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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-626

Filed: 21 April 2020

Granville County, No. 18SPC50,667

IN THE MATTER OF: O.L.

Appeal by Respondent-Appellant from order entered 15 November 2018 by Judge Adam S. Keith in Granville County District Court. Heard in the Court of Appeals 8 January 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General John Tillery, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Hitchcock, for Respondent-Appellant.

DILLON, Judge.

Respondent O.L. appeals from an order concluding that he “is mentally ill [and] dangerous to others” and ordering that he “be committed [] to the inpatient 24-hour facility” for 5 days. After careful review, we affirm.

I. Background

Respondent was scheduled to be released from Central Prison on 6 November 2018 after serving a sentence for second-degree murder. The day before his scheduled

release, Dr. Robert Lucking from Central Prison filed an Affidavit and Petition for Involuntary Commitment of Respondent [“the Petition”].

In the Petition, Dr. Lucking asserted that Respondent was mentally ill and dangerous to himself or others in addition to being mentally retarded. To support his assertion, he alleged specific facts about Respondent, as follows:

Inmate verbally aggressive towards officers threatening to harm them this morning. Inmate recently threatened to kill nursing staff and got into a physical altercation with officers. Inmate is non-compliance [sic] with his medications, medical and psychiatric, which will result in further decompensation. Inmate has accepted insulin once over the past 2 weeks. Inmate has a mental health diagnosis of schizophrenia. Inmate is paranoid and states that he will not accept injections from nursing staff because “they might try to make me sterile.” Inmate is at risk for further decompensation, which will result in him being a danger to self as he will continue to refuse medications. Inmate will also likely become more agitated, which will result in danger to others as inmate becomes easily agitated. Inmate has a history of aggressive behaviors, is in jail for 2nd degree murder.

Also attached to the Petition was Dr. Lucking’s Examination and Recommendation to Determine Necessity for Involuntary Commitment.¹ This report contained Dr. Lucking’s findings, including a recitation of Respondent’s past violent criminal history and a finding that he had “received 47 write-ups for misconduct[,] 16 of which were for assaults and threats, several of [which involved] the use of weapons.”

¹ N.C. Gen. Stat. § 122C-261(d) (2017) requires an initial examination report when the affiant is a physician or eligible psychologist.

Respondent's second examination was completed by psychiatrist Dr. Stephen Ford at Central Regional Hospital. Dr. Ford opined that Respondent was mentally ill, dangerous to others, and mentally retarded. Next to the boxes for these criteria Dr. Ford wrote, "BASED ON RECORDS."

At Respondent's involuntary commitment hearing, the only witness for the State was Dr. Ford, who conducted the second examination. Dr. Lucking did not testify. However, Dr. Ford read aloud from Dr. Lucking's findings that had been incorporated into the Petition. Respondent testified on his own behalf.

Based on the evidence, the trial court entered a written order, concluding that Respondent was mentally ill and dangerous to others and ordered that he be committed to an inpatient 24-hour facility for a period not to exceed 5 days.²

II. Analysis

On appeal, Respondent argues that "[t]he trial court erred by committing [him] where the findings of fact were not supported by competent evidence, and where the findings did not establish that [he] was dangerous to others." Respondent also argues that his statutory right to confront and cross-examine witnesses was denied at the involuntary commitment hearing. We address each argument in turn.³

² The trial court did not order outpatient commitment following inpatient commitment.

³ We acknowledge that O.L.'s period of involuntary commitment has terminated. However, the present appeal is still properly before our Court. See *In re Whatley*, 224 N.C. App. 267, 270, 736 S.E.2d 527, 529 (2012) (holding that prior discharge from involuntary commitment does not render an appeal moot).

A. Involuntary Commitment Order

The General Assembly has directed that “[t]o support an inpatient commitment order, the court shall find by clear, cogent, and convincing evidence that the respondent is mentally ill and . . . dangerous to others[.] The court shall record the facts that support its findings.” N.C. Gen. Stat. § 122C-268(j) (2017).

We review whether these findings are “supported by the court’s underlying findings, and whether those underlying findings, in turn, are supported by competent evidence.” *In re W.R.D.*, 248 N.C. App. 512, 515, 790 S.E.2d 344, 347 (2016).

Our General Statutes state that an individual is “dangerous to others” when:

within the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another . . . *and* that there is a reasonable probability that this conduct will be repeated. Previous episodes of dangerousness to others, when applicable, may be considered when determining reasonable probability of future dangerous conduct. Clear, cogent, and convincing evidence that an individual has committed a homicide in the relevant past is prima facie evidence of dangerousness to others.

N.C. Gen. Stat. § 122C-3(11)(b) (emphasis added). Our Court has found that this statutory definition essentially requires a trial court to find three elements:

- (1) Within the [relevant] past
- (2) Respondent has
 - (a) inflicted serious bodily harm on another, *or*
 - (b) attempted to inflict serious bodily harm on another, *or*
 - (c) threatened to inflict serious bodily harm on another, *or*

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- (d) has acted in such a manner as to create a substantial risk of serious bodily harm to another,
[or
- (e) has engaged in extreme destruction of property,
and]
- (3) There is a reasonable probability that such conduct will be repeated.

In re Monroe, 49 N.C. App. 23, 30-31, 270 S.E.2d 537, 541 (1980).⁴

Here, the trial court made nine written findings. The first four findings are numbered as 1 through 4 in the order. The last five findings are labeled as sub-findings of Finding #5.⁵ Respondent makes a number of arguments concerning the order, which we address below. Respondent challenges two of the nine findings, specifically Findings #5-2 and #5-4.

In Finding #5-2, the trial court found that “[t]he [involuntary commitment] petition indicated [Respondent] had multiple incidents and muptiple [sic] write ups for assaultive behavior.” This finding is merely a recitation of evidence; it is not a finding that Respondent, in fact, had assaulted people. *See In re Green*, 67 N.C. App. 501, 505, 313 S.E.2d 193, 195 n.1 (1984) (recognizing that “[r]ecitations of the [evidence] do not constitute findings of fact . . . because they do not reflect a conscious choice” by the fact-finder that it is finding the evidence to be true). The Petition

⁴ The definition of “dangerous to others” in effect at the time *In re Monroe* was decided did not include engaging in extreme destruction of property. *See* 1979 N.C. Sess. Laws. 1260, 1261, ch. 915, § 1; 1985 N.C. Sess. Laws. 670, 672, ch. 589, §§ 1, 2.

⁵ That is, Finding #5 is subdivided in the written order into five sub-findings, numbered 1 through 5.

completed by Dr. Lucking includes his affidavit alleging the above details. Therefore, the Petition does indicate that Respondent has engaged in assaults for which he was written up.

In Finding #5-4, the trial court found that “[t]he Court feels he has acted in a way that is violent to others.” Respondent argues that the use of the word “feels” indicates a “conclusory assertion” by the trial court. We interpret “feels” as meaning “finds,” such that the trial court found that Respondent had been violent towards others in the past. The trial court did not make findings regarding any specific episode of assaultive behavior. Nonetheless, this bare finding in the order is supported by the evidence. For instance, the record shows that Defendant committed a homicide.

Respondent further argues that the trial court’s findings fail to establish that he is a danger to others. Here, there was sufficient evidence before the trial court to support its ultimate finding that Respondent is a danger to others. Specifically, Dr. Ford testified that Respondent committed a homicide in 2007, which is statutorily considered *prima facie* evidence of dangerousness to others.

Citing *In re L.D.B.*, 168 N.C. App. 206, 211, 617 S.E.2d 288, 291 (2005), Respondent argues that a *prima facie* presumption has “no weight as evidence. It serves to establish a prima facie case, but if challenged by rebutting evidence, the presumption cannot be weighed against the evidence.”

Respondent further argues that the *prima facie* presumption of Respondent's homicide conviction was rebutted by Dr. Ford's testimony that Respondent had not exhibited any violent behavior since his involuntary admission. In any event, the State did offer other evidence of Respondent's violent behavior; specifically, Dr. Ford testified about reports that Respondent had recently threatened to kill a nurse and that he had acted violently towards others during his incarceration.

Notwithstanding the sufficiency of the evidence to support the trial court's ultimate finding, the General Assembly requires that the trial court "record the facts that support its findings." N.C. Gen. Stat. § 122C-268(j). Though the trial court did not make express findings about Respondent's violent behavior in prison, the court did "find[] as fact all matters set out" in Dr. Ford's report. And in his report, Dr. Ford found that Respondent engaged in violent behavior towards others while in prison.

Finally, Respondent argues that the trial court's order fails to include the statutorily required future-looking element of "dangerous to others," in other words, the requirement of "a reasonable probability that this conduct will be repeated." N.C. Gen. Stat. § 122C-3(11)(b). Indeed, our Court has held that where a trial court's "findings pertain only to Respondent's past conduct and draw no nexus between that conduct and future danger to others[.]" those findings are "insufficient to support its conclusion that Respondent was dangerous to others[.]" *In re Whatley*, 224 N.C. App.

267, 274, 736 S.E.2d 527, 531 (2012). However, the General Assembly has provided in Section 122C-3(11)(b) that evidence of a homicide committed by an individual within the relevant past is sufficient to show that the individual is dangerous to others. For this reason, we conclude that the trial court's involuntary commitment order was adequately supported.

B. Right to Confront and Cross-Examine Witnesses

Respondent next argues that the trial court "violated [his] statutory right to confrontation by admitting as substantive evidence out-of-court statements by the petitioning physician and unidentified prison officials."

Section 122C provides that "[c]ertified copies of reports and findings of physicians and psychologists and previous and current medical records are admissible in evidence, but the respondent's right to confront and cross-examine witnesses may not be denied." N.C. Gen. Stat. § 122C-268(f).

Here, Respondent's attorney objected as Dr. Ford began reading from Dr. Lucking's report at the hearing concerning Respondent's *arrest* history, an objection which was overruled.

However, then Dr. Ford read from Dr. Lucking's report concerning matters of Respondent's assaultive behavior since being incarcerated. And Respondent's counsel did not object to this portion of Dr. Ford's testimony. We conclude that the trial court did not commit error by failing to intervene where no objection was lodged.

Respondent, though, urges us to consider this matter as a statutory mandate case, based on Section 122C which provides that a “respondent’s right to confront and cross-examine witnesses may not be denied.” N.C. Gen. Stat. § 122C-268(f). Respondent essentially argues that although his counsel did not object to the alleged hearsay testimony, the trial judge had a duty to intervene *sua sponte*. We disagree.

“It is well established that when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court’s action is preserved, notwithstanding defendant’s failure to object at trial.” *In re E.D.*, 372 N.C. 111, 116, 827 S.E.2d 450, 454 (2019) (internal quotation marks omitted).

“When a statute is clearly mandatory, and its mandate is directed to the trial court, the statute automatically preserves statutory violations as issues for appellate review.” *Id.* at 117, 827 S.E.2d at 454 (internal quotation marks omitted). A mandate is directed to the trial court either: “(1) by requiring a specific act by the trial judge, or (2) by requiring specific courtroom proceedings that the trial judge has authority to direct[.]” *Id.* at 119, 827 S.E.2d at 456 (internal citation omitted). However, where “the responsibility is squarely on” a party to take some action under a statute to preserve a right, they waive appellate review by failing to take that action. *Id.* at 120, 827 S.E.2d at 456.

In this case it was not the trial judge’s responsibility to intervene when Respondent’s attorney did not object to the alleged hearsay testimony. Here, there

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was no mandate directed to the trial court; the responsibility was “squarely on” Respondent’s attorney to object to alleged hearsay testimony. *See id.* at 120, 827 S.E.2d at 456.

III. Conclusion

We affirm the trial court’s Involuntary Commitment Order.

AFFIRMED.

Judges TYSON and MURPHY concur.

Report per Rule 30(e).