2018 IL App (4th) 170204-U

NO. 4-17-0204

FILED
May 23, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

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| *In re* COMMITMENT OF DONNIE R. BARRETT | ) | Appeal from the |
| | ) | Circuit Court of |
| (The People of the State of Illinois, | ) | Morgan County |
| Petitioner-Appellee, | ) | No. 07MR51 |
| v. | ) | |
| Donnie R. Barrett, | ) | Honorable |
| Respondent-Appellant). | ) | Jeffery E. Tobin, |
| | ) | Judge Presiding. |

JUSTICE TURNER delivered the judgment of the court.
Justices Holder White and Knecht concurred in the judgment.

**ORDER**

¶ 1 *Held*: The State's evidence was sufficient to support the jury's finding respondent was a sexually violent person, and the circuit court did not commit any reversible errors.

¶ 2 In August 2007, the State filed a petition seeking to commit respondent, Donnie R. Barrett, pursuant to the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 *et seq.* (West 2006)). In October 2016, a jury found respondent was a sexually violent person, and the Morgan County circuit court committed respondent to the custody of the Department of Human Services (Department) for institutional care in a secure facility. Respondent filed a motion for a new trial and a supplemental motion. The court denied the posttrial motions in March 2017.

¶ 3 Respondent appeals, asserting (1) the circuit court erred by allowing the prosecutor in opening statements to assert respondent had committed uncharged sexual acts

against minors, (2) the court erred by not allowing his counsel to argue the State was required to prove it was more than 50% likely he would engage in acts of sexual violence, (3) the State failed to prove beyond a reasonable doubt he was a sexually violent person, and (4) the court failed to comply with section 40(b)(2) of the Act (725 ILCS 207/40(b)(2) (West 2006)). We affirm.

¶ 4 I. BACKGROUND

¶ 5 The State's August 2007 petition alleged respondent (1) had twice been convicted of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(ii) (West 2006)) (People v. Barrett, No. 06-CF-23 (Cir. Ct. Morgan Co.); People v. Barrett, No. 97-CF-56 (Cir. Ct. Cass Co.)); (2) had been diagnosed by Dr. Martha Bellew-Smith with pedophilia, attracted to both (genders), and personality disorder not otherwise specified with antisocial features; (3) was dangerous to others because his mental disorders affect his emotional or volitional capacity and predispose him to engage in acts of sexual violence; and (4) was substantially probable to engage in acts of sexual violence without treatment. Attached to the petition were several documents from respondent's criminal cases, Dr. Bellew-Smith's report, and her curriculum vitae. Due to an updated version of the Diagnostic and Statistical Manual (DSM-5), the State filed an amended petition in December 2014. Under the DSM-5, Dr. Bellew-Smith diagnosed respondent with (1) pedophilic disorder, attracted to both, nonexclusive; and (2) other specified personality disorder.

¶ 6 In October 2016, the circuit court held a jury trial on the State's amended petition. During opening statements, the assistant attorney general laid out the elements for being adjudicated a sexually violent person. He then introduced the two expert witnesses, Dr. Bellew-Smith and Dr. Edward Smith, and explained what Dr. Bellew-Smith did to prepare for her evaluation of respondent, including reviewing his criminal history. The assistant attorney

general then noted Dr. Bellew-Smith would "tell" the record shows respondent's conviction in case No. 06-CF-23 established the first element and then proceeded to describe the acts that constituted the crime. He continued discussing respondent's prior crimes by setting forth the facts underlying case No. 97-CF-56 and Morgan County case No. 00-CF-52, which resulted in his conviction for sexual exploitation of a child (720 ILCS 5/11-9.1(a)(2) (West 2000)). Thereafter, the assistant attorney general began to note allegations of sexual acts against children committed by respondent that did not result in a conviction. Respondent's counsel objected, and a discussion was held off the record. After the discussion, the assistant attorney general continued to describe several other uncharged acts allegedly committed by respondent. When he was done with the uncharged acts, the assistant attorney general then addressed the second element and eventually the third element.

¶ 7 In his opening statements, respondent's counsel pointed out opening statements were not evidence and further stated the following: "Whatever the State just said is nothing but what the State just said. It is not evidence to be considered by you." Respondent's counsel also noted respondent's prior convictions and allegations of other acts that did not result in convictions were not to be considered as evidence against respondent.

¶ 8 In addition to the testimony of Dr. Bellew-Smith and Dr. Smith, the State presented (1) Dr. Bellew-Smith's curriculum vitae; (2) a certified copy of respondent's case No. 06-CF-23; (3) a certified copy of respondent's case No. 97-CF-56; (4) Dr. Bellew-Smith's 2007 report; (5) Dr. Bellew-Smith's 2010 addendum; (6) Dr. Bellew-Smith's 2013 addendum; (7) Dr. Bellew-Smith's 2016 addendum; (8) Dr. Smith's curriculum vitae; (9) Dr. Smith's 2007 report; (10) Dr. Smith's 2010 addendum; and (11) Dr. Smith's 2014 addendum. Respondent did not present any evidence.

¶ 9 Dr. Bellew-Smith testified she was a licensed psychologist and worked for Wexford Health Sources, which had a contract with the Department of Corrections (DOC) to provide mandatory sex offender evaluations. Without objection, the circuit court accepted Dr. Bellew-Smith as an expert in the area of clinical psychology, specifically in regard to offering opinions as to whether a person meets the criteria of being a sexually violent person. Dr. Bellew-Smith was assigned to evaluate respondent. She testified respondent's conviction for aggravated criminal sexual abuse in case No. 06-CF-23 made him eligible for commitment under the Act. She noted respondent pleaded guilty to fondling a little boy that was either seven or nine years old. Dr. Bellew-Smith also stated respondent's case No. 97-CF-52 involved respondent becoming friends with a girl's mother and then he later fondled the girl over her nightgown while she was sitting on his lap watching television. She noted respondent was alleged to have fondled other children while babysitting them, including the daughter of his twin sister. Other incidents involved respondent showing his penis to children. While respondent was in jail, another inmate reported respondent was masturbating to children on television. During his interview with Dr. Bellew-Smith, respondent denied committing the uncharged acts and stated the victims made them up.

¶ 10 Dr. Bellew-Smith opined, to a reasonable degree of psychological certainty, respondent had the following diagnoses under the DSM-5: (1) pedophilic disorder, nonexclusive; and (2) other specified personality disorder with antisocial features. Pedophilic disorder is an ongoing pervasive, persistent attraction and urges directed at children under the age of 13. The DSM-5 indicates an extensive use of child pornography is a useful diagnostic indicator of a pedophilic disorder. While no child pornography was noted in respondent's records, Dr. Bellew-Smith pointed out respondent turned a television show showing children into

pornography. The pedophilic disorder was nonexclusive because respondent was also attracted to adults. The personality disorder consists of a pervasive pattern of behavior over a lifetime after the age of 15. It is a "long ongoing kind of thing." It is shown by people who lack respect for the law and do things that keep getting them arrested. Also, it is shown by people, who get irritated and agitated, sometimes get themselves into aggressive situations, and have physical confrontations, such as the battery charge that respondent had. Antisocial behaviors consist of (1) deceitfulness, such as lying and taking advantage of others; and (2) risky behavior for others and themselves. Dr. Bellew-Smith could not diagnose respondent as "flat out anti-social" because she did not have documented evidence of a conduct disorder prior to age 15, which is required. A diagnosis of pedophilic disorder and personality disorder are congenital or acquired conditions that affect the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence. Dr. Bellew-Smith explained the urges, impulses, and interest in children make people more likely to engage in sexual behaviors with children. The other specified personality disorder lowers inhibitions, so that when people have those urges they are more likely to act on them. Additionally, she did not diagnose respondent with alcohol dependence because he did not report a major problem with alcohol.

¶ 11 Moreover, Dr. Bellew-Smith used several actuarial instruments to make a risk assessment on whether it was substantially probable respondent would commit further sexually violent offenses. Respondent scored a seven on the Static-99R, which is very high risk of reoffending. He scored a 10 on the Static-2002R, which also placed him in the very high risk category. Dr. Bellew-Smith repeated the tests after respondent turned 40 years old, and he scored a six on the Static-99R and a nine on the Static-2002R, both of which meant he was still in the highest risk category to reoffend. In her initial evaluation, Dr. Bellew-Smith used the

MNSOST, which is no longer used, and that assessment placed respondent in the low risk category to reoffend. Additionally, Dr, Belew-Smith testified many dynamic factors not captured by the actuarial instruments increased respondent's risk of reoffense, including his (1) very strong deviant interest in children; (2) difficulty controlling impulses; (3) lack of ever having been in a committed, long-term relationship; (4) grooming of families with children; and (5) his alienation and social isolation, as shown by his exposures. Respondent's age was the only factor that decreased his risk. In Dr. Bellew-Smith's opinion to a reasonable degree of psychological certainty, a substantial probability existed respondent would engage in future acts of violence if released. She noted the overwhelming thing she considered with respondent was his pervasive pattern. He just kept doing it over and over again. Dr. Bellew-Smith believed respondent would reoffend.

¶ 12 In evaluating respondent, Dr. Bellew-Smith looked at, *inter alia*, his criminal records, reports by the Department of Children and Family Services (DCFS), medical records, and police reports. She also interviewed respondent. Dr. Bellew-Smith did not have the results of a penile plethysmograph test, which is a helpful in diagnosing pedophilic disorders, for respondent. She noted the test was available at the treatment and detention facility, but respondent had not participated. While Dr. Bellew-Smith had updated her evaluation reports several times, she had only spoken with respondent once. She acknowledged she did not know whether the allegations in the DCFS reports were true, but even without considering those allegations, she would diagnosis respondent with the same disorders. Her latest diagnoses for respondent were based on the DSM-5, which has a different definition of mental disorder than the one contained in the Act. Additionally, she acknowledged the DSM-5 notes a risk of diagnostic information being misused or misunderstood because of the "imperfect fit between the

questions of ultimate concern to the law and the information contained in a clinical diagnosis."

¶ 13 Dr. Bellew-Smith was familiar with the 2012 research study that indicated actuarial scales tend to overestimate recidivism rates for older offenders. The study indicated that, with the Static-99R, people age 30 to 39.9 in a high category had a 27.4% risk to reoffend, and those age 40 to 49.9 in the same category had a 23.4% risk to reoffend. With the Static 2002-R, people age 30 to 39.9 in the high category had a 37.4% risk to reoffend, and those age 40 to 49.9 in the same category had a 28.6% risk to reoffend. Dr. Bellew-Smith also acknowledged studies which showed people who do not know their victims are at a higher risk to reoffend than people who know their victims. Respondent knew his victims.

¶ 14 Dr. Smith testified he was a licensed clinical psychologist and a licensed sex offender evaluator in Illinois. He currently worked for the Department conducting sexually violent person examinations. Without objection, the circuit court accepted Dr. Smith as an expert in the area of clinical psychology and specifically sex offender evaluation and risk assessment. In preparing his evaluation of respondent, Dr. Smith reviewed respondent's master file, which included prior convictions, police reports, treatment records, DCFS records, and medical records. He also interviewed respondent once in 2007 and had not spoken to him again. Dr. Smith prepared his first report in 2007, and then his addendum in 2010 to reflect the change from the Static 99 to the Static 99-R. He filed his third and final report in 2014, which reflects the change from the DSM-4 to the DSM-5.

¶ 15 Dr. Smith testified aggravated criminal sexual abuse is one of the offenses listed as a sexually violent offense under the Act. He noted respondent's prior convictions, including those that were not sexually violent offenses. Dr. Smith gave more information about respondent's case No. 97-CF-52 than Dr. Bellew-Smith and explained that case involved four

separate incidents of respondent touching the genitalia of four different children. Respondent pleaded guilty to all four counts of aggravated criminal sexual abuse. Dr. Smith also discussed respondent's 2004 conviction for trespass to land, which resulted from a woman reporting that respondent was spending time in front of an apartment complex watching and following children.

¶ 16 Dr. Smith opined, to a reasonable degree of psychological certainty, respondent had the following diagnoses under the DSM-5: (1) pedophilic disorder, sexually attracted to both males and females, nonexclusive type; (2) alcohol use disorder in a controlled environment; and (3) antisocial personality disorder. The diagnoses are congenital or acquired conditions that affect the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence. Alcohol use disorder and antisocial personality disorder qualify as well when combined with pedophilic disorder because they contribute to lowered inhibitions and demonstrate a willingness to violate rules and the rights of others. Respondent met the criteria for pedophilic disorder because his prior convictions and reported sexual acts show a period of more than six months where respondent had intense sexual arousal, urges, fantasies, or behaviors that involved sexual activity with prepubescent children, and he was over 16 years of age and more than 5 years older than his victims. Respondent had an ongoing pattern of sexual interest and sexual offending behavior toward prepubescent children. Alcohol use disorder is a pattern of problematic substance use that occurs over the course of a 12-month period. It involves things like increasing alcohol intake to have the same effect, alcohol interfering with responsibilities, committing criminal type behaviors under the influence of alcohol, and having difficulty reducing alcohol consumption. Respondent reported he began drinking at 16 and his alcohol consumption increased to the point where he used alcohol daily. He also acknowledged driving

under the influence of alcohol on five occasions and committing a sex offense while under the influence of alcohol. Antisocial personality disorder is a long-standing pattern of willingness to violate rules and the rights of others, being impulsive, making reckless decisions. Respondent admitted he stole from family members, violated family rules, skipped school, and started drinking at age 16. He continued to violate the law and the rights of others and had violated the rules of DOC and the Department.

¶ 17 Dr. Smith also performed risk assessments. He originally used the Static-99 and MNSOST-R, but those assessments were no longer used. Using the Static-99R, respondent most recently scored an eight (taking into account respondent turned 40), which puts him in the high risk category for recidivism. He scored higher than 98% of offenders for risk of sexual recidivism and was 7.32 times more likely to reoffend than the typical sex offender. Dr. Smith also found a total of eight dynamic risk factors applied to respondent that increased his likelihood to reoffend. Dr. Smith testified respondent's age was not a protective factor beyond what was taken into consideration with the risk assessments. In his opinion to a reasonable degree of psychological certainty, respondent was substantially probable to engage in future acts of sexual violence. Dr. Smith also opined respondent met the definition of a sexually violent person.

¶ 18 Dr. Smith was also familiar with the 2012 research study that indicated actuarial scales tend to overestimate recidivism rates for older offenders. He also was aware of studies that offenders who knew their victims were less likely to reoffend than those whose victims were strangers. Respondent's victims were generally people he knew. According to Dr. Smith, the Static 99-R has moderate accuracy, which means the middle toward the high range of predictive accuracy.

¶ 19 During closing arguments, the circuit court sustained the State's objection to respondent's argument the State was required to prove it was much more than 50% likely respondent would engage in acts of sexual violence in the future. The jury found respondent was a sexually violent person. After the jurors were discharged, the State requested the dispositional hearing to be heard then based on the evidence presented at trial. Respondent argued the evidence was insufficient and a predispositional report was necessary. He also requested the dispositional hearing be set at a later time. The court set the dispositional hearing for later that day.

¶ 20 At the dispositional hearing, both sides presented oral arguments. Thereafter, the circuit court ordered respondent to be committed to the Department's care and custody for secure inpatient treatment until he is no longer a sexually violent person. The court found that was the least restrictive means under the circumstances of respondent's case. That same day, the court entered a written order, committing respondent to institutional care in a secure facility.

¶ 21 Respondent filed a posttrial motion and a supplement to the motion. In January 2017, the circuit court held a hearing on respondent's posttrial motions. On March 7, 2017, the court entered a written order denying respondent's posttrial motion.

¶ 22 On March 14, 2017, respondent filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 303 (eff. Jan. 1, 2015). See *In re Detention of Samuelson*, 189 Ill. 2d 548, 559, 727 N.E.2d 228, 235 (2000) (providing cases under the Act are civil in nature). Thus, this court has jurisdiction of respondent's appeal under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

¶ 23 II. ANALYSIS

¶ 24 A. Opening Statement

¶ 25 Respondent first contends the State improperly referenced uncharged acts of sexual violence as substantive evidence and did not limit the purpose of such facts to showing the basis for the expert's opinion. He contends the State's remarks created substantial prejudice resulting in reversible error. The State asserts the prosecutor's remarks were proper, and respondent was not denied a fair trial by those remarks. The regulation of opening statements and closing arguments lie within the circuit court's discretion, and its determination of the propriety of the remarks would not be disturbed absent a clear abuse of discretion. *People v. Terry*, 312 Ill. App. 3d 984, 991-92, 728 N.E.2d 669, 676 (2000). "A trial court abuses its discretion when its decision is fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it." (Internal quotation marks omitted.) *In re Commitment of Fields*, 2012 IL App (1st) 112191, ¶ 60, 981 N.E.2d 384 (quoting *People v. Zirko*, 2012 IL App (1st) 092158, ¶ 32, 976 N.E.2d 361)). We recognize our supreme court has found the issue of whether remarks made by the prosecutor at closing argument were so egregious as to warrant a new trial presented a legal question subject to *de novo* review. *People v. Wheeler*, 226 Ill. 2d 92, 121, 871 N.E.2d 728, 744 (2007). Under either standard of review, the prosecutor's remarks do not warrant a new trial.

¶ 26 In cases under the Act, expert witnesses may give their opinions based on facts not in evidence if those facts are of a type reasonably relied on by experts in their particular field. *In re Commitment of Gavin*, 2014 IL App (1st) 122918, ¶ 68, 14 N.E.3d 1163. However, the facts underlying the expert's opinion are not substantive evidence unless they are admitted separately. *Gavin*, 2014 IL App (1st) 122918, ¶ 68. While the State may not present 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" (*In re*

*Commitment of Butler*, 2013 IL App (1st) 113606, ¶ 36, 996 N.E.2d 273). Thus, the State should not refer to facts underlying an expert witness testimony as substantive evidence during opening statement. See *Gavin*, 2014 IL App (1st) 122918, ¶ 68.

¶ 27 In *Butler*, 2013 IL App (1st) 113606, ¶ 34, the reviewing court found the prosecutors' statements in closing argument that described the respondent's actions during prior sexual offenses were proper. The *Butler* court viewed the prosecutors' statements in their entirety and found the State was clearly arguing the facts and circumstances of the respondent's prior violent sexual offenses as having been relied upon and supporting the opinions of the State's expert witnesses. *Butler*, 2013 IL App (1st) 113606, ¶ 34. It also noted both prosecutors had repeatedly prefaced and qualified their remarks as relating solely to their expert witnesses' opinions. *Butler*, 2013 IL App (1st) 113606, ¶ 34.

¶ 28 However, in *Gavin*, 2014 IL App (1st) 122918, ¶ 75, the reviewing court found the prosecutors' statements in closing arguments about the respondent's prior crimes were improper. There, the prosecutors "repeatedly referred to the underlying facts as something other than the basis for the experts' opinions." *Gavin*, 2014 IL App (1st) 122918, ¶ 73. The prosecutors stated "the experts were going to 'tell' or 'show' the jury about [the respondent]'s past sex crimes" and referred to those "hearsay statements as 'facts' and 'evidence.' " *Gavin*, 2014 IL App (1st) 122918, ¶ 73. Additionally, the prosecutors argued the explicit facts underlying the respondent's convictions as a narrative. *Gavin*, 2014 IL App (1st) 122918, ¶ 74. They did occasionally preface the recitation of the details by noting the "facts were what the experts 'relied on' to form their opinions." *Gavin*, 2014 IL App (1st) 122918, ¶ 74. "But, unlike in *Butler*, the prosecutors did not mention how the experts relied on these facts to diagnose or assess [the respondent]." *Gavin*, 2014 IL App (1st) 122918, ¶ 74. The *Gavin* court found the

narration of the facts underlying the respondent's crimes read, at times, as if the respondent was on trial for rape. *Gavin*, 2014 IL App (1st) 122918, ¶ 74. As such, the narration misdirected the case's focus by disconnecting the underlying facts and the experts' use of them, thereby leading the jury to consider the facts independent of the experts' testimony. *Gavin*, 2014 IL App (1st) 122918, ¶ 74.

¶ 29 The prosecutor's remarks in this case are more like those in *Gavin* than *Butler*. Here, the prosecutor explained the three elements necessary to establish a person is a sexually violent person and then noted it would present the testimony of Dr. Bellew-Smith and Dr. Smith to establish the elements. The State further stated Dr. Bellew-Smith would "tell" the jury how the record shows the first element that respondent committed a sexually violent offense. The prosecutor then stated the 2006 offense and described it. The prosecutor further noted Dr. Bellew-Smith would "tell" the jury she received more of his criminal history and described respondent's other conviction for a sexual offense, as well as uncharged allegations of sexual offenses. After that, the prosecutor explained how Dr. Bellew-Smith's testimony would prove the second and third elements.

¶ 30 While the prosecutor in this case did tie the facts of the sexual offenses to the expert's review of respondent's information, the first element of a sexually violent person is sufficiently proved by the introduction of a certified copy of the respondent's convictions. *People v. Winterhalter*, 313 Ill. App. 3d 972, 979, 730 N.E.2d 1158, 1164 (2000). Any testimony describing the details of the crime is admissible only as the basis for the expert's (1) diagnosis of a mental disorder and/or (2) opinion the respondent is dangerous to others because his or her mental disorder creates a substantial probability that he or she will engage in acts of sexual violence. See *Butler*, 2013 IL App (1st) 113606, ¶ 36; *Winterhalter*, 313 Ill. App. 3d at

979, 730 N.E.2d at 1164. Thus, the prosecutor improperly referenced the facts of respondent's prior crimes and uncharged acts as support for the first element. As in *Gavin*, the prosecutor did not tie the description of the prior crimes to the expert's diagnosis of respondent or assessment of respondent's dangerousness. The descriptions of the offenses are also in a narrative form, consisting of almost three pages of transcript. The prosecutor also stated Dr. Bellew-Smith would "tell" the jury about the prior offenses. Accordingly, we find the prosecutor's description of respondent's uncharged acts in opening statements was improper, as it was not tied to the basis of an expert's opinion and gave the appearance of substantive evidence.

¶ 31 Generally, improper remarks by the prosecutor in opening statements do not constitute reversible error unless they result in substantial prejudice to the respondent. See *People v. Dunlap*, 2011 IL App (4th) 100595, ¶ 24, 963 N.E.2d 394. An error resulting from a prosecutor's remarks is usually cured when the circuit court sustains an objection or admonishes the jury. *Dunlap*, 2011 IL App (4th) 100595, ¶ 24. Here, before each expert testified and after closing arguments, the circuit court instructed the jury in accordance with Illinois Pattern Jury Instruction, Civil, No. 2.04 (2010), stating that the bases of the experts' testimony was not evidence and could only be used to evaluate their opinions. Respondent asserts the court's instructions were insufficient to overcome the prejudice, as in *Gavin*.

¶ 32 While the prosecutor's remarks in opening statements were improper like in *Gavin*, the nature of the prosecutor's remarks and the trial itself are different from those in the *Gavin* case. In *Gavin*, 2014 IL App (1st) 122918, ¶ 75, the prosecutors remarks were at both the beginning and the end of the case. Moreover, the prosecutor listed each of respondent's crimes and allegations of sexual misconduct with a brief description but did not rely heavily on the facts underlying the respondent's crimes as in *Gavin*, 2014 IL App (1st) 122918, ¶ 74, where the

prosecutor's narration of Gavin's crimes read as if he was on trial for rape. Here, in opening statements, the prosecutor set forth the three elements for commitment as a sexually violent person and then went through the facts supporting the three elements twice, once for each expert. While the prosecutor improperly mentioned past crimes with the first element and did not tie the crimes to a diagnosis or opinion, the prosecutor did not misdirect the focus of the case or give the impression it was a criminal case. Additionally, in *Gavin*, 2014 IL App (1st) 122918, ¶ 76, the reviewing court emphasized the evidence was closely balanced, exponentially increasing the effects of prejudicial acts. Here, the evidence was not closely balanced. Additionally, respondent's counsel emphasized in his opening statements the State's opening statements were not evidence and also mentioned the instruction about the limited purpose of testimony related to the basis for the expert's opinion. Accordingly, we find the prosecutor's improper remarks in opening statements did not result in substantial prejudice to respondent.

¶ 33 B. Likelihood of Engaging in Acts of Sexual Violence

¶ 34 Respondent next asserts the circuit court erred by not allowing his counsel to argue in closing arguments the State was required to prove it was more than 50% likely respondent would engage in acts of sexual violence in the future. The State asserts the court's ruling was consistent with prevailing case law. We review this issue for an abuse of discretion. See *Terry*, 312 Ill. App. 3d at 991-92, 728 N.E.2d at 676.

¶ 35 In *In re Detention of Hayes*, 321 Ill. App. 3d 178, 186, 747 N.E.2d 444, 451-52 (2001), the respondent asserted the Act's definition of "sexually violent person" violated his substantive due process rights because the use of the phrase "substantially probable" in the definition created a lower standard than the "likely" standard approved by the United States Supreme Court in *Kansas v. Hendricks*, 521 U.S. 346 (1997). The *Hayes* court found the

"substantially probable" language did not violate due process and was constitutional. *Hayes*, 321 Ill. App. 3d at 189, 747 N.E.2d at 454. In doing so, the court rejected the respondent's argument the *Hendricks* decision required a probability of reoffense greater than 50%. The *Hayes* court noted "[t]he question of substantial probability under the Act cannot be reduced to mere percentages." *Hayes*, 321 Ill. App. 3d at 187, 747 N.E.2d at 453. It explained that, instead of a mathematical standard, "the combination of a 'likely' standard with evidence of mental illness complied with due process because the statutory requirements served to 'limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control.' " *Hayes*, 321 Ill. App. 3d at 187-88, 747 N.E.2d at 453 (quoting *Hendricks*, 521 U.S. at 358).

¶ 36 Additionally, the *Hayes* court noted that, even if the *Hendricks* decision established a minimum threshold of danger to justify commitment, the Act's definition of sexually violent person meant or exceeded the requirement. *Hayes*, 321 Ill. App. 3d at 188, 747 N.E.2d at 453. In reaching that conclusion, the *Hayes* court determined the phrase "substantially probable" in the Act meant "much more likely than not." *Hayes*, 321 Ill. App. 3d at 188, 747 N.E.2d at 453. The *Hayes* court further emphasized the definition could not be reduced to a mere mathematical formula or statistical analysis. *Hayes*, 321 Ill. App. 3d at 188, 747 N.E.2d at 453. It explained that, instead of mathematical formula, "the jury must consider all factors that either increase or decrease the risk of reoffending and make a commonsense judgment as to whether a respondent falls within the class of individuals who present a danger to society sufficient to outweigh their interest in individual freedom." *Hayes*, 321 Ill. App. 3d at 188, 747 N.E.2d at 453.

¶ 37 Accordingly, we disagree with respondent's contention that *Hayes* did not

explicitly reject a more than 50% standard. Since an Illinois court has explicitly rejected a mathematical formula or statistical analysis, we decline to look at decisions from Wisconsin. Thus, the circuit court did not error by sustaining the State's objection to respondent's 50% argument.

¶ 38 C. Sufficiency of the Evidence

¶ 39 Respondent also challenges the sufficiency of the evidence, contending the State failed to prove he had a mental disorder and that it was substantially probable he would engage in acts of sexual violence. The State contends its evidence was sufficient. In reviewing a sufficiency of the evidence claim, we 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 Detention of Welsh*, 393 Ill. App. 3d 431, 454, 913 N.E.2d 1109, 1129 (2009).

¶ 40 To establish a person is a sexually violent person under the Act, the State must prove the following three elements beyond a reasonable doubt: (1) the respondent has been convicted of a sexually violent offense; (2) the respondent has a requisite mental disorder; and (3) the respondent is dangerous to others because the mental disorder creates a substantial probability the person will engage in future acts of sexual violence. 725 ILCS 207/5(f), 15(b), 35(d)(1) (West 2006); *Welsh*, 393 Ill. App. 3d at 454, 913 N.E.2d at 1129. In this case, respondent challenges the sufficiency of the evidence as to the second and third elements.

¶ 41 Respondent contends the second element was not met because the State's two experts used the same diagnostic manual and reviewed the same records but came up with different diagnoses. Respondent's argument overlooks the fact the experts conducted separate interviews of respondent. Dr. Bellew-Smith explained she could not make a diagnosis of

antisocial personality disorder because she lacked information about respondent before the age of 15. Dr. Smith had that information and made the diagnosis. Regardless, their diagnoses of antisocial personality disorder and personality disorder with antisocial features are so similar as to not raise a reasonable doubt whether respondent has a mental disorder. As to the alcohol use disorder, Dr. Smith testified respondent reported his alcohol use to him. On the other hand, Dr. Bellew-Smith testified respondent did not report to her a major problem with alcohol. Thus, a reasonable basis exists for the difference in the experts' diagnoses. Moreover, both experts found respondent suffered from pedophilic disorder. Thus, we disagree with respondent the State failed to prove the second element.

¶ 42 Regarding the third element, respondent reargues his cross-examination of the State's experts and again attempts to reduce the third element to a mathematical threshold. In reviewing a challenge to the sufficiency of the evidence, this court does not retry respondent. *In re Tittlebach*, 324 Ill. App. 3d 6, 11, 754 N.E.2d 484, 488 (2001). In this case, the jury had the responsibility of evaluating the witnesses' credibility, resolving conflicts in the evidence, and deciding what reasonable inferences to draw from the evidence. *Tittlebach*, 324 Ill. App. 3d at 11, 754 N.E.2d at 488. Moreover, as previously stated, in determining "much more likely than not," "the jury must consider all factors that either increase or decrease the risk of reoffending, and make a commonsense judgment as to whether a respondent falls within the class of individuals who present a danger to society sufficient to outweigh their interest in individual freedom." *Hayes*, 321 Ill. App. 3d at 188, 747 N.E.2d at 453. Given the multitude of factors that indicate respondent has an increased risk of recidivism, his history of sex offenses, and the experts' opinions, the State presented ample evidence for the jury to find the third element beyond a reasonable doubt.

¶ 43 D. Dispositional Hearing

¶ 44 Last, respondent asserts the circuit court committed reversible error by holding a "perfunctory and cursory" dispositional hearing and denying counsel's request for time to prepare evidence and argument for the hearing. Specifically, he asserts his dispositional hearing did not comply with section 40(b)(2) of the Act (725 ILCS 207/40(b)(2) (West 2006)). The State argues the circuit court did not abuse its discretion by denying respondent's request to hold the dispositional hearing at a later time. Respondent's argument is difficult to follow, but it appears he is contending his statutory right to a dispositional hearing was violated, which is a matter we review *de novo*. See *In re Amanda H.*, 2017 IL App (3d) 150164, ¶ 34, 79 N.E.3d 215.

¶ 45 Section 40(b)(1) of the Act (725 ILCS 207/40(b)(1) (West 2006)) provides, in pertinent part, the following:

> "The court shall enter an initial commitment order under this Section pursuant to a hearing held as soon as practicable after the judgment is entered that the person who is the subject of a petition under Section 15 is a sexually violent person. If the court lacks sufficient information to make the determination required by paragraph (b)(2) of this Section immediately after trial, it may adjourn the hearing and order the Department to conduct a predisposition investigation or a supplementary mental examination, or both, to assist the court in framing the commitment order."

Paragraph (b)(2) of section 40 of the Act (725 ILCS 207/40(b)(2) (West 2006)) states, in pertinent part, the following:

> "In determining whether commitment shall be for institutional care in a secure facility or for conditional release, the court shall consider the nature and

> circumstances of the behavior that was the basis of the allegation in the petition under paragraph (b)(1) of Section 15, the person's mental history and present mental condition, and what arrangements are available to ensure that the person has access to and will participate in necessary treatment."

¶ 46 On appeal, respondent does not challenge the circuit court's determination it had sufficient evidence to address respondent's commitment or argue the court abused its discretion by not ordering a predisposition investigation and/or a supplementary mental examination. Instead, he contends his dispositional hearing did not comply with "section 40(b)(2) of the Act" because he was denied the opportunity to prepare and present evidence, not just argument. In support of his argument, respondent cites *In re Commitment of Fields*, 2014 IL 115542, 10 N.E.3d 832, and its underlying appellate court case, *Fields*, 2012 IL App (1st) 112191. He also notes *In re Commitment of Dodge*, 2013 IL App (1st) 113603, 989 N.E.2d 1159.

¶ 47 In *Fields*, 2014 IL 115542, ¶ 49, our supreme court recognized section 40(b)(1) of the Act requires a dispositional hearing and the failure to hold one constitutes reversible error. There, immediately after the circuit court indicated the dispositional hearing had not yet begun, the court made its dispositional ruling. The supreme court noted the circuit court did not give the "respondent an opportunity to present evidence or argument regarding disposition." *Fields*, 2014 IL 115542, ¶ 47. Likewise, in *Dodge*, 2013 IL App (1st) 113603, ¶ 40, the First District found a violation of section 40(b)(1) where the court asked the respondent's counsel for his position on whether a continuance was needed before the entry of the disposition, did not allow counsel to answer that question, and then committed the respondent to a secure facility "without the presentation of *any* argument or additional evidence." (Emphasis in original.) However, the *Dodge* court did not reverse the dispositional order because the nature of the dispositional

hearing was raised in the context of an ineffective assistance of counsel claim. *Dodge*, 2013 IL App (1st) 113603, ¶ 47. We note both cases stated the circuit court did not allow the respondent to present argument *or* additional evidence.

¶ 48 In this case, after the jury was discharged, the circuit court asked the State and respondent their positions on when to hold the dispositional hearing. The State asserted the court had sufficient evidence to determine respondent's commitment and should directly proceed to the dispositional hearing. Respondent's counsel asserted (1) the court lacked sufficient information and needed a predisposition report, and (2) if the court felt it had sufficient information, he requested the hearing be set at a later time to allow him and respondent "to prepare for that." Counsel did not mention the need to gather evidence for the hearing or in any way indicate he had a witness to present. The court found it had sufficient information to make a determination, and set the hearing for 1:30 that afternoon to allow the attorneys to review the statutory factors. When the court reconvened, it allowed both the State and respondent's counsel to make arguments. Respondent's counsel did not make a request to present additional evidence. Thus, unlike in *Fields* and *Dodge*, respondent clearly had an opportunity to present argument to the court on whether respondent's commitment should be for institutional care in a secure facility or for conditional release. While respondent's counsel asked for time to prepare for the dispositional hearing, he did not indicate he wanted to collect additional evidence. Moreover, at the dispositional hearing, he did not make a request to present evidence. Thus, the court did not deny respondent the opportunity to present evidence because he never requested it.

¶ 49 Accordingly, we find respondent's dispositional hearing complied with sections 40(b)(1) and 40(b)(2) of the Act.

¶ 50 III. CONCLUSION

¶ 51 For the reasons stated, we affirm the Morgan County circuit court's judgment.

¶ 52 Affirmed.