IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-256

Filed: 20 December 2016

Buncombe County, No. 15 SPC 1527

IN THE MATTER OF: BARBARA HEDRICK

Appeal by Respondent from order entered 18 September 2015 by Judge Susan M. Dotson-Smith in Buncombe County District Court. Heard in the Court of Appeals 6 September 2016.

Attorney General Roy Cooper, by Assistant Attorney General Josephine N. Tetteh, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel L. Spiegel, for Respondent.

STEPHENS, Judge.

In this appeal from an order involuntarily committing Respondent to a mental health facility for 30 days, we consider whether the transcript of the involuntary commitment hearing is sufficiently complete to permit meaningful appellate review. Because significant portions of witness testimony were inaudible to the court reporter rendering the hearing transcript incomplete, Respondent has been deprived of her right to meaningful appellate review, and, accordingly, we vacate the involuntary commitment order and remand for a new hearing.

Factual and Procedural History

In the years before her September 2015 involuntary commitment, Respondent Barbara Hedrick began to exhibit various signs of mental illness, including auditory hallucinations and irrational thinking. On 3 September 2015, Barbara's estranged husband, Mark Hedrick, filed an affidavit and petition requesting that Barbara be involuntarily committed. The case came on for hearing at the 17 September 2015 session of Buncombe County District Court, the Honorable Susan M. Dotson-Smith, Judge presiding. At the hearing, the court received testimony from three witnesses: Barbara; Dr. Trace Fender, Barbara's treating psychiatrist; and Blake Hedrick, Barbara's twenty-three-year-old son. In addition, Barbara's medical records were admitted as an exhibit without objection. At the conclusion of the hearing, the court found that Barbara was mentally ill and a danger to herself and others, and ordered her committed to an inpatient mental health facility for 30 days. A written order memorializing the court's ruling ("the commitment order") was entered on 18 September 2015 and included the following findings of fact supporting Barbara's involuntary commitment:

> 1. The [c]ourt heard testimony from Respondent, the Respondent's treating psychiatrist, Dr. Trace Fender, and [R]espondent's son, Blake Hedrick. The [c]ourt further considered Respondent's medical chart, which was admitted into evidence, and the court pleadings.
>
> 2. The [c]ourt certified Dr. Fender an expert in the field of general psychiatry.

3. Dr. Fender testified and the [c]ourt finds as competent evidence that Respondent was suffering from auditory hallucinations, including "electronic voices" that told her her children were in danger, and that Respondent appeared to be suffering from visual hallucinations in that she communicated through hand signals to persons that weren't present.

4. Dr. Fender testified and the [c]ourt finds as competent evidence that Respondent lacked insight into her condition, and had a history of failing to take care of herself and was not likely to continue taking medications if discharged.

5. Respondent testified that she heard "electronic voices" that warned her when her children were in danger.

6. Blake Hedrick testified and the [c]ourt finds as competent evidence that, after being contacted by law enforcement and EMT, he encountered his mother parked in her vehicle within travel lanes of a busy intersection in Charlotte. Respondent was suffering from auditory hallucinations, had not taken care of herself or her dog, who was also in the vehicle, and she compelled her son to drive her to various places around Charlotte. Respondent eventually became visibly upset and struck the dashboard of the vehicle, forced [Blake] Hedrick to stop and demanded she be allowed to drive. Thereafter Respondent drove erratically and dangerously from Charlotte to Asheville. Respondent tried to force her son out of the driver's seat.

7. Blake Hedrick testified and the [c]ourt finds as competent evidence that he was concerned his mother would harm herself or others either through driving or in response to the "electronic voices" advising her that he or his sibling were in danger.

8. The [c]ourt finds that through these actions, Respondent placed her son and the general public in danger.

> 9. Respondent['s] medical chart and the testimony of Dr. Fender and Blake Hedrick, which the [c]ourt finds as competent evidence, [was] evidence that Respondent has failed to take care of herself and was likely to stop taking medications if discharged.
>
> 10. The [c]ourt finds that Respondent has demonstrated a lack of insight into her mental health conditions and an inability to care for herself.

On 16 October 2015, Barbara filed a notice of appeal from the commitment order.

Unknown to the trial court or the parties, the witness microphone in the courtroom was not working correctly during the 17 September 2015 hearing, such that in November 2015 the court reporter ordered to transcribe the proceedings emailed Barbara's appellate counsel to notify him that she could "hear the questions [asked by the court and counsel] but not the answers [of the witnesses]." Barbara's appellate counsel asked the court reporter to prepare the transcript to the best of her ability, but ultimately, the 37-page transcript produced by the court reporter contained more than 250 instances in which the word "inaudible" was substituted for witness testimony. In an attempt to reconstruct the proceedings, Barbara's appellate counsel contacted all parties who had been present—the trial judge, Barbara, Barbara's trial attorney, Fender, the attorney for the hospital where Fender worked, and Blake—asking for any notes or recollections about testimony offered at the hearing. The attorney for the hospital responded on behalf of himself and Fender, stating, "Given the extent of the gaps in the transcript and the time that has elapsed

since the hearing, neither he nor I feel it would be appropriate to speculate as to the specifics of what was said at any given point in the hearing." The trial judge likewise responded that she could not offer any account of the hearing testimony. An attorney for Blake notified Barbara's appellate counsel that Blake would be in touch if he could recall anything useful about the hearing, but Blake himself never contacted Barbara's appellate counsel. Barbara's trial attorney never responded to appellate counsel's request. Ultimately, the only party who provided any recollections was Barbara, who was able to supply only very limited memories of the missing testimony.

Discussion

On appeal, Barbara argues that the commitment order must be vacated because the hearing transcript is inadequate to permit effective appellate review, thereby depriving her of her constitutional rights to effective assistance of counsel, equal protection, and due process. We agree.

> First, we note that even though the term for [a] respondent's involuntary commitment has passed, a prior discharge will not render questions challenging the involuntary commitment proceeding moot. When the challenged order may form the basis for future commitment or may cause other collateral legal consequences for the respondent, an appeal of that order is not moot.
>
> In reviewing a commitment order[,] we 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 to self or others were supported by the facts recorded in the

> order. To 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, or dangerous to others. The court shall record the facts that support its findings. Further, it is mandatory that the trial court record the facts which support its findings.

In re Allison, 216 N.C. App. 297, 299-300, 715 S.E.2d 912, 914-15 (2011) (citations, internal quotation marks, and ellipses omitted; emphasis in original). The question presented in this appeal, then, is whether the incomplete transcript of the commitment hearing is sufficient to permit this Court to determine whether the findings of fact in the commitment order are supported by evidence and whether those factual findings support the court's "ultimate findings of mental illness and dangerous to self" or others. *See id.* at 300, 715 S.E.2d at 914-15 (citation and internal quotation marks omitted).

> Although due process does not require a verbatim transcript of the entire proceedings, the United States Supreme Court has held that an appellate counsel's duty cannot be discharged unless he has a transcript of the testimony and evidence presented . . . . [because, a]s any effective appellate advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law. Anything short of a complete transcript is incompatible with effective appellate advocacy. Nevertheless, notwithstanding the critical importance of a complete trial transcript for effective appellate advocacy, the unavailability of a verbatim transcript does not *automatically* constitute error. To prevail on such grounds,

> a party must demonstrate that the missing recorded evidence resulted in prejudice. General allegations of prejudice are insufficient to show reversible error.

State v. Hobbs, 190 N.C. App. 183, 185-86, 660 S.E.2d 168, 170 (2008) (citations, internal quotation marks, and some brackets omitted; emphasis added). Further,

> our Supreme Court has held that the lack of a transcript does not prejudice [an appellant] when alternatives—such as a narrative of testimonial evidence compiled pursuant to Rule 9(c)(1) of the North Carolina Rules of Appellate Procedure—are available that would fulfill the same functions as a transcript and provide the [appellant] with a meaningful appeal.

Id. at 186, 660 S.E.2d at 170 (citation and internal quotation marks omitted). However, "[i]f a [trial] transcript is altogether inaccurate and no adequate record of what transpired at trial can be reconstructed, the court must remand for a new trial." *In re Rholetter*, 162 N.C. App. 653, 664, 592 S.E.2d 237, 244 (2004) (citation omitted). *See also State v. Sanders*, 312 N.C. 318, 320, 321 S.E.2d 836, 837 (1984) (per curiam) (granting a new trial where meaningful appellate review was precluded by "the entirely inaccurate and inadequate transcription of the trial proceedings and [where] no adequate record [could] be formulated").

As observed *supra*, Barbara's appellate counsel contacted every party present at the hearing, including the presiding judge, in an ultimately unsuccessful effort to construct a narrative of the proceedings that could "fulfill the same functions as a transcript and provide [Barbara] with a meaningful appeal." *Hobbs*, 190 N.C. App.

at 186, 660 S.E.2d at 170 (citation and internal quotation marks omitted). "Without an adequate alternative, this Court must determine whether the incomplete nature of the transcript prevents [us] from conducting a meaningful appellate review . . . ." *Id.* at 187, 660 S.E.2d at 171 (citation and internal quotation marks omitted).

Barbara's appellate counsel, who did not represent her at the hearing, has made numerous specific allegations of prejudice in regard to the gaps in the witness testimony as reflected in the incomplete transcript. For example, he notes that the inaudible portions of the transcript render incomprehensible Fender's responses to questions about Barbara's diagnoses and whether she was a danger to herself:

> Q. What about [Barbara's] ability to care for herself, have you made any observations in that area?
>
> A. It's diminished (inaudible) and has involved delusions about (inaudible) and fears. I will say while she's been on (inaudible). I'll also say that she came back kind of while she's been on the (inaudible) restricted (inaudible).
>
> Q. And I believe the medical chart, at page 15, references that she had refused to take medications. Is that still the state of things?
>
> A. She's been taking medications while she's been a patient. Her previous admission she was on forced medication. (Inaudible) she wouldn't take medications after. She would indicate she is (inaudible) because she's just not (inaudible).
>
> Q. Has [Barbara] been diagnosed with any disordering conditions result [sic] of all those observations?

> A. (Inaudible) the diagnosis initially is that the original disorder is (inaudible). (Inaudible) delusional disorder at this point are differential (inaudible) between delusional disorder (inaudible). It is kind of a (inaudible).
>
> . . . .
>
> Q. Based on your treatment of [Barbara] and your observations, evaluations, review of her medical record and your collateral evidence—or collateral investigation, do you have an opinion within a reasonable degree of medical certainty whether or not [Barbara] is mentally ill?
>
> A. Yes.
>
> Q. And what is that opinion?
>
> A. She is ill.
>
> Q. How would [Mission's] treatment, supervision and control over [Barbara] impact that—that capacity?
>
> A. My hope is that restore her (inaudible).
>
> Q. And do you have an opinion within a reasonable degree of medical certainty whether or not [Barbara] is a danger to herself?
>
> A. She is without (inaudible).

Likewise, the transcript prevents any meaningful review of Fender's responses when he was queried on cross-examination about why he changed his opinion regarding the need for involuntary commitment after the petition for commitment was filed and only three days before the hearing:

> Q. Dr. Fender, you're now stating that you believe [Barbara] needs inpatient, correct?

A. Yes.

Q. And but as previously—or as early as Monday, September 14th of this year, you thought that she met the criteria for outpatient commitment; is that correct?

A. There was a—that was before I (inaudible) the information (inaudible) true, and also the timeline of (inaudible) making the decision (inaudible), came back completely with the (inaudible).

Q. Okay. But on September 14th, you sent documentation to the [c]ourt stating that you believe that she could safely make it in the community, correct, besides—

A. (Inaudible).

Q. —okay, sorry.

A. So there were—there was a period of time on Monday where (inaudible) her best interest was to be transitioned to outpatient commitment. That was—there was (inaudible) issue about strength, and (inaudible) and (inaudible).

Q. Okay. And what is that further information?

A. That further information was (inaudible) from the petitioner about her (inaudible), and (inaudible) of her responding to hallucinations (inaudible).

Q. And you did not have that information prior to this conversation?

A. I had information about her being down in Charlotte seeking her (inaudible).

> Q. And you testified that while she has been on the unit, you've not observed her responding to those internal stimuli or hallucinations?
>
> A. She's been on the meds.
>
> Q. And that would be an indication that perhaps she's getting better, correct?
>
> A. (Inaudible) she's getting better, and I (inaudible) at this time the protection of the 30 days (inaudible) and true. But the response treatment (inaudible).
>
> Q. So to be clear, the client—or my client, your patient, did not behave in a manner that would indicate the change in your decision from inpatient to out—or from outpatient to inpatient?
>
> A. (Inaudible), and that was the only way that she (inaudible). That she (inaudible)—
>
> THE COURT: She's been more what?
>
> A. (Inaudible.) Prone to (inaudible) of the electronic voices, and this is when those sorts of (inaudible) delusions, there always some extra (inaudible). She lacks the capability after she (inaudible).

More concerning to this Court, however, is the issue Barbara's appellate counsel raises regarding the gaps in the transcript of Blake's testimony. Three of the ten findings of fact[1] contained in the commitment order are based upon testimony

[1] The importance of the three factual findings regarding Blake's testimony is perhaps even greater than suggested by this numerical description since the first two findings of fact merely identify the parties who testified and note that Fender was admitted as an expert witness. In addition, according to finding of fact eight, the trial court relied solely upon Blake's testimony in finding that Barbara was a danger to others.

given by Blake. Unfortunately, due to the malfunctioning microphone, Blake's testimony was largely inaudible for the court reporter's transcription. After a few introductory questions, the transcript of Blake's direct examination reads:

> A. I was at work, got a call, and [Barbara] called me about (inaudible), and then I called from Charlotte number (inaudible) as voice mail. It was an EMT [emergency medical technician], and he said he got the number for Mom, she said—or he said, "Got your mom on the road and that (inaudible)." And I said, "Yes," and he asked that I come right away. It was in Ballantyne, and they were talking (inaudible), and the two officers, and she was outside Ballantyne office. I was at work at state university. It took about 30 or 40 minutes to get down there.
>
> On the way, they had called some policemen, and (inaudible) situation. So they left (inaudible). I asked what's been going on? (Inaudible). And so pretty much within the four-[lane] road outside. There was two lanes and then another lane that turns off to the Interstate. She was parked driving (inaudible). Police officer said, "Well, she's been here for awhile [sic], and they're concerned, so that was Mom, (inaudible) and I was a little confused. (Inaudible) a little unusual. And so after talking with (inaudible), he said, "I'm going to go with this (inaudible)." And he said, EMT (inaudible). They recommended that she not drive (inaudible). And I said, "Okay." The officer said something else.
>
> So (inaudible) I drove my car off and come back and pick you up in the car because they don't want you driving. And I went kind of went back (inaudible) for a few minutes. She goes driving off. (Inaudible). So I drove my car, parked in a parking lot, came back, and then they asked me (inaudible), and the police officer said (inaudible).
>
> So I got back in my car probably about five minutes. We went up to the gas station, and bought some gas

(inaudible), and after driving—we were driving for a few minutes, and (inaudible) said, "Let's turn around." And I said, "Well, you know, (inaudible)." And so she started—said, "Turn around." (Inaudible) "Turn around the car, turn around the car." And so I pulled up to, like, a Walgreen's and the (inaudible) that he had (inaudible). But then—and (inaudible) and jumped out of the car. And he run my side, opened the doors and said, "Get out of the car. I'm going to drive, let me drive." (Inaudible)—I was driving down to a gas station. And then she tried to (inaudible), parking get out of the car. "Come on (inaudible) get out." And then she started talking, "Come on, what's there?" (Inaudible), "Sir, please tell him (inaudible) tell him what (inaudible). And at that time got out of the car and, "Mom, there's no one here." (Inaudible). And he (inaudible) two or three times, and I didn't know what to do, so I (inaudible), and "Get in the car." So drove back to my car, dropped me off and she said, "I want to go back (inaudible). Just go back to Asheville and (inaudible). And (inaudible). And so we passed a gas station and (inaudible). Guess we go home. And she tells me go to the airport. "And Mom, why do you go to airport?" She said, "I can't tell you, but you need to be there." (Inaudible). I said, "Mom, (inaudible)." And so she started—said, "Turn around car, turn around car." And so I pulled up to, like, a Walgreen's. That's when she started driving pretty recklessly on a four-lane road, (inaudible), brake, stop (inaudible), turn left turn right. She said, "No, I want you to go (inaudible)." (Inaudible). And basically, we got out of Charlotte and she—we pulled over again (inaudible). And I had to drive or had her call on the phone. And that was pretty much it.

Before we got to Asheville (inaudible), I said, "Hey, Mom, I'm pretty tired (inaudible)." She didn't (inaudible). She said she (inaudible) and all that (inaudible) which time we (inaudible). But we find the house. (Inaudible) to be 125 miles from my home. We got home about 7:15 (inaudible). (Inaudible) contacted the family (inaudible). I think the

> time for her (inaudible). We talked about it for a couple of weeks at that point, and so I (inaudible).
>
> Q. Thank you. I know that's a difficult story to tell. I just want to be clear. You're worried about your mother's safety?
>
> A. Yes, she—before that, she would drive to Charlotte. To my knowledge (inaudible). She said most of the time (inaudible). (Inaudible) made her angry. She thinks (inaudible) a danger to the public (inaudible). I heard (inaudible). I think she okay. [sic] So our concern (inaudible) and she's driving (inaudible) about eight, nine, (inaudible). And she (inaudible), she just sitting on the road. But what happened, she turned the wrong way started parking the car and something happened (inaudible) if he forces her (inaudible), could harm herself or harm something else, wreck the car. (Inaudible).
>
> She's in and out of the hospital (inaudible) so that she can get the help she needs and hopefully (inaudible).

Similarly, when Blake was asked on cross-examination about whether he believed that his mother was a danger to herself or others, his response was completely lost, as were most of the rest of his answers:

> Q. Good afternoon. You testified that you're afraid that the voices she hears may direct her to harm you or harm others. But to your knowledge, she hasn't expressed that the voices are telling her to commit any harm, correct?
>
> A. (Inaudible answer.)
>
> Q. But if she—but when she's been felt to drive to Charlotte, it's been out of the concern for your safety?
>
> A. I think that (inaudible) the root of it, yes.

> Q. And when you were driving with your mother, she never struck you or threatened to strike you?
>
> A. No, ma'am.
>
> Q. And the officer didn't issue her a citation when you guys were in Charlotte?
>
> A. No. The worst thing was she shouldn't drive (inaudible) do not drive. She should have stayed at the hospital (inaudible). She wanted to do that, she probably could. I think (inaudible).
>
> Q. Was that the first time something like that had happened where law enforcement had called you about the car being blocking traffic?
>
> A. (Inaudible answer.)
>
> Q. Has it happened in the past?
>
> A. In the past, no, (inaudible) she had gone and just sat somewhere (inaudible). But this is the third time that it has (inaudible).
>
> Q. And when you were driving back from Charlotte, she didn't hit any cars?
>
> A. (Inaudible). No, she drove (inaudible) and went and (inaudible).

Read fairly and in context, the portion of Blake's testimony which was able to be transcribed supports some parts of finding of fact six—that he was contacted by EMTs in Charlotte, and that Barbara was suffering from auditory hallucinations, asked her son to drive her around Charlotte, asked to be allowed to drive, and drove "recklessly[,]" apparently while in Charlotte. However, this Court cannot tell

whether other portions of finding of fact six are supported by his testimony, specifically that Blake "encountered his mother parked in her vehicle within travel lanes of a busy intersection in Charlotte[,]" that Barbara "had not taken care of herself or her dog," "became visibly upset and struck the dashboard of the vehicle," "drove erratically and dangerously from Charlotte to Asheville[,]" or "tried to force her son out of the driver's seat." Further, although Blake testified that he was worried about Barbara's "safety[,]" we cannot discern whether the transcript supports finding of fact seven, "that he was concerned his mother would harm herself or others either through driving or in response to the 'electronic voices' advising her that he or his sibling were in danger." Because we cannot evaluate whether findings of fact six and seven are supported by evidence, we likewise cannot meaningfully review finding of fact eight, "that through these actions, [Barbara] placed her son and the general public in danger." Thus, we hold that "the incomplete nature of the transcript prevents [us] from conducting a meaningful appellate review[,]" *see Hobbs*, 190 N.C. App. at 187, 660 S.E.2d at 171 (citation and internal quotation marks omitted), and as a result, we vacate the commitment order and remand this matter for a new hearing. *See In re Watson*, 209 N.C. App. 507, 521-22, 706 S.E.2d 296, 305 (2011).

On remand, we remind the trial court that, "[t]o support an inpatient commitment order, the court [must] find by clear, cogent, and convincing evidence that [a] respondent is mentally ill and dangerous to self, or dangerous to others." *In*

re Allison, 216 N.C. App. at 299-300, 715 S.E.2d at 914-15 (citation, internal quotation marks, and ellipses omitted). "Further, it is mandatory that the trial court record the facts which support its [ultimate] findings." *Id.* at 300, 715 S.E.2d at 915 (citation and internal quotation marks omitted). As noted by Barbara's appellate counsel, even if the transcript permitted meaningful review, and we determined that the trial court's findings of fact were supported by clear, cogent, and convincing evidence, those factual findings do not support its ultimate findings that Barbara was a danger to herself and to others. *See In re Monroe*, 49 N.C. App. 23, 29, 270 S.E.2d 537, 540 (1980) (discussing the "two prong test for dangerousness to self[:] . . . self-care ability regarding one's daily affairs. . . . [and] a probability of serious physical debilitation resulting from the more general finding of lack of self-caring ability"); *see also* N.C. Gen. Stat. § 122C-3(11)(b) (2015) (" '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.").

VACATED AND REMANDED.

Judges BRYANT and DILLON concur.

Report per Rule 30(e).