2015 IL App (4th) 140645-U

NO. 4-14-0645

FILED
May 11, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: the Detention of RONNIE BRAZZELL,	)	Appeal from
a Sexually Violent Person,	)	Circuit Court of
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Coles County
Petitioner-Appellee,	)	No. 12MR60
v.	)	
RONNIE L. BRAZZELL,	)	Honorable
Respondent-Appellant.	)	James R. Glenn,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Turner and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the trial court's judgment, which committed respondent to the custody of the Department of Human Services pursuant to the Sexually Violent Persons Commitment Act.

¶ 2 In March 2012, the State filed a petition pursuant to the Sexually Violent Persons Commitment Act (725 ILCS 207/1 to 99 (West 2012)), alleging that respondent, Ronnie L. Brazzell, was a sexually violent person who should be committed to the Department of Human Services (DHS) for control, care, and treatment pursuant to the Act. In April 2014, a jury found that respondent was a sexually violent person within the meaning of the Act. In July 2014, the trial court ordered respondent committed to the custody of DHS until such time as he was no longer a sexually violent person.

¶ 3 Respondent appeals, arguing that the trial court erred by (1) denying his motion to continue the trial to obtain additional discovery, (2) depriving him of his right to be present for

trial, (3) admitting evidence that revealed he was being held at the Rushville DHS treatment facility, and (4) denying his motion for judgment notwithstanding the verdict (JNOV). We disagree and affirm.

¶ 4 I. BACKGROUND

¶ 5 The following facts were gleaned from the parties' pleadings and motions, the clinical reports on file, and evidence admitted at trial.

¶ 6 A. The State's Petition and Pretrial Proceedings

¶ 7 In March 2012, three days before respondent was scheduled to be released on parole from a 10-year sentence for criminal sexual assault (720 ILCS 5/11-1.20 (West 2002)) in Coles County case No. 03-CF-47, the State filed its petition for commitment pursuant to the Act.

¶ 8 In August 2013, respondent served the State with discovery requests, including a request for "all treatment notes, summaries, and certificates for groups attended and treatment received from Counselor Karen Kirschke, while [respondent was incarcerated] at Big Muddy Correctional Facility." The State produced documents in response to respondent's request. However, Kirschke's treatment notes no longer existed and were not among the documents provided.

¶ 9 On Wednesday, April 23, 2014—five days before the Monday, April 28, 2014, trial was scheduled to commence—respondent filed a motion to continue so that he could obtain Kirschke's treatment notes. At an April 24, 2014, pretrial hearing, the State objected to respondent's motion to continue, arguing that (1) Kirschke's treatment notes "don't exist"; (2) respondent failed to exercise due diligence to obtain the notes during the two years since the State filed its petition; and (3) a continuance would prejudice the State in that it would require the multiple expert witnesses to reschedule and coordinate their availability to testify at the two- or three-day

trial. The trial court denied respondent's motion to continue.

¶ 10 After the trial court denied respondent's motion to continue, respondent's counsel informed the court that respondent—who was being housed at DHS's facility in Rushville, Illinois—did not wish to be housed at the Coles County jail during the trial because the jail (1) might not be able to provide adequate treatment for respondent's migraines, (2) would not allow respondent's parents to bring him lunch, and (3) would limit the amount of clothing respondent could bring with him from Rushville. Respondent requested to be transported from the Rushville treatment facility to the Coles County courthouse (a 300-mile roundtrip) each day of the trial. The court denied respondent's request, finding that (1) the Coles County jail could adequately treat respondent's migraines and (2) respondent's desires to have his parents bring him lunch and enjoy multiple changes of clothes were insufficient to justify transporting him from Rushville to Coles County each day of trial. Accordingly, the court ordered DHS to remand respondent to the Coles County jail for the duration of the trial.

¶ 11 B. Trial

¶ 12 1. *Respondent's Absence*

¶ 13 On the morning of trial, counsel for the State informed the trial court of an e-mail counsel received from an employee at the DHS Rushville facility, which stated that respondent "refused to be transported" to court for trial. On a "refusal form" that respondent gave to Rushville personnel, he wrote the following: "Not going to be a fair trial. Filed motion for judge to recuse himself." (After counsel for the State read the e-mail aloud, respondent's counsel made an oral "motion to recuse" on respondent's behalf. The court denied that motion, finding that it had no basis.) According to respondent's counsel, respondent believed the court was "biased" in light of its denials of respondent's motion to continue and request for daily transportation. Respond-

ent's counsel stated, however, that (1) respondent could be tried *in absentia*, (2) counsel was "ready to go," and (3) counsel had no objection to proceeding to trial in respondent's absence.

¶ 14 The trial court and parties engaged in a lengthy discussion as to the appropriate manner of informing the jury that respondent was absent from the trial. Pursuant to the discussion, the court stated in its opening instructions, "[t]he respondent has a constitutional right not to testify or appear at trial, and the jury may not draw any inference of guilt if the respondent does not testify or appear for trial." In his opening statement, respondent's counsel stated to the jury that "[respondent's] empty chair does not change any of your obligations in this case."

¶ 15 2. *Evidence Presented*

¶ 16 Pursuant to the parties' stipulation, the trial court informed the jury that (1) respondent had been convicted of the sexually violent offense of criminal sexual assault in Coles County case No. 03-CF-47, and (2) the actuarial instruments and psychological tests used by all expert witnesses were commonly and reasonably relied upon in their fields.

¶ 17 Dr. Martha Bellew-Smith testified that she was a licensed clinical psychologist who specialized in performing evaluations of sex offenders for purposes of the Act. In reaching her expert opinion, Bellew-Smith (1) reviewed respondent's case file; (2) interviewed respondent personally; and (3) interviewed Kirschke, respondent's treatment provider at Big Muddy Correctional Facility, where respondent participated in—but failed to complete—sex-offender treatment. Bellew-Smith described respondent's history as follows.

¶ 18 Respondent was born in October 1971. Between the ages of 5 and 12, respondent was sexually abused by his older brother. When respondent was 12, he sexually abused an 8-year-old boy and a 7-year-old girl. As a result of those crimes, respondent was adjudicated delinquent and sentenced to probation. Thereafter, respondent continued to sexually abuse chil-

dren. By respondent's own admission, he abused 17 different children between the ages of 3 and 15 before he reached adulthood. Most of these crimes went uncharged.

¶ 19 When respondent was 22, he was convicted of sexually abusing an 11-year-old boy and sentenced to probation and sex-offender treatment. During the course of that treatment, when respondent was 28, he began abusing a 13-year-old girl who lived next door to him. Respondent told Bellew-Smith that he "groomed [the girl] by treating her nice" before he and the girl "started dating." Respondent had sexual intercourse with the girl over 300 times, ultimately impregnating her in February 1999. As a result, respondent was convicted of aggravated criminal sexual abuse and sentenced to five years in prison (Coles County case No. 00-CF-57). During his imprisonment, respondent participated in three years of sex-offender treatment.

¶ 20 In 2003, after respondent was paroled from the Department of Corrections (DOC), he "almost immediately" reoffended by raping his 21-year-old half-sister while she was sleeping. (Respondent told Bellew-Smith that he had previously sexually abused his half-sister when she was 3 and 14.) For his 2003 offense, respondent was convicted of criminal sexual assault and sentenced to 10 years in prison (Coles County case No. 03-CF-44). Bellew-Smith observed, based upon respondent's history, that respondent reoffends regardless of the treatment he receives or the punishment the courts impose. Bellew-Smith also noted that shortly after respondent was transferred to the Rushville facility in 2012, he quit participating in treatment "to focus on his legal work."

¶ 21 Bellew-Smith initially diagnosed respondent—pursuant to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR)—with paraphilia, not otherwise specified, and antisocial personality disorder. She based the antisocial personality disorder diagnosis on respondent's "pervasive pattern *** of violation of the law" with

"absolutely no remorse whatsoever." Bellew-Smith testified that these diagnoses (1) satisfied the mental-disorder component of the Act in that they were congenital or acquired conditions affecting respondent's emotional and volitional capacity, and (2) predisposed respondent to future acts of sexual violence. 725 ILCS 207/5(b) (West 2012). At a subsequent evaluation of respondent, Bellew-Smith took into account "a lot more crimes" that respondent admitted committing but for which he was never convicted. Based upon these crimes, Bellew-Smith diagnosed respondent with the following additional disorders: (1) pedophilic disorder; (2) other specified paraphiliac disorder, nonconsent in a controlled environment; and (3) pedophiliac disorder in a controlled environment. These diagnoses also satisfied the mental-disorder component of the Act.

¶ 22 Bellew-Smith testified that, according to the Static-99R actuarial risk-assessment test, respondent was a moderately high risk to reoffend (2 1/2 times more likely than the average sex offender). Based on this and other tests, Bellew-Smith concluded that respondent "is just going to keep right on engaging in criminal behavior." (Both of Bellew-Smith's reports were admitted into evidence pursuant to stipulation.)

¶ 23 On cross-examination, respondent's counsel asked Bellew-Smith about "the treatment [respondent has] had at Rushville[.]" Referring to the Rushville facility, counsel stated (through leading questions) that "it's not as if [respondent is] sitting there doing nothing." Later, the following exchange occurred between respondent's counsel and Bellew-Smith:

> "[COUNSEL]: [H]e hasn't reoffended since this last series of treatment, has he?
>
> [BELLEW-SMITH]: He's been in Rushville.
>
> [COUNSEL]: He hasn't been released. Sure."

¶ 24 Dr. Kimberly Weitl, a licensed clinical psychologist who specialized in evaluating

sex offenders for DHS, testified that she reviewed respondent's DOC master file and personally interviewed respondent. Weitl diagnosed respondent with (1) pedophilia; (2) paraphilia not otherwise specified, sexually attracted to nonconsenting persons; (3) alcohol abuse; and (4) antisocial personality disorder. According to Weitl, these diagnoses predisposed respondent to commit future acts of sexual violence. Weitl also determined, pursuant to the Static-99 risk-assessment test, that respondent was a moderately high risk to reoffend.

¶ 25 Weitl testified that before respondent quit sex-offender treatment, he "was still *** blaming the victim, not taking responsibility, getting kind of defensive or upset when somebody would correct him." Weitl concluded, to a reasonable degree of psychological certainty, that respondent was "at a substantially high risk to reoffend" and met all criteria of a sexually violent person under the Act.

¶ 26 On cross-examination, respondent's counsel questioned Weitl at length regarding respondent's participation in treatment at the Rushville facility.

¶ 27 Respondent's expert, Dr. Kirk Witherspoon, testified about respondent's participation in treatment at Rushville, acknowledging that respondent would have to repeat a component of sex-offender treatment "if he stayed in this facility." Witherspoon testified that respondent made "significant progress" in treatment and had not sexually victimized a child in approximately 20 years. Witherspoon opined, based upon several different diagnostic tests respondent completed, that (1) respondent had no "ongoing" antisocial tendencies, (2) the test results revealed no "sexual psychopathology," and (3) respondent's interests were no longer "deviant."

¶ 28 However, Witherspoon also determined, based upon the Static 2002R actuarial test, that respondent was a moderately high risk to reoffend. Additionally, Witherspoon found respondent to be in the highest risk category under the Table of Sexual Recidivism (MATS-1)

test. Witherspoon acknowledged that offenders falling into the highest risk category under the MATS-1 test (which takes into account only offenses for which the subject has been *convicted*) have a 25% chance of just *being caught* reoffending. Witherspoon opined, however, that respondent had a "rather low" risk of recidivism.

¶ 29 During closing argument, respondent's counsel referred to "the two years [respondent has] been in Rushville" and the "ten years of treatment" he has received.

¶ 30 The jury found that respondent was a sexually violent person within the meaning of the Act.

¶ 31 C. Posttrial Proceedings

¶ 32 In May 2014, respondent filed posttrial motions for (1) JNOV and (2) a new trial. In his motion for JNOV, respondent argued, in pertinent part, that (1) Bellew-Smith's testimony was unreliable because she did not review the treatment notes from respondent's time at Big Muddy Correctional Facility and (2) Witherspoon's testimony "was more credible on the issues." In his motion for a new trial, respondent contended that he was prejudiced by (1) the trial court's denial of the motion to continue, (2) the court's denial of respondent's request to be transported from Rushville to Coles County each day of the trial, and (3) the admission of evidence revealing that respondent was being held at the Rushville facility.

¶ 33 In July 2014, following a hearing, the trial court denied respondent's posttrial motions. As to the motion JNOV, the court explained that (1) the jury's findings as to the credibility of the expert witnesses was entitled to great weight, and (2) a rational trier of fact could have found the elements beyond a reasonable doubt.

¶ 34 As to respondent's claim that the trial court improperly denied a continuance, the court noted that (1) "respondent was provided ample opportunity within which to obtain discov-

ery," (2) the specific documents respondent desired "did not exist," and (3) respondent's own expert indicated that the documents at issue were not necessary for him to reach his conclusions and opinions. The court further found that respondent failed to demonstrate he needed daily transportation to and from Rushville to the courthouse. Finally, the court noted that respondent's own expert also mentioned during his testimony that respondent was being housed at the Rushville facility.

¶ 35 After denying respondent's posttrial motions, the trial court immediately held a dispositional hearing. Following the presentation of argument, the court ordered respondent committed to DHS custody for secure care and treatment.

¶ 36 This appeal followed.

¶ 37 II. ANALYSIS

¶ 38 Respondent argues that the trial court erred by (1) denying his motion to continue the trial to obtain additional discovery, (2) depriving him of his right to be present for trial, (3) admitting evidence that revealed he was being held at the Rushville DHS treatment facility, and (4) denying his motion for JNOV. We address these contentions in turn.

¶ 39 A. Respondent's Motion To Continue Trial

¶ 40 Respondent first argues that the trial court erred by denying his motion to continue trial so that he could obtain additional discovery. We disagree.

¶ 41 Illinois Supreme Court Rule 231(a) (eff. Jan. 1, 1970) provides the procedure for requesting a continuance to obtain additional evidence, as follows:

> "If either party applies for a continuance of a cause on account of the absence of material evidence, the motion shall be supported by the affidavit of the party so applying or his authorized agent. The

> affidavit shall show (1) that due diligence has been used to obtain the evidence, or the want of time to obtain it; (2) of what particular fact or facts the evidence consists; (3) if the evidence consists of the testimony of a witness, his place of residence, or if his place of residence is not known, that due diligence has been used to ascertain it; and (4) that if further time is given the evidence can be procured." Ill. S. Ct. R. 231(a) (eff. Jan. 1, 1970).

¶ 42 Further, subsection (f) of Rule 231 provides that "[n]o motion for the continuance of a cause made after the cause has been reached for trial shall be heard, unless a sufficient excuse is shown for the delay." Ill. S. Ct. R. 231(f) (eff. Jan. 1, 1970). Interpreting subsection (f) of Rule 231, the appellate court has held that "[o]nce the case reaches the trial stage, the party seeking a continuance must provide the court with 'especially grave reasons' for the continuance because of the potential inconvenience to the witnesses, the parties, and the court." *K & K Iron Works, Inc. v. Marc Realty, LLC*, 2014 IL App (1st) 133688, ¶ 23, 21 N.E.3d 1190 (quoting *In re Marriage of Ward*, 282 Ill. App. 3d 423, 430-31, 668 N.E.2d 149, 154 (1996)). "The decision to grant or deny a motion for a continuance is within the sound discretion of the trial court and will not be disturbed on appeal 'unless it has resulted in a palpable injustice or constitutes a manifest abuse of discretion.' " *Id.* ¶ 22, 21 N.E.3d 1190 (quoting *Wine v. Bauerfreund*, 155 Ill. App. 3d 19, 22, 507 N.E.2d 155, 156 (1987)).

¶ 43 In this case, respondent moved for a continuance less than a week—and only two business days—before trial was scheduled to begin so that he could attempt to obtain Kirschke's treatment notes. Respondent did not accompany his motion with an affidavit pursuant to Rule 231(a), nor did he provide *any* excuse for his late filing. As the State notes in its brief, respond-

ent had over two years to complete discovery. His final written discovery request was made eight months prior to trial, and the State provided all available requested documents seven months prior to trial. Accordingly, respondent had seven months to request the additional material he believed he needed. We conclude that his failure to do so amounted to a lack of due diligence.

¶ 44 Further, respondent has never contested the State's representation that Kirschke's notes no longer exist. Even if a continuance were granted, the trial court had no reason to believe that respondent would even be able to obtain the evidence he desired. Additionally, we note that a continuance would have required the three expert witnesses to reschedule their appearances and coordinate a time when all three could be available to testify at a multiday trial. This would have greatly inconvenienced the State, the court, and the witnesses. Last, because Kirschke never testified, the materiality of her notes is hardly evident. Accordingly, the trial court did not err by denying respondent's motion to continue trial.

¶ 45 B. Evidence That Respondent Was Held at Rushville

¶ 46 Respondent next argues that the trial court erred by admitting evidence that he was being held at the Rushville DHS treatment facility. Respondent has forfeited this argument.

¶ 47 Respondent never objected at trial to any testimony that revealed he was being held in the Rushville treatment facility. In fact, respondent's counsel *elicited* some of that very testimony. (We note that on appeal, respondent has not alleged plain error or ineffective assistance of counsel.) Accordingly, respondent forfeited this claim. See *People v. Johnson*, 368 Ill. App. 3d 1146, 1155, 859 N.E.2d 290, 299 (2006) ("A party cannot complain of error that he himself injected into the trial.").

¶ 48 C. Respondent's Absence From Trial

¶ 49 Respondent next argues that he was denied his right to be present at trial when the trial court denied his request to be transported from the Rushville facility to Coles County each day of trial. However, we conclude that respondent affirmatively waived his right to be present at trial when *he refused to be present at trial*. Respondent even filled out a "refusal form," which he gave to Rushville staff, confirming that he refused to attend trial.

¶ 50 Respondent contends on appeal that the court "forced him to be absent" from trial by requiring him to stay at the Coles County jail, which would not have provided "reasonable accommodations" to respondent during the trial. Specifically, respondent wanted to have multiple changes of clothes and home-cooked lunches provided by his parents. Without these creature comforts, respondent claims, he would have become "overly anxious" and possibly developed a migraine. However, setting aside the absurd nature of these requests, these were not the *actual* reasons respondent gave for his refusal to attend trial. Instead, respondent explained his reasons on the refusal form: "Not going to be a fair trial. Filed motion for judge to recuse himself." Although respondent suggests on appeal that medical necessity required him to spend the night at Rushville during the trial, his own statements on the refusal form contradict this claim.

¶ 51 Additionally, we note that even if the trial court did commit error—which it did not—respondent's claim would be barred under the invited-error doctrine because it was *respondent's counsel* who told the court that respondent could be tried *in absentia* and that he was ready to proceed with trial. See *In re Detention of Swope*, 213 Ill. 2d 210, 217, 821 N.E.2d 283, 287 (2004) (under the invited-error doctrine, "a party cannot complain of error which that party induced the court to make or to which that party consented."). (We again note that, on appeal, respondent has not alleged plain error or ineffective assistance of counsel.)

¶ 52 Further, even if respondent had not affirmatively waived his right to be present at trial or invited the error of which he now complains, we would nonetheless conclude that the trial court properly denied respondent's extravagant and unreasonable request.

¶ 53 D. Respondent's Motion for JNOV

¶ 54 Last, respondent argues that the trial court erred by denying his motion for JNOV. We disagree.

¶ 55 A motion for JNOV should be granted "only where 'all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors [the] movant that no contrary verdict based on that evidence could ever stand.' " *Hamilton v. Hastings*, 2014 IL App (4th) 131021, ¶ 22, 14 N.E.3d 1278 (quoting *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510, 229 N.E.2d 504, 513-14 (1967)). "In ruling on these motions, 'a court does not weigh the evidence, nor is it concerned with the credibility of the witnesses; rather it may only consider the evidence, and any inferences therefrom, in the light most favorable to the party resisting the motion.' " *Id.* (quoting *Maple v. Gustafson*, 151 Ill. 2d 445, 453, 603 N.E.2d 508, 512 (1992)).

¶ 56 To establish that someone is a sexually violent person, "the State must prove the following three elements beyond a reasonable doubt: (1) that the person has been convicted of a sexually violent offense; (2) that the person has a requisite mental disorder; and (3) that the person is dangerous to others because the mental disorder creates a substantial probability that the person will engage in future acts of sexual violence." *In re Commitment of Trulock*, 2012 IL App (3d) 110550, ¶ 49, 970 N.E.2d 560; 725 ILCS 207/5(f), 15(b), 35(d)(1) (West 2010).

¶ 57 Here, respondent claims that the jury's verdict cannot stand because the State's expert witnesses, Bellew-Smith and Weitl, were not as credible as respondent's expert witness,

Witherspoon. Respondent's argument is so unpersuasive as to barely merit discussion. Suffice it to say, (1) Bellew-Smith and Weitl—whom respondent stipulated were experts in their field—testified that respondent met the criteria of a sexually violent person under the Act, and (2) the trial court properly refused to weigh their credibility against Witherspoon's for purposes of respondent's motion for JNOV. *Hastings*, 2014 IL App (4th) 131021, ¶ 22, 14 N.E.3d 1278. Accordingly, we conclude that the court did not err by denying respondent's motion for JNOV.

¶ 58 III. CONCLUSION

¶ 59 For the reasons stated, we affirm the trial court's judgment.

¶ 60 Affirmed.