2019 IL App (2d) 180888-U
No. 2-18-0888
Order filed September 16, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. WESLEY A. COAN, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of DeKalb County. No. 97-CF-248 Honorable Robbin J. Stuckert, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Jorgensen and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was clear and convincing that defendant is still a sexually dangerous person; the defendant invited any error in instructing the jury that it would receive three forms of verdict when he requested the instruction about which he complains; the defendant forfeited issues relating to the State's closing argument.

¶ 2 Defendant, Wesley A. Coan, appeals an order of the circuit court of DeKalb County continuing his commitment pursuant to the Sexually Dangerous Persons Act (Act) (725 ILCS 205/0.01 *et seq.* (West 2014)) following a jury trial in August 2018. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In 1998, defendant was committed as a sexually dangerous person (SDP) after having

been charged with one count of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 1996)). We affirmed that judgment in *People v. Coan*, 311 Ill. App. 3d 296, 301 (2000) (*Coan I*). In 2006 and 2009, defendant unsuccessfully applied for discharge. On September 18, 2012, defendant filed a third application for discharge alleging that he was no longer a SDP. He amended the application in June 2015. In June 2015, a jury determined that defendant was still sexually dangerous. This court reversed that judgment and remanded for a new trial due to an error in instructing the jury. *People v. Coan*, 2016 IL App (2d) 151036, ¶ 31 (*Coan II*). In August 2018, defendant was retried before another jury.

¶ 5 Dr. Kristopher Clounch, a clinical psychologist, was the State's only witness. In 2016, Clounch evaluated defendant to determine whether he had recovered and was no longer sexually dangerous. Clounch testified that his evaluation consisted of a document review and a two-hour interview with defendant.

¶ 6 Clounch testified to defendant's criminal history, as follows. In 1979, defendant was convicted of aggravated incest based on oral and vaginal sex with his 11-year-old stepdaughter. In 1981, while defendant was on probation for that offense, he was convicted of indecent liberties for engaging in oral sex with his 12-year-old stepson. While he was on bail for that offense, defendant fled to Florida. He was returned to Illinois and was sentenced to 15 years' incarceration. In 1990, while on parole for his 1981 conviction, defendant was convicted of aggravated criminal sexual assault for numerous instances of oral and anal sex with an 11-year-old boy. On another occasion, defendant showed his girlfriend's minor sons a pornographic movie, had sex with their mother in front of them, and then instructed the boys to have sex with their mother. That incident resulted in defendant's conviction of aggravated criminal sexual assault and sentence of nine years' incarceration. In 1997, when defendant was 56 years old, he

was charged with aggravated criminal sexual assault for groping a 14 year-old girl. When Clounch questioned defendant about his criminal history, defendant either denied the events or blamed the victims for initiating contact.

¶ 7 Clounch testified that defendant was terminated from a treatment program in 1980 due to his noncompliance with treatment and his unwillingness to meet goals. Clounch noted that defendant was suspended from treatment numerous times between 1998 and 2008, and that defendant had not participated in any treatment since 2008. According to Clounch, a previous evaluation found that defendant's lack of progress in treatment was due to his refusal to take responsibility for his crimes and his lack of insight into his behavior. Clounch testified that defendant was inappropriate and belligerent toward treatment staff.

¶ 8 Clounch opined that it was "substantially probable" that defendant would reoffend if he were not confined in an institution. Clounch based that opinion on a risk assessment tool that scored defendant in an "above average" category of risk, even after reducing the risk based on defendant's age (77). Clounch explained that offenders in that category offend two times as often as the average sex offender. In addition, Clounch relied on certain factors which increased the risk, including defendant's sexual preference for children, his "offense supportive attitudes," and his resistance to rules and supervision. According to Clounch, "offense supportive attitudes" referred to defendant's belief that the children he molested were the aggressors. Clounch testified that defendant's age did not warrant a further reduction in the risk assessment, because defendant continued to offend while he was in his fifties and he had not been offense-free in the community for any significant period of time. According to Clounch, defendant's various medical conditions, such as diabetes, arthritis, high blood pressure, high cholesterol, and skin cancer, would not reduce his risk of reoffending. Clounch testified that defendant used a wheelchair for

traveling distances but that he could walk short distances. Clounch noted that defendant's offenses, such as fondling, could be committed even if defendant were wheelchair-bound.

¶ 9 Clounch diagnosed defendant with "pedophilic disorder, sexually attracted to both males and females, nonexclusive." According to Clounch, that condition was a mental disorder within the meaning of the Act that had existed for a period of not less than one year immediately prior to when the State filed its petition to commit defendant. Clounch also testified that defendant did not have control over his behavior. Clounch opined that defendant had not sufficiently recovered such that he could be placed on conditional release. The State rested at the conclusion of Clounch's testimony.

¶ 10 Defendant presented the testimony of Dr. Diane Lytton, a forensic psychologist who also reviewed documents and interviewed defendant. Lytton opined that defendant's risk to reoffend was low due to his age and disability (he was wheelchair-bound due to pulmonary disease). According to Lytton, defendant's diabetes was not well controlled, and he also had a history of heart attacks. Lytton testified that defendant currently did not suffer from any mental disorder. According to Lytton, defendant's denial of responsibility for his crimes was not a predictor of his risk to reoffend. Lytton testified that defendant had been "no angel" in prison, but that his many rule violations did not involve sexually acting out. Lytton also believed that defendant no longer entertained sexual fantasies involving children. Lytton performed the same risk analysis that Clounch did, although she believed that it was useless for people over age 70. The result was that defendant scored low for the possibility of reoffending. Lytton testified that she did not "bump up" his risk because he offended while he was on probation. She stated that his current age and ill health made the risk of reoffending very low.

¶ 11 Lytton testified that defendant made some progress in treatment but that his refusal to accept responsibility for his crimes, along with just being a difficult person, resulted in suspensions from treatment programs. According to Lytton, because defendant was already at a low risk to reoffend, it would be impossible to know if treatment would further reduce the risk. Lytton opined that defendant should be discharged or, in the alternative, that he was suitable to be conditionally released. Defendant then rested.

¶ 12 The court gave the jury three verdict forms. The first was to be used if the jury found defendant still to be sexually dangerous. The second was to be used if the jury found that defendant was no longer a SDP. The third verdict form read: "We, the jury, find that the Respondent, Wesley Coan, appears no longer to be dangerous but that it is impossible to determine with certainty under conditions of institutional care that the person has fully recovered." That language mirrored the language found in section 9(e) of the Act (725 ILCS 205/9(e) (West 2018)). Upon such a finding, the person is entitled to conditional release. 725 ILCS 205/9(e) (West 2018). Defense counsel stated that he had no objection to the third verdict form. It was given in conjunction with the State's tendered instruction 17B, explained below.

¶ 13 The State tendered two alternative instructions explaining the verdict forms that the jury would receive. The State's 17A told the jury that it would receive two forms of verdict, one finding that defendant was still sexually dangerous and the second finding that he was not. The State's 17B told the jury that it would receive three forms of verdict, the third mirroring the language of section 9(e) of the Act. At the jury instructions conference, which was held immediately after the jury was impanelled, the court began addressing 17A when defendant's counsel drew the court's attention to the State's 17B. Defense counsel explained that 17B reflected his alternative position that defendant should be conditionally released. "So," said

defense counsel, "I would ask that 17B be given and 17A I do object [*sic*]." The State then withdrew 17A.

¶ 14 After the parties rested, but before closing arguments, the court went over the jury instructions that it intended to give with the lawyers, to make sure that everyone was "in agreement." When the court indicated that it would give 17B, none of the attorneys made any comments. The court also indicated that it would give the third verdict form, and, again, none of the attorneys had any comments.

¶ 15 The jury returned the first verdict form, finding that defendant was still sexually dangerous. Defendant did not raise any issues with respect to the instructions or the verdict forms in his posttrial motion. On October 16, 2018, the court denied defendant's posttrial motion, and defendant was remanded to the custody of the Director of the Illinois Department of Corrections (Department). He filed a timely appeal.

¶ 16 II. ANALYSIS

¶ 17 Defendant first contends that it was error to give 17B and the third verdict form. Before we address this issue, we will briefly set forth some information regarding the Act. As an alternative to criminal prosecution, the Act provides for the involuntary commitment to the Department of persons who are adjudicated SDPs. 725 ILCS 205/2 (West 2018). Persons are deemed to be sexually dangerous who suffer from a mental disorder that has existed for at least one year prior to the filing of the petition, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children. 725 ILCS 205/3 (West 2018). SDP proceedings are civil in nature, but, as commitment under the Act entails a loss of liberty, the Act also affords defendants due process protections. *Coan II*, 2016 IL App (2d) 151036, ¶ 19. A person who is committed

pursuant to the Act may file a written application for discharge setting forth facts to show that the person has recovered and is entitled to discharge or conditional release. *Coan II*, 2016 IL App (2d) 151036, ¶ 20. The SDP is entitled to have a jury determine whether the person has recovered, and the State has the burden of proving by clear and convincing evidence that the applicant is still a SDP. *Coan II*, 2016 IL App (2d) 151036, ¶ 20. Section 9(e) of the Act (725 ILCS 205/9(e) (West 2018)) provides that, if the person is found to be no longer dangerous, the court shall order that he or she be discharged. In the next sentence, that section provides that "If the court finds that the person appears no longer to be dangerous but that it is impossible to determine with certainty under conditions of institutional care that the person has fully recovered," the court shall enter an order permitting the person to go at large subject to the conditions and supervision by the Department that, in the court's opinion, will adequately protect the public. 725 ILCS 205/9(e) (West 2018).

¶ 18 Here, defendant asserts that the clear language of the statute requires that the court, rather than a jury, decide whether the person appears no longer to be dangerous. Defendant further argues that the jury was not properly instructed, because the instruction defining the propositions that the State had to prove completely omitted mention of the option contained in the third verdict form. Further, defendant argues, the jury was not instructed on which party had the burden of proof, or what the burden of proof was, on such third option. Defendant recognizes that he forfeited this issue by not objecting at trial and by failing to include the issue in his posttrial motion. Nevertheless, defendant argues, the error is reviewable as plain error. Generally, a defendant forfeits review of an alleged error in instructing the jury if he or she does not object to the instruction or offer an alternative instruction and does not raise the issue in the posttrial motion. *People v. Herron*, 215 Ill. 2d 167, 175 (2005). However, the plain-error

doctrine allows a reviewing court to consider unpreserved error when a clear or obvious error occurred and the evidence is closely balanced, or a clear or obvious error occurred that is so serious that it affected the fairness of the trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 19 The State asserts that the plain-error doctrine does not apply because defendant invited any error when he requested that the court give 17B. "Even plain-error review is forfeited when a defendant invites the error." *Coan II*, 2016 IL App (2d) 151036, ¶ 23. Under the invited-error doctrine, a defendant cannot request to proceed in one manner at trial and then argue on appeal that the course of action was error. *Coan II*, 2016 IL App (2d) 151036, ¶ 23. Defendant's argument that he merely failed to object to the instruction is somewhat disingenuous. The record is clear that defendant actually requested that the court give 17B.

¶ 20 At the jury instructions conference, which occurred before any witnesses testified, the court noted that the State tendered its proposed instruction 17A. That proposed instruction explained that there were two forms of verdict: one to find that defendant was still a SDP and the other to find that he was not. Defense counsel then stated: "They've also submitted 17B, Judge." Defense counsel explained 17B to the court: "[It] essentially means [the jury finds] that [defendant] would be appropriate for conditional release, and part of my [application] in the alternative does ask for conditional release so I would ask that 17B be given and 17A I do object [*sic*]." The State withdrew 17A, and the court stated: "With the instruction of 17B to be given." Before closing arguments, the court held another brief conference to go over the instructions that it intended to give, and defense counsel made no comment with regard to 17B or the third verdict form.

¶ 21 Defendant argues that his request to give 17B was more akin to simply failing to object to the instruction than to actually tendering it. Defendant posits that the State prepared and tendered two erroneous instructions, 17A and 17B, and defendant had to choose one of them. In *Coan II*, we held that defendant's failure to object to an instruction tendered by the State was not the same as inviting the error by actually tendering the instruction himself. *Coan II*, 2016 IL App (2d) 151036, ¶ 24. Defendant relies on *People v. Harvey*, 211 Ill. 2d 368, 384-85 (2004), where our supreme court held that the defendant's failure to object to the mere-fact method of impeachment was distinguishable from a situation in which a defendant "actively participated in the direction of the proceedings."

¶ 22 Here, even though the State prepared and tendered 17B and the third verdict form, we believe that defendant "actively participated in the direction of the proceedings" by formally requesting that the court give 17B. Defense counsel was not passive or merely acquiescent. Rather, he brought 17B to the court's attention and then explained in detail why in his view 17B was appropriate under the pleadings. Counsel used the unequivocal language "so I would ask that 17B be given." We believe that this case is more like *People v. Patrick*, 233 Ill. 2d 62, 66-67, 76-77 (2009), where the defendant complained on appeal of instructions that he tendered at trial. Moreover, in our case, defendant did not have to choose between 17A and 17B. He objected to 17A, as he could have done with 17B, had he thought that instruction to be erroneous. We note that defendant conceded at oral argument that giving 17B was the choice most favorable to the defense. An appellant cannot urge reversal based on error which was committed in his favor and at his request. *Spinney v. Barbe*, 43 Ill. App. 585, 587 (1892). Accordingly, we hold that defendant invited any error. Additionally, we perceive no prejudice to

defendant. The jury did not return the third verdict, so any error in giving that verdict form, or 17B, did not affect the outcome of the trial.

¶ 23 Moreover, even if we agreed with defendant that he did not request 17B and we analyzed this issue under the plain-error doctrine, we would not find error. ("The first step of plain-error review is determining whether any error occurred." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).) At oral argument, defendant stressed that the court did not instruct the jury on the burden of proof or give the jury an instruction defining the issues in the third option. However, defendant did not request such instructions. The burden of preparing jury instructions is on the parties, not the court, and the court generally has no obligation to give instructions that counsel does not request. *People v. Hanes*, 204 Ill. App. 3d 35, 39-40 (1990).

¶ 24 Next, defendant argues that the State failed to prove by clear and convincing evidence that he is still a SDP. Essentially, defendant argues that Lytton's testimony was more credible than Clounch's. The finding that a defendant is still sexually dangerous will not be reversed unless it is against the manifest weight of the evidence. *People v. Donath*, 2013 IL App (3d) 120251, ¶ 38. A decision is against the manifest weight of the evidence only if the opposite conclusion is clearly apparent. *Donath*, 2013 IL App (3d) 120251, ¶ 38. Lytton agreed with Clounch as to defendant's criminal history and his treatment history. Lytton also agreed that defendant denied or minimized his behavior. Lytton disagreed with Clounch's diagnosis of pedophilic disorder and defendant's risk of reoffending based almost exclusively on defendant's advanced age and his medical impairments. Clounch testified that defendant still suffered from a mental disorder despite his age and infirmities, and the jury could have found Clounch's opinions more credible than Lytton's, especially as the evidence showed that defendant continued to offend well into his fifties and stopped only after he was committed as a SDP.

Consequently, we cannot say that the jury's verdict was against the manifest weight of the evidence.

¶ 25 Lastly, defendant contends that the State improperly interjected the safety of the community into the trial when it elicited that defendant's crimes were committed in DeKalb and neighboring counties and then argued to the jury that there was no way for defendant to be safely managed in the community. Defendant relies on *People v. Wheeler*, 226 Ill. 2d 92, 129 (2007), where our supreme court held that it is improper for the prosecution in closing argument to inflame the passions of the jurors by "uniting the interests of the jurors in their own safety with that of the interests of the State in convicting" the defendant. Because defendant did not object to the evidence at trial or include it as error in his posttrial motion, he has forfeited this issue. See *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ ¶ 54, 55 (failure to object at trial and to include the issue in the posttrial motion results in forfeiture). Although we may consider whether a prosecutor's remarks in closing argument constitute plain error (*Cosmano*, 2011 IL App (1st) 101196, ¶ 55), defendant does not argue plain error. Accordingly, we hold that this issue is forfeited.

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we affirm the judgment of the circuit court of DeKalb County.

¶ 28 Affirmed.