COURT OF APPEALS
DECISION
DATED AND FILED

June 7, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2458-CR **Cir. Ct. No. 2004CF124**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GRAHAM L. STOWE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Graham Stowe appeals an order denying his petition for conditional release from his commitment to the Department of Health

and Family Services following his insanity acquittal.[1] Stowe argues there was insufficient evidence to support the circuit court's finding that he posed a significant risk of bodily harm to others if conditionally released. We conclude the circuit court's finding was supported by credible evidence and affirm.

BACKGROUND

¶2 In 2004, Stowe broke into the home of Amanda Boeder, his former girlfriend, with plans to kidnap her and then kill himself in front of her. While in the home, Stowe tied up Boeder's brother and father, then doused the father with gasoline and beat him. The captives were able to escape only after Stowe overdosed on medications and passed out. Stowe was found not guilty by reason of mental disease or defect of charges stemming from the incident and was committed to the Department of Health and Family Services for thirty-nine years and six months.

¶3 Stowe was conditionally released in June 2007, but was revoked in July 2009 after a host of rule violations. The primary violations occurred on June 14, 2009, when Stowe entered the Stadium View Bar where Boeder worked, remained for forty-five minutes, drank two beers, and questioned employees about Boeder.[2] Stowe's conditions of release forbade him from having unsupervised contact with Boeder, entering any establishment whose sole purpose was to serve

[1] As our supreme court has explained, an insanity acquittee refers to an individual who has been convicted of a criminal offense and subsequently excused from responsibility for the criminal act as a result of having successfully proved to a jury, or by stipulation with the state, that he or she suffered from a mental disease or defect at the time of the offense. *See* ***State v. Randall***, 192 Wis. 2d 800, 806 n.2, 532 N.W.2d 94 (1995) (***Randall I***).

[2] Although Stowe claims Boeder was not at the bar when he went there, the record definitively establishes that Boeder was indeed present and that Stowe and Boeder saw one another.

alcohol, and consuming alcohol. Stowe also had an angry confrontation with Boeder regarding overnight arrangements for their child, spray painted an obscene phrase near a different ex-girlfriend's workplace, and was warned by police after calling the same woman more than thirty times in one night.

¶4 Stowe petitioned for conditional release six months after revocation. The court appointed Dr. James Armentrout and Dr. Kevin Miller to examine Stowe, both of whom submitted written reports and testified at a hearing on April 9, 2010. Armentrout determined that Stowe posed a substantial risk of dangerousness to others and was unfit for conditional release. Miller, who stated that he did not equate "bending and breaking rules with a substantial likelihood that somebody will be violent," reached the opposite conclusion and recommended that Stowe be released with the conditions that he remain in a group home with an ankle bracelet and maintain absolute sobriety. Boeder also testified at the hearing in opposition to Stowe's release.

¶5 The circuit court denied Stowe's petition for conditional release. It observed that Stowe appeared intelligent and capable, but also highly deceptive and manipulative. The court found that there was no ideal treatment environment, but declined to simply "let him off [in] the streets," concluding that future attempts to test or break the rules could have "horrific potentials." The court determined Stowe's behavior on his prior conditional release represented a "clear and rapid progression into extremely risky behavior that immediately threatened not only the victim, but others as well." On balance, the court concluded that Stowe posed a significant risk of bodily harm to others and required institutionalization.

DISCUSSION

¶6 The state has a legitimate and compelling interest in protecting the community from those individuals who are a continuing threat to society and to themselves. ***State v. Randall***, 192 Wis. 2d 800, 807, 532 N.W.2d 94 (1995) (***Randall I***). The state may confine an insanity acquittee in a state mental health facility for so long as he or she is considered dangerous, provided that the commitment does not exceed the maximum term of imprisonment which could have been imposed for the offenses charged. ***Id.*** at 806-07; *see also* WIS. STAT. § 971.17(1)(b), (3)(a).[3]

¶7 A person committed under WIS. STAT. § 971.17 may petition for conditional release if at least six months have elapsed since entry of the initial commitment order, denial of the most recent release petition, or revocation of the most recent order for conditional release. WIS. STAT. § 971.17(4)(a). The court must grant the petition unless it finds "by clear and convincing evidence that the person would pose a significant risk of bodily harm to himself or herself or to others or of serious property damage if conditionally released." WIS. STAT. § 971.17(4)(d). Among the factors the court may consider are, without limitation, the nature and circumstances of the crime, the person's mental history and present mental condition, where the person will live, how the person will support himself or herself, what arrangements are available to ensure that the person has access to and will take necessary medication, and what arrangements are possible for treatment beyond medication. ***Id.***

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶8 On appeal, Stowe argues there was insufficient evidence supporting the circuit court's dangerousness finding. We view the evidence in the light most favorable to the circuit court's determination. *See* ***State v. Randall***, 222 Wis. 2d 53, 60, 586 N.W.2d 318 (Ct. App. 1998) (***Randall II***). We will affirm that determination if there is any credible evidence, or reasonable inferences from that evidence, upon which the court could have based its decision. ***Id.***

¶9 At the conditional release hearing, Armentrout testified that Stowe posed a significant risk of bodily harm to himself or others. Armentrout diagnosed Stowe with alcohol abuse and personality disorder not otherwise specified, with narcissistic and antisocial traits. Importantly, Armentrout opined that Stowe's original crimes arose "primarily" out of the personality disorder, and *not* a major depressive disorder for which Stowe was initially treated after successfully pursuing the insanity defense. Armentrout further stated that Stowe's original crime "was … a harmful, aggressive attempt to get back at someone who [had] hurt his feelings, and I think since that time, that pattern has been followed in other relationships."

¶10 Armentrout testified that Stowe's conduct during his 2007 conditional release "is consistent with someone who feels entitled to do as he likes …." In his written report, Armentrout expressed concern regarding several events reflected in Stowe's hospital record chart, all of which occurred during the conditional release. One event was the Stadium View Bar incident in which Stowe questioned several employees about Boeder. Another was the angry confrontation with Boeder regarding their young daughter, whom Stowe threatened to keep overnight at his apartment, contrary to a family court order requiring preapproval and a chaperone. In 2009, Stowe spray-painted obscene comments about a different ex-girlfriend near her workplace when told she did not

want a serious relationship with him, and was warned by the Hobart Police Department after calling the same woman over thirty times in one night. Later that year, Stowe's case manager recommended revocation of his conditional release because his behavior had not improved despite numerous warnings and chances to change. Armentrout considered each of these incidents in forming his opinion that Stowe posed a substantial risk of bodily harm. Armentrout's report and testimony constitute credible evidence supporting the circuit court's decision.

¶11 Stowe contends Armentrout's opinion was unreliable because it "was premised on a patently erroneous view of the legal standard to be applied." In support of his argument, Stowe points to Armentrout's testimony disapproving of Miller's report:

> I'm not familiar and I don't mean to be in any way critical of his work, but when I read his report, it seemed to me that he was addressing a question different from the one that I addressed. As I read through his report, again, it seemed to me that he was saying that he did not see a mental illness in Mr. Stowe which requires inpatient psychiatric treatment in a hospital setting. *Almost as if the burden might be on us to justify our continued treatment of him rather than, in my view, the burden being on Mr. Stowe to demonstrate that he can be released without substantial risk to individuals or property.*
>
> It just seemed that, as I read through that report, that Dr. Miller was addressing the question that should have been addressed in the original [mental disease or defect] hearing, does he require inpatient psychiatric treatment. *Now, … rightly or wrongly, he is now in a treatment program and I believe the burden is on him to demonstrate the lack of dangerousness, which I feel he has not done.* (Emphasis added.)

Stowe claims Armentrout's testimony was unreliable because the State bears the burden of proving that he posed a significant risk of harm. *See* WIS. STAT. § 971.17(4)(d). Importantly, Stowe does not contend the circuit court misallocated

the burden of proof. Stowe's argument is that Armentrout's "entire report, testimony, and ultimate opinion were filtered through [his] erroneous understanding of the law."

¶12 We conclude the circuit court properly relied on Armentrout's testimony and written report. The proper allocation of the burden of proof is a question of law, not fact. ***Long v. Ardestani***, 2001 WI App 46, ¶36, 241 Wis. 2d 498, 624 N.W.2d 405. A court is not bound by a witness's conclusion of law. *See* ***MercyCare Ins. Co. v. Wisconsin Comm'r of Ins.***, 2010 WI 87, ¶73, 328 Wis. 2d 110, 786 N.W.2d 785. In its oral decision, the circuit court explicitly acknowledged that the State bore the burden of proving dangerousness. Even assuming that Armentrout improperly placed the burden on Stowe, the circuit court plainly rejected Armentrout's testimony on that point.[4]

¶13 Boeder's testimony also supports the circuit court's dangerousness finding. Boeder stated she still felt threatened by Stowe. She expressed concern that, contrary to the conditions of his release, out "of all the bars in Green Bay for him to come to last year, he decided to come to mine … knowing that I was there …." Boeder stated she did not think Stowe had "learned his lesson yet." The circuit court picked up on Boeder's distress in its oral decision, stating, "I think that one would be hard-pressed to say that Ms. Boeder, in that experience, was not really physically troubled in any way, that there's somehow some separable

[4] It is not clear from the transcript that Armentrout intended his testimony to establish the burden of proof in a legal sense. Instead, Armentrout appears to be saying that, given Stowe's history, it was Stowe's responsibility to convince his evaluators that he could be released without substantial risk to individuals or property. Armentrout criticized Miller's report because he felt Miller was addressing a different question than dangerousness; namely, whether an inpatient setting was appropriate for treatment of a personality disorder.

personal experience she has that's of an emotional nature that had no physical effect upon her."

¶14 Stowe argues the circuit court erred by equating the risk of harm to Boeder's emotional state with the risk of physical harm. He contends the court's decision was contrary to WIS. STAT. § 971.17(4)(d) because there was no perceived risk of bodily harm.

¶15 Contrary to Stowe's argument, the circuit court did not base its decision on the type of harm caused by Stowe's sudden appearance at Boeder's workplace. Nor could it, for while an insanity acquitee's past conduct is relevant to the dangerousness inquiry, the standard governing conditional release focuses on the risk of *future* harm. *See* WIS. STAT. § 971.17(4)(d).

¶16 Instead, the court's decision was based on its assessment of the risk that Stowe would once again engage in violent acts if released. Immediately after discussing the distress Stowe caused by showing up at Boeder's bar, the court observed, "The reality is that [Stowe] was revoked because this was a clear and rapid progression into extremely risky behavior that immediately threatened not only the victim, but others as well." The circuit court concluded that Stowe was likely to commit future violent acts if released:

> The volatile behavior, the volatile temper, the conduct … on the last occasion of that conditional release demonstrates amply that the defendant poses a … significant risk of bodily harm to himself or others, or … of property damage, and there is nothing in this record to suggest that that has been mitigated in any way[. Stowe has been] given an opportunity to attempt to mitigate it [and] no effort has been made, so the court could have little confidence that there is going to be any change.

Because the circuit court reached a rational conclusion based on credible evidence, we affirm.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.