

No. 1-11-2300

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

<i>In re</i> THE COMMITMENT OF	)	Appeal from the
ANTHONY HOWARD	)	Circuit Court of
	)	Cook County.
(The People of the State of Illinois,	)	
	)	
Petitioner-Appellee,	)	
	)	
v.	)	No. 01 CR 80009
	)	
Anthony Howard,	)	Honorable
	)	Michael J. Howlett, Jr.,
Respondent-Appellant.)	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held:* We affirmed respondent's civil commitment to a secured facility for treatment as a sexually violent person where: (1) the trial court did not violate Rule 431(b) during its questioning of the potential jurors during *voir dire*; (2) the trial court's remarks during *voir dire* concerning proceedings under the Sexually Violent Persons Commitment Act did not deprive respondent of a fair trial; (3) the trial court committed no reversible error in failing to give a limiting instruction to the jury regarding the experts' testimony; (4) the State's comments during closing arguments were properly based on the evidence at trial; and (5) his trial counsel committed no ineffective assistance.

¶ 2 The State of Illinois petitioned to civilly commit respondent, Anthony Howard, as a sexually

No. 1-11-2300

violent person pursuant to the Sexually Violent Persons Commitment Act (the Act). 725 ILCS 207/1 *et. seq.* (West 2008). Following a jury trial, the jury found respondent was a sexually violent person and the trial court subsequently committed him to a secure facility for treatment. On appeal, respondent contends: (1) the trial court violated Illinois Supreme Court Rule 431(b) (Ill. S. Ct. Rule 431(b) (eff. May 1, 2007)) by failing to ask the potential jurors during *voir dire* whether they understood and accepted all four principles set forth in *People v. Zehr*, 103 Ill. 2d 472 (1984); (2) the trial court made various improper remarks during *voir dire*; (3) the trial court erred by failing to give a limiting instruction to the jury that the details of respondent's prior sex crimes were being offered only to explain the basis of the experts' opinions that respondent was a sexually violent person; (4) the State made improper remarks during closing arguments; and (5) his trial counsel provided ineffective assistance. We affirm.

¶ 3 The Act authorizes the involuntary civil commitment of "sexually violent persons" for "control, care and treatment." 725 ILCS 207/40(a) (West 2008). The Act defines a "sexually violent person" as a person who has "been convicted of a sexually violent offense" and who "is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence." 725 ILCS 207/5(f) (West 2008). The Act defines a "mental disorder" as a "congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." 725 ILCS 207/5(b) (West 2008). Although the Act states that the proceedings thereunder are "civil in nature" (725 ILCS 207/20 (West 2008)), it further provides that the State bears the burden of proving beyond a reasonable doubt that a person is a sexually violent person. 725 ILCS 207/35(f) (West 2008). If a court or jury determines

No. 1-11-2300

a person is sexually violent under the Act, he may be indefinitely committed "until such time as the person is no longer a sexually violent person." 725 ILCS 207/35(f), 40(a) (West 2008).

¶ 4 In July 2001, the State petitioned the trial court to commit respondent as a sexually violent person under the Act; the 2001 petition is not contained in the record on appeal. In August 2001, the trial court found probable cause to believe respondent was sexually violent and ordered him transferred to the Department of Human Services (DHS). In January 2009, the State filed an amended petition, which is contained in the record on appeal. The amended petition alleged respondent had been convicted of the sexually violent offense of aggravated criminal sexual assault and that Dr. Jacqueline Buck had diagnosed him with a mental disorder, "paraphilia, not otherwise specified, sexually attracted to non-consenting females, non-exclusive type," that made it substantially probable he would commit future acts of sexual violence. The State attached to the amended petition a written report from Dr. Buck detailing the bases for her opinion that respondent was a sexually violent person who should be civilly committed under the Act.

¶ 5 I. Respondent's Motion *In Limine* to Limit the Use of Expert Testimony

¶ 6 On April 3, 2009, respondent filed a motion *in limine* to limit the use of testimony from Dr. Buck about the details of her report referring respondent for commitment to DHS. The motion argued that large parts of Dr. Buck's report were based on a report written by another evaluator, Dr. Agnes Jonas, who conducted an interview with respondent in 2001. The motion asserted that Dr. Buck's report "contains numerous instances of inadmissible hearsay from [Dr.] Jonas" and that "[b]y using [Dr.] Buck as its witness and not making [Dr.] Jonas available, the [S]tate would [be] presenting hearsay disguised as the basis of expert opinion." The motion also noted that the hearsay

No. 1-11-2300

is "highly prejudicial, inflammatory and damning in that it labels the [r]espondent a liar, supplies the basis of determinations that he suffers mental disorders that are highly stigmatizing, and that he has committed other crimes and bad acts which are not relevant to the cause and not a matter of any judicial record."

¶ 7 After hearing arguments on the motion, the trial court denied respondent's motion *in limine*, ruling that Dr. Buck could "testify as to whatever it is that Dr. Buck relied upon in reaching an opinion." The trial court also noted that respondent would be entitled to a limiting instruction informing the jury that Dr. Buck's testimony regarding respondent's other crimes was admitted only to demonstrate the basis of her expert opinion that respondent was sexually violent.

¶ 8 *II. Voir Dire*

¶ 9 When the first panel of veniremembers was seated, the trial court explained to them in pertinent part that this case involved a petition to civilly commit respondent under the Act, pursuant to which the State must prove respondent previously has been convicted of a sexually violent offense and suffers from a mental disorder making it substantially probable he will engage in future acts of sexual violence. The State also informed the jury that although the case was classified as a civil action under the Act, the burden of proof is the criminal standard of proof beyond a reasonable doubt.

¶ 10 The trial court made similar remarks on the second and third days of *voir dire*.

¶ 11 The trial court questioned the members of the venire individually, asking them whether they understood and accepted: (1) respondent is presumed innocent of all charges; (2) the State must prove respondent guilty beyond a reasonable doubt before a conviction can be secured; and (3)

No. 1-11-2300

respondent is not required to offer any evidence on his own behalf. The trial court never specifically questioned any venireperson as to whether he or she understood and accepted that respondent's decision not to testify could not be held against him.

¶ 12

### III. Trial

¶ 13 The State called Dr. Jacqueline Buck, a clinical psychologist who was qualified as an expert in the area of sex offender evaluation and risk assessment. Dr. Buck testified that prior to a convicted sex offender being released from the department of corrections, the department provides an evaluation of him by a licensed clinical psychologist to determine whether he meets the criteria for commitment under the Act. The psychologist initially engages in a "screening" process whereby she reviews the inmate's master file, which contains all court documents, police reports, presentence evaluations, psychological evaluations, and reports on "current disciplinary behavior." If the psychologist determines from the screening process that the inmate meets the criteria for commitment under the Act, she recommends a face-to-face interview with that inmate.

¶ 14 Dr. Buck testified she had personally screened over 2,000 files beginning in 1998, and she had recommended approximately 240 persons be interviewed. Of the 240 persons interviewed, Dr. Buck recommended that approximately 110 of them be committed under the Act.

¶ 15 Dr. Buck testified Dr. Agnus Jonas initially screened respondent in May 2001 and recommended he be interviewed. Dr. Jonas conducted the interview and then prepared a report recommending he be further reviewed for civil commitment under the Act. Dr. Jonas has since retired.

¶ 16 Dr. Buck testified that a court order was issued in March 2008 directing her to evaluate

No. 1-11-2300

respondent to determine if he is a candidate for civil commitment under the Act. In response, Dr. Buck screened the master file, which included medical records, police records, court records, and "material from the Department of Human Services." In all, Dr. Buck reviewed over 5,000 pages. The documents Dr. Buck reviewed were the type relied upon by experts in her field when evaluating whether convicted sex offenders should be civilly committed under the Act.

¶ 17 Dr. Buck testified she tried to interview respondent in April 2008, but he refused to talk or meet with her. Dr. Buck testified it is an acceptable practice in her field to conduct an evaluation even without an interview.

¶ 18 Dr. Buck testified respondent's prior convictions for sexual offenses were "significant" to her evaluation of him. Dr. Buck first described an offense from 1975, stating that respondent was then 17 years old and he approached a 14-year-old boy, produced a gun, and forced the boy to let him into his mother's apartment. Respondent tied up the boy, took the mother into the bedroom, "and proceeded to rape her." Respondent then took money, food stamps, and the television from the apartment, and threatened to kill the boy if he told anyone what had occurred. Respondent later was arrested and eventually pleaded guilty to rape and received a four-year sentence. He was released in 1979.

¶ 19 Dr. Buck testified that about three weeks after his release, respondent committed a second sexual assault. Dr. Buck also considered the facts and circumstances of that assault when evaluating whether respondent should be civilly committed under the Act. Dr. Buck described this second sexual assault, stating respondent was then 20 years old, he climbed through the window of his half-sister's apartment at 2:30 a.m., and proceeded to rape her while armed with a knife. Respondent was

No. 1-11-2300

later convicted of this offense and sentenced to 13 years' imprisonment.

¶ 20 Dr. Buck then testified to a third sexual assault which she considered when evaluating respondent. Dr. Buck testified that respondent was paroled in 1985, and that approximately one year later, he offered a 22-year-old woman a ride home at 1 a.m. Once she was in the car with him, he produced a screwdriver, held it to her throat, and raped her twice. Respondent then forced her to go with him to his mother's house, where he introduced them to each other. Respondent threatened to kill the young woman "if at any time during this charade \*\*\* she let on that anything was problematic." She escaped later that morning, and respondent subsequently was arrested and convicted of aggravated criminal sexual assault and sentenced to 30 years' imprisonment.

¶ 21 The State questioned Dr. Buck about the significance of these three criminal offenses, and Dr. Buck testified:

"It's the behaviors that he exhibited that are of primary interest to me as a psychologist because I'm asked to diagnose him, if he has a mental disorder. And what is striking is that from a very early age, he's using weapons, a gun, a knife, even on a family member, a screwdriver; threatening to kill if they don't comply; raping, apparently without remorse. There's no evidence in any of his records to date that he is sorry or has expressed any remorse for these things. That pattern of violence just continued and escalated and that continued even during his incarceration."

¶ 22 Dr. Buck testified that the facts and circumstances of respondent's behavior while in the Department of Corrections also was relevant to her opinion regarding whether respondent should be civilly committed under the Act. Dr. Buck testified that during his incarceration for his initial rape,

No. 1-11-2300

respondent was prosecuted in 1977 for the battery of another inmate. Respondent "even went to mental health saying he was hearing voices and he was afraid that he had killed this other inmate. Fortunately he did not."

¶ 23 Dr. Buck testified that in 1978, respondent was at the Stateville Corrections Center, where he smoked marijuana, used cocaine and set his cell on fire, burning his thorax and arms in the process. Dr. Buck testified, "[s]o this total out-of-control behavior even in a confined environment continues with him."

¶ 24 Dr. Buck testified that during his incarceration for his second offense, respondent was listed as a member of the Black Gangster Disciples and complained of having 17 enemies in prison. Dr. Buck testified that "[t]he drug behavior continued and he also sexually assaulted another inmate after hitting him twice in the head, once in the stomach, then he raped him and he received strong disciplinary action from the Department of Corrections for intimidation, threats, as well as sexual misconduct."

¶ 25 Dr. Buck testified that during his incarceration for his second offense, respondent received "32 major disciplinary tickets." During his incarceration for his third offense, respondent received "37 major disciplinary tickets," and "[s]o his behavior did not modify at all as he was aging within the Department of Corrections." The State questioned Dr. Buck regarding the significance of respondent's behavior while incarcerated, and Dr. Buck testified:

"Again, the violence, the lack of self control, the lack of willingness to abide by rules, the continued fighting. There were a couple of incidents where mops and buckets were involved and so weapons were used, not just—not that punching somebody is a good thing, but it goes

No. 1-11-2300

beyond that. So that continued kind of out-of-control [behavior] while in corrections was well documented."

¶ 26 Dr. Buck testified that in forming her opinion as to whether respondent should be civilly committed under the Act, she also considered that he had declined sex offender treatment until the August before trial and also had declined substance abuse treatment. Dr. Buck also described an incident on January 19, 2009, when respondent was in the "day room" with the other inmates and took all the napkins. One of the other inmates objected, and respondent invited him into his cell to fight. Security was called, and the two men were put into temporary confinement in separate rooms. While in temporary confinement, respondent took off all his clothes and defecated in the middle of the floor. Then respondent curled up into a ball on the bed, covered his face, and began screaming. Dr. Buck testified "it's so easy for [respondent] to slip back into doing petty things which wind up becoming much larger things. And he doesn't have the skills to manage himself very well."

¶ 27 Dr. Buck testified that as part of her evaluation, she used the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, which is the authoritative reference manual in her field. Dr. Buck diagnosed respondent with "paraphilia, not otherwise specified, sexually attracted to non-consenting females, non-exclusive type." Dr. Buck explained:

"[T]he nonexclusive type was based on the fact that he did have consenting relationships during the—for about 14 months of his adult life that he was in the free world.

\*\*\* So it's not like every sexual encounter for him was a rape.

The rest of the diagnosis is defined by saying that there needs to be for a period of at least six months intensely sexually arousing thoughts, feelings, or behaviors which involve

No. 1-11-2300

in this case non-consenting adults. And when we look at the behaviors attached to the convictions that he received, we have 1975, sexually assaulted behavior with the mother of the 14-year-old; we have the next victim was his half-sister where he climbs in the window to rape her; and then the third is the friend of a friend kind of a thing, he really didn't know her. \*\*\* And again, he, with a weapon in hand, performed a rape twice with her. So that meets that criteria.

The second criteria in the diagnosis of paraphilia, not otherwise specified, is that these behaviors cause a disturbance in his ability to function in the community, to carry on with work, school, whatever it may be. And because these behaviors were identified by the police and so on, the non-consenting kind of thing, he was incarcerated, that certainly interfered with his ability to live in the community.

And the third is that he's at least 18 years of age at the time of the diagnosis and he's 51 years old now."

¶28 Dr. Buck also diagnosed respondent as having antisocial personality disorder with narcissistic traits, as exhibited by his failure to abide by social norms, lying, impulsivity, failure to sustain a work history, lack of remorse, and reckless disregard for the safety of others. Dr. Buck also diagnosed respondent with alcohol dependence, cocaine dependence, heroin dependence, and cannabis abuse.

¶29 Dr. Buck testified respondent is predisposed to commit acts of sexual violence because of the paraphilia mental disorder. In coming to that opinion, Dr. Buck conducted a risk assessment using three risk actuarial tools. The first risk actuarial tool is called the Static-99 and assesses 10 risk factors. Respondent's score "was in the category of very high reoffenders." The second risk

No. 1-11-2300

actuarial tool is the Minnesota Sex Offender Screening Tool-Revised, which assesses 12 risk factors. Respondent again scored "in a very high risk category." The third risk actuarial tool is the Sex Offender Risk Appraisal Guide, which assesses 17 risk factors. Respondent "scored again in a very high risk group." Dr. Buck testified that "[t]he fact that all of them put him in their high risk category allows me to feel confident to say \*\*\* he is at high risk of sexually reoffending."

¶ 30 Dr. Buck further testified that it was her opinion, to a reasonable degree of psychological certainty, that respondent has been convicted of a sexually violent offense; he suffers from a mental disorder that is a congenital or acquired condition affecting his emotional or volitional capacity which predisposes him to commit acts of sexual violence; and his mental disorder makes it substantially probable he will engage in future acts of sexual violence.

¶ 31 The State called Dr. Ray Quackenbush, a clinical psychologist, who was qualified as an expert in the area of sex offender evaluations and risk assessments. Dr. Quackenbush testified that in August 2001, he was assigned to independently evaluate respondent and to determine whether he agreed or disagreed with Dr. Jonas's initial evaluation. Dr. Quackenbush evaluated respondent in October 2001, and again in October 2008. As part of the evaluation process, Dr. Quackenbush reviewed thousands of documents contained in the master file. The documents he reviewed were of the type reasonably relied upon by experts in the field when evaluating whether convicted sex offenders should be civilly committed under the Act. Dr. Quackenbush asked to meet with respondent, but respondent declined to do so.

¶ 32 Dr. Quackenbush testified that in evaluating respondent, he took into consideration respondent's three prior convictions. Specifically, Dr. Quackenbush testified he considered

No. 1-11-2300

respondent's 1975 conviction of rape, when he tied up a 14-year-old boy after producing a gun, and then raped the boy's mother. Dr. Quackenbush also considered respondent's second conviction for raping his stepsister<sup>1</sup> at knifepoint. Finally, Dr. Quackenbush considered respondent's third conviction for sexually assaulting a woman while threatening her with a screwdriver.

¶ 33 Dr. Quackenbush testified as to why the behaviors respondent exhibited during those three prior offenses were significant in evaluating whether respondent should be civilly committed under the Act:

"First of all, these are all sexual acts with non-consenting persons. This was—each thing he did was against the will and without the consent of the victim involved. In each case, he used a weapon. In each case, there was a level of violence. At least one of the victims in the second offense was actually injured.

In each of these cases, there is nothing in the record that documents his having any remorse or regrets about these offenses. All of those are significant to me.

It's also significant to me that these were all adults, that none of the victims were children."

¶ 34 Dr. Quackenbush testified that in evaluating respondent, he also took into consideration respondent's behavior while in the penitentiary. Specifically, Dr. Quackenbush considered that in 1982, respondent committed a sexual assault on a male prisoner. There also was a report of a second rape, for which respondent was not prosecuted because the alleged victim refused to take a polygraph examination.

---

<sup>1</sup>Dr. Buck referred to this woman as respondent's half-sister.

No. 1-11-2300

¶ 35 Dr. Quackenbush testified he also took into consideration that respondent did not undergo sex offender treatment while in the department of corrections, nor did he undergo substance abuse treatment, despite a history of using alcohol and cocaine.

¶ 36 Dr. Quackenbush testified he diagnosed respondent with paraphilia not otherwise specified, non-consenting persons, meaning "he has a deviant sexual preference for persons who do not consent to engage in sexual activity with him." Dr. Quackenbush also diagnosed respondent with antisocial personality disorder, cocaine abuse, and alcohol abuse.

¶ 37 Dr. Quackenbush testified that respondent's mental disorders are acquired conditions that affect his emotional or volitional control, predispose him to commit acts of sexual violence, and make it substantially probable that he will engage in future acts of sexual violence. Dr. Quackenbush testified that in coming to that opinion, he conducted a risk assessment using two risk actuarial tools, the Static 99 and the Minnesota Sex Offender Screening Tool. Respondent scored in the high risk range under both actuarial tools.

¶ 38 Respondent did not call any witnesses in his defense. After hearing closing arguments and receiving their instructions, the jury found respondent to be a sexually violent person under the Act. The trial court held a dispositional hearing and ordered respondent committed to DHS custody until he is no longer sexually violent. Respondent appeals.

¶ 39 First, respondent argues the trial court violated Illinois Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. July 1, 2012)) when it failed to ask the potential jurors during *voir dire* whether they understood and accepted the principle set forth in *Zehr* that respondent's decision not to testify could not be held against him. Respondent waived review by failing to object to the trial court's

No. 1-11-2300

alleged failure to comply with Rule 431(b) (see *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), but argues we should review the court's alleged failure to comply with Rule 431(b) for plain error pursuant to Illinois Supreme Court Rule 615(a). Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999); see also *In re Commitment of Curtner*, 2012 IL App (4th) 110820, ¶ 26 (applying Rule 615(a) in a sexually violent person case).

¶ 40 There was no plain error here. In *Zehr*, our supreme court held that a trial court erred during *voir dire* by refusing defense counsel's request to ask questions about the State's burden of proof, the defendant's right not to testify and his right not to have to offer evidence in his own behalf, and the presumption of innocence. *Zehr*, 103 Ill. 2d at 476-78. The supreme court held that "essential to the qualification of jurors *in a criminal case* is that they know that a defendant is presumed innocent, that he is not required to offer any evidence in his own behalf, that he must be proved guilty beyond a reasonable doubt, and that his failure to testify in his own behalf cannot be held against him." (Emphasis added.) *Id.* at 477.

¶ 41 In 1997, to ensure compliance with *Zehr*, the supreme court amended Rule 431(b), which is part of Article IV of the Supreme Court Rules governing "criminal proceedings in the trial court." The 1997 amendment provided that "[i]f requested by the defendant," the court shall ask the prospective jurors whether they understand and accept the *Zehr* principles. Ill. S. Ct. R. 431(b) (eff. May 1, 1997). The rule sought "to end the practice where the judge makes a broad statement of the applicable law followed by a general question concerning the juror's willingness to follow the law." Ill. S. Ct. R. 431, Committee Comments (eff. May 1, 1997). The appellate court held that Rule 431(b), as amended in 1997, "does not require the judge to ask the questions unless defendant's

No. 1-11-2300

counsel has asked the court to do so." *People v. Williams*, 368 Ill. App. 3d 616, 623 (2006); see also *People v. Foreman*, 361 Ill. App. 3d 136, 145 (2005).

¶ 42 Effective May 1, 2007, the supreme court again amended Rule 431(b), deleting the language "[i]f requested by the defendant" and leaving the remainder of the rule unchanged. Rule 431(b) now reads:

"(b) The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that if a defendant does not testify it cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects.

The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

¶ 43 Thus, Rule 431(b) currently imposes a *sua sponte* duty on the circuit court *in a criminal case* to question each potential juror as to whether he understands and accepts the *Zehr* principles. Such questioning of the potential jurors is no longer dependent upon a request by defense counsel.

¶ 44 Neither *Zehr* nor Rule 431(b) applies here because proceedings under the Act are civil rather than criminal in nature. See *In re Detention of Samuelson*, 189 Ill. 2d 548, 559 (2000); 725 ILCS 207/20 (West 2008).

No. 1-11-2300

¶ 45 Even if *Zehr* and Rule 431(b) did apply here, we would find no reversible error in the trial court's failure to instruct the venire that it could not hold respondent's decision not to testify against him.

¶ 46 Our supreme court recently addressed a similar issue in *People v. Thompson*, 238 Ill. 2d 598 (2010). In *Thompson*, the defendant, Angelo Thompson, was convicted of aggravated unlawful use of a weapon and sentenced to one year in prison. *Id.* at 601. On appeal, Thompson argued his conviction should be reversed because the trial court failed to comply with Rule 431(b). *Id.* at 605. Specifically, the trial court did not question whether any of the prospective jurors understood and accepted that Thompson was not required to produce any evidence on his own behalf. *Id.* at 607. Further, the trial court did not ask the prospective jurors whether they accepted the presumption of innocence. *Id.* Thompson did not object to the alleged Rule 431(b) violation or include it in his posttrial motion but the appellate court found that the alleged error was subject to plain-error review. *Id.* at 605. The appellate court held that the trial court committed reversible error by failing to comply with Rule 431(b) and so reversed Thompson's conviction and remanded for a new trial. *Id.*

¶ 47 On appeal to the supreme court, the State first contended that a violation of Rule 431(b) is not a structural error requiring automatic reversal. *Id.* The supreme court agreed. The supreme court noted that structural errors systemically erode the integrity of the judicial process, undermining the fairness of the defendant's trial. *Id.* at 608. "An error is typically designated as structural only if it necessarily renders a criminal trial fundamentally unfair or an unreliable means of determining guilt or innocence." *Id.* at 609. Errors have been recognized as structural only in a limited class of cases, including: a complete denial of counsel; trial before a biased judge; racial discrimination in

No. 1-11-2300

the selection of a grand jury; denial of self-representation at trial; denial of a public trial; and a defective reasonable doubt instruction. *Id.*

¶ 48 The supreme court concluded:

"Rule 431(b) questioning is simply one way of helping to ensure a fair and impartial jury. [Citation.] Despite the trial court's failure to comply with Rule 431(b) in this case, there is no evidence that defendant was tried by a biased jury. We also note that the trial court did address some of the Rule 431(b) requirements in its *voir dire* and \*\*\* the jury was admonished and instructed on Rule 431(b) principles.

Although compliance with Rule 431(b) is important, violation of the rule does not necessarily render a trial fundamentally unfair or unreliable in determining guilt or innocence. We conclude that the trial court's violation of the amended version of Supreme Court Rule 431(b) in this case does not fall within the very limited category of structural errors and, thus, does not require automatic reversal of defendant's conviction." *Id.* at 610-11.

¶ 49 The supreme court next discussed the State's contention that Thompson had forfeited his claim by failing to object to the trial court's failure to comply with Rule 431(b) or include the issue in his posttrial motion. *Id.* at 611-12. Thompson conceded his claim was forfeited, but asked the court to relax the forfeiture rule based on the so-called "*Sprinkle doctrine*." *Id.* Under the *Sprinkle doctrine*, the court may relax the forfeiture rule when a trial judge oversteps his authority in the jury's presence or when trial counsel effectively has been prevented from objecting because such an objection would fall on deaf ears. *Id.* at 612. The supreme court noted there was no indication in

No. 1-11-2300

the case before it that the trial court would have ignored trial counsel's objection to the Rule 431(b) questioning, nor was there any indication that the trial court overstepped its authority in the presence of the jury. *Id.* Accordingly, the supreme court declined to relax the forfeiture rule. *Id.*

¶ 50 The supreme court next discussed whether the trial court's failure to comply with Rule 431(b) constituted plain error. *Id.* at 613. The plain-error doctrine is applied when: (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error; or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *Id.* (citing *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)).

¶ 51 Thompson did not argue plain error under the first prong, but only argued under the second prong that the Rule 431(b) violation infringed his right to an impartial jury and thereby affected the fairness of his trial and the integrity of the judicial process. *Id.* The supreme court disagreed, noting it had equated the second prong of plain-error review with structural error. *Id.* at 613-14 (citing *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009)). The supreme court held:

"A finding that defendant was tried by a biased jury would certainly satisfy the second prong of plain-error review because it would affect his right to a fair trial and challenge the integrity of the judicial process. Critically, however, defendant has not presented any evidence that the jury was biased in this case. Defendant has the burden of persuasion on this issue. We cannot presume the jury was biased simply because the trial court erred in conducting the Rule 431(b) questioning.

\* \* \*

Our amendment to Rule 431(b) does not indicate that compliance with the rule is now indispensable to a fair trial. As we have explained, the failure to conduct Rule 431(b) questioning does not necessarily result in a biased jury, regardless of whether that questioning is mandatory or permissive under our rule. Although the amendment to the rule serves to promote the selection of an impartial jury by making questioning mandatory, Rule 431(b) questioning is only one method of helping to ensure the selection of an impartial jury. [Citation.] It is not the only means of achieving that objective. A violation of Rule 431(b) does not implicate a fundamental right or constitutional protection, but only involves a violation of this court's rules. [Citation.] Despite our amendment to the rule, we cannot conclude that Rule 431(b) questioning is indispensable to the selection of an impartial jury." *Id.* at 614-15.

¶ 52 The supreme court noted, in the case before it, the prospective jurors had received some, but not all, of the required Rule 431(b) questioning and had been admonished and instructed on Rule 431(b) principles. *Id.* at 615. The supreme court concluded Thompson had not established that the trial court's violation of Rule 431(b) resulted in a biased jury and therefore he failed to meet his burden of showing the error affected the fairness of his trial and the integrity of the judicial process. *Id.*

¶ 53 Finally, the supreme court declined Thompson's request to adopt a bright-line rule of reversal for any violation of Rule 431(b) to ensure that the trial courts will comply with the rule. *Id.* at 615-16.

¶ 54 In the present case, as in *Thompson*, respondent's failure to object at trial constituted a forfeiture of the trial court's alleged error in its Rule 431(b) questioning. Respondent does not argue plain error under the first prong, but argues under the second prong that the trial court's failure to question the potential jurors as to whether they understood and accepted that his decision not to testify could not be held against him denied him a fair trial. As in *Thompson*, respondent has failed to establish plain error under the second prong. Respondent has presented no evidence the jury was biased in this case. Respondent bears the burden of persuasion on this issue, and we "cannot presume the jury was biased." *Id.* at 614. In the absence of any evidence of jury bias, respondent has failed to meet his burden of showing that the alleged Rule 431(b) violation constitutes plain error.

¶ 55 Next, respondent argues that although proceedings under the Act are "civil in nature" (725 ILCS 207/20 (West 2008)), the trial court repeatedly employed language during the first, second, and third days of jury selection suggesting he was charged with a criminal offense. Specifically, respondent contends the trial court drew an obvious parallel to criminal law when it stated respondent was "charged" with being a sexually violent person, he was "charged" with having a sexually violent conviction, and that "the charges" were contained in the petition against him.

¶ 56 Respondent argues that by "[i]mproperly comparing" his trial to a criminal prosecution, the trial court "injected an element of moral turpitude and implicitly invited the venire to determine whether [he] was deserving of punishment." Respondent argues that although both criminal trials and proceedings under the Act "pose the risk of a substantial deprivation of liberty," the finder of fact in a trial under the Act has a different duty than a finder of fact in a criminal trial: to ascertain

No. 1-11-2300

whether respondent suffers from a mental disorder that makes it substantially probable he will commit future acts of sexual violence. Respondent argues "[m]oral blameworthiness is not part of that consideration."

¶ 57 In support, respondent cites *People v. Pembrock*, 23 Ill. App. 3d 991, 995 (1974), in which the appellate court commented on the distinction between criminal proceedings and proceedings under the Sexually Dangerous Persons Act (SDPA) (725 ILCS 205/0.01 (West 2008)), another involuntary commitment law, stating:

"While both the civil proceedings in question and criminal prosecutions may result in a loss of liberty, substantial differences exist between them. Foremost among these are that in a commitment under the [SDPA] there is no inference of moral blameworthiness since a finding of sexual dangerousness indicates that a defendant's inability to conform to the dictates of the law is the product of a mental illness and, secondly, commitment under the [SDPA], unlike criminal incarceration, is not intended as punishment." *Pembrock*, 23 Ill. App. 3d at 995.

¶ 58 Respondent argues that although *Pembrock* concerned the SDPA, the same logic applies to the Act here. Respondent argues that like the SDPA, proceedings under the Act are "not only technically civil but are not underpinned by notions of retribution and punishment, unlike the criminal law. In other words, although the effect is largely the same, the purpose is entirely different. Therefore, confusing the distinct areas of law as substantially identical is legally erroneous."

¶ 59 Respondent waived review by failing to object to the trial court's comments during *voir dire*. *Enoch*, 122 Ill. 2d at 186. Respondent argues under the second prong of the plain error rule that the

No. 1-11-2300

trial court's comments comparing his trial to a criminal prosecution denied him a fair trial.

¶ 60 There was no plain error here. In context, the trial court's comments to the venire on the first day of jury selection were as follows:

"The State has filed a petition to civilly commit [respondent] under the Sexually Violent Person's Act. This is something a little different than most criminal cases that jurors try when they come to this courthouse. I want to talk to you a little bit about some basic principles that apply to petitions filed under this Act.

\* \* \*

The respondent in this case, Anthony Howard, is charged with being a sexually violent person. More specifically, it is charged that [respondent] has been convicted of a sexually violent offense. And, he suffers from a mental disorder. And he is dangerous because that mental disorder makes it substantially probable that he will engage in acts of sexual violence.

The law defines a mental disorder as a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence.

The charges here are contained in a document called the petition. You must remember that the petition is not to be considered by you as any evidence against the respondent \*\*\*, nor does the law allow you to infer any presumption that \*\*\* the respondent is a sexually violent person simply because he is named in the petition. The petition is merely a formal way in which [respondent] is brought to court by the People.

The State has the burden of proving the respondent as a sexually violent person beyond a reasonable doubt. This burden remains on the State throughout the case. The respondent is not required to prove he is not a sexually violent person. And once again, for those of you who may have served before on juries, in a civil case the burden of proof is usually one we call the preponderance of the evidence. That means that something is more probably true than not true.

In criminal cases, the standard of proof is what we call \*\*\* beyond a reasonable doubt. This case I had told you is categorized as a civil action, but it requires the criminal standard of proof beyond a reasonable doubt."

¶ 61 Viewing the court's comments to the venire on the first day of jury selection in their entirety, they did not suggest respondent was charged with a criminal offense, but rather they accurately explained that the case against the respondent is categorized as a civil action under the Act, but that the burden of proof is the criminal standard of proof beyond a reasonable doubt. The trial court correctly informed the venire of the specific elements the State must prove in order for respondent to be civilly committed under the Act, specifically, that he has a prior conviction of a sexually violent offense and suffers from a mental disorder making it substantially probable he will engage in future acts of sexual violence. The trial court's comments did not create an inference of moral blameworthiness, where they correctly informed the venire that civil commitment under the Act must be predicated on a finding of mental illness on the part of respondent. *Pembrook*, 23 Ill. App. 3d at 995. Accordingly, as the trial court's comments did not improperly compare respondent's trial to a criminal prosecution and did not inject elements of moral turpitude or moral blameworthiness into

No. 1-11-2300

the venire's consideration, they did not constitute plain error.

¶ 62 On the second day of jury selection, the trial court made comments to the venire regarding the classification of a commitment proceeding under the Act as a civil proceeding for which the State bears the burden of proof under the criminal standard of proof beyond a reasonable doubt. The trial court accurately stated the elements which the State must prove, specifically, that he has a prior conviction of a sexually violent offense and that he suffers from a mental disorder making it substantially probable he will engage in acts of future sexual violence. These comments were substantially similar to the ones made on the first day of jury selection; for the reasons discussed above, said comments did not constitute plain error.

¶ 63 On the third day of jury selection, the trial court explained to the venire that a civil action requires proof by a preponderance of the evidence, that a criminal case requires proof beyond a reasonable doubt, and that the case against respondent "is a little bit of both" and thus is not like the typical criminal case heard in the criminal court building. Like the first two days of jury selection, the court specifically told the venire that to commit respondent under the Act, the State must prove beyond a reasonable doubt that: (1) respondent was previously convicted of a sexually violent offense; and (2) he is dangerous because of a mental disorder making it substantially probable he will engage in future acts of sexual violence. As on the first two days of jury selection, the trial court's comments did not create an inference of moral blameworthiness on the part of respondent, where the comments correctly informed the venire that this was not the typical criminal case involving a determination of punishment but, rather, was a commitment proceeding under the Act that must be predicated on a finding that respondent was mentally ill. *Id.* Accordingly, we reject respondent's

No. 1-11-2300

argument that the court committed plain error by improperly comparing his trial to a criminal prosecution, thereby injecting elements of moral turpitude or moral blameworthiness into the venire's consideration.

¶ 64. Respondent also argues that various comments that the trial court made during individual questioning of potential jurors constituted reversible error. The issue is again waived, as none of the comments were objected to (*Enoch*, 122 Ill. 2d at 186); respondent again argues for plain error review under the second prong.

¶ 65 During individual questioning on each of the three days of jury selection, the trial court asked various potential jurors whether they knew anyone charged under the Act, whether they understood that a person accused of being a sexually violent person or charged in a petition as a sexually violent person is presumed innocent, and that respondent does not have to prove his innocence. Respondent again argues that these comments blurred the lines between proceedings under the Act and criminal proceedings and improperly "created an inference of moral blameworthiness." We disagree. The trial court's comments to individual venirepersons merely reiterated its earlier comments to the entire venire on each of the three days of jury selection which, as we discussed above, did not constitute plain error.

¶ 66 Next, respondent argues the trial court denied him a fair trial during *voir dire* when, in discussion with a single veniremember who did not sit on the jury, the court advised him that respondent's prior convictions of sexually violent offenses were a "given." Also, during *voir dire* the trial court informed two other venirepersons (who did not sit on the jury) that there was no "dispute" that respondent had a previous conviction of a sexually violent offense. Respondent

No. 1-11-2300

contends these comments were overheard by other veniremembers who later sat on the jury, and that the court's comments improperly informed them that the State did not have the burden of proving he had a prior conviction for a sexually violent offense. Respondent waived review by failing to object (*id.*); respondent argues for plain error review under the second prong. There was no plain error, as defense counsel conceded during opening statement that respondent had committed the three prior sexually violent offenses and the parties stipulated to the fact respondent had been convicted of a sexually violent offense, thereby withdrawing that fact from issue and dispensing with need for proof of that fact. See *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 462 (1992).

¶ 67 Next, respondent contends the trial court erred during *voir dire* when it individually questioned 15 venirepersons and asked each of them whether he or she accepted that respondent was presumed not to be a sexually violent person, and that the presumption could not be overcome "until" the State proved respondent a sexually violent person beyond a reasonable doubt. Respondent argues that the use of the word "until" instead of "unless" suggested to the venire that finding him to be a sexually violent person was inevitable. Respondent waived review by failing to object (*Enoch*, 122 Ill. 2d at 186); respondent argues for plain error review under the second prong.

¶ 68 The trial court committed no plain error, where its use of the word "until" did not suggest the inevitability of the State proving respondent was a sexually violent person. The word "until" is defined as "[u]p to the time of" an occurrence or event (American Heritage College Dictionary 1481 (3d ed. 2000)); however, there is no requirement in the definition that the occurrence or event inevitably happen. Moreover, even assuming for the sake of argument only that the trial court did err in using the word "until" instead of the word "unless", the error was cured when the court

No. 1-11-2300

instructed the jurors at the close of trial, "the Respondent is presumed not to be a sexually violent person. This presumption remains with him throughout every stage of the trial and during your deliberations on the verdict and is not overcome *unless* from all the evidence in this case you are convinced beyond a reasonable doubt that he is a sexually violent person." (Emphasis added.) See *Beard v. Barron*, 379 Ill. App. 3d 1, 11 (2008) ("The jury is presumed to follow the trial court's instructions.").

¶ 69 Next, respondent argues the trial court erred by failing to give the jury a limiting instruction informing it that Dr. Buck's and Dr. Quackenbush's testimony regarding the facts underlying respondent's previous convictions and the incident where he defecated on the floor were admitted only to show the basis of their opinion that respondent was a sexually violent person under the Act.

¶ 70 "An expert may give his opinion based upon facts that are not in evidence if those facts are of a type reasonably relied upon by experts in the particular field." *People v. Nieves*, 193 Ill. 2d 513, 527-28 (2000) (citing *Wilson v. Clark*, 84 Ill. 2d 186, 193 (1981)). "While the contents of reports relied upon by experts would be inadmissible as hearsay if offered for the truth of the matter asserted, an expert may disclose the underlying facts and conclusions for the limited purpose of explaining the basis for his opinion." *Id.* at 528.

¶ 71 Respondent argues that in the absence of a limiting instruction here, the jury was allowed to consider the hearsay evidence of the facts underlying his prior convictions and the incident where he defecated on the floor as substantive evidence. Respondent waived review by failing to request the limiting instruction at trial (*Enoch*, 122 Ill. 2d at 186); respondent argues for plain error review under the second prong.

No. 1-11-2300

¶ 72 There was no plain error in the failure to give a limiting instruction. *In re the Detention of Isbell*, 333 Ill. App. 3d 906 (2002), is instructive. Isbell appealed from an order committing him to the Department of Human Services pursuant to the Act. *Id.* at 908. Isbell argued that the trial court erred by admitting expert testimony regarding the contents of certain reports without a limiting instruction informing the jury that the testimony was admitted to show the basis of the experts' opinions. *Id.* at 913. The appellate court found no prejudicial error where "[t]he People were very thorough in prefacing the expert's testimony by asking them if they relied upon the reports in forming their opinions and whether it was common for experts in their field to rely on such reports." *Id.* at 914.

¶ 73 In the present case, Dr. Buck and Dr. Quackenbush each testified that in evaluating respondent, they reviewed thousands of documents contained in the master file, including medical records, police records, court records, and records from the Department of Human Services. Dr. Buck and Dr. Quackenbush each testified that it was common for experts in their field to rely on such documents and records. Included in those records were reports detailing the facts of respondent's three prior convictions for sexual offenses. Respondent committed the first offense in 1975, when he approached a 14-year-old boy with a gun, forced the boy to let respondent inside his apartment, and then sexually assaulted the boy's mother. Respondent committed the second offense about three weeks after his release from prison in 1979, when he climbed through the window of an apartment and sexually assaulted a woman (identified as his half-sister by Dr. Buck and as his stepsister by Dr. Quackenbush) at knifepoint. Respondent committed the third offense about one year after his parole in 1985, when he sexually assaulted a young woman while holding a screwdriver

No. 1-11-2300

to her throat.

¶ 74 Dr. Buck testified respondent's behaviors during the three sexual offenses showed that he repeatedly used weapons during his sexual assaults, he never expressed any remorse for his actions, and his pattern of violence was continuing to escalate. Dr. Buck testified said behaviors were a significant basis for her opinion that respondent suffered from paraphilia, not otherwise specified, sexually attracted to non-consenting females, non-exclusive type, a mental disorder making it substantially probable he will engage in future acts of sexual violence and, thus, should be civilly committed under the Act. Dr. Quackenbush gave similar testimony that respondent's behaviors during his three prior offenses were a significant basis for his opinion that respondent should be civilly committed under the Act.

¶ 75 Dr. Buck also testified that in determining respondent should be civilly committed under the Act, one of the bases of her opinion was a report that on January 19, 2009, respondent argued with another inmate over some napkins and then proceeded to defecate on the floor. Dr. Buck explained that respondent's action of defecating on the floor demonstrated his continued inability to manage his emotions and feelings, contributing to her finding that his mental illness makes it substantially probable he will be unable to prevent himself from engaging in future acts of sexual violence.

¶ 76 In accordance with *Isbell*, the trial court's failure to give a limiting instruction did not constitute reversible error, where Dr. Buck and Dr. Quackenbush made clear in their testimony that the facts contained in the reports of respondent's three prior convictions and the incident where he defecated on the floor were being testified to in order to show the basis of their opinions that respondent should be civilly committed under the Act.

No. 1-11-2300

¶ 77 Next, respondent contends the State made improper remarks during closing arguments, when it argued the facts of respondent's prior convictions as substantive evidence instead of as the basis of Dr. Buck's and Dr. Quackenbush's expert testimony. In an action for civil commitment under the Act, "[t]he prosecution is afforded wide latitude in making closing arguments so long as the comments made are based on the evidence or reasonable inferences drawn therefrom. \*\*\* When we review a challenge to remarks made by the prosecution during closing arguments, the comments must be considered in context of the entire closing arguments made by both parties." *In re the Commitment of Kelley*, 2012 IL App (1st) 110240, ¶ 42. We will not reverse the jury's verdict under the Act based upon improper remarks made during closing arguments unless they were of such magnitude that they resulted in substantial prejudice to respondent. *Id.*

¶ 78 Respondent waived review of this issue by failing to object to the closing arguments at trial. *Enoch*, 122 Ill. 2d at 186. Respondent argues for plain error review under the second prong.

¶ 79 There was no plain error here. Examined in their entirety, the State's closing argument adequately reflected that the facts of respondent's convictions had been testified to in order to show the basis of Dr. Buck's and Dr. Quackenbush's opinions that respondent was a sexually violent person under the Act. Specifically, we note the following comments by the State:

"You've heard two doctors, two experts in the area of psychology tell you that he suffers from paraphilia NOS and it's paraphilia non-consenting adults. One doctor told you it was non-consenting females because she considered the prior convictions. The other doctor told you it was non-consenting adults because he was considering the incident that happened in jail.

No. 1-11-2300

So does he [suffer] from a mental disorder? You have two people tell you that he does. He suffers, he has sexually deviant thoughts. He acts on these sexually deviant thoughts with women who don't want to have sex with him. He doesn't just have thoughts about this. He acts on it, and we know he acts on these things. He has urges and fantasies about assaulting or having non-consensual sex. We know this because he has violently assaulted at least three people that I can tell you about today.

It was a violent sexual assault in 1975 when he tied up the little boy and raped the mother in another room. He acted on an urge, a sexually deviant urge, and that's evidence of paraphilia.

He acted then three weeks out of jail. He acted on his sexual urge again when he took the knife and climbed in his half-sister's room and raped her. That is sexually deviant behavior that's a symptom of paraphilia. And that's what the doctor said.

And the third time he again had a sexual fantasy that he acted on.

The whole problem here, people, is that he acts out on his urges. And it's dangerous to him, and he cannot control his urge.

\* \* \*

They are deviant sexual behaviors that he just can't control. He uses weapons. He threatens to kill people. He has manifestations of his mental disability.

The doctors took into consideration the risk that he posed to society because of his mental disorder. They have used actuarial tools. They told you about that, to decide whether they think he is substantially probable to act on these urges if he gets out of custody again.

No. 1-11-2300

They told you based on all the violent behavior, defecating and stripping naked and lighting himself on fire, and the raping in jail, \*\*\* those are the things that they pointed out from the stand today in all the 5,000 records as some of the things they looked at.

There is a pattern of violent behavior that he has exhibited. That is evidence that he is suffering from paraphilia.

Is he—the third element is \*\*\* the respondent dangerous because he has this mental disorder. And is he substantially probable to engage in acts of sexual violence. \*\*\* You have two experts that told you that's exactly what is going to happen. He is dangerous because of his mental disorder. They've used actuarial tools to determine that. They've looked at all the different things in all the records. They've looked at his lack of treatment. They even looked at his participation in treatment. And after looking at everything, that's what they're telling you."

¶ 80 During rebuttal arguments, the State argued:

"We \*\*\* have to prove to you beyond a reasonable doubt that the respondent has a mental disorder, the paraphilia. Mr. Howard in 1975 at gunpoint, took a young boy into his home, tied up the young boy in the living room and took the mother into the bedroom. Quite a bit of time elapsed from the time he got the kid off the street at gunpoint and took the mother into the bedroom and raped her. And, yes, at the time that offense was called rape.

Dr. Buck testified about, and Dr. Quackenbush as well, that the crime, you don't just look at the crime, the rape itself. You look at the behavior surrounding the rape. He went to prison. He got out. And three weeks later, got into his half-sister's house and raped her

No. 1-11-2300

with a knife \*\*\*.

Again, they weren't just looking at the rape, the conviction of rape, they were looking at the behaviors that led to that. He wasn't just simply in the room with her or that wasn't the testimony. The testimony was he entered the house, either had or got a knife and went to her and committed the sexually violent offense. It's the behavior. It's not just the offense.

He went to prison again, got out and a year later, met someone, a stranger, as Dr. Buck said, who he hadn't known for 24 hours. She thought he looked okay. She got in a car with him. And he found a screwdriver and brutally assaulted her at least twice that we know of.

Dr. Quackenbush and Dr. Buck looked at all of the behaviors surrounding these offenses. They also looked at what took place in prison. They also looked at his behavior in the Department of Corrections. But they looked at his sexually deviant behavior and compared it to the criteria that you need for paraphilia and determined to a degree of psychological certainty that he is substantially probable, that he has the paraphilia, and that he is dangerous because the paraphilia makes it substantially probable, and they described that for you.

\* \* \*

We believe that [we] met our burden of proof. You've heard the testimony. You will go back to the jury room and recollect what Dr. Buck and Dr. Quackenbush related as to how they reached their diagnosis and how they reached their risk assessment."

No. 1-11-2300

¶ 81 Considered in its entirety, the State was arguing to the jury that the behaviors underlying respondent's prior convictions provided the basis for Dr. Buck's and Dr. Quackenbush's opinions that respondent suffered from paraphilia, making him substantially probable to commit future acts of sexual violence and, thus, was a sexually violent person under the Act who should be committed. The State's comments accurately reflected Dr. Buck's and Dr. Quackenbush's testimony and the limited purpose for which it had been admitted and did not constitute plain error.

¶ 82 Respondent argues that the State misstated the evidence when, in commenting on respondent's 1975 conviction for raping a 14-year-old boy's mother, the State referenced the 14-year-old as a "little boy." Respondent waived review by failing to object thereto (*Enoch*, 122 Ill. 2d at 186); further, we cannot say that the State's comment denied him a fair trial under the second prong of the plain error rule (which is the only prong argued by respondent on appeal).

¶ 83 Respondent also argues that the State misstated the evidence when, in commenting on respondent's conviction for sexually assaulting a young woman while armed with a screwdriver, it stated that respondent brutally assaulted her "at least twice *that we know of*", thereby inappropriately intimating that respondent committed other sexual offenses for which no evidence was presented at trial. Respondent waived review by failing to object (*id.*), and we cannot say the State's isolated comment denied respondent a fair trial under the second prong of the plain error rule.

¶ 84 Respondent argues that the "cumulative effect" of all the trial court's errors addressed earlier in this order "was serious enough to constitute plain error" under the second prong of the plain error doctrine. For all the reasons discussed earlier in this order, neither the individual nor cumulative effect of the alleged errors rises to the level of plain error.

No. 1-11-2300

¶ 85 Next, respondent argues his trial counsel provided ineffective assistance by: (1) failing to request that the venire be questioned as to the fourth *Zehr* principle, *i.e.*, that his decision not to testify cannot be held against him; (2) failing to object to the trial court's comments during *voir dire* which improperly compared his trial to a criminal prosecution and implicitly invited the venire to determine his moral blameworthiness, which advised potential jurors that his prior convictions were a "given" and not in dispute, and which stated that the presumption he is not a sexually violent person remains with him "until" it is overcome by the State; (3) failing to request a limiting instruction regarding Dr. Buck's and Dr. Quackenbush's testimony about respondent's prior convictions; and (4) failing to object to the State's closing arguments regarding Dr. Buck's and Dr. Quackenbush's testimony.

¶ 86 In *People v. Rainey*, 325 Ill. App. 3d 573 (2001), we held that a respondent under the Act is entitled to effective assistance of counsel as measured by the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). First, respondent must show "counsel's representation fell below an objective standard of reasonableness" (*Strickland*, 466 U.S. at 688), and second, that he was prejudiced such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688.

¶ 87 To prevail on his claim of ineffective assistance, respondent must satisfy both prongs of the *Strickland* test. If we can dispose of respondent's ineffective assistance claim because he suffered no prejudice, we need not address whether his counsel's performance was objectively reasonable. *Rainey*, 325 Ill. App. 3d at 586.

¶ 88 Respondent's trial counsel committed no ineffective assistance. With respect to respondent's

No. 1-11-2300

claim that his counsel failed to request that the venire be questioned regarding the fourth *Zehr* principle, we note our holding earlier in this order that *Zehr* does not apply here because proceedings under the Act are technically civil in nature. Further, as we discussed, even if *Zehr* did apply, there has been no showing of any jury bias and, accordingly, no prejudice suffered by respondent.

¶ 89 With respect to respondent's claim that his counsel was ineffective for failing to object to the court's allegedly improper remarks during *voir dire* comparing his trial to a criminal prosecution and implicitly inviting the venire to determine his moral blameworthiness, we note our holding earlier in this order that the court's comments did not improperly compare respondent's trial to a criminal prosecution and/or did not invite the venire to determine his moral blameworthiness. Accordingly, trial counsel's failure to object to said comments was not objectively unreasonable and did not constitute ineffective assistance.

¶ 90 With respect to respondent's claim that his counsel was ineffective for failing to object to the trial court's comments during *voir dire* that respondent's prior convictions were a "given" and not in dispute, we note our holding earlier in this order that the parties were not disputing the occurrence of the prior convictions. Accordingly, the trial court's comments were accurate, and trial counsel's failure to object thereto was not objectively unreasonable and did not constitute ineffective assistance.

¶ 91 With respect to respondent's claim that his counsel was ineffective for failing to object to the trial court's comments during *voir dire* that the presumption he is not a sexually violent person remains with him "until" it is overcome by the State, we note our holding earlier in this order that the court's comments were not erroneous, and that even if error occurred, it was cured by the court's

No. 1-11-2300

subsequent jury instruction clarifying that the presumption remains with respondent "unless" it is overcome by the State. Accordingly, trial counsel's failure to object to the trial court's comments was not objectively unreasonable and did not prejudice him, and therefore did not constitute ineffective assistance.

¶ 92 With respect to respondent's claim that his counsel was ineffective for failing to request a limiting instruction to the jury that Dr. Buck's and Dr. Quackenbush's testimony about respondent's prior convictions was admitted only to show the basis of their opinions that he was a sexually violent person under the Act, we note our holding earlier in this order that no reversible error occurred by the failure to give the limiting instruction where the experts' testimony made clear the limited basis for which it was admitted. Accordingly, trial counsel's failure to request a limiting instruction did not prejudice respondent and did not constitute ineffective assistance.

¶ 93 With respect to respondent's claim that his counsel was ineffective for failing to object to the State's closing arguments regarding Dr. Buck's and Dr. Quackenbush's testimony about his prior convictions, we note our holding earlier in this order that the State's comments were an accurate representation of their testimony and of the limited basis for which it had been admitted. Accordingly, trial counsel's failure to object thereto was not objectively unreasonable and did not constitute ineffective assistance.

¶ 94 Respondent argues that the "cumulative effect" of his counsel's errors constituted ineffective assistance. For all the reasons discussed earlier in this order, neither the individual nor cumulative effect of the alleged errors constituted ineffective assistance.

¶ 95 For the foregoing reasons, we affirm the trial court.

No. 1-11-2300

¶ 96 Affirmed.