2017 IL App (1st) 160026-U

SIXTH DIVISION
Order filed: May 19, 2017

No. 1-16-0026

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

In re COMMITMENT OF DANIEL GEROW,	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Cook County
	)	
Petitioner-Appellee,	)	No. 10 CR 80008
	)	
v.	)	
	)	Honorable
Daniel Gerow,	)	Paul B. Biebel, Jr. and
	)	Alfredo Maldonado,
Respondent-Appellant).	)	Judges, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the trial court is affirmed where (1) the State presented sufficient evidence to prove beyond a reasonable doubt that the respondent is a sexually violent person; (2) the respondent was not deprived of his due process right to a fair trial; and (3) the trial court did not abuse its discretion by committing the respondent to a secure treatment and detention facility.

¶ 2 In July 2012, the respondent, Daniel Gerow, was adjudicated a sexually violent person under the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 *et seq*. (West 2008)). Following a subsequent dispositional hearing, the trial court ordered the respondent

committed to the Illinois Department of Human Services (DHS) for institutional care in a secure facility. The respondent appeals, arguing that: (1) the State failed to prove beyond a reasonable doubt that he is a sexually violent person; (2) he was deprived of his due process right to a fair trial where the trial court misapprehended crucial evidence in reaching its verdict; and (3) the trial court erred by ordering him to be committed to a secure treatment and detention facility. For the reasons that follow, we affirm.

¶ 3 In December 2001, the respondent pled guilty to predatory criminal sexual assault of a child (Cook County case No. 00 CR 1567801), and was sentenced to 10 years' imprisonment in the Illinois Department of Corrections (DOC). In April 2010, shortly before the respondent was scheduled to begin mandatory supervised release, the State petitioned to have him adjudicated a sexually violent person under the Act. The trial court subsequently held a hearing pursuant to section 30 of the Act (725 ILCS 207/30 (West 2008)), and found probable cause to believe the respondent was a sexually violent person.

¶ 4 In May 2012, the trial court conducted a bench trial on the petition. At trial, the State and the respondent each presented the testimony of two witnesses who, by stipulation, were accepted as experts in the area of psychology, particularly in the field of sex offender diagnosis, treatment, and risk assessment. Written reports prepared by the four expert witnesses were entered into evidence. The State also presented a certified copy of the respondent's conviction for predatory criminal sexual assault of a child.

¶ 5 The evidence presented at trial consisted principally of the certified copy of the respondent's conviction and the experts' opinions regarding the respondent's mental disorders and the probability of his committing acts of sexual violence in the future. The remainder of the experts' testimony was offered to explain the bases of their opinions.

¶ 6 Dr. Barry Leavitt testified for the State that he conducted a clinical evaluation of the respondent to determine whether the respondent was a candidate for commitment under the Act. As part of that evaluation, Dr. Leavitt personally interviewed the respondent and reviewed records from his DOC master file, which included disciplinary reports, medical and psychiatric evaluations, criminal history reports, and details regarding the crime which led the respondent to be incarcerated.

¶ 7 Dr. Leavitt testified that he found the facts and circumstances of the respondent's criminal history relevant in forming his opinion. He cited, as an example, the respondent's conviction for possession of material harmful to children, which arose from an incident that took place in Janesville, Wisconsin, in June 1991 when the respondent was 49 years old. Records pertaining to that offense established that the respondent was arrested after purchasing three photographs containing child pornography from an undercover police officer. Following his arrest, officers searched the respondent's vehicle and recovered two videotapes and a green travel bag containing chains, ropes, handcuffs, Vaseline, and sex toys. One of the videotapes contained homemade footage, taken from a "peephole" at the respondent's cottage, and depicted the respondent's daughter celebrating her 18th birthday with several friends. The other videotape contained footage of the respondent and an adult woman engaging in sexual intercourse and acts of bondage.

¶ 8 Dr. Leavitt also considered an offense that occurred in December 1999 in which the respondent, then 57 years old, downloaded images of child pornography from the internet. According to investigative reports that Dr. Leavitt reviewed, federal agents from the U.S. Customs Cyber Smuggling Center executed a search warrant at the respondent's residence in Sturgis, Michigan, and seized "338 VHS videotapes; two briefcases filled with numerous sexual

aids; ropes/bondage restraints; a brief [case] containing bondage magazines and a tin canister containing sexual aids." Investigative reports state that the respondent admitted to having viewed child pornography on the internet and to having downloaded the images onto a zip drive. The respondent pled guilty to unlawful receipt of materials involving a minor engaged in sexually explicit conduct (federal case No. 100 CR 104) and was sentenced to 46 months in federal prison.

¶ 9 Dr. Leavitt further testified about the respondent's conviction for predatory criminal sexual assault of a child (Cook County case No. 00 CR 1567801). Records relating to that offense show that, between June 1, 1999, and February 29, 2000, the respondent would take A.R., his long-time girlfriend's 10-year-old adoptive daughter, to his place of business in Harvey, Illinois, to "discipline" her. Dr. Leavitt wrote in his report that the respondent:

> "had a small bedroom set up in his business. While there, [the respondent] would strip the victim naked and tie her legs to a wall. [The respondent] would also gag and blindfold [the] victim. [The respondent] then made [the] 10 year-old victim insert her fingers into her vagina. [The respondent] would then challenge the victim to get out of the restraints and laugh when she could not. These 'discipline sessions' went on approximately every Monday during the above the dates. On at least one such occasion, [the respondent] bound [the] victim's legs and arms to the wall in the Harvey business. [The respondent] used ropes and ties from a suitcase recovered in evidence. [The respondent] after stripping [the] victim naked[,] took out his penis and placed it in [the] victim's mouth for approximately 5-10 minutes and screamed at victim to 'suck it, suck it.' "

¶ 10 Dr. Leavitt testified that, during his interview with the respondent, the respondent described eight incidents in which he sexually assaulted A.R. The respondent told Dr. Leavitt that A.R. was "defiant and fought tooth and nail over everything." The respondent grew frustrated and resentful and felt compelled to spank A.R. in order to discipline her and get her behavior under control. However, the respondent acknowledged that his behavior towards A.R. became "increasingly sexualized" as he incorporated his "power and control issues" with his sexual contact. Dr. Leavitt wrote in his report that the thought of "making [A.R.] do what [the respondent] wanted her to do with no options, and to show her who was boss" began to arouse the respondent sexually. The respondent began to more actively fantasize about the sexual activity and used volumes of pornographic magazines and materials to fuel his fantasies and develop his plans to sexually assault A.R.

¶ 11 Dr. Leavitt testified that the details surrounding the offense against A.R. were significant because it demonstrated a "steady escalation" in the respondent's use of "disciplinary measures" and his reported sexual arousal from inflicting those measures on A.R. The respondent admitted that he planned the offenses and that his plans included increasingly sexually deviant elements, which were highly violent and abusive with sadistic overtones.

¶ 12 Dr. Leavitt also found the respondent's sexual history relevant in forming his opinion. Dr. Leavitt noted that the respondent, at the age of 10, engaged in a single act of exhibitionism while babysitting two younger female children. The respondent also engaged in acts of voyeurism in his 40s, when he videotaped his daughter's teenage friends undressing, and in his late 50s, when he videotaped each of his sexual offenses against A.R. Dr. Leavitt also noted that the respondent possessed a large and diverse collection of pornographic videos and magazines, which he repeatedly viewed. Moreover, the respondent's preoccupation with bondage has

persisted for close to 40 years and involved collecting an extensive volume of bondage related materials, which he frequently used in his bondage relationships. The respondent also reported having had four significant romantic relationships and approximately 200 casual relationships consisting of one-night stands. He was married to his first wife for 22 years, but his marriage fell apart as a result of his growing interest and preoccupation with unusual and deviant sexual activities.

¶ 13 Dr. Leavitt also addressed the respondent's sex offender treatment history. In his report, Dr. Leavitt noted that the respondent's first period of "mandated" sex offender treatment commenced in May 2000 and continued through September 2001 when he began serving his sentence in federal prison. The respondent, however, did not participate in any sex offender treatment in federal prison. After serving his federal prison sentence, the respondent was transferred to the DOC where he completed a 12-week introductory psychoeducational sex offender treatment program and participated in sex offender group therapy. Dr. Leavitt observed that, although the respondent consistently participated in sex offender treatment, he avoided discussing and examining his sexually-deviant behavior which he perpetrated against A.R. Dr. Leavitt also noted that, despite the respondent's consistent level of participation in treatment, he did not complete the program at the time of his release from the DOC.

¶ 14 Dr. Leavitt testified that he consulted the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR), and diagnosed the respondent with: (1) pedophilia, sexually attracted to females, non-exclusive sub-type; (2) sexual sadism; and (3) personality disorder, not otherwise specified.

¶ 15 In evaluating the respondent's risk of reoffending in a sexually violent manner, Dr. Leavitt used an adjusted actuarial approach. He administered three tests—the Static-99R, Static-

2002R, and the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R)—and concluded that the respondent's score on each test placed him in the low risk category for committing a future act of sexual violence. Next, Dr. Leavitt adjusted the actuarially-estimated risk based upon the existence of dynamic risk factors and protective factors. Dr. Leavitt identified six dynamic risk factors, which increased the respondent's risk of reoffending: (1) sexual preoccupation; (2) sexual interest in prepubescent and pubescent children; (3) sexualized violence; (4) multiple paraphilias (*e.g.*, voyeuristic interests and behavior, deviant sexual interest towards children, coercive sexual preference); (5) dysfunctional intimacy relationships; and (6) sexualized coping (*e.g.*, resorting to masturbatory activity to relieve stress). Dr. Leavitt also considered protective factors such as the respondent's age, health, and completion of sex offender treatment, which would lower the risk of sexual offense recidivism, but found that none applied to the respondent. He wrote in his report that, although the respondent was over the age of 60, his sexual offending "significantly intensified in his late fifties" and was "associated with displays of highly deviant and sadistic behavior." Thus, while advanced age may demonstrate a reduction of risk, Dr. Leavitt concluded that the respondent's history of sexual offending is an "outlier from this general trend."

¶ 16 In reviewing the results from the actuarial tests and his clinical assessment of the respondent's dynamic risk factors, Dr. Leavitt opined that the respondent's estimated risk of recidivism is substantially higher than the estimates associated with his scores on the tests, which he administered. He explained that, while the tests placed the respondent in the low risk category for sexually reoffending, the presence of multiple dynamic risk factors warranted a "marked increase" in the respondent's overall risk of sexual recidivism. As a result, Dr. Leavitt

opined that it was substantially probable that the respondent would commit future acts of sexual violence.

¶ 17 The State then called Dr. Angeline Stanislaus to testify. Dr. Stanislaus testified consistently with Dr. Leavitt in terms of the information she relied upon, the diagnostic tools used, and her overall opinion. Like Dr. Leavitt, she diagnosed the respondent with: (1) pedophilia, sexually attracted to females, non-exclusive sub-type; (2) sexual sadism; and (3) personality disorder, not otherwise specified. Dr. Stanislaus wrote in her report that the respondent's pedophilia and sexual sadism have affected his volitional or emotional capacity and have predisposed him to engage in acts of sexual violence.

¶ 18 Regarding the respondent's propensity to engage in future acts of sexual violence, Dr. Stanislaus relied upon the Static-99 and Static-99R tests. She wrote in her report that the respondent's score on the Static-99 placed him in the moderate-high risk category, and his score on the Static-99R placed him in the low risk category. Dr. Stanislaus next adjusted the respondent's risk for future sexual offending based upon certain dynamic risk factors not captured by the actuarial tests. She identified the following risk factors applicable to the respondent: (1) deviant sexual interests (pedophilia coupled with sexual sadism); (2) insufficient sex offender treatment; (3) intimacy deficits; (4) poor sexual self-regulation; and (5) tolerant attitude toward sexual assault.

¶ 19 Dr. Stanislaus determined that the results of the Static-99R did not accurately characterize the respondent's risk. She explained that his score of "one" was the result of a three-point reduction due to his age being over 60. She also noted that the respondent was "arrested for the predatory criminal sexual assault [of a child] for repeatedly sadistically molesting a 10 year old girl when he was 57 years old, which clearly indicates that his age did not decrease his

sexual preoccupation or need to sexually offend." Moreover, the respondent has "compelling dynamic risk factors for sexual recidivism" that further elevate his risk for sexual reoffending. Dr. Stanislaus opined, to a reasonable degree of psychiatric certainty that, due to the respondent's pedophilia and sexual sadism, "it is substantially probable that he will engage in [future] acts of sexual violence." She concluded, therefore, that he meets the statutory criteria for civil commitment under the Act.

¶ 20 After the State rested, the respondent called Dr. Steven Gaskell to testify. Dr. Gaskell testified that, in forming his opinion, he personally interviewed the respondent and reviewed the same documents as the State's experts. He also relied upon the same diagnostic and statistical tools. Dr. Gaskell, however, diagnosed the respondent with two mental disorders: (1) pedophilia, sexually attracted to females, nonexclusive type, and (2) sexual sadism.

¶ 21 As to the respondent's risk of recidivism, Dr. Gaskell wrote in his report that he used the Static-99R and MnSOST-R tests and that the respondent's scores placed him in the low risk category for sexually reoffending. In addition to the risk factors covered by the actuarial tests, Dr. Gaskell identified the following dynamic risk factors that increase the respondent's risk of recidivism: (1) deviant sexual interest; (2) paraphilic interests; (3) hostility (during offenses against A.R.); (4) sexual interests in children; and (5) sexual preoccupations. Dr. Gaskell also considered protective factors that would lower the respondent's risk of reoffending, but found that none applied. More specifically, he determined that the respondent's sex offender treatment is not sufficient to reduce his risk for sexually violent reoffending since he has not made significant progress and had not yet begun treatment at DHS's treatment and detention facility (DHS-TDF). Dr. Gaskell also noted that the respondent does not have any medical conditions

that would warrant a reduction in risk and determined that the respondent's age was taken into consideration by the Static-99R and no further age-based reduction of risk was warranted.

¶ 22 Notwithstanding these findings, Dr. Gaskell opined that, within a reasonable degree of psychological certainty, it is not substantially probable that the respondent will engage in future acts of sexual violence. Dr. Gaskell clarified that, while the respondent is at a low risk of reoffending, the level of risk is "not high enough to indicate that he is substantially probable to sexually reoffend." Dr. Gaskell concluded, therefore, that the respondent should not be found to be a sexually violent person under the Act.

¶ 23 Dr. Paul Heaton testified consistently with Dr. Gaskell in terms of the information he relied upon, the diagnostic tools used, and his overall opinion. In his report, Dr. Heaton diagnosed the respondent with (1) pedophilia, sexually attracted to females, non-exclusive type, and (2) alcohol abuse in a controlled environment. Dr. Heaton scored the respondent using three actuarial tests to determine his likelihood for recidivism. The respondent received a score of "four" on the Static-99 test, indicating moderate-high risk; a "five" on the Static-2002 test, indicating moderate risk; and a "negative two" on the MnSOST-R test, indicating low risk. In his report, Dr. Heaton stated that each test indicated that the respondent "has a substantial and continuing risk for sexual offense." Dr. Heaton testified at trial that he later scored the respondent using two additional tests—the Static 99R and Static 2002R tests—both of which accounted for the respondent's age at the time of the offense. These tests, respectively, indicated that the respondent's risk of recidivism was low and moderate-low. Dr. Heaton acknowledged, however, that the actuarial tests do not account for other risk factors, including the respondent's repeated use of child pornography, and multiple paraphilias, which Dr. Heaton did not diagnose but had been diagnosed by other doctors. Moreover, given the respondent's age of 67, Dr.

Heaton stated that "some additional reduction in risk due to age is warranted." Therefore, Dr. Heaton concluded that the respondent did not meet the criteria necessary to be found a sexually violent person under the Act.

¶ 24 In July 2012, the trial court found that the State proved beyond a reasonable doubt that the respondent was a sexually violent person under the Act. In reaching this conclusion, the court noted that all four doctors agreed that the actuarial tests placed the respondent in the low risk category for committing a sexual offense in the future. The court stated, however, that the actuarial tests are merely a starting point for determining a sex offender's level of risk and that certain factors not captured by the tests should be considered. Ultimately, the trial court credited the expert testimony of Drs. Leavitt and Stanislaus over that of Drs. Gaskell and Heaton because Drs. Gaskell and Heaton did not examine the dynamic risk factors to the same extent as Drs. Leavitt and Stanislaus. The trial court entered a judgment adjudicating the respondent a sexually violent person under the Act and committing him to a secure treatment and detention facility under DHS custody.

¶ 25 Thereafter, the respondent filed a posttrial motion for reconsideration, arguing that the evidence was insufficient to support the trial court's finding. He also requested a dispositional hearing pursuant to section 40(b) of the Act (725 ILCS 207/40(b) (West 2008)), to determine whether he should be committed to a secure treatment and detention facility under DHS custody or granted a conditional release into the community. In January 2013, the trial court entered a written order denying the respondent's motion for reconsideration, but granting his request for a dispositional hearing.

¶ 26 A dispositional hearing was held on October 23, 2015. The evidence presented at that hearing included predisposition investigative reports prepared by the State's expert, Dr. Diana

Dobier, and the respondent's expert, Dr. Heaton. The parties rested on the reports without presenting additional testimony or evidence.

¶ 27 In her report, Dr. Dobier stated that she examined the nature and circumstances of the respondent's behavior giving rise to the State's petition seeking his involuntary civil commitment, reviewed his mental health and treatment history, and conducted an in-person interview. Dr. Dobier noted that the respondent had made some progress in DHS-TDF, but his participation in group therapy had been "minimal." She explained that the sex-offender treatment program at DHS was comprised of five phases and that, at the time of her evaluation, the respondent was in the second phase of the program. According to treatment records that Dr. Dobier reviewed, the respondent struggled with demonstrating accountability for the sexual offenses he committed and made "very little progress" in therapy due to his intentional lack of transparency and emotional outbursts.

¶ 28 Regarding the respondent's treatment needs, Dr. Dobier stated that the respondent "requires sexual offense specific treatment *** to reduce his risk of sexual reoffending." She wrote in her report that the respondent's treatment "must target *** his use of deviant fantasy; grooming/manipulation; and, his deviant arousal" so that "he can gain insight" and "take full responsibility for his offense behaviors." Dr. Dobier also listed nine "items" or treatment recommendations which the respondent has yet to complete and stated that "[t]hese complex treatment requirements indicated [that the respondent] will require intensive sex offender specific treatment." She also noted that the respondent had not developed a plan for how he will avoid reoffending.

¶ 29 Dr. Dobier opined to a reasonable degree of psychological certainty that the respondent should be committed to DHS-TDF for secure care and sexual-offense-specific treatment until he

is deemed to have lowered his substantial risk of sexually reoffending. She explained that the DHS-TDF program was specifically designed for high-risk individuals such as the respondent and no comparable sex-offender treatment program exists in a community setting. Dr. Dobier noted that the Illinois Sex Offender Management Board for Cook County has 94 approved treatment providers, but only one of those treatment providers is located in Forest Park, which is where the respondent would reside while on conditional release. In addition, Dr. Dobier stated that sexually violent persons on conditional release receive a minimal amount of treatment compared to DHS-TDF and that such treatment does not meet the respondent's needs.

¶ 30 Dr. Heaton, in contrast, opined that the respondent is an appropriate candidate to receive treatment in the community on conditional release. His report states that the respondent's treatment should focus on helping him "understand and confront his past history of offending," take responsibility for his actions, and develop an understanding of the gravity of his behavior. The respondent will also need to establish a relapse-prevention plan and an aftercare plan to help him identify his "deviant cycle of offending." Dr. Heaton compared the respondent's treatment needs to the treatment options in a secure treatment facility and those available upon conditional release. He stated that outpatient treatment for recovering violent sexual offenders is available in Cook County and he identified two treatment providers approved by the Illinois Sex Offender Management Board who provide intensive outpatient therapy. Dr. Heaton stated that "[t]here is not a substantial need that [the respondent's] *** treatment be conducted in a locked facility." In support of this opinion, Dr. Heaton noted that the respondent has "avoided trouble" while in federal and State prison, and his treatment records at DHS-TDF demonstrate that he has a "fairly good" ability to stay away from or avoid high-risk situations. Dr. Heaton further noted that the respondent has shown a "consistent ability to follow the rules of the facilities where he has been

incarcerated," does not violate facility expectations for his behavior, and that there have been no reports or indications of violent or sexually inappropriate behavior. Based upon the respondent's treatment history, current age of 71, and declining health (diabetes and hypertension), Dr. Heaton opined that the respondent's risk of reoffending can be safely monitored and controlled while on conditional release.

¶ 31 Following closing arguments, the trial court stated that it considered the reports of Dr. Dobier and Dr. Heaton, and that it was ordering the respondent to be committed to a secure treatment and detention facility under DHS custody. This timely appeal followed.

¶ 32 The respondent's first contention on appeal is that the State presented insufficient evidence to prove beyond a reasonable doubt that he is a sexually violent person. We disagree.

¶ 33 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. *In re Commitment of Fields*, 2014 IL 115542, ¶ 20. 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, weigh and resolve conflicts in the evidence, and determine the reasonable inferences to be drawn from the evidence. *Id*. A reviewing court will not reverse a sexually-violent-person adjudication unless the evidence is so improbable, unsatisfactory, or inconclusive that it leaves a reasonable doubt as to that matter. See *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

¶ 34 To establish that the respondent is a sexually violent person, the State was required to prove beyond a reasonable doubt that he: (1) had been convicted of a sexually violent offense; (2) has a mental disorder; and (3) is dangerous to others because the mental disorder creates a

substantial probability that he will engage in future acts of sexual violence. 725 ILCS 207/5(f), 35(d) (West 2008); *Fields*, 2014 IL 115542, ¶ 20. Here, the respondent does not dispute that the State proved the first and second elements beyond a reasonable doubt. Rather, he focuses on the third element, and asserts that the evidence was insufficient to prove that his mental disorders create a substantial probability that he will engage in future acts of sexual violence. "Substantial probability" has been defined as "much more likely than not." *In re Commitment of Curtner*, 2012 IL App (4th) 110820, ¶ 31.

¶ 35 Having reviewed the record in the instant case, we find that the evidence, considered in the light most favorable to the State, was sufficient to prove beyond a reasonable doubt the substantial-probability element. The State's two experts, Drs. Leavitt and Stanislaus, testified that they reviewed extensive records regarding the respondent, conducted evaluations and actuarial assessments and, based upon all of that information, opined that the respondent's mental disorders created a substantial probability that he would engage in future acts of sexual violence. While the respondent's experts, Drs. Gaskell and Heaton, provided conflicting opinions in this regard, it was for the trial court, as trier of fact, to weigh the evidence and resolve the conflicting expert testimony. See *Tittlebach*, 324 Ill. App. 3d at 11. Here, the trial court credited the opinions of Drs. Leavitt and Stanislaus over that of Drs. Gaskell and Heaton because Drs. Gaskell and Heaton did not examine the dynamic risk factors to the same extent as Drs. Leavitt and Stanislaus. We will not substitute our judgment for that of the trier of fact on this matter. See *id*.

¶ 36 The respondent argues, however, that the evidence was insufficient because his scores on the actuarial tests placed him in the low and low-moderate risk categories for sexually reoffending. He asserts that the rate of recidivism among offenders in these groups does not rise

to the level of "substantial probability." For example, he asserts that the results of the Static-99R indicated only a 9.4% and 15.7% risk of him reoffending in the next 5 and 10 years, respectively. In addition, the respondent challenges the manner in which the State's experts, Drs. Leavitt and Stanislaus, applied the dynamic risk factors to adjust the results of the actuarial tests, asserting they gave too much weight to these factors.

¶ 37 The respondent's arguments amount to nothing more than an invitation to reweigh the evidence. As noted above, it is not our function, in reviewing a challenge to the sufficiency of the evidence, to reweigh the evidence or retry the respondent. *Tittlebach*, 324 Ill. App. 3d at 11; see also *In re Detention of Lieberman*, 379 Ill. App. 3d 585, 602-03 (2007). Instead, it is the province of the trier of fact to evaluate witness credibility, resolve conflicts in the evidence, and draw reasonable inferences therefrom. *Tittlebach*, 324 Ill. App. 3d at 11.

¶ 38 In any case, contrary to the respondent's assertion, the evidence presented at trial revealed that he scored in the moderate-high risk category on the Static-99 test, the moderate risk category on the Static-2002 test, the moderate-low risk category on the Static-2002R test, and scored in the low risk category on the Static-99R test.[1] Viewed in a light most favorable to the State, we cannot say that the respondent's actuarial scores were so low as to render the trial court's finding of substantial probability to be so irrational or unsatisfactory as to leave a reasonable doubt that the respondent was a sexually violent person. See *In re Detention of Welsh*, 393 Ill. App. 3d 431, 457 (2009) (holding that the evidence was sufficient to prove the respondent a sexually violent person where the actuarial tests placed him in the low, moderate-low, moderate, and moderate-high risk categories). We also note that the State's experts, Drs. Leavitt and Stanislaus,

[1] The respondent's scores on these tests, irrespective of which doctor administered and scored the test, were consistent. For example, all four doctors administered the Static-99R and determined that the respondent scored a "one."

did not rely solely upon the actuarial assessments in rendering their opinions. Rather, they testified that they rendered their opinions after reviewing extensive documents, including criminal reports and records contained in the DOC master file. Thus, while it is true that the respondent scored in the low risk category on the Static-99R test, Drs. Leavitt and Stanislaus both testified that the test results did not accurately reflect the respondent's risk of reoffending. Both doctors identified several dynamic risk factors, not measured by the actuarial tests, and opined that, in the respondent's case, application of those factors increased the possibility that he would reoffend, apparently to the point where reoffending became a substantial probability. The record reveals that the respondent's counsel vigorously cross-examined Drs. Leavitt and Stanislaus about the reliability of the actuarial tests, how they scored the respondent based upon the actuarial tools, and how they considered dynamic risk factors, in forming their ultimate conclusion about the respondent's risk of reoffending. The trial court was free to consider their testimony and assess the appropriate credibility about why they utilized certain actuarial tests and applied dynamic risk factors. Here, the trial court found that the test results were merely a starting point and that the application of dynamic risk factors was an important consideration in assessing the respondent's risk of reoffending. The trial court's finding that it is substantially probable that the respondent would commit future acts of sexual violence is supported by testimony of Drs. Leavitt and Stanislaus.

¶ 39 In sum, viewing the evidence in a light most favorable to the State, we find that the evidence was sufficient for the trial court to have found beyond a reasonable doubt that the respondent is a sexually violent person as defined by the Act.

¶ 40 We next address the respondent's contention that he was denied his due process right to a fair trial because the trial court misapprehended the evidence presented at trial in deciding whether the State's experts were more credible than the respondent's experts.

¶ 41 During a bench trial, a trial court's misapprehension of evidence crucial to the defense may violate the defendant's right to due process. *People v. Mitchell*, 152 Ill. 2d 274, 321 (1992). However, where the record does not affirmatively indicate that the fact-finder was mistaken, there is a presumption that the trial court considered only competent evidence in reaching its verdict. *People v. Gilbert*, 68 Ill. 2d 252, 258-59 (1977). Where the record affirmatively indicates that the trial court did not remember or consider the crux of the defense when entering judgment, the defendant did not receive a fair trial. *People v. Bowie*, 36 Ill. App. 3d 177, 180 (1976). Moreover, "[p]arties are not entitled to error-free trials, but fair trials, free of substantial prejudice. [Citation]." *In re Detention of Traynoff*, 358 Ill. App. 3d 430, 440 (2005). As such, not every error committed by the trial court leads to reversal; rather, "there must be some showing that the appellant has been prejudiced by that error, and reversal is required only where it appears that the outcome might have been different had the error not occurred." *Id.*

¶ 42 The respondent first claims that the trial court incorrectly stated that Drs. Gaskell and Heaton did not consider dynamic risk factors in reaching their opinion regarding risk of recidivism. We find that the respondent's assertion is rebutted by the record. Contrary to the respondent's assertion, the trial court stated that "Dr. Gaskell, who has the most extensive report, *** lists five risk factors at page 29 of his 32 page report." The court also noted that "Dr. Heaton *** at page 10 of his report talks about dynamic risk factors in the heading. And yet, if you review the report, he doesn't talk about dynamic risk factors at all. *** He talks about outpatient group sex offender treatment and things like that." After noting that the State's experts discussed

the dynamic risk factors in "great detail," the trial court concluded that Dr. Gaskell's and Dr. Heaton's evaluations "simply don't even address those [dynamic risk factors]." Viewing the trial court's statements as a whole, we find that the court accurately recalled the evidence and then drew a reasonable conclusion from that properly remembered evidence.

¶ 43 The respondent next argues that the trial court inaccurately stated that Drs. Gaskell and Heaton opined that the respondent was "not likely to reoffend." According to the respondent, both doctors concluded that there is *some risk* that he will reoffend, but the risk does not rise to the level of "substantial probability." This claim is also belied by the record. In its oral ruling, the trial court read from Dr. Gaskell's report and correctly recalled his opinion. The court stated:

> "Interestingly in Dr. Gaskell['s report], his language here is interesting. He says, it should be noted that [the respondent] committed his sexual offenses when he was 57; therefore, if anything, his risk may be somewhat higher than the Static-99R suggests which is a one, but not high enough to indicate he's substantially probable to sexually reoffend. Somewhat higher, but not high enough.
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> He says, however, it is this examiner's opinion within a reasonable degree of psychological certainty that [the respondent] is not substantially probable that he will engage *** in future acts of sexual violence. This is not to say that he is at a low risk to reoffend. Whatever that means. But he does not meet the threshold for substantial probability."

In our view, the trial court's subsequent statement that Drs. Gaskell and Heaton opined that the respondent was "not likely to reoffend" does not rise to the level of misstating the evidence;

rather, the court was summarizing their testimony. See *People v. Simon*, 2011 IL App (1st) 091197, ¶¶ 95-96 (a trial court does not improperly recall a witness' testimony where it summarizes the testimony and draws a reasonable inference therefrom). In any case, regardless of whether Drs. Gaskell and Heaton opined that it was "not likely" or not "substantially probable" for the respondent to reoffend, both statements have the same essential meaning—that is, the respondent's risk of committing a future act of sexual violence does not satisfy the third element of the Act. We see no prejudice to the respondent from the trial court's construction of the evidence.

¶ 44 The respondent also argues that the trial court incorrectly stated that the Static-99 and Static-99R tests are "virtually identical with the exception that the Static-99R test accounts for a decrease in recidivism associated with the respondent's age." Although the respondent concedes that "age" is a "prominent distinction" between the two tests, he argues it is not the only factor that differentiates the two tests. While this may be true, we do not agree that the trial court's failure to recount every single difference between the Static-99 and Static-99R tests requires reversal. In our view, the trial court was simply highlighting the most significant difference between the two tests and, as the respondent concedes, its statement is supported by the testimony of Dr. Heaton who stated that "the only difference between the Static-99 and the Static-99R *** is the issue of age, the way the age is scored." Because the record affirmatively supports the trial court's statement, we cannot find that the trial court improperly recalled the evidence.

¶ 45 Finally, the respondent maintains that the trial court "erroneously found the developmental sample for the Static instruments consisted of only eight offenders aged 60 or above." Apparently, the trial court was referring to a study (performed by Thornton in 2006),

cited in Dr. Gaskell's report, and incorrectly implied that the study was used to develop the Static actuarial tests. The respondent argues that the Thornton study was never used to develop any of the actuarial tests and court's mistaken recollection led it to "unreasonably infer that the actuarial instruments have questionable reliability." The State argues that any error was harmless as the Thornton study did not go to the crux of the respondent's defense. We agree with the State.

¶ 46 Our review of the record shows that the trial court reviewed the testimony of all four experts. As noted above, each expert opined as to the relative utility of the actuarial tests and each discussed whether the respondent's actuarial scores should be adjusted based upon his age. The trial court reviewed Illinois Supreme Court cases discussing actuarial tests as well as other research studies cited in Dr. Gaskell's report (*e.g.*, Prenkey and Lee (2007) and Doren (2006)). Based upon the testimony of Drs. Leavitt and Stanislaus, the trial court found that the actuarial test results were merely a starting point and the application of dynamic risk factors was an important consideration. Because the trial court did not rely solely upon the Thornton study in determining the weight it should give to the actuarial tests, we do not believe that the respondent was prejudiced or that the outcome might have been different had the trial court not made this statement. See *Traynoff*, 358 Ill. App. 3d 430, 440-41 (2005) (the respondent was not deprived of a fair trial where the trial court's incorrect statement did not prejudice the respondent and did not affect the outcome of his trial).

¶ 47 Accordingly, we conclude that the respondent was not deprived of his due process right to a fair trial where the trial court correctly recalled the evidence presented at trial and where its alleged misstatement regarding the Thornton study did not prejudice the respondent.

¶ 48 Next, the respondent argues that the trial court erred, as a matter of law, in committing him to a secure detention and treatment facility under DHS control. He asks this court to vacate the trial court's commitment order and grant his request for conditional release.

¶ 49 Section 40(a) of the Act provides that, when a respondent is found to be sexually violent, the court "shall order the person to be committed to the custody of [DHS] for control, care and treatment until such time as the person is no longer a sexually violent person." 725 ILCS 207/40(a) (West 2008). Section 40(b)(2) of the Act provides that the order of commitment shall specify either institutional care in a secure facility or conditional release. 725 ILCS 207/40(b)(2) (West 2008). The court must consider the following three factors in determining whether commitment shall be for institutional care in a secure facility or for conditional release: (1) the nature and circumstances of the behavior giving rise to the allegation in the petition, (2) the person's mental history and present medical condition, and (3) what arrangements are available to ensure the person has access to and will participate in necessary treatment. 725 ILCS 207/40(b)(2) (West 2008).

¶ 50 Initially, we note that the parties disagree as to the appropriate standard of review. Citing *In re Commitment of Kirst*, 2015 IL App (2d) 140532, ¶ 49, the respondent asserts that a *de novo* standard of review applies because no testimony was heard at the dispositional hearing and the court's only task was to review the reports of Drs. Dobier and Heaton. The State maintains that a trial court's decision to commit a person to a secure facility is reviewed for an abuse of discretion. We agree with the State.

¶ 51 A dispositional hearing under section 40(b) of the Act (725 ILCS 207/40(b) (West 2008)) is akin, in many respects, to a criminal sentencing hearing where the matter at hand is one of sentence or disposition. *People v. Miller*, 2014 IL App (1st) 122186, ¶ 32. At a dispositional

hearing, the trial court is called upon to weigh three factors to determine whether the respondent should be committed to a secure facility or conditionally released into the community. As in other cases where trial courts are required to weigh enumerated factors and evaluate evidence to reach a fair and just result, we review the trial court's decision to commit the respondent to a secure facility under an abuse-of-discretion standard. *In re Detention of Ehrlich*, 2012 IL App (1st) 102300, ¶ 75; *In re Detention of Lieberman*, 379 Ill. App. 3d 585, 609 (2007); *In re Detention of Erbe*, 344 Ill. App. 3d 350, 374 (2003). In so holding, we find the respondent's reliance on *Kirst*, to be inapposite since that case was not concerned with review of a commitment order following a dispositional hearing. Rather, the issue in that case was whether the respondent established probable cause to warrant an evidentiary hearing. *In re Commitment of Kirst*, 2015 IL App (2d) 140532, ¶ 49. Given that the case cited by the respondent does not support the application of a *de novo* standard of review, and in light of this court's prior precedent, we find that the abuse-of-discretion standard is appropriate in this case.

¶ 52 Turning to the merits, we now must decide whether the trial court abused its discretion in committing the respondent to a secure treatment facility. An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court. *Erbe*, 344 Ill. App. 3d at 374.

¶ 53 After careful review of the record, we conclude that the trial court did not abuse its discretion when it ordered the respondent to be committed to a secure treatment and detention facility as opposed to conditional release. At the dispositional hearing, the State presented the report of Dr. Dobier, who evaluated the respondent, examined the nature and circumstances of the respondent's behavior that ultimately led to his convictions, reviewed his mental health and treatment history, and interviewed him. She determined that he suffered from mental disorders

that made it substantially probable that he would engage in future acts of sexual violence. She further noted that there is only one treatment provider in Forest Park approved by the Illinois Sex Offender Management Board and the treatment provided at that location does not meet the respondent's treatment needs. Dr. Dobier opined that the respondent requires "intense sex offense specific treatment" and that the secure treatment facility at DHS is the only treatment program that meets the respondent's needs.

¶ 54 In light of the foregoing, we cannot say the trial court's decision to commit respondent to a secure facility was unreasonable or arbitrary. Evidence regarding the appropriate statutory factors was presented to the trial court before it made its decision to commit the respondent to a secure facility. Although we acknowledge that the respondent's expert witness, Dr. Heaton, disagreed with Dr. Dobier's opinion that treatment in a secure facility was the best course of treatment for the respondent, it is not the function of this court to reweigh the evidence, make credibility determinations, or resolve conflicting evidence. *Ehrlich*, 2012 IL App (1st) 102300, ¶ 76. Accordingly, the trial court's determination that the respondent should be committed to a secure facility was neither arbitrary nor unreasonable, and was not an abuse of discretion.

¶ 55 For the reasons stated herein, we affirm the trial court's judgment adjudicating the respondent a sexually violent person and affirm its order committing him to a secure treatment and detention facility.

¶ 56 Affirmed.