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DISTRICT IV

August 4, 2022

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You are hereby notified that the Court has entered the following opinion and order:

2021AP2093 In the matter of the condition of L.G.W.: La Crosse County HSHD v. L.G.W. (L.C. # 2021GN23)

Before Kloppenburg, J.[1]

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

L.G.W. appeals the circuit court's order for protective placement entered pursuant to WIS. STAT. § 55.08(1). L.G.W. argues that: (1) the County failed to prove by clear and convincing evidence that L.G.W. was in need of protective placement; and (2) the circuit court committed plain error when it made findings based on hearsay and facts outside the record to

[1] Because this appeal involves only the protective placement order, it is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2019-20). See order dated August 2, 2022.

All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

support its determination that the standards for protective placement were met. Based upon review of the briefs and record, I conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. As explained below, the standards for protective placement were met by clear and convincing evidence and L.G.W. fails to meet his burden to show that the plain error doctrine applies to the circuit court's determination. Accordingly, I affirm.

In March 2021, the La Crosse County Human Services and Health Department (the County) filed a petition alleging that L.G.W. was in need of protective placement on an emergency basis, and the circuit court issued a temporary protective placement order.

In April 2021, the County filed a petition for permanent protective placement of L.G.W. The circuit court issued orders scheduling a hearing on the petition, appointing a physician to examine L.G.W. and prepare a report, and appointing a County social worker to examine L.G.W. and prepare a report. L.G.W. was also examined by a licensed clinical psychologist, Dr. Stephen Dal Cerro, who also prepared a report in advance of the hearing.

Dal Cerro was the only witness to testify at the hearing, and his report was entered into evidence. Dal Cerro's testimony is described in detail below. After the close of evidence, L.G.W.'s guardian ad litem recommended that, based on the entire file and the evidence presented at the hearing, it was in L.G.W.'s best interest for the circuit court to order protective placement for him.

The circuit court granted the County's petition for permanent protective placement of L.G.W

L.G.W. appeals.

I first address L.G.W.'s argument as to the sufficiency of the evidence and then address L.G.W.'s argument as to plain error based on the circuit court's asserted reliance on hearsay and facts outside the record.

I. Evidence supporting protective placement

L.G.W. argues that the County failed to meet its burden to prove by clear and convincing evidence that he was in need of protective placement. As explained below, there was sufficient evidence to meet the legal standard at issue and to support the circuit court's determination that L.G.W. was in need of protective placement.

Decisions on protective placement are within the sound discretion of the circuit court. ***Anna S. v. Diana M.***, 2004 WI App 45, ¶7, 270 Wis. 2d 411, 678 N.W.2d 285. "The circuit court's factual findings will not be overturned unless clearly erroneous." ***Coston v. Joseph P.***, 222 Wis. 2d 1, 22, 586 N.W.2d 52, 61 (Ct. App. 1998); *see* WIS. STAT. § 805.01(2). The issue of whether the evidence satisfies the legal standard for protective placement is a question of law that we review de novo. ***Coston***, 222 Wis. 2d 23.

Before a circuit court can order the protective placement of an individual, it must find by clear and convincing evidence that the individual meets all four standards in WIS. STAT. § 55.08(1). WIS. STAT. § 55.10(4)(d). Those standards are as follows:

> (a) The individual has a primary need for residential care and custody.
>
> (b) The individual is a minor who is not alleged to have a developmental disability and on whose behalf a petition for guardianship has been submitted, or is an adult who has been determined to be incompetent by a circuit court.

> (c) As a result of developmental disability, degenerative brain disorder, serious and persistent mental illness, or other like incapacities, the individual is so totally incapable of providing for his or her own care or custody as to create a substantial risk of serious harm to himself or herself or others. Serious harm may be evidenced by overt acts or acts of omission.
>
> (d) The individual has a disability that is permanent or likely to be permanent.

Sec. 55.08(1).

Here, L.G.W. challenges only whether the third standard, WIS. STAT. § 55.08(1)(c), was proven by clear and convincing evidence. Specifically, L.G.W. argues that "[t]he County failed to prove that L.G.W. was 'so totally incapable of providing for his … own care or custody as to create a substantial risk of serious harm to himself … or others.'"

At the April 2021 hearing, the County's expert witness, licensed clinical psychologist Dr. Stephen Dal Cerro, testified as follows.

In preparation for the hearing, Dal Cerro met with L.G.W. for approximately fifty minutes and reviewed L.G.W.'s most recent medical records, which included recent mental status assessments, and the examining physician's report that was prepared in advance of the hearing. Dal Cerro also prepared a report that was entered into evidence.

As part of Dal Cerro's evaluation of L.G.W., Dal Cerro conducted three diagnostic tests of L.G.W.'s cognitive function, including a "mini mental state examination" and two other tests that are "screening measures for executive functioning." L.G.W.'s score on the mini mental state examination and L.G.W.'s performance on the other executive functioning tests were consistent with moderate to severe neurocognitive impairment. Based on L.G.W.'s performance on those screening measures, L.G.W.'s level of impairment was great enough that Dal Cerro "deemed it

unnecessary" to test L.G.W. further. L.G.W. is suffering from a degenerative brain disorder, with a specific diagnosis of major neurocognitive disorder likely resulting from dementia, and L.G.W.'s condition is permanent and likely to worsen over time.

L.G.W.'s "impairment" "make[s] him unable to effectively receive and evaluate information or make decisions related to his physical health and safety," and to "meet the essential requirements of his physical health and safety." L.G.W. "did not have an effective understanding of his medical conditions nor the treatment that would be involved in following recommendations." Regarding L.G.W.'s specific medical needs, L.G.W. expressed a basic lack of understanding about his diabetes diagnosis and that he needed to adhere to medication and dietary regimens. L.G.W. did not understand "what would be required in order to be compliant with his medical needs" in general, was "dismissive" of those medical needs, and "denied that he was receiving any kind of medical treatment." L.G.W. was unable to say what he takes medication for, and could not recall where he had left his medication.

Based on Dal Cerro's interactions and conversation with L.G.W., Dal Cerro testified that L.G.W. is incapable of taking his medications as directed, following up with proper medical care, and doing "those sorts of things to keep himself safe." Dal Cerro also testified that the least restrictive placement setting that is appropriate to meet L.G.W.'s needs at this time is "[a] setting that can provide 24-hour supervision in a secure setting … where his basic needs [can] be met" and where he could be monitored.

In explaining his opinion that L.G.W. is not able to care for his own physical health and safety, Dal Cerro testified that

> [L.G.W.]'s just got a general impairment in his ability to process information. He's got a grossly impaired memory, his executive function deficits are in line with his general neurocognitive disorder. So … he would need assistance in prioritizing, organizing and completing basic instrumental activities that would be … necessary to provide for his own basic needs and his personal safety.

When asked whether "[a]s a result of [L.G.W.'s] degenerative brain disorder," [L.G.W.] is … not only incapable of looking after himself, "but so totally incapable of providing for his own care or custody that he creates a substantial risk of harm to himself or others," Dal Cerro testified "I believe so, yes." Dal Cerro then reiterated his previous testimony that he "do[es not] believe that [L.G.W. is] capable of … providing for his own basic needs or his own personal safety."

The circuit court determined that the standards for protective placement were met, and made the following factual findings: L.G.W. "doesn't really know what medications he's on"; "this is a situation where [L.G.W.] needs to have assistance and [a] decision maker with regard to his medical needs [and] with regard to his personal needs"; "he is suffering from a major neurocognitive disorder and it's impacting his life"; and "he's so totally incapable of caring for himself that he would have a substantial risk of harm to himself or others."

Dal Cerro's testimony provided a sufficient basis for the circuit court to determine that the third standard for protective placement, WIS. STAT. § 55.08(1)(c), was met. Specifically, Dal Cerro's testimony provided a sufficient basis for the court to determine that L.G.W was in need of protective placement based on his inability to care for his daily medical needs and to do what

is necessary to keep himself safe. *See* ***Jackson Cnty. DHHS v. Susan H.***, 2010 WI App 82, ¶17, 326 Wis. 2d 246, 785 N.W.2d 677 ("Care" within the meaning of § 55.08(1)(c) "means that the person's incapacity to provide for his or her daily needs creates a substantial risk of serious harm to the person or others.") In pertinent part, Dal Cerro testified that L.G.W. suffers from "a degenerative brain disorder" that is permanent and likely to worsen; L.G.W. denied that he has any medical conditions; L.G.W. does not know what his medications are for; and L.G.W. does not understand what is necessary for his medical needs. It can reasonably be inferred from the circuit court's ruling that the court found Dal Cerro's testimony on these points to be credible and gave his testimony great weight. *See* ***Lessor v. Wangelin***, 221 Wis. 2d 659, 665-66, 586 N.W. 2d 1 (Ct. App. 1998) ("When the [circuit] court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and of the weight to be given to each witness's testimony.").

L.G.W. argues that "[t]he County's sole witness was an examining psychologist who had no personal knowledge of any overt acts or acts of omission," and that none of the hearsay evidence of alleged acts or acts of omission sufficed to establish "that L.G.W. was 'so totally incapable' of caring for himself such that it created a 'substantial risk of serious harm' to himself or others if they were true." I understand L.G.W.'s argument to be that the County failed to prove the third standard by clear and convincing evidence because it did not present specific evidence of "overt acts or acts of omission" regarding L.G.W.'s capacity to provide for his own care and custody, and that such evidence of "overt acts or acts of omission" is "necessary to prove that L.G.W. was in need of a protective placement."

However, the County need not have introduced any evidence of specific acts or acts of omission to prove by clear and convincing evidence that L.G.W. is incapable of providing for his

own care so as to create a substantial risk of serious harm to himself or others. The last sentence in WIS. STAT. § 55.08(1)(c) states "Serious harm *may* be evidenced by overt acts or acts of omission." (Emphasis added.). "Generally in construing statutes, 'may' is construed as permissive." ***City of Wauwatosa v. Milwaukee Cnty.***, 22 Wis. 2d 184, 191, 125 N.W.2d 386, 389 (1963). Accordingly, evidence of "overt acts or acts of omission" is not *required* to meet the legal standard. Sec. 55.08(1)(c).

L.G.W. appears to make an additional argument that Dal Cerro's opinion was insufficient because he did not discuss L.G.W.'s inability to care for his medical needs with more specificity, and that Dal Cerro could not do so because there was no non-hearsay evidence of L.G.W.'s diabetes diagnosis. However, Dal Cerro properly relied upon the hearsay in L.G.W.'s medical records when considering whether L.G.W. was capable of providing for his own medical care. *See* WIS. STAT. § 907.03 (an expert may rely on hearsay in forming an opinion); ***Walworth Cnty. v. Terese B.***, 2003 WI App 223, ¶8, 267 Wis. 2d 310, 671 N.W.2d 377 ("It is well settled that it is 'proper for a physician to make a diagnosis based in part upon medical evidence of which he [or she] has no personal knowledge but which he [or she] gleaned from the reports of others.'" (quoted source omitted)). That Dal Cerro's opinion was partially based on hearsay does not undermine the legitimacy of that opinion or prevent the circuit court from relying on it to determine that L.G.W. was in need of protective placement, and L.G.W. does not develop any argument to the contrary.

In addition, L.G.W.'s trial counsel elicited testimony from Dal Cerro regarding L.G.W.'s specific diabetes diagnosis, at one point referring to L.G.W.'s diabetes diagnosis herself, and asking whether Dal Cerro could recall "the severity level of the diabetes." L.G.W.'s trial counsel did not at any time object to the discussion of L.G.W.'s diabetes diagnosis, and does not raise

any developed argument about it on appeal. For these reasons, I reject any argument L.G.W. intends to make challenging any reliance the circuit court placed on the fact of L.G.W.'s diabetes diagnosis.

In sum, the County, through Dal Cerro's testimony, proved by clear and convincing evidence that L.G.W., "[a]s a result of … degenerative brain disorder … is so totally incapable of providing for his … own care or custody as to create a substantial risk of serious harm to himself." WIS. STAT. § 55.08(1)(c). The circuit court's determination that L.G.W. was in need of protective placement is supported by the record.

II. Relying on hearsay and facts not in evidence

L.G.W. argues that the following six factual findings by the circuit court were erroneously based on inadmissible hearsay and facts not in evidence:

> L.G.W. had experienced periods of homelessness;
>
> L.G.W. thought he had a trailer but he did not;
>
> L.G.W. had not been taking his medications;
>
> There were concerns about neuropathy with regard to L.G.W.'s diabetes;
>
> L.G.W. cared about a woman who did not want to see him and L.G.W. did not remember why she did not want to see him; and
>
> Law enforcement had been involved to protect others from L.G.W.

L.G.W. argues that the circuit court's reliance on these findings to support its protective placement determination constituted "plain error," and that the error was not harmless. As explained below, L.G.W. fails to meet his burden to show that the plain error doctrine applies to the alleged error here and, even if it did apply, the error was harmless.

It is undisputed that L.G.W. failed to object to the introduction of, or the reliance on, hearsay or facts not in evidence during the proceedings before the circuit court. A "failure to object constitutes a forfeiture of the right on appellate review." ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612. However, WIS. STAT. § 901.03(4)[2] recognizes the plain error doctrine, which "allows appellate courts to review errors that were otherwise [forfeited] by a party's failure to object." ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77.

"Plain error is 'error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time.' The error, however, must be 'obvious and substantial.' Courts should use the plain error doctrine sparingly." ***Id.*** (quoted sources omitted). "[T]he existence of plain error will turn on the facts of the particular case. The quantum of evidence properly admitted and the seriousness of the error involved are particularly important." ***Id.***, ¶22 (quoted source omitted). "The defendant bears the burden in the first instance to 'show that the unobjected to error is fundamental, obvious, and substantial.'" ***State v. Nelson***, 2021 WI App 2, ¶46, 395 Wis. 2d 585, 954 N.W.2d 11 (quoting ***Jorgensen***, 310 Wis. 2d 138, ¶23). If the defendant meets that burden, "the burden then shifts to the [opposing party] to show the error was harmless." ***Jorgensen***, , 310 Wis. 2d 138, ¶23.

L.G.W.'s argument fails in at least the following respects.

[2] WISCONSIN STAT. § 901.03(4) states: "Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge."

First, L.G.W. fails to support with relevant legal authority his argument that the alleged errors in making the six factual findings based on inadmissible evidence are fundamental, obvious, and substantial based on the facts of this case and given Dal Cerro's testimony in support of finding L.G.W. in need of protective placement. *See* ***Jorgensen***, 310 Wis. 2d 138, ¶21 ("The quantum of evidence properly admitted … [is] particularly important" to the existence of plain error.).

L.G.W. cites ***Jorgensen***, 310 Wis. 2d 138, ¶43, to support his argument that "[t]he [plain error] doctrine may be used where a basic constitutional right has been denied, such as when the admission of inadmissible evidence violates a defendant's right to confront and cross-examine witnesses." However, ***Jorgensen*** does not stand for the proposition that the admission of inadmissible evidence in itself is a "fundamental, obvious, and substantial" error so as to constitute plain error. In ***Jorgensen***, the supreme court applied the plain error doctrine to a series of errors by the circuit court and the prosecutor. ***Id.***, ¶¶20-53. One of those errors was the circuit court's reading of a transcript of a prior hearing at which Jorgensen was administered a preliminary breath test, both the prosecutor and the circuit court judge witnessed the test, and both the judge and the prosecutor provided testimony on the record regarding Jorgensen's apparent intoxication. ***Id.***, ¶¶2-11. The other errors involved the prosecutor's inclusion of several "highly prejudicial, largely inadmissible" comments throughout the trial and closing argument that were "cloaked with judicial approval" due to the circuit court's erroneous statements. ***Id.***, ¶¶15, 42. The court stated that "[b]ecause of the significance, timing, repetition, and manner in which the improper statements were presented to the jury, they infected the trial with unfairness. These highly prejudicial errors occurred at critical junctures of the trial. Their use at trial denied Jorgensen his right to due process." ***Id.***, ¶44. L.G.W. develops no argument

that the alleged errors here are of the same caliber as the errors in ***Jorgensen*** that "infected the trial with unfairness." *See* ***id.*** Therefore, ***Jorgensen*** is inapplicable to the facts of this case. *See also* ***Rock Cnty. v. J.J.K.***, 2021 WI App 36, 960 N.W.2d 636 (a circuit court's reliance on hearsay in determining that statutory standards are met is not alone sufficient to constitute plain error).[3]

With respect to the alleged errors here, L.G.W. fails to cite any case law applying the plain error doctrine to a circuit court's factual findings based on inadmissible hearsay where an objection was not made. L.G.W.'s citation to ***S.Y. v. Eau Claire County***, 156 Wis. 2d 317, 457 N.W.2d 326 (Ct. App. 1990) is unavailing for this reason. In ***S.Y.***, the party opposing the admission of certain hearsay testimony by an expert witness made a timely objection and, therefore, this court did not apply the plain error doctrine on appeal. ***Id.*** at 327-28. In addition, in ***S.Y.***, we ultimately concluded that the circuit court's failure to sustain the objection was harmless error. ***Id.***

Second, L.G.W. ignores the non-hearsay evidence, summarized above, that supported the circuit court's protective placement determination. L.G.W.'s assertion that any error "was not harmless because here there was no non-hearsay evidence presented that the court could rely on" is not borne out by the record. As stated, Dal Cerro testified that L.G.W. suffers from "a degenerative brain disorder" that is permanent and likely to worsen; L.G.W. denied that he has any medical conditions; L.G.W. does not know what his medications are for; and L.G.W. does not understand what is necessary for his medical needs. As explained above, this testimony

[3] *See* WIS. STAT. RULE 809.23(3)(b) (permitting the citation of authored, unpublished opinions issued after July 1, 2009, for their persuasive value).

sufficed to support the circuit court's findings that L.G.W. "doesn't really know what medications he's on," "he needs to have assistance and [a] decision maker with regard to his medical needs" for his diabetes, and "he is suffering from a major neurocognitive disorder and it's impacting his life." These findings sufficed to support the court's determination that the third standard for protective placement was met. None of these findings are among the six additional factual findings that L.G.W. challenges on appeal. Accordingly, any error in relying on inadmissible evidence to make those six additional factual findings was harmless.

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals