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2016 IL App (3d) 150549-U

Order filed May 4, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2016

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| <i>In re MARRIAGE OF</i> |) | Appeal from the Circuit Court |
| PAUL SILAS ELLIOTT, |) | of the 14th Judicial Circuit, |
| |) | Rock Island County, Illinois, |
| Petitioner-Appellant, |) | |
| |) | Appeal No. 3-15-0549 |
| and |) | Circuit No. 12-D-510 |
| SHELBY GARRISON, |) | |
| |) | Honorable |
| Respondent-Appellee. |) | Greg G. Chickris, |
| |) | Judge, Presiding. |

JUSTICE McDADE delivered the judgment of the court.
Justices Lytton and Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* The court: (1) did not improperly instruct a witness or become an advocate for the opposing party; (2) did not err in finding that petitioner was a "mental defective"; and (3) properly applied the Firearm Owners Identification Card Act.

¶ 2 Petitioner, Paul Silas Elliott, appeals from the trial court's orders that notified the Illinois State Police (ISP) of his "mental defective" adjudication and a custody modification order. On appeal, Elliott argues that the court erred when it: (1) became an advocate for the opposing party while questioning a witness; (2) found Elliott to be a "mental defective"; and (3) improperly

applied the Firearm Owners Identification Card Act (FOID Act) (430 ILCS 65/0.01 *et seq.* (West 2014)). We affirm.

¶ 3

FACTS

¶ 4 At the outset, we admonish Elliott's appellate counsel as to the requirements of Illinois Supreme Court Rule 341(h)(6) (eff. Feb. 6, 2013) that the statement of the facts contain "the facts necessary to an understanding of the case." The bare-bones recitation of facts in Elliott's brief was devoid of the procedural history necessary to decide the issues raised. While we would be justified in striking Elliott's brief and dismissing his appeal on this ground (*In re Application of the County Treasurer & ex officio County Collector*, 2015 IL App (1st) 133693, ¶ 19), we have culled the relevant facts from the record with guidance from the brief of respondent, Shelby Garrison, which included the relevant procedural history and substantive facts.

¶ 5 On February 11, 2013, the trial court entered a judgment for the dissolution of Paul Elliott and Shelby Garrison's marriage. The judgment included a shared parenting agreement that awarded primary custody of A.E., the parties' only marital child, to Garrison.

¶ 6 In January 2015, Garrison sought an emergency order of protection against Elliott and a modification of the parties' custody agreement. The order of protection was consolidated with the custody modification action, and in June 2015, the matter proceeded to trial.

¶ 7 The evidence at trial established that Elliott had suffered a traumatic brain injury when he was 12 years old. According to Elliott, the injury caused him to suffer hearing and memory loss. In January 2015, Elliott took the prescription medications Celexa for depression, and Klonopin for anxiety. Elliott also said that he used cannabis to treat his chronic pain and stomach issues. Elliott said that in January 2015, he was waiting for an appointment to review his medication with a psychiatric professional.

¶ 8 Garrison testified that, in 2011, she and Elliott had gotten into an argument, and Garrison went home. Thereafter, Elliott, his sister and a friend went to Garrison's home. Elliott attacked Garrison with a knife and a starter pistol. Elliott's sister helped Garrison try to avoid Elliott. Garrison saw Elliott put the knife to his sister's ribs. The incident ended when Elliott's father, Phillip Elliott, picked him up.

¶ 9 On January 13, 2015, Elliott was caring for A.E. and Garrison's younger daughter. Garrison said that the visit was intended to last until the evening of January 14. At approximately 9:30 a.m., Garrison received a text message from Elliott to come pick up the children. Garrison found the children dressed in diapers playing without supervision in the living room. Garrison found Elliott lying in the bathtub. Garrison and Elliott argued about their relationship, and Elliott threatened to commit suicide by using his revolver. Garrison left the bathroom, and Elliott followed her into the living room. As the parties argued in the living room, Elliott grabbed a bottle of pills and swallowed the entire contents of the bottle in front of Garrison and A.E. According to Garrison, Elliott then told A.E. "I love you, buddy. Just remember daddy always loved you." Elliott said that, at the time, he was seriously contemplating suicide, and he attributed his suicidal thoughts to his medication. Following the incident, Garrison left the house with her children and called the police.

¶ 10 After Garrison left, Elliott removed a 9 mm. pistol and a revolver from his gun safe. Elliott placed the 9 mm. pistol on his dresser, and he took the revolver to the bathroom where he returned to the bathtub. A police officer found Elliott in the bathtub with the revolver located nearby. Elliott was taken to the hospital and later transferred to the Robert Young Center for a mental health evaluation. Approximately five hours later, Elliott was released from the Robert Young Center. Following his release, Elliott sent several text messages and made several

telephone calls to his father, Phillip. In the messages and calls, Elliott said that he wanted to tell A.E. goodbye, kill Garrison, and commit suicide. In one message, Elliott said that he intended to get a gun from his friend to kill Garrison. Phillip reported Elliott's threats to the police, and that evening, officers returned to Elliott's house. Phillip let the officers in, and the officers transported Elliott to the Robert Young Center. During the drive, Elliott said that he was going to harm himself by slitting his wrists, decapitation, or slamming his head into a piece of concrete. Elliott remained in inpatient care at the Robert Young Center for approximately one week. During this week, Garrison moved in with her mother, had a panic alarm installed by the police, and obtained an emergency order of protection.

¶ 11 When Elliott was released from the Robert Young Center, he began receiving treatment from psychiatric nurse practitioner Eric Meyer. The court certified Meyer as an expert witness in the field of psychiatry, and Meyer opined that the January 2015 incident was possibly the result of Elliott's medication—Celexa. After Elliott's discharge, Meyer tapered Elliott off Celexa mainly because of the sexual side effects of the medication instead of its increased agitation side effect.

¶ 12 Meyer said that Elliott's diagnoses included bipolar disorder, impulse control disorder, and a traumatic brain injury. Meyer stated that Elliott's brain injury could cause increased impulsivity, irritability, and mood disruption. Meyer said that Elliott's bipolar diagnosis would require lifelong care and that Elliott was cooperating with his treatment recommendations.

¶ 13 During direct examination of Meyer, counsel for Elliott, Carrie Clark, asked "[h]ow big of a possibility, with managing—with his cooperation, his openness, and his compliance, how big of a possibility do you think there is of psychosis?" Opposing counsel objected on the ground that the question called for speculation. The court asked Clark to restate the question, and Clark

said "[t]he question is what he believes the likelihood of psychosis is given the circumstances that he's observed." The court sustained the objection, and the following exchange occurred.

[CLARK:] Can you testify, to a reasonable degree of psychiatric certainty, what the likelihood is of psychosis given the conditions of treatment that you've just described?

[MEYER:] If a person stays compliant with—

[CLARK:] I'm sorry. That one is yes or no. Can you state that with a reasonable degree of psychiatric certainty?

[MEYER:] Um... As far as prevention of—Can you repeat the question? I'm sorry.

[CLARK:] Sure. The question would be whether you could say what the likelihood of an episode of psychosis is, given this course of compliance with treatment, if you could say that one way or the other to a reasonable degree of psychiatric certainty.

THE COURT: Okay. Wait a second. Do you have an attorney, sir?

[MEYER:] I do not.

THE COURT: Do you know why you're on the stand?

[MEYER:] My understanding is to provide a statement about my treatment of client Paul Elliott.

THE COURT: Well, this goes beyond that. Okay? It's my understanding, based upon the pleadings filed here, that [Elliott] wants custody of his child. Ms. Garrison wants custody of the child. So the Court is going to have to decide who gets custody or whether it continues to be shared custody and, if I decide that one

of the parties is—that it's in the best interest of the minor child that one of the parties receives custody, what type of visitation to afford the other party.

Now, this—And I don't explain this to you to intimidate you at all but so that you understand what's going on. Ms. Clark wants you to give an opinion as to what is going to happen in the future. In other words, can you state, within a reasonable degree of medical certainty, that [Elliott] won't have a relapse, won't become psychotic, won't discontinue his treatment with you, [and] won't attempt to commit suicide or place the child in a perilous situation? And, if you can state that, then certain assumptions are going to be made, and certain reliances are going to be made on you which you might be liable for in the future.

Okay. So, without trying to intimidate your testimony, can you state, within a reasonable degree of psychiatric certainty, that he won't have a future psychotic episode?

[MEYER:] I cannot state that, no."

¶ 14 At the conclusion of the trial, the court found that Elliott: (1) suffered a traumatic brain injury that affected his mental state; (2) had bipolar disorder which affected his mental state; (3) threatened and attempted suicide in front of A.E.; (4) threatened to harm Garrison and attack her with a knife and gun; (5) is subject to psychotic relapses due to his brain injury and bipolar disorder; (6) illegally used cannabis on a daily basis which could interfere with his prescription medications that are necessary for his mental stability; and (7) became suicidal, abusive and dangerous to himself and others when his mental illness and brain injury were not in remission. The court also found that Elliott was unfit, by reason of mental illness and brain injury, to possess a firearm, and it ordered Elliott to surrender his Firearm Owner's Identification (FOID)

card and sell his weapons. The court entered a two-year plenary order of protection against Elliott and awarded Garrison sole custody of A.E.

¶ 15 On June 8, 2015, the court entered a form "Order to Notify the Illinois State Police of an Adjudication as a Mental Defective." In the order, the court adjudicated Elliott as a mental defective "in that it was determined in these proceedings that, as a result of marked subnormal intelligence, or mental illness, mental impairment, incompetency, condition, or disease, he or she is a danger to himself." See 430 ILCS 65/1.1(1) (West 2014).

¶ 16 On June 30, 2015, the court amended the ISP notification order *nunc pro tunc* to specifically name Elliott as the party that was adjudicated as a mental defective. The court also entered a written order that found Elliott was unfit by reason of mental illness and brain injury to possess a firearm. The court awarded sole legal and physical custody of A.E. to Garrison and granted Elliott supervised visitation. The court also ordered Elliott to surrender his FOID card to the ISP and sell his firearms. Elliott appeals from these orders.

ANALYSIS

I. Witness Question and Instruction

¶ 19 Elliott argues that the court exceeded the permissible scope of judicial involvement when it asked psychiatric nurse practitioner Meyer if he had counsel and advised Meyer that he might be liable for his prospective statements regarding the probability of Elliott suffering another bout of psychosis. Upon review, we find that the court did not abuse its discretion as its questioning of Meyer fell within the court's right to question witnesses to elicit truth or seek clarification.

¶ 20 Illinois Rules of Evidence 614(b) (eff. Jan 1, 2011) allows a court to "interrogate witnesses, whether called by itself or by a party." The trial court's questions should be used to elicit truth or clarify issues. *Waters v. Chicago & Eastern Illinois R.R. Co.*, 13 Ill. App. 3d 661,

669 (1973). The court is given wide latitude in examining witnesses in a bench trial, but the court must not depart from its function as a judge and may not assume an advocacy role for either party. *In re N.T.*, 2015 IL App (1st) 142391, ¶ 43. The propriety of the court's examination is determined by the circumstances of the case and rests largely within the discretion of the trial court. *Charles Selon & Associates, Inc. v. Estate of Aisenberg*, 103 Ill. App. 3d 797, 800 (1981).

¶ 21 Here, Clark asked Meyer whether he could testify to the likelihood that Elliott would suffer a future episode of psychosis. From the record, it appears that Meyer did not understand the question and sought clarification. After the clarification, the court attempted to further place the question in context by asking Meyer about the reason for his testimony. When Meyer said that his testimony pertained to his treatment of Elliott, the court noted that the line of questioning had exceeded that basis. The court cautioned Meyer that his opinion about Elliott's prospective mental health could pose liability issues. The court emphasized that it did not want to "intimidate" Meyer, but it wanted him to understand the context of the proceeding.

¶ 22 Viewed in context, the court's questions were intended to clarify Clark's examination. Moreover, because this was a bench trial, the court had wide latitude to examine the witness as the risk of prejudice was low and the court's question was related to its role as the fact finder. *N.T.*, 2015 IL App (1st) 142391, ¶ 43. As a result, we find that the court did not impermissibly assume an advocacy role and its questions were not the result of an abuse of discretion.

¶ 23 Even if we were to accept Elliott's argument that the trial court abused its discretion, we find the line of questioning was ultimately harmless. *In re Marriage of Roepenack*, 2012 IL App (3d) 110198, ¶ 46 (evidentiary error would be harmless given the weight of the remaining properly admitted evidence). The weight of the remaining evidence of Elliott's prior attack on

Garrison, the January 2015 episode of psychosis and suicide attempt, and threats to harm himself and Garrison readily supported the court's custody modification order and plenary order of protection. See 750 ILCS 5/610(b) (West 2014); *In re Marriage of Rogers*, 2015 IL App (4th) 140765, ¶ 57 (to warrant a custody modification, the moving party must prove by clear and convincing evidence that (1) a change has occurred in the circumstances of the child or custodian; and (2) modification of custody is necessary to serve the best interest of the child); 750 ILCS 60/214(a), 219 (West 2014).

¶ 24

II. Mental Defective Finding

¶ 25

Elliott argues that the court erred in entering the form order that found that he was adjudicated as a "mental defective" because the court did not make the necessary finding of "clear and present danger" to support this adjudication. Upon review, we find that the court's mental defective finding was not manifestly erroneous as the record includes sufficient evidence that Elliott presented a "clear and present danger" to Garrison. See 430 ILCS 65/1.1(1) (West 2014).

¶ 26

The FOID Act authorizes the ISP to revoke and seize an individual's FOID card when that individual's "mental condition is of such a nature that it poses a clear and present danger" to himself or another person. 430 ILCS 65/8(f) (West 2014). Section 8.1(b) of the FOID Act requires the circuit clerk to immediately notify the ISP "[u]pon adjudication of any individual as a mentally disabled person as defined in Section 1.1." 430 ILCS 65/8.1(b) (West 2014). The FOID Act defines "[a]djudicated as a mentally disabled person"¹ as a person that is "the subject

¹The FOID Act does not define the term "mental defective." This term appears to be derived from the Federal Gun Control Act of 1968 which provides that "[i]t shall be unlawful for any person—who has been adjudicated as a mental defective or who has been committed to a

of a determination by a court, board, commission or other lawful authority that the person, as a result of marked subnormal intelligence, or mental illness, mental impairment, incompetency, condition, or disease: (1) presents a clear and present danger to himself, herself, or to others[.]"
430 ILCS 65/1.1 (West 2014). Section 1.1 defines "clear and present danger," as a person who "communicates a serious threat of physical violence against a reasonably identifiable victim or poses a clear and imminent risk of serious physical injury to himself, herself, or another person as determined by a physician, clinical psychologist, or qualified examiner[.]" *Id.* We review the court's findings of fact for manifest error. *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001).

¶ 27 In this case, the evidence satisfied the FOID Act definition of "clear and present danger" because Elliott communicated a threat of physical violence against Garrison. At trial, Phillip testified that after Elliott's first release from the Robert Young Center, Elliott called and sent text messages in which he said that he wanted to kill Garrison. From this evidence, the court found that Elliott had "threatened to harm" Garrison. Although the court omitted the "communicates" language of the section 1.1 definition, this finding was implicit from the record. Therefore, the court's finding satisfied the FOID Act's definition of clear and present danger and was readily supported by the evidence.

¶ 28 In coming to this conclusion, we reject Elliott's argument that the above evidence is insufficient as it did not come from a medical professional. Instead, the evidence was derived from Elliott's father, Garrison and a police officer. Elliott's argument is based on an incorrect

mental institution; to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(g)(4) (2012).

conjunctive reading of the section 1.1 definition of "clear and present danger." See 430 ILCS 65/1.1 (West 2014). The section 1.1 "clear and present danger" definition is phrased in the *disjunctive* with two distinct clauses: (1) "communicates a serious threat of physical violence against a reasonably identifiable victim"; or (2) "poses a clear and imminent risk of serious physical injury to himself, herself, or another person as determined by a physician, clinical psychologist, or qualified examiner." *Id.* By its plain language, the "as determined by a physician" requirement applies only to the second clause. *Id.*

¶ 29

III. Application of the FOID Act

¶ 30

Elliott argues that the court misapplied the FOID Act when it entered an order to revoke Elliott's FOID card. Elliott contends that the FOID Act provided only the ISP, and not the courts, with authority to revoke a FOID card. Upon review, we find that Elliott misconstrues the court's orders. Initially, the court notified the ISP of Elliott's mental defective adjudication, and the later order, which directed Elliott to surrender his FOID card to the ISP, was the inevitable statutory result of the notice.

¶ 31

Section 8 of the FOID Act vests the ISP with "authority to" revoke and seize a FOID card where the ISP finds that an applicant is "[a] person whose mental condition is of such a nature that it poses a clear and present danger to the applicant, any other person or persons or the community[.]" 430 ILCS 65/8 (West 2014). Subsections 8(f) and 8(r) require the revocation of a FOID card where an individual is a person with a mental condition which poses a clear and present danger to the applicant or any other person and an individual who has been adjudicated as a person with a mental disability. 430 ILCS 65/8(f), (r) (West 2014). Additionally, the FOID Act requires the ISP to revoke and seize a FOID card where the ISP "finds that the applicant or person to whom such card was issued is or was at the time of issuance subject to an existing

order of protection." 430 ILCS 65/8.2 (West 2014). We review this issue of statutory construction *de novo*. *In re Detention of Lieberman*, 201 Ill. 2d 300, 307 (2002).

¶ 32 Here, as we noted in Issue II, the court found that Elliott suffered from a mental condition and posed a clear and present danger to Garrison. The court then entered an order to notify the ISP of its finding as required by the FOID Act. See 430 ILCS 65/8.1(b) (West 2014). The court's express "threatened to harm" finding and mental defective/disability adjudication provided the ISP with two grounds on which to revoke Elliott's FOID card. 430 ILCS 65/8(f), (r) (West 2014). The court entered its notification order on June 15, 2015, and 15 days later, on June 30 the court entered the order for Elliott to surrender his FOID card. The surrender order did not revoke Elliott's FOID card, but directed him to give the card to the ISP, who had the authority to revoke the card. According to the plain language of section 8.2, the revocation of Elliott's FOID card was also an inevitable conclusion as the ISP was required to "revoke and seize" his FOID card because of the emergency order of protection and the subsequent two-year plenary order of protection. See 430 ILCS 65/8.2 (West 2014). Therefore, the court did not misapply the FOID Act.

CONCLUSION

¶34 The judgment of the circuit court of Rock Island County is affirmed.

¶ 35 Affirmed.