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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lee County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 04—CF—48
)	
DAVID BIDDLE,)	Honorable
)	Ronald M. Jacobson,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hudson concurred in the judgment.

ORDER

Held: Defendant¹ who was adjudicated a Sexually Dangerous Person was not denied his constitutional right to a speedy trial despite 32 month interval between his application for recovery and his jury trial because he forfeited this issue and demonstrated no plain error; no error occurred where the jury received instruction on the stricter “reasonable doubt” burden of proof when the proper burden of proof was “clear and convincing evidence”; the failure to provide the jury with a third alternative verdict of an “appearance” of recovery coupled with conditional release was harmless error because, under these circumstances, the verdict would not have been different.

¹Throughout the proceedings and in the appellate briefs, Mr. Biddle has been referred to as “defendant” rather than “respondent.” For the sake of consistency, we refer to him as “defendant.”

Defendant, David Biddle, appeals the trial court's January 12, 2010, denial of his application pursuant to section 9 of the Sexually Dangerous Persons Act (Act) (725 ILCS 205/9 (West 2008)) for discharge or conditional release. He argues that (1) he was denied his constitutional right to a speedy trial; (2) he was denied his due process right to a fair trial because the jury was improperly instructed; and (3) the trial court's failure to consider his request for conditional release as an alternative verdict (other than a finding of "Sexually Dangerous Person" or release) and to instruct the jury on this issue resulted in plain error. We affirm.

I. BACKGROUND

In September 2004, defendant was adjudicated a Sexually Dangerous Person under the Act and committed to the custody of the Illinois Department of Corrections. On May 4, 2007, defendant filed *pro se* an application for discharge or conditional release. On the same date, defendant filed *pro se* a jury demand and speedy trial demand. On May 17, 2007, counsel was appointed for defendant. After numerous continuances, a jury trial was held on January 12, 2010.

The jury heard the testimony of two expert witnesses. Dr. Angeline Stanislaus, a psychiatrist, opined that defendant "remains a sexually dangerous person" and that it was "substantially probable that [defendant] would engage in sexual offenses if not confined at this time." She further opined that defendant had not made enough progress so that conditions imposed upon him would allow him to be safely released into the community. During cross-examination and re-direct, she testified at length regarding conditional release and the possible conditions that could be imposed on defendants to safely manage their behaviors. She stated that defendant exhibited a lack of emotional control and a lack of impulse control, and had not reached the level of treatment at which he would be recommended for conditional release.

Dr. Mark Carich, a psychologist, testified that he coordinated the sex offender program for the Illinois Department of Corrections and participated in the interview of defendant. The interview is part of the evaluation required whenever a defendant files an application of recovery. Dr Carich had known defendant since he was committed as a sexually dangerous person in 2004. Defendant participated primarily in group therapy.

Dr. Carich stated there are eight dynamic “elements” focused on during the evaluation process. The first element is the individual’s “motivation” as evidenced by caring about treatment, progress and recovery, as opposed to simply being released from custody; this is indicated by factors such as attendance at and participation in group therapy, receptiveness to feedback, completing homework assignments, compliance with program rules and prison rules. The second element is “responsibility,” indicated by defendant’s admission to the offenses he committed and accountability for his own actions. The third element is “social interest,” *i.e.*, empathy toward the victim and toward other people and a feeling of a sense of remorse. The fourth factor is the “social effect of dimension,” *i.e.*, the development of basic social skills to interact with other people together with anger management, mood management and conflict resolution skills. The fifth element is the “offense process” and involves relapse prevention by recognizing risk factors and triggers and developing coping skills to actively intervene and avoid re-offending. The sixth element is “lifestyle behaviors,” which looks at anti-social characteristics. Seventh is the underlying motivation for the offending behavior, such as anger, resentment, loneliness, neediness, abandonment and vulnerability. The eighth, and last, element is arousal control; the goal is decreased deviant arousal and increased, but regulated, normal arousal.

Dr. Carich stated that defendant had shown some positive progress such as admitting to his offenses, doing his homework, possessing some basic conversation skills, expressing shame and gaining insight into his issues and problems. However, according to the risk assessment test administered, defendant was in the high risk to re-offend category. Defendant was working on all eight of the element categories, none of which were completed satisfactorily. Dr. Carich opined that defendant remained a sexually dangerous person.

The jury was instructed in part as follows:

“The Respondent has applied for release from the Illinois Department of Corrections. The Respondent is presumed to have recovered and no longer be *** a sexually dangerous person. This presumption remains with the Respondent throughout every stage of this case and during your deliberations on the verdict and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the Respondent is still a sexually dangerous person. The State has the burden of proving that the Respondent is still a sexually dangerous person beyond a reasonable doubt, and this burden remains on the State throughout the case. The Respondent is not required to prove that he is recovered.”

The trial court then instructed the jury that the State must prove each of the following four propositions beyond a reasonable doubt: that respondent suffers from a mental disorder; the mental disorder is coupled with criminal propensities to the commission of sex offenses; the respondent has demonstrated propensities towards acts of sexual assault or acts of sexual molestation of children; and that it is substantially probable the respondent will engage in the commission of sex offenses in the future if not confined.

The jury found that defendant remained a sexually dangerous person. The trial court entered an order denying his application for release and remanding him to the custody of the Department of Corrections from which defendant now appeals.

II. ANALYSIS

While proceedings under the Act are civil in nature, the statutory burden of proof required to commit a defendant to confinement as a sexually dangerous person shall be the standard of proof required in a criminal proceedings; *i.e.*, proof beyond a reasonable doubt. 725 ILCS 205/3.01 (West 2008). Under section 9(a) of the Act, a respondent who has been found to be a sexually dangerous person may file an application in writing setting forth facts showing that he or she has recovered. 725 ILCS 205/9(a) (West 2008). The applicant may elect to have the hearing before a jury, and in the recovery proceeding, the State has the burden of proving by clear and convincing evidence that the previously committed applicant is still a sexually dangerous person. 725 ILCS 205/9(b) (West 2008).

A. Speedy Trial

The Act provides for two separate but interrelated proceedings: an initial commitment proceeding (725 ILCS 205/3 (West 2006)) and a recovery proceeding (725 ILCS 205/9 (West 2006)); *People v. Trainor*, 196 Ill.2d 318, 326 (2001). This case involves a recovery proceeding, which is governed by Section 9 of the Act. 725 ILCS 205/9(a) (West 2006). The application is filed in the circuit court in which the respondent was committed. 725 ILCS 205/9(a) (West 2006). Once the application is filed, the circuit clerk is required to forward a copy of the application to the Director of Corrections, and the Director is required to obtain a sociopsychiatric report concerning the applicant. 725 ILCS 205/9(a) (West 2006). The circuit court then sets a hearing date. 725 ILCS

205/9(a) (West 2006). The applicant (or the State) may elect to have a hearing before a jury. 725 ILCS 205/9(b) (West 2006); *People v. Craig*, 403 Ill. App.3d 762, 766 (2010).

Although there is no statutory right to a speedy trial conferred by the legislature, the accused in a sexually dangerous persons proceeding has a constitutional right to due process, and due process includes a right to a speedy trial in the sexually dangerous persons proceeding. *People v. Lawton*, 212 Ill.2d 285, 295 (2004). This court has stated that “[w]e are not unmindful that an accused in a sexually dangerous persons proceeding will often be held in custody while the sexually dangerous persons petition is pending. Our holding does not leave these defendants without speedy trial protections.” *People v. Spurlock*, 388 Ill. App. 3d 365, 377-78 (2009) (holding that proceedings under the Act suspend the running of the statutory speedy term in the underlying criminal case). However, *Spurlock* did not address the issue of whether a defendant in a recovery proceeding enjoys the same protections. Defendant argues that the *Spurlock* court in no way limited its finding to initial commitment proceedings only, instead using the broader term “sexually dangerous persons proceeding.” *Spurlock*, 388 Ill. App. 3d at 378. While this is true, we cannot expand the holding in *Spurlock* to apply to a recovery proceeding, which is a separate, although related, proceeding. See *Trainor*, 196 Ill.2d at 326.

This situation differs from the concerns inherent in holding an accused in custody while a petition is pending; in a recovery proceeding, the defendant has already been adjudicated sexually dangerous, and society has an interest in treating a mental illness until such time as the defendant is found to be recovered. See *People v. Allen*, 107 Ill.2d 91, 102 (1985) (“the State has a substantial interest in treating as well as protecting the public from sexually dangerous persons *** ”). Defendant argues that he was confined for “an additional thirty-two months while he awaited a

hearing upon his application.” Defendant filed his *pro se* application on May 4, 2007, and the hearing was held on January 12, 2010. Part of this delay was occasioned by defendant himself, and the rest of the continuances were either agreed to or were not objected to by defendant’s counsel.

We consider defendant's assertion of his right to be minimal in this case. His speedy trial motion was filed *pro se* prior to his representation by counsel, and although he later stated to the court that “I want another hearing now,” neither speedy trial demands or objections to any of the continuances were made during the time he was represented by counsel. Further, counsel did not preserve the claim of error in a post-trial motion. Without these procedural steps, defendant’s speedy trial claim is forfeited. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, while acknowledging that he failed to preserve the speedy trial issue for review because he neither objected nor included this issue in his a motion for a new trial, defendant urges us to review it under the plain-error doctrine.

Under the plain-error doctrine, we may review a forfeited error when either (1) “the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence” ; or (2) “the error is so serious that the defendant was denied a substantial right, and thus a fair trial.” *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). Defendant bears the burden of persuasion under both prongs. *Herron*, 215 Ill. 2d at 187. The first step in the plain-error analysis is to determine whether any error occurred. *People v. Cosby*, 231 Ill. 2d 262, 273 (2008). Because we have found that *Spurlock* does not apply to a recovery proceeding, a separate proceeding provided for by statute, we find no error of a statutory nature. Additionally, the record does not reflect that a demand or objection was raised such that improper delay could arise.

B. Jury Instruction

Defendant next argues that the jury instruction on the reasonable doubt burden of proof was erroneous. The trial court instructed the jury that the State bore the burden to prove beyond a reasonable doubt that he remained a sexually dangerous person, whereas the trial court should have properly instructed the jury that the State bore the burden to prove by clear and convincing evidence that he remained a sexually dangerous person, in accordance with subsection (b) of section 9 of the Act (725 ILCS 205/9 (b) (West 2006)).

However, defendant did not offer an instruction regarding the proper burden of proof. “It is the burden of the party who desires a specific instruction to present it to the court and request that it be given to the jury.” *People v. Turner*, 128 Ill.2d 540, 562 (1989). Neither did he raise this issue in a post-trial motion, as required by our supreme court. *Enoch*, 122 Ill. 2d 176, 186 (1988). When either the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence, or the error is so serious that the defendant was denied a substantial right and thus a fair trial, we may review a forfeited error. *Herron*, 215 Ill. 2d at 178-79. As stated above, the first step in our plain-error analysis is to determine whether any error occurred. *Cosby*, 231 Ill. 2d at 273.

Defendant claims prejudice because the instruction given was erroneous, and he further claims that this error was exacerbated by references to the burden of proof as reasonable doubt throughout the proceedings below. Generally, the only situations where a fair trial requires the court to *sua sponte* offer an instruction include “seeing that the jury is instructed on the elements of the crime charged, on the presumption of innocence and on the question of burden of proof.” *Turner*, 128 Ill.2d at 562-63 (1989). Without further analysis, it would seem that defendant would prevail as this issue does involve the instruction on the burden of proof. However, we are presented with

the converse of the more typical situation where a jury is instructed on the wrong burden of proof, a lesser one.

“In the initial commitment proceeding, the State is held to a beyond-a-reasonable doubt burden of persuasion (725 ILCS 205/3.01 (West 2006)), and thus the Act exceeds the minimum demands of due process. In the recovery proceeding, the State is held to a clear-and-convincing-evidence burden of persuasion (725 ILCS 205/9(b) (West 2006)), and the Act meets the minimum demands of due process. [Emphasis added.] ” *Craig*, 403 Ill. App.3d at 769.

We also note that “the clear-and-convincing-evidence standard *nearly* approaches the criminal standard of proof in terms of the allocation of the risk of error between the parties.” *In re D.T.*, 212 Ill.2d at 361 (Emphasis added). It is evident that this jury was given an erroneous instruction, but we do not find prejudice where the jury delivered a verdict after deliberating under a more stringent standard of proof than that required by law. Defendant has failed to establish that the evidence was so closely balanced that a different verdict would have probably resulted, and has not established that a more strict standard of proof violates a substantial right. If anything, it would enhance this substantial right. Therefore, we determine that the erroneous submission of an instruction setting forth a more strict standard of proof upon appellant’s opponent does not constitute plain error.

C. Alternative Verdict

Finally, defendant asserts that the trial court’s failure to consider his request for conditional release as an alternative verdict (other than a finding of “Sexually Dangerous Person” or release) and to instruct the jury on this issue resulted in plain error. The State responds that “the adequacy of the application was not questioned below,” that defendant did not proffer an instruction on conditional

release, nor did he raise the issue in a post-trial motion. Therefore, the issue is forfeited. “It is the burden of the party who desires a specific instruction to present it to the court and request that it be given to the jury.” *Turner*, 128 Ill.2d at 562. We agree that the issue was forfeited, so we turn to the question of whether this issue should be reviewed under the plain error doctrine.

Defendant’s original *pro se* application for release requested that he be considered for discharge or, in the alternative, for conditional release. The Act provides in part:

“[i]f the court finds that the person appears no longer to be dangerous but that it is impossible to determine with certainty under conditions of institutional care that such person has fully recovered, the court shall enter an order permitting such person to go at large subject to such conditions and such supervision by the Director as in the opinion of the court will adequately protect the public.” 725 ILCS 205/9(e) (West 2008).

Defendant claims that a clear and obvious error occurred when the trial court failed to inform the jury that an alternative verdict was possible, and argues that, while the issue was not raised in the trial court, we should take notice because the defect affected his substantial rights. Once again, as stated above, the plain error doctrine bypasses normal forfeiture principles and allows for a review of unpreserved error only when the evidence is closely balanced or the error was so fundamental that the defendant was denied a fair trial. *Herron*, 215 Ill.2d at 186-87. The burden of persuasion rests on the defendant in both instances. *Herron*, 215 Ill.2d at 187.

Defendant cites one case to support his contention, *People v. Whitney*, 33 Ill.App. 3d 729 (1975), a third district case where “the issue confronting the trial court, and on which no finding was made, was whether it *appears* that defendant is no longer dangerous but that it is impossible to determine with certainty under conditions of institutional care.” [Emphasis in original]. *Whitney*,

33 Ill. App. 3d at 734. Defendant reasons that under *Whitney*, “when an application seeks conditional release,” a third alternative to the either/or proposition that defendant remains dangerous or should be released becomes available.

We note that the purpose of the Act is both to protect the public by sequestering a sexually dangerous person until such a time as the individual is recovered and released, and to treat sexually dangerous persons such that the individual may recover from the propensity to commit sexual offenses and be rehabilitated. *People v. Kastman*, 335 Ill. App.3d 87, 98 (2002). The State argues that “conditional release would not have been an option for the jury either [*sic*] and any error regarding the failure to instruct the jury was harmless” because under the statute “the possibility of conditional release under the [Act] is only triggered if the defendant is found to be no longer dangerous.” The State cites no cases to support this interpretation, and we have found none in our research. To the contrary, pursuant to the Act, there are three possible verdicts; (1) still dangerous, in which case the defendant remains committed as a sexually dangerous person; (2) no longer dangerous, in which case the defendant is discharged; or (3) it *appears* that a defendant is no longer dangerous *but it is impossible to determine* under the “conditions of institutional care.” Rather than the all-or-nothing approach taken by the State, our legislature has provided a middle ground that recognizes the limitations of a system that provides the structure and control needed by persons adjudicated sexually dangerous, but who may have reached a point in their recovery where they should be allowed more freedoms under certain conditions. These persons may appear to be recovered, but they have not been sufficiently proven to be capable of operating “out in the world.” The system provides for these persons to receive supervision, support and guidance to help prevent relapse.

The question facing us, then, is whether this error was so serious that it affected the fairness of the trial or challenged the integrity of the judicial process. *Herron*, 215 Ill.2d at 187. Defendant here fails to establish evidence that would have implicated plain error considerations based upon the closeness of the evidence. The two expert witnesses testified fully as to defendant's progress in his therapy and the goals that he had yet to attain. Each unequivocally stated that at the time of the hearing, he would not be considered recovered, nor would he be a candidate for conditional release. However, the question of a jury presented with only two verdicts when arguably there was a third alternative, goes to the core of our judicial process, and we will consider this issue as a question of plain error.

The State cites *People v. Johnson*, 146 Ill. 2d 109, 137 (1991), which held that an error in a jury instruction is harmless if it is demonstrated that the result of the trial would not have been different if the proper instruction had been given. In *Johnson*, the jury declined to reach a verdict of guilty but mentally ill even though it was erroneously instructed that defendant's sanity was required to be proved by a preponderance of the evidence rather than beyond a reasonable doubt, the correct burden. *Johnson*, 146 Ill. 2d at 137. In other words, the jury found the defendant guilty rather than guilty but mentally ill even though the erroneous instruction made the latter verdict easier to obtain. In this case, the fact that the jury deliberated and reached its decision while applying a more stringent burden of proof to the State's evidence than that required by the statute renders *de minimis* any error in failing to provide the jury with an alternative verdict. We find that the result of the hearing would not have been different if no imperfect verdict was provided to this jury. The error that occurred was, in this instance, harmless. Plain error has not been established.

III. CONCLUSION

No. 2—10—0085

For the reasons stated, we affirm the judgment of the circuit court of Lee County.

Affirmed.