COURT OF APPEALS
DECISION
DATED AND FILED

July 20, 2021

Sheila T. Reiff
Clerk of Court of Appeals

Appeal Nos. 2019AP839
2020AP1580

Cir. Ct. Nos. 2017ME1
2019ME12

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

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

RUSK COUNTY,

PETITIONER-RESPONDENT,

V.

A. A.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Rusk County: STEVEN P. ANDERSON, Judge. *Reversed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 STARK, P.J. Andy[1] appeals two orders that extended his involuntary commitment under WIS. STAT. ch. 51 (2019-20),[2] as well as an order for involuntary medication and treatment.[3] In case No. 2019AP839, Andy argues: (1) Rusk County's petition to extend his commitment was insufficient because it failed to comply with requirements set forth in WIS. STAT. § 51.20(1); (2) if—as our supreme court recently held in ***Waukesha County v. S.L.L.***, 2019 WI 66, ¶24, 387 Wis. 2d 333, 929 N.W.2d 140—the requirements in § 51.20(1)-(9) do not apply to recommitment proceedings, then ch. 51's recommitment provisions violate both due process and equal protection; and (3) the evidence at the recommitment hearing was insufficient to support the order extending his commitment.[4]

¶2 In case No. 2020AP1580, Andy argues: (1) the County's petition to extend his commitment was insufficient under WIS. STAT. § 51.20(1)(c); (2) even if the rules of civil procedure, rather than § 51.20(1), apply to recommitment petitions, the County's petition was insufficiently pled; (3) the circuit court erred

[1] For ease of reading, we refer to the appellant in these confidential appeals using a pseudonym, rather than his initials.

[2] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted. As our supreme court has previously noted, WIS. STAT. § 51.20 uses the terms "recommitment" and "extension of a commitment" interchangeably. *See* ***Portage Cnty. v. J.W.K.***, 2019 WI 54, ¶1 n.1, 386 Wis. 2d 672, 927 N.W.2d 509. We therefore do the same.

[3] By this court's February 19, 2021 order, these cases were consolidated for disposition pursuant to WIS. STAT. RULE 809.10(3). Another order issued on the same date provided that these appeals would be decided by a panel of three judges pursuant to WIS. STAT. RULE 809.41(3).

[4] In his brief-in-chief in case No. 2019AP839, Andy also argued that WIS. STAT. § 51.20(1)(am)—which sets forth a distinct method of proving dangerousness in recommitment proceedings—violated substantive due process and equal protection and was unconstitutionally vague. Andy has now withdrawn those arguments, however, and we do not address them further.

by holding that Andy's motion to dismiss the County's petition was filed too late; and (4) the court erred by admitting hearsay evidence, and the error was not harmless.

¶3 We resolve these appeals on the narrowest possible grounds. *See* ***Miesen v. DOT***, 226 Wis. 2d 298, 309, 594 N.W.2d 821 (Ct. App. 1999) (court of appeals "should decide cases on the narrowest possible grounds"); ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (court of appeals need not address all issues raised by the parties if one is dispositive). In case No. 2019AP839, we conclude the evidence was insufficient to support the order extending Andy's commitment because the County failed to prove, by clear and convincing evidence, that Andy was dangerous. In case No. 2020AP1580, we conclude that the circuit court erred by admitting hearsay evidence; that the error was not harmless; and that under the circumstances of this case, the appropriate remedy for the court's error is outright reversal, without a remand for further proceedings. We therefore reverse the commitment orders in both appeals, as well as the order for involuntary medication and treatment in case No. 2020AP1580.

BACKGROUND

¶4 Andy was taken into custody pursuant to a statement of emergency detention filed on January 10, 2017, after he called the police and stated he wanted to kill himself. After examining Andy, a physician and a psychologist both opined that he was mentally ill, a proper subject for commitment, and dangerous to himself. Upon the parties' stipulation, on January 23, 2017, the circuit court entered an order for Andy's involuntary commitment on an outpatient basis for six months, along with an order for involuntary medication and treatment. On July 21, 2017, the court granted the County's petition to recommit Andy on an

outpatient basis for twelve months, and it again entered an order for involuntary medication and treatment during the period of his recommitment.

¶5 On June 28, 2018, the County again petitioned the circuit court to extend Andy's involuntary commitment for twelve months. The parties subsequently stipulated to the extension of Andy's commitment for a four-month period. On July 20, 2018, in accordance with the parties' stipulation, the court entered an order extending Andy's outpatient commitment until November 20, 2018. The court did not, however, enter another order for involuntary medication and treatment.

¶6 On July 26, 2018—just six days after the circuit court had extended Andy's commitment—the County filed another recommitment petition, which sought a twelve-month extension "of the involuntary commitment ordered by this court on July 21, 2017."[5] In support of its petition, the County submitted an affidavit of Chris Soltis, the County's behavioral health coordinator. Soltis averred that Andy had been found to be mentally ill and had been involuntarily committed to the County for treatment; that he remained under commitment and was receiving treatment; and that he had a continued need for treatment based on a diagnosis of "Psychotic Disorder, Schizophrenia (Paranoid Type)." Soltis then averred that "if treatment were withdrawn there [was] a substantial likelihood

[5] The petition's reference to the July 21, 2017 commitment order was incorrect, as that order had already expired and had been replaced by the court's July 20, 2018 order.

based on [Andy's] treatment record that he/she would be a proper subject for treatment under Sec. 51.20(l)(a), Wis. Stats."[6]

¶7 The circuit court scheduled a recommitment hearing for November 12, 2018. On the day of the hearing, Andy's attorney filed a motion to dismiss the July 26 recommitment petition. The motion alleged, among other things, that the petition was deficient because it failed to set forth "a clear and concise statement of the facts which constitute probable cause to believe the allegations of the petition," as required by WIS. STAT. § 51.20(1)(c).

¶8 Neither the circuit court nor the County had the opportunity to review Andy's motion to dismiss before the November 12, 2018 hearing. Consequently, the hearing proceeded as scheduled, with the understanding that the court would address the motion at a later date. Two days later, on November 14, 2018, the court denied Andy's motion to dismiss in an oral ruling. As relevant here, the court held that the County's recommitment petition was not required to comply with WIS. STAT. § 51.20(1) because that subsection applied only to initial commitment petitions, not petitions for recommitment.

¶9 After denying Andy's motion to dismiss, the circuit court granted the County's recommitment petition and entered a written order recommitting Andy on an outpatient basis for twelve months. The court did not enter an order for involuntary medication and treatment. Andy appealed the court's November 14, 2018 recommitment order in case No. 2019AP839.

[6] It is undisputed that Soltis misstated the statutory standard. Under WIS. STAT. § 51.20(1)(am), the County was required to prove that Andy "would be a proper subject for *commitment* if treatment were withdrawn." (Emphasis added.)

¶10 Approximately eight months later, Andy was again taken into custody pursuant to a statement of emergency detention filed on July 24, 2019. According to an attached incident report, Andy had told both a physician and a police officer that he was having thoughts about killing multiple individuals. A psychiatrist and a psychologist subsequently examined Andy and opined that he was mentally ill, a proper subject for commitment, and dangerous to others. On August 2, 2019, pursuant to the parties' stipulation, the circuit court entered an order for involuntary commitment on an outpatient basis for six months and an order for involuntary medication and treatment.

¶11 The County subsequently moved to extend Andy's August 2, 2019 commitment for twelve months. Again, the County submitted an affidavit of Chris Soltis in support of its petition. Aside from the relevant dates, Soltis's affidavit was identical in all respects to the affidavit she had previously filed in support of the County's July 26, 2018 recommitment petition. Soltis again averred that if treatment were withdrawn there was "a substantial likelihood based on [Andy's] treatment record that he/she would be a proper subject for treatment under Sec. 51.20(l)(a), Wis. Stats."

¶12 A recommitment hearing took place on January 31, 2020. At the beginning of the hearing, Andy's attorney moved to dismiss the County's petition on the grounds that it did not set forth an adequate factual basis for recommitment. In response, the County argued that WIS. STAT. § 51.20(13)(g)3. does not require a recommitment petition to include any factual allegations in support of recommitment. Andy's attorney countered that if § 51.20 does not specify the necessary contents of a recommitment petition, then "the basic rules of civil

procedure apply. And part of civil procedure is [that] in a petition[,] you have to state a claim."

¶13 The circuit court denied Andy's motion to dismiss. The court reasoned that under the rules of civil procedure, Wisconsin is a notice-pleading state. The court then concluded that Soltis's affidavit was sufficient under the notice-pleading standard. The court also concluded that Andy's motion to dismiss was untimely because it was not filed until the day of the recommitment hearing.

¶14 The circuit court then heard the testimony of a single witness, psychiatrist Patrick Helfenbein, in support of the County's recommitment petition. As relevant to this appeal, Helfenbein testified, over the hearsay objection of defense counsel, that there was a substantial likelihood Andy would be dangerous to himself or others if treatment were withdrawn based on "events" described in Andy's medical records. The court subsequently granted the County's petition to recommit Andy in an oral ruling, during which it relied on Helfenbein's testimony to support its conclusion that Andy was dangerous. On February 5, 2020, the court entered a written order recommitting Andy on an inpatient basis for twelve months, as well as an order for involuntary medication and treatment. Andy appealed the court's February 5, 2020 orders in case No. 2020AP1580.

DISCUSSION

I. Case No. 2019AP839

¶15 As noted above, Andy raises three distinct arguments in case No. 2019AP839. His first argument poses important questions regarding the pleading requirements for recommitment petitions under WIS. STAT. ch. 51. His second argument challenges the constitutionality of ch. 51's recommitment

provisions. Ultimately, however, it is not necessary for us to address those thorny issues in order to resolve this appeal. Instead, we agree with Andy's third, and narrowest, argument that reversal is warranted because the County failed to present sufficient evidence to support an extension of his commitment.

¶16 Whether the County met its burden of proof to extend Andy's commitment presents a mixed question of fact and law. *See* ***Waukesha Cnty. v. J.W.J.***, 2017 WI 57, ¶15, 375 Wis. 2d 542, 895 N.W.2d 783. We will uphold the circuit court's findings of fact unless they are clearly erroneous, but whether the facts satisfy the statutory standard is a question of law that we review independently. ***Id.*** To extend Andy's commitment, the County had the burden to prove by clear and convincing evidence that Andy was: (1) mentally ill; (2) a proper subject for treatment; and (3) dangerous to himself or others. *See* WIS. STAT. § 51.20(1)(a)1.-2., (13)(g)3. Andy does not dispute that the County established the first two of these elements. He argues, however, that the County failed to meet its burden to show that he was dangerous.

¶17 In an initial commitment proceeding, WIS. STAT. § 51.20(1)(a)2. sets forth five ways in which a petitioner may establish that an individual is dangerous. ***Langlade Cnty. v. D.J.W.***, 2020 WI 41, ¶30, 391 Wis. 2d 231, 942 N.W.2d 277. Each of those standards requires the petitioner to "identify recent acts or omissions demonstrating that the individual is a danger to himself [or herself] or to others." ***Portage Cnty. v. J.W.K.***, 2019 WI 54, ¶17, 386 Wis. 2d 672, 927 N.W.2d 509; *see also* § 51.20(1)(a)2.a.-e.

¶18 In a recommitment proceeding, however, the petitioner is not required to identify "recent" acts or omissions demonstrating dangerousness. Instead, the dangerousness requirement in a recommitment proceeding "may be

satisfied by a showing that there is a substantial likelihood, based on the subject individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn." WIS. STAT. § 51.20(1)(am). The recommitment standard in § 51.20(1)(am) "recognizes that an individual receiving treatment may not have exhibited any recent overt acts or omissions demonstrating dangerousness because the treatment ameliorated such behavior, but if treatment were withdrawn, there may be a substantial likelihood such behavior would recur." ***J.W.K.***, 386 Wis. 2d 672, ¶19.

¶19 WISCONSIN STAT. § 51.20(1)(am) therefore serves as an "alternative evidentiary path" by which a petitioner may establish dangerousness in a recommitment proceeding. ***J.W.K.***, 386 Wis. 2d 672, ¶19. It does not, however, eliminate the requirement that the petitioner prove the subject individual is currently dangerous at the time of the recommitment hearing. *See* ***id.***, ¶24. "It is not enough that the individual was at one point a proper subject for commitment. The [petitioner] must prove the individual '<u>is</u> dangerous.'" ***Id.*** (citation omitted).

¶20 In this case, the circuit court concluded Andy was dangerous under WIS. STAT. § 51.20(1)(am) because there was a substantial likelihood that he would be a proper subject for commitment if treatment were withdrawn.[7] We

[7] The circuit court did not specify under which subdivision paragraph of WIS. STAT. § 51.20(1)(a)2. it concluded Andy would become a proper subject for commitment if treatment were withdrawn. In ***Langlade County v. D.J.W.***, 2020 WI 41, ¶41, 391 Wis. 2d 231, 942 N.W.2d 277, our supreme court clarified that § 51.20(1)(am) "mandates that circuit courts ground their conclusions in the subdivision paragraphs of" § 51.20(1)(a)2. The court therefore held that, "going forward[,] circuit courts in recommitment proceedings are to make specific factual findings with reference to the subdivision paragraph of § 51.20(1)(a)2. on which the recommitment is based." ***D.J.W.***, 391 Wis. 2d 231, ¶40.

(continued)

agree with Andy that the County's evidence at the recommitment hearing was insufficient to support the court's conclusion in that regard.

¶21 Psychiatrist Robert Sharpe was the only witness to testify during the recommitment hearing. Sharpe testified that he met with Andy for about forty minutes via teleconference. Sharpe diagnosed Andy with schizophrenia and testified that he was a proper subject for treatment. Sharpe further testified that, as of the date of his examination, Andy was taking 10 milligrams of Prolixin per day to treat his condition.

¶22 Sharpe then testified that, in his opinion, there was a substantial likelihood that Andy would become dangerous to himself or others if treatment were withdrawn. More specifically, Sharpe testified there was a substantial likelihood "that if the commitment is lifted that he will go off of his medications and will not comply with any further treatment." When asked to provide a basis for that opinion, Sharpe responded:

> I will admit that I haven't known him over the years but [outpatient] schizophrenia [patients] generally need medications over long term or with—they have a very strong chan[c]e of decompensating if they go off of their medications. By a strong chance, I would say with a reasonable degree of psychiatric medi[c]al certainty of that being over fifty percent that he would relapse and be readmitted.

D.J.W. was decided on April 24, 2020, after the recommitment orders in case Nos. 2019AP839 and 2020AP1580 were entered. Accordingly, ***D.J.W.***'s requirement of specific factual findings with reference to the applicable subdivision paragraph of WIS. STAT. § 51.20(1)(a)2. is inapplicable in these appeals.

Sharpe conceded, however, that as far as he knew, Andy was currently taking his prescribed medication. In addition, Sharpe acknowledged that Andy's dangerousness could be controlled with the appropriate medications and that it had, in fact, been so controlled for the past four years.

¶23 Sharpe's report was also admitted into evidence at the recommitment hearing. In the report, Sharpe stated Andy "has a history of psychosis and a serious suicide attempt precipitating commitment. Symptoms are well controlled at present on [medications] but he is likely to stop treatment if commitment is lifted." The report further noted that Andy had been receiving Prolixin injections, "but this was switched to oral Prolixin due to refusal of injections." According to the report, Andy was then prescribed five milligrams of oral Prolixin twice a day, but he was "noncompliant" and the dosage was therefore changed to ten milligrams once a day.

¶24 On cross-examination during the recommitment hearing, Sharpe clarified that, to his knowledge, although Andy had indicated that he did not want to take the Prolixin injections anymore, he had agreed to take the same medication orally. Sharpe conceded that there is no difference between the oral and injectable forms of Prolixin, as far as their ability to control a patient's symptoms. Sharpe also acknowledged that the side effects of injectable Prolixin include pain and bruising at the injection site, and that patients taking oral Prolixin would not experience those side effects. He agreed that the discomfort associated with an injection may be a reason that a patient chooses to take an oral medication rather than an equivalent injectable medication.

¶25 Sharpe further clarified on cross-examination that Andy's oral Prolixin was changed from five milligrams twice a day to ten milligrams once a

day not because Andy was refusing to take the medication, but because he was having trouble remembering to take the morning dose. Sharpe conceded that it is easier to remember to take a pill once a day than twice a day, and that the change in the dosage and timing of Andy's oral Prolixin had no effect on its therapeutic value. Sharpe also conceded that he had no reason to believe that Andy had not consented to, or had refused, the "easier[-]to[-]comply[-]with [Prolixin] schedule."

¶26 In its oral ruling, the circuit court acknowledged that Andy was not under an involuntary medication order and was currently compliant with his medications. Nonetheless, the court stated Sharpe "fears that if the commitment is lifted … [Andy] will … become noncompliant." The court continued:

> [U]ncommitted[,] [Andy] suffered from psychosis, apparently either threatened or attempted suicide that led to hospitalizations. So that is what the doctor's opinion is. His opinion is that if this commitment or treatment were withdrawn that [Andy] would go back to the way he was.
>
> ….
>
> So if psychosis led to him making the suicide threats or the attempts and leading to hospitalizations and leading to the original commitment, the doctor says that we have to have it and we have to keep it or else he is going to fall back into that condition. So then I think the grounds for recommitment have been shown. So that if treatment is withdrawn from [Andy], there is a substantial likelihood based upon his treatment records and based upon his history that he would be a proper subject for commitment if treatment were withdrawn in this case.

¶27 We agree with Andy that Sharpe's testimony and report were insufficient to support the circuit court's conclusion that Andy was dangerous under WIS. STAT. § 51.20(1)(am) because he would be a proper subject for commitment if treatment were withdrawn. The court essentially concluded that recommitment was necessary because Andy had been psychotic and had attempted

suicide in the past, and he should therefore remain committed to prevent him from becoming psychotic again. Under ***J.W.K.***, however, it is not enough for a petitioner to prove that an individual was dangerous at some point in the past; instead, the petitioner must prove by clear and convincing evidence that the individual is currently dangerous. ***J.W.K.***, 386 Wis. 2d 672, ¶24.

¶28 The County failed to make that showing. The County did not present any evidence as to when Andy's prior suicide attempt had occurred. The undisputed facts at the recommitment hearing established that Andy's symptoms had been well controlled by medication for the past four years. That time period included the approximately four months leading up to the recommitment hearing, during which Andy was not under an involuntary medication order. Despite the absence of an involuntary medication order, Sharpe testified that, as far as he knew, Andy was taking his medication as prescribed. Although there was evidence that Andy did not want to take an injectable form of that medication and had trouble remembering to take the oral form twice a day, the evidence also showed that he had agreed to take a higher concentration of the oral form once a day, which was equally effective at controlling his symptoms.

¶29 On these facts, there was no basis for a conclusion that Andy would become a proper subject for commitment if treatment were withdrawn. As Andy correctly notes, the evidence instead showed that involuntary treatment *had* been withdrawn for about four months before the recommitment hearing, and Andy nevertheless continued to take his prescribed medication, which effectively controlled his symptoms. While the circuit court relied on Sharpe's testimony that Andy had at one point been psychotic and suicidal, and that if he stopped taking his medication he would likely become psychotic again, there was no evidence to

indicate that Andy actually would refuse to take his medication absent a commitment order. Indeed, Sharpe's testimony in that regard appears largely based on his generalizations about the medication needs of outpatient schizophrenia patients and their chance of decompensating if they go off of their medications. The court in ***D.J.W.***, however, held that an opining doctor's testimony as to generalized propositions about people with schizophrenia was insufficient to presume future danger to a specific committee. ***D.J.W.***, 391 Wis. 2d 231, ¶53.

¶30 The County therefore failed to prove by clear and convincing evidence that Andy was currently dangerous at the time of the recommitment hearing. Accordingly, we reverse the November 14, 2018 recommitment order.

II. Case No. 2020AP1580

¶31 In case No. 2020AP1580, Andy appeals the orders for recommitment and involuntary medication and treatment that were entered on February 5, 2020. As noted above, Andy first argues that the County's recommitment petition was insufficient under WIS. STAT. § 51.20(1)(c) because it did not "contain a clear and concise statement of the facts which constitute probable cause to believe the allegations of the petition." In the alternative, Andy argues that if the rules of civil procedure govern the sufficiency of the County's petition, the petition was nevertheless insufficient because the County did not allege the necessary facts in support of its claim. Andy also argues the circuit court erred by holding that his motion to dismiss the County's petition—which was made for the first time at the recommitment hearing—was untimely.

¶32 Again, although these arguments raise important legal questions, we need not address them because we agree with Andy that the circuit court's orders must be reversed for another reason. Specifically, we conclude that the court erred by admitting hearsay evidence pertaining to Andy's alleged dangerousness during the recommitment hearing, and we further conclude that the court's error in that regard was not harmless.

¶33 Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3). Hearsay is inadmissible, unless an exception to the hearsay rule applies. WIS. STAT. § 908.02. The admissibility of hearsay is committed to the circuit court's discretion, and we will uphold the court's decision as long as it "examined the relevant facts, applied a proper legal standard, and reached a reasonable conclusion using a demonstrated rational process." ***State v. Mayo***, 2007 WI 78, ¶31, 301 Wis. 2d 642, 734 N.W.2d 115.

¶34 Andy argues the circuit court improperly admitted hearsay over his attorney's objection during Helfenbein's testimony at the recommitment hearing. Helfenbein testified that he had spent about thirty minutes evaluating Andy and had also reviewed unspecified medical records and a statement of emergency detention. He diagnosed Andy with schizophrenia and described the symptoms of that disorder, and he then testified that Andy was a proper subject for treatment.

¶35 Helfenbein also testified that there was a substantial likelihood Andy would be dangerous to himself or others if treatment were withdrawn. He stated that opinion was based on "events" described in Andy's medical records. The County then asked Helfenbein to provide "examples" of such events, at which

point Andy's attorney objected on hearsay grounds. After the circuit court overruled that objection, Helfenbein testified:

> For one he … was in a group home which was basically his—they get (Inaudible) his ability to function is marginal and while he was in a group home he was running away because he felt he was not safe. He was being disorganized and psychotic in front of the police telling them to—to—telling them to kill him and saying that he wanted, you know, he was trying to get their gun. I think that makes him dangerous. And I think without medications that type of behavior will continue.

¶36 We agree with Andy that the circuit court erred by admitting Helfenbein's testimony in this regard. On cross-examination, Helfenbein conceded that he had no personal knowledge of anything that had happened in Andy's group home, and there is nothing in the record to indicate that Helfenbein had personal knowledge of Andy's alleged encounter with the police. Instead, the record reflects that Helfenbein was merely describing events he had read about in what were purported to be Andy's medical records. Andy correctly asserts that Helfenbein's testimony about those events was hearsay.

¶37 WISCONSIN STAT. § 907.03 provides, in relevant part, that an expert witness may rely on inadmissible facts or data when forming his or her opinion, but the inadmissible facts or data "may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion or inference substantially outweighs their prejudicial effect." Here, following counsel's objection, the circuit court did not make any determination that the probative value of the inadmissible evidence Helfenbein relied upon substantially outweighed its prejudicial effect. In fact, the court had no basis to judge the probative value of the "events" that Helfenbein testified he had read about in what he understood

were Andy's medical records, as no evidence was admitted regarding those events from a person with personal knowledge of them. Instead, the court simply concluded that Helfenbein's testimony was admissible because the events that he testified about "[went] to the basis for his opinion" regarding dangerousness. As such, the court did not properly admit the evidence under § 907.03.

¶38 Moreover, the circuit court's decision to admit Helfenbein's testimony about the events described in Andy's medical records was inconsistent with our decision in ***S.Y. v. Eau Claire County***, 156 Wis. 2d 317, 457 N.W.2d 326 (Ct. App. 1990), *aff'd*, 162 Wis. 2d 320, 469 N.W.2d 836 (1991). In that case, an expert witness testified that, "according to reports, S.Y. had committed an unprovoked assault on a female undergraduate student prior to his commitment." ***Id.*** at 327. We concluded that testimony was inadmissible hearsay because the expert witness "had only limited personal contact with S.Y.," and his testimony regarding the assault was instead based on his review of S.Y.'s medical records. ***Id.*** Those medical records, however, were not authenticated at trial or offered into evidence. ***Id.*** We reasoned that although an expert may rely on inadmissible evidence when forming his or her opinion, "the underlying evidence is still inadmissible." ***Id.*** at 327-28 (citing WIS. STAT. § 907.03 and ***State v. Coogan***, 154 Wis. 2d 387, 399-401, 453 N.W.2d 186 (Ct. App. 1990)). Because the circuit court had failed to provide an explanation for its decision to admit the expert's testimony, we concluded the court erroneously exercised its discretion by doing so. ***Id.*** at 328.

¶39 Similarly, in this case, the circuit court erroneously exercised its discretion by admitting Helfenbein's testimony regarding events that he had only read about in what were claimed to be Andy's medical records. Like the expert

witness in ***S.Y.***, Helfenbein had no personal knowledge of those events. In addition, as in ***S.Y.***, the medical records that Helfenbein relied upon were not authenticated or offered into evidence at the recommitment hearing. The County also failed to call any fact witness who had personal knowledge of the events Helfenbein described. And, like the circuit court in ***S.Y.***, the court here failed to provide a reasoned basis for its decision to admit Helfenbein's testimony. Under these circumstances, we agree with Andy that the court erroneously exercised its discretion by admitting Helfenbein's hearsay testimony about the events at the group home and Andy's interaction with the police.

¶40 Nevertheless, an erroneous evidentiary ruling does not require reversal if the error was harmless. *See* ***Martindale v. Ripp***, 2001 WI 113, ¶30, 246 Wis. 2d 67, 629 N.W.2d 698. Stated differently, reversal is not warranted unless the evidentiary error affected the appellant's substantial rights. ***Id.***; *see also* WIS. STAT. § 901.03(1). An error affects an appellant's substantial rights when there is a reasonable possibility that the error contributed to the outcome of the action or proceeding. ***Martindale***, 246 Wis. 2d 67, ¶32. A reasonable possibility is a possibility that is sufficient to undermine confidence in the outcome. ***Id.*** "[W]here the outcome of the action or proceeding is weakly supported by the record, a reviewing court's confidence in the outcome may be more easily undermined than where the erroneously admitted or excluded evidence was peripheral or the outcome was strongly supported by evidence untainted by error." ***Id.***

¶41 We conclude that the admission of Helfenbein's testimony regarding the events at the group home and Andy's encounter with the police affected Andy's substantial rights because there is a reasonable possibility that without that

testimony, the circuit court would not have found Andy to be dangerous. Without Helfenbein's inadmissible hearsay testimony, the County presented no evidence to show that Andy was currently dangerous; it merely presented evidence that he was mentally ill and a proper subject for treatment. No witness was called to substantiate any of the information contained in the records relied upon by Helfenbein. Moreover, the court expressly relied on the inadmissible hearsay during its oral ruling, stating:

> Particular concern with [Andy] is that he feels that he is in some kind of danger at the group home or the group home is not safe for him. And so he has run away from the group home and he has threatened to get a gun and shoot himself. He has told people that.

Given the lack of other evidence showing that Andy was dangerous, and the court's express reliance on the hearsay testimony in reaching its decision, the erroneous admission of that testimony undermines our confidence in the outcome of the recommitment hearing. We therefore conclude that the court's error in admitting the evidence was not harmless.[8]

[8] In ***S.Y. v. Eau Claire County***, 156 Wis. 2d 317, 328, 457 N.W.2d 326 (Ct. App. 1990), *aff'd*, 162 Wis. 2d 320, 469 N.W.2d 836 (1991), we concluded the circuit court's error in admitting the expert witness's testimony was harmless. The supreme court subsequently affirmed our decision, concluding that it did not need to determine whether the circuit court erroneously admitted the testimony because "[i]f its admission were error, it was harmless." ***S.Y. v. Eau Claire Cnty.***, 162 Wis. 2d 320, 338-39, 469 N.W.2d 836 (1991).

(continued)

¶42 When we determine that evidence was erroneously admitted, and that the error was not harmless, the appropriate remedy is typically to reverse and remand for a new trial—or, in this case, a new recommitment hearing. *See, e.g.*, ***Nischke v. Farmers & Merchs. Bank & Tr.***, 187 Wis. 2d 96, 102, 522 N.W.2d 542 (Ct. App. 1994). However, under the circumstances of this case, we conclude the appropriate remedy is to reverse both the recommitment order and the order for involuntary medication and treatment.[9]

¶43 A circuit court "must hold a hearing on [a] petition for extension [of a WIS. STAT. ch. 51 commitment] before the previous order expires or it loses competency to extend the commitment." ***J.W.K.***, 386 Wis. 2d 672, ¶20. The commitment order that preceded the extension order at issue in this appeal expired on February 2, 2020. Although the circuit court held a hearing on the County's petition to extend Andy's commitment before that date, the court failed to enter a valid order extending Andy's commitment before his prior commitment order expired. As such, when the prior commitment order expired, the court lost competency to conduct further proceedings on the County's petition to extend

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Because the admission of the expert witness's testimony in ***S.Y.*** was harmless, the County contends that any error by the circuit court in admitting Helfenbein's testimony must also have been harmless. However, ***S.Y.*** is factually distinguishable from this case, at least for purposes of the harmless error analysis. In ***S.Y.***, there was a "plethora of other evidence that convincingly demonstrated that S.Y. was dangerous to himself as well as to others." ***S.Y.***, 162 Wis. 2d at 338. In light of that other evidence, the supreme court stated the expert witness's challenged testimony "weigh[ed] but little" and its "contribution to the final result was at worst *de minimis*." ***Id.*** at 338-39. The same cannot be said here, where the County failed to introduce any other evidence showing that Andy was currently dangerous and where the circuit court expressly relied on the challenged testimony during its oral ruling.

[9] An order for involuntary medication and treatment requires the existence of a valid commitment order. *See* WIS. STAT. § 51.61(1)(g)3. As such, reversal of Andy's recommitment order also requires reversal of the associated involuntary medication order.

Andy's commitment. Thus, if we were to remand for the court to conduct a new hearing on the County's petition, absent the inadmissible hearsay testimony, the court would lack the competency to do so.

¶44 Moreover, we note that in his brief-in-chief in this appeal, Andy asked us to reverse the recommitment and involuntary medication orders outright. In response, the County merely asserted that we should affirm those orders. The County did not ask us to remand for further proceedings in the event we concluded the circuit court had erred by admitting Helfenbein's hearsay testimony. The County's failure to request a remand further convinces us that outright reversal of the recommitment and involuntary medication orders is the appropriate remedy in this case.

By the Court.—Orders reversed.

Not recommended for publication in the official reports.

¶45 STARK, P.J. (*concurring*). I agree with the majority that the recommitment order in case No. 2019AP839 must be reversed because Rusk County failed to meet its burden to establish that Andy was dangerous. I further agree that reversal of the recommitment and involuntary medication orders in case No. 2020AP1580 is warranted because the circuit court erroneously admitted hearsay testimony, and the error was not harmless. Because we decide the issues in these consolidated cases on the narrowest possible grounds, it is not necessary for us to address the other issues that Andy raises.

¶46 Those issues, however, raise important questions regarding the legal requirements for a petition to extend an individual's WIS. STAT. ch. 51 commitment. In issuing its order in case No. 2019AP839, the circuit court expressed frustration with the legislature's lack of guidance about the pleading requirements for recommitment petitions. While our supreme court's recent decision in ***Waukesha County v. S.L.L.***, 2019 WI 66, 387 Wis. 2d 333, 929 N.W.2d 140, sheds some light on this issue, it does not fully identify all of the significant differences between the pleading and legal requirements for an initial petition to commit an individual under ch. 51, as compared to a recommitment petition under that chapter. Nor does ***S.L.L.*** address the important constitutional questions that Andy raises in these appeals.

¶47 We initially certified these appeals to the Wisconsin Supreme Court so that it could address these important issues, but our certification was denied. *See* ***Rusk Cnty. v. A.A.***, Nos. 2019AP839 and 2020AP1580, unpublished certification (WI App Apr. 13, 2021). I therefore take what is, in my experience,

the unusual step of writing a separate concurrence to my own majority opinion in order to clarify the minimal pleading requirements that apply to recommitment petitions following ***S.L.L.***, and to express concern as to whether those requirements are sufficient to satisfy a committee's due process and equal protection rights.

¶48 WISCONSIN STAT. § 51.20(1)(a) requires each "petition for examination" to allege that "the subject individual to be examined" is mentally ill, a proper subject for treatment, and dangerous. Section 51.20(1)(c), in turn, states that the petition "shall contain a clear and concise statement of the facts which constitute probable cause to believe the allegations of the petition." In ***S.L.L.***, as in this case, the committed individual argued that a petition to extend her commitment was insufficient because it did not contain the clear and concise statement of facts required by § 51.20(1)(c). ***S.L.L.***, 387 Wis. 2d 333, ¶24.

¶49 The ***S.L.L.*** court rejected that argument, holding that "the procedure for extending a person's commitment is governed by WIS. STAT. § 51.20(10) through (13), not § 51.20(1)." ***S.L.L.***, 387 Wis. 2d 333, ¶24. In doing so, the court relied on § 51.20(13)(g)3., which states in relevant part: "Upon application for extension of a commitment by the department or the county department having custody of the subject, the court shall proceed under subs. (10) to (13)." *See* ***S.L.L.***, 387 Wis. 2d 333, ¶22. Based on that language, the court stated that § 51.20(1) "governs an initial petition for examination, not a petition for extension of a commitment." ***S.L.L.***, 387 Wis. 2d 333, ¶24. Accordingly, the court held that while a petitioner seeking to extend an individual's commitment must establish at an extension hearing that the individual is mentally ill, a proper subject for treatment, and dangerous, "there is no statutory mandate that [the petitioner] must serve a document with such a factual recitation in advance." ***Id.***

¶50 After noting that WIS. STAT. § 51.20(10)(c) incorporates the rules of civil procedure, except to the extent they conflict with WIS. STAT. ch. 51, the ***S.L.L.*** court addressed the "nature of the notice" that a petitioner must provide when seeking to extend an individual's commitment. ***S.L.L.***, 387 Wis. 2d 333, ¶22. Specifically, the court stated that a petitioner must serve "three items" on the individual before the extension hearing:

> First, by virtue of the incorporation of WIS. STAT. § 801.14, the [petitioner] must serve the Extension Petition itself. Second, notice of the Extension Hearing must be served pursuant to WIS. STAT. § 51.20(10)(a) ("Within a reasonable time prior to the final hearing, the petitioner's counsel shall notify the subject individual and his or her counsel of the time and place of final hearing."). And third, "[w]ithin a reasonable time prior to the final hearing, each party shall notify all other parties of all witnesses he or she intends to call at the hearing and of the substance of their proposed testimony." ***Id.*** And although they need not be served, [the individual's] counsel must have "access to all psychiatric and other reports 48 hours in advance of the final hearing." § 51.20(10)(b).

S.L.L., 387 Wis. 2d 333, ¶23 (footnote omitted).

¶51 The ***S.L.L.*** court then rejected the appellant's argument that the circuit court lacked personal jurisdiction over her because the allegations in the recommitment petition were insufficient to satisfy due process. ***Id.***, ¶25. The court reasoned that the circuit court "already had jurisdiction over Ms. L. because an extension hearing is not the commencement of a new proceeding, it is the continuation of an existing case." ***Id.*** The court concluded that the notice "sent to Ms. L. and her attorney provided the date, time, location, and subject matter of the Extension Hearing," and because the circuit court "already had jurisdiction over Ms. L., nothing more was necessary." ***Id.***

¶52 Following ***S.L.L.***, it is clear that a petitioner seeking to extend an individual's commitment must serve an extension petition on the individual. ***Id.***, ¶23. That petition, however, is not required to notify the individual of any facts relied upon by the petitioner in support of the requested extension. Instead, the petition need only notify the individual that the petitioner is seeking an extension of his or her commitment. Further, within a reasonable time before the extension hearing, the petitioner must provide a notice that informs the subject individual of the date, time, and place of the hearing, and the petitioner must also identify the witnesses it intends to call at the hearing and the substance of their proposed testimony. *See* ***id.***, ¶23.

¶53 As Andy correctly notes, ***S.L.L.***'s holding that only subsecs. (10) through (13) of WIS. STAT. § 51.20 apply to recommitment proceedings has additional implications. Section 51.20(2)(a) provides that after a "petition for examination" is filed, the circuit court must review that petition within twenty-four hours to determine "if there is cause to believe" that the individual meets the statutory criteria for commitment. If the court so determines, it "shall appoint 2 licensed physicians specializing in psychiatry, or one licensed physician and one licensed psychologist, or 2 licensed physicians one of whom shall have specialized training in psychiatry, if available, or 2 physicians, to personally examine the subject individual." Sec. 51.20(9)(a)1. Under § 51.20(9)(a)2., the subject individual has the ability to select one of those examiners. The examiners "shall personally observe and examine the subject individual at any suitable place and satisfy themselves, if reasonably possible, as to the individual's mental condition, and shall make independent reports to the court." Sec. 51.20(9)(a)5. Moreover, in addition to the two examinations required by § 51.20(9)(a)1., the subject individual also "has a right … to secure an additional medical or psychological

examination and to offer the evaluator's personal testimony as evidence at the hearing." Sec. 51.20(9)(a)3.

¶54 If ***S.L.L.*** correctly held that subsecs. (1) through (9) of WIS. STAT. § 51.20 do not apply to recommitment proceedings, then the procedures described above apply only to initial commitment proceedings. Accordingly, pursuant to ***S.L.L.***, there is no requirement that the circuit court determine whether a recommitment petition establishes probable cause to believe that the individual meets the statutory criteria for recommitment. Additionally, while an individual in an original commitment proceeding has the right to be personally examined by two doctors, in a recommitment proceeding, the petitioner need only file "an evaluation of the individual and the recommendation of the [petitioner] regarding the individual's recommitment." Sec. 51.20(13)(g)2r. Nothing in subsecs. (10) through (13) of § 51.20—which, according to ***S.L.L.***, are the only subsections that apply to recommitment proceedings—specifies the type of evaluation that must occur, the contents of the evaluation and recommendation, or the qualifications of the individuals responsible for preparing those documents. Of particular concern, there is no requirement that the evaluation referenced in § 51.20(13)(g)2r. be performed by a psychologist, psychiatrist, or licensed physician, nor is the person conducting the examination required to personally examine the subject individual. Furthermore, unlike § 51.20(9)(a), subsecs. (10) through (13) do not give the subject individual in a recommitment proceeding the right to select one of the examiners or to secure an independent medical or psychological evaluation.

¶55 Thus, under ***S.L.L.***'s interpretation of WIS. STAT. ch. 51, there are significant differences between the robust protections afforded to individuals in original commitment proceedings and the lesser protections provided in

recommitment proceedings. I agree with Andy that these differences raise equal protection concerns.

¶56 To prove an equal protection violation, the party challenging a statute's constitutionality must show that the statute unconstitutionally treats members of similarly situated classes differently. ***Waupaca Cnty. v. K.E.K.***, 2021 WI 9, ¶33, 395 Wis. 2d 460, 954 N.W.2d 366. The right to equal protection does not require that similarly situated classes be treated identically, but "the distinction made in treatment [must] have some relevance to the purpose for which classification of the classes is made." ***Id.*** (citation omitted). Applying rational basis scrutiny, the question is whether there is a "reasonable basis to support" the disparate treatment. ***Id.***, ¶35 (citation omitted).

¶57 Here, Andy argues there is no reasonable basis to require a petitioner to provide advance notice of the legal standard and factual basis for a subject individual's detention at the initial commitment stage, and to require a personal examination by two doctors at that stage, while denying those protections in recommitment proceedings. As Andy correctly notes, an individual faces an even greater deprivation of liberty at the recommitment stage than at the initial commitment stage, as a recommitment can last twice as long as an initial commitment. *See* WIS. STAT. § 51.20(13)(g)1. (stating that an initial commitment order "may be for a period not to exceed 6 months, and all subsequent consecutive orders of commitment of the individual may be for a period not to exceed one year"). As a result, Andy persuasively argues that there is no reasonable basis to provide fewer protections to individuals at the recommitment stage than those at the initial commitment stage. The County does not meaningfully respond to this argument or assert any reasonable basis for this disparate treatment. The County

also does not dispute that subject individuals in initial commitment proceedings and subject individuals in recommitment proceedings are similarly situated.

¶58 I also question whether a recommitment petition that does not contain any factual basis for the petitioner's assertion that recommitment is warranted provides the notice required by due process. The ***S.L.L.*** court confirmed that WIS. STAT. ch. 51 proceedings are "subject to the full complement of due process guarantees." ***S.L.L.***, 387 Wis. 2d 333, ¶33. As a general matter, "due process requires notice and an opportunity to be heard before a deprivation of life, liberty or property." ***Santiago v. Ware***, 205 Wis. 2d 295, 336, 556 N.W.2d 356 (Ct. App. 1996). The notice must "reasonably convey information about the proceedings so that the respondent can prepare a defense or make objections." *See* ***Schramek v. Bohren***, 145 Wis. 2d 695, 704, 429 N.W.2d 501 (Ct. App. 1988). Andy persuasively argues that absent any statutory provision that "prescribes the contents of a petition for recommitment or requires a county to give notice of the legal standard and grounds for commitment," WIS. STAT. § 51.20 violates due process by failing to require a petitioner to give a committed individual notice of the basis for recommitment that is sufficient to allow that individual to prepare a defense.[1]

[1] As Andy correctly notes, ***Waukesha County v. S.L.L.***, 2019 WI 66, ¶25, 387 Wis. 2d 333, 929 N.W.2d 140, addressed the notice required by due process in the context of S.L.L.'s argument that the circuit court lacked personal jurisdiction over her. The ***S.L.L.*** court did not address whether the recommitment petition in that case violated due process because it did not contain sufficient information to allow S.L.L. to prepare a defense. Nor did the court address whether its holding that subsecs. (1) through (9) of WIS. STAT. § 51.20 do not apply to recommitment proceedings would violate the equal protection rights of subject individuals in recommitment proceedings.

¶59 In addition, Andy argues in case No. 2020AP1580 that if the "clear and concise statement of the facts" requirement in WIS. STAT. § 51.20(1)(c) does not apply to recommitment petitions, then the pleading requirements in the rules of civil procedure arguably apply. Section 51.20(10)(c) states, in relevant part, that except as otherwise provided in WIS. STAT. ch. 51, "the rules of evidence in civil actions and s. 801.01(2) apply to any judicial proceeding or hearing under this chapter." Under WIS. STAT. § 801.01(2), WIS. STAT. chs. 801 to 847 "govern procedure and practice in circuit courts of this state in all civil actions and special proceedings whether cognizable as cases at law, in equity or of statutory origin except where different procedure is prescribed by statute or rule." WISCONSIN STAT. § 802.02(1)(a), in turn, provides that each pleading that sets forth a claim for relief shall contain "[a] short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief."

¶60 Andy argues that the County's recommitment petition in case No. 2020AP1580 was insufficient under WIS. STAT. § 802.02(1)(a). However, under ***S.L.L.***, it is not clear whether the pleading requirements in § 802.02(1)(a) apply to recommitment petitions. The ***S.L.L.*** court acknowledged that WIS. STAT. § 51.20(1)(c) "incorporates our rules of civil procedure (except to the extent they conflict with Chapter 51)." ***S.L.L.***, 387 Wis. 2d 333, ¶22. But the court did not specifically address whether § 802.02(1)(a) applies to recommitment petitions. Nonetheless, the court's decision suggests that § 802.02(1)(a) does not apply, as the court held that the petitioner in ***S.L.L.*** was not required to serve a recommitment petition that contained a recitation of the facts supporting recommitment. ***S.L.L.***, 387 Wis. 2d 333, ¶24. To the contrary, the court held that the notice sent to the appellant and her attorney was sufficient because it

"provided the date, time, location, and subject matter of the Extension Hearing," and "nothing more was necessary." ***Id.***, ¶25.

¶61 In the wake of ***S.L.L.***, significant questions remain as to whether the recommitment provisions in WIS. STAT. ch. 51—as interpreted by the ***S.L.L.*** court—satisfy due process and equal protection. In addition, it remains unclear whether the pleading requirements in WIS. STAT. § 802.02(1)(a) apply to recommitment petitions. I write separately to highlight these lingering questions and to suggest that further clarification by our supreme court or the legislature is necessary to provide guidance to Wisconsin litigants, attorneys, and lower courts.