

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-476-2

Filed 2 January 2024

Durham County, No. 21SPC2564

IN THE MATTER OF:

C.H.

Appeal by respondent from order entered 10 January 2022 by Judge Pat Evans in Durham County District Court. Originally heard in the Court of Appeals 15 November 2022, with opinion issued 29 December 2022. *See In re C.H.*, COA22-476, 2022 WL 17985666, (N.C. Ct. App. Dec. 29, 2022). The Supreme Court of North Carolina allowed respondent's petition for discretionary review. In an order entered 16 June 2023, our Supreme Court remanded to this Court to reconsider our decision in light of the Supreme Court's decision in *In re R.S.H.*, 383 N.C. 334, 881 S.E.2d 480 (2022). *See In re C.H.*, 384 N.C. 666, 892 S.E.2d 66 (2023).

*Attorney General Joshua H. Stein, by Assistant Attorney General Hilary R. Ventura, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz for respondent-appellant.*

FLOOD, Judge.

On remand from the Supreme Court, this Court must first consider whether Respondent preserved his confrontation right. If we conclude the issue was preserved, we must then determine whether (A) the trial court violated Respondent's confrontation right, and, if so, (B) whether Respondent was prejudiced by this violation. After careful review, we conclude Respondent preserved the issue of his confrontation right, and his confrontation right was violated, but he was not prejudiced. Thus, we affirm the order of the trial court.

### **I. Factual and Procedural Background**

For a full recitation of the facts *see In re C.H.*, 2022 WL 17985666. Only the pertinent facts are restated here.

On 22 December 2021, Dr. Shelby Powers ("Dr. Powers") signed an affidavit and petition requesting Respondent be involuntarily committed to Duke Regional Hospital on the grounds that he was mentally ill and a danger to himself. Respondent had been admitted to Duke Regional Hospital three days prior, following his second suicide attempt in six months. In this affidavit, Dr. Powers represented that Respondent was "certain" to kill himself "at some point" if he were released.

On 23 December 2021, Dr. Shi Xun Fang ("Dr. Fang") performed a "24 Hour Facility Exam for Involuntary Commitment" on Respondent. In this report, Dr. Fang made the following findings:

[Respondent] states that "his soul has left his body" and that he "feels no emotions." He currently has little insight with regards to his mental health, stating that he is

experiencing this because he is “cursed” and that medication would not help him. Considering the severity and lethality of his recent attempt, continued delusions, refusal to engage with treatment, [and] little insight, he is at a high risk of harm to self and requires inpatient hospitalization.

Based on these findings, Dr. Fang recommended Respondent be committed to inpatient treatment for thirty days.

An involuntary commitment hearing was scheduled for 31 December 2021, but Respondent requested a continuance on the grounds that he did “not wish to contest at [that] time.” The hearing was continued to 7 January 2022.

At the 7 January 2022 involuntary commitment hearing, Dr. Sandra Brown (“Dr. Brown”), a psychiatrist at Duke Regional Hospital who had been caring for Respondent, gave the following testimony. Respondent had a history of unspecified psychosis and mood disorder. Prior to starting treatment with Dr. Brown, Respondent had been in the intensive care unit at Duke Regional Hospital following an intentional overdose of Percocet. Respondent had first attempted suicide in July 2021 by overdosing on Percocet. After Respondent was discharged from the hospital in July, he stopped taking his medications and attending his outpatient appointments. While Respondent was making progress in his treatment with Dr. Brown, he was still having trouble understanding the need for continued treatment. Based on Respondent’s prior cessation of treatment, coupled with his misunderstanding of his need for treatment, Dr. Brown represented to the trial court

that Respondent posed a danger to himself. Dr. Fang did not testify at the hearing.

During Respondent's testimony, he denied having a mental illness and represented that he would not take medications for something with which he had not been diagnosed. Respondent, however, later testified that he was taking medication, and he thought it was helping him feel better. When asked by the trial court about his second suicide attempt, Respondent said he had been living with sickle cell disease and "feeling emotionless, and those two combined upon each other [had] just been very, very difficult." Respondent told the trial court that he was not "able to feel connected to [his] soul" and was in constant pain.

At the conclusion of the hearing, the trial court announced its decision to involuntarily commit Respondent for up to thirty days and entered an involuntary commitment order, requiring Respondent to remain at the Duke Behavioral Health Center for a period of thirty days. In the order, the trial court incorporated Dr. Fang's report and made the following, written findings of fact supporting involuntary commitment:

- Being treated for unspecified psychosis and mood disorder
- Second suicide attempt
- Continued delusional thinking (soul not connected to body; others out to get him, etc.)
- Medication non-compliant
- Respondent denies any mental illness

Respondent filed notice of appeal to this Court, arguing the trial court erred in: "(1) incorporating Dr. Fang's report into its order in violation of his constitutional

confrontation rights; (2) failing to make adequate factual findings to support involuntary commitment; and (3) proceeding with the involuntary commitment hearing and directly questioning witnesses in the State’s absence.” *See In re C.H.* at \*2. This Court affirmed the trial court’s order, concluding Respondent waived his constitutional argument by failing to object at the hearing, the trial court’s findings were adequate, and Respondent’s argument as to the involuntary commitment hearing and questioning witnesses in the State’s absence was precluded by our Supreme Court’s precedent. *See id* at \*2.

On 26 January 2023, Respondent filed a petition for discretionary review with the Supreme Court. On 16 June 2023, via order, the Supreme Court concluded this Court’s prior opinion failed to take into consideration the Supreme Court’s decision in *In re R.S.H.*, 383 N.C. 334, 881 S.E.2d 480 as it applied to the issue of whether Respondent preserved the confrontation challenge. The Supreme Court, therefore, remanded back to this Court for reconsideration.

## **II. Analysis**

We must first determine whether Respondent preserved his argument that the trial court violated his constitutional right to confrontation in light of the Supreme Court’s decision in *In re R.S.H.*, 383 N.C. 334, 881 S.E.2d 480. Because we conclude this issue is preserved, we will also address whether incorporating the report violated Respondent’s confrontation right, and if so, whether this violation prejudiced Respondent.

### **A. Confrontation Right**

An appellant may not raise a challenge on appeal unless they “presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make . . . .” N.C.R. App. P. 10(a)(1). “A party does not fail to preserve an issue for appellate review, however, where the trial court acts on its own motion without prior notice and thereby denies the party the opportunity to object.” *In re R.S.H.*, 383 N.C. at 338, 881 S.E.2d at 483.

In *In re R.S.H.*, the trial court incorporated a physician’s report after the involuntary commitment hearing concluded—thereby depriving the respondent of the opportunity to object to the report. *Id.* at 338, 881 S.E.2d at 484. The Supreme Court held the challenge to the respondent’s confrontation right was therefore persevered because he did not have an opportunity to object to the report at the hearing. *Id.* at 338, 881 S.E.2d at 484. The Supreme Court further held that the trial court violated the respondent’s confrontation right by incorporating the report into its findings of fact because: the physician who created the report “did not testify at the hearing; the report was not formally offered or admitted into evidence; and the trial court did not inform [the] respondent that it was incorporating the report into its findings of fact.” *Id.* at 339, 881 S.E.2d at 484.

Here, the trial court acted on its own accord without giving notice to the parties that it would incorporate the report into the order. As in *In re R.S.H.*, the trial court merely checked the box in its order indicating Dr. Fang’s report was “incorporated by

reference as findings.” Thus, Respondent did not have an opportunity to object to the report, and this issue is preserved for appellate review. *See id.* at 338, 881 S.E.2d at 484.

Now, we turn to whether the incorporation of the report violated Respondent’s confrontation right. Pursuant to *In re R.S.H.*, we conclude it did.

“Certified copies of reports and findings of commitment examiners 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) (2021). A respondent, therefore, must be informed of any and all reports “received by the court and given an opportunity to test, explain, or rebut it.” *In re R.S.H.*, 383 N.C. at 339, 881 S.E.2d at 484.

Here, as in *In re R.S.H.*, the physician who created the report—Dr. Fang—did not testify at the hearing, the report was not formally introduced into evidence during the hearing, and the trial court did not inform Respondent that it was incorporating the report into the findings. The trial court, therefore, violated Respondent’s confrontation right by incorporating the report without giving Respondent an opportunity to “test, explain or rebut it.” *See id.* at 339, 881 S.E.2d at 484.

Accordingly, we conclude Respondent’s challenge to his confrontation right was preserved because the trial court acted on its own motion without notice when incorporating the report, and Respondent’s right was violated because he did not have an opportunity to challenge the findings in the report or cross-examine Dr. Brown

regarding the report at the hearing. *See id.* at 339, 881 S.E.2d at 484.

## **B. Prejudice**

Having concluded the trial court violated Respondent's confrontation right, we next consider whether Respondent was prejudiced by the incorporation of Dr. Fang's report.

### **1. Standard of Review**

This Court reviews a "trial court's commitment order to determine whether the ultimate finding concerning the respondent's danger to self or others is 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). As for showing prejudice,

[a]n error is not prejudicial unless a respondent demonstrates that a different result would have likely ensued had the error not occurred. For involuntary commitment orders, the erroneous incorporation of an examination report is not prejudicial if the trial court's remaining factual findings, based on competent evidence, support its ultimate finding that the statutory criteria for commitment have been met.

*In re R.S.H.*, 383 N.C. at 339, 881 S.E.2d at 484 (citations and internal quotation marks omitted).

"To support an inpatient commitment order, the [trial] court shall find by clear, cogent, and convincing evidence that the respondent is mentally ill and dangerous to self . . . or dangerous to others[.]" N.C. Gen. Stat. §122C-268(j). "A respondent poses



a danger to himself when, ‘[w]ithin the relevant past,’ he [] has (1) acted in a manner that presents a reasonable probability that he [] will suffer serious physical debilitation in the near future; [or] (2) attempted or threatened suicide and there is a reasonable probability of suicide[.]” *In re C.G.*, 383 N.C. 224, 237, 881 S.E.2d 534, 544 (2022) (first alteration in original) (citation omitted). A respondent is a danger to themselves if they act in a way that shows the following:

I. The individual would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of the individual’s daily responsibilities and social relations, or to satisfy the individual’s need for nourishment, personal or medical care, shelter, or self-protection and safety.

II. There is a reasonable probability of the individual’s suffering serious physical debilitation within the near future unless adequate treatment is given pursuant to this Chapter. A showing of behavior that is grossly irrational, of actions that the individual is unable to control, of behavior that is grossly inappropriate to the situation, or of other evidence of severely impaired insight and judgment shall create a prima facie inference that the individual is unable to care for himself or herself.

N.C. Gen. Stat. § 122C-3(11)(a)(1)(I)–(II) (2021).

The trial court, therefore, is required to make findings that address the probability that a respondent is a future danger to themselves and current inability to care for themselves. *See In re R.S.H.*, 383 N.C. at 340, 881 S.E.2d at 484; *see also In re C.G.*, 383 N.C. at 237–38, 881 S.E.2d at 544 (“A trial court must make findings of fact that support both prongs of this test in order to support an involuntary

commitment order.”).

## 2. Danger to Himself

Respondent argues the trial court failed to make “explicit findings” that there was a likelihood he would attempt suicide in the near future. The trial court, however, is not required to make “explicit findings” that a future suicide attempt is likely.

To show a respondent has a probability of being a danger to themselves in the future, “the trial court’s findings must simply ‘*indicate* that respondent is a danger to [him]self in the future.’” *In re R.S.H.*, 383 N.C. at 340, 881 S.E.2d at 484 (citation omitted). The use of the words “reasonable probability of harm” is not required, but the trial court must show a correlation between the “past conduct and future danger.” *See id.* at 340, 881 S.E.2d at 484.

Here, the trial court found that Respondent was “[b]eing treated for unspecified psychosis and mood disorder”; had made a second suicide attempt; continued to have delusional thoughts, including that his “soul was not connected to [his] body” and that others were “out to get him”; was non-compliant with his medication; and denied having a mental illness. These findings were supported by Dr. Brown’s testimony that Respondent had a “history of unspecified psychosis and unspecified mood disorder”; attempted suicide in July 2021 and again in December 2021; expressed “a lot of delusional thinking, feeling paranoid that someone was out to get him, reports of feeling like his soul was [not] connected to his body”; and stopped

taking medication and going to outpatient treatment. The finding that Respondent denied having a mental illness is supported by Respondent's own testimony that he has "never been diagnosed with a mental illness or a mood disorder."

These findings "indicate" Respondent posed a "reasonable probability of future harm" to himself, as he had a history of psychosis, had made two suicide attempts, had been inconsistent in taking medication, and denied having a mental illness. *See In re R.S.H.*, 383 N.C. at 340, 881 S.E.2d at 484.

### 3. Inability to Care for Himself

Finally, these findings also "indicate a reasonable probability" that Respondent cannot provide adequate care for himself without supervision. Respondent denied having a mental disorder, did not believe he needed medication for a mental disorder, and showed hesitancy towards therapy. *See id.* at 341, 881 S.E.2d at 485 (concluding the evidence showed the respondent posed a danger to herself without further supervision when she had denied needing medication and failed to communicate with her doctors).

Accordingly, Respondent was not prejudiced by the trial court's incorporation of the report into the findings of fact because the written findings support the ultimate finding that Respondent posed a danger to himself without continued care, and a different result, therefore, would not have occurred absent the erroneous incorporation of the report. *See In re R.S.H.*, 383 N.C. at 341, 881 S.E.2d at 485.

### **III. Conclusion**

We conclude Respondent preserved his challenge to his confrontation right because the report was incorporated on the trial court's own motion after the hearing had ended. We further conclude incorporating the report violated Respondent's confrontation right, but Respondent was not prejudiced by this violation because the trial court's written findings of fact, based upon evidence presented at the hearing, supported its conclusion that Respondent was a danger to himself.

AFFIRMED.

Judges ARROWOOD and CARPENTER concur.

Report per Rule 30(e).