2018 IL App (1st) 161733-U

No. 1-16-1733

Third Division
January 17, 2018

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

In re COMMITMENT OF LEONEL GARZA,	)	Appeal from the Circuit Court of Cook County.
(The People of the State of Illinois,	)	
Petitioner-Appellee,	)	No. 09 CR80007
v.	)	Honorable Thomas J. Byrne,
Leonel Garza,	)	Judge, presiding.
Respondent-Appellant).	)	

PRESIDING JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Lavin concurred in the judgment.

O R D E R

¶ 1 *Held*: The State's reference to basis-of-opinion testimony was not improper where the remarks were made in the context of the expert witnesses' opinions. Other remarks by the State were within the wide latitude given to prosecutors in argument. Any prejudice from minor and isolated misstatements of law and fact was cured by the trial court's instructions.

¶ 2 Proceedings under the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 *et seq*. (West 2012)) identify individuals who are dangerous due to mental disorders that would predispose them to sexual violence and compel them into treatment. Respondent

Leonel Garza appeals a jury's finding that he is a sexually violent person under the Act, arguing that the State made numerous improper remarks during its opening statement, closing argument, and rebuttal that deprived him of a fair trial. He contends that the State (1) argued basis-of-opinion testimony for its substantive truth; (2) misstated the law; (3) made arguments unsupported by the record; (4) injected personal opinions on witness credibility; and (5) used inappropriate sarcasm and derision in reference to respondent and his witness. He argues alternatively that his trial counsel was ineffective for failing to object to the challenged comments. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The State petitioned to commit respondent as a sexually violent person on October 3, 2009, shortly before his scheduled release from the Illinois Department of Corrections. Dr. Raymond Wood, Dr. Paul Heaton, and Dr. Luis Rosell each evaluated respondent and subsequently testified at his commitment trial.

¶ 5 A. Opening Statement

¶ 6 At the beginning of the trial, the trial court instructed the jury that each party would be making a statement and that the statements were not evidence and should not be considered as evidence. In the State's opening statement, the assistant state's attorney described the evidence the State would be presenting. She explained that the State's expert witnesses had relied on several things in coming to their opinion, including documents, interviews with respondent, and psychological tests. The assistant State's attorney also stated:

> "You're going to hear how the doctors relied upon [respondent's] 1976 conviction for rape. And you're going to he[a]r the facts of that. You're going to hear how that individual was a woman who was standing at a bus stop.

> How he approached her and asked her if she wanted to smoke some reefer with him. And how he drug her to a loading dock. How he forced her to remove her pants. And how he forcefully raped her."

She then noted that respondent had been arrested for "two separate other offenses" while on court supervision, before stating:

> "You're going to hear that the doctors relied upon the facts from the 1992 case. And these are just some of the things that you're going to hear that they relied upon to come to their conclusions.
>
> In the 1992 case – while he was 18 at the time of the '76 case, in the 1992 case he was 35 years old. This is another case where he dragged someone in off the street into a gangway.
>
> He demanded money from the person. He struck her in the face. He ended up relocating her to another area in the alley, striking her again, and physically removing her clothing and raping her.
>
> So you're going to se[e] how this pattern of behavior that the doctors are looking at to diagnos[e] the individual how that pattern of behavior goes on and on."

The assistant state's attorney then discussed other aspects of the doctors' expected testimony at length.

¶ 7 B. Trial Evidence

¶ 8 Following opening statements, the State presented the testimony of two experts: Dr. Raymond Wood and Dr. Paul Heaton. Before each witness's opinion testimony, the trial court instructed the jury on the limited use of basis-of-opinion testimony.

¶ 9 Dr. Wood, a psychologist and former evaluator for the Illinois Department of Human Services, testified that he first evaluated respondent in December 2009. During the evaluation respondent exercised his right not to participate in an interview. Accordingly, Dr. Wood based his evaluation on respondent's medical, criminal, disciplinary, and other records. He evaluated respondent again in 2010, after respondent indicated that he wished to participate in the evaluation process.

¶ 10 In his evaluation, Dr. Wood relied on respondent's criminal history, which included 16 arrests between the ages of 18 and 33. He testified that respondent had been convicted of rape and robbery in 1976. Records from the conviction indicated that respondent, then 18 years old, had approached a woman at a bus stop and offered to smoke marijuana with her. When the woman declined, respondent forced her behind a building and raped her. He then robbed her.

¶ 11 Dr. Wood also relied upon respondent's 1988 arrest. A 17-year-old woman had reported that respondent invited her back to his hotel room and they had talked. When the woman indicated that she had to leave, he told her that she was "going to like what I'm going to do next." He then choked the woman, ordered her to undress, "forced her to perform *** oral copulation," and "raped her while he had his arms across her throat." Respondent was subsequently charged with aggravated criminal sexual assault, but the charge was dismissed. During his interview with Dr. Wood, respondent stated that the woman had met with him seeking drugs and became angry when they used up his supply. He admitted that there "might have been some non-consensual contact, but it wasn't intentional." He further told Dr. Wood that "she should have known that sex was going to be involved."

¶ 12 Dr. Wood next described respondent's 1992 conviction for criminal sexual assault and robbery. In that case, the victim reported that respondent dragged her into a gangway and demanded that she give him her money. After she complied, he struck her and demanded her jewelry. He dragged her by the throat into an alley and ordered her to undress. When she refused, he struck her, removed her clothing, pushed her to the ground, and raped her. In the 2010 interview with Dr. Wood, respondent stated that he had seen the 1992 victim while riding on the bus. He followed her after she exited and "his intent was to rape."

¶ 13 In considering respondent's criminal history, Dr. Wood noted that respondent repeatedly used "violence beyond what seemed necessary to gain the victim's compliance" and restricted the victim's breathing. He opined that these details suggested that respondent's sexual arousal was tied to violence.

¶ 14 Dr. Wood further testified that respondent was "cooperative, but *** kind of guarded" during his interview. He was inconsistent in relating details and exhibited "minimization", stating that 1976 sexual assault "just happened" and "painting himself in the best manner possible." Although respondent showed remorse and indicated that he took "full responsibility" for his actions, there was also evidence that he "distanc[ed] himself from responsibility" over the course of the interview.

¶ 15 Dr. Wood also administered several psychological tests to respondent. One test[1] indicated that respondent "was attempting to make things look better than they should in terms of his life and the problems he's facing." Another[2] indicated that respondent attempts to present himself in an overly positive fashion, is unwilling to disclose much about himself, and engages in denial and minimization of his offending behaviors. Dr. Wood also considered

[1] The Minnesota Multiphasic Personality Inventory-2.
[2] The Multiphasic Sex Inventory-2.

three actuarial instruments, each of which indicated that respondent had either a moderate or high risk of sexually reoffending. Based on these instruments and his own evaluation, Dr. Wood opined respondent was "substantially probable" to commit further acts of sexual violence if released.

¶ 16 Dr. Wood diagnosed respondent with (1) paraphilia, not otherwise specified, sexually attracted to non-consenting females not exclusive (hereinafter[3], "paraphilia NOS non-consent"); (2) alcohol, cannabis, and cocaine abuse in a controlled environment; and (3) personality disorder, not otherwise specified, with antisocial traits. Dr. Wood further opined that each of the diagnoses was congenital or acquired, affected respondent's emotional or volitional capacity, and predisposed him to engage in future acts of sexual violence. He testified that all of the diagnoses were found in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (hereinafter "DSM-IV").

¶ 17 A newer edition of the DSM (hereinafter "DSM-5") had been approved shortly before respondent's trial, and Dr. Wood acknowledged that it did not specifically contain a paraphilia NOS diagnosis. He testified, however, that the DSM-5 contained a diagnosis termed "other specified paraphilic disorder" that was "exactly akin" to paraphilia NOS and encompassed his diagnosis of paraphilia NOS non-consent. He acknowledged that there was disagreement concerning the use of a paraphilia NOS diagnosis within his professional community. A similar diagnosis of paraphilic coercive disorder had been proposed for the DSM-5, but was denied because it was difficult to distinguish from a separate disorder.

¶ 18 Dr. Heaton, an evaluator for the Illinois Department of Corrections, testified that he evaluated respondent in early 2011. Respondent declined to participate in an interview or

[3] Where testimony related to the more general diagnosis of paraphilia, not otherwise specified, we will use paraphilia NOS.

psychological tests, so Dr. Heaton relied on records, reports, and prior evaluations of respondent in his prison file and his file with the Department of Human Services. He also considered respondent's criminal history. His description of the circumstances of respondent's sexual violence convictions and 1988 arrest was substantially similar to Dr. Wood's testimony.

¶ 19 He also reviewed respondent's prison disciplinary record, explaining that respondent had accumulated "between 32 and 93" rule violations between 2000 and 2009. Department of Human Services records indicated that respondent had been reported for four rule violations in the year preceding his commitment trial. The violations involved threats, intimidation, fighting, and insolence.

¶ 20 Dr. Heaton diagnosed respondent with (1) paraphilia NOS non-consent; (2) personality disorder, not otherwise specified, with anti-social features; and (3) alcohol, cocaine, and cannabis abuse in a controlled environment. He acknowledged that there is "major debate" in the psychological field about a paraphilia NOS diagnosis. In the DSM-5, paraphilia NOS is included as "other specified paraphilic disorder."

¶ 21 Reviewing actuarial instruments that indicated respondent was a moderate or high risk for recidivism and other factors, Dr. Heaton opined that respondent was substantially probable to sexually reoffend.

¶ 22 Dr. Luis Rosell, a clinical psychologist, testified on respondent's behalf.[4] He evaluated respondent in 2010, performing a clinical interview and reviewing his records. During his interview with Dr. Rosell, respondent spoke about his social history, criminal history, and substance abuse history. Respondent admitted engaging in the behavior underlying his

[4] As with the State's experts, the trial court instructed the jury on the limited use of basis-of-opinion testimony before Dr. Rosell's opinion testimony.

convictions and understood that his behavior had harmed his victims. However, Dr. Rosell acknowledged that he did not review any police reports concerning respondent's 1988 arrest and relied exclusively on respondent's description of the encounter as consensual. Respondent described the 1992 sexual assault as a "random occurrence" that was due to his intoxication.

¶ 23 According to Dr. Rosell, respondent also admitted to having a substance abuse problem in the past, but he refused to engage in drug or alcohol use in prison, despite opportunities to do so. Dr. Rosell opined that respondent's abstinence from illicit substances was a "good sign" that he might continue to abstain if released.

¶ 24 Dr. Rosell diagnosed respondent with personality disorder, not otherwise specified, and substance abuse disorders. He opined that respondent did not have any mental disorder "to the extent *** for him to be civilly confined." He further opined that respondent did not suffer from an acquired or congenital mental disorder. Testifying about paraphilia NOS, Dr. Rosell opined that the diagnosis is a "waste basket diagnosis" that psychologists use when an individual does not meet the criteria of the eight more-specified disorders found in the DSM-IV. He acknowledged that paraphilia NOS was present in the DSM-IV and had been "renamed" in the DSM-5. He further opined that a diagnosis of paraphilia NOS non-consent is not included in either the DSM-IV or the DSM-5. Noting professional controversy regarding paraphilia NOS non-consent, Dr. Rosell testified that the similar paraphilic coercive disorder had been proposed for the various editions of the DSM and rejected multiple times.

¶ 25 He also conducted a risk assessment of respondent, using two actuarial instruments. One of the instruments indicated that respondent was in the "moderate-high" risk range with an

18% chance to recidivate in five years. The second instrument placed respondent in the moderate risk category. Dr. Rosell opined that respondent was "non-substantially probable to reoffend" based on his acknowledgment of guilt, remorse, support system, and other factors.

¶ 26 Dr. Rosell acknowledged that he had not reviewed any of respondent's records since submitting his report in 2010.

¶ 27 C. Closing Arguments

¶ 28 In the State's closing argument, an assistant attorney general stated that Dr. Wood and Dr. Heaton diagnosed respondent with paraphilia NOS non-consent after looking at "his behavior and history that resulted in arrests and convictions." She then described respondent's criminal history as follows:

> "Going back to the 1976 case, that was the one where he was out partying. He saw some woman at the bus stop, dragged her into a loading dock, and raped her.
>
> In 1988, he was charged with an offense, although not convicted, where he was talking with some girl on the street. They went back to his hotel room. And you heard the testimony from the doctors that he then choked her into submission and forced her to perform oral and vaginal sex with him.
>
> Also in 1992, this respondent again engaged in this type of behavior. This was the conviction for aggravated criminal sexual assault where he was doing community service. He felt angry about that. He went out partying. Things escalated. He saw some woman on the bus. He felt attracted to her. He had the urge to have sex with her. And he followed her off the bus, dragged her, took her money and jewelry, and then raped her."

¶ 29 The assistant attorney general then discussed the psychologists' other two diagnoses and argued that respondent was substantially probable to commit further acts of sexual violence.

¶ 30 In respondent's closing argument, his counsel argued that paraphilia NOS non-consent was a waste basket diagnosis that had been rejected by the DSM's drafters.

¶ 31 For the State's rebuttal[5], the assistant state's attorney argued that the State's experts' paraphilia NOS non-consent diagnoses were valid. She further argued that Dr. Rosell's testimony was incredible and contradictory.

¶ 32 Following arguments, the trial court instructed the jury that the parties' arguments were not evidence. The jury found respondent to be a sexually violent person and the court subsequently ordered him to institutional care in a secure facility.

¶ 33 II. Analysis

¶ 34 A. Plain Error

¶ 35 Respondent alleges several instances of impropriety in the State's opening statement, closing argument, and rebuttal. He acknowledges that his trial counsel failed to raise any objection to the challenged statements, and thus none of the alleged errors were preserved. Nevertheless, he asks that we review the merits of his claims under the plain error doctrine.

¶ 36 Although proceedings under the Act are civil in nature, the fundamental liberty interests involved require that we consider the criminal plain error rule in such cases. *In re Commitment of Gavin*, 2014 IL App (1st) 122918, ¶ 55. Generally, a respondent waives any error that was not preserved through both a contemporaneous objection and a written post-trial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). The plain error doctrine allows a reviewing court to consider a clear or obvious unpreserved error where (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the respondent or (2) the error is so serious that it affected the fairness of the

[5] As respondent asserts an extensive list of improprieties in the State's rebuttal, we provide a brief summary and elaborate on the specifically challenged passages in the relevant sections of our analysis.

respondent's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. See *People v. Nowells*, 2013 IL App (1st) 113209, ¶ 18.

¶ 37 The first step in a plain error analysis is to determine whether an error occurred as, absent an error, there can be no plain error. *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010). Thus, we first address each of respondent's claims to determine whether any error occurred before considering whether the plain error doctrine is applicable.

¶ 38 B. References to Basis-of-Opinion Evidence

¶ 39 Respondent first contends that the State improperly argued and referenced basis-of-opinion testimony for its substantive truth. He argues that the State excessively related the facts underlying his 1976 conviction, 1988 arrest, and 1992 conviction in its opening statement, closing argument, and rebuttal argument, and thus denied him his right to a fair trial.

¶ 40 We have already related the relevant portions of the State's opening statement and closing argument. The challenged assertions in its rebuttal argument follow. Referencing Dr. Wood's testimony that not every rapist has a mental disorder, the assistant state's attorney argued, "But when you start to rape over and over and over there is a pattern of behavior, and that behavior is pointing. This is what the doctors are looking at to get the diagnosis [paraphilia NOS non-consent]. It is the attraction to the non-consent." Later, she stated, "And Dr. Wood pretty eloquently told you about the point of violence in all of this. The fact that when you use violence beyond what you need to control someone. Because if you are going to strong arm rob someone or take someone's car or rape someone, there is a lot of physical control you have over them, either scare them because you have a weapon or big person that they comply." Finally, in responding to respondent's closing argument that he had not

demonstrated an uncontrollable sexual urge while incarcerated, the assistant state's attorney stated, "There are no bus stops where you can approach someone and ask if you can smoke reefer with them and then club them and take them in an alley. There are no alleys to drag women into."

¶ 41 The prosecution is afforded wide latitude in making closing arguments so long as the comments made are based on the evidence or reasonable inferences. *People v. Williams*, 192 Ill. 2d 548, 573 (2000). The State may comment upon the credibility of the witnesses and may respond to a respondent's statements that clearly invite a response. *People v. Gonzalez*, 388 Ill. App. 3d 566, 590 (2008). When we review a challenge to remarks made by the prosecution during a commitment hearing, we consider the comments in context of the entire closing arguments made by both parties. *In re Commitment of Butler*, 2013 IL App (1st) 113606, ¶ 30. We will not reverse a jury's verdict based upon improper remarks unless those comments were of such magnitude that they resulted in substantial prejudice to respondent and constituted a material factor in his commitment. See *id.*

¶ 42 Experts may give their opinions based on facts not in evidence if the facts are of a type reasonably relied on by experts in their particular field. *People v. Nieves*, 193 Ill. 2d 513, 527-28 (2000); see also Ill. R. Evid. 703 (eff. Jan. 1, 2011); Ill. R. Evid. 705 (eff. Jan. 1, 2011). The facts underlying an expert's opinion may not be considered as substantive evidence unless independently admissible. *In re Commitment of Doherty*, 403 Ill. App. 3d 615, 621 (2010). Although the State may not allude to these facts for their substantive truth (*Gavin*, 2014 IL App (1st) 122918, ¶ 55) it "may rely on expert witness opinion and in doing so may also explain the basis for those opinions" (*Butler*, 2013 IL App (1st) 113606, ¶ 36).

¶ 43 The State relies upon *Butler*, in which the reviewing court rejected the respondent's contention that the State had improperly argued the basis-of-opinion evidence as substantive evidence. *Butler,* 2013 IL App (1st) 113606. The court noted that the State argued that the facts and circumstances of the respondent's history of violent and sexual offenses were relied upon by their expert witnesses and supported their expert witnesses' opinions. *Id*. ¶ 34. In addition, the prosecutors prefaced and qualified their remarks "as relating solely to their expert witnesses' opinions." The reviewing court concluded that the State's remarks in closing argument were not improperly made. *Id*.

¶ 44 In contrast, respondent cites *Gavin*, where the State repeatedly referred to the underlying facts as something other than the basis of the experts' opinions. *Gavin*, 2014 IL App (1st) 122918, ¶¶ 73-74. The State argued the explicit facts as a narrative and only occasionally prefaced its recitation of the facts by noting that the experts relied on these facts to form their opinions but did not mention how these facts were relied on by the experts. *Id*. The effect of the narrative was to disconnect the facts from the experts' opinions and to make it seem as though the respondent was on trial for the crime of rape. *Id*. The court in *Gavin* distinguished *Butler*, because the State in that case had framed respondent's past convictions as a " 'deviant pattern' " of behavior the experts relied upon in reaching their diagnoses and further qualified its remarks by repeatedly referencing the experts' reliance on the substantive facts. *Gavin*, 2014 IL App (1st) 122918, ¶ 70. In *Gavin*, the court determined that the State insufficiently tied the underlying facts to the testimony that the respondent had a mental disorder. *Gavin*, 2014 IL App (1st) 122918, ¶ 71.

¶ 45 We find *Butler* to be more comparable to the case at bar. In its opening statement, closing argument, and most of its rebuttal, the State prefaced any reference to the facts of

respondent's past behavior by noting the experts relied on those facts in making their opinions. Viewed in context, these statements are only related as part of the State's explanation of the experts' diagnoses. Only the final challenged statement, regarding respondent's lack of sexual misconduct while incarcerated, was not immediately preceded or followed by reference to the experts' opinions. However, it took place in a longer discussion of mental disorder and was put forth to counter respondent's attack of the State's experts' diagnoses. Moreover, we cannot find that the State's references were of such magnitude that they resulted in substantial prejudice and constituted a material factor in respondent's commitment. None of the challenged statements go into excessive detail or are couched in such inflammatory language that they make it appear as if respondent was on trial for rape, as was found in *Gavin.* Additionally, any prejudice was cured by the repeated instructions given to the jury by the trial court. *People v. Brooks*, 345 Ill. App. 3d 945, 951 (2004) ("The trial court can generally correct any error resulting from an improper remark by sustaining an objection or instructing the jury.") There is a strong presumption that the jurors followed the instruction of the court. *In re Detention of Lieberman*, 379 Ill. App. 3d 585, 605 (2007). The jury was instructed three times on the limited use of basis-of-opinion evidence and instructed that opening statement and closing arguments were not to be viewed as evidence. None of the statements were so prejudicial so as to overcome the presumption that the jury followed the court's instruction. Accordingly, the State's remarks did not constitute error, and consequently were not plain error.

¶ 46 C. Misstatement of Law

¶ 47 Respondent contends that the State misstated the law in the following statements made during rebuttal:

> "That mental disorder definition that Judge Byrne is going to give you, it doesn't say it has to be in the [DSM.] The reason why you get diagnoses out of here is this is a manual that doctors talk to with each other, the psychologists and psychiatrists, and they agree. If somebody came in to you and testified, you know, loony-coocoo disease was a disease and you guys decided that the doctor knew from the research what he was talking about in his experience that loony-coocoo disease was the reason why the person was more likely than not to substantially probable to reoffend you could do it. I would not suggest it, but if you did and felt it met this category, it would."

Respondent argues that these statements incorrectly assert that involuntary civil confinement can be imposed "on the basis of any imaginable diagnosis" and diminished the State's burden of proof.

¶ 48 Although the State is given great latitude in making its arguments, it may not misstate the applicable law or diminish its burden of proof. *Gavin*, 2014 IL App (1st) 122918, ¶ 51. However, misstatements of law by a prosecutor are not reversible error unless they cause substantial prejudice. See *People v. Brooks*, 345 Ill. App. 3d 945, 951 (2004). In determining the prejudicial weight of a misstatement of law, we consider the number of times the misstatement was repeated and whether further argument or court instruction corrected the misstatement. See *id.*

¶ 49 Section 5(f) of the Act (725 ILCS 207/5(f) (West 2012)) defines a sexually violent person 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." Although the phrase "substantially probable"

is not defined in the Act, the appellate court has defined it to mean "much more likely than not." See, *e.g.*, *In re Commitment of Curtner*, 2012 IL App (4th) 110820, ¶ 37.

¶ 50 We disagree with respondent's contention that the State implied that involuntary confinement can be imposed based on any diagnosis. The assistant state's attorney noted that the jury would be given a definition of mental disorder, which did not require a diagnosis included in the DSM, and that if the jury believed expert testimony that an individual had a hypothetical disease which rendered him substantially probable to reoffend and it "felt [the disease] met this category," the jury could find it constituted a mental disorder. Although perhaps not eloquent, the assistant state's attorney's words are reasonably read as arguing that a disease could meet the definition of mental disorder despite not being found in the DSM. As the Act contains no requirement that a mental disorder be found in the DSM, we cannot find that this is a misstatement of law.

¶ 51 We do agree that the assistant state's attorney's statement "the person was more likely than not to substantially probable to reoffend" did not accurately reflect the definition of "substantially probable." Instead, it appears she began to state an inaccurate standard before switching to the correct substantially probable standard. However, we note that shortly thereafter, the assistant state's attorney correctly stated that "substantially probable only means much more likely than not" and that the trial court subsequently instructed the jury on the proper definition of "substantially probable." Given the singular misstatement and the later correction and proper instructions, we cannot find that respondent suffered any prejudice from the misstatement. Accordingly the State's statements did not constitute reversible error, and consequently were not plain error.

¶ 52 D. Arguments Unsupported by the Evidence

¶ 53 Respondent further contends that the State's arguments in rebuttal were unsupported by the evidence where the assistant state's attorney: (1) argued that "[t]hese types of diagnoses you heard do not go away" through reflection or incarceration; (2) twice argued that respondent had "slipped" in telling Dr. Wood that he intended to rape his victim in the 1992 offense; (3) argued three times that Dr. Rosell denied paraphilia NOS non-consent existed despite it being "in black and white" in the DSM-IV and the DSM-5; and (4) argued that Dr. Rosell admitted that a personality disorder makes "it twice as likely " that an individual will sexually reoffend.

¶ 54 The State may not misstate the facts of a case in argument (*Gavin*, 2014 IL App (1st) 122918, ¶ 51), and cannot argue inferences or facts not based upon the evidence in the record (see *People v. Moody*, 2016 IL App (1st) 130071, ¶ 60). The State may properly comment on the evidence presented and suggest reasonable inferences drawn from that evidence. *Moody*, 2016 IL App (1st) 130071, ¶ 60. As noted previously, misstatements will only be grounds for reversal where they substantially prejudice respondent. See *id.*

¶ 55 Having reviewed the record, we find that most of the alleged improper arguments are based on reasonable inferences drawn from the evidence. Dr. Wood testified that paraphilia NOS non-consent "does not spontaneously go away" and Dr. Rosell testified on cross-examination that he was not aware of any studies that indicated incarceration alone reduced the rate of an individual subsequently sexually reoffending. This evidence supported the reasonable inference that such a disorder would not "just go away."

¶ 56 Dr. Wood also testified that he believed respondent was trying to minimize his responsibility for his crimes during his interview, but he also admitted he had intended to rape during the 1992 offense. The assistant state's attorney's characterization of respondent's

admission as a "slip" was not unreasonable given his attempts to otherwise cast himself in a positive light.

¶ 57 We also cannot find that the assistant state's attorney's arguments that Dr. Rosell denied paraphilia NOS non-consent existed despite it being "in black and white" in the DSM-IV and the DSM-5 were an unreasonable characterization. Dr. Rosell acknowledged that paraphilia NOS was included in the DSM-IV and had been renamed but included in the DSM-V. Dr. Wood and Dr. Heaton testified that paraphilia NOS included the more specific paraphilia NOS non-consent diagnosis. Although Dr. Rosell disagreed with that conclusion, the assistant state's attorney was allowed to highlight the State's experts' opinions over those of respondent's witness.

¶ 58 The State concedes, however, that there is no support in the record for the assistant state's attorney's suggestion that a personality disorder makes an individual twice as likely to sexually reoffend. Yet we cannot find that this singular overstatement[6] of the evidence substantially prejudiced respondent. The trial court instructed the jury that closing arguments were not to be considered as evidence and there is nothing in the record that overcomes the strong presumption that the jurors followed that instruction. Thus, the factual misstatement by the assistant state's attorney did not warrant reversal.

¶ 59 E. Personal Opinions of the Prosecutor

¶ 60 Respondent contends that the assistant state's attorney improperly injected her personal opinions about Dr. Rosell's credibility into her rebuttal argument when she stated:

"Then there is Dr. Rosell. He said at a minimum of three times he talked about 'they.' Now I am not a psychologist, but I think that is pretty close to paranoia. Who is they?

[6] Dr. Wood testified that a personality disorder did make reoffending more likely, although he did not indicate how much more likely.

> They don't want it in the book; they tried to get it in the book; they, that's how they used it. He has clearly identified himself in one camp, which is the defense camp."

She also argued, shortly thereafter: "Then I ask you to ask yourself what would you expect of a doctor coming, a licensed doctor, coming into this courtroom? Do you expect him to be prepared? I would expect them to be prepared."

¶ 61 It is generally improper for a prosecutor to express a personal opinion on a case. *People v. Deramus*, 2014 IL App (1st) 130995, ¶ 51. A prosecutor may comment on the strength of the evidence and may argue that an expert's opinion is invalid. *Gavin*, 2014 IL App (1st) 122918, ¶ 57. A prosecutor may not, however, state his or her personal opinion regarding the veracity of a witness or vouch for a witness's credibility. *People v. Roach*, 213 Ill. App. 3d 119, 124 (1991). Yet the appellate court has "expressly reject[ed] the notion that a prosecutor improperly crosses the bounds of asserting his personal views regarding witnesses' credibility * * * if the jury has to infer the prosecutor is doing so from his comments." *People v. Pope*, 284 Ill. App. 3d 695, 707 (1996).

¶ 62 In *Roach*, cited by respondent, the court held that a prosecutor "clearly and repeatedly stated his personal feelings about the witnesses' credibility," and that most of the opinions were not based upon the record. *Roach*, 213 Ill. App. 3d at 124. Examples of the problematic comments included: " 'I just got a feeling that [a witness] was sincere' "; " 'I didn't get the feeling when [a witness] was on the witness stand that he was a liar' "; and " 'I got this feeling in my stomach that I just—I can't buy anything [a witness] says when he tells me * * * that he lied to [a detective] once before.' " *Id.* at 123. In contrast, the appellate court has found no error where prosecutors expressed personal opinions, but did not directly or explicitly state that a witness's testimony was incredible. See *People v. Bailey*, 249 Ill. App.

3d 79, 83 (1993) (no error where the prosecutor repeatedly made statements such as " 'I don't think that if you look at Doug Bailey * * * that he looks like the kind of person that could drink 18 beers in four hours and still drive home' "); *People v. Wright*, 246 Ill. App. 3d 761, 774 (1992) (no error where the prosecutor asserted: " 'Now I don't want to believe that is a warning shot as the defendant alleges. * * * I am going to preface what I am going to say by telling you that [a witness] has no motivation to come in here and lie to you.' ")

¶ 63 We believe the comments in the case at bar are distinguishable from those in *Roach*. The assistant state's attorney interjected some personal opinions into her rebuttal, but she did not directly and explicitly state that she did not believe Dr. Rosell. Although those opinions on potential bias and lack of preparation could lead to an inference that the expert was not reliable, an inference is insufficient to show error. *Pope*, 284 Ill. App. 3d at 707. The inclusion of the statements may have been less than ideal, but they are no worse than comments deemed acceptable in *Bailey* and *Wright.* Therefore, we find they were not in error, and accordingly, not plain error.

¶ 64 F. Sarcastic Tone

¶ 65 Respondent also contends that throughout rebuttal, the assistant state's attorney made numerous sarcastic and mocking remarks towards him and Dr. Rosell, largely citing remarks that we have already considered in prior sections of our analysis.

¶ 66 A respondent's right to due process is infringed when prosecutors depart from proper questioning or argument in an attempt to prejudice the jury by disparaging the integrity of opposing counsel (see *People v. Thompson*, 313 Ill. App. 3d 510, 514 (2000)) or respondent (see *Gavin*, 2014 IL App (1st) 122918, ¶ 62). However, when considering whether a prosecutor's comments are improper, we must consider them in their entirety and within full

context. See *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007). What is more, although we do not condone the State's comments, prosecutors are afforded "some degree of both sarcasm and invective to express their points." See *People v. Banks*, 237 Ill. 2d 154, 183 (2010). A prosecutor may not allege that an individual has deliberately lied or fabricated a defense, but he or she may use words such as "ridiculous," "sad," and "pathetic" to describe a theory of defense. *People v. Ligon*, 365 Ill.App.3d 109, 124-25 (2006).

¶ 67 Respondent again analogizes his case to *Gavin*, where the appellate court found sarcastic remarks by the State to be improper. *Gavin*, 2014 IL App (1st) 122918, ¶ 66. There a panel of the appellate court found that the prosecutor's argument was replete with "extreme sarcasm" as well as "ridicule and derision at its harshest". *Id.* ¶ 62. The court was particularly offended by the prosecutor's "incendiary language" and mockery of the respondent's health problems in relation to his risk to reoffend. *Id.* ¶ 65. The court held that the highly sarcastic attacks, when viewed in tandem with other inappropriate remarks by the prosecutor, required reversal. *Id.* ¶ 81.

¶ 68 Here, in the full context of the trial, we cannot find that the comments by the assistant state's attorney cited by defendant were of such an egregious nature as to be prosecutorial misconduct. Even though the attorney expressed sarcasm, nothing in the record indicates the extreme level of invective found in *Gavin*. Having reviewed the record, we note that the zealousness of the assistant state's attorney clearly produced less than praiseworthy rhetoric, but we cannot find that it rose to such a level that it deprived respondent of a fair trial.

¶ 69 G. Ineffective Assistance of Counsel

¶ 70 Finally, respondent contends that trial counsel was ineffective because he failed to object to the numerous arguments respondent has alleged are improper on appeal.

¶ 71 Proceedings under the Act are civil in nature (*In re Detention of Samuelson*, 189 Ill. 2d 548, 552 (2000)); nonetheless, the Act provides a respondent with the right to the effective assistance of counsel as provided in *Strickland v. Washington*, 466 U.S. 668, 686 (1984). *People v. Rainey*, 325 Ill. App. 3d 573, 585-86 (2001); see also 725 ILCS 207/25(c)(1) (West 2012). In order to prove ineffective assistance of counsel, respondent must show that (1) counsel's conduct fell below an objective standard of reasonableness and (2) a reasonable probability exists that but for counsel's unprofessional conduct, the outcome would have been different. *In re Detention of Tittlebach*, 324 Ill. App. 3d 6, 10 (2001). Both prongs of the test must be satisfied in order for a respondent to prevail. *In re Commitment of Bushong*, 351 Ill. App. 3d 807, 817 (2004).

¶ 72 As we have already determined, most of the comments complained of by respondent were not improper and thus any objection by counsel would have failed. Trial counsel will not be deemed ineffective for failing to raise futile objections. *People v. Mister*, 2016 IL App (4th) 130180-B, ¶ 95. In regards to the assistant state's attorney's unsupported assertion that personality disorders doubled the risk of reoffending and her misstatement of the definition of "substantial probability" we have already determined that the isolated misstatements were cured by further comments or instructions from the court. Accordingly, respondent has failed to prove the prejudice prong and we find that trial counsel's representation was not ineffective.

¶ 73 III. CONCLUSION

¶ 74 For the foregoing reasons, we find that the State's remarks throughout respondent's involuntary commitment trial were primarily within the wide latitude granted to prosecutors in argument. The minor and isolated misstatements of law and fact did not prejudice

respondent where the trial court issued curative instructions, and thus did not constitute reversible error. Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 75 Affirmed.