2016 IL App (4th) 150515-U

NO. 4-15-0515

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
August 26, 2016
Carla Bender
4th District Appellate
Court, IL

In re: The Commitment of DAVID SHANKS,	)	Appeal from
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
Petitioner-Appellee,	)	Macoupin County
v.	)	No. 11MR29
DAVID SHANKS,	)	
Respondent-Appellant.	)	Honorable
	)	Rudolph M. Braud, Jr.,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Harris and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the trial court's judgment, which committed respondent to the custody of the Department of Human Services pursuant to the Sexually Violent Persons Commitment Act.

¶ 2 Respondent, David Shanks, was convicted and sentenced to prison on a charge of aggravated criminal sexual abuse (720 ILCS 5/12-16(a) (West 2008)). Within 90 days of respondent's release from prison, the State instituted a civil commitment proceeding pursuant to Illinois's Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 to 99 (West 2014)). After a jury trial, the trial court declared respondent a sexually violent person and ordered his detention and commitment to the Department of Human Services (DHS) for control, care, and treatment pursuant to the Act.

¶ 3 In this appeal, respondent argues his commitment should be reversed because (1) the prosecutor made comments during her opening statement so prejudicial as to deprive him of

a fair trial, and (2) the State's evidence was insufficient to prove he was a sexually violent person within the meaning of the Act beyond a reasonable doubt. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On September 19, 2011, the State filed a sexually violent person petition pursuant to the Act, seeking an order for detention and commitment of respondent. Respondent was scheduled to be released from the Department of Corrections (DOC) on September 24, 2011, upon completion of his sentence for a 2010 conviction for aggravated criminal sexual abuse (720 ILCS 5/12-16(a) (West 2008)). The State also alleged respondent suffered from three mental disorders affecting his emotional or volitional capacity and predisposing him to commit acts of sexual violence: (1) "pedophilic disorder, non-exclusive, attracted to females, in a controlled environment"; (2) "rule out other specified paraphilic disorder, non-exclusive, non-consent, attracted to females, in a controlled environment"; and (3) "antisocial personality disorder."

¶ 6 On December 8, 2011, during pretrial proceedings, the trial court entered an order for detention, placing respondent in the custody of DHS based upon his stipulation of probable cause. The trial court conducted a jury trial on the petition in December 2014.

¶ 7 During her opening statement for the State, the prosecutor attempted to define a sexually violent person for the jury. She stated as follows:

> "MS. NELSON [Assistant Attorney General]: *** It is the State's burden to prove beyond a reasonable doubt that respondent, they are not called defendants, they are called respondents, is a sexually violent person beyond a reasonable doubt.
>
> Now, like I was saying, you probably don't know what a sexually violent person is. That is part of our job, to show you what that is.

It doesn't mean that the respondent had to go out and beat somebody up and sexually assault them. There are qualifying offenses that we call them that place them in the category of sexually violent person or make them eligible to be sexually violent.

Our doctors, Dr. Bellew—and Dr. Ed Smith, the State's doctors are going to explain to you that he has committed one of those offenses and that it does make him eligible for these proceedings."

¶ 8 Respondent did not object to any part of the State's opening statement. During his opening statement, respondent's counsel stated:

"MR. VERTICCHIO: The State is going to ask you to find that [respondent] is a sexually violent person. At first glance that seems like a rather easy proposition, but it is not. That is why we are here today, because as the State said, simply because a person commits a sexually violent offense does not make that person a sexually violent person as defined by the law."

¶ 9 During its case in chief, the State called two expert witnesses: Dr. Martha Bellew-Smith and Dr. Edward Smith, both clinical psychologists. Both experts examined respondent's records from DOC and DHS, police reports, court documents, medical records, and reports from other mental health professionals. Respondent refused to be interviewed by Dr. Edward Smith, but he consented to an interview with Dr. Bellew-Smith.

¶ 10 Referring to the Diagnostic and Statistical Manual of Mental Disorders, fourth edition, text revision (DSM-IV-TR), both experts diagnosed respondent with pedophilia, attracted to females, and antisocial personality disorder. They noted that in the later revision of the manual, the DSM-V, the name "pedophilia" was changed to "pedophilic disorder." Dr.

Bellew-Smith also diagnosed respondent with "rule out paraphilia." The expert explained her "rule out" diagnosis as one that required more information. She said she believed there was "more going on" than what the data provided. The experts testified that none of these disorders will resolve themselves and, accordingly, require treatment.

¶ 11 Dr. Bellew-Smith testified she considered respondent's 2004 conviction of criminal sexual assault, for which he was sentenced to four years in prison. In that incident, the victim's mother asked respondent to walk her seven-year-old daughter to school. He sexually assaulted the girl on the way. Respondent had told a prerelease evaluator that he had been fantasizing about this particular girl for several weeks prior to the incident. He reoffended within nine months after his release.

¶ 12 In 2009, he was convicted of aggravated criminal sexual abuse after having intercourse with a 16-year-old girl when he was 23 years old. He claimed it was consensual. He was sentenced to three years in prison.

¶ 13 While briefly participating in sex-offender treatment after his 2004 conviction, respondent self-reported other incidents of abuse. He said when he was 14 or 15, he had sexual interactions with his 11-year-old cousin for over six months. He also had sexual contact with a seven-year-old girl for whom his family babysat. Overall, respondent said, he had sexual contact with six girls between the ages of 6 and 11 when he was approximately 14 years old.

¶ 14 Dr. Bellew-Smith also testified she considered respondent's nonsexual criminal history, which consisted of an expulsion for taking a knife to school and a domestic-battery incident against his stepsister where he kicked, punched, and choked her. He was suspended from school for fighting and he received approximately 28 disciplinary reports in prison. The

doctor also considered respondent's substance-abuse history. She noted he began using alcohol and marijuana when he was 10 and was using both every day by the time he was 13.

¶ 15 Dr. Bellew-Smith explained that pursuant to the DSM-V, an individual is appropriately diagnosed with pedophilic disorder where: (1) for at least six months, the individual has urges, fantasies, or behaviors involving children under 13; (2) the individual has acted on these urges, or the urges, fantasies, or behaviors cause him clinically significant distress; and (3) the individual is at least 16 years old and at least 5 years older than the child. The doctor relied on the following facts in diagnosing respondent with pedophilic disorder: (1) his 2004 conviction; (2) his sexual behavior with his cousin; (3) his sexual behavior with the child his family babysat; and (4) his sexual behavior with the other children younger than 11 years old. Dr. Bellew-Smith explained: "Those support pedophilia, even though he was too young when he did the self-reported behaviors for that to have been labeled pedophilia then, but it is early onset of the behavior, and it supports his interest in very young children."

¶ 16 Dr. Bellew-Smith also testified that based upon the actuarial risk-assessment tools she used, respondent was at a high risk of reoffending. She found respondent had dynamic factors that increased his risk of reoffending. However, the term "dynamic" meant that if respondent received treatment, those behaviors could be changed. The dynamic factors she identified were (1) respondent's sexual interest in children, (2) his failure to obtain treatment, and (3) his personality disorder. She found no protective factors that would decrease respondent's likelihood of reoffending. In her opinion, she found, to a reasonable degree of psychological certainty, that respondent was a sexually violent person.

¶ 17 Dr. Edward Smith testified consistently with Dr. Bellew-Smith in terms of the information he relied upon, the diagnostic tools used, and his overall opinion. Respondent

refused to be interviewed by this expert, but the doctor was able to gather sufficient information to form an opinion. He diagnosed respondent with two qualifying mental disorders: (1) pedophilic disorder, attracted to females; and (2) antisocial personality disorder. Based on the statistical tools relied upon, Dr. Edward Smith opined respondent was at a moderate to high risk of reoffending. He also found, to a reasonable degree of psychological certainty, that respondent was a sexually violent person in need of treatment and commitment.

¶ 18 Dr. Lesley Kane testified as respondent's expert. In forming her opinion, she personally interviewed respondent and reviewed the same documents as the State's experts. She also relied upon the same diagnostic and statistical tools. However, she diagnosed respondent with: (1) cannabis use disorder; (2) antisocial personality disorder; and (3) rule out pedophilic disorder because "it could be there, but there is not enough information to substantiate that diagnosis." She believes the data indicates respondent was "experimenting," and he was not necessarily sexually attracted to young children. Dr. Kane testified she cannot say, with reasonable psychological certainty, that respondent has pedophilic disorder; and therefore, in her opinion, respondent does not meet the criteria to be found a sexually violent person.

¶ 19 On December 9, 2014, the jury found respondent to be a sexually violent person. After a May 22, 2015, dispositional hearing, the trial court entered a dispositional order, ordering respondent committed to institutional care until such time as he is no longer a sexually violent person.

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 The purpose of the Act is to identify dangerous individuals who have been convicted of a sexually violent offense and who suffer from a mental disorder that predisposes

them to sexual violence. 725 ILCS 207/5(f) (West 2014). Respondent appeals the jury's finding that he is a sexually violent person under the Act, arguing (1) the State's opening statement was improper and so prejudicial as to require a new trial; and (2) the evidence failed to prove he met the definition of a sexually violent person.

¶ 23 A. Prosecutor's Opening Statement

¶ 24 Respondent challenges the prosecutor's statement in her opening remarks where she tried to define a sexually violent person. She said:

> "It doesn't mean that the respondent had to go out and beat somebody up and sexually assault them. There are qualifying offenses that we call them that place them in the category of sexually violent person or make them eligible to be sexually violent."

¶ 25 Respondent argues that, by making this statement, the prosecutor suggested respondent is indeed a sexually violent person simply because he was convicted of a "qualifying offense." The State, on the other hand, argues first that respondent forfeited this argument by not raising it prior to this appeal. In his reply, respondent acknowledges he failed to object at trial, but he claims the forfeiture rule should not apply to these proceedings because "substantial safeguards are necessary to insure the defendant is not being punished, again[] for his prior acts."

¶ 26 Respondent does not argue plain error. Instead, he suggests the "more enlightened view would be to apply the standards suggested by the First District Appellate Court in *Gavin* in 2014 because of the nature of this proceeding." See *In re Commitment of Gavin*, 2014 IL App (1st) 122918, ¶¶ 34-36 (the court reversed the jury's verdict finding Gavin to be a sexually violent person under the Act because the State made improper remarks during its opening and closing statements). Although respondent does not specifically identify what

"standards" from *Gavin* this court should consider, we note the First District indeed applied the forfeiture doctrine when Gavin failed to object in the sexually violent person trial proceedings. The court then applied the plain-error doctrine, citing this court's decision in *People v. Curry*, 2013 IL App (4th) 120724, ¶¶ 72-73. *Gavin*, 2014 IL App (1st) 122918, ¶ 60.

¶ 27 Respondent did not object to the prosecutor's remark at trial, and therefore, he did not preserve for the purposes of this appeal his contention of error. Not only did respondent *not* object to the prosecutor's remark, he, in fact, referenced the remark with approval in his own opening statement. He said: "That is why we are here today, *because as the State said*, simply because a person commits a sexually violent offense does not make that person a sexually violent person as defined by the law." (Emphasis added.) Because respondent failed to object at trial, he has forfeited review of his claim. *Gavin*, 2014 IL App (1st) 122918, ¶ 52. See also *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996) ("It is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal."). And, because respondent does not argue plain error, we honor his procedural default. *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010) ("In the absence of a plain-error argument by a defendant, we will generally honor the defendant's procedural default.").

¶ 28 B. Sufficiency of the Evidence

¶ 29 Next, respondent argues the State failed to prove beyond a reasonable doubt that he was a sexually violent person. He asserts the jury's verdict cannot be supported because it was contrary to the testimony of respondent's expert witness, who conducted the same or a similar assessment on respondent as the State's expert witnesses, yet reached a different conclusion. The State argues the evidence was sufficient to support the jury's finding respondent was a sexually violent person.

¶ 30 When faced with a challenge to the sufficiency of the evidence in a sexually violent person proceeding, the reviewing court must view the evidence in a light most favorable to the State and determine whether any rational trier of fact could have found the required elements proven beyond a reasonable doubt. *In re Detention of Welsh*, 393 Ill. App. 3d 431, 454 (2009); see also *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (sets forth the standard of review for a sufficiency-of-the-evidence claim in a criminal case). The reviewing court will not retry a case on appeal. *In re Detention of Tittlebach*, 324 Ill. App. 3d 6, 11 (2001). Rather, it is the responsibility of the trier of fact to evaluate the credibility of the witnesses, to weigh and resolve conflicts in the evidence, and to determine the reasonable inferences to be drawn from the evidence. *Tittlebach*, 324 Ill. App. 3d at 11. A reviewing court will not reverse a determination that a person is a sexually violent person unless the evidence is so improbable or unsatisfactory that it leaves a reasonable doubt as to that matter. See *People v. Jackson*, 232 Ill. 2d 246, 281 (2009) (sets forth the standard that applies to a sufficiency-of-the-evidence claim in a criminal case).

¶ 31 To establish that a person is a sexually violent person, the State must prove the following three elements beyond a reasonable doubt: (1) the person has been convicted of a sexually violent offense; (2) the person has a requisite mental disorder; and (3) the person is dangerous to others because the mental disorder creates a substantial probability that the person will engage in future acts of sexual violence. See 725 ILCS 207/5(f), 15(b), 35(d)(1) (West 2014); *Welsh*, 393 Ill. App. 3d at 454.

¶ 32 The first element in a sexually violent person proceeding requires proof that the respondent was convicted of a sexually violent offense. 725 ILCS 207/5(e), 35(d) (West 2014). Respondent does not dispute this element was proved beyond a reasonable doubt.

¶ 33 Respondent seems to challenge only the second element, the mental-disorder element. He claims the evidence presented at trial was conflicting and, therefore, insufficient to prove he suffered from a "mental disorder" as that term is defined under the Act. A mental disorder "means 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 2014). Respondent claims all three expert witnesses could not agree respondent undeniably suffered from pedophilic disorder.

¶ 34 Both of the State's experts, Dr. Bellew-Smith and Dr. Edward Smith, diagnosed respondent with pedophilic disorder and antisocial personality disorder. They also found that, due to the existence of the mental disorders, it was substantially probable that respondent will reoffend. However, respondent's expert, Dr. Kane, diagnosed respondent with antisocial personality disorder and rule out pedophilic disorder. Dr. Kane explained her "rule out" diagnosis meant "that it could be there, but there [was] not enough information to substantiate that diagnosis."

¶ 35 Two experts diagnosed respondent with pedophilic disorder with certainty and one expert with the possibility. Although there was a disagreement among the experts regarding the existence of the diagnosis given the information before them, it was the trier of fact's duty to make a determination based upon that evidence. Respondent's claim attacks the weight of the evidence and witness credibility. "It is not our function, in reviewing a challenge to the sufficiency of the evidence, to retry the defendant. [Citations.] Instead, it is the province of the trier of fact to evaluate witness credibility, resolve conflicts in the evidence, and draw reasonable inferences therefrom." *Welsh*, 393 Ill. App. 3d at 455. See also *Tittlebach*, 324 Ill. App. 3d at 11; *In re Detention of Lieberman*, 379 Ill. App. 3d 585, 602 (2007).

¶ 36 Here, as the courts did in *Welsh*, *Tittlebach*, and *Lieberman*, we reject respondent's challenge to the sufficiency of the evidence. The issue of the conflicting opinions among the experts goes to the weight and credibility of those opinions. The conflicting opinions do not indicate the evidence was insufficient to support the jury's verdict. Instead, it means simply that the experts, who used the same methodology, formed different opinions using their own individual professional judgment.

¶ 37 Because none of the experts' testimony was inherently incredible, we find no reason to disturb the verdict. "A rational trier of fact could have found beyond a reasonable doubt all required elements for sexually violent person adjudication." *Welsh*, 393 Ill. App. 3d at 456. All three experts relied on psychological testing, the case record, police reports, mental health evaluations, treatment records, DOC records, and past or personal interviews with respondent. Likewise, all three experts explained the bases for their opinions and were subject to thorough cross-examination. With the evidence presented, the jury had the opportunity to evaluate the credibility of each expert, resolve conflicts among their testimony, and draw reasonable inferences therefrom. See *Welsh*, 393 Ill. App. 3d at 455. We find no valid reason to substitute our judgment for that of the jury. Thus, viewing the evidence in a light most favorable to the State, we conclude a rational trier of fact could have concluded beyond a reasonable doubt that respondent suffered from a mental disorder and, further, met the criteria of a sexually violent person as defined by the Act.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm the trial court's judgment.

¶ 40 Affirmed.