

2012 IL App (2d) 110173-U
Nos. 2-11-0173 & 2-11-0174 cons.
Order filed June 27, 2012

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.	)	No. 05-CF-3046
)	
PAUL OLSSON,	)	Honorable
	)	Christopher R. Stride,
Defendant-Appellant.	)	Judge, Presiding.

THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.	)	No. 05-CF-3629
)	
PAUL OLSSON,	)	Honorable
	)	Christopher R. Stride,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Burke and Hudson concurred in the judgment.

ORDER

Held: The trial court properly remanded defendant for an extended period of treatment under section 104-25(g)(2) of the Code of Criminal Procedure: the procedures of the Mental Health and Developmental Disabilities Code did not apply in this context, and, despite defendant's various attacks on the quality of the State's evidence that he was a serious threat to public safety, the trial court was entitled to accept it.

¶ 1 These consolidated appeals arise from prosecutions for various sex offenses against children.¹ Although the record on appeal is incomplete, there appears to be no dispute that defendant, Paul Olsson, was found unfit to stand trial and was placed in the custody of the Department of Human Services (Department). The trial court later held a discharge hearing to determine whether sufficient evidence existed to prove defendant's guilt beyond a reasonable doubt. See 725 ILCS 5/104-25 (West 2008). The trial court concluded that—at least as to some charges—it did and defendant was remanded to the Department for an extended period of treatment under section 104-25(d) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/104-25(d) (West 2008)). As the end of the extended period of treatment drew near, the State moved for an additional extension of defendant's treatment. Following an evidentiary hearing—at which the trial court took judicial notice of the evidence at the discharge hearing and heard testimony from Richard Malis, a psychiatrist employed at the Elgin Mental Health Center—the trial court granted the motion and remanded defendant to the Department for a period to end no later than October 12, 2037, finding that defendant was “a serious threat to the public safety.” 725 ILCS 5/104-25(g)(2) (West 2010). Defendant argues on appeal that the remand order violates procedural requirements of the Mental Health and Developmental Disabilities Code (Mental Health Code) (405 ILCS 5/1-100 *et seq.* (West 2010)) and is not supported by the evidence. We affirm.

¶ 2 Malis testified that he headed a treatment team consisting of a social worker, a nurse, a psychologist, an activities therapist, and a security therapy aid. In June 2010, defendant was assigned

¹The charging instruments are not part of the record on appeal.

to the unit where Malis worked, and Malis's treatment team began working with defendant in August 2010. Defendant was invited to attend a monthly treatment team meeting. Sometimes defendant attended. Other times he declined. Malis would see defendant in the hallways on a daily basis and had personal interaction with defendant once every week or two. Malis reviewed defendant's file, including reports from mental health personnel who had treated or examined defendant at the Elgin Mental Health Center before defendant was assigned to Malis's treatment team. Malis also reviewed the evidence at the discharge hearing and the trial court's findings that there was sufficient evidence to sustain convictions of certain sex offenses against children. Malis formed the opinion that defendant was mentally ill and that his mental illness was pedophilia.

¶ 3 According to Malis, the clinical diagnosis of pedophilia applies to individuals (1) who have recurrent sexual fantasies over a period of at least 6 months involving children who are generally under the age of 13; (2) who have acted on the sexual fantasies or whose fantasies interfere with their functioning; and (3) who are least 16 years old and whose victims are at least 5 years younger than they are. Malis noted that evidence at the discharge hearing indicated that defendant, who was 17 years old in 2004, engaged in sexual conduct with children under the age of 13 in 2004 and 2005.

¶ 4 Malis was also of the opinion that, due to his condition, defendant posed a potential danger to society. Malis noted that defendant's victims were male and that there is a higher rate of recidivism among pedophiles whose victims are male. Defendant's youth at the time of the first offense also correlated with an increased rate of recidivism.

¶ 5 On cross-examination, Malis testified that he had reviewed many but not all of the reports and other documents prepared by mental health professionals who had treated or examined defendant before Malis became responsible for defendant's care. Defendant's attorney showed Malis several such documents, which are described in the transcript as a "fitness evaluation" dated April 9, 2005,

a “30-day fitness evaluation” dated November 19, 2007, a “90-day report” dated December 21, 2007, a “90-day report to the Court evaluation of [defendant]” dated May 19, 2008, a “30-day report evaluation” dated September 3, 2008, a “90-day report” dated September 26, 2008, an “admission psychiatric evaluation” dated February 18, 2010, a “psychiatrist progress note” dated May 20, 2010, and a “fitness evaluation” dated June 28, 2010. Malis could not specifically recall which, if any, of those reports and evaluations he had reviewed. Malis explained that he did not typically review all prior reports to the court when a patient had been hospitalized for as long as defendant had been. Malis acknowledged that, although each report (except the May 20, 2010, progress note) included an Axis I diagnosis, in no case was an Axis I diagnosis of pedophilia indicated. On this subject, the following exchange occurred:

“Q. Isn’t an Axis I diagnosis the diagnosis of the patient?

A. I am not sure I understand the question.

Q. You pick and choose what part of an Axis I diagnosis you’re going to give or do you give universal or global Axis I diagnosis.

A. Sometimes we are asked to evaluate specific things. Other times we are asked to evaluate other things.

Q. What do you think you were asked to diagnose in Axis I on [defendant]?

A. I was asked to evaluate his fitness for trial. I was asked to evaluate whether he was a danger to society.

Q. Same that all the other treating teams have been asked to diagnosis [*sic*]? There is nothing different about the request you diagnose [defendant], was there?

A. I don’t know what they were asked to evaluate.”

¶ 6 Malis acknowledged that the February 18, 2010, admission evaluation indicated a diagnosis of “delusional disorder persecutory type.” The same diagnosis appeared on a “comprehensive psychiatric evaluation” dated February 22, 2010, which did not set forth a diagnosis of pedophilia. However, Malis testified that he reviewed other reports from psychiatrists who had worked with defendant, and several of the reports included a diagnosis of pedophilia or did not “rule out pedophilia,” meaning that pedophilia was a likely diagnosis.

¶ 7 Malis testified that he had not performed a formal risk assessment to determine the likelihood that defendant would commit future sex offenses. However, in forming his opinion on that question, Malis considered some of the factors that such assessments employ. Malis testified that he conducted clinical interviews with defendant on fewer than six occasions. Each interview lasted from 20 to 30 minutes.

¶ 8 Section 104-25(g)(2) of the Code of Criminal Procedure of 1963 (725 ILCS 5/104-25(g)(2) (West 2010)) provides that, when a defendant remains unfit after an extended period of treatment under section 104-25(d), the trial court “shall determine whether he or she is subject to involuntary admission under the [Mental Health Code] or constitutes a serious threat to the public safety.” Section 104-25(g)(2) further provides:

“ If so found, the defendant shall be remanded to the Department *** for further treatment and shall be treated in the same manner as a civilly committed patient for all purposes, except that the original court having jurisdiction over the defendant shall be required to approve any conditional release or discharge of the defendant, for the period of commitment equal to the maximum sentence to which the defendant would have been subject had he or she been convicted in a criminal proceeding.” *Id.*

¶ 9 Defendant first contends that the order remanding him to the Department is procedurally infirm because the State did not comply with provisions of the Mental Health Code governing the contents of a petition for involuntary admission. Defendant here raises an issue of statutory construction, so our review is *de novo*. *People v. Powell*, 2012 IL App (1st) 102363, ¶ 8. The argument is meritless. In *People v. Houston*, 407 Ill. App. 3d 1052, 1055-56 (2011) (emphasis omitted), we held that section 104-25(g)(2)'s requirement that the defendant "be treated in the same manner as a civilly committed patient for all purposes" (725 ILCS 5/104-25(g)(2) (West 2008)) applies only *after* the trial court has found the defendant subject to involuntary admission. Defendant advances a slightly different argument, which is based on the requirement that the trial court "shall determine whether he or she is subject to involuntary admission *under the [Mental Health Code]*" (emphasis added) (725 ILCS 5/104-25(g)(2) (West 2010)). In defendant's view, this language signifies that the Mental Health Code supplies the procedures by which the trial court determines whether the defendant is subject to involuntary admission. In other words, according to defendant, the words "under the [Mental Health Code]" modify "shall determine." This reading violates the principle that "relative or qualifying words, phrases, or clauses are applied to the words or phrases immediately preceding them and are not construed as extending to or including other words, phrases, or clauses more remote, unless the intent of the legislature, as disclosed by the context and reading of the entire statute, requires such an extension or inclusion." *In re E.B.*, 231 Ill. 2d 459, 467 (2008). By dint of this rule of statutory construction, the phrase "under the [Mental Health Code]" modifies only the words that immediately precede it: "subject to involuntary admission." And because the determination under section 104-25(g)(2) is not governed by the Mental Health Code's procedural requirements, cases cited by defendant that require strict

compliance with the Mental Health Code in civil commitment proceedings simply do not apply in this setting.

¶ 10 Defendant next argues that, for several reasons, Malis's testimony was insufficient to establish that defendant was subject to involuntary admission as a pedophile who posed a threat to public safety. We will uphold the trial court's acceptance of that testimony unless it was against the manifest weight of the evidence. See *People v. Bocik*, 211 Ill. App. 3d 801, 807 (1991). First, defendant faults Malis for his inability to recall whether he had reviewed selected reports that did not set forth a diagnosis of pedophilia. Frankly, we fail to see why Malis would be expected to recall these reports specifically. There is no indication that they excluded pedophilia as a possible diagnosis, and while Malis might be expected to have reviewed some or all of these reports when the treatment team he headed assumed responsibility for defendant's care, we are neither surprised nor concerned that Malis failed to commit them to memory.

¶ 11 Defendant also argues that the diagnosis of pedophilia is suspect because "there was no recent evidence of urges or fantasies on the part of [defendant], nor any sexually inappropriate behavior manifested by [defendant] while incarcerated over the past five years at Elgin Mental Health." The argument is meritless. Malis testified that the criteria for a diagnosis of pedophilia existed. Defendant offered no evidence to the contrary. His argument now would seem to be that the diagnosis was based on "stale" data. There is no evidence in the record, however, that this is of any clinical significance. Nor is there any evidence in the record indicating whether a pedophile would be expected to engage in sexually inappropriate behavior while confined to an environment in which no children were present.

¶ 12 In arguing that the evidence was insufficient to establish that he is a pedophile, defendant stresses "the fact that a multitude of qualified doctors have failed to diagnose [him] with the disorder

of pedophilia over the many years prior to this hearing.” The record establishes no such “fact.” Rather, the record shows merely the existence of a number of reports that Malis might or might not have reviewed indicating diagnoses other than pedophilia without excluding the possibility of an additional diagnosis of pedophilia. Moreover, the reports were not offered into evidence and the conclusions they contain are hearsay.

¶ 13 Defendant also argues that Malis’s opinion should be discounted because Malis did not perform a formal risk assessment to determine the likelihood that defendant would reoffend. In *In re Commitment of Simons*, 213 Ill. 2d 523 (2004), our supreme court held that two particular risk assessment tools that use actuarial methods to predict recidivism—the Static-99 and the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R)—have gained general acceptance in the psychological and psychiatric communities and that the results of the assessments are therefore admissible in evidence. However, although the *Simons* court cited scientific literature suggesting that actuarial assessments are superior to clinical methods of determining recidivism risk (*id.* at 541-42 (citing E. Janus & R. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability*, 40 Am. Crim. L. Rev. 1443, 1445 (2003)). But see *United States v. McIlrath*, 512 F.3d 421, 425 (7th Cir. 2008) (quoting Andrew Harris, Amy Phenix, R. Karl Hanson, & David Thornton, *STATIC-99 Coding Rules Revised 2003*, http://www.static99.org/pdfdocs/static-99-coding-rules_e.pdf (last visited June 18, 2012) (“even *** advocates [of the Static-99 assessment] claim only ‘moderate predictive accuracy’ ”)), defendant cites no authority—and we are aware of none—holding that, in the absence of a formal assessment, the trial court must discount an expert opinion on a sex offender’s risk of recidivism.

¶ 14 Defendant also contends that, because sex offender treatment had not been made available to him, it is “incomprehensible” that Malis would consider the lack of treatment in forming his

opinion that defendant is likely to reoffend. Although defendant's prospects for adhering to the law might be better than a sex offender who was offered treatment and refused it, the fact that, for whatever reason, defendant received no treatment is relevant to the question of whether he is at risk.

¶ 15 Finally, we note that the trial court took judicial notice of the evidence presented at the discharge hearing, and Malis considered that evidence in forming his opinion. However, as the State notes, the record on appeal contains no transcript of the discharge hearing. It is axiomatic that "an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Thus, even to the extent that the record, as it stands, did not already support the trial court's judgment, we would be obliged to resolve any doubt arising from the incompleteness of the record against defendant. *Id.* at 392.

¶ 16 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 17 Affirmed.