COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2216-FT **Cir. Ct. No. 2003ME89**

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

IN THE MATTER OF THE MENTAL COMMITMENT OF MICHAEL B.:

ONEIDA COUNTY,

PETITIONER-RESPONDENT,

V.

MICHAEL B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Oneida County: MARK MANGERSON, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Michael B. appeals an order extending his WIS. STAT. ch. 51 mental health commitment. Michael asserts the jury instructions directed the jury to find he was dangerous and there was insufficient evidence to support a finding of dangerousness. We disagree and affirm.

BACKGROUND

¶2 Michael was originally placed on a WIS. STAT. ch. 51 commitment in 2003. The commitment has been extended each year and the most recent extension, and subject of this appeal, occurred following a jury trial in February 2010. To extend the chapter 51 commitment, the County was required to prove by clear and convincing evidence that Michael was: (1) mentally ill, drug dependent, or developmentally disabled; (2) a proper subject for treatment; and (3) dangerous. *See* WIS. STAT. § 51.20(1)(a), (13)(e).

¶3 The County called two expert witnesses: Dr. Michael Galli and Dr. William Roberts. Both doctors testified that Michael suffers from a mental illness, chronic paranoid schizophrenia, and that his illness is treatable. Additionally, the doctors opined if treatment were withdrawn, Michael would not take his medications and this would lead to dangerous behavior. Galli testified that in the past, when Michael's illness was active, Michael was aggressive toward others and has threatened to shoot people and any officer who makes contact with him. Galli stated Michael has never actually shot anyone, and Galli did not know whether Michael possessed firearms.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). This is also an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 Neither party objected to the proposed jury instructions. While instructing the jury, the court misspoke, deviating from the proposed instructions and stating, "the law requires that the requirement of a recent act, attempt, or threat … is satisfied," instead of, "the law provides that the requirement of a recent act, attempt or threat … is satisfied." However, the jury was provided with a copy of the properly worded written instruction.

¶5 The jury found Michael was mentally ill, dangerous to himself or others, and a proper subject for commitment. The court entered an extension of commitment order.

DISCUSSION

¶6 Michael raises two arguments on appeal. First, he alleges the jury instruction on the element of dangerousness was improper because it directed the jury to find he was dangerous. Second, he contends there was insufficient evidence to prove dangerousness.

I. Jury Instructions

¶7 Although a circuit court has broad discretion in deciding whether to give a particular jury instruction, the court must exercise its discretion to "fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence." ***State v. Draughon***, 2005 WI App 162, ¶9, 285 Wis. 2d 633, 702 N.W.2d 412 (citation omitted). This court independently reviews whether a particular jury instruction is appropriate under the facts of a given case. ***Id.*** However, our review of a waived objection to a jury instruction is limited. *See* WIS. STAT. § 805.13(3); ***Steinberg v. Jensen***, 204 Wis. 2d 115, 121, 553 N.W.2d 820 (Ct. App. 1996). Pursuant to our discretionary

powers, we will reverse if it appears the real controversy has not been tried. *See* WIS. STAT. § 752.35.

¶8 Michael asserts that the jury instruction in this case prevented the jury from determining whether he was dangerous. Specifically, he contends the circuit court erred by failing to use the pattern instruction and by inadvertently misstating the instruction it opted to use.

¶9 The language from the pattern jury instruction for chapter 51 recommitment proceedings states:

> Question 2 asks: Is [subject] dangerous to [himself] or to others?
>
> A person is dangerous to [himself] or to others if [he]: 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.
>
> ….
>
> This is a recommitment proceeding. *Therefore, the law provides that you may also find that [the subject] is dangerous to himself … or others* if you find that there is a substantial likelihood, based on [the subject's] treatment record, that [the subject] would be a proper subject for commitment if treatment were withdrawn.

WIS JI—CIVIL 7050 and cmt. (2007) (emphasis added). In this case, the instruction used by the circuit court was identical to the pattern jury instruction except for the last paragraph. Instead, the court orally instructed:

> This is a recommitment proceeding, *therefore, the law requires that the requirement of a recent act, attempt or threat to do serious physical harm is satisfied.* If you find that there is a substantial likelihood, based on [Michael B.'s] treatment record that he would be a proper

> subject for commitment if treatment were withdrawn. (Emphasis added.)

¶10 The court also provided the jury with a written copy of the jury instruction, which stated:

> This is a recommitment proceeding. Therefore, the law *provides* that the requirement of a recent act, attempt or threat to do serious physical harm is satisfied if you find that there is a substantial likelihood, based on [Michael B.'s] treatment record, that he would be a proper subject for commitment if treatment were withdrawn. (Emphasis added.)

¶11 Michael first contends the proposed jury instruction, which was agreed on by the parties and used instead of the pattern instruction, directs the jury to find that the requirement of a recent overt act, attempt or threat is met and therefore, find Michael dangerous. We conclude the proposed jury instruction does not direct the jury to find Michael is dangerous. The jury instruction used by the circuit court first directs the jury, in language identical to that of the pattern instruction, that it may find Michael is dangerous to himself or others if it finds evidence of a recent overt act, attempt, or threat that shows violent behavior. Then, similar to the pattern instruction, the instruction informs the jury that it may also find the dangerousness element satisfied if there is a substantial likelihood, based on Michael's treatment record, that he would be a proper subject for commitment if treatment were withdrawn. The instruction does not direct the jury to find Michael dangerous; therefore, we determine the jury instruction used in this case did not prevent the real controversy from being tried.

¶12 Additionally, Michael asserts the real controversy was not tried because, when instructing the jury, the circuit court mistakenly stated "the law requires" instead of "the law provides." He concedes the jury was given a proper written copy of the instruction; however, he contends the improper oral instruction

"implied that the jury had no choice but to find that the county had proven the element of dangerousness."

¶13 We disagree and conclude that this inadvertent misstatement does not take the finding of dangerousness away from the jury. The circuit court's instruction still directed the jury to determine whether "there is a substantial likelihood, based on [Michael's] treatment record, that he would be a proper subject for commitment if treatment were withdrawn." We also determine the circuit court's inadvertent misstatement did not make the written instruction ineffective; we are satisfied the jury would review and apply the law as indicated in the written instruction. Because the instruction directed the jury to determine whether Michael was dangerous, we conclude the controversy was fully tried.

II. Sufficiency of the Evidence

¶14 When reviewing the sufficiency of evidence, this court will not reverse unless, after "considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, [the court determines] there is no credible evidence to sustain a finding in favor of such party." WIS. STAT. § 805.14(1). There must be "such a complete failure of proof that the verdict must have been based on speculation." ***Nieuwendorp v. American Fam. Ins. Co.***, 191 Wis. 2d 462, 472, 529 N.W.2d 594 (1995).

¶15 Michael asserts the evidence does not support a finding of dangerousness. Dangerousness can be proven in several ways. *See* WIS. STAT. § 51.20(1)(a)2. Here, the County relied on § 51.20(1)(a)2.b., which provides a person is dangerous if he or she:

> 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.

Further, because this was an extension hearing, the County used WIS. STAT. § 51.20(1)(am), which provides:

> [T]he requirements of a recent overt act, attempt or threat to act … 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.

¶16 Michael concedes both examining experts opined he would become a proper subject for recommitment if treatment were withdrawn. However, Michael asserts their characterization of his behavior does not meet the legal standard for dangerousness. Specifically, he asserts the doctors merely stated that if treatment were withdrawn, he would stop taking his medications, and he argues the doctors did not give sufficient reasons as to why this would be dangerous.

¶17 We conclude the record does not support Michael's argument. Dr. Galli testified that when Michael is not medicated, he is aggressive toward others and has made threats of shooting people and the police. Threats to do serious physical harm are dangerous. *See* WIS. STAT. § 51.20(1)(a)2.b. Because we conclude the record supports the jury's determination, we affirm.

By the Court.—Order affirmed.

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