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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

<i>In re</i> COMMITMENT OF JAKE SIMMONS)	
)	Appeal from the
(The People of the State of Illinois,)	Circuit Court of
Petitioner-Appellee,)	Cook County.
)	
v.)	No. 05 CR 80007
)	
Jake Simmons,)	Honorable
Respondent-Appellant).)	Michael B. McHale,
)	Judge Presiding.
)	

JUSTICE ROBERT E. GORDON delivered the judgment of the court.
Justices Hall and Garcia concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not err in referring to the State’s opinion witnesses as experts in the presence of the jury, since it was commenting on the admissibility of the witnesses’ testimony and not the credibility of the witnesses and there is no indication that the trial court’s comments led the jury to place more weight on the witnesses’ testimony. (2) The trial court did not abuse its discretion in denying respondent’s motion to continue the dispositional hearing, since the court had sufficient information after trial to make a disposition.

¶ 2 On July 25, 2005, the State filed a petition seeking the involuntary commitment of respondent Jake Simmons under the Sexually Violent Persons Commitment Act (the Act) (725 ILCS 207/1 *et seq.* (West 2004)). After a jury trial, respondent was found to be a sexually violent

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person and was ordered to be detained at a Department of Human Services (DHS) treatment and detention facility. Respondent appeals, arguing: (1) the trial court erred in referring to State opinion witnesses as “experts” in the presence of the jury and (2) the trial court erred in denying respondent his statutory right to a dispositional hearing. For the reasons that follow, we affirm.

¶ 3

BACKGROUND

¶ 4 On July 25, 2005, the State filed a petition to commit respondent as a sexually violent person pursuant to the Act. According to the petition, respondent had two convictions for sexually violent offenses. On October 28, 1992, respondent was convicted of aggravated criminal sexual abuse for an incident in which he “lured an 11 year old female off the street then rubbed his penis between her legs, against her anus and against her vagina”; respondent was sentenced to three years in the Illinois Department of Corrections (IDOC) for the crime. On December 20, 2001, respondent was convicted of aggravated criminal sexual abuse for an incident in which he “lured a 10 year old male^[1] into his automobile with the promise to buy him candy” and “fondled the victim’s genital area with his right hand” while driving with his left hand; respondent was sentenced to seven years in the IDOC, which he was serving at the time the petition was filed.

¶ 5 The petition claimed that respondent is diagnosed with the mental disorder of “Paraphilia, Not Otherwise Specified,” and “Rule Out Antisocial Personality Disorder” and “Rule Out Alcohol Abuse in a controlled environment,” which the petition claimed predisposed him to

¹ Testimony from both respondent’s probable cause hearing and his trial indicates that the boy was mentally disabled.

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commit future acts of sexual violence.² The petition further claimed that respondent is dangerous to others because his mental disorders make it substantially probable that he will engage in future acts of sexual violence, and stated that respondent had not agreed to participate in any sex offender treatment.

¶ 6 The petition also included a written report from Dr. Craig Shifrin, a clinical psychologist with the IDOC who conducted an evaluation of respondent pursuant to the Act. In the report, dated June 24, 2005, Dr. Shifrin stated that he relied upon a number of respondent's records in preparing the report, including respondent's IDOC master file, medical file, and inmate disciplinary card; respondent's arrest reports and criminal history reports; respondent's mental health and psychiatric evaluation reports; and a psychological test and an actuarial measure administered by Dr. Shifrin. The report indicated that Dr. Shifrin met with respondent to conduct an interview, but respondent chose not to participate, stating that " 'I am afraid to participate because of the possibility that it may incriminate me.' " The interview was then terminated.

¶ 7 The report indicated that respondent was an "average built 34 year old African American

² The petition was amended on April 20, 2010, to change the diagnosis from paraphilia to pedophilia. According to Dr. Quackenbush, the psychologist who testified at respondent's probable cause hearing, "[p]edophilia is a sexual preference for prepubescent children." Dr. Quackenbush also testified that "pedophilia is a paraphilia." While the amended petition is not in the record on appeal, it also appears that "Rule Out Antisocial Personality Disorder" was changed to "personality disorder not otherwise specified with antisocial f[ea]tures," based on Dr. Quackenbush's testimony, whose report was attached to the amended petition.

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male,” weighing approximately 135 pounds and standing five feet six inches; the report further stated that respondent is currently confined to a wheelchair due to a spinal cord injury.³ Based on “the few minutes the evaluator met with Mr. Simmons to go over the informed consent,” the report stated that respondent’s speech “was clear, coherent, and articulate,” although his demeanor was “somewhat hostile and resistant as demonstrated by the fact that he refused to read the informed consent out loud in spite of the evaluator politely asking him to do so twice.” The report further stated that respondent’s “thought processes were logical and goal-directed, and he had a general understanding of the [informed consent] form.” Respondent did not demonstrate any “gross signs” of hallucinations but appeared “somewhat angry,” and his cognitive functioning appeared to be within the average range.

¶ 8 The report discussed respondent’s prior criminal history, including several sexual offenses that did not result in convictions. The report also noted that respondent failed to register a change of address in 2001, which was required since he was a sexual offender, which resulted in a sentence of 18 months’ probation; the probation was revoked the same year, when he committed the sexual offense that resulted in his second conviction. The report further noted that respondent had two disciplinary tickets “of a sexual misconduct nature,” and quoted reports from the IDOC adjustment committee and an IDOC “Adult and Juvenile Divisions Incident Report” in which respondent allegedly spent time in the restrooms and shower observing other inmates

³ The report indicates that respondent sustained his spinal cord injury in 1998, but that, since he had another sexual crime in 2001, “it is clear that he is capable of committing another offense in spite of being in a wheelchair.”

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using the restroom and taking showers. The report also stated that, based on a report of a counselor at Big Muddy River Correctional Center, respondent left the sex offender treatment program at the correctional center after three days. After examining respondent's records, Dr. Shifrin concluded that respondent "is at a very high risk to continue offending nonconsenting people, especially children and adolescents."

¶ 9 On July 25, 2005, the trial court ordered respondent detained pending a probable cause hearing. On July 26, 2005, respondent waived the 72-hour probable cause hearing requirement. On December 4, 2006, the State requested an updated evaluation of respondent, given that the June 24, 2005, evaluation of respondent would be 19 months old at the time of the probable cause hearing, which the court permitted on December 12, 2006. A copy of the second evaluation is not in the record on appeal. However, Dr. Raymond Quackenbush, the licensed clinical psychologist who performed the evaluation, testified during respondent's probable cause hearing.

¶ 10 Dr. Quackenbush testified that in conducting his evaluation, he reviewed the master file from the IDOC, reviewed the previously prepared evaluation of Dr. Shifrin, and attempted to interview respondent. Dr. Quackenbush testified that when he approached respondent for an interview, "he declined to participate in it which is his right," after which Dr. Quackenbush based his evaluation solely on a records review. Dr. Quackenbush testified to the same criminal history as in Dr. Shifrin's evaluation, but testified that in addition to respondent's two sexual misconduct disciplinary tickets, he had received a third for fighting, which was the result of an incident that involved him sexually approaching another inmate.

¶ 11 Dr. Quackenbush testified that he found that respondent suffered from “pedophilia sexually attracted to both genders exclusive type,” based on his sexual offense convictions and a statement he made to the police during the investigation of his first offense “that he had been sexually attracted to girls 11 to 14 for a period of six years.” Dr. Quackenbush also determined that respondent “suffered from a personality disorder not otherwise specified with antisocial [fea]tures,” based on respondent’s disregard for lawful behavior, his disregard for his own and his victims’ safety, and his lack of remorse toward his victims. Dr. Quackenbush opined that these mental disorders predisposed respondent to commit future sexually violent offenses and that respondent was “substantially likely” to commit a future sexually violent crime.

¶ 12 On October 15, 2007, during a hearing at which defendant chose not to be present, the court found probable cause to believe respondent was a sexually violent person. The court entered an order continuing the detainment of respondent and ordering respondent to “undergo and cooperate with an evaluation by Illinois Department of Human Services to determine whether he is a sexually violent person” under the Act. Although it is not included in the record on appeal, according to the record, the report was completed by Dr. Kimberly Weitzl on December 3, 2007.

¶ 13 According to the record, on April 19, 2010, the State filed a motion for leave to amend the petition for commitment.⁴ The amended petition changed respondent’s diagnosis from paraphilia to pedophilia, as testified to by Dr. Quackenbush at the probable cause hearing. The amended petition also had Dr. Quackenbush’s report attached instead of Dr. Shifrin’s. On April

⁴ The motion and the amended petition are not included in the record on appeal.

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20, 2010, the trial court granted the State's motion for leave to amend the petition over respondent's objection.

¶ 14 On April 28, 2010, the State filed a motion to conduct another evaluation of respondent. The State claimed that Dr. Quackenbush, who conducted the second evaluation of respondent and testified at the probable cause hearing, had retired and was moving to Arizona. Accordingly, the State sought an updated evaluation, which was permitted by the court. The updated evaluation is not in the record on appeal.

¶ 15 On April 13, 2011, the parties came before the court concerning several motions *in limine* filed by respondent. Although respondent had often chosen not to attend court proceedings, respondent was present in court on that date. The parties agreed to set the case for trial on May 10, 2011; the trial court informed respondent of his right to be present at trial, and advised him that the trial would be conducted *in absentia* if respondent chose not to attend. The attorneys then entered into the following exchange:

“MR. COYNE [Respondent's Counsel]: If the State is going to move for immediate disposition following trial, we would like to have notice of that ahead of trial so that if we intend to put on any evidence we may have that evidence available on that day.

THE COURT: Okay. State, any feelings about that?

MS. SNOW [Assistant Attorney General]: Based on the evidence we would ask that the Court make a disposition following trial. If counsel has evidence that he wants to put on it can be a

short hearing immediately following trial.

THE COURT: Okay. That's fine. We're in agreement."

¶ 16 Jury selection for respondent's trial was conducted on May 10, 2011; respondent declined to attend. Prior to beginning jury selection, the court ruled on a number of motions *in limine*. One of respondent's motions was a motion *in limine* "to preclude the [S]tate from referring to opinion witnesses as experts at trial." Respondent claimed that any reference to the opinion witnesses as experts by the State "may lead the jury to incorrectly give more weight to their testimony than other evidence and/or witnesses at the trial." The court denied respondent's motion to preclude the State from referring to opinion witnesses as experts, stating that "[i]f properly qualified and the proper foundation is laid, the State may refer to their doctors as expert witnesses." After that motion was denied, the following colloquy occurred:

"MR. COYNE: Judge, may we address one issue on that particular matter?

THE COURT: Sure.

MR. COYNE: We are going to be asking that -- certainly the State can qualify their experts before the jury and ask about their qualifications just as we can attempt to show their qualifications are not such that would give them the ability to testify as an expert.

However, when it comes time to asking that they be declared an expert, since that is a question of law and not a

question of fact, we are asking that that be done at side bar.

THE COURT: State.

MR. COYNE: Specifically out of the presence of the jury.

MS. SNOW: No. Once the Court has ruled the experts are experts, the jury needs to know the Court has made that ruling.

THE COURT: I am going to deny that request by the Respondent. Over your objection, Mr. Coyne, it will be stated in front of the jury.”

¶ 17 During jury selection, the trial court asked the prospective jurors:

“You will hear testimony from psychologists or psychiatrists during this case. You must treat the testimony of such a witness the same as you would any other witness as far as your determination of their credibility or believability and deciding to give their testimony.

Is there anyone who does not understand and accept this instruction? No one has raised their hand.”

The trial court also asked each juror the same question individually, and all responded that they would be able to treat the testimony of a psychologist or psychiatrist in the same way as they would any other witness.

¶ 18 Respondent’s trial began on May 11, 2011; respondent again chose not to be present.

Prior to opening statements, the trial court again instructed the jury: “It is your job to determine

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the facts of this case. You and you alone are the judges of credibility, the believability of the witnesses. In other words you will determine whether or not the witnesses are telling the truth and how much weight to give their testimony.” The trial court also told the jury: “Do not take from any ruling I might make that I have an opinion about this case one way or the other.”

¶ 19 The State presented the testimony of two witnesses. The State’s first witness was Dr. Vasiliki Tsoflias, a forensic psychologist. Dr. Tsoflias was questioned about her qualifications, including her educational and professional background and her experience in proceedings under the Act, after which the State requested “that Dr. Tsoflias be qualified as an expert in the area of clinical and forensic psychology[,] specifically in the area of sex offender evaluations including diagnosis and risk assessment.” After respondent’s cross-examination, the trial court stated: “At this time I do find that Dr. Tsoflias is qualified as an expert in the field of clinical and forensic psychology in the specific areas of sex offender evaluation, diagnosis, and risk assessment.”

¶ 20 Dr. Tsoflias testified that she was assigned to complete a sexually violent person evaluation of respondent after the individual who performed respondent’s earlier evaluation retired. Dr. Tsoflias testified that she did not attempt to interview respondent for her evaluation, because when she was assigned the evaluation, she was informed that respondent had stated that he would not participate in any evaluations. Based on that information, Dr. Tsoflias completed his evaluation based on respondent’s records. Dr. Tsoflias later discovered that respondent had not made such a statement and attempted to have a different psychologist obtain respondent’s consent to an interview, but respondent refused to consent to an interview.

¶ 21 Dr. Tsoflias testified that, in conducting her evaluation, she relied on the following

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records: respondent's IDOC master file, which included his criminal history and disciplinary history; respondent's medical file from the IDOC, which included mental health evaluations he had received while in the IDOC; previous sexually violent person evaluations that had been conducted; and current records from the Department of Human Services (DHS), where respondent was currently housed. She further testified that the evaluation was conducted in November 2010 and updated in April 2011, when she received updated documents from DHS that she reviewed.

¶ 22 Dr. Tsoflias also testified to the facts and circumstances of respondent's criminal history that she relied upon in forming her opinion. She first testified to the facts surrounding respondent's 1991 conviction. She testified that in 1991, respondent brought his 11-year-old female neighbor into an alley between their houses. He told her to remove her pants, then exposed his erect penis and rubbed it against her vagina for two to three minutes. Dr. Tsoflias further testified that during the investigation of that crime, it was discovered that respondent had also exposed himself to the victim's 12-year-old sister and her 13-year-old friend. The victim's sister stated that on one occasion, respondent was on his front porch, trying to obtain her attention, and when she looked at him, he exposed himself and began masturbating in front of her. The sister also stated that two years prior to the incident with the victim, the sister was on her porch and respondent touched her vagina and chest and inserted a finger into her vagina.

¶ 23 Dr. Tsoflias testified that when the police were investigating the crime, respondent admitted to them that he had touched the victim and "told them that he has been attracted to young girls for the past six years. He stated that he prefers girl[s] between the ages of 11 and 14.

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And he stated that he knows it's wrong and that he needs help because he wants to stop hurting little boys and girls." Dr. Tsoflias further testified that the reports she relied upon also stated that respondent said that the victim "had been checking out his groin area" and that was the reason he approached her. Respondent was 20 years old at the time, and after a trial, he was convicted of one count of aggravated criminal sexual abuse and was sentenced to three years in the IDOC.

¶ 24 Dr. Tsoflias also testified that she relied on respondent's 2001 conviction in forming her opinion. The incident in that case occurred while respondent was on probation for failing to register as a sex offender. Respondent coaxed a 10-year-old boy toward his automobile, promising him candy. He then grabbed the boy, pulled him into the automobile, and drove away. After driving away, respondent touched the boy's penis over his clothes; the boy told him to stop. Two individuals approached the automobile and respondent instructed the boy to tell them that he was the boy's father, but the boy refused. At the time, respondent was 30 years old. Respondent pled guilty to one count of aggravated criminal sexual abuse and was sentenced to seven years in the IDOC, which was to run concurrent with the three-year sentence he received for failure to register as a sex offender.

¶ 25 Dr. Tsoflias testified that she also relied on other sexually related charges or behavior that did not result in a conviction. In 1994, respondent was charged with criminal sexual abuse for an incident in which he grabbed a 13-year-old boy and pulled him into an abandoned building. Respondent ordered the boy to remove his pants and attempted to perform oral sex on the boy and anally penetrate the boy with his penis. The boy refused, and respondent told the boy "that if the boy didn't put his penis in Mr. Simmons' anus that he would kill him," after which the boy

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complied for approximately 10 seconds. That case was dismissed.

¶ 26 Dr. Tsoflias also testified that there was a police report from 2001 that stated that respondent told a 13-year-old boy and his brother that he would take them to purchase marijuana. Respondent drove them to purchase marijuana and, after smoking some marijuana, respondent went into the backseat of the vehicle with the 13-year-old boy. Respondent unzipped the boy's pants and attempted to perform oral sex on the boy. The boy became upset and told respondent to stop, and the boy and his brother began striking respondent until they were able to flee. Respondent was never charged in that case.

¶ 27 Dr. Tsoflias also testified that respondent's non-sexually-related criminal history was also relevant in forming her opinion. She testified that "[s]ince the age of 19 while Mr. Simmons has been in the community he's been arrested almost every year for various crimes. They include burglary, battery, aggravated assault, domestic battery, possession of a stolen vehicle, [and] robbery."

¶ 28 Dr. Tsoflias further testified that respondent's behavior in the IDOC was relevant in forming her opinion. She testified that respondent received 34 disciplinary tickets, 2 of which were for sexual misconduct. Respondent's first ticket for sexual misconduct was in August 2002 when respondent was discovered performing oral sex on another inmate. The second was in March 2004 and concerned four incidents that had been reported by inmates: (1) respondent offered oral sex to an inmate, (2) an inmate was using the bathroom and respondent approached him and watched him use the bathroom, (3) respondent pulled himself over a half-wall in the bathroom so that he could watch other inmates using the bathroom, and (4) respondent

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positioned himself in the bathroom so that he could use the bathroom mirror to watch other inmates showering behind him. Dr. Tsoflias testified that respondent's two tickets were relevant to her opinion because "[i]t shows us that even in a very secure facility where he is constantly being monitored he is still engaging in sexual acts that are breaking the rules, so it speaks to his ability to control his sexual urges."

¶ 29 Dr. Tsoflias testified that respondent's DHS disciplinary tickets were also relevant in forming her opinion. While respondent had not received any sexual misconduct tickets, he had received a number of disciplinary tickets for "insolence" and "trading."

¶ 30 Dr. Tsoflias testified that while respondent was housed at Big Muddy River Correctional Center, he was placed in a sex offender treatment program, but left the program three days later "because he stated that he wasn't readily committed to the treatment program." The following year, when he was housed at Taylorville Correctional Center, he requested treatment "because he said that he needed help." He was placed on a waiting list, but was then transferred to another facility. Dr. Tsoflias testified that there was no information as to whether respondent received any treatment after that point, but that respondent refused all sex offender treatment while at the DHS facility.⁵

¶ 31 Dr. Tsoflias testified that she formed an opinion within a reasonable degree of psychological certainty that respondent suffered from "pedophilia sexually attracted to both nonexclusive known type." Dr. Tsoflias further testified that she "gave a rule out diagnosis of

⁵ Dr. Tsoflias explained that the DHS facility was "a facility that houses sex offenders and offers sex offender specific treatment."

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paraphilia not otherwise specified, hebephilia, and another diagnosis of personality disorder not otherwise specified with antisocial features.” Dr. Tsoflias testified that respondent’s “features of antisocial personal[ity] disorder” exacerbated his pedophilia, “[s]o he is more likely to act out on these urges that he has because he does not -- he has a disregard for the safety of others and because he doesn’t -- he doesn’t mind engaging in unlawful behaviors. So because he doesn’t have those parts of his personality, he is more likely to act on the pedophilia.”

¶ 32 Dr. Tsoflias testified that, as part of her evaluation, she conducted a risk assessment of respondent’s likelihood of committing a sexually violent offense, based on actuarial instruments and “dynamic and protective risk factors.” She testified that she used a “Static 99R” and “Minnesota Sex Offender Screening Tool Revised” (MnSOST-R) to predict the risk of respondent committing a sexual offense in the future. She testified that respondent fell into the “high” category on the Static 99R and fell into the highest category on the MnSOST-R. Additionally, Dr. Tsoflias testified that a number of dynamic risk factors were present in respondent’s case: he never participated in or completed a sex offender treatment program; he committed his 2001 sexual offense while on probation for failing to register as a sex offender; he used force and attempted to manipulate his victims in an attempt to have them engage in sexual acts with him, which demonstrated that “he exhibits some intimacy deficits”; and he did not cooperate well with supervision, given the revocation of his probation, his failure to comply with rules for registering as a sex offender, and his disciplinary tickets in the IDOC and DHS. Dr. Tsoflias further testified that the fact that respondent had previous arrests for battery, domestic battery, and aggravated assault “show that he has difficulty managing some of his negative

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emotions” and that he “exhibited hostility as evidenced by those physical assaults as well as the verbal threats that he was provided to his victims telling them that he would kill them if they didn’t comply.” Dr. Tsoflias testified that respondent has “problems with problem solving” in that “the fact that he had previously been arrested, charged, and convicted for sex offenses did not stop him from committing another sex offense,” nor did the fact that respondent continued to violate rules despite being “written up” while in the IDOC. “So it shows that he can’t take what has happened to him in the past and apply it to future behavior and think[] about consequences in the future that might happen.” Finally, Dr. Tsoflias testified that the diagnosis of a personality disorder also served as a dynamic risk factor.

¶ 33 Dr. Tsoflias testified that she examined factors that could decrease respondent’s risk of reoffending, but did not find that any of them applied. She testified that respondent was in a wheelchair, but since he committed a sexual offense after he was confined to the wheelchair in 1998, “the fact that he is partially paralyzed and in a wheelchair does not affect his ability to offend again sexually because he’s done it since then.” She also testified that respondent “has not been in the community for a long period of time without sexually offending,” which was another factor which could have lowered his risk.

¶ 34 After examining all of the factors, Dr. Tsoflias opined that, to a reasonable degree of psychological certainty, it was substantially probable that respondent would engage in future acts of sexual violence. She further opined that, to a reasonable degree of psychological certainty, respondent was dangerous because his mental disorder of pedophilia made it substantially probable that he would commit acts of sexual violence.

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¶ 35 After the State had finished its direct examination of Dr. Tsoflias, and prior to cross-examination, the following colloquy occurred:

“A JUROR: There was something you said that I didn’t hear. Can I ask you to repeat[?]”

THE COURT: I said it. Either side object to the question[?] Go ahead.

A JUROR: It’s kind of important. You were talking about qualifications of the expert witness. I couldn’t hear if you said qualified or disqualified?

THE COURT: Qualified.”

¶ 36 The State’s second witness was Dr. Kimberly Weitzl, a licensed clinical psychologist. Dr. Weitzl was questioned about her qualifications, including her educational and professional background and her experience in proceedings under the Act, after which the State “tender[ed] the witness as an expert in clinical psychology specifically in the area of sex offender evaluation and risk assessment [*sic*].” Respondent did not cross-examine Dr. Weitzl on her qualifications, and the court found “that the Doctor is qualified as an expert in the field of clinical and forensic psychology. Specifically in the area of sex offender evaluations and risk assessment.”

¶ 37 Dr. Weitzl testified that she was assigned to perform a pretrial evaluation of respondent. She testified that she reviewed respondent’s master file, which included police reports, court documents, probation and parole records, and had access to his DHS records. She further testified that she attempted to interview respondent and he “refused” to speak with her. She

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conducted her evaluation in December 2007 and updated it in August 2009; she also testified that she reviewed DHS records through April 7, 2011, in preparation for trial.

¶ 38 Dr. Weitz testified she considered the facts and circumstances of respondent's prior convictions for sexually violent offenses in forming her opinion. She recounted the same facts as Dr. Tsoflias, but added the fact that the 10-year-old victim of the 2001 offense was "mentally retarded." Dr. Weitz testified that the two convictions were significant, even discounting the other cases in which respondent was not convicted:

"[W]e see the same type of pattern with a male and a female. We see that there has been legal intervention and he continued to reoffend. Mr. Simmons was even in a wheel chair in the second offense. That didn't stop him. He just kind of changed pattern of [*sic*] rather than dragging the victim into an abandoned building or garage he pulled them into his car."

Dr. Weitz also testified that the facts and circumstances of respondent's nonsexual criminal history was relevant, as was respondent's record while in the IDOC and DHS and his behavior on probation. She recounted the same information as Dr. Tsoflias had. Dr. Weitz also recounted more recent incidents while with the DHS, including an incident in February 2011, where one of the residents was informing a DHS officer that respondent was propositioning him for sex and while the resident was in the process of informing the officer, the resident and officer observed respondent "in the room with the door open masturbating openly for them to see."

¶ 39 Dr. Weitz testified that it was her opinion to a reasonable degree of psychological

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certainty that respondent suffered from the mental disorders of “pedophilia sexually attracted to both male and female, alcohol abuse in a controlled environment, and personality disorder not otherwise specified with antisocial features.”

¶ 40 Dr. Weitz testified that she used the Static 99 and MnSOST-R in completing her evaluation. In her 2007 evaluation, respondent’s Static 99 score placed him in the “moderate high” category and his MnSOST-R score placed him in the highest category. When she updated her evaluation in 2009, Dr. Weitz performed a new Static 99 because a revised version had been released. His score on the Static 99R remained the same, but his category changed from “moderate high” to “high.”

¶ 41 Dr. Weitz also testified that she considered respondent’s risk factors, such as his history of substance abuse, his “lack of treatment motivation,” and his “intimacy deficits.” Dr. Weitz further testified that respondent had an “antisocial life-style,” “[n]oncompliance with conditional release,” and a “[l]ack of empathy or what we call blaming the victim.” She also considered protective factors such as respondent’s age, medical issues, and completion of sex offender treatment, and noted that none of those applied.

¶ 42 Based on her review of respondent’s records and the use of risk assessment tools, Dr. Weitz opined to a reasonable degree of psychological certainty that respondent was substantially probable to sexually reoffend. She testified that her opinion was the same as it was in 2007 and 2009, when she prepared her reports, and testified that “[n]othing has changed. In fact, his behavior has continued.” She further opined to a reasonable degree of psychological certainty that respondent was dangerous because his mental disorders of pedophilia and personality

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disorder predisposed him to commit future acts of sexual violence.

¶ 43 On cross-examination, Dr. Weitzl testified that respondent's scores on the Static 99 and Static 99R had changed since her initial evaluations due to errors and an increase in respondent's age. After Dr. Weitzl was excused, the parties agreed that her testimony concerning the Static 99 and Static 99R should be stricken and the jury would be ordered to disregard that testimony.

¶ 44 After Dr. Weitzl's testimony, the State introduced into evidence certified copies of conviction and disposition for respondent's two sexually violent offenses.

¶ 45 Respondent did not present any evidence in his defense.

¶ 46 During closing arguments, respondent's counsel reminded the jury:

“We have testimony of two witnesses. Dr. Tsoflias and Dr. Weitzl. Now, both witnesses testified as experts but what I wanted to remind you of or what I want to share with you is *** the instructions the Judge will read to you and that's regarding their testimony and the Judge is going to tell you you have heard witnesses give opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way you judge the testimony from any other witness. The fact that such persons given [*sic*] opinions does not mean that you're required to accept them. Give the testimony whatever weight you think it deserves. Considering the reasons given for opinions, the witness qualifications and all of their evidence in this case. You don't have

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to accept those opinions. If they are not reasonable to you, you don't have to accept them. If they don't seem that they have done a good enough job for you, you don't have to accept those opinions. Just because somebody is a psychologist doesn't mean you have to agree with what they are saying. So, please, remember that. Keep that in mind when you are looking at their opinions."

Respondent's counsel also argued about the qualifications of the witnesses and, specifically, about Dr. Tsoflias' limited experience. In response, the State pointed out that the doctors who testified "were accepted by the Court as experts in clinical psychology specifically in the area of sexually violent persons evaluations and risk assessment. So hopefully we can put that to bed."

The trial court also gave the following jury instructions:

"Only you are the judges of the believability of the witnesses and of the weight to be given the testimony of each of them. In considering the testimony of any witness you may take into account his ability or opportunity to observe, his memory, his manner while testifying, any interest, bias[] or prejudice he may have, and the reasonableness of his testimony in light of all the evidence in the case.

* * *

You have heard witnesses give opinions about matters requiring special knowledge or skill. You should judge this

testimony in the same way you judge the testimony from any other witness.

Give the testimony whatever weight you think it deserves considering the reasons given to the opinions, the witness' qualifications and all of the other evidence in the case.”

¶ 47 On May 11, 2011, the jury found respondent to be a sexually violent person and the trial court entered judgment on the verdict. After the trial court entered judgment on the verdict, the following colloquy occurred:

“THE COURT: Is there anything else at this time[?]

MS. SNOW: There is, Your Honor. We would ask the Court that based on the testimony that was heard from Dr. Tsoflias and Dr. Weitzl with regard to the respondent's lack of treatment as well as his behavior through April that the Court has sufficient evidence upon which to make a termination [*sic*] with regard to the disposition.

THE COURT: Mr. Coyne, your response.

MR. COYNE: Judge, we would be asking pursuant to Section 40 of the [A]ct for a predispositional evaluation to continue the matter for dispositional hearing.

THE COURT: Okay.

MR. COYNE: The reason I am asking, Judge, is we believe

that Section 40 of the [A]ct requires the Court to determine what Mr. Simmons' current situation is. That is to say to evaluate his current protective factors, his current risk level, level of his current treatment. Whether or not CR will be appropriate for him, conditional release, will be appropriate for him. What sort of treatment is available in the institution currently as a result of budget cut backs versus what sort of treatment is available in the community on conditional release. And also to assist the court in determining what is the least restrictive environment for Mr. Simmons to be in order to undergo the treatment that's going to be necessary for pursuant to this Court's order of commitment.

We are prepared to go forward and call witness [*sic*] in order to do that dispositional hearing. We are asking for an opportunity to do that.

THE COURT: Okay. Based on my hearing of the testimony from two expert witnesses specifically Dr. Weitl I believe said that she reviewed records through April 17th I believe was the date of this year. Based on the fact that he has never completed treatment, never any of the even five stages of core treatment, based on the history that I heard, I am quite comfortable that I know the current status of Mr. Simmons' current condition. I

find that the proper place for him will be the treatment in detention facility over the respondent's objection. I will make that dispositional finding at this time.

MR. COYNE: As for our motion for a predisposition evaluation.

THE COURT: Denied. I'm allowed to do this pursuant to statute.

Pursuant to statute denied. Anything further at this time?
Anything for the record?

MS. SNOW: No, Your Honor.

MR. COYNE: Matter will be off call.

THE COURT: Yes. Dispositional finding that the TDF is the appropriate place. Off call."

On June 10, 2011, respondent filed a posttrial motion including, *inter alia*, a claim "[t]hat the trial court erred in denying the Respondent's motion in limine to preclude the State from referring to testifying opinion witnesses as experts." The trial court denied respondent's motion on June 28, 2011, and the instant appeal follows.

¶ 48

ANALYSIS

¶ 49 On appeal, respondent argues: (1) the trial court erred in referring to the State's opinion witnesses as "experts" in the presence of the jury and (2) the trial court erred in denying

respondent his statutory right to a dispositional hearing.⁶ We address each argument in turn.

¶ 50

I. Expert Witnesses

¶ 51 Respondent's first argument is that the trial court erred in declaring, in the presence of the jury, that Dr. Tsoflias was "qualified as an expert in the field of clinical and forensic psychology in the specific areas of sex offender evaluation, diagnosis, and risk assessment" and in declaring Dr. Weitzl as "qualified as an expert in the field of clinical and forensic psychology,"

"[s]pecifically in the area of sex offender evaluations and risk assessment." Respondent claims that when the trial court "pronounced the State's opinion witnesses as experts in the presence of the jury," the court's statement caused the jury to place undue weight on the experts' testimony.

¶ 52 Initially, the State argues that this issue should be forfeited because respondent failed to properly preserve it by objecting at trial and raising the issue in his posttrial motion. Illinois law is clear that both an objection and a written posttrial motion raising an issue are necessary to preserve any error for appellate review. *Orzel v. Szewczyk*, 391 Ill. App. 3d 283, 287 (2009); see also *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) ("Both a trial objection and a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial.")

⁶ Respondent initially raised a third argument on appeal: that the trial court erred in denying respondent's motion *in limine* to stipulate to his prior convictions for sexually violent offenses and erred in permitting certified copies of conviction and disposition for those offenses to be given to the jury during deliberations. However, during the pendency of this appeal, we decided *In re Commitment of Kelley*, 2012 IL App (1st) 110240, and respondent has withdrawn this issue as a basis for appeal.

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(Emphases in original.)). In the case at bar, the State claims that respondent did neither.

¶ 53 Respondent argues that the issue was properly raised in his posttrial motion, which included a claim “[t]hat the trial court erred in denying the Respondent’s motion in limine to preclude the State from referring to testifying opinion witnesses as experts.” Respondent claims that while his objection to the trial court declaring the witnesses to be experts in the presence of the jury was raised orally, that objection “was made in the context of [the motion to preclude the State from referring to its witnesses as experts] and denied in the context of that specific motion.” The State, however, argues that the motion to preclude the State from referring to its witnesses as experts did not encompass the oral motion since “the requests are completely different, as they are directed towards separate entities.” We agree with respondent that the claim in the posttrial motion was sufficient to preserve the issue on appeal. In examining the record, it is clear that the motion concerning the trial court’s declaration of the witnesses as experts was connected to the motion concerning the State’s reference to its witnesses; indeed, after the motion concerning the State was denied, respondent asked the court if he could “address one issue on that particular matter.” Thus, we find the issue sufficiently preserved in respondent’s posttrial motion.

¶ 54 However, in order to properly preserve the issue, respondent was required to object at trial, in addition to raising the issue in a posttrial motion. See *Enoch*, 122 Ill. 2d at 186. Respondent conceded that he did not object to the trial court’s qualification of the State’s witnesses as experts during trial, but claims that his motion *in limine* is sufficient to preserve the issue. As respondent recognizes, a motion *in limine* is normally not sufficient to preserve an

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error for review. See *Simmons v. Garces*, 198 Ill. 2d 541, 569 (2002) (“The denial of a motion *in limine* does not itself preserve an objection to disputed evidence that is introduced later at trial.”); *In re Commitment of Sandry*, 367 Ill. App. 3d 949, 963 (2006). However, relying on *Sandry*, respondent claims that “Illinois courts have found that a party need not make a contemporaneous objection to preserve an error for review where the issue was raised in a motion *in limine* and no evidentiary context could develop at trial relevant to determining the issue previously presented to the court.”

¶ 55 In *Sandry*, the Second District Appellate Court considered whether a respondent in a commitment case properly preserved his objection to an expert’s report when the respondent filed a motion *in limine* asserting that penile plethysmograph testing relied on by the expert did not meet the standards of *Frye* but did not renew the objection at trial. *Sandry*, 367 Ill. App. 3d at 963. The court found that “under the[] unique circumstances” before it, the respondent was not required to object at trial to the admission of an expert’s report because “[t]here is really no evidentiary context that could develop at trial relevant to deciding this question,” since “[a] new scientific methodology either satisfies *Frye* or does not.” *Sandry*, 367 Ill. App. 3d at 963.

¶ 56 In the case at bar, respondent likewise claims that there was no evidentiary context that could develop at trial relevant to the question of whether the trial court should refer to the witnesses as experts in the presence of the jury. However, we decline to adopt respondent’s argument, since *Sandry* relied on *Spyrka v. County of Cook*, 366 Ill. App. 3d 156, 165 (2006), which has been criticized for its reasoning. See *Guski v. Raja*, 409 Ill. App. 3d 686, 696 (2011) (“the *Spyrka* decision was not well reasoned and we decline to follow it”).

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¶ 57 Nevertheless, we consider respondent’s claim to be properly preserved. In the case at bar, respondent orally made a motion *in limine* for the trial court not to declare the witnesses as experts before the jury, which was denied, so the trial court was aware of respondent’s objection the day before the trial. Additionally, “[a]pplication of the waiver rule *** is less rigid where the basis for the objection is the trial judge’s conduct” (*People v. Williams*, 173 Ill. 2d 48, 85 (1996) (citing *People v. Nevitt*, 135 Ill. 2d 423, 455 (1990))), as it was in this case. See also *People v. Brown*, 200 Ill. App. 3d 566, 575 (1990) (“the waiver rule is less rigidly applied when the trial judge’s conduct is the basis for the objection [citation], in light of ‘the fundamental importance of a fair trial and the practical difficulties involved in objecting to the conduct of the trial judge’ ” (quoting *People v. Heidorn*, 114 Ill. App. 3d 933, 936 (1983))). Moreover, the waiver doctrine is a limitation on the parties, not on the reviewing court. *Niles Township High School District 219 v. Illinois Educational Labor Relations Board*, 369 Ill. App. 3d 128, 137 (2006); *Luss v. Village of Forest Park*, 377 Ill. App. 3d 318, 330 (2007). We choose to find no forfeiture in this case and proceed to consider respondent’s claim on its merits.

¶ 58 Respondent argues that the trial court erred in stating before the jury that Dr. Tsoflias was “qualified as an expert in the field of clinical and forensic psychology in the specific areas of sex offender evaluation, diagnosis, and risk assessment” and Dr. Weitzl was “qualified as an expert in the field of clinical and forensic psychology,” “[s]pecifically in the area of sex offender evaluations and risk assessment.” We note that, according to respondent’s brief, “[i]mportantly, Respondent is not claiming that the trial court abused its authority in finding expert testimony admissible. Instead, Respondent’s point is that the trial court erred by invading the jury’s

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province to determine on its own whether the witnesses were credible by qualifying the witnesses in the jury's presence."

¶ 59 "[A] trial judge should refrain from conveying to the jury his or her opinions on ultimate matters of fact or the credibility of witnesses and the weight to be given their testimony." *Holton v. Memorial Hospital*, 176 Ill. 2d 95, 127 (1997). While the trial court has wide discretion in conducting a trial, the trial judge is "the dominant figure in the courtroom" and "should exercise caution and avoid making statements that could prejudice the jury against or in favor of a party." *Sekerez v. Rush University Medical Center*, 2011 IL App (1st) 090889, ¶ 73 (citing *Lopez v. Northwestern Memorial Hospital*, 375 Ill. App. 3d 637, 651 (2007)). "A new trial will be granted on the basis of a judge's remarks or conduct only if the remarks or conduct result in prejudice to a party." *Sekerez*, 2011 IL App (1st) 090889, ¶ 73 (citing *Lopez*, 375 Ill. App. 3d at 652).

¶ 60 Both parties acknowledge that there is no Illinois law specifically permitting or preventing the trial court from qualifying a witness as an expert in the presence of the jury. However, respondent argues that we should look to cases in other jurisdictions, which have considered the issue. After considering respondent's cited cases, we find that they do not support the argument that it is reversible error for a trial court to qualify a witness as an expert in the presence of the jury.

¶ 61 Respondent relies on two cases, and cites to two⁷ more, that he claims support his

⁷ Respondent cites to a third case, but as it is an unpublished federal case, we do not consider it in our discussion.

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argument. However, none of his cases use the trial court's conduct in qualifying a witness as an expert in the presence of a jury as a basis for reversal. See, e.g., *Berry v. City of Detroit*, 25 F.3d 1342, 1348 (6th Cir. 1994) (witness did not have the qualifications to testify as an expert on the issue and, if he did, no proper foundation was laid for his opinion). At most, the reviewing courts disapprove of such a practice in *dicta*. See, e.g., *United States v. Johnson*, 488 F.3d 690, 698 (6th Cir. 2007) (“paus[ing]” in its analysis of whether expert testimony was admissible to “comment on the procedure used by the trial judge in declaring before the jury that [a police officer] was to be considered an expert” and noting that “[o]ther courts have articulated good reasons disapproving of such practices, with which we agree”); *State v. McKinney*, 917 P.2d 1214, 1233 (Ariz. 1996) (noting that “we disapprove of the procedure followed in this case,” but finding that there was no error in admitting witness opinion testimony); *United States v. Bartley*, 855 F.2d 547, 552 (8th Cir. 1988) (finding no error in the admission of witness testimony but noting, without any reference to authority, that “[a]lthough it is for the court to determine whether a witness is qualified to testify as an expert, there is no requirement that the court specifically make that finding in open court upon proffer of the offering party. Such an offer and finding by the Court might influence the jury in its evaluation of the expert and the better procedure is to avoid an acknowledgement of the witnesses’ expertise by the Court.”).

¶ 62 We express no view as to whether the better practice is to avoid such qualification of witnesses as experts in the presence of the jury. However, we cannot find that the trial court’s decision to do so in the case at bar was error.

¶ 63 As noted, the trial court “must not in the presence of a jury invade the province of the jury

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by making any remarks indicative of belief or disbelief in the integrity or credibility of a witness.” *People v. Brown*, 200 Ill. App. 3d 566, 577 (1990) (citing *People v. Marino*, 414 Ill. 445, 450 (1953)); *People v. Enoch*, 189 Ill. App. 3d 535, 543 (1989). “The decision of the veracity or credibility of a witness must be left to the jury.” *Brown*, 200 Ill. App. 3d at 577 (citing *People v. Santucci*, 24 Ill. 2d 93, 98 (1962)).

¶ 64 However, “[a]lthough the expert witness’ qualifications are one factor properly considered by the jury in weighing his testimony, those same qualifications establish the foundation—or lack of foundation—for the admissibility of the expert’s testimony which must be determined by the court—not the jury—in the first place.” *People v. Hanna*, 120 Ill. App. 3d 602, 609 (1983). “[A]n expert’s competence to testify depends on his qualifications [citations], and, in the context of expert witnesses, qualifications are synonymous with competency. As such, the trial court makes a determination of whether the testimony of an expert witness will be admitted prior to allowing an expert to testify.” *Keating v. Dominick’s Finer Foods, Inc.*, 224 Ill. App. 3d 981, 986 (1992).

¶ 65 In the case at bar, respondent does not argue that the trial court erred in finding that the State’s witnesses were qualified to testify as experts. Thus, the witnesses were properly permitted to testify about their opinions as to whether respondent satisfied the requirements of being considered a sexually violent person. Conversely, if the State’s witnesses had *not* been qualified as experts, permitting them to testify to their opinions as they did could have been reversible error. See *People v. Crump*, 319 Ill. App. 3d 538, 542-43 (2001) (a lay witness’ opinion is generally not admissible, and admission of such testimony may be reversible error if

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prejudicial). Thus, in effect, the trial court’s statement that the witnesses were “qualified” as experts was simply stating that they were permitted to give their opinions, which is the same information that would have been conveyed by the substance of their testimony. In other words, the trial court was merely putting into words what was demonstrated by the witnesses’ testimony – that the witnesses were allowed to testify as to their opinions.

¶ 66 We agree with the State that respondent’s argument conflates the issues of admissibility and credibility. As noted, the trial court’s statement that the witnesses were qualified as experts merely concerned the admissibility of their opinion testimony. There is no indication that the trial court’s statement that each witness was “qualified as an expert in the field of clinical and forensic psychology” in any way included an opinion on the witness’ credibility.

¶ 67 Moreover, there is no indication that the jury believed that it was required to give the witnesses’ testimony more weight because they were qualified as experts. There were multiple times during the trial that the jury was directed that it alone was to make determinations as to the credibility of the witnesses. Indeed, each juror stated that he or she would be able to treat a psychologist’s testimony in the same way as any other witness’ testimony. The mere fact that one juror asked the trial court to repeat what it had stated concerning one witness does not change this result. Thus, we cannot find that the trial court erred in stating in the presence of the jury that the State’s witnesses were qualified as experts.

¶ 68 We note that the result would be the same even if we had accepted the State’s argument and found that respondent’s claim had been forfeited. While proceedings under the Act are civil in nature (see *In re Detention of Samuelson*, 189 Ill. 2d 548, 559 (2000)), the criminal plain-error

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rule has been used when considering unpreserved issues. See, e.g., *In re Detention of Sveda*, 354 Ill. App. 3d 373, 377-78 (2004) (applying criminal plain-error rule); *In re Commitment of Bushong*, 351 Ill. App. 3d 807, 813-14 (2004) (same); *In re Detention of Traynoff*, 338 Ill. App. 3d 949, 963-64 (2003) (same). “[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.” *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). In a plain error analysis, “it is the defendant who bears the burden of persuasion.” *People v. Woods*, 214 Ill. 2d 455, 471 (2005). However, in order to find plain error, we must first find that the trial court committed some error. *Piatkowski*, 225 Ill. 2d at 565 (“the first step is to determine whether error occurred”).

¶ 69 In the case at bar, as noted, we have determined that the trial court did not err in stating before the jury that Dr. Tsoflias was “qualified as an expert in the field of clinical and forensic psychology in the specific areas of sex offender evaluation, diagnosis, and risk assessment” and Dr. Weitzl was “qualified as an expert in the field of clinical and forensic psychology,” “[s]pecifically in the area of sex offender evaluations and risk assessment.” Accordingly, there can be no plain error.

¶ 70

II. Dispositional Hearing

¶ 71 Respondent also argues that he was denied his statutory right to a dispositional hearing.

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Under section 40(b)(1) of the Act, “[t]he 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.” 725 ILCS 207/40(b)(1) (West 2004). The order for commitment “shall specify either institutional care in a secure facility *** or conditional release.” 725 ILCS 207/40(b)(2) (West 2004). In determining the type of commitment, “the court shall consider the nature and circumstances of the behavior that was the basis of the allegation in the petition [for commitment], the person’s mental history and present mental condition, where the person will live, how the person will support himself or herself, and what arrangements are available to ensure that the person has access to and will participate in necessary treatment.” 725 ILCS 207/40(b)(2) (West 2004). “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 [DHS] to conduct a predisposition investigation or a supplementary mental examination, or both, to assist the court in framing the commitment order.” 725 ILCS 207/40(b)(1) (West 2004).

¶ 72 In the case at bar, respondent argues that he was denied his statutory right to a dispositional hearing. Both parties agree that respondent was entitled to a disposition hearing pursuant to the Act but disagree as to whether the trial court held a sufficient hearing. Prior to jury selection, the State indicated that it would be seeking a dispositional hearing directly after trial:

“MR. COYNE: If the State is going to move for immediate disposition following trial, we would like to have notice of that

ahead of trial so that if we intend to put on any evidence we may have that evidence available on that day.

THE COURT: Okay. State, any feelings about that?

MS. SNOW: Based on the evidence we would ask that the Court make a disposition following trial. If counsel has evidence that he wants to put on it can be a short hearing immediately following trial.

THE COURT: Okay. That's fine. We're in agreement."

After the jury found that respondent was a sexually violent person and the trial court entered judgment on the verdict, the trial court continued:

"THE COURT: Is there anything else at this time[?]

MS. SNOW: There is, Your Honor. We would ask the Court that based on the testimony that was heard from Dr. Tsoflias and Dr. Weitzl with regard to the respondent's lack of treatment as well as his behavior through April that the Court has sufficient evidence upon which to make a termination [*sic*] with regard to the disposition.

THE COURT: Mr. Coyne, your response.

MR. COYNE: Judge, we would be asking pursuant to Section 40 of the [A]ct for a predispositional evaluation to continue the matter for dispositional hearing.

THE COURT: Okay.

MR. COYNE: The reason I am asking, Judge, is we believe that Section 40 of the [A]ct requires the Court to determine what Mr. Simmons' current situation is. That is to say to evaluate his current protective factors, his current risk level, level of his current treatment. Whether or not CR will be appropriate for him, conditional release, will be appropriate for him. What sort of treatment is available in the institution currently as a result of budget cut backs versus what sort of treatment is available in the community on conditional release. And also to assist the court in determining what is the least restrictive environment for Mr. Simmons to be in order to undergo the treatment that's going to be necessary for pursuant to this Court's order of commitment.

We are prepared to go forward and call witness [*sic*] in order to do that dispositional hearing. We are asking for an opportunity to do that.

THE COURT: Okay. Based on my hearing of the testimony from two expert witnesses specifically Dr. Weigl I believe said that she reviewed records through April 17th I believe was the date of this year. Based on the fact that he has never completed treatment, never any of the even five stages of core

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treatment, based on the history that I heard, I am quite comfortable that I know the current status of Mr. Simmons' current condition. I find that the proper place for him will be the treatment in detention facility over the respondent's objection. I will make that dispositional finding at this time.

MR. COYNE: As for our motion for a predisposition evaluation.

THE COURT: Denied. I'm allowed to do this pursuant to statute.

Pursuant to statute denied. Anything further at this time?
Anything for the record?

MS. SNOW: No, Your Honor.

MR. COYNE: Matter will be off call.

THE COURT: Yes. Dispositional finding that the TDF is the appropriate place. Off call."

Respondent claims that the above did not qualify as a proper dispositional hearing under the Act since he should have been permitted to present evidence as to whether he should be committed to a secure facility or placed on conditional release. We do not find respondent's argument persuasive.

¶ 73 The Act gives the trial court discretion to continue the dispositional hearing to obtain

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additional information, and the court's decision whether to continue the hearing will not be reversed absent an abuse of discretion. *In re Detention of Tittlebach*, 324 Ill. App. 3d 6, 12 (2001); *In re Detention of Varner*, 315 Ill. App. 3d 626, 639 (2000). An abuse of discretion occurs when the ruling is "arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view." *Favia v. Ford Motor Co.*, 381 Ill. App. 3d 809, 815 (2008).

¶ 74 There are three cases we find relevant in determining whether the trial court abused its discretion in the case at bar, two from the Second District Appellate Court, and one from the Third District. In *Varner*, after the respondent was found to be a sexually violent person under the Act, the trial court immediately conducted a dispositional hearing. The court asked the parties if they had any evidence to present regarding an appropriate placement for the respondent, and neither party presented any additional evidence. *Varner*, 315 Ill. App. 3d at 633. The trial court questioned the respondent concerning where he would live and how he would support himself if he was placed on conditional release. The State suggested that a psychologist be asked to prepare a report on appropriate placement, and the trial court responded that no additional information was needed to enable the court to make its determination. *Varner*, 315 Ill. App. 3d at 633. "Following comments by counsel," the court ordered respondent committed to a secure facility for treatment. *Varner*, 315 Ill. App. 3d at 633.

¶ 75 On appeal, the Second District found that the trial court had not abused its discretion in ordering the respondent committed to a secure facility. The appellate court noted that since the Act provided that the trial court " 'may adjourn the hearing' to obtain additional information if the court believes it 'lacks sufficient information,' " the Act "clearly gives the trial court

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discretion to continue the dispositional hearing to obtain additional information.” *Varner*, 315 Ill. App. 3d at 639 (quoting 725 ILCS 207/40(b)(1) (West 1998)). The appellate court noted that the record indicated that the trial court had heard the testimony of three expert witnesses, as well as comments by the respondent. *Varner*, 315 Ill. App. 3d at 637. Based on the record, the appellate court could not find that the trial court abused its discretion by not ordering a continuance of the dispositional hearing. *Varner*, 315 Ill. App. 3d at 639.

¶ 76 Next, in *People v. Winterhalter*, 313 Ill. App. 3d 972 (2000), the Third District considered whether the respondent was denied a dispositional hearing when, immediately following the verdict that the respondent was a sexually violent person, the trial court ordered the respondent committed to a secure facility. In that case, after the verdict, the trial court noted that a hearing needed to be held to determine the respondent’s placement. The respondent indicated that he would “prefer” that the trial court wait to make its determination until a psychiatrist had drafted a report regarding a treatment recommendation. *Winterhalter*, 313 Ill. App. 3d at 980. However, the trial court indicated that it had enough information on which to base its decision. The trial court asked the attorneys if either side had any additional evidence they wished to introduce and asked the respondent if he wished to testify, but both questions were answered in the negative. *Winterhalter*, 313 Ill. App. 3d at 980. The trial court stated that the respondent was to be committed to a secure facility, but that if the psychiatrist’s report suggested a contrary disposition or the respondent had additional evidence, he should file a motion to reconsider. *Winterhalter*, 313 Ill. App. 3d at 980. The respondent filed a motion to reconsider, but instead of suggesting that the psychiatrist had a contrary recommendation or introducing additional

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evidence, the respondent claimed that the trial court “ ‘should have conducted a formal dispositional hearing including a report from the Department of Human Services and/or supplemental mental examination pursuant to section 207/40(b)(1)’ of the Act.” *Winterhalter*, 313 Ill. App. 3d at 980.

¶ 77 The Third District first noted that under the language of the statute, the trial court was required to conduct a hearing prior to entering its commitment order. The court further noted that the record indicated that the respondent was not denied a dispositional hearing, since the trial court gave the respondent the opportunity to present evidence or testimony and the parties argued as to the appropriate disposition. *Winterhalter*, 313 Ill. App. 3d at 981. The court also found that “[g]iven the evidence that respondent did not take advantage of treatment opportunities while incarcerated, felt that treatment would be useless since he was drunk when he committed the crimes and did not remember them anyway, and failed to attend counseling when required as a condition of his mandatory supervised release following his 1995 sentence,” the trial court had sufficient evidence to conclude that the respondent would not have been an appropriate candidate for conditional release. *Winterhalter*, 313 Ill. App. 3d at 981. Consequently, the appellate court held that the trial court did not err in failing to request “the discretionary predispositional investigation or supplementary mental examination.” *Winterhalter*, 313 Ill. App. 3d at 981.

¶ 78 Finally, the Second District again considered the issue in *Tittlebach*. In that case, it is not clear what occurred after the trial court found the respondent to be a sexually violent person, other than that the trial court “clearly indicated that it had sufficient information to make its decision” and ordered the respondent committed to a secure facility. *Tittlebach*, 324 Ill. App. 3d

at 13. The appellate court noted that the trial court had the discretion to continue the dispositional hearing to obtain more information on suitable placement, but that based on the record, the trial court had not abused its discretion in failing to continue the hearing.⁸ *Tittlebach*, 324 Ill. App. 3d at 13. The court further noted that the trial court had not erred in finding that the respondent was not an appropriate candidate for conditional release, given the testimony of two psychologists that there was a substantial probability that the respondent would engage in further acts of sexual violence as a result of his mental disorder and the fact that the respondent never participated in treatment for his disorder while he was incarcerated. *Tittlebach*, 324 Ill. App. 3d at 13.

¶ 79 In the case at bar, we cannot find that the trial court abused its discretion in failing to continue the dispositional hearing. After the jury found respondent to be a sexually violent person, the State asked the trial court to make its finding regarding respondent's disposition, as the State had indicated it would do prior to trial. In response, respondent's attorney asked to continue the matter for a predispositional evaluation. Respondent's attorney further indicated that "We are prepared to go forward and call witness [*sic*] in order to do that dispositional hearing. We are asking for an opportunity to do that." The trial court then responded:

"Based on my hearing of the testimony from two expert witnesses

⁸ The *Tittlebach* court indicated that it was declining to follow *Winterhalter*, but the two cases are consistent, with both finding that while a dispositional hearing is required under the Act, the trial court is not required to continue the hearing if it has sufficient information to make its determination as to the respondent's disposition.

specifically Dr. Weitz I believe said that she reviewed records through April 17th I believe was the date of this year. Based on the fact that he has never completed treatment, never any of the even five stages of core treatment, based on the history that I heard, I am quite comfortable that I know the current status of Mr. Simmons' current condition. I find that the proper place for him will be the treatment in detention facility over the respondent's objection. I will make that dispositional finding at this time."

We cannot find that this decision was an abuse of discretion. Respondent characterizes the trial court's actions as denying him an opportunity to present evidence. However, respondent had the opportunity to present evidence at the time of the dispositional hearing, which respondent had notice would occur immediately following trial. Instead, respondent asked for a continuance to conduct a predispositional evaluation, at which time respondent would have a witness to present. At oral argument, respondent's counsel indicated that it had retained an expert and had tendered the expert's report to the State. However, the only reference to a witness for respondent is a motion to appoint Dr. Lesley Kane, "a well-recognized expert in the area of forensic psychology and sexually violent persons," as respondent's expert, filed on October 15, 2007, and granted on the same day, over three years prior to the time of trial. There is no indication that Dr. Kane was present on the day of the dispositional hearing or what her testimony would have entailed; Dr. Kane's report is also not in the record on appeal. Given the testimony of the witnesses during trial and respondent's history of not participating in treatment, we cannot find that the trial

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court's determination that it had enough information to make a decision was an abuse of discretion.

¶ 80

CONCLUSION

¶ 81 We find that the trial court did not err in referring to the State's witnesses as experts in the presence of the jury. We further find that the trial court did not abuse its discretion in holding a dispositional hearing immediately after trial and denying respondent's request for a continuance.

¶ 82 Affirmed.