruction the circuit court gave the jury as to the second element of incompetency used the WIS. STAT. § 54.10(3)(a)2. language, but not the WIS. STAT. § 54.01(19) definitional language of the phrase about meeting essential requirements for R.M.C.'s health and safety. The instruction given stated:

> [T]hat because of a major neurocognitive disorder due to alcohol use, [R.M.C.] is unable to effectively receive and evaluate information or to make or communicate decisions to such an extent that he cannot meet the essential requirements for his physical health and safety.

¶17 R.M.C. argues the circuit court was required to give *both* parentheticals — which, together, comprise a phrase of the element and its definition — to give a complete and accurate statement of the law, and that he was prejudiced by his trial counsel's failure to object to the court's giving only the first parenthetical. We later briefly discuss the alternatives structure of the pattern jury instruction. However, we need not address the propriety of that structure to resolve this appeal. We reject R.M.C.'s ineffective assistance of counsel claim by explaining why, in light of the particular evidence here, R.M.C. fails to show that he was prejudiced by the omission of the definitional language.

¶18 The evidence at trial showed that, from November 2015 to the filing of the County's petitions in June 2016, R.M.C.:

- Caused disturbances and acted irrationally in a store and casino, including waiting for four hours in the cold for a taxi he had not called, telling people he was the head of security and armed, and referring to his watches as weapons he could use to blow up people;

- Said he was an undercover government operative on a secret mission and that people who needed to get hurt would get hurt, and falsely stated that he had served in the military in a top secret assignment;

- Was found living in November in a rented room with no heat and no means of transportation, after having been found passed out in his truck on the highway;

- Trespassed in a vacant apartment building where he was found wearing only a coat with nowhere to live;

- Prowled while homeless, with health issues including hypertension and memory problems such that he forgot whether he had taken his medications;

- Was placed in an assisted living facility after being found homeless, where he possessed and carried knives although he knew no knives were allowed, and where he had trouble remembering whether he had taken his medications;

- Left the assisted living facility at the facility's request after being arrested for having an altercation with another resident, thereby leaving him homeless again;

- Was hospitalized because of a bicycle accident, after which he agreed to go to a psychiatric facility, but left the psychiatric facility without receiving treatment, and got lost before being found three days later;

- Was placed in a different mental health facility for evaluation, then left the facility after arranging his bed to look as though he was sleeping, and was located by the Sauk County Sheriff a day later.

¶19 In addition, the County social worker testified that R.M.C. has serious memory loss that makes it difficult for him to plan for his own well-being; that, due to his memory loss, confusion, use of alcohol, health issues including having suffered a stroke and having high blood pressure, and difficulty remembering taking his medications, he has not been and is not able to provide for his own medical care, meet his basic needs for shelter and food, or manage his money to pay for his basic needs; and that because of his memory loss he is

vulnerable to financial exploitation as had recently happened when a person took his money and his truck.

¶20 The psychologist who evaluated R.M.C. testified that his impairment — dementia due to chronic alcohol use — is at a level that prevents him from providing for his own care and custody, meeting his essential needs, ensuring his own health and safety, and effectively receiving and evaluating information, such that there is a substantial risk that serious harm could occur to himself or others.

¶21 R.M.C. testified that he had been taking care of himself for seventy-one years, he can take his medications without help by using a system of putting them in daily pill boxes and if the pills are not in those boxes he takes them the next day, and he was in top secret military service and lives on a rich hermit's property in Colorado.

¶22 On appeal, R.M.C. argues that it is not clear that the jury would have found him incompetent had the jury been additionally instructed with the definitional language and, therefore, we can have no confidence in the outcome. R.M.C. asserts that "evidence was presented at trial indicating that R.M.C. could actually perform some or all of the things listed in the omitted [parenthetical] including 'actions necessary to provide ... healthcare, food, shelter, clothes, personal hygiene and other care.'" In support, the only evidence R.M.C. points to is the social worker's testimony that when she first met him in November 2015 he was living in the rented room with no heat and no means of transportation, but that he had space heaters, groceries and medications and "his own system" for remembering to take his medications; and his own testimony that he has taken care of himself his whole life and has not needed assistance with taking his

medications, which he takes in the morning when he wakes up using the daily pill boxes.

¶23 At best for R.M.C., he points to evidence supporting a finding that at some points in his life he may have been able to take his medications and otherwise care for himself to some extent. But, R.M.C. points to no evidence from which a jury could reasonably infer that he was currently able to meet his basic needs, including food, shelter, and health care, on a sufficiently sustained basis without risk of harm to himself or others.

¶24 More to the point, R.M.C. gives us no reason to think that the outcome of the proceeding might have hinged on the difference between the jury's assessment of whether he was able to "meet the essential requirements for his or her physical health and safety" and what would have occurred if the jury had additionally been informed that the definition of that phrase meant that he was able to "provide the healthcare, food, shelter, clothes, personal hygiene and other care, without which serious physical injury or illness will likely occur." The statutory definition of the phrase is, of course, a more complete statement of the requirement, but the evidence here as to R.M.C.'s inability to meet his health and safety needs was so strong that it is not reasonable to think that the omitted language made a difference to the jury's decision. In the words of the ineffective assistance prejudice prong, the failure of R.M.C.'s counsel to insist on adding the definitional language to the jury instruction does not undermine our confidence in the outcome.

B. Interest of Justice

¶25 WISCONSIN STAT. § 752.35 permits this court to order a new trial "if it appears from the record that the real controversy has not been fully tried, or that

it is probable that justice has for any reason miscarried." R.M.C. asks that we order a new trial, arguing that "the [circuit court's] failure to give the correct and complete instruction on incompetency resulted in the real controversy not being fully tried."

¶26 R.M.C. cites a number of cases in which Wisconsin courts have held that jury instruction errors have resulted in the real controversy not being fully tried, but the analogy R.M.C. attempts to draw between this case and those cases falls short. In ***Estate of Plautz v. Time Ins. Co.***, 189 Wis. 2d 136, 139, 152-53, 158-59, 525 N.W.2d 342 (Ct. App. 1994), the instruction omitted required words from the elements themselves. In ***State v. Perkins***, 2001 WI 46, ¶¶37-38, 43-44, 46, 243 Wis. 2d 141, 626 N.W.2d 762, the instruction omitted a constitutionally required standard. In ***State v. Harp***, 150 Wis. 2d 861, 443 N.W.2d 38 (Ct. App. 1989), *rev'd on other grounds*, ***State v. Camacho***, 176 Wis. 2d 860, 501 N.W.2d 380 (1993), the court omitted required elements altogether. In ***Air Wisconsin, Inc. v. North Central Airlines, Inc.***, 98 Wis. 2d 301, 327, 296 N.W.2d 749 (1980), the instruction was taken from a statute that did not apply to the facts of the case. And, in ***Austin***, 349 Wis. 2d 744, ¶¶17-19, the instruction omitted the burden of proof. Here, in contrast, the circuit court followed the correct statute, included the required element, and did not omit any required words from the required element. Moreover, unlike in the cited cases, this is not an "exceptional case" warranting discretionary reversal. *See* ***State v. Schutte***, 2006 WI App 135, ¶62, 295 Wis. 2d 256, 720 N.W.2d 469 ("We exercise our authority to reverse in the interest of justice under WIS. STAT. § 752.35 sparingly and only in the most exceptional cases.").

C. The Pattern Jury Instruction

¶27 Above, we resolve this case by applying an ineffective assistance of counsel analysis and by explaining why this is not the sort of case warranting our discretionary reversal authority. Neither requires an assessment of whether the pattern jury instruction used in this case, WIS JI—CIVIL 7060, optimally defines the portion of the second incompetency element at issue. Here, we briefly comment on that instruction.

¶28 As noted, WIS JI—CIVIL 7060 sets forth the WIS. STAT. § 54.10(3)(a)2. language identifying the second element and, as an alternative, gives the WIS. STAT. § 54.01(19) definition of part of that language. At least one other related incompetency instruction uses this alternatives structure. *See* WIS JI—CIVIL 7054. As the circuit court recognized, these are not alternative ways of satisfying a statutory requirement. Rather, one "alternative" is the statutory definition of part of one element of incompetency, which defines that part of the element in a non-technical manner. Thus, the circuit court correctly rejected R.M.C.'s postdisposition argument that one "alternative" imposes a greater burden on the government than the other does.

¶29 We urge the Civil Jury Instruction Committee to assess the instruction in light of our observation that these are not alternative ways of satisfying a statutory requirement, but rather one parenthetical defines a portion of an incompetency element stated in the other parenthetical.

CONCLUSION

¶30 For the reasons stated, we affirm.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.