2019 IL App (5th) 180156-U

NO. 5-18-0156

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re COMMITMENT OF JOHNNY GIBSON	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Marion County.
	)	
Petitioner-Appellee,	)	
	)	
v.	)	No. 16-MR-81
	)	
Johnny Gibson,	)	Honorable
	)	Mark W. Stedelin,
Respondent-Appellant).	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Welch and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court properly committed respondent to the Department of Human Services for care, treatment, and control after a jury found him to be a sexually violent person pursuant to the Sexually Violent Persons Commitment Act.

¶ 2 Respondent, Johnny Gibson, appeals from the judgment of the circuit court of Marion County, entered after a jury trial, civilly committing him as a sexually violent person pursuant to the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 *et seq*. (West 2016)). Respondent argues on appeal that the State failed to prove beyond a reasonable doubt that he is a sexually violent person when respondent's expert testified

that he did not have a qualifying mental health diagnosis and is not substantially likely to commit future acts of sexual violence. Respondent further argues that he was denied a fair trial when the prosecutor, in closing argument, referred to respondent as having committed rape. We affirm.

¶ 3 In July 2008, respondent pleaded guilty to predatory criminal sexual assault and was sentenced to 10 years in prison. Near the end of his sentence, respondent was diagnosed with pedophilic disorder and it was recommended that he be civilly committed as a sexually violent person. In 2016, the State filed a petition alleging respondent was a sexually violent person as defined by Illinois law and asked that respondent be involuntarily committed to the Department of Human Services for care, treatment, and control.

¶ 4 At the commitment trial, two experts, both doctors of psychology, testified for the State that respondent was a sexually violent person. Their conclusions were based on prior evaluations, respondent's police and prison records, and interviews with respondent. Both doctors specialized in sex offender evaluations and were qualified as experts in the areas of sex offender evaluation and risk assessment. After reviewing all of the information, both doctors diagnosed respondent with pedophilic disorder, sexually attracted to both females and males, nonexclusive type, and other specified personality disorder with antisocial features. According to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, an authoritative manual in the field, a pedophilic disorder diagnosis requires that the subject (1) has intense recurrent sexual arousal to fantasies, urges, or behaviors involving sexual activity with children, generally age 13 and younger, for a period of at least six months; (2) has acted on the urges, or the

urges have caused interpersonal distress or harm; and (3) the person is at least 16 years old and 5 years older than the victim.

¶ 5 Both expert witnesses noted that respondent's history of committing sex offenses against younger victims began at a young age and continued into adulthood. Respondent admitted that he was tempted by girls as young as eight years old and had committed other sexual acts against the eight-year-old victim of his 2008 conviction. He had also masturbated to thoughts or images of her and believed his 2008 offense was the "most exciting sexual thought he has acted on." According to the experts, respondent's persistent masturbation to fantasies about children demonstrated "an intense recurrent fantasy." Reports also revealed that respondent, as early as age 11, started touching his half-sister and had sex with her. Such behavior went on for three years. Respondent additionally admitted to fondling a six- to seven-year-old female cousin, digitally penetrating his sleeping twin sister, and touching the penis of an eight-year-old male. The experts further testified that respondent was substantially probable to reoffend. They opined that respondent was more likely to reoffend because he had a deviant sexual interest evidenced by his stated interest in eight-year-old females; he demonstrated resistance to rules and supervision because he reoffended after undergoing sex offender treatment as a juvenile and was later removed from two sex offender treatment programs for failing to follow the rules; he lacked intimate relationships; and he showed chronic instability because he had never held long-term, productive employment or stable housing. Additionally, respondent's personality disorder with antisocial features was an "aggravating" disorder that made respondent more likely to act on his pedophilic impulses and disregard others.

¶ 6 Respondent's expert also had a doctorate in psychology, specialized in sex offender evaluations, and was also qualified as an expert in the areas of sex offender evaluation and risk assessment. He questioned the diagnosis of pedophilic disorder, however, after pointing out that most of respondent's behavior occurred before respondent was 16 years old. Respondent's father had physically, emotionally, and sexually abused respondent and his siblings, which reinforced respondent's behavior. He further opined that respondent did not have the "intense urge" necessary for a pedophilic disorder diagnosis because there was no evidence of respondent offending for several years until his 2008 offense, he stopped engaging in sex offenses after that incident, and he did not reoffend while incarcerated. The expert also stated that respondent denied fantasizing about children and claimed that he only thinks about adult females. He pointed out that there was no evidence that respondent possessed any photos, drawings, or like items relating to children, which is something often seen by incarcerated people trying to feed the urges generally felt by people with pedophilic disorder. The expert further noted that respondent had lived with a woman for 2½ years and subsequently had a child with her and had told her what he had done. Given such information, he believed that respondent presented a much lower risk of reoffending than the State's experts suggested. He concluded that respondent did not qualify as a sexually violent person.

¶ 7 The jury found respondent to be a sexually violent person. After a dispositional hearing, the court, upon determining that it was the least restrictive placement for respondent to receive treatment, ordered respondent to be committed to the custody of the

Department of Human Services at the Treatment and Detention Facility in Rushville, Illinois.

¶ 8 Respondent first argues on appeal that the State failed to prove beyond a reasonable doubt that he is a sexually violent person. Respondent does not dispute that he was convicted of a sexually violent offense. He argues only that the State failed to establish that he has a mental disorder, and thus failed to meet its burden of proof on the second and third elements required for finding him to be a sexually violent person.

¶ 9 To prove that respondent is a sexually violent person, the State has to show that respondent was convicted of a sexually violent offense, respondent has a mental disorder, and his mental disorder creates a substantial probability that he will engage in acts of sexual violence. 725 ILCS 207/15(b) (West 2016). The Act defines a mental disorder as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." 725 ILCS 207/5(b) (West 2016). When faced with a challenge to the sufficiency of the evidence in a sexually violent person proceeding, the reviewing court, considering the evidence in the light most favorable to the State, must determine whether any rational trier of fact could have found the required elements proven beyond a reasonable doubt. *In re Commitment of Fields*, 2014 IL 115542, ¶ 20; *In re Detention of Welsh*, 393 Ill. App. 3d 431, 454 (2009). Given that it is the jury's responsibility to weigh the credibility of the witnesses and the weight to be given the evidence (*In re Detention of White*, 2016 IL App (1st) 151187, ¶ 56), a reviewing court will not reverse a jury's sexually violent person determination unless the

evidence is so improbable or unsatisfactory that it leaves a reasonable doubt (*In re Commitment of Trulock*, 2012 IL App (3d) 110550, ¶ 48).

¶ 10 The State's expert witnesses both diagnosed respondent as having pedophilic disorder. Respondent's expert did not reach the same diagnosis, after noting that the majority of respondent's misconduct occurred when he was under 16 years of age. Respondent therefore concludes the State did not prove he is a sexually violent person in need of commitment. Pedophilia is the existence, over a six-month period of time, of an intense, recurrent sexual arousal to fantasies, urges, or behaviors involving sexual activity with children, where the person has acted on the urges or the fantasies have caused interpersonal distress or harm to the person. The diagnoses of the State's experts were supported by respondent's long history of sex offenses and admitted sexual conduct, his admitted sexual preference for minors, and his admissions that he fantasized about his prior victim when he masturbated. Respondent's own expert testified that he might have rendered the diagnosis of pedophilic disorder had he known of respondents' admission about his masturbatory fantasies. The State's experts also testified that respondent was substantially probable to engage in future acts of sexual violence, and his probability to reoffend was further exacerbated by numerous risk factors including his deviant sexual interest, resistance to supervision, impulsiveness, and employment instability. Respondent reoffended after receiving sexual offender treatment as an adolescent and did not complete two different sexual offender treatment programs while incarcerated. Simply because respondent's expert witness determined respondent's likelihood of reoffending was not as high as the State's experts opined does not constitute insufficient evidence. See *Trulock*,

2012 IL App (3d) 110550, ¶ 50. Again, it was for the jury to weigh the credibility of the evidence and to resolve any conflicts among the opinions of the experts. See *Trulock*, 2012 IL App (3d) 110550, ¶ 48. The evidence presented was not so improbable or unsatisfactory as to leave a reasonable doubt that respondent was a sexually violent person. Respondent's assertions and contentions to the contrary raise only matters that go to the weight to be given to particular expert testimony and do not undermine the sufficiency of the evidence. See *Trulock*, 2012 IL App (3d) 110550, ¶ 50. Taking the evidence in the light most favorable to the State, we therefore agree that the State proved beyond a reasonable doubt that respondent is a sexually violent person.

¶ 11 Respondent also argues on appeal that he was deprived of a fair trial because of the prosecutor's reference to him as a rapist in closing argument. Respondent believes such argument had no legitimate purpose other than to inflame the passions of the jury.

¶ 12 During closing argument, the prosecutor noted that respondent's defense strategy focused on whether he exhibited the urges necessary for a pedophilic disorder diagnosis. After noting that the experts had considered both respondent's alleged sex offense when he was 18 and the sex offense underlying his conviction when he was 21, the prosecutor argued:

> "Use your common sense. If [the victim] said three years previous he was raping her and then finally three years later he admits *** that he's raping her, what most likely was happening? That's way more than six months needed to have this, that's three years. Let's say then he does rape her. He's telling everyone in the evaluations for his sentence, I'm still having these urges, I still think about it."

Counsel for respondent made no objections. Following arguments, the trial court instructed the jury that closing arguments were not evidence and should be disregarded if they conflicted with the evidence.

¶ 13 We initially note that respondent's claim is forfeited even though raised in a posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). More importantly, the three references to rape made in the closing argument did not substantially prejudice respondent. A prosecutor is afforded wide latitude in making closing argument provided that the comments made are based on the evidence or reasonable inferences drawn therefrom. *In re Commitment of Butler*, 2013 IL App (1st) 113606, ¶ 30. When considering the propriety of closing arguments, we as a reviewing court must consider the challenged comments in the context of the entire proceedings. *In re Commitment of Kelley*, 2012 IL App (1st) 110240, ¶ 42. Even when the comments exceed the bounds of propriety, we may not reverse the jury's verdict based upon improper remarks unless the comments were of such magnitude that they resulted in substantial prejudice to respondent and constituted a material factor in the conviction. *Kelley*, 2012 IL App (1st) 110240, ¶ 42. Here the record shows that the prosecutor was challenging respondent's theme that he could not have pedophilic disorder because he had committed only a single sex offense as an adult. The State's experts had considered the prior allegations of an adult offense and the circumstantial evidence supported such allegations. The prosecutor admittedly used strong language to respond to respondent's claim, but it was not of such magnitude that the argument resulted in substantial prejudice and constituted a material factor in the verdict. *Kelley*, 2012 IL App (1st) 110240, ¶ 47. The evidence was not closely balanced and the

references were brief and isolated statements. There was no attack on respondent's character, rather the comments were made in response to the question of whether the offense had in fact occurred. By the time of closing argument, the jury had already heard evidence of respondent's conviction for a sexually violent offense against a child, his admitted sexual actions against other children, and his admitted sexual interest in minors. All of the evidence permissibly before the jury far outweighed the prosecutor's brief use of the word rape in closing argument. Additionally, any prejudice that may have occurred was cured by the trial court's instruction to the jury that closing arguments were not evidence. We further note that any claim of ineffective assistance of counsel does not excuse respondent's forfeiture of the issue in this instance. Respondent cannot show he was prejudiced by counsel's decision not to object (see *People v. Smith*, 242 Ill. App. 3d 555, 567 (1993) (decision not to object to improper argument is a matter of trial strategy)), especially in light of the fact that the comments did not prejudice respondent.

¶ 14 For the foregoing reasons, we affirm the judgment of the circuit court of Marion County finding respondent to be a sexually violent person and involuntarily committing him to the Illinois Department of Human Services for care, treatment, and control.

¶ 15 Affirmed.