IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0688

IN THE MATTER OF THE
MENTAL HEALTH OF:

R.B.,

Respondent and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, the Honorable Michael F. McMahon,
Presiding

APPEARANCES:

CHAD WRIGHT
Appellate Defender
MICHAEL MARCHESINI
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
Michael.Marchesini@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

TIMOTHY C. FOX
Montana Attorney General
C. MARK FOWLER
Bureau Chief
Appellate Services Bureau
P.O. Box 201401
Helena, MT 59620-1401

LEO JOHN GALLAGHER
Lewis and Clark County Attorney
KATIE JERSTAD
Deputy County Attorney
228 Broadway
Helena, MT 59601

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Montana Code Annotated

Montana Rules of Evidence

STATEMENT OF THE ISSUE

In a rare involuntary commitment jury trial that hinged on whether the effects of R.B.'s stroke constituted a "mental disorder" or a "medical" issue, did the District Court commit reversible error by admitting out-of-court statements from R.B.'s doctors that his condition was not "medical" in nature?

STATEMENT OF THE CASE

R.B. suffered a major stroke in April 2018. Due to his subsequent confusion, disorientation, homelessness, and numerous hospital visits, the State filed an involuntary commitment petition on September 18, 2018. (District Court Document ("Doc.") 1.)

R.B. exercised his right to a jury trial, and the Lewis and Clark County District Court held trial on October 1 and 2, 2018. Karrie Bird, a licensed clinical professional counselor and certified "professional person," testified she was initially skeptical the commitment proceedings should go forward because R.B.'s memory and behavioral issues could be more "medical" in nature, rather than mental. (Combined Transcripts ("Tr.") at 250–54, 273.) She then testified, over R.B.'s hearsay objection, that R.B.'s doctors had assured her his issues

were not "medical" in nature. (Tr. at 253–54.) The District Court overruled the objection without explanation. (Tr. at 254.)

The jury found R.B. suffered from a mental disorder and he required commitment due to his inability to care for his basic needs, the threat of harm he posed to himself and others, and the likelihood his condition would predictably deteriorate if left untreated. (Doc. 15.) The District Court committed R.B. to the Montana State Hospital for a period not to exceed 90 days. (Doc. 18 at 4.)

R.B. filed a timely notice of appeal. (Doc. 19.)

STATEMENT OF THE FACTS

R.B. is a 64-year-old man with a history of serious medical issues. (Doc. 1 at 6, 10–13.) Many of his conditions pertain to his cardiovascular system: coronary artery disease, atrial fibrillation, and ventricular tachycardia, to name a few. (Tr. at 183, 200–01; Doc. 1 at 10–11.) R.B.'s ventricular tachycardia causes his heart to beat in a "very dangerous rhythm," which has required an automatic defibrillator to be implanted in his heart. (Tr. at 201.) His atrial fibrillation creates blood clots in his heart that can easily migrate to the brain, greatly increasing his risk of stroke. (Tr. at 201.)

R.B. suffered a serious stroke in April 2018. (Tr. at 183, 196.) Before the stroke, he lived with his wife in Helena and spoke daily on the phone with his adult son in Kalispell. (Tr. at 165, 177.) He had no history of mental illness beyond generalized anxiety disorder, moderate alcohol use disorder, and a single prior episode of major depressive disorder. (Tr. at 254; Doc. 1 at 13.)

After the stroke, R.B. began experiencing memory loss, disorientation, and confusion. Friends and police officers would find him walking in downtown Helena, lost and without shoes. (Tr. at 167, 205.) He would periodically be unable to recall his date of birth or the current day. (Tr. at 166, 247.) He developed a speech impediment. (Tr. at 174, 210.) And he became homeless due to a falling out with his wife. (Tr. at 187.) After the stroke, R.B. showed up at the emergency room dozens of times in mid-2018, typically due to confusion or chest pain. (Tr. at 195.)

R.B.'s doctors and social workers referred him to skilled nursing and rehabilitation facilities to help him recover from his stroke. (Tr. at 169, 176, 197.) While at such facilities, R.B. received speech therapy, among other forms of rehabilitation. (Tr. at 174, 184, 210.) As his son described to the jury, R.B.'s care team sought "a place that would be

able to serve his medical needs." (Tr. at 169.)

But R.B. had trouble getting the help he needed. He was denied admission to numerous facilities for reasons largely beyond his control: one facility denied him because it had no private rooms available; another denied him for "being a smoker"; and yet another denied him because it was "not able to bill Medicaid." (Doc. 1 at 9.) His social workers spent an "extensive amount of time" trying to find an appropriate placement, but numerous facilities throughout the state denied him admission. (Tr. at 246, 265.)

When he did gain admission, he would sometimes check himself out of rehabilitation facilities early, against medical advice. (Tr. at 198.) For instance, he agreed to stay at the Missoula Health and Rehabilitation Facility—a skilled nursing facility—but checked himself out after one month to return to Helena. (Tr. at 169, 176.)

R.B. gave his son a power of attorney. (Tr. at 261.) Due to R.B.'s stated willingness to go along with his son's healthcare advice, his care team tried to locate a suitable rehabilitation facility near Kalispell, but could not find one capable of serving R.B.'s needs. (Tr. at 169, 198.)

After five months of R.B.'s stroke-related symptoms, dozens of hospital visits, and frustrating efforts to get him rehabilitation services, the State petitioned for his involuntary commitment. (Doc. 1.) On September 17, 2018, the hospital summoned Bird to conduct a mental health evaluation of R.B. (Doc. 1 at 6.) Bird had previously met with R.B. during a hospital visit on August 1, but due to R.B.'s agreeability to "continue with his medical care" at that time, Bird made no recommendations for his detention or commitment. (Tr. at 242–43.)

After evaluating R.B. on September 17, Bird recommended his emergency detention, citing his disorientation, homelessness, difficulty caring for himself, and the lack of success in placing him in a skilled nursing facility. (Doc. 1 at 6–13.) The State attached Bird's evaluation report to its commitment petition. (Doc. 1 at 6–13.)

At trial, R.B. argued he did not suffer from a mental disorder and did not require commitment. (Tr. at 158–61, 308–11.) R.B.'s son testified about R.B.'s unusual behavior since the stroke and described how his father had "a ton of medical issues." (Tr. at 182.) Dr. Ashley Basten, a hospitalist who attended to R.B. during many of his hospital visits, testified she had diagnosed R.B. with "stroke extension": "So

ischemic stroke with more brain tissue involved, cognitive disfunction, which is a term for not being able to think clearly, and vascular dementia, which is a form of dementia caused by strokes." (Tr. at 197.) She explained how the stroke had given R.B. receptive and expressive aphasia—i.e., difficulty speaking and understanding speech. (Tr. at 210.) Dr. Basten's recommendation for R.B.'s medical treatment was to "go into some type of rehab or skilled nursing facility." (Tr. at 197.)

When the prosecutor asked Dr. Basten how confident she was that R.B.'s "current mental state" was attributable to his stroke extension, cognitive disfunction, and vascular dementia, rather than "just a side effect of one of his medications or the heart condition," Dr. Basten answered: "Very confident. And one reason I don't think it's a side effect of medications is he's often off of his medications when he comes in more confused." (Tr. at 202.)

Bird met R.B. for a second mental health evaluation three days after her initial evaluation. (Tr. at 248–49.) Although R.B. still displayed some confusion, she testified he "appeared much better." (Tr. at 249.) Bird diagnosed R.B. with "unspecified neural cognitive disorder," a "broad diagnosis" that "affects memory and the ability to

understand things." (Tr. at 254–55.) She stated R.B.'s confusion and disorientation were not constant, but rather that his lucidity "comes and goes." (Tr. at 262.)

Bird was skeptical after her second evaluation that the commitment proceedings should go forward. (Tr. at 250, 273.) She questioned whether R.B.'s condition was related more to "the medical piece of the stroke" rather than to a "mental illness" or dementia. (Tr. at 251, 273.) So she pushed for a postponement of the proceedings "until we could get the medical issue cleared up" with R.B.'s doctors. (Tr. at 274.)

Bird told the jury: "Multiple doctors in speaking with me who have helped him have informed me that they did not feel it was a medical issue. The cardiologist . . . specified that that question had been presented and that she [ ] did not feel that it was related to a heart problem at all." (Tr. at 253–54.) R.B. objected to Bird's testimony on hearsay grounds, and the District Court overruled the objection without explanation. (Tr. at 254.)

Bird acknowledged she was not a medical professional and had no medical training. (Tr. at 255, 269.) She agreed R.B.'s confusion,

disorientation, and memory issues could be considered "complications from a stroke" and that he "could still be suffering" from stroke complications. (Tr. at 271.)

Bird ultimately concluded R.B. had a mental disorder requiring commitment. (Tr. at 254.) She testified that if R.B. were committed, he would be placed at the Montana State Hospital—a "psychiatric" facility. (Tr. at 237.)

The State argued in closing that R.B. had a mental disorder, while acknowledging Dr. Basten and Bird had "different terms" for his disorder. (Tr. at 302.) The State emphasized R.B.'s continued need for speech therapy and stroke rehabilitation. (Tr. at 312.) And it asserted that R.B.'s irrational decision-making could be "a symptom of dementia" or "a result of a stroke." (Tr. at 313.)

The jury instructions defined a mental disorder as "any organic, mental, or emotional impairment that has substantial adverse effects on an individual's cognitive or volitional functions." (Doc. 17, Instr. 17; *see* Mont. Code Ann. § 53-21-102(9)). After the jury deliberated for nearly two and a half hours, it asked two questions of the judge regarding the term "mental disorder": (1) "Definition of

cognition/cognitive?"; and (2) "In the definition of 'mental disorder' provided what is meant by 'organic'?" (Doc. 13; Tr. at 320–21.) The court explained to the parties there was no statutory definition of "organic" or "cognitive," it could not give the jury "a definition that the legislature didn't give them," and it could not "tell them to use their commonsense" or "give them the dictionary." (Tr. at 323–24.) The District Court's written response to the jury was simply, "The legislature did not provide definitions" for these terms. (Doc. 13.)

After another two and a half hours of deliberation, the jury rendered its verdict. (Tr. at 324, 327.)

STANDARDS OF REVIEW

This Court reviews a district court's evidentiary rulings for an abuse of discretion. *In re Mental Health of D.L.T.*, 2003 MT 46, ¶ 7, 314 Mont. 297, 67 P.3d 189. An appeal from an involuntary commitment order is not rendered moot by expiration of the commitment period, "since the issues raised would fall under the 'capable of repetition, yet evading review' exception to the mootness doctrine." *In re J.S.W.*, 2013 MT 34, ¶ 11, 369 Mont. 12, 303 P.3d 741.

SUMMARY OF THE ARGUMENT

The jury had reason to doubt whether R.B.'s complications from his recent stroke amounted to a "mental disorder." His treatment regimen consisted of stroke rehabilitation, speech therapy, and skilled nursing—not psychiatric or mental health care. The testimony and arguments left the jury to question whether R.B.'s symptoms crossed the line from medical side effects of a stroke to a standalone mental disorder. The jury was sufficiently confused to the point that it had to ask two clarifying questions about the definition of a mental disorder—questions that went unanswered.

To ensure R.B.'s commitment to the Montana State Hospital—a facility designed to offer psychiatric treatment, not stroke rehabilitation—the State had to dispel the notion that R.B.'s diagnoses were "medical" in nature, rather than "mental." It did so by eliciting out-of-court statements from non-testifying medical doctors that R.B.'s issues were not in fact "medical."

This testimony came in through Karrie Bird, a counselor with no medical training. Bird repeated the opinions of the non-testifying doctors wholesale to the jury without adding her own expertise or

analysis. Absent any explanation as to why the court was allowing these statements, the jury presumably took the statements as proof of the matter asserted: that R.B. had a mental disorder, not a medical condition. Bird's testimony was inadmissible hearsay that the District Court should have excluded.

The court's evidentiary error prejudiced R.B.'s substantial rights. The jury was clearly uncertain whether R.B.'s memory and behavioral issues resulting from his stroke fit the definition of a mental disorder. The jury likely resolved its uncertainty by deferring to the opinions of non-testifying medical doctors. This hearsay testimony likely influenced the jury's finding of a mental disorder, warranting reversal of the commitment order.

ARGUMENT

I. The District Court abused its discretion by admitting hearsay statements from non-testifying doctors claiming R.B.'s symptoms were not "medical" in nature.

"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." M. R. Evid. 801(c). Unless an exception applies, hearsay is inadmissible. M. R. Evid. 802. This Court has

emphasized the "critical importance" of procedural safeguards in civil commitment cases, "given the utmost importance of the rights at stake" and the "calamitous effect of a commitment, including loss of liberty and damage to a person's reputation." *In re Mental Health of L.K.–S.*, 2011 MT 21, ¶ 15, 359 Mont. 191, 247 P.3d 1100.

Under the Montana Rules of Evidence, an expert witness offering an opinion may refer to otherwise inadmissible evidence to explain the basis of her opinion, so long as the evidence is of a type reasonably relied upon by experts in the field. M. R. Evid. 703; *Matter of C.K.*, 2017 MT 69, ¶¶ 18–20, 387 Mont. 127, 391 P.3d 735. But for such evidence to be admissible, it must be strictly limited to showing the basis for the expert's opinion and cannot act as substantive proof of the facts asserted therein. *C.K.*, ¶¶ 19–22. Its purpose must be to aid the factfinder "in assessing the credibility and reliability of the expert's opinion." *C.K.*, ¶ 21; *accord Reese v. Stanton*, 2015 MT 293, ¶ 22, 381 Mont. 241, 358 P.3d 208 (stating that otherwise inadmissible evidence may be admitted only "for the limited and independent purpose of enabling the jury to scrutinize the expert's reasoning"). Unless explicitly admitted for this limited proper purpose, there is a "danger that the

factfinder will prejudicially view the Rule 703 information as substantive proof not subject to the usual safeguards of foundational competence and cross-examination." *See C.K.*, ¶ 22.

An expert witness may not merely "serve as a conduit to admit otherwise inadmissible information as substantive evidence." *C.K.*, ¶ 21. In other words, she "may not simply transmit the out-of-court statements or opinions of others without adding" any analysis of her own. *Weber v. BNSF Ry. Co.*, 2011 MT 223, ¶ 38, 362 Mont. 53, 261 P.3d 984; *State v. Hardman*, 2012 MT 70, ¶ 28, 364 Mont. 361, 276 P.3d 839.

In *C.K.*, professional person Kim Waples testified that, according to clearly identified and documented counseling and staff records from a group home, C.K. had threatened to kill people and violently banged his head against windows while residing there. *C.K.*, ¶ 8. Waples used these records in conjunction with her personal observations of C.K. to opine C.K. posed a risk of harm to himself or others and required commitment. *C.K.*, ¶¶ 8, 26. The district court overruled C.K.'s hearsay objection to Waples's testimony about the group home records, reasoning, "I'm going to let her tell me what is in the record. That's what she relied on as part of her reaching her opinion about this case."

C.K., ¶ 26.

In holding the out-of-court statements contained in the group home records were admissible under M. R. Evid. 703, this Court emphasized that "the District Court *clearly recognized* the limited permissible purpose for admission of the otherwise inadmissible hearsay." *C.K.*, ¶ 26 (emphasis added). Because the testimony was admitted to explain "the basis of the expert's opinion rather than proving the facts asserted in the statement," the district court did not abuse its discretion in admitting it. *C.K.*, ¶ 29.

The State wanted to counteract R.B.'s defense theory that his diagnoses were medical complications from a stroke, rather than a mental disorder. (*See* Tr. at 158–61, 271, 308–11.) And it wanted to minimize Bird's own doubts about whether R.B. had a mental disorder. (*See* Tr. at 273–74.) To do this, the State elicited testimony from Bird that she deferred to non-testifying doctors' opinions excluding "medical" explanations for R.B.'s behavior. (*See* Tr. at 253–54.) Far from explaining the basis for Bird's own opinion, the State used Bird as a mouthpiece to transmit the opinion of the non-testifying doctors that "they did not feel it was a medical issue." (Tr. at 253–54.)

Bird conveyed the opinions of these non-testifying doctors to the jury "without adding any analysis" of her own. *See Hardman*, ¶ 28; *Weber*, ¶ 38. In *C.K.*, the group home record-keepers did not opine that C.K. posed an imminent threat of harm; they merely documented C.K.'s violent and threatening behavior. *C.K.*, ¶ 8. Waples then used that documented violent behavior to formulate her own opinion that C.K. posed a threat of harm. *C.K.*, ¶ 8. By contrast, Bird—who had no medical expertise of her own—restated the conclusive *opinions* of the non-testify medical professionals that R.B.'s issues were not medical in nature. (Tr. at 250–54.) Bird initially thought R.B.'s behavior could be a direct result of the stroke. (Tr. at 273–74.) Rather than applying her own expertise and analysis to factual observations to explain why she had changed her position, Bird simply relayed the non-testifying doctors' opinions to the jury. (*See* Tr. at 250–55.)

Bird's transmittal of the doctors' statements did not assist the jury in "assessing the credibility and reliability" of her opinion or help it "scrutinize [her] reasoning." *See C.K.*, ¶ 21; *Reese*, ¶ 22. The out-of-court statements served simply to prove the truth of the matter asserted: R.B.'s memory and behavior problems were not "medical" complications

from a stroke, but rather a mental disorder.

There was no reason to believe the jury would interpret the out-of-court statements as anything but substantive proof R.B.'s issues were not "medical" in nature. In *C.K.*, the judge was the factfinder, and she "clearly recognized the limited permissible purpose for admission of the otherwise inadmissible hearsay" when she said, "I'm going to let [the expert witness] tell me what is in the record. That's what she relied on as part of her reaching her opinion about this case." *C.K.*, ¶ 26.

Unlike in *C.K.*, the jury was the factfinder in this case. The District Court gave the jury no explanation for its admission of Bird's testimony; it responded to R.B.'s objection with one word—"Overruled."[1] (Tr. at 254.) Absent an explanation or limiting instruction, there is no reason to believe the jury was cognizant of Rule 703 or that it "recognized the limited permissible purpose" for the

[1] After the close of evidence, the District Court explained to the parties, *outside the presence of the jury*, that it had admitted the out-of-court statements from non-testifying doctors to explain the basis of Bird's opinion. (Tr. at 283.) With the evidentiary portion of trial finished, and having already lost the hearsay challenge, defense counsel apologized to the court for having made a "stupid objection" earlier to Bird's hearsay testimony. In context, defense counsel's statement was not a withdrawal of the objection, but rather an apparent effort to curry favor with the court. (*See* Tr. at 283.)

admission of the out-of-court statements. *See C.K.*, ¶ 26.

In fact, the District Court instructed the jury to "consider *all the facts* relevant to the issue of whether Respondent is suffering from a mental disorder." (Doc. 17, Instr. 17 (emphasis added).) The jury undoubtedly took this admonition to mean it could rely on the non-testifying doctors' opinions when deciding whether R.B.'s diagnoses were more "medical" or "mental" in nature.

Bird improperly "serve[d] as a conduit to admit otherwise inadmissible information as substantive evidence." *See C.K.*, ¶ 21. This was inadmissible hearsay not falling under an exception, and the District Court abused its discretion in admitting it. *See* M. R. Evid. 802.

II. The improper admission of hearsay testimony prejudiced R.B.'s substantial rights, warranting reversal.

A district court's evidentiary error requires reversal only if it adversely impacts a party's substantial rights. *S & P Brake Supply, Inc. v. STEMCO LP*, 2016 MT 324, ¶ 51, 385 Mont. 488, 385 P.3d 567 (citing M. R. Evid. 103(a)). This Court has reversed involuntary commitment orders tainted by inadmissible hearsay. In *D.L.T.* and *In re Mental Health of T.J.D.*, 2002 MT 24, 308 Mont. 222, 41 P.3d 323, the district courts relied on out-of-court statements concerning the

respondents' violent behaviors in finding the respondents posed an imminent threat of harm to themselves and others. *D.L.T.*, ¶¶ 10–11; *T.J.D.*, ¶¶ 5–6, 15. Because the inadmissible hearsay affected the courts' findings of the need for commitment, this Court reversed in both cases. *D.L.T.*, ¶ 17–18; *T.J.D.*, ¶ 16–18.

This case turned on whether R.B.'s stroke-related complications constituted a "mental" disorder. This was a threshold question in determining whether R.B. would be involuntarily committed. (*See* Doc. 17, Instr. 20.)

The jury had reason to doubt whether R.B., then a 63-year-old man with no significant history of congenital or long-standing mental health issues, had a mental disorder. He had suffered a major stroke just six months before trial. The ensuing effects included "stroke extension," "cognitive disfunction," "vascular dementia," and "unspecified neural cognitive disorder." (Tr. at 197, 254.) The jury heard testimony that these diagnoses could be considered "complications" from the stroke. (Tr. at 271.) And the prosecutor acknowledged R.B.'s irrational decision making could be considered either a "symptom of dementia" or a "result of a stroke." (Tr. at 313.) The jury had to make a

sophisticated, nuanced decision whether R.B.'s diagnoses crossed the blurry line from "medical" complications to a "mental" disorder.

R.B.'s treatment regimen strongly suggested he did not have a mental disorder. He needed speech therapy, stroke rehabilitation, and skilled nursing, not psychiatric treatment. (Tr. at 184, 197, 210.) And the commitment proceedings began not because of a sudden revelation in September 2018 that R.B. had a mental disorder requiring commitment. Rather, the State initiated the proceedings because, after countless emergency room visits and failed placement attempts at skilled nursing facilities, his care team was at a loss for how else to ensure he received proper treatment for his "medical needs." (*See* Doc. 1 at 6–13; Tr. at 195–98, 246, 265.)

The jury knew that if committed, R.B. would be sent to the Montana State Hospital, a psychiatric facility. (Tr. at 237.) R.B.'s potential commitment to a psychiatric facility did not square with his treatment needs. The looming Montana State Hospital commitment raised a serious question whether R.B.'s disorder was "mental" in nature and whether involuntary commitment was the proper procedure.

R.B. argued vigorously his stroke-related complications did not constitute a "mental" disorder. (Tr. at 308, 310.) Dr. Basten testified she was "very confident" R.B.'s issues were caused by his stroke extension, cognitive disfunction, and vascular dementia. But she never opined whether any of these diagnoses qualified as a "mental disorder," as opposed to medical complications or side effects from a stroke. (Tr. at 202.) Bird, not an expert on medical matters, testified to her initial belief finding commitment proceedings improper because R.B.'s issues could be related more to "the medical piece of the stroke" than to a mental disorder. (Tr. at 273–74.) The only medical experts to opine on the lynchpin question whether R.B.'s issues were more "medical" or "mental" in nature were non-testifying doctors who never stepped foot inside the courtroom.

The jury asked two questions to try and clarify what exactly constitutes a mental disorder. (Doc. 13.) When it received no substantive response from the court, it was left to "consider all the facts relevant to the issue of whether" R.B. had a mental disorder. (Doc. 17, Instr. 17.) At a loss for how to determine when complications from a medical event cross into the territory of a mental disorder, the jury

likely adopted the expert opinions of the non-testifying doctors and concluded that, because R.B.'s disorder was not "medical" in nature, it must be "mental."

R.B. clearly was reeling from stroke-related complications and needed skilled nursing, stroke rehabilitation, and possibly a legal guardian to prevent him from checking himself out of rehabilitation facilities.[2] But it was not clear he had a mental disorder.

Absent the inadmissible hearsay testimony, there is a high likelihood the jury would have concluded R.B.'s disorder was "medical" in nature and that he should not be involuntarily committed to the

[2] R.B. notes a guardianship proceeding would have been the proper procedure here. *See* Mont. Code Ann. §§ 72-5-301 to -325. The District Court and State implicitly acknowledged this at disposition when they expressed optimism that R.B.'s adult children would secure a guardianship over R.B. in the near future. (Tr. at 347–51.) Guardianships are designed for people "incapacitated" with impaired judgment or decision-making due to "mental illness, mental deficiency, physical illness or disability . . . *or other cause*." Mont. Code Ann. §§ 72-5-101(1) (emphasis added), -315. A guardian would have authority to prevent R.B. from checking himself out of skilled nursing or rehabilitation facilities. Mont Code Ann. § 72-5-321(2)(c), (6)(a). "Any competent person or a suitable institution, association, or nonprofit corporation" could serve as R.B.'s guardian. Mont. Code Ann. § 72-5-312(1). Even if the District Court could not immediately line up a permanent guardian, the statutes allow for appointment of a temporary emergency guardian for up to six months. Mont. Code Ann. § 72-5-317.

Montana State Hospital. The improperly admitted testimony likely influenced the jury's findings, thus prejudicing R.B.'s substantial rights.

CONCLUSION

The State's biggest hurdle to securing R.B.'s involuntary commitment was proving his stroke-related complications amounted to a mental disorder rather than a medical issue. To convince the jury on this factual question, the State used Bird as a mouthpiece to transmit out-of-court statements from non-testifying doctors that R.B.'s issues were not "medical" in nature. This was inadmissible hearsay, and the District Court abused its discretion in admitting it.

The jury clearly grappled with whether R.B.'s issues constituted a mental disorder. Uncertain whether R.B.'s diagnoses were more "mental" or "medical" in nature, the jury likely deferred to the opinions of non-testifying doctors that his diagnoses were not "medical." The inadmissible hearsay testimony thus influenced the jury's finding that R.B. had a mental disorder.

R.B. respectfully asks this Court to reverse his commitment order.

Respectfully submitted this 7th day of January, 2020.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Michael Marchesini
MICHAEL MARCHESINI
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,461, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Michael Marchesini
MICHAEL MARCHESINI
Assistant Appellate Defender

APPENDIX

CERTIFICATE OF SERVICE

I, Michael Marchesini, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 01-07-2020:

Leo John Gallagher (Prosecutor)
Lewis & Clark County Attorney Office
Courthouse - 228 E. Broadway
Helena MT 59601
Representing: State of Montana
Service Method: eService

Timothy Charles Fox (Prosecutor)
Montana Attorney General
215 North Sanders
PO Box 201401
Helena MT 59620
Representing: State of Montana
Service Method: eService

Electronically signed by Pamela S. Rossi on behalf of Michael Marchesini
Dated: 01-07-2020