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SIXTH DIVISION
January 19, 2018

No. 1-15-0918
2018 IL App (1st) 150918-UB

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re COMMITMENT OF ADAM HALL	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Cook County.
	)	
Petitioner-Appellee,	)	
	)	No. 09 CR 80003
v.	)	
	)	
Adam Hall,	)	Honorable
	)	Thomas J. Byrne,
Respondent-Appellant).	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

Held: State's comments in opening and closing arguments were not plain error or improper; evidence was sufficient to prove beyond a reasonable doubt that respondent was a sexually violent person; affirmed.

¶ 1 Following a jury trial, respondent Adam Hall was found to be a sexually violent person under the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 *et seq*. (West 2008)), and was committed to the custody and care of the Department of Human Services (DHS). In a previous opinion, we concluded that we could not address the merits of respondent's

appeal because respondent did not timely file a postjudgment motion that would have tolled the deadline for filing a notice of appeal. *People v. Hall*, 2017 IL App (1st) 150918, ¶ 18. We also found that the circuit court did not have jurisdiction to address respondent's posttrial motions. *Id.* ¶ 16. On September 27, 2017, our supreme court entered a supervisory order that directed us to vacate our judgment and proceed as though the circuit court had jurisdiction of respondent's posttrial motions, reinstate the appeal, and consider the appeal on the merits. We now vacate our prior judgment and consider on the merits the issues that respondent raises on appeal. Respondent contends that: (1) he was denied a fair trial where the State made improper remarks in its opening and closing arguments and (2) the evidence was insufficient to prove beyond a reasonable doubt that he is a sexually violent person. We affirm.

¶ 2 I. BACKGROUND

¶ 3 The record reveals that in 2000, when respondent was approximately 15 years old, he was charged with criminal sexual assault, attempted first degree murder, unlawful restraint, and aggravated battery with a firearm. Respondent ultimately pled guilty to sexual assault and attempted first degree murder and was sentenced to 10 years in prison. Shortly before respondent's release, on July 31, 2009, the State filed a petition under the Act to have respondent adjudicated a sexually violent person and committed to the care and custody of DHS. The petition alleged that respondent had previously been found guilty of the sexually violent offense of aggravated criminal sexual assault. The petition further stated that respondent had been diagnosed with "Paraphilia NOS, Non-consenting Persons," which was a congenital or acquired condition affecting respondent's emotional or volitional capacity that predisposed respondent to commit acts of sexual violence. An evaluation indicated that respondent was dangerous because

his mental disorder made it substantially probable that he would engage in acts of sexual violence.

¶ 4 The matter proceeded to a jury trial that began on May 13, 2014. In its opening statement, the State asserted in part as follows. Respondent was evaluated by two doctors who reviewed information about respondent's background, looked for patterns of behavior, and concluded that respondent was a sexually violent person. Respondent first had contact with the criminal justice system when he was 13 years old. The jury would "hear why that is important from the testimony from the doctors." Respondent's antisocial acts continued and he was subsequently arrested for unlawful use of a weapon. The State contended, "What you are going to see, what the doctors relied on is this pattern of behavior that continues to escalate and grow."

¶ 5 The State discussed respondent's sexual offenses, beginning with a summary of the first offense that occurred in 1999 with a 14-year-old victim. "The facts from that case that the doctors relied on" were that respondent saw the victim talking to another man, whereupon respondent became angry. Respondent punched the victim and dragged her to a building where he orally, vaginally, and anally raped her. While that offense was pending, respondent committed another sexually violent offense, which involved a 23-year-old EMS worker "that he strikes over the head, bites, pulls to a yard, pulls out her hair, and hits her with a brick trying to subdue her to obtain sex." The State maintained that "[t]hese are the facts that the doctors are looking at to see this pattern of offending."

¶ 6 The next sexual offense occurred when respondent was 15 years old and was noted in the State's commitment petition. Respondent asked a 19-year-old to be his girlfriend, and when he did not like the response, he choked her in her apartment building. As respondent was raping the victim in a hallway, the victim's family heard her screaming and tried to intervene, whereupon

respondent took out a gun and shot the victim's cousin. The State contended, "So this pattern of behavior and his escalation that [the doctors are] going to tell you about, you can see it building."

¶ 7 The State also discussed the doctor that was expected to testify for respondent, as well as how each doctor used actuarial instruments and other factors to predict respondent's likelihood to reoffend. Respondent had not completed sex offender-specific treatment and the jury would "hear why that is so important."

¶ 8 In his opening statement, respondent's counsel contended in part as follows. The presumption that respondent was not a sexually violent person remained with him throughout the trial. While respondent's offenses were "horrific and shocking," they were not the focus of the case, which was actually about predicting the future. Further, there was reasonable doubt that respondent suffered from a mental disorder and whether the mental disorder made it substantially probable that he would engage in future acts of sexual violence.

¶ 9 The State's case consisted of testimony from two expert witnesses, Dr. Richard Travis and Dr. Barry Leavitt. Dr. Travis testified that he was a licensed clinical psychologist and DHS evaluator for sexually violent persons. Dr. Travis conducted a clinical evaluation of respondent on behalf of DHS to determine if he was a candidate for commitment under the Act. Respondent declined to be interviewed, but Dr. Travis reviewed police reports, court documents, previous evaluations, and records from DHS and the Department of Corrections. Dr. Travis stated that there was no impropriety in conducting an evaluation without an interview. The court allowed Dr. Travis to testify in part to records so that he could tell the jury what he relied on to form his opinion. The material could not be considered evidence and the jury could consider the material to decide what weight, if any, to give the doctor's opinions.

¶ 10 Dr. Travis summarized respondent's prior offenses. In 1999, respondent was charged as a juvenile with aggravated battery and unlawful use of a weapon, for which he received 18 months' probation. Respondent also committed three sexual offenses. The first such offense occurred in June 1999, when respondent was 14 years old. Respondent approached a 14-year-old female with whom he was acquainted and knocked her to the ground. Respondent then took her to a back porch area of his home, where he orally, vaginally, and anally raped her. In September 1999, respondent dragged a 23-year-old female EMT to a vacant lot, where he beat, bit, and tried to rape her before she fled. Dr. Travis stated that respondent was on probation when he committed those two sexual offenses. Respondent's last sexual offense occurred when he was 15 and involved a 19-year-old female victim. In a stairwell, respondent started choking the victim and then removed her clothes and pulled his pants down to his ankles. Eventually, the victim's cousin came out of a neighboring apartment and confronted respondent. Respondent and the cousin struggled and respondent ultimately shot the cousin four times. Respondent pled guilty to aggravated criminal sexual assault and attempted first degree murder and was sentenced to concurrent 10-year sentences in the Department of Corrections.

¶ 11 Dr. Travis also testified about respondent's disciplinary records from the Department of Corrections, which indicated that respondent had incurred multiple major and minor violations. The violations included three incidents of threats and intimidation and one incident of battery to another person. Respondent was also involved in disciplinary infractions in DHS custody, including two batteries against other residents and an incident of interfering with facility operations. Respondent committed one of the batteries while he knew that he was being evaluated for sexually violent person proceedings, "[s]o while he knows that his life is on the line, he continues to violate those kinds of rules."

¶ 12 Using the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, (58) Dr. Travis diagnosed respondent with two mental disorders under the Act: (1) other specified paraphilic disorder, sexually attracted to non-consenting females in a controlled environment, and (2) antisocial personality disorder. Dr. Travis explained that someone with other specified paraphilic disorder has sexual urges, interests, and behaviors directed toward females who do not consent. Dr. Travis noted that in a prior edition of the Diagnostic and Statistical Manual of Mental Disorders, there was a category called paraphilia not otherwise specified. The nomenclature changed in the fifth edition. Dr. Travis asserted that the violence involved in respondent's offenses was a factor in the diagnosis because respondent engaged in more violence than was needed to get compliance. Dr. Travis stated that 14- and 15-year-old offenders usually do not engage in the level of violence that respondent demonstrated when committing sexual offenses. Dr. Travis also explained the term "controlled environment" that was used in the diagnosis. He stated that for many years, respondent had been in the Department of Corrections or in DHS custody. One of the reasons that respondent had not acted out sexually in those facilities was that respondent did not have unrestricted access to women.

¶ 13 As for antisocial personality disorder, Dr. Travis stated that the disorder involves repeated violations of other people's boundaries and a disregard for other people and their boundaries over a long period of time. To be diagnosed, respondent had to display three of seven criteria and respondent displayed many more than three.

¶ 14 To assess respondent's risk of re-offending, Dr. Travis examined risk factors from three actuarial instruments—the Static-99, the Static-99R, and the Minnesota Sex Offender Screening Tool Revised (MnSOST-R). These instruments assign a number to various risk factors. Normally, an evaluator adds up the various factors to generate a score, which corresponds to a

percentage risk and places the person in a certain risk category. However, Dr. Travis used the instruments differently here due to respondent's age. The Static instruments specifically recommend that they should not be used with someone who committed the crime before he turned 16 years old, but also states that the instruments can be used for someone who is 16 or 17 if the crimes were adult in nature. Dr. Travis also asserted that the Static-99's coding rules state that in certain cases, the instrument may be useful with juvenile sex offenders if used cautiously, and he used it "[e]xtremely cautiously." Because respondent was not yet 16 when he committed his last offense, Dr. Travis did not come up with a percentage risk because that would have gone against the instruments' recommendations. The risk factors included in the instruments are associated with a higher risk of offending for both juveniles and adults, so Dr. Travis looked at the factors that respondent presented and found that respondent had many of them—"much higher than average." Dr. Travis stated that respondent's score would have been an eight on the Static-99, which was two above the cut-off for the high-risk category, and a nine on the Static-99R, which was three above the cut-off for the high-risk category. On the MnSOST-R, respondent's score was above 13, which placed him in the highest risk category.

¶ 15 Dr. Travis also examined dynamic risk factors, which can change with time and included a deviant sexual preference, respondent's antisocial personality disorder, poor problem solving, problems in intimate relationships, respondent reportedly being intoxicated during his offenses, and that respondent started sexually offending at such a young age. Additionally, Dr. Travis looked for protective factors that would reduce respondent's risk. These included respondent's age, whether he had engaged in sex offender treatment, and whether he had any kind of health condition. Dr. Travis found that no factors reduced respondent's risk. As for the significance of sex offender treatment, Dr. Travis stated that a person's sexual preferences and tastes do not

change much once established, and treatment helps a person manage his sexual problems and teaches coping skills so that the person is "less likely to go out and take things from other people." Respondent had not participated in any sex offender treatment in the community or while in prison. When respondent was a juvenile, it was recommended that he attend sex offender treatment, but he did not do so. Overall, Dr. Travis concluded that respondent had a substantial probability of future sexual violence, meaning that it was much more likely than not that he would re-offend. Further, respondent was at a substantial risk to sexually re-offend because of his mental disorders.

¶ 16 On cross-examination, Dr. Travis stated that respondent's records did not indicate that he had committed sexual offenses in juvenile custody, Cook County Jail, or the Department of Corrections, although women were present in all three locations. Dr. Travis also stated that in DHS custody, respondent had some contact with women, including female guards and mental health professionals, and he had not acted out sexually. Dr. Travis maintained that the fact that respondent did not engage in sexual misconduct in a controlled environment did not reduce his risk of re-offending.

¶ 17 Respondent's counsel also cross-examined Dr. Travis about respondent's prior contact with mental health professionals. Dr. Travis stated that at one time, respondent was diagnosed with conduct disorder, which was a juvenile diagnosis. In Cook County Jail, respondent was visited by mental health professionals at intake and potentially other times, but there was no documentation indicating that respondent was diagnosed with a mental disorder. In the Department of Corrections, respondent had access to mental health professionals and would have gone through an intake process. Further, a mental health professional would have interviewed respondent if he was on suicide watch, and Dr. Travis acknowledged that respondent attempted

suicide at some point. Nonetheless, respondent's records from the Department of Corrections did not indicate that he was diagnosed with a mental disorder. Since 2000, the first reference of a diagnosis was after respondent completed his prison sentence.

¶ 18 Dr. Travis agreed that most of the time, a 29-year-old man was more mature than a 14- or 15-year-old teenager. Dr. Travis also acknowledged that the MnSOST-R instrument was developed on a population of adult male incarcerated sex offenders and had not been validated for other populations, including juveniles. Dr. Travis recognized that while incarcerated or detained, respondent had obtained a GED and participated in anger management counseling and vocational skills training.

¶ 19 The State's other expert witness was Dr. Leavitt, a clinical and forensic psychologist who completes sexually violent and sexually dangerous persons evaluations. The court allowed Dr. Leavitt to testify in part to records so that Dr. Leavitt could tell the jury what he relied on to form his opinion. The material could not be considered evidence and the jury could consider the material to decide what weight, if any, to give to Dr. Leavitt's opinions.

¶ 20 Respondent declined to be interviewed, but Dr. Leavitt reviewed other materials, including respondent's certified statement of convictions, police and investigative reports, victim statements, juvenile records, and records from the Department of Corrections. Dr. Leavitt stated that a document review is an acceptable form of evaluation.

¶ 21 Dr. Leavitt testified about respondent's juvenile non-sexual offenses and stated that those offenses spoke to a very early onset of significant behavioral problems and a gradual movement from antisocial behaviors to actual violent episodes. Respondent had a history of early alcohol and illegal drug use as well as a history of selling illegal drugs. Dr. Leavitt noted that respondent committed his first sexually violent offense at the age of 14, when he forced a 14-year-old victim

to orally copulate and perform anal and vaginal intercourse. Shortly afterwards, in a further escalation of sexually violent behavior, respondent confronted a 23-year-old EMT, struck and bit her, and tried to sexually assault her before she fled. Respondent was subsequently committed to the juvenile division of the Department of Corrections, where he was assessed for his risk of sexually re-offending, but Dr. Leavitt did not recall seeing records of treatment.

¶ 22 After respondent, then 15 years old, was discharged, he committed another sexual offense. When the 19-year-old victim refused to be his girlfriend, respondent struck her, choked her, and forced her to the ground and performed sexual intercourse. As the victim yelled for help, her male cousin tried to intervene and struggled with respondent, whereupon respondent pulled out a gun shot the cousin in the chest. Respondent served 10 years in the Department of Corrections for aggravated criminal sexual assault and attempted murder. Dr. Leavitt stated that respondent's sexual offenses were more typical of an adult offender.

¶ 23 Dr. Leavitt found that respondent's antisocial traits continued in the Department of Corrections and DHS custody. Specifically, respondent displayed poor impulse control, a quick temper, disdain for authority and rules, and he engaged in acts of defiance. Respondent's disciplinary history in the Department of Corrections indicated that respondent received major disciplinary infractions for acts of intimidation and threats. Respondent also engaged in altercations with acts of marked defiance in dealing with orders and/or particular conditions that were placed on him. In DHS custody, respondent had numerous disciplinary problems for the first several years, including incidents of intimidation and threats, insolence, battery, and failures to comply with rules. Until 2013, there was a general reduction in respondent's behavioral problems. In September 2013, respondent received an incident report that reflected his dealing

with frustration and stress through threats and intimidation. There, in response to observing masturbatory behavior from his cellmate, respondent threatened to split open his cellmate's head.

¶ 24 According to Dr. Leavitt, respondent suffered from antisocial personality disorder, which includes a pervasive disregard for the rights of others and societal rules and regulations. Dr. Leavitt stated that respondent had an early childhood onset to very serious and escalating behavioral problems and in his adolescence, and as a young adult and adult, continued to manifest many features of the diagnosis, both with respect to his offenses and in a correctional setting. Dr. Leavitt believed that antisocial personality disorder may be the driving force behind respondent's infliction of sexual violence on others. Dr. Leavitt also explained that a person can change and progress, but antisocial personality disorder is often a very chronic condition, particularly if a person does not attempt to address it through meaningful treatment. Dr. Leavitt also stated that it was not uncommon for a sex offender and someone who has violent tendencies not to engage in that behavior while incarcerated.

¶ 25 Dr. Leavitt also found evidence of three rule-out diagnoses, which are additional diagnoses that need to be ruled out at a further time with additional information. One of the rule-out diagnoses for respondent was paraphilia not otherwise specified, sexually attracted to non-consenting persons. Dr. Leavitt made that finding under the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders and explained that in the fifth edition, the disorder was called other specified paraphilic disorder.[1] The record indicated the diagnosis because the degree of violence that was incorporated into respondent's sexual offenses was "over the top" and far beyond what was needed to gain compliance. Still, Dr. Leavitt did not have sufficient information to clearly establish the diagnosis. Dr. Leavitt would have wanted the results of

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[1] For consistency, we will hereinafter refer to the diagnosis as other specified paraphilic disorder.

testing that could actually evaluate respondent's patterns of sexual arousal and to have talked with respondent about his sexual history and fantasies.

¶ 26 Dr. Leavitt further testified that he conducted a wide-ranging risk assessment, which was made more complicated because of respondent's age at the time of his sexual offenses. Dr. Leavitt looked at adult-based and adolescent-based instruments and factors. One instrument that Dr. Leavitt used was the Static-99R, an adult sex offender screening tool that included among its sample groups a certain number of adolescent sex offenders. Respondent scored a 9 on the Static-99R, which placed him in the high-risk category. Dr. Leavitt explained that the information from the Static-99R can be helpful, but it was essential to look at other pieces of information to make a decision. Dr. Leavitt also used a juvenile sex offender instrument called the JSORRAT. There, respondent scored a 13, which placed respondent in the high-risk category.

¶ 27 After using these two instruments, Dr. Leavitt examined the adult and adolescent sex offender research literature for additional risk factors. From the adult research, Dr. Leavitt found that respondent had a history of sexualized violence, offense-supported attitudes, minimization, denial, and externalization of blame. Dr. Leavitt also saw evidence of very poor problem solving skills and abilities, a tendency to be impulsive, and a resistance to rules and supervision. Relevant juvenile risk factors included sexual entitlement and seeking sexual satisfaction through inappropriate means. Dr. Leavitt noted that respondent had a general tendency to easily anger and strike out when denied what he wants, as well as difficulties controlling his sexual impulses. Respondent also displayed disdain for rules and regulations, refused to comply with authority, and was hostile and angry. Dr. Leavitt went on to discuss factors that could lower respondent's risk of re-offending, which include age, whether he completed meaningful sex offender

treatment, and any life-threatening health conditions. None of those factors applied to respondent. Dr. Leavitt noted that respondent had not participated in any sex offender-specific treatment, which is the most demonstrated and documented way for a person to reduce his risk. In Dr. Leavitt's opinion, respondent had a substantial probability of re-offending in the future, in that he was much more likely than not to sexually re-offend. Dr. Leavitt further stated that respondent was dangerous because his antisocial personality disorder made it substantially probable that he would commit a future act of sexual violence.

¶ 28 On cross-examination, Dr. Leavitt acknowledged that respondent had contact with women in the juvenile facility, Cook County Jail, Department of Corrections, and DHS, and there was no documentation in his records of acting out sexually. Dr. Leavitt also stated that respondent was routinely visited by mental health professionals in the different settings. However, respondent was not formally evaluated for a mental disorder in the juvenile facility and was not diagnosed with a mental disorder when he was in the Cook County Jail. Respondent also was not formally assessed, evaluated, or given a diagnosis in the Department of Corrections. Dr. Leavitt explained that mental health professionals are available in the Department of Corrections, but respondent did not have regular and ongoing contact with them. At the same time, respondent would have received a cursory evaluation upon arrival and respondent's suicide attempt would have probably prompted mental health attention. Dr. Leavitt further stated that the brain physically matures as a person moves from adolescence into adulthood.

¶ 29 Dr. Leavitt was also cross-examined about his use of risk assessments. He admitted that the coding rules for the Static-99 state that in most cases, the instrument should not be used for people under 16 years old. Yet, Dr. Leavitt believed there was an exception if the evaluator used a great deal of caution. Dr. Leavitt additionally noted that the guidelines indicate that the

instrument may have some validity when the offenses are more adult in nature. Dr. Leavitt stated that the Static-99R should be used as part of a wide-ranging assessment and that overall, the results should be taken "with a grain of salt."

¶ 30 Respondent's counsel asked about the impact of respondent furthering his education while incarcerated and participating in anger management and substance abuse treatment. Dr. Leavitt described education as a positive step that did not speak to risk reduction. He also stated that anger management would be important along with multiple other interventions and any relevant substance abuse treatment would be potentially beneficial. Dr. Leavitt noted that in DHS custody, respondent's behavioral problems reduced over time and respondent was acting out much less frequently.

¶ 31 Following Dr. Leavitt's testimony, the State entered into evidence a certified copy of respondent's conviction for aggravated criminal sexual assault.

¶ 32 Dr. Diane Lytton, a forensic psychologist, testified as an expert for respondent. As it did with the State's experts, the court told the jury that Dr. Lytton would be allowed to testify about records so that Dr. Lytton could tell the jury what she relied on to form her opinion. The material being referred to was not evidence and the jury could consider the material to decide what weight, if any, to give Dr. Lytton's opinions.

¶ 33 Dr. Lytton's evaluation included an interview with respondent and a review of records of his criminal history and records from the Department of Corrections and DHS, totaling several thousand pages. Dr. Lytton stated that most of respondent's criminal activity stemmed from respondent wanting to impress the older boys that he was associating with. Dr. Lytton stated that in respondent's first sexual offense, a 14-year-old female victim refused to have sex with respondent, and respondent admitted to Dr. Lytton that he forced her to perform oral sex and

vaginally raped her. Three months later, respondent struck, beat, and attempted to rape an EMT. When respondent was 15 years old, he forced a 19-year-old female victim to have sex with him on a porch, whereupon the victim's relative encountered respondent and attacked him. Respondent shot the relative about four times. Respondent told Dr. Lytton that he was extremely remorseful and attributed the offenses to being an impulsive kid. Dr. Lytton stated that the last part of the brain to develop is the section where judgment, impulsivity, and higher-level human functioning occurs.

¶ 34 Dr. Lytton also testified about respondent's time in the Department of Corrections. Respondent pursued his GED, participated in the academic olympics, received a computer skills certificate, and completed many certification programs, anger management courses, and food, sanitation, and safety courses. Respondent also participated in a substance abuse recovery program and various religious groups. Dr. Lytton described respondent's experience as "kind of a mix" because respondent did many positive things, but also had behavioral issues, especially in his younger years.

¶ 35 Dr. Lytton further found that respondent matured over time in the DHS facility. Although respondent had four or five records of behavior problems, he had done quite well, following the rules and holding down a job. Further, the DHS facility did not observe mental health concerns for respondent.

¶ 36 Dr. Lytton testified that respondent did not have any mental disorders. Respondent did not meet the criteria to be diagnosed with a sexual deviation disorder and the fact that respondent committed rapes did not mean that he had a mental illness. Dr. Lytton did not find any evidence that respondent had any persistent intense urges or fantasies to commit forced sex on someone

since his last offense in 1999. Dr. Lytton also did not find that respondent suffered from antisocial personality disorder.

¶ 37 Dr. Lytton's approach to determining the risk of re-offending is to examine if anything overrides juveniles' otherwise low risk of re-offending. There were no overriding factors for respondent, and so Dr. Lytton did not find that respondent was substantially probable to commit another sex offense. In reaching her conclusion, Dr. Lytton did not use any actuarial instruments because adult instruments should not be used on juvenile-only offenders and juvenile instruments should not be used on adults. Referring to specific instruments, Dr. Lytton asserted that the Static-99R's coding manual states that it was not developed on juvenile-only offenders whose last offense was at 15 years old. Thus, re-offense rates from the Static-99R are inaccurate. Dr. Lytton also asserted that the MnSOST-R is not for juvenile-only sex offenders and is an unreliable predictor. As for the JSORRAT, Dr. Lytton stated that some cross-validations had not shown that it predicts risk.

¶ 38 On cross-examination, the State asked Dr. Lytton about certain details of respondent's sex offenses. Dr. Lytton acknowledged that when describing his first offense, respondent did not admit to anal sex and her report did not include that anal sex was involved in the offense. Dr. Lytton also did not include in her report that respondent bit his second victim, but Dr. Lytton admitted that fact was important. Dr. Lytton added that she was aware of the details, but she typically does not list every detail of an offense. Dr. Lytton also acknowledged that her report stated that respondent may have been diagnosed or been able to be diagnosed with antisocial personality disorder at an earlier time. However, Dr. Lytton asserted that she did not evaluate him then and respondent did not presently meet the criteria for the disorder. According to Dr.

Lytton, antisocial personality disorder was not a life-long chronic disorder. Dr. Lytton also stated that she would see someone who committed a sex offense at some risk to re-offend.

¶ 39 After the close of testimony, the parties presented closing arguments. To begin its closing, the State asserted that in October 2000, respondent "did an action which ultimately has resulted in this matter being brought before this Court ***." The State continued:

> "[H]e sexually assaulted a young woman and then shot a relative of hers who was attempt together intervene [*sic*] in this. He was initially charged as a juvenile, ultimately these charges were upgraded to adult charges and subsequently he did plead guilty to aggravated criminal sexual assault and attempted first degree murder.
>
> The psychologist that evaluated him and performed evaluations looked at the record of these offense toss [*sic*] look at the conduct that were involved in these offenses."

The State further asserted that with regard to the 2000 offense, "the records indicated and what they were able to glean from the records" was that the victim was 19 years old and walking home with her sister when respondent approached. The State recounted other facts of the offense, including that respondent ultimately restrained the victim and "forcibly had sexual intercourse with her while he was choking her."

¶ 40 The State maintained that "the story here actually started before that" because respondent had prior sexually violent offenses. The State summarized the facts of respondent's first sexual offense, in which respondent "dragged [the victim] into an apartment and forcibly had sexual intercourse with her." Three months later, respondent committed a second sexual offense against an EMT, in which "[h]e bit her, he pulled her hair, he apparently threw a brick and hit her in the

back, he threatened her with a bottle, [and] ultimately began to have sexual intercourse with her" until she fled. The State contended that the offenses involved a significant degree of violence.

¶ 41 The State also commented on the requirement that respondent have a mental disorder. The State asserted that Dr. Travis and Dr. Leavitt found that respondent suffered from antisocial personality disorder and Dr. Travis found that respondent also suffered from other specified paraphilic disorder. As for respondent's risk of re-offending, the State noted the disagreement about using actuarial instruments on people who committed crimes as juveniles. The State maintained that its experts used the instruments with caution because they were combined with a variety of factors. According to the State, the most important factor was that every time respondent offended and was later released, he re-offended again.

¶ 42 The State also cast doubt on respondent's expert, Dr. Lytton, characterizing her evaluation as cursory and stating that her report minimized respondent's offenses by omitting many damaging details. The State added that Dr. Lytton "totally [neglected]" the facts of respondent's past and dismissed respondent's aggressive behavior in custody. Further, Dr. Lytton was incorrect that evaluators cannot use actuarial scoring on juvenile offenders. In contrast to Dr. Lytton, the State's experts were very credible and "bent over backwards" to give respondent the benefit of the doubt, but still found that respondent had a mental disorder and was substantially probable to re-offend. The State concluded that the evidence showed beyond a reasonable doubt that respondent was a sexually violent person.

¶ 43 Respondent's counsel stated in closing that the case was about predicting what respondent may or may not do. Respondent's counsel asserted that a person's mind changes between his young teenage years and his late twenties. Respondent's counsel further stated that respondent was only diagnosed with a mental disorder when he was about to be transferred to a

DHS facility in 2009. Yet, respondent had contact with mental health professionals in juvenile custody, the Cook County Jail, and the Department of Corrections. Also, while in custody or detained, respondent did not engage in any sexual offending toward women or inmates. Respondent's counsel noted that respondent had furthered his education and participated in self-help programs.

¶ 44 Respondent's counsel maintained that Dr. Lytton testified credibly and consistently that neither the diagnosis of antisocial personality disorder nor other specified paraphilic disorder was appropriate. Respondent's counsel disputed that respondent minimized his offenses when speaking with Dr. Lytton. Further, there was reasonable doubt about whether respondent had other specified paraphilic disorder because the State's experts voiced a difference of opinion about whether the diagnosis was appropriate. Respondent's counsel also asserted that because the State's experts did not place great reliance on actuarial instruments, the jury should not place very much reliance on the instruments either. Respondent's counsel concluded that there was reasonable doubt that respondent suffered from a mental disorder and that the disorder made it substantially probable that respondent would engage in acts of sexual violence.

¶ 45 In rebuttal, the State contended that psychology recognizes that the possibility of acting out is minimized when someone is in prison or otherwise detained. Even if someone suffers from a sexual deviance, he is unlikely to act out in a controlled environment. The State continued:

> "So that there is a reason why we haven't seen him hit his 14-year-old girlfriend or his peer on the street, in the chest and drag her to another room, or drag her to his apartment and rape her, there is a reason why we haven't seen him take an EMT, pull out her hair, bite her, hit her, strike her with a brick and rape her, there is a reason why we haven't seen him

> choking a girl in a stairwell in the Department of Corrections [or] in the [DHS facility]. None of those things have [been] available to him. There are rules and there are [structures], and that is why that deviate that you get, that deviate sexual interest and that paraphilia can be fed in those environments."

¶ 46 The State also maintained that the Act only requires that respondent suffer from one mental disorder. The doctors did not have to agree and the State further suggested that Dr. Leavitt was more reasonable by asking for more information about other specified paraphilic disorder. The State recalled that:

> "Remember that ruled out diagnosis isn't saying, oh, it's not there, it's saying, yes, that violence, the biting, the choking, the hitting, the pulling out the hair, that overabundance of violence to get the woman — girl, to submit to the sex act is disproportionate and shows a deviate sexual interest in the fact that you're getting off from the nonconsent, yes, I see those facts. We submit to you that both are present."

The State also noted that some jurors could think both antisocial personality disorder and other specified paraphilic disorder are present, while others could think only one disorder was present.

¶ 47 As to risk assessment, the State maintained the following:

> "I told you in the opening statement we're not talking about a crystal ball or an eight ball or tarot cards, we are talking about a risk assessment. The doctors look at the factors that the research has shown will increase risk or would increase his risk of reoffense or give him a risk of reoffense, and that is exactly what the doctors in this situation did. Again I ask you to

> pour over those jury instructions. You are not asked to predict anything, you are not asked to say when he's going to reoffend or if (inaudible), how he's going to do it, is it going to be *** an older woman, is it going to be a young kid, none of that[.]"

At that point, the court overruled an objection from respondent's counsel. The State continued:

> "All of the instructions, what the law says is that it's substantially probable, and that is that it's much more likely than not. And again we know what his offense and reoffense and recidivism rate is, it's not a hundred [percent], it's 200 percent, and it's 200 percent when he has been under the supervision of a court. He had juvenile intervention, *** he had probation running, and he had one case already charged that he was being supervised and released on when he commits another one. He does time on those juvenile offenses, have had some type of intervention and reoffense. His recidivism rate is beyond a hundred percent."

¶ 48 The State noted that it had the burden in the case and respondent did not "have to present one iota of testimony." However, when respondent presents evidence, the jury could judge it in the same way it would judge the State's evidence. The State then commented on various aspects of Dr. Lytton's testimony, including that Dr. Lytton left out that respondent's offenses included anal rape. The State asserted that:

> "Anal rape is one of the most offensive, it is beyond an oral copulation and vaginal rape, it is violent, it is egregious, and it goes beyond just needing sex, it is hurting someone else, it's hurting the other person. She leaves that out completely."

The State also asserted that Dr. Lytton left out other details from her report that would show respondent's desire for nonconsensual sex and a deviate sexual interest.

¶ 49 After closing arguments, the court provided the jury with instructions that included the following:

> "Opening statements are made by the attorneys to acquaint you with the facts they expect to prove. Closing arguments are made by the attorneys to discuss the facts and circumstances in the case and should be confined to the evidence and to reasonable inferences to be drawn from the evidence. Neither opening statements nor closing arguments are evidence, and any statements or argument made by the attorneys which is not based on the evidence should be disregarded.
>
> * * *
>
> I have allowed witnesses to testify in part to records. These materials have not [been] admitted in evidence. This testimony was allowed for a limited purpose. It was allowed so the doctors may tell you what he or she relied on to form your [*sic*] opinion. The material being referred to is not evidence in this case and may not be considered by you as evidence. You may consider the material for the purpose of deciding what weight if any you will give the opinions testified to by these witnesses.
>
> * * *
>
> To sustain the charge that the Respondent is a sexually violent person, the State must prove each of the following propositions: First, that

> the Respondent has been convicted of a sexually violent offense; and, second, that the Respondent suffers from a mental disorder; and third, that the respondent is dangerous because said mental disorder makes it substantially probable that he will engage in acts of sexual violence."

¶ 50 Following deliberations, the jury found that respondent was a sexually violent person. The court entered judgment on the verdict and after a dispositional hearing, the court ordered respondent committed to the custody and care of DHS.

¶ 51 Subsequently, respondent filed a motion for a new trial. In part, the motion asserted that the State made prejudicial, inflammatory, and erroneous statements in closing argument that misled the trier of fact and damaged respondent's right to a fair trial. A supplemental motion for a new trial contended that the State repeatedly argued the facts of respondent's sex crimes as evidence. The court ultimately denied the motions after a hearing on February 6, 2015. Respondent subsequently appealed.

¶ 52 II. ANALYSIS

¶ 53 On appeal, respondent contends that he was denied a fair trial because the State made improper remarks during its opening statement and closing argument. Relying in part on *In re Commitment of Gavin*, 2014 IL App (1st) 122918, respondent argues that the State's closing argument was an improper narrative of respondent's past criminal conduct argued for the truth of the matter asserted. According to respondent, the State created substantial prejudice by encouraging the jury to consider the facts underlying the past crimes as substantive evidence, which amplified the possibility that the jury would use the proceedings to punish respondent for his past acts.

¶ 54 Respondent recognizes that he did not preserve this argument. See *People v. Henderson*, 2016 IL App (1st) 142259, ¶ 238 (to preserve for review issue of claimed improper statements during closing argument, a defendant must object to the statements at trial and in a written posttrial motion). Respondent requests plain error review, correctly stating that the criminal plain error rule applies to appeals from proceedings under the Act. See *Gavin*, 2014 IL App (1st) 122918,

¶ 55. The plain error doctrine allows a reviewing court to reach a forfeited error in two circumstances: (1) where the evidence is so closely balanced that the verdict may have resulted from the error and not the evidence; and (2) where the error is so serious that the defendant was denied a substantial right and thus a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). Respondent has the burden of persuasion (*id.* at 187), and seeks plain error review under the second prong of the rule.

¶ 55 The first step is to determine whether any error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Respondent takes issue with how the State used facts about his past offenses that the experts discussed in their testimony. Expert witnesses may base their opinion testimony on facts that are not ordinarily admissible in evidence. *In re Commitment of Butler*, 2013 IL App (1st) 113606, ¶ 31. The underlying facts or data are admitted "for the limited purpose of explaining the basis of the expert witness's opinion." (Internal quotation marks omitted.) *Id* . As such, facts that are admitted as the basis for an expert's opinion must not be presented to the jury as substantive evidence of the underlying assertions. *Id.* This concern has special relevance in sexually violent person proceedings, where judges should take special care in conducting jury trials to ensure that the verdict is not used to punish the respondent for his past crimes. *Gavin*, 2014 IL App (1st) 122918, ¶ 67. We also note that when reviewing a challenge to remarks made

during closing argument, we must consider the remarks in context of the entire closing arguments made by both parties. *In re Commitment of Kelley*, 2012 IL App (1st) 110240, ¶ 42.

¶ 56 Respondent asserts that four aspects of the State's argument improperly argued the facts of his past crimes as substantive evidence. First, respondent contends that at the beginning of its closing argument, the State recited every aspect of respondent's criminal history in detail, without referring to the experts' testimony or how the prior instances of sexual violence had any relation to the diagnosis of a mental disorder. Respondent also maintains that the State made improper remarks in its opening statement.

¶ 57 Two cases illustrate the concern that respondent raises. In *Gavin*, 2014 IL App (1st) 122918, ¶ 74, the court found that the State's closing argument was improper where the prosecutors argued the explicit facts underlying the respondent's convictions as a narrative. Although the prosecutors occasionally prefaced their recitation of these details by noting that those facts were what the experts relied on to form their opinions, the prosecutors did not mention how the experts relied on those facts to diagnose or assess the respondent. *Id.* The State insufficiently tied the underlying facts to the testimony that the respondent had a mental disorder. *Id.* ¶ 71.

¶ 58 Meanwhile, in *Butler*, 2013 IL App (1st) 113606, ¶ 34, the court found that the State did not err when it recounted the respondent's criminal history during closing argument and rebuttal. The prosecutors repeatedly prefaced and qualified their remarks as relating solely to their expert witnesses' opinions. *Id*. The court stated that when the arguments were viewed in their entirety, it was clear that "the State argued the facts and circumstances of [the] respondent's history of violent sexual offenses as having been relied upon and completely supporting the opinions of their expert witnesses." *Id*.

¶ 59 With *Gavin* and *Butler* in mind, we address the State's recitation of respondent's criminal history in its opening statement and closing argument. Respondent does not point to particular parts of the State's opening statement that he finds problematic. Nonetheless, for the sake of completeness, we find that the State's opening statement was proper. The State repeatedly noted that its expert witnesses relied on the patterns of behavior that the State described. The State asserted that the experts reviewed the information related to respondent's background and looked for patterns. In describing respondent's non-sexual offenses, the State informed the jury that it would "hear why that is important from the testimony of the doctors," and asserted that "[w]hat you are going to see, what the doctors relied on is this pattern of behavior that continues to escalate and grow." When summarizing one of respondent's sexual offenses, the State noted that "[t]hese are the facts that the doctors are looking at to see this pattern of offending." Similarly, when summarizing another sexual offense, the State asserted, "So this pattern of behavior and his escalation that [the doctors are] going to tell you about, you can see it building." As in *Butler*, the State's use of respondent's criminal history in its opening statement was consistently connected to the experts' opinions. See *Butler*, 2013 IL App (1st) 1136 06, ¶ 34.

¶ 60 The State's closing argument, however, is more problematic. The State spent the first part of its closing argument summarizing respondent's past offenses, only mentioning once that the experts looked at the conduct involved in the offenses. Otherwise, the State's summary of the facts of each offense was uninterrupted by any reference to how those facts informed the experts' opinions. As a result, the first part of the State's closing argument was closer to *Gavin* than *Butler*. See *Gavin*, 2014 IL App (1st) 122918, ¶ 74.

¶ 61 Still, this aspect of the State's closing argument is not plain error because the error was not " 'so serious that it affected the fairness of the [respondent's] trial and challenged the

integrity of the judicial process.' " *People v. Adams*, 2012 IL 111168, ¶ 24. The State's summary of respondent's criminal history was a relatively brief part of an otherwise lengthy closing argument that covered several other topics. Further, the jury was instructed during the experts' testimony that the experts' materials could not be considered evidence. The court repeated this warning when it instructed the jury after closing arguments. The jury was further instructed that closing arguments were not evidence. There is nothing to rebut the presumption that the jurors followed these instructions and so we find that the instructions were sufficient to alleviate the risk that the jury considered the State's closing argument as substantive evidence. See *Butler*, 2013 IL App (1st) 113606, ¶ 38; *Kelley*, 2012 IL App (1st) 110240, ¶ 46. Further, we note that in *Gavin*, the court found plain error based not only on the State's reliance on the facts of the respondent's prior offenses, but also due to the State's use of sarcasm and mockery, which "[inflamed] the passions of the jury, and [distracted] it from properly considering the evidence of [the respondent's] risk of sexual recidivism." *Gavin*, 2014 IL App (1st) 122918, ¶ 66. Under the circumstances here, the State's recitation of respondent's prior offenses did not deny respondent a fair trial and was not plain error. Thus, respondent's argument on this point is forfeited.

¶ 62 Respondent's second claimed instance of the State arguing past crimes as substantive evidence occurred when the State remarked in rebuttal:

> "So that there is a reason why we haven't seen him hit his 14-year-old girlfriend or his peer on the street, in the chest and drag her to another room, or drag her to his apartment and rape her, there is a reason why we haven't seen him take an EMT, pull out her hair, bite her, hit her, strike her with a brick and rape her, there is a reason why we haven't seen him choking a girl in a stairwell in the

> Department of Corrections [or] in the [DHS facility]. None of those things have [been] available to him."

¶ 63 The above-quoted remarks were not an instance of arguing past crimes as substantive evidence. Rather, the State was responding to remarks made by respondent's counsel. See *Kelley*, 2012 IL App (1st) 110240, ¶ 42 (prosecution may respond in rebuttal to statements made by the defense counsel that clearly invite a response). In his closing argument, respondent's counsel contended that respondent did not sexually offend against women or inmates while he was in custody or detained. The State's above remarks were a response to that statement, which we determined by examining their context. Before the quoted portion above, the State asserted that psychology recognizes that when someone is in prison or otherwise detained, the possibility of acting out is minimized. The State further asserted that even if that person has a sexual deviance, he is unlikely to act out in a controlled environment. The State's remarks contained vivid descriptions, but considered in its broader context, was part of a response to respondent's closing argument. See *id.* ¶¶ 43-45 (State's comment during rebuttal, "ask yourselves has he had the opportunity to get himself a gun or a knife, hold it to somebody's throat and rape them?", was not an instance of arguing past crimes as substantive evidence where the remarks were a response to the respondent's closing argument). We find that the State's remarks were not improper, and therefore, do not amount to plain error. See *People v. Lopez*, 2012 IL App (1st) 101395, ¶ 64 (if there is no error, there can be no plain error). Respondent's argument on this point is forfeited.

¶ 64 Respondent's third claimed instance of the State arguing past crimes as substantive evidence occurred when, during rebuttal, the State allegedly offered its personal opinion about anal rape:

> "Anal rape is one of the most offensive, it is beyond an oral copulation and vaginal rape, it is violent, it is egregious, and it goes beyond just needing sex, it is hurting someone else, it's hurting the other person."

¶ 65 Again, context is important. The State's comments above were a response to part of the closing argument of respondent's counsel, as well as part of the back-and-forth about whether Dr. Lytton was credible. In its closing argument, the State attacked Dr. Lytton's testimony, stating that she conducted a cursory evaluation and omitted damaging details from respondent's offenses. In his closing argument, respondent's counsel maintained that Dr. Lytton testified credibly and consistently and disputed that respondent minimized his offenses when speaking with Dr. Lytton. In rebuttal, before the above-quoted remarks, the State commented on various parts of Dr. Lytton's testimony, including that she left out that respondent's offenses included anal rape. The State concluded the above-quoted remarks with, "She leaves that out completely." The State went on to assert that Dr. Lytton also left out other details that would show respondent's desire for nonconsensual sex and a deviate sexual interest. Looking at the closing arguments as a whole, the State's remarks were part of attacking Dr. Lytton's credibility based on her leaving out key details of respondent's offenses. The prosecution may comment on the credibility of the witnesses and how the defense characterized the evidence (*Kelley*, 2012 IL App (1st) 110240, ¶ 42), which the State did here.

¶ 66 We recognize that the State's remarks about anal rape were pointed, to say the least. Still, even if the State's remarks went beyond attacking Dr. Lytton's credibility, the error would not rise to the level of plain error. The remarks were a brief part of an otherwise lengthy closing argument and rebuttal from the State. Further, the jury was instructed that closing arguments were not evidence and to disregard any statements or argument made by the attorneys that was

not based on the evidence. As stated above, there is nothing in the record to rebut the presumption that the jury followed the instructions, and so the instructions were sufficient to alleviate the risk that the jury considered this portion of the closing arguments as substantive evidence. See *id*. ¶ 46. Under these circumstances, the remarks were not so serious that they affected the fairness of the respondent's trial and challenged the integrity of the judicial process. See *People v. Adams*, 2012 IL 111168, ¶ 24. As a result, even if they were improper, the remarks do not amount to plain error and respondent's argument is forfeited.

¶ 67 We turn to respondent's fourth and final claimed instance of the State arguing past offenses as substantive evidence. Respondent contends that in rebuttal, the State improperly tried to connect specific criminal acts with a non-diagnosis from one of the State's experts. Respondent does not provide a specific quote—only a page number of the transcript where this occurred—but we assume the offending comments were as follows:

> "Remember that ruled out diagnosis isn't saying, oh, it's not there, it's saying, yes, that violence, the biting, the choking, the hitting, the pulling out the hair, that overabundance of violence to get the woman — girl, to submit to the sex act is disproportionate and shows a deviate sexual interest in the fact that you're getting off from the nonconsent, yes, I see those facts. We submit to you that both are present."

¶ 68 The context of the comments shows that no error occurred. In his closing argument, respondent's counsel stated that because there was a difference of opinion about whether respondent had other specified paraphilic disorder, there was reasonable doubt about whether respondent had that mental disorder. The State's rebuttal, including the comments quoted above, addressed that issue. The State contended that the doctors did not have to agree and suggested

that Dr. Leavitt was more reasonable by finding other specified paraphilic disorder to be a rule-out diagnosis. Dr. Leavitt had earlier testified that he believed the disorder may be present because of the degree of violence that was incorporated into respondent's offenses. It has long been held that the underlying facts relied on by an expert witness are admissible and subject to comment to explain the basis for the expert witness's opinions, even if those facts are not independently admissible. *Butler*, 2013 IL App (1st) 113606, ¶ 36. That is what occurred here. Thus, no error occurred and without error, there can be no plain error. *Lopez*, 2012 IL App (1st) 101395, ¶ 64. The argument is forfeited.

¶ 69 We next consider respondent's contention that the State's closing argument was improper for another reason—the State misstated the law and tried to shift its burden of proof. Respondent challenges two of the State's comments that were made during rebuttal. One comment was, "You are not asked to predict anything, you are not asked to say when he's going to reoffend or if (inaudible), how he's going to do it, is it going to be *** an older woman, is it going to be a young kid, none of that." The second allegedly improper comment occurred after the court overruled an objection from respondent and the State contended, "And again we know what his offense and reoffense and recidivism rate is, it's not a hundred [percent], it's 200 percent, and it's 200 percent when he has been under the supervision of a court." Respondent argues that by telling the jury that it need not predict if respondent would re-offend and stating that his re-offense rate had already been established as 200 percent, the State misstated the law and diminished its burden of proof. Respondent also contends that the State's comments were inflammatory.

¶ 70 A State's closing argument will lead to reversal only if the remarks created " 'substantial prejudice,' " which occurs if the improper remarks were a material factor in the verdict. See

Henderson, 2016 IL App (1st) 142259, ¶ 238. Turning to the first challenged remark, the State asserted in full that:

> "I told you in the opening statement we're not talking about a crystal ball or an eight ball or tarot cards, we are talking about a risk assessment. The doctors look at the factors that the research has shown will increase risk or would increase his risk of reoffense or give him a risk of reoffense, and that is exactly what the doctors in this situation did. Again I ask you to pour over those jury instructions. You are not asked to predict anything, you are not asked to say when he's going to reoffend or if (inaudible), how he's going to do it, is it going to be *** an older woman, is it going to be a young kid, none of that —
>
> * * *
>
> All of the instructions, what the law says is that it's substantially probable, and that is that it's much more likely than not."

¶ 71 The State did not tell the jury that it did not have to predict if respondent would re-offend. The State asked the jury to "pour over those jury instructions," which stated that to sustain the charge that respondent is a sexually violent person, the State had to prove that "the respondent is dangerous because said mental disorder makes it substantially probable that he will engage in acts of sexual violence." See 725 ILCS 207/5(f) (West 2008). Further, the State referred to the risk assessments that its experts conducted. Reading the remarks as a whole, the State asserted that the jury did not have to predict the details of how the re-offending would take place, only whether it would take place. That is entirely consistent with the requirements of the Act and the comments were not improper.

¶ 72 We next turn to the statement that respondent had a recidivism rate of 200 percent. The full remarks on this topic were:

> "And again we know what his offense and reoffense and recidivism rate is, it's not a hundred [percent], it's 200 percent, and it's 200 percent when he has been under the supervision of a court. He had juvenile intervention, *** he had probation running, and he had one case already charged that he was being supervised and released on when he commits another one. He does time on those juvenile offenses, have had some type of intervention and reoffense. His recidivism rate is beyond a hundred percent."

¶ 73 We agree that the prosecutor should not have assigned a number to respondent's recidivism rate. The State apparently concluded that the rate was 200 percent or "beyond a hundred percent" based on testimony that respondent re-offended after he was released for a prior offense. However, there was no testimony about respondent's exact recidivism rate. Still, we decline to find that the State's remark about a specific figure was a material factor in the verdict. The remark was isolated and elsewhere, the State referred to its experts' use of risk assessments. Further, the jury was instructed that closing arguments are not evidence and any statements or argument made by the attorneys that was not based on the evidence should be disregarded. As noted above, there is nothing in the record to rebut the presumption that the jurors followed the court's instructions. See *Kelley*, 2012 IL App (1st) 110240, ¶ 46. We will not reverse and remand for a new trial on this basis.

¶ 74 Next, respondent contends that the evidence was insufficient to prove beyond a reasonable doubt that he is a sexually violent person. Respondent argues that the State failed to

prove that respondent had a mental disorder at the time of trial and that his mental disorder made it substantially probable that he would engage in acts of sexual violence.

¶ 75 Under the Act, a sexually violent person is a person who has been convicted of a sexually violent offense and who is dangerous because he suffers from a mental disorder that makes it substantially probable that he will engage in acts of sexual violence. 725 ILCS 207/5(f) (West 2008). The State must prove the allegations in its petition beyond a reasonable doubt. 725 ILCS 207/35(d)(1) (West 2008). On review, we ask whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find the elements proved beyond a reasonable doubt. *In re Detention of Lieberman*, 379 Ill. App. 3d 585, 598 (2007). It is not our function to retry the respondent. *In re Detention of Welsh*, 393 Ill. App. 3d 431, 455 (2009). Rather, it is the trier of fact's responsibility to evaluate the credibility of the witnesses, resolve conflicts in the evidence, and draw reasonable inferences from the evidence. *Id*. We will not reverse the jury's determination that a respondent is a sexually violent person unless the evidence is so improbable or unsatisfactory that it leaves a reasonable doubt. *In re Detention of White*, 2016 IL App (1st) 151187, ¶ 56.

¶ 76 In disputing that the evidence was sufficient to prove he had a mental disorder, respondent asserts that the only two doctors who diagnosed him—Dr. Travis and Dr. Leavitt—relied on past documentation and did not interview him or testify how his current behavior supports the diagnosis. Meanwhile, three doctors in the past 10 years conducted full, in-person evaluations of respondent and found him not to suffer from a mental disorder. These three doctors were Dr. Lytton and the practitioners who would have evaluated respondent when he was initially processed in prison and when he was put on suicide watch. Respondent further asserts that he did not demonstrate the lack of control required for a sexually violent person

finding. Respondent maintains that despite being surrounded by female guards and health professionals, he never received an infraction for his inability to control his sexual urges and was never written up for his treatment of female employees.

¶ 77 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). We find that the evidence was sufficient to find that respondent suffers from a mental disorder. The State presented the testimony of two experts, Dr. Travis and Dr. Leavitt, who both testified that an evaluation could be done without an interview. Dr. Travis diagnosed respondent with other specified paraphilic disorder and antisocial personality disorder and noted that in respondent's past offenses, he engaged in more violence than needed to gain compliance. Dr. Travis also described respondent's disciplinary issues in the Department of Corrections and the DHS facility. According to Dr. Travis, one reason that respondent had not acted out sexually while incarcerated or detained was that he did not have unrestricted access to women, although Dr. Travis acknowledged that respondent had some contact with women.

¶ 78 Dr. Leavitt diagnosed respondent with antisocial personality disorder, which he believed may be the driving force of respondent's sexual violence. Dr. Leavitt also found evidence of a rule-out diagnosis of other specified paraphilic disorder. Dr. Leavitt summarized respondent's past offenses and found a continuation of respondent's antisocial traits in the Department of Corrections and the DHS facility. Dr. Leavitt further stated that antisocial personality disorder is often a very chronic condition, especially if untreated, as in respondent's case. Dr. Leavitt also addressed respondent's lack of sexual offenses while incarcerated or detained, stating that it was not uncommon for a sex offender and someone with violent tendencies not to necessarily engage in that behavior while incarcerated. He acknowledged that respondent had contact with women

while incarcerated or detained and that respondent exhibited fewer behavioral problems over time in the DHS facility.

¶ 79 Dr. Travis and Dr. Leavitt also addressed the issue of respondent's prior contact with mental health professionals. Dr. Travis described respondent's past access to mental health professionals and acknowledged that the first reference to respondent having a mental disorder was after he had completed his prison sentence. Dr. Leavitt also described the extent of contact that respondent had with mental health professionals in the different settings.

¶ 80 Meanwhile, respondent's expert, Dr. Lytton, who interviewed respondent, did not diagnose him with a mental disorder. Dr. Lytton described respondent's experience in the Department of Corrections as "kind of a mix," because respondent engaged in many positive activities, but also had behavior issues, especially in his younger years. Dr. Lytton further found that respondent matured over time in the DHS facility and did not see any evidence that respondent had any persistent intense urges or fantasies to commit forced sex on someone since 1999.

¶ 81 All of the alleged shortcomings in the evidence that respondent raises—that the State's experts did not interview him, respondent had prior contact with mental health professionals who did not diagnose him with a mental disorder, and his lack of sexual offenses while incarcerated or detained—were brought up at trial and addressed through the experts' testimony. Respondent is asking this court to credit Dr. Lytton's testimony over that of Dr. Travis and Dr. Leavitt, which we cannot do. The jury may accept the opinion of one expert witness over another or accept part and reject part of each expert's testimony. *People v. McDonald*, 329 Ill. App. 3d 938, 946-47 (2002). The jury apparently believed the testimony of the State's experts over that of Dr. Lytton, and its findings about credibility are entitled to great weight. *In re Commitment of Fields*, 2012

IL App (1st) 112191, ¶ 65. We will not substitute our judgment for that of the jury regarding the credibility of the witnesses or the weight to be given the evidence. *White*, 2016 IL App (1st) 151187, ¶ 56. Further, this court has affirmed sexually violent person adjudications despite the lack of previous diagnoses or sexually overt acts in the controlled environment of a prison. See *id.* ¶ 60 (noting cases where evidence was sufficient despite no diagnosis of a mental disorder or evidence of nonconsensual sexual activity while incarcerated). Dr. Travis and Dr. Leavitt's testimony provided ample evidence that respondent suffered from a mental disorder and we find no valid reason to disturb the jury's conclusion.

¶ 82 Respondent next contends that the State failed to prove that he was substantially probable to re-offend. Respondent asserts that in assessing his risk to re-offend, the State's experts used an adjusted actuarial approach, which has not been validated for use on juvenile offenders. Respondent maintains that his initial, high-level of risk was based on behavior from when he was 14 or 15 years old, before his brain was fully developed, and he has never had an opportunity to offset this risk because he was too young for his age to be considered a protective factor and he has been incarcerated and unable to enter into a long-term relationship with a girlfriend. Respondent further argues that the State's experts considered neither his positive actions nor the natural maturing of the human brain from the teenage to the adult years.

¶ 83 The issue of the experts' use of actuarial assessments was fully explored at trial. Dr. Travis testified that he used actuarial assessments differently from how they are normally used because of respondent's age when he committed his last offense. Dr. Travis also asserted that the Static-99's coding rules state that the assessment may be useful if used cautiously, which he did. Additionally, Dr. Travis acknowledged the shortcomings of the MnSOST-R. Dr. Travis further testified that protective factors include treatment, which respondent had not completed. Dr.

Travis agreed that a 29-year-old man was more mature than a teenager and acknowledged that respondent had obtained a GED and participated in anger management counseling and vocational skills training. Ultimately, Dr. Travis found that respondent was a substantial risk to re-offend.

¶ 84 Noting respondent's age at the time of his past offenses, Dr. Leavitt testified that he conducted a wide-ranging risk assessment that used adult-based and adolescent-based instruments and factors and was supplemented with adult and adolescent research. Dr. Leavitt believed that for people under 16 years old, the Static-99 could be used if the evaluator used a great deal of caution and moreover, the instrument may be valid when the offenses are more adult in nature. Dr. Leavitt noted that the results should be taken "with a grain of salt." Dr. Leavitt acknowledged that the brain physically matures as a person moves into adulthood and was asked about respondent's various positive actions. According to Dr. Leavitt, respondent had a substantial probability of re-offending in the future.

¶ 85 Dr. Lytton testified that she did not use any actuarial instruments. She also noted the shortcomings of the instruments used by the State's experts.

¶ 86 As seen from our summary of the State's expert testimony above, the jury was presented with the limits of using actuarial assessments for respondent and heard testimony about the brain maturing over time and respondent's positive steps while incarcerated or detained. Respondent asks this court to reweigh the evidence that was presented to the jury, which we may not do. See *Lieberman*, 379 Ill. App. 3d 585, 602 (2007) (it is not the function of reviewing court to reweigh the evidence). We do not find that the testimony from the State's experts is so improbable or unsatisfactory that it leaves a reasonable doubt that respondent is substantially probable to re-offend. See *White*, 2016 IL App (1st) 151187, ¶ 56. We acknowledge respondent's concern that based on the methodology used, his re-offense rate will remain the same no matter what positive

steps he takes, but the evidence suggests otherwise. Dr. Travis and Dr. Leavitt testified about the importance of treatment and noted that respondent did not participate in treatment, which otherwise would lower his risk. The State's experts took respondent's young age into account and the experts' testimony was sufficient to find that respondent was substantially probable to reoffend.

¶ 87 III. CONCLUSION

¶ 88 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 89 Affirmed.