COURT OF APPEALS
DECISION
DATED AND FILED

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Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP958 **Cir. Ct. No. 2011ME4847**

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

IN THE MATTER OF THE MENTAL COMMITMENT OF MARY F.-R.:
MILWAUKEE COUNTY,

PETITIONER-RESPONDENT,

V.

MARY F.-R.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed*.

¶1 FINE, J. Mary F.-R. appeals the order committing her involuntarily under WIS. STAT. § 51.20 for six months in a locked Milwaukee County facility. The commitment order was entered on a jury verdict finding that: (1) she was "mentally ill," (2) she was "a danger to herself and/or to others" when she was "detained"; and (3) she was a "proper subject for treatment." She claims on

appeal that: (1) there was insufficient proof that she "evidenced a 'substantial probability of physical harm' to herself or others and was therefore 'dangerous' under Wis. Stat. § 51.20(1)(a)(2)"; and (2) WIS. STAT. § 51.20(11) is an unconstitutional violation of equal protection because it provides for a jury of six in chapter 51 trials, while a person whose commitment is sought under WIS. STAT. ch. 980 is entitled to a jury of twelve. We affirm.

I.

¶2 This matter was triggered by one of Mary F.-R.'s neighbors, a seventy-eight-year-old woman, when she called the police to say that Mary F.-R. was acting strangely and that she was afraid of her. The neighbor told the jury that she heard a noise at 4:30 in the morning, went out on her patio, and saw Mary F.-R. on her patio, which was about eight feet away from one of the neighbor's windows. She testified that Mary F.-R. "threw" a "big bucket of water" at the neighbor's window. In response to the neighbor's question as to what Mary F.-R. was "doing," Mary F.-R. "ran back in her -- back in her house and got another bucket of water and a big iron type of pole or whatever." When the neighbor again asked why she had thrown the water at her window, Mary F.-R. replied, as testified to by the neighbor: "She said I'm gonna do -- shoot all you peoples [*sic*] that's been messing with me, and she had the iron pipe, you know, moving it about." The neighbor then "called the police right away" because "she said she had the gun. … I really got afraid."

¶3 Michael Post, one of the police officers who went to Mary F.-R.'s apartment, told the jury that two other officers were already there when he arrived. They were all outside the apartment, and asked the building's manager to help them.

> At first we were trying to just to get [Mary F.-R.] just to come to the door and open the door. She was talking with the management lady, and [Mary F.-R.] was telling us to go away, go to hell, and that we're driving her to commit suicide; and then I asked the management to open up the door.

Once the officers got inside, Mary F.-R. "continued to make statements that I've now pushed her to where she's gonna commit suicide." She did not, however, say how she would do that.

¶4 According to Officer Post, Mary F.-R.'s apartment was barely habitable:

> The carpet seemed to be wet and like a mildew smell. There was just only two pails of water in the living room.
>
> All the appliances -- the microwave, refrigerator, the electrical heating units -- were all unplugged; and the cords were like taken out and like perfectly lined -- laid out.
>
> The stove was -- Electrical stove was taken apart. There was no power, no lights inside the residence.
>
> …
>
> [T]here was no food in the residence. … The main power switch had been turned off.

¶5 Mary F.-R.'s lawyer brought out on his cross-examination of Officer Post that she never made any attempts to harm him or herself. Post also told the jury that Mary F.-R. did not have a gun in her apartment.

¶6 Peder Piering, a clinical psychologist, testified for Milwaukee County, telling the jury that since 2001 he had evaluated "[a]bout a thousand" persons alleged to be proper subjects for involuntary commitment. Appointed to evaluate Mary F.-R., he tried to see her but she would not see him, so he restricted his evaluation to her records and discussions that he had with the staff at the

facility where Mary F.-R. was being kept pending the trial. He said that he spent approximately "40 to 45 minutes in the records" and some "[t]en to 15 minutes" talking to the staff. The records indicated to him that "she was considered illogical, irritable, paranoid. She exhibited loose associations and disorganized thought process." He also told the jury that while there "she required seclusion and IM [intramuscular] medications due to -- due to physically and verbally threatening behaviors" towards the "staff." He conceded though, that "[s]he did not strike out to my knowledge."

¶7 Dr. Piering concluded that Mary F.-R. had a "bipolar disorder," which, he said, was a treatable mental illness. Piering explained to the jury that bipolar disorders were "recurrent" and "cyclical" disorders, which, in Mary F.-R.'s case, cycles "with manic episodes, initially with elevated mood, excessive energy" that "begins to effect [*sic*] -- it's the thought process where you might have racing thoughts, more tangential thoughts." He indicated that "[s]uicide is a high risk with people with bipolar disorder." He concluded that Mary F.-R. "requires medication management on an inpatient unit." In response to cross-examination by Mary F.-R.'s lawyer, he noted that the records indicated that Mary F.-R. had an "extensive, psychiatric history, including about 15 inpatient hospitalizations, the most recent one … being in September." The trial was on December 8, 2011, and the police went to her apartment in response to the neighbor's call on November 26, 2011. Another Milwaukee County psychologist later told the jury that the September admission was because "she was threatening people with a knife." Piering indicated that her admission as a result of that call was Mary F.-R.'s "seventh admission of this year."

¶8 Dr. Piering also told the jury that although Mary F.-R. had never followed through on what her trial lawyer on cross-examination called "homicidal

behavior," "the threat is there. The threat's legitimate." He also noted that even though she never actually tried to commit suicide, she had a "history of suicidal ideation."

¶9 The County also called Douglas Hardy, also a psychologist with Milwaukee County, who testified that Mary F.-R. had been his patient at the Milwaukee County facility from her admission on November 26 until December 7, when the units were rearranged.[1] He testified that Mary F.-R. had "Bipolar 1 disorder," which was treatable. His description of the illness tracked Dr. Piering's testimony. Hardy also told the jury that the illness:

> has to be managed through medications, and it's dangerous to not to take your medications because every time you have an episode, it makes it more likely that you'll have another episode; and it makes it more likely that that episode will become more intense; so you really need to take medications consistently for the rest of your life for the best outcome.

Dr. Hardy noted that Mary F.-R. was taking her medications orally because the facility got an order permitting intramuscular injections if she did not. He also told the jury that he believed that Mary F.-R. was a proper subject for inpatient treatment because "[g]iven her current irritable behavior and the fact that she certainly would not take medications in anything but a locked unit."

II.

A. *Requisite dangerousness.*

¶10 As material here, WIS. STAT. § 51.20(1)(a)2 says that a person:

[1] Mary F.-R. erroneously refers to Dr. Hardy as "Dr. Harding" in her reply brief.

> is dangerous because he or she does any of the following:
>
> a. Evidences a substantial probability of physical harm to himself or herself as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm.
>
> b. Evidences a substantial probability of physical harm to other individuals as manifested by evidence of recent homicidal or other violent behavior, or by evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them, as evidenced by a recent overt act, attempt or threat to do serious physical harm.

The County had to prove that Mary F.-R. was "dangerous," as defined by § 51.20(1)(a)2, "by clear and convincing evidence." WIS. STAT. § 51.20(13)(e). As noted, Mary F.-R. contends that the jury's finding that she was "dangerous" is not supported by the evidence.

¶11 Our review of a jury verdict is not, of course, *de novo*. Rather, even in criminal cases, where the State's burden of proof is "beyond a reasonable doubt," we must give substantial deference to the jury. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752, 757–758 (1990), recounts the scope of our review in criminal cases:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

(Internal citation omitted.) The ***Poellinger*** scope of review, *a fortiori*, applies here as well, where the legislature has not only set a lower standard of proof ("clear and

convincing evidence," as we have seen), but has also designated WIS. STAT. ch. 51 matters as essentially "civil." WIS. STAT. § 51.20(10)(c) ("Except as otherwise provided in this chapter … s. 801.01(2) apply to any judicial proceeding or hearing under this chapter."). The scope of our review of jury verdicts in civil cases tracks that set out in ***Poellinger***. *See* WIS. STAT. RULE 805.14(1) ("No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is *no* credible evidence to sustain a finding in favor of such party.") (emphasis added).

¶12 Here, the County had to prove, as material to the evidence the jury heard, that, at the very least, Mary F.-R. made "recent threats of … suicide" that "[e]vidences a substantial probability of physical harm to … herself." *See* WIS. STAT. § 51.20(1)(a)2.a. As seen from Part I, she not only made those "threats," but, indeed, as Dr. Piering testified, had a "history of suicidal ideation." The jury was well within its discretion to return the verdict it did, finding the requisite "substantial probability of physical harm," even though, as Mary F.-R. argues, the jury could have gone the other way.

B. *Jury of six.*

¶13 WISCONSIN STAT. § 51.20(11)(a) provides, as material here, that a trial to determine if a person is "dangerous" is to be decided by "a jury of 6 people" if "before involuntary commitment a jury is demanded by the individual against whom a petition has been filed under sub. (1) or by the individual's counsel if the individual does not object." Although Mary F.-R. initially filed at least one *pro se* request for a twelve-person jury, and personally asked for a

twelve-person jury at the probable-cause hearings, she did not, as her main brief on appeal concedes, "argue to the circuit court that Wis. Stat. § 51.20(11) violates equal protection," which, as we have seen, is the argument she makes here.[2] Indeed, when the trial on the County's petition started, neither Mary F.-R. nor her

[2] The Record reveals the following:

(1) A handwritten letter from Mary F.-R. dated November 27, 2011, and filed on November 30, 2011, that asserts that it "is my Third 12 person Jury Trial Demand for any involuntary medication and any involuntary commitment here or elsewhere." (Capitalization and underlining in original.)

(2) At the probable cause hearing held before a court commissioner on November 30, 2011, Mary F.-R. interrupted the proceeding and the following happened:

> THE COURT: All right. So I'll have you be seated, please.
>
> THE RESPONDENT: No, I would have my attorney to start off because I spent hours --
>
> THE COURT: But Ms. F[.]-R[.], what I need you to do --
>
> THE RESPONDENT: These are four grievances.
>
> THE COURT: What I need you to do --
>
> THE RESPONDENT: You'll hear a different story about what happened on that ward, and five 12-person jury demands -- or six. Would you please put this into evidence? I'd like it in evidence before I give testimony.

The court commissioner again told Mary F.-R. to sit down, and Mary F.-R. further disrupted the proceedings.

(3) The court commissioner at the November 30 probable cause hearing accepted for filing Mary F.-R.'s "demand for a jury trial."

(4) At a December 2, 2011, probable cause hearing before the circuit court, Mary F.-R. told the circuit court: "And I deny that I'm mentally ill, and I'm against medication; and I know you want me to be quiet; and I will be; and I want a 12-person jury demand; and it's been in numerous times; and I have all the grievances and all the jury demands." The circuit court responded that "I do have a recently-filed jury demand."

lawyer objected — no less argued the basis for any objection — that impanelment of a six-person jury violated any of her rights.

¶14 The general rule is that we do not address arguments, even of constitutional dimension unless they were raised and argued before the circuit court. *See* ***City of Mequon v. Hess***, 158 Wis. 2d 500, 506, 463 N.W.2d 687, 690 (Ct. App. 1990) ("The court of appeals will not generally consider an issue raised for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443–44, 287 N.W.2d 140, 145 (1980). This is especially so for a claim that a statute is unconstitutional. ***Tomah-Mauston Broadcasting Co. v. Eklund***, 143 Wis. 2d 648, 657–58, 422 N.W.2d 169, 173 (Ct. App. 1988)."). At the very least, Mary F.-R. forfeited her objection to a jury of six by: (1) not arguing that it was unconstitutional, and (2) accepting the jury of six without complaint. *See* ***State v. Robles***, 157 Wis. 2d 55, 59–60, 458 N.W.2d 818, 820–821 (Ct. App. 1990) (a party who acquiesces in the trial court's course of action cannot later allege error because of that action), *aff'd sub nom*, ***State v. Martin***, 162 Wis. 2d 883, 470 N.W.2d 900 (1991).

¶15 Mary F.-R. contends, however, that the rule here is different because, as she asserts in her main brief:

> [W]here an issue presents a facial challenge to the constitutionality of a law, that issue goes to the subject matter jurisdiction of the court and appellate courts will consider it even if it has not first been raised in the circuit court. ***State v. Bush***, 2005 WI 103, ¶¶ 14-19, 283 Wis. 2d 90, 699 N.W.2d 80; *see also* ***State v. Campbell***, 2006 WI 99, ¶ 45, 294 Wis. 2d 100, 718 N.W.2d 659 ("if a statute is unconstitutional on its face, any judgment premised upon that statute is void.").

There are several things lacking in this argument, and it is misleading: (1) Mary F.-R. cites nothing to support her broad assertion that every "facial challenge to

the constitutionality of a law" "goes to the subject matter jurisdiction of the court"; and (2) contrary to her assertion, the constitutional question in ***Bush*** *was* raised first in the circuit court, *see* ***Bush***, 2005 WI 103, ¶11, 283 Wis. 2d at 101, 699 N.W.2d at 86 ("Bush again appealed, *renewing his argument he made for the first time in the circuit court* that chapter 980 is unconstitutional because it does not require a recent overt act. The State argued that Bush should not be allowed to attack the underlying commitment on constitutional grounds because he should have made this challenge in his two prior appeals.") (emphasis added). ***Bush*** held that: (1) Bush did not waive his right to challenge the constitutionality of WIS. STAT. ch. 980; and (2) the challenge, if successful, would have knocked out the statutory basis for committing him as a sexually-violent person. *See* ***Bush***, 2005 WI 103, ¶19, 283 Wis. 2d at 104–105, 699 N.W.2d at 87 ("We conclude that because Bush has facially challenged the constitutionality of chapter 980, his challenge goes to the subject matter jurisdiction of the court. Therefore, because challenges to subject matter jurisdiction cannot be waived, we reach the merits of his claim."). Mary F.-R.'s contention on appeal does not challenge "the constitutionality of chapter" 51; if it did, her contention might be more in tune with that for which she cites ***Bush***. As it is, though, her citation of ***Bush*** has nothing to do with her belated constitutional challenge to the six-person jury provided for by WIS. STAT. § 51.20(11)(a). Under the circumstances, we decline to consider that challenge now.

By the Court.—Order affirmed.

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