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2012 IL App (3d) 100451-U

Order filed September 20, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	of the 21st Judicial Circuit
)	Kankakee County, Illinois
Plaintiff-Appellee,)	
)	Appeal No. 3-10-0451
v.)	Circuit No. 06-CF-716
)	
SAMUEL R. BYRD,)	Honorable
)	Clark Erickson,
Defendant-Appellant.)	Judge Presiding

JUSTICE WRIGHT delivered the judgment of the court.
Justice Carter concurred in the judgment.
Justice McDade dissented.

ORDER

¶ 1 *Held:* The trial court's determinations that defendant had been restored to fitness and could represent himself at trial were proper.

¶ 2 Defendant claims the trial court's finding that he was restored to fitness one year after the court declared defendant unfit, was contrary to the manifest weight of the evidence presented during the 2009 restoration hearing. Alternatively, defendant argues that even if he was restored to fitness, he should not have been allowed to represent himself during the jury trial on the merits

due to his ongoing mental illness. Defendant requests this court to reverse the finding he was restored to fitness and order a new fitness hearing. Alternatively, if this court determines the trial court properly found defendant's fitness was restored after one year of treatment, defendant requests a new trial. We affirm.

¶ 3

FACTS

¶ 4 The State filed amended charges against defendant alleging two Class 2 felony counts of theft between \$10,000 and \$100,000. Initially, the court appointed defense counsel to represent defendant. On February 28, 2007, defendant's appointed counsel informed the court of defendant's apparent delusional behavior. The trial judge ordered Dr. Erwin Baukus and Dr. James Simone to conduct fitness examinations of defendant.

¶ 5 Defendant's first fitness hearing began on May 21, 2007 before a jury. Dr. Baukus, a licensed clinical psychologist, testified defendant refused to be cooperative when he attempted to evaluate defendant on March 26, 2007. Dr. Baukus concluded defendant was both delusional and unfit to stand trial due to his inability to cooperate and thereby, assist in his own defense.

¶ 6 Dr. Simone, a licensed psychologist, also testified during the 2007 fitness hearing. Dr. Simone advised the jurors he evaluated defendant on April 2, 2007. During this evaluation, defendant demonstrated he understood courtroom procedures and personnel, would be able to observe, recollect, and relate his experiences with his defense counsel, and could follow and understand testimony. Based on this examination, Dr. Simone concluded defendant was fit.

¶ 7 Defendant also testified during the 2007 fitness hearing and explained to the jury he was the owner and CEO of a music concert promotion company, Mil'on Musyck, Inc. Defendant testified he was falsely accused of theft after his agreement to purchase a home failed because the

alleged victim acted in bad faith concerning the real estate transaction and a related transaction involving defendant's music promotion company. Defendant advised the jury he understood his constitutional rights and the roles of court personnel. In addition, defendant stated he was entirely capable of listening to testimony at trial and suggesting questions or expressing objections to his defense attorney. The jury found defendant fit to stand trial on May 24, 2007.

¶ 8 On June 27, 2007, defendant requested the judge to clear the courtroom to allow defendant to discuss matters of national security with the court. Defendant spoke to the judge and counsel in chambers. Defendant told the court that during his previous employment with the Congressional Post Office, defendant 'mooned' President Richard Nixon. Following this in-chambers discussion, at defense counsel's request, the judge ordered Dr. Simone to complete another evaluation of defendant.

¶ 9 On November 28, 2007, defense counsel informed the court that Dr. Simone reviewed the transcripts of the recent court hearings, met with defendant, and concluded defendant was delusional. The judge then ordered Dr. Simone and Dr. Baukus to re-evaluate defendant's fitness to stand trial and scheduled a second fitness hearing for January 23, 2008.

¶ 10 During the 2008 fitness hearing, Dr. Simone testified defendant suffered from delusional disorder which prevented defendant from assisting defense counsel. Therefore, based on his evaluation and report dated November 29, 2007, Dr. Simone testified defendant was unfit to stand trial. In addition, defense counsel and the prosecutor stipulated to Dr. Baukus' December 5, 2007 report, which concluded defendant was unfit to stand trial due to his "unwillingness or inability to cooperate with court procedures or comply with a Judge's order."

¶ 11 Defendant also testified at the 2008 fitness hearing and disputed Dr. Simone's opinion.

Defendant explained he simply refused to cooperate with defense counsel because he did not agree with the defense strategy and did not want his family involved in the case. Defendant advised the judge that the information he disclosed about events leading to the criminal charges and his previous employment history were truthful and not based on delusions. Defendant further testified he understood why he was in court and the purpose of the second fitness hearing.

¶ 12 Following the 2008 fitness hearing, the trial judge rejected defendant's contention he was fit to stand trial. Relying on the experts' opinions, the court found defendant unfit to stand trial but also found defendant was likely to be restored to fitness within one year, after treatment.

¶ 13 Defendant was admitted to Elgin Mental Health Center (EMHC) for mental health treatment directed by forensic psychiatrist Dr. Romulo Nazareno on February 13, 2009. Defendant's treatment plan involved the administration of psychotropic medications and an educational program. On January 23, 2009, one year after the court found defendant unfit, Dr. Nazareno filed a progress report with the court indicating defendant had been restored to fitness.

¶ 14 On January 28, 2009, defendant attempted to fire defense counsel and informed the judge his private attorneys would soon file their appearances on his behalf. To verify defendant's claims, both defense counsel and the judge's clerk contacted these private attorneys, who confirmed they were awaiting the payment of a retainer before entering their appearance on defendant's behalf. The judge continued the matter to allow defendant to obtain private counsel.

¶ 15 Nonetheless, defendant was represented by appointed counsel at the restoration hearing which began on May 13, 2009. Dr. Nazareno advised the court that defendant exhibited bipolar disorder, involving both delusional and manic symptoms, and suffered from a personality disorder not otherwise specified. Dr. Nazareno stated defendant believed he was a wealthy music

promoter, that EMHC staff singled him out for harassment, and that defendant suffered from numerous health problems and food allergies.

¶ 16 Dr. Nazareno classified defendant's delusions as "grandiose" and "persecutory" but indicated "nothing" had been done to address defendant's delusions while at EMHC. Dr. Nazareno testified defendant refused to take psychotropic medications as prescribed but did attend occasional group therapy sessions. Dr. Nazareno opined defendant's beliefs were delusional or extremely exaggerated, but concluded defendant had been restored to fitness since defendant accepted the premise that his attorney was not conspiring with the judge and prosecutor and he talked openly with Dr. Nazareno about his family.

¶ 17 The judge permitted both defense counsel and defendant to cross-examine Dr. Nazareno during the restoration hearing. Defendant's cross-examination of Dr. Nazareno focused on whether defendant's thoughts and perceptions were based on real events. Defendant specifically asserted his meeting with President Nixon, his multi-million dollar music business, and the mortgage to buy the victim's home in this case, were all based on reality. Following the cross-examination by defense counsel and defendant, Dr. Nazareno changed his opinion and concluded defendant had not been restored to fitness. Dr. Nazareno testified he now believed defendant was unable to assist in his defense.

¶ 18 The judge allowed defendant to testify in narrative fashion. During his testimony, which consumed three days, defendant played recordings of conversations and read transcripts of those conversations into the record. On June 3, 2009, after three separate hearings of defendant's narrative testimony, the State moved to conclude the restoration hearing since "Dr. Simone and Dr. Baukus in their second fitness reports *** both found him to be delusional and also that was

the conclusion of the experts at [EMHC]." On June 10, 2009, defense counsel agreed with the State's motion. However, after more testimony from defendant, the court continued the hearing.

¶ 19 On June 24, 2009, the parties appeared before the court. The State produced case law in support of the State's position that the trial judge could not find defendant fit based solely on defendant's own assertion, which was contrary to the expert testimony the court received during the restoration hearing. The matter was once again continued to allow the trial judge to consider appointing an expert court's witness. On July 1, 2009, the trial judge appointed Dr. Randi Zoot, a licensed clinical psychologist, to conduct a fitness evaluation. Dr. Zoot filed a report dated July 20, 2009, finding defendant fit to stand trial.

¶ 20 On August 12, 2009, the restoration hearing continued with Dr. Zoot testifying as the court's witness. She testified that she reviewed the April 4, 2007 and December 5, 2007 psychological assessments by Dr. Baukus, the psychological evaluation by Dr. Simone, the mental health reports from EMHC prepared during defendant's treatment, pretrial reports, transcripts from the court proceedings, court docket entries, and some motions prepared and filed by defendant *pro se*. Dr. Zoot stated she reviewed these documents both before and after meeting with defendant to conduct his in-person evaluation. Dr. Zoot testified she did not believe defendant to be delusional, but rather, concluded defendant's statements and behaviors were the result of a personality disorder.

¶ 21 Dr. Zoot noted EMHC's records referred only to defendant as having bipolar mood disorder. Dr. Zoot testified that, while she did not find defendant to be delusional, if he was harboring delusional thoughts, they were not affecting his ability to present a defense in his criminal case. Dr. Zoot testified defendant knew his statements were untrue, and was making a

voluntary choice to present those untruthful statements. Dr. Zoot believed, after thoroughly reviewing the records and personally examining defendant, he was mentally fit to stand trial.

¶ 22 Defense counsel called Dr. Simone to rebut Dr. Zoot's testimony. Dr. Simone testified it was still his opinion defendant was not fit to stand trial and nothing in Dr. Zoot's testimony changed his opinion.

¶ 23 On September 11, 2009, the prosecutor and defense counsel once again agreed defendant had not been restored to fitness. After hearing arguments, during a lengthy explanation of his decision, the trial judge observed the evidence did not contradict the truthfulness of defendant's claim he was a successful music promoter. The trial court found defendant was capable of understanding and participating in the courtroom proceedings following defendant's treatment at EMHC. Consequently, the trial judge concluded defendant had been restored to fitness and was therefore, fit to stand trial.

¶ 24 After the judge's ruling, defendant announced he wanted to fire defense counsel and proceed *pro se*. At the next hearing on September 16, 2009, the trial judge admonished defendant of his right to counsel, the charges against him, and his opinion that proceeding *pro se* was a bad idea and carried potential disadvantages. Nonetheless, defendant insisted that he wished to proceed without counsel. Consequently, the trial judge discharged defense counsel and granted defendant's request to proceed *pro se*.

¶ 25 The matter proceeded to jury trial on March 24, 2010 with defendant representing himself. The trial continued for four weeks. The jury found defendant guilty of both Class 2 felony counts. The judge sentenced defendant to 7-years' imprisonment. Defendant appeals.

¶ 26

ANALYSIS

¶ 27 Defendant raises two issues for our review. First, defendant contends the trial judge's September 11, 2009 ruling that defendant had been restored to fitness was contrary the manifest weight of the evidence. Second, defendant argues the trial judge abused his discretion when he allowed defendant's request to represent himself during the trial on the pending criminal charges.

¶ 28 I. Defendant's Fitness to Stand Trial

¶ 29 The due process clauses of the Illinois Constitution and the United States Constitution prohibit the prosecution of a defendant who is unfit for trial. Ill. Const. 1970, Art I, §2; U.S. Const., Amends. VI, XIV. Under Illinois law, a defendant is presumed fit to stand trial or to plead, and be sentenced. A defendant is unfit if, because of his mental or physical condition, he is unable to understand the nature and purpose of the proceedings against him or to assist in his defense. 725 ILCS 5/104-10 (West 2008). "A defendant may be competent to participate at trial even though his mind is otherwise unsound." *People v. Eddmonds*, 143 Ill. 2d 501, 519 (1991).

¶ 30 A trial judge's finding a defendant has been restored to fitness or is fit to stand trial should be reversed if it is contrary to the manifest weight of the evidence. *People v. Jamison*, 197 Ill. 2d 135, 153 (2001). See *People v. Gill*, 304 Ill. App. 3d 23, 32 (1999) (finding defendant restored to fitness after being found unfit and obtaining treatment was not against manifest weight of the evidence). It is well-settled that the credibility and weight to be given to psychiatric testimony are for the trier of fact to determine. *People v. Haynes*, 174 Ill. 2d 204, 231 (1996).

¶ 31 Since defendant did not raise this fitness issue in his motion for new trial, he concedes this issue has been forfeited. *People v. Herron*, 215 Ill. 2d 167, 175 (2005). However, defendant urges that this court may review the forfeited issue by applying the plain error doctrine because his fitness to stand trial involves a substantial constitutional right. *People v. Contorno*, 322 Ill.

App. 3d 177, 180 (2001).

¶ 32 Under Illinois Supreme Court Rule 615(a), "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Aug 27, 1999). These rules permit us to consider the forfeited claim when (1) an error occurred and the evidence is so closely balanced, regardless of the seriousness of the error, or (2) the error is so serious it affected the fairness of defendant's trial, regardless of the strength of the evidence. *Herron*, 215 Ill. 2d at 178-79.

¶ 33 We agree the determination of a defendant's fitness to stand trial involves a substantial right. *People v. Vernon*, 346 Ill. App. 3d 775, 777 (2004). Thus, we examine the forfeited issue regarding defendant's fitness to stand trial pursuant to the plain error doctrine. The first step of plain error is determining whether the trial court erred. *People v. Walker*, 232 Ill. 2d 113, 124 (2009).

¶ 34 On appeal, defendant concedes he understood the nature and purpose of the criminal proceedings against him. The crux of defendant's argument before this court is although he understood the nature and purpose of the proceedings, his ongoing delusional thinking prevented him from assisting counsel when preparing and presenting a defense to the criminal charges. We begin by examining the record to determine whether the court's finding defendant was capable of assisting in his defense was contrary to the manifest weight of the evidence.

¶ 35 Defendant's restoration hearing began on May 13, 2009. In a report dated January 16, 2009, Dr. Nazareno, defendant's treating physician at EMHC, found defendant had been restored to fitness after one year of treatment. However, Dr. Nazareno reversed his opinion while on the witness stand several months later, following cross-examination by both defense counsel and

defendant. Consequently, the trial judge continued the 2009 restoration hearing. Without objection from either party, the court ordered a court's expert to prepare an independent report for the judge's consideration, based on these unusual circumstances.

¶ 36 At the hearing on August 12, 2009, the court's expert, Dr. Zoot, advised the trial court that defendant did not suffer from a delusional disorder and was, in fact, fit for trial. Dr. Zoot testified that, after reviewing the other experts' reports, court records, and personally interviewing defendant, she concluded defendant's behavior resulted from defendant's voluntary choices which were not based on delusional thinking.

¶ 37 At the conclusion of the restoration hearing, the court stated "although untrained as a lawyer and having some personality traits that tend to lead him astray – he's very capable of understanding what's taking place." The court also observed "it keeps popping up in these earlier reports from [EMHC] and elsewhere that the Defendant is delusional he's a concert promoter. Well, he's a licensed – the only evidence I have on that is that he's a licensed concert promoter."

¶ 38 The trial court also noted defendant's un-refuted documentary evidence included a Nevada license allowing him to conduct business as Mil'on Musyck, and cancelled checks totaling thousands of dollars related to defendant's music business. The trial court addressed defendant's other purported delusions including defendant's assertions that he made significant financial contributions to a battered women's shelter. The trial court noted that defendant's documentary evidence demonstrated the accuracy of defendant's contention because IRS records revealed he made \$32,0000 in contributions to The Shade Tree. The trial court found Dr. Nazareno's recantation less than credible or "suspect" because it was based solely on the character of defendant's cross-examination, which the court had an opportunity to observe.

¶ 39 The trial court ultimately determined defendant was not so driven by delusions that he was incapable of making choices. At the conclusion of the restoration hearing, the trial court found that the evidence presented, including Dr. Zoot's conclusions, supported a finding that defendant had been restored to fitness and was now fit to stand trial.

¶ 40 The ultimate decision as to a defendant's fitness must be made by the trial court, not the experts. *Contorno*, 322 Ill. App. 3d at 179; *People v. Cleer*, 328 Ill. App. 3d 428, 431 (2002). After hearing all of the evidence over the course of several days, the trial court relied on Dr. Zoot's opinion, which considered all of the previous experts' reports prepared in 2007, 2008, and 2009, and her most recent three hour examination of defendant on July 13, 2009.

¶ 41 The trial court made extremely detailed findings and after careful consideration, determined defendant understood the nature and purpose of the proceedings and had the ability to assist in his defense and, therefore, was fit to stand trial. The trial court was in a superior position to observe defendant's behavior and evaluate the credibility of defendant and the expert witnesses who testified during the restoration hearing. After careful review of the record, we conclude the trial court's ruling that defendant was fit to stand trial was not contrary to the manifest weight of the evidence presented.

¶ 42 II. Defendant's Competence to Represent Himself at Trial

¶ 43 We next consider defendant's argument that the trial judge abused his discretion by allowing defendant's request to represent himself at trial. The State initially argues defendant has waived this issue. The State alternatively argues that since defendant did not suffer from a "severe mental illness" as required by *Indiana v. Edwards*, 554 U.S. 164 (2008), the trial court properly granted defendant's unequivocal request to present his own defense.

¶ 44 We must first address whether defendant has forfeited this issue by failing to object at trial or file a written post-trial motion raising the issue, thereby preserving it for our review. *People v. Williams*, 193 Ill. 2d 306, 347 (2000). In addition, defendant raises plain error for the first time in his reply brief. However, defendant's failure to include his plain error argument in his opening brief does not preclude us from considering it. *Id.* (it is unfair to require a defendant to assert plain error in his opening brief); *People v. Ramsey*, 239 Ill. 2d 342, 411 (2010) (arguing plain error in a reply brief is sufficient to allow review under the plain error doctrine).

¶ 45 As previously stated, the plain error doctrine allows a reviewing court to consider an error not properly preserved for review when (1) the evidence is closely balanced or (2) where the error is so fundamental that the defendant was denied his right to a fair trial. *Williams*, 193 Ill. 2d at 348. However, we first must determine whether the trial court committed any error at all. *People v. Bannister*, 232 Ill. 2d 52, 65 (2008).

¶ 46 Case law provides a defendant has a constitutional right to self-representation if he makes an unequivocal request to do so. *People v. Shelton*, 401 Ill. App. 3d 564, 574 (2010); *People v. Rohlf*s, 368 Ill. App. 3d 540, 544 (2006). A trial judge's decision concerning a defendant's election to proceed *pro se* will be upheld absent an abuse of discretion. *Shelton*, 401 Ill. App. 3d at 574. Competence to waive counsel is measured by the same standard as competence to stand trial. *People v. Redd*, 173 Ill. 2d 1, 23 (1996) (citing *People v. Mahaffey*, 166 Ill. 2d 1, 19 (1995)). Traditionally, a trial court allowed a defendant's unequivocal request to proceed *pro se* so long as defendant was fit to stand trial and the judge was satisfied defendant understood the admonishments and knowingly and voluntarily executed his waiver of counsel. *People v. Lego*, 168 Ill. 2d 561, 576-77 (1990); *Godinez v. Moran*, 509 U.S. 389 (1993)).

¶ 47 In this case, defendant agrees he was able to understand the trial court's careful admonishments regarding defendant's decision to waive his right to appointed counsel. However, defendant claims the trial court should have denied his request to proceed *pro se* because he suffered from a "severe mental illness." Defendant relies on the recent decision in *Indiana v. Edwards*, 554 U.S. 164 (2008) and requests a new trial.

¶ 48 When considering *Edwards* in another factually similar case, this court held that unless the accused clearly suffers from a "severe" mental illness, the existence of a diagnosed personality disorder alone does not constitute a valid reason to deny an unequivocal request by a defendant to proceed without counsel. *People v. Sheley*, 2012 IL App. 3d 090933 (2012). Like *Sheley*, the record in this case does not contain any indication this defendant suffers from a "severe mental illness" which could impair defendant's ability to present his defense *pro se*.

¶ 49 The record does not support defendant's contention that he suffered from a severe mental illness. The record shows that over the course of one year of treatment, Dr. Nazareno did not diagnose defendant with a severe mental illness. In addition, the court's expert, Dr. Zoot, concluded defendant's statements were the result of a "personality disorder with anti-social" traits rather than a severe mental illness.

¶ 50 On appeal, defendant argues that due to his ongoing delusional thinking the trial judge "had every reason to believe" defendant "would likely turn his trial into a spectacle and a sham" and should have prevented defendant from proceeding *pro se*. In support of this contention, counsel argues the jury trial was unduly time consuming and involved a defense predicated on a meritless premise which was doomed to fail. While we agree that the assistance of experienced defense counsel might have shortened the length of the month long jury trial in this case, a *pro se*

litigant is not expected to be as efficient as experienced defense counsel. *Martinez v. Court of Appeal of California, Fourth Appellate Dist.*, 428 U.S. 152 (2000) ("No one *** attempts to argue that as a rule *pro se* representation is wise, desirable, or efficient.") Even though the defense theory presented by defendant did not result in an acquittal, the case law provides that we cannot protect the defendant from the consequences of an unwise, but informed, decision to represent himself. *People v. Palmer*, 382 Ill. App. 3d 1151, 1158 (2008) (to protect defendants from their decision to proceed *pro se* would be "inviting defendants to 'game the system'" by playing the *Faretta* game).

¶ 51 Further, the record does not support defendant's contention that his trial became a spectacle or sham. Rather, the trial judge complimented defendant's trial techniques by stating at defendant's sentencing hearing:

"You clearly have shown a great of skill in conducting yourself throughout this case. I mean you tried a jury trial for four weeks of trial, and you were able to pick up very quickly in general on the rules of evidence. You were able to present maybe 200 exhibits which is far more than the number of exhibits are typical – typically presented in a case. * * * I think the record reflects that you displayed a lot of skill in handling your case, the mechanics of it."

¶ 52 In the absence of a diagnosis this defendant suffered from a severe mental illness, we conclude a personality disorder involving grandiose delusions of success cannot defeat a defendant's informed decision to represent himself. Consequently, no error occurred when the trial judge allowed defendant to proceed *pro se*. Having found no error, there can be no plain error. *Bannister*, 232 Ill. 2d at 71.

¶ 53

CONCLUSION

¶ 54 For the foregoing reasons, the judgment of the circuit court of Kankakee County is affirmed.

¶ 55 Affirmed.

¶ 56 JUSTICE McDADE, dissenting.

¶ 57 The majority has affirmed the decision of the circuit court of Kankakee County finding that defendant, Samuel Byrd, had been restored to fitness and was capable of representing himself at his trial on two counts of class 2 felony theft. Following the presentation of all evidence, defendant was convicted on both counts and sentenced to serve seven years in the Illinois Department of Corrections.

The defendant has raised two issues on appeal: whether the finding of fitness to stand trial was contrary to the manifest weight of the evidence and whether allowing the defendant to represent himself was an abuse of the court's discretion.

¶ 58

Defendant's Fitness to Stand Trial

¶ 59 With regard to the first issue, I begin by acknowledging that there is certainly something off-putting about Byrd insisting from February 2007 until the end of his trial in 2010, first that he was not delusional but was actually a wealthy and successful music producer and, second, that he was not only fit to stand trial with the assistance of counsel but was also fully capable of representing himself; and then reversing his position and filing an appeal in which he contends that the trial court was in error for agreeing with him and that he should have a new trial. That said, it is one of the fundamentals of our criminal justice system and a requirement of due

process that a person who is mentally unfit to assist counsel in his defense cannot be properly tried and convicted. *People v. Sandham*, 174 Ill. 2d 379 (1996); *People v. Haynes*, 174 Ill. 2d 204 (1996); *Medina v. California*, 505 U.S. 437 (1992). Because it appears to me that the trial court's finding that defendant was fit to stand trial was contrary to the manifest weight of the evidence, I would find that Byrd's apparent "gaming" of the system to his detriment is further evidence of his mental impairment and unfitness. I, therefore, dissent from the majority's contrary decision.

¶ 60 Upon defendant's representation that he was unable to afford counsel, Attorney Lawrence Beaumont was appointed by the court to represent him. In February 2007, Beaumont advised the court that he believed defendant was delusional and that his delusions and resultant lack of cooperation were interfering with the attorney's ability to investigate the case and defend his client.

¶ 61 Some, but not all, of the following facts have been set out in the majority's statement of facts. In 2007, the two original court-appointed mental health experts, Dr. Erwin Baukus and Dr. James Simone, disagreed at the first fitness hearing on whether the defendant was fit to stand trial. Dr. Baukus testified that, although defendant had been uncooperative during the evaluation, he had seen enough to conclude Byrd was delusional and unable to assist in his defense. Dr. Simone also found evidence of delusions but had not tried to determine if defendant actually suffered from a delusional disorder. However, because defendant demonstrated a fundamental grasp of courtroom procedures and general recall of his interactions with his attorney, Dr. Simone believed him capable of understanding enough to assist his counsel and, therefore, fit to stand trial. The jury concluded that he was fit.

¶ 62 Thereafter, Dr. Simone revised his conclusion and, pursuant to the court's direction, Dr.

Simone and Dr. Baukus re-examined the defendant. Dr. Baukus persisted in his opinion that defendant was unfit for trial. Dr. Simone, however, reiterated his revised determination that defendant was indeed delusional, that his disorder prevented him from assisting in his defense, and that he was unfit for trial.

¶ 63 At a second fitness hearing held in 2008, both experts testified – Dr. Simone in person, and Dr. Baukus by stipulation – that defendant was unfit. The trial judge agreed and held defendant unfit but likely to be restored to fitness within one year with treatment.

¶ 64 Defendant was admitted to Elgin Mental Health Center for treatment which was directed by Dr. Romulo Nazareno, a forensic psychiatrist. During the course of this treatment, Dr. Nazareno filed three reports in April, July and October 2008, indicating defendant refused to cooperate with his treatment plan and was not restored to fitness. Three and a half months after the last such report, Dr. Nazareno reported defendant had been restored to fitness.

¶ 65 Beaumont, defendant's attorney, refused to stipulate to that report and defendant attempted to fire him, advising the court that two privately retained attorneys, Erin Potempa and Alan Becker, would be filing appearances on his behalf as soon as his accountant, Mel Crohn, could free up assets from his trust to pay them. Upon inquiry by Beaumont and the judge's clerk, Potempa confirmed her intent to enter an appearance if and when she received a retainer. Crohn, on the other hand, denied any authorization to release funds from any trust. The trial court ordered Beaumont to continue his representation until one of the other attorneys filed an appearance.

¶ 66 At the 2009 restoration hearing, defendant continued to be represented by his court-appointed counsel. Dr. Nazareno initially testified that defendant exhibited bipolar disorder and

an unspecified personality disorder but, because he no longer believed his attorney was conspiring with the court and the State and he had “opened up” with Dr. Nazareno, he was fit to stand trial. Dr. Nazareno clarified that the reason defendant no longer thought his attorney was conspiring against him was his erroneous belief that Beaumont had been replaced by retained counsel whom he liked. The “opening up” about his family consisted of showing Dr. Nazareno a picture of his sons. Following his cross-examination by *both* defendant and his counsel, Dr. Nazareno changed his opinion and concluded defendant had not been restored to fitness.

¶ 67 Despite his representation by counsel, Byrd was allowed to present his evidence and argument that he was fit in a narrative that lasted for three court days. During his testimony he sang, karaoke-style, some of his claimed hits; described for a second time¹ a 1974 encounter where he "mooned" President Nixon, invited him to "kiss my ass," and heard the president ask Vice President Ford to pardon him in the event he had to resign; played recorded conversations between his attorney and counsel for the man who allegedly defaulted on the real estate transactions, and read one of those conversations into the record.

¶ 68 Relying on the assessments of all three experts that defendant was not fit to stand trial and contending that case law precluded a finding of fitness based solely on the defendant's own assertions, both the state's attorney and defense counsel sought a finding by the court that defendant was not fit.

¶ 69 Instead the court continued the restoration hearing and appointed yet another expert, Dr.

¹Defendant had earlier characterized this incident as a matter of national security and had sought to have the courtroom cleared while he described it and his resultant persecution and torture by the U.S. Marshals and the FBI. He recounted it in chambers.

Randi Zoot to assess Byrd's fitness. Dr. Zoot reviewed the findings of the other experts, spent three hours with Byrd, and disagreed with findings that defendant was delusional. She did, however, conclude that defendant's statements were untrue, that he knew they were untrue, and that making the untruthful statements was a voluntary choice. She diagnosed a personality disorder that did not render him unfit for trial.

¶ 70 After hearing arguments from both the State and the defense counsel that defendant had not been restored to fitness, the trial judge found--based on his observation that the evidence did not contradict the truthfulness of the defendant's claim that he was a successful music promoter and that he was capable, following his treatment, of understanding and participating in the proceedings--that defendant had been restored to fitness. I believe this finding to be against the manifest weight of the evidence before us in the record.

¶ 71 It appears from the record that there was substantial professional evidence that Byrd was not fit to stand trial. Drs. Baukas, Simone, and Nazareno all testified that Byrd was delusional and unable to assist his attorney at trial. They convinced both the State and defendant's attorney, who moved the court to find defendant had not been restored to fitness. The court did not agree, relying, instead, on Dr. Zoot's contrary opinion.

¶ 72 I have no quarrel with the majority's statement that it is the right and the responsibility of the trial judge to make the final determination of fitness and that the court has the authority to reach a finding despite the opinions of the experts to the contrary and I agree that reliance on *People v. Contorno*, 322 Ill. App. 3d 177 (2001), is proper. The thrust of *Contorno* is that the trial court cannot simply defer to the opinions of the experts in making a fitness determination, but "the record must show an affirmative exercise of judicial discretion regarding the

determination of fitness." *Contorno*, 322 Ill. App. 3d at 179.

¶ 73 In this case, it is not totally clear what the court's finding actually was with regard to the defendant's mental state. Apparently the court concluded that Byrd was delusional but that he "was not totally at the mercy of his delusions[,]" and was "not so driven by delusions that he was incapable of making choices[;]" in short the court found that the preponderance of the evidence indicated that the defendant did not have such a delusional network that he was incapable of cooperating with defense counsel. The court found Byrd was a person who was "very very capable of being in control."

¶ 74 Our standard of review (manifest weight of the evidence) demands that there also be some demonstrable factual basis in the record which supports the court's conclusion – contrary to the bulk of the professional opinions – that defendant had been restored to fitness. *People v. Jamison*, 197 Ill 2d 135 (2001).

¶ 75 In that regard, all *four* of the mental health professionals discounted Byrd's claim that he was a successful promoter -- Drs. Simone and Baukus finding him delusional, and Dr. Zoot believing he was just deliberately lying. His treating psychiatrist, Dr. Nazareno, also concluded he was delusional and unfit. All four of these doctors testified that defendant's claims of being a wealthy music promoter were untrue. The court found these professional opinions overwhelmed by a business form and license from Nevada and cancelled checks for a concert and a sizeable charitable donation.

¶ 76 Buttressing the medical testimony was the *fact* that Byrd, through all of the proceedings up to the actual trial, was represented by court-appointed counsel. Thus, there must have been an affidavit of assets and liabilities entitling him to free legal assistance. Although he claimed

several times to be hiring private counsel using assets from his trust fund, no such attorney was ever retained and the accountant he identified as accessing the money denied any ability to draw from a trust fund.

¶ 77 "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri*, 420 U.S. 162, 171 (1975), quoted in *Indiana v. Edwards*, 554 U.S. 164, 170 (2008). "Fitness speaks only to a person's ability to function within the context of trial; it doesn't refer to sanity or competence in other areas." *People v. Coleman*, 168 Ill. 2d 509 (1995). There is no evidence of any such ability on defendant's part.

¶ 78 Beyond the representations of defense counsel about Byrd's refusal to cooperate and the testimony of Dr. Nazareno about Byrd's distrust of his attorney and his refusal to produce what might have been relevant defense evidence, there is ample demonstration in the record of Byrd's insistence on following his own course rather than cooperating with his attorney. His demand that the courtroom be cleared so he could advise the court about a totally irrelevant and untenable 1974 incident with the late President Nixon and its unlikely aftermath; his unwillingness to simply allow his attorney to cross-examine Dr. Nazareno but adding his own lengthy cross-examination that resulted in the doctor changing his opinion and finding Byrd to be delusional; objecting to questions asked by the State and his own attorney, some of which objections were sustained by the court; and providing his own rambling three-day narrative testimony instead of responding to a more focused direct examination by his attorney all demonstrated an inability to cooperate with counsel in his defense.

¶ 79 Even more significant to my way of thinking is Byrd's conduct dramatically demonstrated his obvious lack of awareness of what evidence and arguments were relevant and appropriate. He may have been capable of an abstract understanding of what was taking place in the courtroom and able to articulate, in the abstract, the nature and elements of the proceedings, but he amply demonstrated a fundamental failure to grasp the essence of the proceedings and a lack of judgment of what was in his best interest and an inability to cooperate with the attorney who did possess that judgment.

¶ 80 For these reasons, I would find that the decision that Byrd had been restored to fitness and was fit to stand trial was against the manifest weight of the evidence, that defendant's conviction should be reversed and the matter remanded for a new evaluation and determination of fitness.

¶ 81 Defendant's Fitness to Represent Himself

¶ 82 The court did find Byrd fit to stand trial, whereupon defendant immediately confirmed his lack of judgment by pressing to fire his court-appointed counsel and represent himself at trial.

¶ 83 Because I would reverse on the finding that defendant had been restored to fitness, I would ordinarily not reach the issue of his fitness to represent himself at trial. I address it, however, to respond to one of the conclusions drawn by the majority.

¶ 84 Our courts have recognized that there is an essential tension between the defendant's right to represent himself in court, his right to a fair hearing, his right to the affirmation of his dignity and the court's right and duty to ensure the integrity and fairness of the judicial process through, among other things, the adversarial testing that is the foundation of our search for the truth. See generally, *Indiana v. Edwards*, 554 U.S. 164 (2008), citing as precedents that frame the issue, *Godinez v. Moran*, 509 U.S. 389 (1993); *Faretta v. California*, 422 U.S. 806 (1975); *Drope v.*

Missouri, 420 U.S. 162 (1975); and *Dusky v. United States*, 362 U.S. 402 (1960). When those critical interests collide, striking an appropriate balance can be a complicated and nuanced exercise. *Edwards* undertook to strike that balance in the context of persona found competent to stand trial but who suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

¶ 85 The specific question asked in *Edwards* was whether the Constitution permits a State to limit the self-representation right of a person found fit to stand trial by insisting upon representation by counsel at trial on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented. *Edwards*, 554 U.S. 174. The answer to that question was:

"We consequently conclude that the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to do so. That is to say, the Constitution permits States to insist on representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Edwards*, 554 U.S. at 177-78.

¶ 86 During its analysis between asking the question and reaching the answer, the supreme court used language that suggests to me that when it referred to "severe mental illness," it was not requiring a specifically-diagnosed disease, but rather a series of deficits directly related to the defendant's ability to represent himself. The court observed: "Mental illness itself is not a unitary

concept. It can vary over time. It interferes with an individual's functioning at different times in different ways." *Edwards*, 554 U.S. at 175.

¶ 87 The court cited its decision in *McKaskle v. Wiggins*, 465 U.S. 168 (1984), "describing trial tasks as including organization of defense, making motions, arguing points of law, participating in *voir dire*, questioning witnesses, and addressing the court and jury."

¶ 88 The *amicus* brief filed by the American Psychiatric Association states that "[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses can impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant." The court found that supporting documents presented by Edwards "suggest to a layperson the common sense of this general conclusion." *Edwards*, 554 U.S. at 176.

¶ 89 Referring to *McKaskle's* conclusion that "dignity" and "autonomy" of individuals underlie the self-representation right, the court opined that "a right of self-representation at trial will not 'affirm the dignity' of a defendant who lacks the mental capacity to conduct his defense with the assistance of counsel." The court continued:

"To the contrary, given that defendant's uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling. Moreover, insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the

Constitution's criminal law objectives, providing a fair trial."

Edwards, 554 U.S. at 176-77.

All of the above discussion strongly suggests that the court was far more concerned about the deficits in the defendant's ability to conduct critical elements of trial than it was in a specific diagnosis.

¶ 90 Which brings me to ¶51 of the majority decision. I believe the supreme court would be less impressed by Byrd's ability to execute the mechanics of presenting "maybe 200 exhibits" than concerned about whether he possessed the strategic ability, the understanding of his case, the organizing skills to decide what was appropriate to present, and the wisdom and judgment to determine *not* to present 200 if he would be more effectively served by 20. To conclude that mechanical skills were sufficient to prevent the trial from becoming a spectacle or sham is to denigrate all of the elements that go into competent representation at trial.

¶ 91 The fact that neither of the alleged errors we consider in this case was properly preserved for the record is merely further indication, in my opinion, of defendant's total inadequacy to either stand trial and assist his counsel in presenting a viable defense or to represent himself against criminal charges.

¶ 92 On one hand, it hardly seems fair to fault the trial court for not addressing a concern that was not only not raised but was vigorously resisted by the defendant. On the other hand, we presume the trial judges know and follow the law. *People v. Gaultney*, 174 Ill. 2d 410, 420 (1996). It does not seem unjust to find error if a defendant who is demonstrably mentally incompetent to represent himself at trial is allowed to do so.

¶ 93 As defendant has pointed out in his brief, the trial court had "seen the defendant single-

handedly stretch a four-witness restoration hearing into a four-month debacle," "had seen the defendant sing and play 'hand trombone' along with a CD in open court, in an attempt to prove that he actually produced the CD," and "had heard countless hours of the defendant's barely coherent, rambling arguments." It is a fair inference that his trial would be a protracted version of the same conduct, detrimental to both defendant's interests in a fair trial and the court's interest in guarding the integrity of the judicial process.