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2016 IL App (3d) 150501-U

Order filed June 14, 2016

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2016

<i>In re</i> COMMITMENT OF	)	Appeal from the Circuit Court
EDWARD TUCKER	)	of the 12th Judicial Circuit,
	)	Will County, Illinois,
(The People of the State of Illinois	)	
	)	
Petitioner-Appellee,	)	Appeal No. 3-15-0501
	)	Circuit No. 12-MR-251
v.	)	
	)	
EDWARD TUCKER,	)	Honorable
	)	Sarah F. Jones,
Respondent-Appellant).	)	Judge, Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Presiding Justice O'Brien and Justice Schmidt concurred in the judgment.

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**ORDER**

¶ 1 *Held:* (1) The record on appeal is insufficient to establish respondent's contention that the trial court abused its discretion in barring respondent's untimely jury demand; and (2) respondent forfeited review of the admissibility of the experts' diagnosis of other specified paraphilic disorder, sexually attracted to nonconsenting persons.

¶ 2 Respondent, Edward Tucker, was adjudicated a sexually violent person and committed to the custody of the Department of Human Services (DHS). Respondent appeals, arguing the trial

court erred when it denied his untimely jury demand and his request for a hearing pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). We affirm.

¶ 3

### FACTS

¶ 4

On February 10, 2012, the State filed a petition under the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 *et seq.* (West 2012)) to commit respondent to the custody of the DHS. The petition alleged that respondent is a sexually violent person as defined by the Act. In particular, the petition claimed that respondent had previous convictions of sexually violent offenses, including: (1) criminal sexual assault in 1993; (2) attempted criminal sexual assault and kidnapping in 1989; (3) aggravated sexual assault in 1989; (4) rape in 1983; and (5) attempted rape in 1982. According to the petition, respondent suffered from paraphilia not otherwise specified, attracted to nonconsenting persons and antisocial personality disorder. The petition contended these disorders made it substantially probable that respondent would engage in future acts of sexual violence.

¶ 5

Attached to the petition was a sexually violent persons evaluation of respondent dated January 2012. Clinical psychologist Dr. Deborah Nicolai performed the evaluation and diagnosed respondent with paraphilia not otherwise specified, attracted to nonconsenting persons and antisocial personality disorder.

¶ 6

On February 14, 2012, respondent stipulated that probable cause existed to believe he is a sexually violent person, and the trial court ordered that respondent be detained in a DHS facility. On the same day as the probable cause hearing, the State filed a jury demand.

¶ 7

On April 25, 2012, respondent filed his own jury demand (initial jury demand). On November 16, 2012, counsel for respondent withdrew, and the trial court appointed new counsel to represent respondent.

¶ 8 More than two years after the probable cause hearing (September 24, 2014), respondent's new counsel filed a second jury demand (second jury demand). The State filed a motion to bar respondent's untimely jury demand. The record on appeal does not include transcripts from the hearing on the State's motion to bar respondent's jury demand, but a written order indicates that respondent agreed to withdraw his "motion to file jury demand." The written order does not explicitly reference the State's motion to bar respondent's jury demand or explain why respondent withdrew his jury demand. There also is no indication from the order that the parties made any distinction between respondent's initial and second jury demand.

¶ 9 On June 9, 2015 (seven months after respondent withdrew his jury demand), the parties returned to court for a status hearing. The record on appeal does not include transcripts from this hearing, but a written order states that the trial court denied respondent's request to file a jury demand and granted the State's motion to bar respondent's jury demand. It is unclear from the record whether respondent made the jury demand orally or attempted to rely on his initial and second written jury demand. The written order also shows that the trial court allowed the State's request to withdraw its jury demand, and the court set the matter for a bench trial.

¶ 10 Prior to trial, respondent filed a motion for a hearing pursuant to *Frye* to determine the admissibility of the State's expert witnesses' diagnosis that respondent suffered from "Paraphilia, Not Otherwise Specified." The trial court denied respondent's motion by written order.

¶ 11 Next, the State filed a motion for leave to amend the petition to commit respondent. The State's motion derived from Nicolai's addendum to her evaluation of respondent. The addendum updated respondent's original American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, DSM-IV-TR (DSM-4) diagnosis to the American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders,

Fifth Edition, DSM-5 (DSM-5). Nicolai's addendum reflected the updated evaluation of respondent and the changes in the DSM-5. The State sought leave to amend the petition to allege that respondent suffered from DSM-5 other specified paraphilic disorder, sexually attracted to nonconsenting persons and to attach Nicolai's addendum. The record on appeal does not show that respondent objected to the State's motion, and the trial court allowed the State's request.

¶ 12 At the bench trial, the State presented two witnesses. Nicolai testified as an expert in clinical psychology evaluation and risk analysis of sex offenders. She evaluated respondent by interviewing him, reviewing court records related to respondent, and reviewing respondent's Department of Corrections master file and medical file.

¶ 13 Nicolai explained that she relied on the DSM-4 in her initial evaluation and diagnosed respondent with paraphilia not otherwise specified, attracted to nonconsenting persons and antisocial disorder. Nicolai based her diagnosis on respondent's criminal history, his aggressiveness, lack of remorse, disregard for the safety of others, and other factors. Nicolai also relied on risk analysis of respondent, actuarial tools, and other empirical risk factors.

¶ 14 After the initial evaluation, Nicolai prepared an addendum to her evaluation to reflect the changes in the DSM-5. Nicolai's addendum changed respondent's diagnosis to other specified paraphilic disorder, sexually attracted to nonconsenting persons as described in the DSM-5. Nicolai explained, while the labels of the diagnoses changed from the DSM-4 to the DSM-5, the diagnostic criteria for each disorder remained the same.

¶ 15 Ultimately, Nicolai concluded respondent met the criteria for commitment based on her opinion that: (1) respondent had a conviction for a sexually violent offense; (2) respondent suffered from a mental disorder that is congenital or acquired; and (3) a substantial probability of sexual reoffense existed.

¶ 16 Next, Dr. Richard Travis testified as an expert in clinical psychology evaluation and risk analysis of sex offenders. Like Nicolai, Travis evaluated respondent and originally diagnosed him with DSM-4 paraphilia not otherwise specified, attracted to nonconsenting persons and antisocial disorder but updated his diagnosis to reflect the new label in the DSM-5. According to Travis, although the labels for the disorders changed between DSM-4 and DSM-5, both diagnoses described the same disorder. Also like Nicolai, Travis based his diagnosis on respondent's past criminal history, risk analysis, actuarial tools, and other empirical risk factors. Travis came to the same conclusion as Nicolai that respondent met the criteria for commitment as a sexually violent person.

¶ 17 Respondent did not present any witnesses.

¶ 18 Following the parties' arguments, the trial court found respondent to be a sexually violent person and ordered his commitment to the DHS.

¶ 19 ANALYSIS

¶ 20 I.

¶ 21 Respondent contends the trial court abused its discretion in barring his jury demand. Respondent concedes that he failed to timely file a jury demand, but argues that he established good cause to file a late jury demand. Although respondent fails to identify which jury demand he claims should not have been barred (both were untimely), we find the record insufficient to support respondent's contention.

¶ 22 At the outset, we note that there is no constitutional right to a jury trial in proceedings under the Act. *In re Detention of Samuelson*, 189 Ill. 2d 548, 560-61 (2000). The Act provides that a request for a jury trial "shall be made within 10 days after the probable cause hearing." 725 ILCS 207/35(c) (West 2012). However, "Illinois Supreme Court Rule 183 (eff. Feb. 16,

2011) gives the trial court discretion to decide whether to grant a late request for a jury trial." *People v. Miller*, 2014 IL App (1st) 122186, ¶ 22. To obtain an extension of time to file a late jury demand, a party must show good cause. *Id.* The trial court's determination on whether to allow an untimely jury demand will not be disturbed absent an abuse of discretion. *Id.*

¶ 23 Respondent's sole argument is that he established good cause because his untimely request was the result of "an inadvertent mistake by his original counsel." According to respondent, the parties were under the impression that the cause would proceed to a jury trial because the State had timely submitted its own jury demand. Initially, we note that respondent's contention conflicts with the written order that shows he agreed to withdraw his jury demand. Moreover, it is unclear respondent presented his "inadvertent mistake" explanation to the trial court because he failed to provide this court with a complete record on appeal. Simply put, we are unable to assess any discretionary decision made by the trial court with regard to respondent's jury demands as we do not know what actually occurred in the trial court. Respondent's failure to provide this court with transcripts from the proceedings relevant to his jury demands prevents this court from assessing whether the trial court abused its discretion in denying respondent's untimely jury demands. It is respondent's burden to present a sufficiently complete record of the proceedings at trial to support his claim of error. *People v. Carter*, 2015 IL 117709, ¶ 19. In the absence of a complete record preserving the claimed error, this court will presume the trial court's order is in line with the law. *Id.*

¶ 24

## II.

¶ 25 Respondent contends the trial court erred in denying his motion for a *Frye* hearing. According to respondent, this diagnosis does not satisfy the general acceptance standard for admissibility under *Frye*. Respondent does not argue that the labeling changes in the DSM-4 and

DSM-5 necessitate a *Frye* hearing. Rather, respondent contends generally that the trial court erred in denying his *Frye* request, which respondent made before the State amended the complaint to update respondent's diagnosis to the DSM-5. For clarity, we will use the current DSM-5 label, other specified paraphilic disorder, sexually attracted to nonconsenting persons, throughout our analysis.

¶ 26 At the outset, we find respondent forfeited this issue. In the present case, respondent did request a *Frye* hearing regarding the admissibility of expert testimony as to his *original* DSM-4 diagnosis "paraphilia not otherwise specified, attracted to nonconsenting persons." However, respondent did not renew his request for a *Frye* hearing after the State amended the petition to include his *current* DSM-5 diagnosis "other specified paraphilic disorder, sexually attracted to nonconsenting persons." See *Snelson v. Kamm*, 204 Ill. 2d 1, 24-25 (2003) (a party's failure to raise an objection to the admissibility of expert testimony under *Frye* results in forfeiture of the claimed error on review). Respondent also failed to object to the testimony of the State's expert witnesses regarding respondent's DSM-5 diagnosis. See *id.* Finally, respondent failed to raise the issue in a posttrial motion. See *id.* In short, respondent failed to preserve review of the admissibility of expert testimony regarding the DSM-5 diagnosis—the basis for his commitment.

¶ 27 We acknowledge that unpreserved errors may be considered by a reviewing court if respondent satisfies his burden of persuasion under the plain error doctrine. *In re Commitment of Gavin*, 2014 IL App (1st) 122918, ¶ 56. However, respondent failed to address forfeiture in his brief and he did not file a reply brief. An appellant who fails to argue for plain error review cannot meet his burden of persuasion and thereby forfeits plain error review. *People v. Hillier*, 237 Ill. 2d 539, 544-45 (2010). Accordingly, we find that respondent forfeited plain error review of this issue.

¶ 28 Even if we were to examine the merits of respondent's argument, however, we would find no error. As noted above, respondent contends that the disorder he was diagnosed with does not meet the general acceptance standard for admissibility under *Frye*. We note that respondent does not argue that the change in the label of his diagnosis from the DSM-4 to the DSM-5 required a hearing to determine whether the DSM-5 diagnosis met general acceptance. Instead, respondent argues generally that his diagnosis does not meet the general acceptance standard under *Frye*. Because the DSM-4 diagnosis meets the general acceptance standard and because both experts testified that the diagnosis is substantively the same in the DSM-5, we find a *Frye* hearing was unnecessary. See *People v. Hudson*, 228 Ill. 2d 181, 199 (2008) (without error there can be no plain error).

¶ 29 The *Frye* test requires the proponent of evidence derived from a new or novel scientific methodology demonstrate that it is " 'sufficiently established to have gained general acceptance in the particular field in which it belongs.' " *In re Commitment of Simons*, 213 Ill. 2d 523, 529-30 (2004) (quoting *Frye*, 293 F. at 1014). "A court may determine the general acceptance in either of two ways: '(1) based on the results of a *Frye* hearing; or (2) by taking judicial notice of unequivocal and undisputed prior judicial decisions or technical writings on the subject.' " *In re Detention of New*, 2014 IL 116306, ¶ 39 (quoting *People v. McKown*, 226 Ill. 2d 245, 254 (2007)). At issue here is whether it was proper for the trial court to forgo a *Frye* hearing and take judicial notice of this diagnosis' general acceptance.

¶ 30 Other specified paraphilic disorder, sexually attracted to nonconsenting persons has been held to be an appropriate diagnosis in this State. For example, the Second District held that a *Frye* hearing is unnecessary because this diagnosis was "generally accepted by a significant subset of the community of specialists who work with sex offenders." *In re Commitment of*



*Walker*, 2014 IL App (2d) 130372, ¶ 72. In reaching this conclusion, *Walker* relied on two First District decisions holding the same: *In re Detention of Melcher*, 2013 IL App (1st) 123085, and *In re Detention of Hayes*, 2014 IL App (1st) 120364.

¶ 31 In *Melcher*, the First District considered whether other specified paraphilic disorder, sexually attracted to nonconsenting persons, as a diagnosis, satisfied the general acceptance standard. *Melcher*, 2013 IL App (1st) 123085, ¶ 54. The court in *Melcher* found this diagnosis met the general acceptance requirements. *Id.* ¶ 62. Therefore, *Melcher* held the trial court could properly take judicial notice of this diagnosis' general acceptance without conducting a *Frye* hearing.

¶ 32 The First District addressed the same issue presented in *Melcher* again in *Hayes*. *Hayes*, 2014 IL App (1st) 120364. That is, *Hayes* considered whether other specified paraphilic disorder, sexually attracted to nonconsenting persons satisfied general acceptance standards. *Id.* ¶ 32. The court ultimately concluded that a trial court could properly take judicial notice of this diagnosis' general acceptance within the psychological community. *Id.* ¶ 35. Thus, "a *Frye* hearing was unnecessary" to determine general acceptance. *Id.* ¶ 36.

¶ 33 We find *Walker*, *Hayes*, and *Melcher* support the proposition that the need for a *Frye* hearing to determine general acceptance is unnecessary in this case. This is consistent with several other cases in which a diagnosis of other specified paraphilic disorder, sexually attracted to nonconsenting persons provided the basis of probable cause or sexually violent person findings. See *In re Detention of Lieberman*, 2011 IL App (1st) 090796, ¶ 53 (citing *In re Detention of Hardin*, 238 Ill. 2d 33, 49-50 (2010), *In re Commitment of Sandry*, 367 Ill. App. 3d 949, 953 (2006)). Accordingly, we see no reason to deviate from *Walker*, *Hayes*, and *Melcher* and hold that the trial court properly denied respondent's request for a *Frye* hearing.

¶ 34 In reaching this conclusion, we reject respondent's argument that experts' diagnosis is inadmissible because there is disagreement in the psychological community over whether the diagnosis is appropriate. Universal acceptance is not necessary to establish general acceptance. *Simons*, 213 Ill. 2d at 530. In fact, general acceptance does not even require that a majority of experts in the field accepts the methodology. *Id.* Rather, it is sufficient that a significant subset of experts reasonably relies upon the methodology. *Sandry*, 367 Ill. App. 3d at 965.

¶ 35 CONCLUSION

¶ 36 The judgment of the circuit court of Will County is affirmed.

¶ 37 Affirmed.