NO. COA09-1058

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

IN RE ALVIOUS FRED CHURCH

Ashe County
No. 07 SPC 162

Appeal by respondent from order entered 17 March 2009 by Judge Mitchell McLean in Ashe County District Court. Heard in the Court of Appeals 10 December 2009.

Attorney General Roy Cooper, by Assistant Attorney General M. Elizabeth Guzman, for State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kristen L. Todd, for Respondent.

ERVIN, Judge.

Respondent Alvious Fred Church appeals from an order recommitting him to Broughton Hospital for a one-year term of involuntary inpatient treatment. On appeal, Respondent contends that the trial court's conclusion that he posed a danger to others lacked adequate evidentiary support and that the trial court's order did not include sufficient findings of fact. As a result of our determination that the trial court's findings of fact are insufficient to support its legal conclusions, we reverse the trial court's order.

I. Factual Background

Respondent was charged with first degree murder in connection with the shooting death of his wife in Ashe County File No. 04 CrS 50110. Subsequently, Respondent sought dismissal of the murder charge that had been lodged against him pursuant to N.C. Gen. Stat. § 15A-1008(1) on the grounds that he was not capable of proceeding. In an order ruling on Respondent's motion to dismiss the murder indictment entered on 2 October 2007, Judge Richard L. Doughton found as a fact that Respondent had "been evaluated upon orders of the Superior Court on various occasions," as follows:

> a. In December 2004, by Dr. Robert Rollins, a forensic psychiatrist at Dorothea Dix Hospital, found Mr. Church to be not competent to proceed, and that he met the criteria for involuntary commitment. Dr. Rollins opined that, with active treatment, including rehabilitation and competency restoration, Mr. Church may regain competency to stand trial. Rollins went on to opine that at some future time, forensic re-evaluation may be indicated.
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> b. In April 2005, Dr. Rollins found Mr. Church to be incapable of proceeding.
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> c. In September 2005, Dr. Nichole Wolfe, a forensic psychiatrist at Dorothea Dix Hospital, found Mr. Church to be competent to proceed. Mr. Church was re-committed to Dorothea Dix Hospital for an evaluation [of] whether he was responsible at the time of the alleged killing.
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> d. In November/December 2005, Dr. Wolfe completed another evaluation wherein Mr. Church was found to be not capable of proceeding.
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> e. In July/August 2006, Dr. Wolfe evaluated Mr. Church again, and found him to be not capable of proceeding.

> f. In March of 2007, Dr. Wolfe testified that Mr. Church was not capable of proceeding. Dr. Rollins testified as to his earlier findings. The Superior Court of Ashe County, Judson D. DeRamus, Jr., committed Mr. Church to Dorothea Dix with instructions for another evaluation.
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> g. Pursuant to that order, Mr. Church was evaluated by Drs. David Bartholomew, a forensic psychiatrist at Dorothea Dix Hospital, and Dr. Jeffrey Childers, a psychiatrist at Dorothea Dix Hospital. The evaluation spanned April 2007 to July 3, 2007. Dr. Bartholomew appeared and testified before [Judge Doughton] on October 1 in Ashe Superior Court, and the report prepared by him and Dr. Childers was received in evidence.

Judge Doughton further found that "Dr. Bartholomew testified that, . . . [Respondent's] medical condition, which is Dementia consisting of Alzheimer's disease and possibly multi-vascular, based on a series of strokes and deteriorating brain function, will not improve, but will only worsen as time passes;" that "there exists a risk that [Respondent] could be a danger to himself, others, or to the community at large," which Judge Doughton believed to be "substantial;" and that "further efforts to treat in hopes of restoring [Respondent's] capacity to proceed is not recommended." Finally, Judge Doughton found that Respondent was not capable of proceeding to trial at that time given "the dementing illness recited in the various evaluations;" that he was "not satisfied . . . that [Respondent] will not at some point in the future, given further evaluation and treatment, be capable of proceeding to trial;" that "there is no family or community-based facility or person or group of persons with either the will or the

capability of maintaining [Respondent] outside a locked and secure environment in such a way as to insure that [Respondent] will not be a risk of harm to himself, other persons or the community; and that the District Attorney's office intended to seek to have Respondent involuntarily committed. As a result, Judge Doughton ordered that:

> 1. The Court hereby **REFERS** the [Respondent] to the District Court of Ashe County, for the appointment of counsel for the purpose of representing [Respondent] on the State's intended Motion for Involuntary Commitment. The Court recommends that the appointment of counsel and the hearing on the State's announced motion for involuntary commitment take place as soon as possible.
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> . . . .
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> 3. That a hearing be scheduled before the Chief District Court Judge of the Twenty-Third Judicial District, or such other District Judge as the Chief District Judge shall designate for this hearing.
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> 4. Under the circumstances existing based on the record, and the representations and arguments of counsel made in open court at this session, the Court **DENIES** the Defendant's Motion to Dismiss, without prejudice and with leave to re-file the motion in the future.

(emphasis in the original)

On 5 October 2007, the trial court entered an Involuntary Commitment Custody Order in which he concluded that Respondent was "mentally ill and [] dangerous to himself or others," committed Respondent to Broughton Hospital "for a period not to exceed 90 days," and retained jurisdiction over the matter in the Ashe County District Court. On 14 December 2007, Dr. Masood Mohiuddin, completed an Examination and Recommendation to Determine Necessity

For Involuntary Commitment on Respondent. After concluding that inpatient treatment would be necessary beyond the 3 January 2008 expiration date of Respondent's commitment, Dr. Mohiuddin recommended a subsequent rehearing. On 2 January 2008, Respondent waived his right to rehearing and requested that the matter be "scheduled for review within ninety (90) days of [said] date". On 3 January 2008, the trial court entered an Order of Involuntary Commitment in which it found that Respondent "continue[d] to be mentally ill and . . . dangerous to others" and ordered that Respondent "shall remain committed to Broughton Hospital for an additional period not to exceed 90 days from this date" for "examination and treatment" and that "[t]his Court [] retains jurisdiction of this matter for all further hearings in this action."

On 6 March 2008, Dr. Joanna Gaworowski completed an Examination and Recommendation to Determine Necessity for Involuntary Commitment in which she recommended that a "subsequent rehearing . . . be scheduled" because inpatient treatment would be necessary beyond 1 April 2008. On 26 March 2008, Respondent "request[ed] a rehearing pursuant to N.C. Gen. Stat. § 122C-268 and 122C-276 and further request[ed] that he be present for the proceedings. . . ." A hearing was held on 28 March 2008 at which the trial court determined that Respondent was mentally ill and a danger to himself and others and ordered that Respondent be recommitted for a period not to exceed one year.

On 10 February 2009, Dr. Gaworowski completed an Examination and Recommendation to Determine Necessity for Involuntary Commitment in which she recommended that Respondent receive an outpatient commitment and indicated that a rehearing needed to be scheduled because outpatient treatment would be necessary beyond 1 April 2009. In her report, Dr. Gaworowski indicated that Respondent suffered from "dementia, mild, vascular type." Dr. Gaworowski described Defendant's stay at Broughton Hospital as "unremarkable" and reported that he was "oriented," "ha[d] no evidence of psychosis," and was not"dangerous to [him]self or others in any way." Dr. Gaworowski further noted that, despite Defendant's "mild cognitive impairment," he "understands his legal situation in a way that is congruent with his limited education."

A hearing was held before the trial court at the 16 March 2009 session of the Ashe County District Court. The only witness to testify at the hearing was Dr. Gaworowski. Dr. Gaworowski had been practicing psychiatry for 34 years, had become board-certified in 1978, and had been on the staff at Broughton Hospital for 20 years. Dr. Gaworowski had been treating Respondent, off and on, since January, 2008.

According to Dr. Gaworowski, Respondent was mentally ill, with a diagnosis of vascular dementia. Dr. Gaworowski did not think that Respondent "really" had psychosis, although he "has moments in which he's somewhat unrealistic." For example, Dr. Gaworowski testified that:

> sometimes he tells me that he, that he had, that he sustained serious financial losses

> after what happened, you know, and that, I don't know, that his children started controlling his money or property–I'm not even sure what it was. But later he was kind of having, almost sounded like fantasy, that he is going to go back–he feels like he's going to be–well, he has enough sense of his crime, that he will have a successful book life, that he will have a, that he will have a summer house in Ashe County and [a] winter house somewhere in, like Morganton or Lenoir where it is warmer. That sounds, something, you know, unrealistic for a man maybe in his, maybe wishful thinking but it's the way he talks.

Dr. Gaworowski testified that Respondent was doing well, by which she meant:

> . . . he's mostly cooperative, pleasant. Other people like him. He's clean and neat. He takes care of–I mean, he's on a geriatric unit where, of course, many people, you know, are confused, you know, and don't even clean themselves. So of course [Respondent] is neat and cooperative. He doesn't really create any major problems on the ward. He's sometimes–I think he's sometimes frustrated and shows some small dissatisfaction.

Respondent "would still need to continue his treatment" and "would have to be supervised."

According to Dr. Gaworowski, Respondent had not exhibited any signs of serious violent behavior while at Broughton Hospital. When Dr. Gaworowski stated in her report that Respondent was not dangerous to himself or others, she meant that he was not dangerous to himself or others "when in the hospital" even though she used the expression "in any way." Dr. Gaworowski meant when she stated that Respondent's stay at Broughton Hospital had been "unremarkable" that "he didn't make any verbal threats against anybody," that he "didn't . . . engage in any fights," that "he

never attempted suicide and he never said that he would want to harm himself." Respondent "has not presented any dangerousness when he was in" Broughton Hospital, although "that is not a real sufficient part of the past." Dr. Gaworowski acknowledged that Broughton Hospital "is a locked facility," that Respondent lives "on a locked ward," and that he "is escorted always one-to-one" "[i]f he goes off the ward." Respondent "participates in different activities" and "does very well in those," but "he's always escorted."

In Dr. Gaworowski's opinion, Respondent understands his legal situation "to a point." According to Dr. Gaworowski, what Respondent really "wants is to restore his competence to stand his trial."

> He knows what his charges are. He knows who his authorities are and, you know, those, like the basic things and maybe knows right, right from wrong. But I know when he goes to Dorothea Dix, they do very thorough evaluations. I know they were quizzing him on, like, the names of all the people he had seen. And of course, there they are concerned about his cognitive situation, which is not perfect but he doesn't seem to be getting coerced so we felt like it was fair to him at this point maybe to be reevaluated by forensic people whether he can stand his trial.

Dr. Gaworowski "didn't see directly that [Respondent] was dangerous to himself." In fact, Respondent "was very emphatic about . . . self harm." When asked if Respondent was dangerous to others, the following colloquy occurred between Dr. Gaworowski and counsel for Respondent:

> Q. What about a danger to others at this point?

> A. Well, (inaudible) of course, is like, I thought he said, you know-there's a situation that I don't quite understand but, I mean, in view of what happened, you know, (inaudible), if you like, there is something but I cannot say that he's not dangerous, so--
>
> Q. And you're talking about the criminal charges pending?
>
> A. Right.
>
> Q. But in your treatment of him, have you seen any evidence of danger, of him being a danger to other people?
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> A. I mean, not directly in this hospital.
>
> Q. Of any kind?
>
> A. No, I wouldn't say dangerous. I mean, there was maybe playful times from childhood, but, no, I mean-
>
> Q. But that could change?
>
> A. Sometimes maybe, actually there was sometimes maybe a little bump, but nothing, nothing serious really, no, nothing that would be called dangerous.

"Other than the charge that is pending now in Ashe County Superior Court," Dr. Gaworowski was not "aware of any evidence that [Respondent has] been a danger to himself or others." After agreeing with counsel for the State that Respondent "is in need of treatment in order to prevent further disability or deterioration which could predictably result in dangerousness," Dr. Gaworowski testified that a diagnosis of vascular dementia "implies, in itself, unpredictable behavior."

> Q. But you did-you do find that he is mentally ill and that without treatment in a structured environment, he could

> decompensate and potentially become violent?
>
> A. Well, right, that, or he may–violent or he may develop some ideas that may --
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> Q. Not tied to reality?
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> A. Exactly, and may need–and of course, you know, we can just speculate, you know, what may happen to somebody in his situation, you know. On one hand, you know, he may try to be a model citizen. And in some ways he is, you know, in the hospital. On the other hand, he may be somebody who is bitter and may feel that he was wronged by life, system, God, whoever, you know, and I feel like it's impossible to say.
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> Q. So he could kill again?
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> A. Exactly.

In other words, Dr. Gaworowski could not "predict what [Respondent's] future dangerousness to others would be." At bottom, however, she did not believe that Respondent met "the criteria for involuntary commitment" and testified that this opinion was shared by "everybody [at Broughton Hospital] who has any kind of contact with him." Instead, her recommendation was that Respondent receive commitment "for some very specific outpatient treatment," while recognizing that "it may not be realistic" due to an inability to find a proper outpatient facility. In fact, Dr. Gaworowski testified that the outpatient facility was likely to be a jail "because of his legal charges."

In an Involuntary Commitment Order Mentally Ill entered on 17 March 2009, the trial court found "as facts all matters set out in" Dr. Gaworowksi's report and "incorporated [the report] by reference

as findings." In addition, the trial court made a number of additional findings "by clear, cogent and convincing evidence." Based on these findings, the trial court concluded that Respondent was "mentally ill" and "dangerous" to "others." As a result, the trial court ordered that Respondent "be committed/recommitted to [Broughton Hospital] for" a period not to exceed one year. Respondent noted an appeal to this Court from the trial court's order.

II. Legal Analysis

On appeal, Respondent advances two challenges to the trial court's order, the first of which is that the trial court erred by premising its decision to involuntarily recommit him to Broughton Hospital for an additional year on insufficient findings of fact and the second of which is that the evidence was insufficient to establish that he was dangerous to others. After carefully reviewing the trial court's order, we conclude that the trial court's findings are not, in fact, sufficient to support its conclusion that Respondent is dangerous to others and that the trial court's order must be reversed. Having reached that conclusion, we need not address Respondent's second argument.[1]

A. Standard of Review

[1] Although the one year period of involuntary commitment specified in the order which we have under consideration in this case has expired, the collateral consequences which flow from an involuntary commitment order preclude a finding that this appeal is moot. *In re Hatley*, 291 N.C. 693, 695, 231 S.E.2d 633, 635 (1977); *In re Webber*, __ N.C. App. __, __, 689 S.E.2d 468, 472-73 (2009); *In re Booker*, 193 N.C. App. 433, 436, 667 S.E.2d 302, 304 (2008). As a result, we will proceed to address Respondent's appeal on the merits.

As the record reflects, Respondent had been involuntarily committed as the result of an earlier order. For that reason, the order on appeal is a recommitment order rather than a commitment order. However, there is "no reason to distinguish the standard of review of a recommitment order from that of a commitment order, and hence, we review this order as we would a commitment order." *In re Hayes*, 151 N.C. App. 27, 29, 564 S.E.2d 305, 307 (2002), *appeal dismissed and disc. review denied*, 356 N.C. 613, 574 S.E.2d 680 (2002), *disc. review denied*, 363 N.C. 803, 690 S.E.2d 694 (2010).

> On appeal of a commitment order[,] our function is to determine whether there was *any* competent evidence to support the "facts" recorded in the commitment order and whether the trial court's ultimate findings of mental illness and dangerous[ness] to self or others were supported by the "facts" recorded in the order. *In re Underwood*, 38 N.C. App. 344, 347-48, 247 S.E.2d 778, 781 (1978); *In re Hogan*, 32 N.C. App. 429, 433, 232 S.E.2d 492, 494 (1977). We do not consider whether the evidence of respondent's mental illness and dangerousness was clear, cogent and convincing. It is for the trier of fact to determine whether the competent evidence offered in a particular case met the burden of proof. *In re Underwood*, *supra*, at 347, 247 S.E.2d at 781.

In re Collins, 49 N.C. App. 243, 246, 271 S.E.2d 72, 74 (1980). As a result, we will now apply this standard of review to the issues that Respondent has raised on appeal.

B. Sufficiency of the Findings of Fact

N.C. Gen. Stat. § 122C-268(j) provides that, "[t]o support an inpatient commitment order, the court shall find by clear, cogent, and convincing evidence that the respondent is mentally ill and dangerous to self, as defined in [N.C. Gen. Stat. §] 122C-3(11)a,

or dangerous to others, as defined in [N.C. Gen. Stat §] 122C-3(11)b." According to N.C. Gen. Stat. § 122C-3(11)b, "dangerous to others"

> means that within the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property; and that there is a reasonable probability that this conduct will be repeated. Previous episodes of dangerousness to others, when applicable, may be considered when determining reasonable probability of future dangerous conduct. Clear, cogent, and convincing evidence that an individual has committed a homicide in the relevant past is prima facie evidence of dangerousness to others.

In an order addressing involuntary commitment issues, "[t]he court shall record the facts that support its findings." N.C. Gen. Stat. § 122C-268(j). "The direction to the court to record the facts which support its findings is mandatory." *In re Koyi*, 34 N.C. App. 320, 321, 238 S.E.2d 153, 154 (1977).

In its order, the trial court incorporated Dr. Gaworowski's 10 February 2009 report by reference.[2] In her report, Dr. Gaworowski opined that:

> [R]espondent is mentally ill[;] [R]espondent is capable of surviving safely in the community with available supervision[;] based upon [Respondent's] treatment history, [Respondent] is in need of treatment in order to prevent further disability or deterioration which would predictably result in

[2] After careful study of the trial court's order, we are unable to agree with the State's contention that the trial court incorporated Dr. Gaworowski's "testimony at the March 16, 2009 rehearing for involuntary commitment" in its findings as well.

> dangerousness as defined by [N.C. Gen. Stat. §] 122C-3[; Respondent's] current mental status or the nature of his illness limits or negates [his] ability to make an informed decision to seek treatment voluntarily or comply with recommended treatment.

In addition, Dr. Gaworowski made, in her own handwriting, a number of additional statements, such as findings that Respondent had been readmitted because of his "legal charges;" that he presented "no evidence of psychosis;" that "at no point was [he] dangerous to self or others;" that he exhibited "mild cognitive impairment;" and that he "under[stood] his legal situation" to an extent "congruent with his limited education." After "find[ing] as facts all matters set out in" Dr. Gaworowski's report, the trial court made the following additional findings of fact:

> The Court heard from Dr JoAnna Gaworowski, the staff psychiatrist at Broughton Hospital. Dr. Gaworowski stated that she could not say that [Respondent] is not dangerous. She further stated that [Respondent] is mentally ill. [Respondent] is currently charged with first degree murder. Dr Gaworowski stated that without medical attention, [Respondent] would deteriorate which would predictably result in dangerousness to others. The respondent therefore meets the defin[i]tion of dangerousness to others within [N.C. Gen. Stat. §] 122C-3(11)b].

Although Respondent does not challenge the sufficiency of the trial court's finding that he suffered from a mental illness, he contends that the trial court did not record sufficient facts to support a determination that he was "dangerous to others" as that term is defined in N.C. Gen. Stat. § 122C-3(11)b.

A careful examination of Dr. Gaworowski's report reveals no indication that it provides any support for the trial court's

determination that Respondent posed a danger to others.[3] On the contrary, as we have already noted, Dr. Gaworowski's report states that "at no point was [he] dangerous to self or others." For that reason, the "recording" of facts required to sustain the trial court's determination must, of necessity, come from the trial court's own findings.

The portion of the trial court's order in which it states its own findings indicates that the trial court appears to have based its determination that Respondent posed a danger to others on three principal facts–(1) the fact that Dr. Gaworowski "could not say that [Respondent] is not dangerous," (2) the fact that Respondent "is currently charged with first degree murder," and (3) the fact that, "without medical attention, [Respondent] would deteriorate which would predictably result in dangerousness to others." According to N.C. Gen. Stat. § 122C-268(j), the facts that the trial court is required to "record" in an involuntary commitment order must establish that Respondent *is* "dangerous to others" as defined in N.C. Gen. Stat. § 122C-3(11)b. The trial court's order is completely devoid of any indication that Respondent has "within the relevant past," inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to

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[3] The import of Dr. Gaworowski's statement that, "based upon [Respondent's] treatment history, [Respondent] is in need of treatment in order to prevent further disability or deterioration which would predictably result in dangerousness as defined" in N.C. Gen. Stat. § 122C-3(11) is discussed below, since the trial court included similar language in its own findings.

another, or has engaged in extreme destruction of property." N.C. Gen. Stat. § 122C-3(11)b. The fact that Dr. Gaworowski is unable to say that Respondent is not dangerous to others does not provide any basis for a finding by "clear, cogent and convincing evidence" that Respondent *is* "dangerous to others." Instead, while Dr. Gaworowski certainly testified in the manner described by the trial court, her statement to that effect is simply an acknowledgement of uncertainty and cannot be taken as a prediction that Respondent will act in a violent manner in the future.[4] Similarly, the fact that Respondent has been charged with first degree murder does not constitute a finding that he actually committed the homicide with which he has been charged. On the contrary, as Respondent notes in his brief, the fact that he had been indicted for first degree murder simply establishes that the Ashe County grand jury found probable cause to believe that he had committed the offense in question. N.C. Gen. Stat. § 15A-628. Put another way, the fact that someone has been charged with a crime does not suffice to support a finding of the type required to sustain an involuntary commitment order.[5] Finally, the fact that, "without medical

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[4] Although the State argues that the trial court linked this statement to the fact that Respondent had been charged with first degree murder, the two statements are contained in different sentences in the trial court's order and we see no apparent linkage of the type contended for by the State between the two statements.

[5] The clear, cogent and convincing evidence standard employed in involuntary commitment proceedings is an intermediate standard of proof lying between a preponderance of the evidence and beyond a reasonable doubt. *In re Nowell*, 293 N.C. 235, 247, 237 S.E.2d 246, 254 (1977). Probable cause, on the other hand, is "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in

treatment, [Respondent] would deteriorate which would predictably result in dangerousness to others" does not suffice to establish the necessary "dangerousness to others" since it provides no information about Respondent's current status and since it says nothing about the likelihood that Respondent would fail to receive needed medical treatment in the future.[6] Thus, none of the "facts" which the trial court "recorded" in its order provides adequate support for a finding that Respondent was "dangerous to others." For that reason, the trial court's order does not comply with the requirement of N.C. Gen. Stat. § 122C-268(j) that it "record the facts that support its findings."

C. Sufficiency of the Evidence of Dangerousness to Others

Secondly, Respondent contends that the evidence does not support the trial court's determination that he poses a danger to others. "Whether or not there was sufficient competent evidence . . . that Respondent was dangerous to himself and to others, we do not determine," since "the facts recorded in the trial court's order . . . are insufficient to support the trial court's findings

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believing the accused to be guilty." *State v. Joyner*, 301 N.C. 18, 21-22, 269 S.E.2d 125, 128 (1980). Thus, a finding of probable cause does not equate to a finding that, by clear, cogent and convincing evidence, Respondent "ha[d] committed a homicide in the relevant past," which would constitute "prima facie evidence of dangerousness to others." N.C. Gen. Stat. § 122C-3(11)b.

[6] In addition, the trial court's finding is taken from N.C. Gen. Stat. § 122C-271(a)(1), which enunciates one of the criteria for involuntary outpatient commitment rather than the involuntary inpatient commitment that the trial court actually ordered. *In re Webber*, __ N.C. App. __, __, 689 S.E.2d 468, 478 (2009). Thus, the trial court's finding does not support the result reached by the trial court for this reason as well.

that Respondent was dangerous to himself and to others," necessitating a reversal of the trial court's order without consideration of the sufficiency of the evidence issue. *In re Booker*, 193 N.C. App. at 437, 667 S.E.2d at 304. Thus, given the holding in *Booker*, we do not reach the issue of whether the evidence was sufficient to support the trial court's determination that Respondent was "dangerous to others."

III. Conclusion

As a result, we conclude that the trial court erred by failing to make sufficient findings of fact to support its determination that he was "dangerous to others." Thus, the trial court's order should be, and hereby is, reversed.

REVERSED.

Judges STROUD and ROBERT N. HUNTER, JR., concur.

Report per Rule 30(e).