2016 IL App (4th) 150767-U

NO. 4-15-0767

FILED
August 25, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

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| In re: the Commitment of JON CANADA, a Sexually Violent Person, | ) | Appeal from Circuit Court of |
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Livingston County |
| Petitioner-Appellee, | ) | No. 12MR23 |
| v. | ) | |
| JON CANADA, | ) | Honorable |
| Respondent-Appellant. | ) | Robert M. Travers, |
| | ) | Judge Presiding. |

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Knecht and Justice Pope concurred in the judgment.

**ORDER**

¶ 1 *Held*: The appellate court affirmed (1) the jury's verdict that respondent was a sexually violent person and (2) the trial court's decision placing him in institutional care.

¶ 2 Following a January 2016 jury trial, respondent, Jon Canada, was adjudicated a sexually violent person under the Sexually Violent Persons Commitment Act (725 ILCS 207/1 to 99 (West 2012)) and committed to the custody of the Department of Human Services (DHS). Respondent appeals, arguing that (1) the evidence was insufficient to prove that he suffered from a qualifying mental disorder; (2) the trial court erred by failing to hold a *Frye* hearing to determine whether the State's alleged mental disorders were sufficiently accepted by the scientific community; (3) the court abused its discretion by allowing the State to introduce details about respondent's criminal history; and (4) the court abused its discretion by placing respondent in institutional care instead of ordering conditional release. We disagree and affirm.

¶ 3 I. BACKGROUND

¶ 4 In 2010, respondent pleaded guilty to aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2008)) and was sentenced to three years in prison.

¶ 5 In March 2012, prior to respondent's transfer to mandatory supervised release, the State (by the Attorney General and the Livingston County State's Attorney) filed a petition pursuant to section 15 of the Act. 725 ILCS 207/15 (West 2012). The State alleged that respondent had two mental disorders: (1) "paraphilia, not otherwise specified (NOS), with mixed features (voyeurism, exhibitionism, and non-consent)," and (2) "personality disorder, NOS, with antisocial features." The State alleged further that respondent was dangerous to others because his mental disorders created a substantial probability that he would engage in future acts of sexual violence. The State explained that respondent's diagnoses were described in the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition-TR (DSM-IV-TR). The State requested that the trial court find that respondent was a sexually violent person and commit him to the Department of Human Services (DHS) for control, care, and treatment pursuant to section 40 of the Act. (725 ILCS 207/40 (West 2012)).

¶ 6 In January 2014, the State filed an amended petition. In it, the State explained that Dr. Raymond Wood and Dr. Richard Travis had diagnosed respondent with mental disorders set forth in the Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), and that those disorders affected his emotional or volitional capacity, predisposing him to commit acts of sexual violence. The State alleged further that the diagnosed mental disorders created a substantial probability that respondent would engage in future acts of sexual violence. The amended petition did not specifically name the alleged diagnoses.

¶ 7 In April 2014, the State filed a motion explaining that Wood and Travis had initially made their diagnoses relying on the DSM-IV-TR. However, in May 2013, a new edition of

the manual—the DSM-5—was released. As a result, Wood and Travis had updated their diagnoses, relying on the DSM-5. Wood now diagnosed respondent with (1) "other specified paraphilic disorder, with mixed features (voyeurism, exhibitionism, non-consent), in a controlled environment"; (2) "alcohol use disorder, severe, in sustained remission, in a controlled environment"; (3) "cannabis use disorder, moderate, in sustained remission, in a controlled environment"; and (4) "other specified personality disorder, with cluster B traits." Dr. Travis now diagnosed respondent with (1) "voyeuristic disorder, in a controlled environment, rule out other specified paraphilic disorder, sexually attracted to nonconsenting females, nonexclusive type"; (2) "rule out exhibitionistic disorder"; (3) "alcohol use disorder, moderate, in sustained remission"; and (4) "other specified personality disorder, with narcissistic and antisocial personality traits."

¶ 8 Prior to trial, respondent filed two motions relevant to this appeal. First, respondent requested a *Frye* hearing to determine whether the diagnoses made by the State's experts pursuant to the DSM-5 were generally accepted by the scientific community. Second, respondent moved to limit the State from introducing evidence of respondent's criminal history beyond the evidence necessary to establish that respondent had been convicted of a crime of sexual violence.

¶ 9 The trial court denied respondent's motion for a *Frye* hearing, determining that the DSM-5 was merely a "recategorization" or "reclassification" of already accepted diagnoses and did not create new conditions. The court also denied respondent's motion *in limine* to limit the State's introducing evidence at trial of the facts underlying respondent's criminal history. The court found that evidence of what respondent actually did—instead of merely stating the offense committed—was necessary foundation to establish the experts' diagnoses of respondent.

¶ 10 C. Trial

¶ 11 1. *Dr. Wood*

¶ 12 The trial court permitted Dr. Raymond Wood to testify as an expert in the area of clinical psychology, specifically in the area of evaluation and risk assessment of sex offenders. Wood testified that he evaluated respondent by interviewing him, reviewing his records, and conducting psychological assessments.

¶ 13 Wood testified that respondent was convicted of aggravated criminal sexual abuse in 2010, which Wood stated was a qualifying offense for a finding that respondent was a sexually violent person. When the State questioned Wood about the specific facts of that case, respondent objected, arguing that the underlying facts of the offense were highly prejudicial and irrelevant to prove that respondent committed the qualifying offense. The State argued that the facts were relevant not to prove that respondent committed the underlying offense but to establish the foundation Wood relied on when diagnosing respondent. The trial court overruled respondent's objection. Respondent stated that he was raising a continuing objection to any details about respondent's criminal history.

¶ 14 Wood went on to testify about what he knew about the acts that led to respondent pleading guilty to aggravated criminal sexual abuse. Wood explained that the 14-year-old victim reported that respondent—who was 32 or 33 years old at the time—had on several occasions touched her breasts, buttocks, and vagina, usually over her clothing. The touching often occurred when respondent was giving the victim a ride to school. When police initially investigated the allegations, respondent admitted reaching up the victim's shirt and touching her bare breasts on one occasion. Respondent eventually pleaded guilty to one count of criminal sexual abuse. During Wood's evaluation, respondent denied that any illegal or inappropriate touching occurred and asserted that the victim's mother had fabricated the allegations because she was upset that respondent was living with another woman.

¶ 15 Wood also testified to the following underlying details of respondent's criminal history: (1) in 1997 respondent was arrested for burglary, but the charges were dismissed (Wood was unable to provide any additional details about the underlying facts); (2) in 2000, respondent pleaded guilty to "loitering and prowling" for peering at a woman through the windows of her home; (3) in 2001, respondent pleaded guilty to burglary and trespass for entering the bedroom of a sleeping woman he did not know and masturbating until she woke up; and (4) in 2009, respondent was charged with videorecording up a woman's skirt in a Hobby Lobby. Wood testified that he considered the facts of those crimes when diagnosing respondent.

¶ 16 Wood testified further that he initially used the DSM-IV to diagnose respondent. However, after the DSM-5 was released, Wood "updated the diagnoses to be consistent with the current manual." Wood explained that while some of the names of the diagnoses had changed, the underlying conditions that he was diagnosing had not. Using the DSM-5, Wood diagnosed respondent with four mental disorders: (1) other specified paraphilic disorder with mixed features, voyeurism, exhibitionism, and nonconsent; (2) alcohol use disorder; (3) cannabis use disorder; and (4) other specified personality disorder, with cluster B features. Wood explained that those mental disorders affected "respondent's emotional or volitional capacity" and "predispose[d] him to engage in acts of sexual violence."

¶ 17 2. *Dr. Travis*

¶ 18 The trial court permitted Dr. Richard Travis to testify as an expert in clinical psychology, specifically in the area of evaluation and risk assessment of sex offenders. Travis testified that he reviewed Wood's evaluation of respondent and conducted his own evaluation. In addition, Travis reviewed respondent's records, including police reports from his previous criminal history.

¶ 19 Travis, like Wood, testified to the details of defendant's criminal history. In addition to the details provided by Wood, Travis noted that respondent was arrested for solicitation of prostitution in 2007. Travis explained that respondent's criminal history followed a trajectory toward more serious offenses. In addition, Travis discussed the Hobby Lobby incident as evidence that respondent was becoming more brazen. Travis testified further that respondent had not participated in treatment while incarcerated in DHS. Travis testified that during his evaluation of respondent, he denied committing any sexual crimes, stating, "I didn't do anything sexual ever to anybody."

¶ 20 Travis relied on the DSM-5 to diagnose respondent with (1) voyeuristic disorder, (2) "specified personality disorder that has anticsocial and narcissistic traits," and (3) alcohol use disorder. Travis testified further that the mental disorders with which he had diagnosed respondent affected his emotional and volitional capacity and predisposed him to engage in acts of sexual violence. Travis used the Static-99R and Static-2002R instruments to predict respondent's likelihood of reoffending. Based on those evaluations, Travis opined that respondent had a high or moderate-high risk of committing another sexual offense, compared to the average sex offender. Travis concluded that respondent was "substantially probable" to commit future acts of sexual violence.

¶ 21 After Travis testified, the State rested. Respondent moved for a directed verdict, which the trial court denied. The parties stipulated that respondent had a prior conviction for aggravated criminal sexual abuse.

¶ 22 3. *Dr. Witherspoon*

¶ 23 The trial court permitted Dr. Kirk Witherspoon to testify as an expert in clinical psychology and evaluating sexually dangerous persons. Witherspoon testified that he conducted

several evaluations of respondent and concluded that respondent did not suffer from any mental disorder. Witherspoon opined that respondent's criminal history was the result of his substance abuse, not a mental disorder. Witherspoon explained that it is not pathological—*i.e.*, not a mental disorder—to be attracted to sexually mature adolescents, such as the 14-year-old victim in the predicate offense.

¶ 24 4. *Dr. Schecter*

¶ 25 The trial court permitted Dr. Allison Schecter to testify as an expert in clinical psychology and the performance of evaluations of sexually violent persons. Shecter testified that she evaluated respondent by reviewing his case history, despite respondent's refusal to be interviewed by her. In Schecter's opinion, respondent did not have a mental disorder that created a substantial probability that respondent would commit acts of sexual violence.

¶ 26 Schecter described respondent's criminal history as voyeuristic, meaning that his offenses involved only looking at victims, which were not crimes of sexual violence. Schecter explained that the only offense of sexual violence respondent had committed was the predicate offense. Schecter noted that the victim in that case reported that respondent touched the victim's breast, buttocks, and vagina over her clothing. However, when respondent propositioned the victim for additional sexual activity, the victim refused and slapped respondent. At that point, respondent relented. Schecter opined that if respondent had a mental disorder that caused him to be aroused by nonconsensual sexual activity, he would have continued with the sex acts instead of relenting. As a result, Schecter concluded that respondent did not have a mental disorder as required by the Act and was therefore not a sexually violent person.

¶ 27 After the conclusion of evidence, the jury found that respondent was a sexually violent person.

¶ 28 This appeal followed.

¶ 29 II. ANALYSIS

¶ 30 Respondent argues that (1) the evidence was insufficient to prove that respondent was a sexually violent person; (2) the trial court erred by failing to hold a *Frye* hearing on the State's diagnoses of respondent; (3) the court abused its discretion by allowing the State to introduce details about respondent's criminal history; and (4) even if respondent was a sexually violent person, the court should have ordered conditional release.

¶ 31 A. Sufficiency of the Evidence

¶ 32 Respondent argues that the evidence was insufficient to prove that he was a sexually violent person. Specifically, he argues that the State failed to prove that he had a requisite "mental disorder." We disagree.

¶ 33 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); *Fields*, 2014 IL 115542, ¶ 20, 10 N.E.3d 832. 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).

¶ 34 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 proved beyond a reasonable doubt. *Fields*, 2014 IL 115542, ¶ 20, 10 N.E.3d 832. The review-

ing 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).

¶ 35 In this case, Wood testified that respondent suffered from *other specified paraphilic disorder*, which, in combination with other disorders, affected his "emotional or volitional capacity" and "predispose[d] him to engage in acts of sexual violence." Likewise, Travis testified that his diagnoses of respondent affected his emotional and volitional capacity and predisposed him to engage in acts of sexual violence. Therefore, according to the expert testimony of Wood and Travis, respondent had a requisite mental disorder to support a finding that he was a sexually violent person.

¶ 36 Respondent does not contend that the jury should have disregarded the testimony of Wood and Travis, or that the jury was unreasonable by accepting their testimony instead of Witherspoon's and Schecter's in this "battle of the experts." Instead, respondent seems to be arguing that the conditions diagnosed by Wood and Travis do not meet the definition of a "mental disorder" as defined by the Act. Respondent asserts that "voyeurism is not a diagnosis" and that *other specified paraphilia disorder* is not "a real qualifying diagnosis." Respondent cites no case law in support of his claims.

¶ 37 We do not understand how we could question the sufficiency of the evidence to

prove that these diagnoses were "mental disorders" when the explanations given by Wood and Travis about their diagnoses tracked almost exactly the language in the Act that defines "mental disorder." 725 ILCS 207/5(b) (West 2014) (A mental disorder is "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence."). The purpose of an expert witness is to provide testimony about subjects that are beyond the ken of the trier of fact.

¶ 38 Both Wood and Travis testified that respondent's diagnoses affected his emotional and volitional capacity and predisposed him to engage in acts of sexual violence. Assuming that the jury accepted their testimony as credible, that testimony was sufficient to prove beyond a reasonable doubt that respondent had a mental disorder. The only resource that we consider when determining whether the evidence was sufficient is the evidence in the record. That evidence—the testimony of Wood and Travis—established that their diagnoses constituted mental disorders. Respondent's assertion otherwise does not make their testimony insufficient.

¶ 39 B. *Frye* Hearing

¶ 40 Respondent also argues that the trial court erred by failing to hold a *Frye* hearing on respondent's alleged mental illness.

¶ 41 In Illinois the admission of scientific evidence is governed by the *Frye* standard. *In re Detention of New*, 2014 IL 116306, ¶ 25, 21 N.E.3d 406; *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The *Frye* standard has been codified in the Illinois Rules of Evidence, as follows:

> "Where an expert witness testifies to an opinion based on a new or novel scientific methodology or principle, the proponent of the opinion has the burden of showing the methodology or scien-

tific principle on which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs." Ill. R. Evid. 702 (eff. Jan. 1, 2011).

¶ 42 A *Frye* hearing concerning a mental diagnosis is necessary when "the diagnosis is predicated on new or novel science." *New*, 2014 IL 116306, ¶ 34, 21 N.E.3d 406. A diagnosis is new or novel if it is " 'original or striking' " or does " 'not resembl[e] something formerly known' or used." *Id.* (quoting *Donaldson v. Central Illinois Public Service Co.*, 199 Ill. 2d 63, 78, 767 N.E.2d 314, 325 (2002)). "We review *de novo* a trial court's determination of whether a *Frye* hearing is necessary and whether there is general acceptance in the relevant scientific community." *New*, 2014 IL 116306, ¶ 26, 21 N.E.3d 406.

¶ 43 In this case, the trial court denied respondent's motion for a *Frye* hearing, concluding that the DSM-5 did not create new conditions but, instead, reclassified the known, existing conditions listed in the DSM-IV-TR. Respondent, relying on the supreme court's decision in *New*, 2014 IL 116306, 21 N.E.3d 406, argues that the trial court should have held a *Frye* hearing

¶ 44 Respondent's reliance on *New* is misplaced. In *New*, 2014 IL 116306, ¶ 3, 21 N.E.3d 406, the State filed a sexually violent person petition asserting that the respondent had been diagnosed with "paraphilia not otherwise specified [paraphilia NOS], sexually attracted to adolescent males." (Internal quotation marks omitted.) The State's expert explained that this particular diagnosis of paraphilia NOS is often referred to in scientific literature as "hebephilia," and that a proposal to include hebephilia as a specific diagnosis in the DSM-5 had been rejected. The respondent's pretrial motion for a *Frye* hearing on the expert's diagnosis was denied by the trial court.

¶ 45 On appeal, the supreme court held that the trial court should have conducted a

*Frye* hearing because hebephilia was a new or novel diagnosis. The court noted that the diagnosis of hebephilia had not yet become widely used by professionals in the field and that the proposal to include hebephilia in the DSM-5 "drew vigorous criticism" and was eventually rejected. *New*, 2014 IL 116306, ¶ 36, 21 N.E.3d 406. After considering hebephilia's status in the scientific community, the court determined that a *Frye* hearing was necessary. *Id.* ¶ 37.

¶ 46 In this case, Wood diagnosed respondent with other specified paraphilic disorder with mixed features, voyeurism, exhibitionism, and nonconsent. At the hearing on respondent's *Frye* motion, respondent's counsel stated, as follows:

> "[T]his was the new diagnosis that my client received under the DSM-5. *** I would argue that this is not exactly the same as the old diagnosis. I will acknowledge *** that the old diagnosis *** I do acknowledge there is case law out there that states that there is no need for a *Frye* hearing, that it's not novel or anything. But this is a new diagnosis under a new DSM-5. As far as I can tell, it has not been subject to any, any sort of scrutiny by the court; and as such, *** I believe that it does constitute a novel *** approach *** and should be subject to a *Frye* hearing."

The trial court denied the motion, finding that the DSM-5 merely reclassified paraphilia NOS as other specified paraphilic disorder.

¶ 47 The trial court did not err by denying respondent's motion for a *Frye* hearing. The reclassification of paraphilia NOS as other specified paraphilic disorder did not make the latter diagnosis new or novel for *Frye* purposes. This is not a situation like *New*, in which the diagnosis at issue was specifically rejected for inclusion in the DSM-5. Instead, the DSM-5 created a

distinction between paraphilias and paraphilic disorders. However, the DSM-5 explained that the distinction was " 'implemented without making any changes to the basic structure of the diagnostic criteria as they had existed since DSM-III-R.' " *In re Detention of Hayes*, 2015 IL App (1st) 142424, ¶ 22, 40 N.E.3d 374 (quoting American Psychiatric Association, *Highlights of Changes From DSM–IV–TR to DSM–5*, (2013), http://www.dsm5.org/Documents/changes% 20from% 20dsm–iv–tr% 20to% 20dsm–5.pdf). As a result, we conclude that the changes to the DSM-5 did not make the diagnosis of other specified paraphilic disorder new or novel. Therefore, no *Frye* hearing was required.

¶ 48 C. Introduction of Respondent's Complete Criminal History into Evidence

¶ 49 Respondent argues that the trial court abused its discretion by allowing the State to introduce details about respondent's criminal history. Specifically, respondent argues that the court incorrectly allowed evidence about the details of respondent's criminal history when respondent was willing to stipulate to the fact that he had been convicted of a crime of violence.

¶ 50 Respondent relies on *People v. Winterhalter*, 313 Ill. App. 3d 972, 730 N.E.2d 1158 (2000). That reliance is misplaced. In *Winterhalter*, the court held the following:

> "While the State is obliged to prove that a respondent has been convicted of a sexually violent offense, that element of the State's petition is sufficiently proven by the introduction of a certified copy of the respondent's conviction. Therefore, the testimony of a victim describing the details of such crime would be admissible only if relevant to the remaining issues of whether the person has a mental disorder and is dangerous to others because the person's mental disorder creates a substantial probability that he or she

will engage in acts of sexual violence." *Id.* at 979, 730 N.E.2d at 1164.

¶ 51 In this case, contrary to respondent's contentions, *Winterhalter* actually *supports* introduction of the evidence detailing respondent's criminal history. According to *Winterhalter*, that evidence is admissible "if relevant to the *** issues of whether the person has a mental disorder and is dangerous to others ***." *Id.* The State introduced evidence of respondent's criminal history to support the expert opinions of Wood and Travis that respondent had a mental disorder and that a substantial probability existed that he would reoffend. The evidence of respondent's criminal history was therefore highly probative and explicitly authorized by *Winterhalter*. The trial court did not abuse its discretion by admitting that evidence.

¶ 52 D. Conditional Release

¶ 53 Last, respondent argues that the trial court abused its discretion by not ordering that respondent be conditionally released. We disagree.

¶ 54 An order for commitment under the Act shall specify that the respondent will be placed in either institutional care or conditional release. 725 ILCS 207/40(b)(2) (West 2014). When determining whether to commit pursuant to institutional care or conditional release, the trial court shall consider the following factors: (1) the nature and circumstances of the behavior that formed the basis of the petition for commitment; (2) the person's mental history and present mental condition; and (3) the arrangements available to ensure that the person has access to and will participate in necessary treatment. *Id.* We review a court's decision to commit a person to institutional care for an abuse of discretion. *In re Detention of Lieberman*, 379 Ill. App. 3d 585, 609, 884 N.E.2d 160, 182 (2007). A court abuses its discretion when its decision is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial

court. *Id.*

¶ 55 In this case, the trial court's decision was not an abuse of discretion. Prior to reaching its decision, the court quoted the factors listed in section 40(b)(2) and stated that it had considered all of them. The court explained that the two factors it relied on most heavily were that (1) respondent had not participated in treatment while in custody and (2) experts agreed that respondent's risk of reoffending was high. The court reasonably concluded that if respondent had failed to participate in treatment while in the custody of DHS, it was unlikely that he would participate in treatment on conditional release. That concern, coupled with the evidence establishing that respondent's risk of reoffending was high, supported the court's decision to order respondent placed in institutional care instead of conditional release.

¶ 56 Although the court mentioned that conditional release was the safest decision for a judge because nobody would show up with "pitchforks," the court then clarified that "that's not a factor, okay, that is a nonissue with this court. It doesn't come into play." The court's decision weighed the appropriate factors and was not arbitrary, fanciful, or unreasonable. The decision to choose institutional care instead of conditional release was not an abuse of discretion.

¶ 57 III. CONCLUSION

¶ 58 For the foregoing reasons, we affirm the trial court's judgment.

¶ 59 Affirmed.