MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Commitment of D.E.,

Appellant-Respondent,

v.

Evansville State Hospital, Indiana Family and Social Services, Division of Mental Health and Addiction,

Appellee-Petitioners,

October 21, 2021

Court of Appeals Case No. 21A-MH-496

Appeal from the Brown Circuit Court

The Honorable Mary Wertz, Judge

Trial Court Cause No. 07C01-1710-MH-2

Robb, Judge.

Case Summary and Issues

[1] In 2017, D.E. was committed to an institution administered by the Indiana Family and Social Services Administration Division of Mental Health and Addiction after he was found not responsible by reason of insanity of charges of attempted murder, aggravated battery, and battery resulting in serious bodily injury. In 2019, D.E. filed a request for review of his commitment and asked to appear at the review hearing in person. The trial court denied the request for D.E. to be present in person at the hearing, instead holding the hearing by audiovisual telecommunication. Following the review hearing, the trial court continued D.E.'s regular commitment.

[2] D.E. appeals, raising two issues for our review: 1) whether the trial court denied D.E. due process when it denied his request to appear in person at the review hearing, and 2) whether there was sufficient evidence that D.E. posed a danger to others to support his continued commitment. Concluding D.E. was not denied due process when the trial court denied his request to participate in the hearing in person and there was sufficient evidence supporting the trial court's determination that D.E. is a danger to others and therefore in need of continued commitment, we affirm.

Facts and Procedural History

[3] In February 2016, D.E. attacked a person with a hatchet, leading to charges of attempted murder, aggravated battery, and battery resulting in serious bodily

injury. After a bench trial in 2017, D.E. was found not responsible by reason of insanity. The State filed a petition for an order of immediate regular commitment as required by Indiana Code section 35-36-2-4(a). On October 6, 2017, following a hearing, the trial court made the required findings and issued an order of regular commitment. D.E. was committed for a period expected to exceed ninety days, with the commitment continuing until D.E. was discharged by the facility or until the commitment was terminated by court order. D.E. was committed to the Logansport State Hospital.

[4] In June 2018, after receiving a periodic report and treatment plan summary from Logansport State Hospital and holding a hearing, the trial court continued D.E.'s commitment. In September 2018, D.E. was transferred from Logansport State Hospital to Evansville State Hospital ("ESH") "as a stepdown[.]" Appellant's Appendix, Volume 2 at 55. In December 2018, D.E.'s commitment was continued again after a review hearing at which D.E. appeared by video conference because the trial court determined transporting him to court would be injurious to his mental health or well-being.

[5] In June 2019, ESH filed a periodic report and treatment plan summary with the trial court. The report indicated:

> [D.E.] was transferred from Logansport State Hospital on 9/19/18; . . . he appeared to be at baseline with stable behavior and mood and no physical aggression until mid-May of 2019; since then he has displayed mania with euphoria and agitation including unstable sleep, grandiosity, delusional and disorganized thoughts, pressured speech, animated behavior, and elevated mood; he has been making racist statements toward

> others; he is resistive to taking sleeping aids; [his] insight into his current behavior is poor; medications have recently been adjusted; he was aggressive toward a peer on 06/14/19.

Id. at 51. Continued treatment at ESH was recommended because D.E. presented a substantial risk of danger to others in that he "has a substantial legal history and has committed violent acts toward individuals of different ethnicities; he lacks insight regarding [that he] currently is in a manic phase of his illness; [and he] is a high risk in the community based on risk assessments." *Id.*

[6] Also in June, D.E. filed a request for review or dismissal of his regular commitment. The trial court held a hearing in August 2019 in part to address whether D.E. would appear at the review hearing in person or by audiovisual means.[1] D.E.'s treating physician, Dr. Kari Kernek, testified that since the December 2018 hearing, which D.E. attended by video, his condition had "significantly worsened" and his behavior was "quite unpredictable." Transcript, Volume II at 32. Accordingly, Dr. Kernek believed the stress of transport would "be very potentially injurious to him. [H]e is perfectly capable of speaking up and . . . expressing himself to an audio visual system. I think that is the safest and best way for us to handle the hearing." *Id.* at 33. She expressed concern for D.E. and for staff doing the transport in the event of an adverse ruling: "I don't know how he would react but I think his symptoms

[1] D.E. appeared at this preliminary hearing by video. *See* Transcript, Volume II at 4.

would likely get worse because that is how most people react when they get news they don't like. But [it] causes stress and it causes their psychotic symptoms to worsen." *Id.* at 33-34. The trial court denied D.E.'s request to appear at the hearing in person, finding that although D.E. had a right to be present at the hearing, he did not have a right to be *physically* present and that transportation to the hearing presented a high risk of being injurious to D.E.'s mental health or well-being.

[7] A few days prior to the status review hearing, ESH filed a periodic report with the trial court that indicated D.E. was a danger to others and needed to remain in the facility. *See* Appellant's App., Vol. 2 at 90. The review hearing began on January 28, 2020 and was concluded in February 2021.[2] D.E. appeared by video at each day of the hearing.

[8] At the January hearing, Dr. Kernek testified that D.E.'s diagnosis of many years is "schizoaffective disorder, bipolar type which accounts for his episodes of mania as well as psychotic symptoms which remain prominent even when he is not manic." Tr., Vol. II at 62.[3] She meets with D.E. every three to four weeks. She explained that since D.E.'s admission to ESH,

> he has had a fluctuation of his symptoms. At times he is extremely delusional and has manic behavior. He loses

[2] The hearing was scheduled to resume in April 2020, but the COVID-19 pandemic delayed the completion of the hearing until 2021.

[3] D.E. also has a diagnosis of narcissistic personality disorder, but Dr. Kernek testified that diagnosis is not a focus of his treatment and does not impact his need for continued hospitalization. *See* Tr., Vol. 3 at 10.

> connection with reality [and] becomes very unstable. . . . This last occur[red] over September and October of [2019,] at that time he was observed responding to internal stimuli. He was unstable. His thinking was very disorganized. [H]e was writing bizarre letters, including a letter that was thought to be threatening toward myself. . . . But most notable about that is he told me he was extraordinary [sic] stable and he was not having any symptoms, which make[s] me concerned as for whether he would . . . recognize his symptoms when he is unstable.

Id. at 60-61 (cleaned up). Although Dr. Kernek did not feel D.E. was a danger to himself, she did believe he was dangerous to others, "in particular when he is in a psychotic and manic state" because he does not recognize that he is psychotic and therefore "remains a significant risk of harm to others if he were in [an] unsupervised setting." *Id.* at 67. She also believed "he has very poor insight and judgment in particular regarding his mental health needs[,]" and "does not recognize that he needs to take antipsychotic medication"; therefore, she felt it was not likely he would continue to take antipsychotic medication and maintain proper medical care on his own. *Id.* at 68.

[9] D.E. had recently been granted the next level of privileges at ESH which allowed him to access an exterior fenced courtyard from his building within the facility and to take short van rides with staff within the community without exiting the vehicle. Dr. Kernek explained this was part of trying to meet the overall treatment goal of moving D.E. out of the hospital even though he was not yet at that point. Dr. Kernek recommended that D.E. remain at ESH "where we can continue to work with him and improve his stability to both medication and . . . the understanding of his mental illness. . . . [T]he longer

that he is able to maintain stability, there is the potential that he could enter discharge planning and he could return to the community. I would like to see him stable six to twelve months before that would be considered. At this point in time, he has only been stable approximately three months." *Id.* at 69. Ultimately, though, she felt that D.E. was "unlikely to maintain stability to the point that he can function independently for an extended period of time" and "is highly likely to need long term hospitalization again." *Id.* at 72.

[10] During the COVID-19 delay, periodic reports were filed with the trial court in June 2020 and January 2021, both of which indicated D.E. was a danger to others and needed to remain in the facility. *See* Appellant's App., Vol. 2 at 117, 139. The January 2021 progress report indicated:

> [D.E.] has shown stability since July, 2020 without psychosis and has been clear of significant manic symptoms for several months longer; insight into his illness has improved over time, but remains limited; . . . a Risk Assessment completed on 11/02/2020 indicates he has shown improvement on his risk factors, but continues to lack sufficient self-monitoring and self-regulation of symptoms in order to manage further decompensation on his own; [D.E.] currently is able to acknowledge symptoms and takes partial blame for events precipitating his admission [but] his Narcissi[s]tic Personality Disorder is a barrier to helping him understand his illness[.]

Id. at 139. The report concluded D.E. needs continued treatment because "[D.E.] has a [not responsible by reason of insanity] status related to attempted murder charge; he has a history of severe harm to others when manic/psychotic

[and] has limited insight as to why others would be concerned that he could be violent in the future." *Id.*

[11] The hearing resumed on February 4, 2021 and concluded on February 19, 2021.[4] Dr. Jeremy English, a clinical psychologist, had done two risk assessments on D.E., one in August 2019 and another in November 2020. The 2020 risk assessment was conducted for the "purpose of treatment planning . . . to look at areas of risk for future violence and treatment to best mitigate those risks[.]" Tr., Vol. II at 140. It was premised on the idea that in the future, D.E. would be able to be released from ESH with a community mental health center's cooperation. The risk assessment included information about D.E.'s legal history, noting several "[m]ajor incidents" including charges for intimidation, harassment, resisting law enforcement, and battery dating back to 2003. Exhibit Volume, Volume IV at 5. The assessment also included information about D.E.'s psychiatric history, disclosing at least two prior commitments that "have occurred largely in connection with his legal history." *Id.* at 4. In concluding that D.E. would remain a moderate risk for violence in a community center setting, Dr. English specifically pointed out D.E.'s past legal

[4] The parties agreed that although the periodic reports filed during the COVID-19 delay could be considered by the trial court in ruling on the pending request for review, D.E. would still be able to challenge the most recent report independently. *See* Tr., Vol. II at 136-37; *see also* Ind. Code § 12-26-15-3(a) (stating that the right to review of a regular commitment is limited to one review each year, unless the court finds good cause for an additional review).

history and that the pattern of escalation over time has "a weight in doing these [assessments]." Tr., Vol. II at 146.

[12] Dr. Kernek also testified, updating her testimony from the January 2020 hearing. D.E. had not had any further manic episodes after late 2019 but did continue to have psychotic symptoms through July 2020. He exhibited improved insight into his symptoms although he still did not believe he has schizoaffective disorder, insisting he has been misdiagnosed. Dr. Kernek believed D.E. continued to meet the criteria of being a danger to others because "he does remain at risk of cycling and having another manic episode or reoccurrence of psychosis even if [he is] a hundred percent medication compliant." *Id.* at 166. She noted that D.E. appeared to be responding well to his current medicine regimen, although he would not agree to increase the dose of a mood stabilizer that Dr. Kernek believed would reduce his risk of relapse in the future. He also continued to ask for a reduction in his antipsychotic medication which Dr. Kernek said "could easily double his risk of having a manic episode in the next year." *Id.* at 170. She believed ESH remained the least restrictive environment suitable for D.E.'s care, protection, and treatment, but she indicated they were "beginning the process of looking at what would occur if he should be placed in discharge planning[,]" and had reached out to the "successor gatekeeper" to assess whether it could implement appropriate safety measures to make D.E.'s return to the community possible. *Id.* at 167, 172-73. D.E.'s "prognosis is guarded[,]" *id.* at 172, and Dr. Kernek felt Dr. English's risk assessment was appropriate and fair.

[13] D.E. testified that he can accept he has a mental illness and that it causes him to need medication which he does not intend to refuse or discontinue if he is released. He admitted he committed the act of striking another person with a hatchet but denied he had any intent to injure her and called it a "singular incident[,]" believing his risk of danger to others at this point was "very, very low[.]" Tr., Vol. III at 27. If released, "I would live with my mother and I would help take care of her. I would seek immediately the help of Centerstone in Bartholomew County, get a psychiatrist lined up." *Id.* at 30. He did not believe a stepdown approach from ESH to a community care setting was appropriate or necessary given his "highly functioning nature." *Id.* at 31.

[14] D.E. called Gloria Sterns-Bruner as a witness on his behalf. Sterns-Bruner knows D.E. through their participation in Quaker meetings. Given concern over D.E.'s community support when he is released, she testified that she would interact with D.E. "certainly on a weekly basis if not more frequently, in person if possible" and that six to ten other members of the Quaker community were also willing to be members of a supportive community for D.E. when he is discharged. Tr., Vol. II at 218. Several of those people submitted letters on D.E.'s behalf.

[15] The trial court issued an order on February 26, 2021, continuing D.E.'s commitment at ESH until discharged or until the court terminates the commitment, finding by clear and convincing evidence that:

1. [D.E.] is suffering from Schizoaffective Disorder, Bipolar Type, which is mental illness as defined in Indiana Code § 12-7-2-130.

2. [D.E.] is dangerous to others, as defined in Indiana Code § 12-7-2-53.

3. [D.E.] continues to be in need of custody, care and treatment at [ESH] for a period of time expected to exceed ninety (90) days.

4. [ESH] is determined to be the least restrictive environment suitable for care, treatment and stabilization as well as protecting [D.E.] while restricting [D.E.'s] liberty to the least degree possible.

5. The treatment plan for [D.E.] has been fully evaluated, including alternate forms, and is believed to result in benefitting [D.E.] while outweighing any risk of harm.

Appealed Order at 1. D.E. now appeals.

Discussion and Decision

I. In Person Attendance at Hearing[5]

[16] D.E. contends the trial court denied him due process when it did not allow him to be present in person at his review hearing because the denial "interfered with

[5] D.E. renewed his objection to appearing by video when the review hearing resumed in February 2021. Pursuant to the Indiana Supreme Court's "Emergency Order Permitting Expanded Remote Proceedings" that was issued on May 13, 2020, and remained in effect in February 2021, the considerations surrounding

his right to cross-examine witnesses and to assist his attorney." Brief of Appellant at 27-28. A civil commitment is a significant deprivation of liberty that requires due process protections. *Civ. Commitment of W.S. v. Eskenazi Health, Midtown Cmty. Mental Health*, 23 N.E.3d 29, 33 (Ind. Ct. App. 2014), *trans. denied*. Due process generally requires notice, an opportunity to be heard, and an opportunity to confront witnesses. *D.G. v. S.G.*, 82 N.E.3d 342, 347 (Ind. Ct. App. 2017), *trans. denied*. Whether a party was afforded an opportunity to be heard is a question of law, which is reviewed de novo. *Id*.

[17] D.E. cites Indiana Code section 12-26-2-2, which codifies some of the due process rights of an individual alleged to have a mental illness, including the right

> [t]o be present at a hearing relating to the individual. The individual's right under this subdivision is subject to the court's right to do the following:
>
> > (A) Remove the individual if the individual is disruptive to the proceedings.
> >
> > (B) Waive the individual's presence at the hearing if the individual's presence would be injurious to the individual's mental health or well-being.

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remote proceedings in February 2021 were somewhat different. We focus our attention on the decision when it was originally made.

Ind. Code § 12-26-2-2(b)(3).[6] Although the trial court here did make a finding that D.E.'s *physical* presence at the hearing would be injurious to his mental health or well-being, the trial court did not, in fact, waive D.E.'s presence at the review hearing under this statute. D.E. participated by audiovisual means for the entirety of the hearing. *Cf. A.A. v. Eskenazi Health/Midtown CMHC*, 97 N.E.3d 606, 609 (Ind. 2018) (because of waiver finding, individual was not present by any means other than by counsel at commitment hearing). If the legislature had intended for the individual to have the right to be present *in person* at the hearing, it could have worded the statute differently. For instance, Indiana Code section 35-38-1-4(a) provides that a criminal defendant "must be *personally* present at the time sentence is pronounced." (Emphasis added.) But in this case, there is no such specific language.

[18] To preserve D.E.'s right to be present at the review hearing, the trial court looked to the provisions of Indiana Administrative Rule 14. Rule 14 allows a trial court "in its discretion, [to] use telephone or audiovisual telecommunication" for certain court proceedings; specifically, Rule 14(A)(2)(f) provides that a trial court may use audiovisual telecommunication to conduct "[r]eview hearings in mental health commitment proceedings pursuant to IC

[6] The other rights codified in this statute are the right to notice and to be represented by counsel. Ind. Code § 12-26-2-2(b)(1), (2), and (4). Additional due process rights are codified in Indiana Code sections 12-26-2-3 (the right to present evidence and to cross-examine witnesses) and 12-26-2-5(e) (imposing the clear and convincing standard of proof).

12-26-15-2[.]"[7] D.E. appeared by audiovisual means so that he was both seen/heard and could see/hear throughout the proceedings. Although D.E. generally complains that the trial court's denial of his request to attend the hearing in person "interfered with his right to cross-examine the witnesses and to assist his attorney[,]" Br. of Appellant at 27-28, he does not cite any specific examples of such interference. During the hearing, D.E., through his attorney, was provided the opportunity to cross-examine the witnesses and to present evidence on his behalf. When D.E. wished to confer with his attorney, the trial court recessed the proceedings and facilitated private communications between them. The remote nature of the proceedings did not prevent D.E. from fully and fairly presenting his case and therefore, his due process right to be present was not denied.

II. Continuation of Commitment

[19] D.E. also challenges the trial court's continuation of his regular commitment. Indiana Code section 12-26-2-5(e) provides that the petitioner in a case involving the involuntary commitment of a mentally ill individual must prove by clear and convincing evidence that: (1) the individual is mentally ill and either dangerous or gravely disabled; and (2) detention or commitment of that individual is appropriate. Clear and convincing evidence is an intermediate

[7] Administrative Rule 14(B), governing proceedings not specifically enumerated in section (A), requires either the written consent of the parties or the trial court's finding of good cause in order to proceed by telephone or audiovisual communications. Rule 14(A) does not have these restrictions.

standard of proof greater than a preponderance of the evidence and less than proof beyond a reasonable doubt. *T.D. v. Eskenazi Health Midtown Cmty. Mental Health Ctr.*, 40 N.E.3d 507, 510 (Ind. Ct. App. 2015). In order to be clear and convincing, the existence of a fact must be "highly probable." *Matter of Commitment of C.N.*, 116 N.E.3d 544, 547 (Ind. Ct. App. 2019) (quotation omitted). In reviewing the sufficiency of the evidence to support continuation of a civil commitment, we consider only the probative evidence and the reasonable inferences supporting it and we do not weigh evidence or assess witness credibility. *Id*. We will affirm if a reasonable trier of fact could find the necessary elements proven by clear and convincing evidence. *Civ. Commitment of T.K. v. Dep't of Veterans Affs.*, 27 N.E.3d 271, 273 (Ind. 2015). "There is no constitutional basis for confining a mentally ill person who is not dangerous and can live safely in freedom." *Commitment of J.B. v. Midtown Mental Health Ctr.*, 581 N.E.2d 448, 451 (Ind. Ct. App. 1991), *trans. denied*.

[20] Because D.E. was committed under Indiana Code section 35-36-2-4 (describing commitment procedures following a finding of not responsible by reason of insanity), ESH was required to file with the trial court every six months a report addressing D.E.'s mental condition, whether he is dangerous or gravely disabled, and whether he needs to remain in the facility or may be cared for under a guardianship. Ind. Code § 12-26-15-1(a), (c). Upon receipt of the report, the trial court was authorized to order D.E.'s continued commitment, terminate the commitment, or conduct a hearing. Ind. Code § 12-26-15-2(a). D.E. was also empowered to request a hearing for review or dismissal of the

commitment. Ind. Code § 12-26-15-3(a). Just as at the original hearing, ESH was required to prove and the trial court was required to find by clear and convincing evidence that D.E. is mentally ill and either dangerous or gravely disabled. Ind. Code § 12-26-15-4(b) (stating that procedures for a review hearing as the same as those provided in Indiana Code chapter 12-26-6); *see also* Ind. Code § 12-26-6-8(a) (describing what the court must find in order to commit the individual to an appropriate facility).

[21] The trial court found that ESH proved by clear and convincing evidence that D.E. is mentally ill and that he is dangerous to others. Appealed Order at 1. There seems to be no dispute that D.E. is mentally ill, *see* Tr., Vol. 3 at 11 (D.E. answering "I do" when asked if he believes he has a mental illness), and we therefore focus on whether there was clear and convincing evidence that he is dangerous. "Dangerous" is defined as "a condition in which an individual as a result of mental illness, presents a substantial risk that the individual will harm the individual or others." Ind. Code § 12-7-2-53.

> Dangerousness must be shown by clear and convincing evidence indicating that the behavior used as an index of a person's dangerousness would not occur but for the person's mental illness. This standard is not met by a showing that a person made a rational and informed decision to engage in conduct that may have entailed a risk of harm. Instead, the evidence must show that there is a substantial risk that the person will harm himself [or others] as a result of a psychiatric disorder which substantially disturbs the person's thinking, feeling, or behavior and impairs the person's ability to function.

In re Commitment of C.A. v. Ctr. for Mental Health, 776 N.E.2d 1216, 1218 (Ind. Ct. App. 2002) (quotations and citations omitted).

[22] D.E.'s argument on appeal amounts to a request that we reweigh the evidence, which we will not do. ESH presented ample evidence that it is highly probable that as a result of his mental illness, D.E. presents a substantial risk of harm to others. Although a trial court is not required to wait until harm has nearly or actually occurred before determining that an individual poses a substantial risk to others, *C.J. v. Health & Hosp. Corp. of Marion Cnty.*, 842 N.E.2d 407, 410 (Ind. Ct. App. 2006), D.E. has a history dating back to at least March 2003 of committing violence upon others when he is in a manic or psychotic state. In January 2020, Dr. Kernek testified that D.E. did not recognize when he is psychotic or that he needs to take antipsychotic medications and therefore he presented a significant risk of causing harm to others if he were not supervised. By February 2021, D.E.'s insight into his symptoms and his need for medication had improved but remained limited, and he still denied his diagnosis, believing he had been misdiagnosed. His risk factors for future violence had also improved but remained moderate. Dr. Kernek testified that D.E. had exhibited psychotic symptoms through July 2020, and they had begun the process of trying to move D.E. toward a less restrictive environment, but they were still working to improve his stability with respect to understanding his illness and maintaining his medication regimen and she wanted to see six to twelve months of that stability before considering discharge planning.

[23] Because D.E. has a history of harming others when having a psychotic episode and because he remained at risk of having another episode, especially because he did not accept his diagnosis and would not agree to maintaining or increasing the dosage of medications that could reduce his risk of relapsing, there was clear and convincing evidence that D.E. is "dangerous" for purposes of the involuntary commitment statute and the trial court did not err in continuing his commitment.

Conclusion

[24] The trial court did not err in denying D.E.'s request to participate in the review hearing in person and there was clear and convincing evidence supporting the trial court's determination that D.E. poses a danger to others. Therefore, the judgment of the trial court is affirmed.

[25] Affirmed.

Bradford, C.J., and Altice, J., concur.