2017 IL App (3d) 170094-U

Order filed November 20, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

In re COMMITMENT OF KIRK BURKS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
(The People of the State of Illinois,	)	Peoria County, Illinois.
	)	
Petitioner-Appellee,	)	Appeal No. 3-17-0094
	)	Circuit No. 13-MR-2
v.	)	
	)	
Kirk Burks,	)	
	)	Honorable Albert L. Purham, Jr.,
Respondent-Appellant).	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Holdridge and Justice Wright concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court did not abuse its discretion in denying respondent's motion for mistrial.

¶ 2 Respondent, Kirk Burks, appeals from the circuit court's order, issued pursuant to a jury verdict, declaring him a sexually violent person (SVP). Respondent argues that his motion for mistrial, made at the close of the State's case-in-chief, should have been granted, and that the circuit court's failure to do so amounted to an abuse of discretion. We affirm.

¶ 3 FACTS

¶ 4 On January 13, 2013, the State brought a petition to have respondent committed pursuant to the Sexually Violent Persons Commitment Act (Act). 725 ILCS 207/15 (West 2012). The petition alleged that respondent was an SVP as defined by the Act, and sought an order committing respondent to the custody of the Department of Human Services (DHS) for treatment.

¶ 5 Respondent's jury trial commenced on January 10, 2017. In an extensive opening statement, the State delivered the following passage:

> "Now, the way that these cases normally work is when an individual has been convicted of a sexually violent offense, they go to the Department of Corrections [(DOC)]. When they're getting ready to get out, they will be screened to see if they're a [SVP]. If they get past that screening and they say, 'Yes, we think they may be,' they're evaluated by a [DOC] doctor. And if they refer them as being a [SVP], then the Attorney General's office gets the report, and we file the case.
>
> And then at the probable cause hearing, which is the first hearing we have in this case without a jury, then the judge—if there's probable cause, the judge will then order [DHS] to do an evaluation, and then the defense would ask for their expert. In this case, it's a little bit different, because the [DOC] doctor came back and said that she did not think the Respondent was a [SVP], which is fine. It happens. We want—you know, regardless of who the doctors work for, regardless of, you know, where they—we think their loyalties may lie or should lie or, you know, we

assume that they would lie, we want them to always feel that they are free to give their honest opinion, and we feel that's what she did in this case."

¶ 6 Throughout the trial, the State introduced evidence related to respondent's previous convictions. The evidence showed that in 1992, the State charged respondent with three counts of aggravated criminal sexual abuse (Ill. Rev. Stat. 1991, ch. 38, ¶ 12-16). In that incident, which occurred when respondent was 25 years old, respondent touched the vaginal area of three girls between the ages of 11 and 13, then masturbated in front of the girls. Respondent pled guilty to the charges and the court sentenced him to six years' imprisonment on each count.

¶ 7 The evidence further showed that in 2008, an incident occurred in which respondent placed his penis into the hand of a sleeping 18-year-old girl and proceeded to use her hand to masturbate himself. That incident occurred while a 15-year-old girl was in the room, pretending to be asleep. Later, respondent fondled the vagina and anus of the younger girl, then rubbed his penis on her head. The State charged respondent with one count of aggravated criminal sexual abuse (720 ILCS 5/12-16 (West 2008)) and one count of criminal sexual abuse (720 ILCS 5/12-15 (West 2008)). Respondent pled guilty and the court sentenced him to nine years' and six years' imprisonment, with the sentences running concurrently. It was his pending release from these sentences that gave rise to the petition in the present case.

¶ 8 The first of two expert witnesses brought by the State was Dr. Angelique Stanislaus, a forensic psychiatrist. In addition to respondent's prior convictions, Stanislaus detailed an uncharged 1992 incident in which a 13-year-old girl accused respondent of intentionally rubbing his penis on her back. Stanislaus also reported that respondent had been written up eight times for sexual misconduct while in DOC custody from 1992 through 2005. These write-ups each involved respondent exposing or fondling himself in front of female officers.

¶ 9 Stanislaus diagnosed respondent with frotteuristic disorder, exhibitionist disorder, and antisocial personality disorder. She opined that each met the definition of a mental disorder found in the Act. She further opined these disorders made it substantially probable that respondent would commit future acts of sexual violence.

¶ 10 The State's second expert was forensic psychologist Dr. David Suire. After discussing respondent's criminal history, Suire testified that he diagnosed respondent with six disorders, including exhibitionism. Suire also found it substantially probable that respondent would engage in acts of sexual violence in the future as a result of his mental disorders.

¶ 11 On recross-examination, counsel for respondent questioned Suire regarding the relationship between respondent's exhibitionism and sexual violence.

> "Q. *** [Y]ou're stating that if he exhibits his privates to a prison guard, that you can consider that an offense?
>
> A. Under certain circumstances, yes, that's correct.
>
> Q. But not a sexually violent offense? You're not testifying that that's sexually violent?
>
> A. I don't know that a simple act of exhibitionism would necessarily fall under sexually violent, but in terms of considering sexual offenses for the purpose of a risk assessment, they don't necessarily have to meet the specific legal definition under sexually violent. If nothing else—
>
> Q. Wait, wait, wait. Okay. Okay. Okay. So you're using things other than what is defined as a sexually violent offense by the statute?

A. In terms of his past sexual offense history, absolutely. We're not limited, nor can we be, to what's defined in Illinois as a sexually violent offense.

Q. Okay.

A. Now, in terms of the prediction, it is based on sexually violent offenses."

¶ 12 Following Suire's testimony, the State rested. Counsel for respondent immediately moved for a mistrial. Counsel argued that the State's mention of a probable cause hearing in its opening statement was grounds for a mistrial, as was what counsel characterized as testimony from the State's witness that could cause confusion as to the definition of sexual violence. The court denied the motion.

¶ 13 Following the close of evidence and arguments, the court tendered instructions to the jury. Those instructions included the following:

"The term 'Sexually Violent Offense' as defined by the [Act] includes the offense of Aggravated Criminal Sexual Abuse. It does not include the offense of Criminal Sexual Abuse ***.

The term 'Sexually Violent Offense' as defined by the [Act] does not include exhibitionist behavior.

The term 'Sexually Violent Offense' as defined by the [Act] does not include masturbation.

The term 'Sexually Violent Offense' as defined by the [Act] does not include disciplinary tickets received in the [DOC]."

The jury returned a verdict finding that respondent was an SVP. Following a dispositional hearing, the court found respondent required treatment in a secure facility and remanded him to DHS custody.

¶ 14 ANALYSIS

¶ 15 On appeal, respondent argues that the circuit court abused its discretion in denying his motion for mistrial. Respondent cites two grounds upon which he argues a mistrial was warranted. First, respondent contends that the State, in its opening statement, "told the jury that there had already been a finding by a judge that there was probable cause to believe that Respondent was sexually dangerous." Second, respondent contends the State evoked "confusing testimony from Dr. Stanislaus and Dr. Suire about what would be considered an act of sexual violence."

¶ 16 "Generally, a mistrial should be granted where an error of such gravity has occurred that it has infected the fundamental fairness of the trial, such that continuation of the proceeding would defeat the ends of justice." *People v. Bishop*, 218 Ill. 2d 232, 251 (2006). On review, we will not disturb the circuit court's denial of a motion for mistrial absent a clear abuse of discretion. *Id*. An abuse of discretion occurs where the circuit court's determination "is arbitrary, fanciful, unreasonable, or no reasonable person would take the view adopted by the *** court." *People v. Delvillar*, 235 Ill. 2d 507, 519 (2009).

¶ 17 I. Opening Statements

¶ 18 Initially, we note that respondent, in summarizing the State's opening remarks, mischaracterizes its reference to probable cause. Respondent asserts that the State "told the jury that there had already been a finding by a judge that there was probable cause to believe that Respondent was sexually dangerous." However, a reading of the State's comments (see *supra*

¶ 5) shows that the State was merely providing an abstract summary of the procedures employed under the Act. In the State's single mention of probable cause, it made no specific reference to respondent's case. Indeed, the only specific mention of the case included in the State's procedural summary was its admission that the DOC doctor had not suggested respondent was sexually violent, a fact actually beneficial to respondent's case.

¶ 19 Respondent cites a single case in ostensible support of the proposition that "[a]ny references to previous findings of probable cause are improper." *In re Commitment of Butler*, 2013 IL App (1st) 113606. In that case, however, the purported error was not the mere mention of probable cause, but the violation of the circuit court's *in limine* order barring any such references. *Id*. ¶ 5. Thus, the respondent in that appeal was not arguing that references to the probable cause finding were errors *per se*, but simply violations of a court order that was issued in that particular case. *Id*. ¶ 56. In any event, the *Butler* court actually rejected the argument, finding, *inter alia*, "each witness's reference to a finding of probable cause was a brief passing reference the significance of which the jury did not likely understand." *Id*.

¶ 20 We are further persuaded by our supreme court's analyses in an analogous context. In *People v. Howard*, 147 Ill. 2d 103, 140 (1991), the court rejected the notion that the State's reference to the grand jury indictment constituted error. In that case, the State commented in its opening statement that the grand jury had indicted the defendant on the charge on which he was now being tried. *Id*. at 139. In finding no error in that comment, the court remarked:

> "Viewed in context, the prosecutor's brief remark was, we believe, merely a neutral reference to the fact that prosecution of the present case had been commenced by indictment. The prosecutor stated only that the jury would be determining *whether or not* the defendant was guilty of the offenses

> charged; the prosecutor did not suggest that the indictment itself was evidence of guilt." (Emphasis in original.) *Id*. at 139-40.

The supreme court rejected the same argument in the earlier case of *People v. Jones*, 123 Ill. 2d 387, 416 (1988).

¶ 21 In the present case, the State's passing comment on the procedures leading up to an SVP trial was not an error. The State did not express or imply that the probable cause finding was indicative of whether the jury should determine respondent to be an SVP. It was nothing more than "a neutral reference" explaining how the matter had proceeded from point A to point B. *Howard*, 147 Ill. 2d at 139. Moreover, absent further elaboration by the State, it is doubtful that the jury would attach any significance to a pretrial finding of probable cause. See *Butler*, 2013 IL App (1st) 113606, ¶ 56. Because the comment was plainly not an error of such magnitude that would undermine the fairness of respondent's trial, the circuit court did not abuse its discretion in denying respondent's motion for mistrial on this ground.

¶ 22 II. Testimony on Sexual Violence

¶ 23 The Act defines an SVP as "a person who has been convicted of a sexually violent offense *** and who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence." 725 ILCS 207/5(f) (West 2012). The definition required the State to prove three elements at trial: (1) that respondent had been convicted of a sexually violent offense, (2) that respondent suffers from a mental disorder, and (3) respondent's mental disorder makes it substantially probable that respondent will engage in acts of sexual violence. Section 5(e) of the Act lists the criminal offenses that qualify as "sexually violent." 725 ILCS 207/5(e) (West 2012). It is undisputed on appeal that respondent's convictions in 1992 and 2008 for aggravated criminal sexual abuse constituted

sexually violent offenses. It is also undisputed that acts such as exhibitionism and masturbation are not sexually violent offenses.

¶ 24 Respondent argues on appeal that the State's evidence regarding respondent's exhibition and masturbation "possibly led the jury to believe that the State had met their [*sic*] burden if they [*sic*] had shown a substantial probability that [respondent] would engage in future acts of masturbation and exhibitionism." While, at one point in his brief, respondent references "confusing testimony from Dr. Stanislaus and Dr. Suire," the only actual evidence he takes exception to is the following colloquy from Suire's recross-examination:

> "Q. *** [Y]ou're stating that if he exhibits his privates to a prison guard, that you can consider that an offense?
>
> A. Under certain circumstances, yes, that's correct.
>
> Q. But not a sexually violent offense? You're not testifying that that's sexually violent?
>
> A. I don't know that a simple act of exhibitionism would necessarily fall under sexually violent, but in terms of considering sexual offenses for the purpose of a risk assessment, they don't necessarily have to meet the specific legal definition under sexually violent. If nothing else—
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> Q. Wait, wait, wait. Okay. Okay. Okay. So you're using things other than what is defined as a sexually violent offense by the statute?
>
> A. In terms of his past sexual offense history, absolutely. We're not limited, nor can we be, to what's defined in Illinois as a sexually violent offense.
>
> Q. Okay.

A. Now, in terms of the prediction, it is based on sexually violent offenses."

It is this testimony that respondent claims may have confused the jury.

¶ 25 We reject respondent's argument completely. Suire's testimony could not have been more clear. He explained that exhibitionism was not a sexually violent offense, but that he considers all sexually-based offenses—especially heinous or not—in composing a risk assessment. He then clarified that the ultimate prediction, however, remains whether respondent is substantially probable to commit acts of sexual violence. We find it unlikely that the jury was so confused by these statements that it came to the belief that exhibitionism (or masturbation) were sexually violent offenses. Moreover, even respondent concedes, citing *In re Detention of Lieberman*, 379 Ill. App. 3d 585 (2007), that evidence regarding his exhibitionism or masturbation constituted "proper evidence of disorders that are not sexually violent in themselves but impact the offender's emotional and volitional capacity that may predispose him to commit future acts of sexual violence."

¶ 26 Furthermore, the circuit court's denial of respondent's motion for mistrial was undoubtedly informed by the fact that, even if somehow the jury had been misled by Suire's testimony, any such confusion would be cured through jury instructions. Indeed, those instructions explicitly told the jury that exhibitionist behavior, masturbation, or disciplinary tickets from the DOC do *not* constitute sexually violent offenses under the Act. In short, there was no possibility that the jury in respondent's case was confused.

¶ 27 We find that the circuit court's denial of respondent's motion for mistrial on the grounds of jury confusion was not arbitrary, fanciful, or unreasonable. *Delvillar*, 235 Ill. 2d at 519. Moreover, because we find no error either in the State's opening statements or in the admission

of Suire's testimony, we find no cumulative error between the two, let alone error of such gravity as would infect the fairness of respondent's trial. *Bishop*, 218 Ill. 2d at 251. Accordingly, we conclude that the circuit court did not abuse its discretion in denying respondent's motion for mistrial.

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, we affirm the judgment of the circuit court of Peoria County.

¶ 30 Affirmed.