

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1201**

In the Matter of the Civil Commitment of:
David Austin Russell.

**Filed March 14, 2022
Affirmed in part, reversed in part, and remanded
Ross, Judge**

Winona County District Court
File No. 85-PR-21-1255

David A. Russell, Winona, Minnesota (pro se appellant)

Karin Sonneman, Winona County Attorney, Paul R. Ellison, Assistant County Attorney,
Winona, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Kirk,
Judge.*

NONPRECEDENTIAL OPINION

ROSS, Judge

The district court civilly committed David Russell and ordered that he be involuntarily treated with neuroleptic drugs after finding that he posed a substantial risk of harm to himself and that he needed medical treatment for his psychiatric disorder. Addressing Russell's appeal from the order of commitment and the order that he be involuntarily treated with drugs, we hold that the district court's finding that Russell poses

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

a risk of harm is inadequate to support the commitment because the only harm the findings refer to is the psychiatric disorder that results from Russell's failing to take the drugs, not harm that results from the disorder. Although the district court properly supported its decision to order medication and we affirm in part, we therefore also reverse in part and remand for more fact-finding regarding the need for commitment.

FACTS

David Russell was previously civilly committed for treatment of schizophrenia and schizoaffective disorder. His symptoms of paranoia and extreme irritability resurfaced when he appeared at multiple county government locations erratically expressing conspiracy theories. Winona County deputies took him to the Mayo Clinic. An evaluating physician prescribed neuroleptic medications, but Russell refused to take them. The county petitioned the district court to order Russell confined at the clinic, and a physician filed a *Jarvis* petition asking the district court to order involuntary neuroleptic medication.

The district court conducted a trial on both petitions. Two physicians testified in support of the petitions. They offered substantial testimony supporting a finding that Russell was suffering from mental illness and that medication, which Russell refused to take, is necessary to mitigate his significant symptoms. One physician testified regarding whether Russell posed a risk of harm to himself or others, noting in his report that Russell had said, "My death is the only way this stops," and opining that Russell's statement represents suicidal ideation.

Russell also testified. He said that he does not believe he needs to be hospitalized and that he is "not willing to take [neuroleptic medications] based on their horrific affects."

He denied that he threatens himself or others and asserted that his treatment team was harming other patients.

The district court granted both the petition for commitment and the *Jarvis* petition authorizing the medical team to administer neuroleptic medications against Russell's will. Russell appeals.

DECISION

Russell challenges the sufficiency of the district court's factual findings and legal conclusions in ordering his civil commitment and involuntary medication. We review the district court's fact-findings for clear error. *In re Civ. Commitment of Breault*, 942 N.W.2d 368, 378 (Minn. App. 2020). We review alleged legal error de novo. *In re Civ. Commitment of Crosby*, 824 N.W.2d 351, 356 (Minn. App. 2013), *rev. denied* (Minn. Mar. 27, 2013).

I

We first address Russell's challenge to his civil commitment. The district court may not civilly commit a person unless it "finds by clear and convincing evidence that the proposed patient poses a risk of harm due to mental illness" and commitment is the only suitable alternative to other options. Minn. Stat. § 253B.09, subd. 1(a) (2020). For the following reasons, our review of the record informs us that the district court did not make a factual finding on the primary evidence of harm presented during the commitment trial.

The district court's finding that Russell poses a risk of harm is not sufficient to support commitment because the risk of harm the district court found was essentially the harm *of* Russell's mental illness, not the risk of harm that is *due to* his mental illness. The commitment statute defines a "person who poses a risk of harm due to a mental illness" as

a person who has a substantial psychiatric disorder and who poses a demonstrated substantial likelihood of physical harm to self or others. Minn. Stat. § 253B.02, subd. 17a(a) (2020). And the demonstration of harm must be evidenced by one of four circumstances:

(1) a failure to obtain necessary food, clothing, shelter, or medical care as a result of the impairment;

(2) an inability for reasons other than indigence to obtain necessary food, clothing, shelter, or medical care as a result of the impairment and it is more probable than not that the person will suffer substantial harm, significant psychiatric deterioration or debilitation, or serious illness, unless appropriate treatment and services are provided;

(3) a recent attempt or threat to physically harm self or others; or

(4) recent and volitional conduct involving significant damage to substantial property.

Id. The district court’s analysis focused on the evidence showing that Russell has a substantial psychiatric disorder and that his symptoms will persist. It credited the physicians’ testimony that Russell is “caught up in his extreme paranoia” and that his agitation and paranoia has caused him to stop “random people to tell them about [his] delusions or conspiracy theories.” This evidence demonstrates only that Russell suffers from mental illness, not that he faces a substantial likelihood of harm “due to” the illness.

The testifying physicians speculated that Russell’s mental illness might lead to harmful circumstances, and the district court credited their testimony. For example, they speculated that, because of his mental illness, Russell might in the future lose his residence. But no one testified that Russell lost his residence because of his illness, and we have

clarified that speculation that a mentally ill person “may, in the future, fail to obtain necessary food, clothing, shelter, or medical care or may attempt or threaten to harm [him]self or others” is not enough to justify commitment under the requirement to prove harm to self as demonstrated by an actual failure. *In re McGaughey*, 536 N.W.2d 621, 623–24 (Minn. 1995). Crediting the physicians’ concerns, though reasonable, was not a basis to order commitment.

What remains are generalized conclusory concerns and findings of potential harm. The district court credited physician testimony that Russell is “unable to function,” but the conclusion was not supported by any of the statutorily identified evidence necessary to demonstrate likely harm. The district court also credited physician testimony that Russell “poses a substantial likelihood of harm.” But we could affirm this generalized finding only if the testimony cited in support could clearly and convincingly support it. It cannot.

Although the evidence cited by the district court does not meet the statutory element of a demonstrated risk of harm to self or others, some evidence does at least possibly meet the element, but the district court made no related finding. The statute establishes that “a recent attempt or threat to physically harm [him]self” can demonstrate the risk of harm necessary to justify civil commitment. Minn. Stat. § 253B.02, subd. 17a(a)(3). The record indicates that Russell told a treating nurse that he had suicidal ideations, and one of the physicians interpreted Russell’s statement, “My death is the only way this stops,” as indicating that Russell is suicidal. The district court made no finding crediting the physician’s interpretation or otherwise interpreting Russell’s statement in the context of the statute. Despite the serious nature of the concern, the absence of any express or implied

finding as to whether the statement constitutes Russell's recent threat to harm himself leaves us unable to affirm on this basis. We therefore remand and instruct the district court to make a finding as to whether Russell poses a risk of harm to himself based on the evidence and concerns related to suicide.

II

We reject as unpersuasive Russell's challenge to the district court's order granting the *Jarvis* petition. Patients have a constitutional right to refuse intrusive medications like neuroleptics. *Jarvis v. Levine*, 418 N.W.2d 139, 148 (Minn. 1988). But the district court may order involuntary medication if it finds that the committed patient lacks capacity to decide whether to take the medication, and a reasonable person would take it. Minn. Stat. § 253B.092, subds. 7, 8(e) (2020). Russell unconvincingly contests the incapacity finding.

We see no clear error in the district court's finding that Russell lacks capacity to decide whether to take neuroleptic medication. A patient has capacity to refuse neuroleptic medications if he:

(1) has an awareness of the nature of [his] situation, including the reasons for hospitalization, and the possible consequences of refusing treatment with neuroleptic medications;

(2) has an understanding of treatment with neuroleptic medications and the risks, benefits, and alternatives; and

(3) communicates verbally or nonverbally a clear choice regarding treatment with neuroleptic medications that is a reasoned one not based on a symptom of [his] mental illness, even though it may not be in [his] best interests.

Id., subd. 5(b) (2020). We presume the patient has capacity, but a preponderance of the evidence may rebut the presumption. *Id.*, subds. 5(a), 6(d) (2020). The record supports the finding that the evidence does so here.

The district court received considerable evidence that addressed the statutory capacity factors and that rebutted the presumption. Among other things, it heard testimony that Russell was delusional, and Russell concedes that, based on his behavior, he is “easily misconstrued to be someone who is unstable and/or psychotic.” The evidence supports the district court’s findings that Russell is not aware of his situation and that his objection to the medication arises from his delusional concerns.

III

Russell raises various procedural challenges. He asserts that he was denied his right to access records, to a second mental-health examiner, to a jury trial, and to effective assistance of counsel. We do not consider arguments made for the first time on appeal or those unsupported by evidence in the record. *Thiele v. Stich*, 425 N.W.2d 580, 582–83 (Minn. 1988). Russell’s assertions fall into one or both categories.

Regarding Russell’s allegation that he had no access to the physician’s report, Russell’s attorney said to Russell during trial, “[W]e have received the report of Dr. Dennis,” and Russell tacitly accepted his attorney’s statement. Regarding Russell’s allegation that he was denied an independent mental-health examiner, the statute authorizes a second examination by a professional of the patient’s choosing on the patient’s request, Minn. Stat. § 253B.07, subd. 3 (2020), and Russell never made the request. Regarding Russell’s allegation that he was denied his right to a jury trial, he cites no authority

establishing that this right exists (and caselaw refutes it). *See State ex rel. Anderson v. U.S. Veterans Hosp.*, 128 N.W.2d 710, 716–17 (Minn. 1964). And regarding Russell’s allegation that his appointed counsel refused to communicate sufficiently with him to reach the witnesses he suggested and to investigate certain evidence, we will not review matters of attorney strategy. *Carridine v. State*, 867 N.W.2d 488, 494 (Minn. 2015). And even if we would, Russell does not say or even suggest what new and relevant evidence would have surfaced had his attorney been more vigilant. The procedural challenges fail.

Affirmed in part, reversed in part, and remanded.