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2012 IL App (3d) 110401-U

Order filed August 16, 2012

IN THE
APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

| | | |
|--|---|-------------------------------|
| <i>In re</i> COMMITMENT OF BRAD SIEVER |) | Appeal from the Circuit Court |
| |) | of the 9th Judicial Circuit, |
| (The People of the State of Illinois, |) | Knox County, Illinois |
| |) | |
| Petitioner-Appellee, |) | Appeal No. 3-11-0401 |
| |) | Circuit No. 08-MR-60 |
| v. |) | |
| |) | |
| Brad Siever, |) | |
| |) | Honorable James B. Stewart, |
| Respondent-Appellant). |) | Judge, Presiding. |

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

- ¶ 1 *Held:* The jury's finding that respondent is a sexually violent person is not against the manifest weight of the evidence. Statements made during closing argument did not deny respondent a fair trial. The trial court did not abuse its discretion in committing respondent to a secure facility or denying his motion for a mistrial.
- ¶ 2 On August 5, 2008, the State filed a petition seeking to declare respondent, Brad Siever,

to be a sexually violent person pursuant to the Sexually Violent Persons Commitment Act (the Act) (725 ILCS 207/1 (West 2008)). Following a trial, a jury returned a verdict finding respondent to be a sexually violent person. Respondent filed a "motion for new trial," which the trial court denied. At the dispositional hearing, the circuit court of Knox County ordered respondent to be committed to institutional care. Respondent appeals, claiming: (1) the jury's finding that he is a sexually violent person is against the manifest weight of the evidence; (2) statements made by the State during closing arguments denied him a fair trial; (3) the trial court abused its discretion in ordering him committed to a secure facility; and (4) the trial court erred when denying his motion for a mistrial. We affirm.

¶ 3

BACKGROUND

¶ 4 In 1998, respondent pled guilty to aggravated criminal sexual abuse in Warren County. The Warren County case reportedly involved respondent, then 22 years old, fondling and kissing a 13-year-old girl. In exchange for his plea of guilty, respondent received a sentence of 2 years' probation, 40 days in jail and was ordered to seek mental health evaluation and treatment. On January 19, 2000, a petition to revoke his probation was filed as a result of his failure to comply with the treatment requirement of his probation. Respondent failed to comply with the terms of his release by breaking "the terms of his sex offender contract by marrying and living with a woman with two small children."

¶ 5 Respondent's outpatient sex offender therapist, Scott Smith, indicated in a letter dated July 26, 1999, that he considered respondent to be at serious risk to sexually reoffend by being in

the presence of two children without proper supervision or a safety plan. Smith's concerns were based, in part, on his view that respondent was a pedophile who had deviant fantasies of prepubescent children and had masturbated to such fantasies for years.

¶ 6 In 2004, the State charged respondent in Knox County with two counts of aggravated criminal sexual abuse claiming:

"On or about during this month of March 2004 and April 2004, the said defendant committed an act of sexual penetration with H.A.L., who was at least 13 years of age but under 17 years of age, in that defendant placed his penis in the vagina of H.A.L., and that defendant was at least 5 years older than H.A.L., in violation of 720 ILCS 5/12-16(d)."

¶ 7 In exchange for the State dismissing one count and agreeing not to seek a term of imprisonment greater than five years' incarceration on the other, respondent pled guilty to one count of criminal sexual abuse. On December 22, 2004, the circuit court of Knox County sentenced respondent to five years' incarceration. Respondent was paroled on February 23, 2007.

¶ 8 Respondent was incarcerated twice for violating the terms of his parole. Records indicate that on September 6, 2007, "a 4 year old child was present" at respondent's "host site" (his grandmother's house). In a "Parole Violation Report" dated November 2, 2007, respondent's parole officer noted that respondent had signed at least five different instructions acknowledging he was not to have child visitors at his host site. Less than two months later, despite receiving

specific directions to stay at home on "holidays which would seem directed at children," a parole officer spotted respondent "lurking in the dark" outside his host site on Halloween. The trial court revoked respondent's parole. Respondent was again paroled on February 4, 2008.

¶ 9 On April 30, 2008, parole officers conducted a host site visit and found large amounts of pornographic material. Respondent admitted possessing pornographic videos, but claimed he "had not watched them in three years" despite the fact that one was found in his VCR and another in his DVD player. To illustrate the quantity of pornographic material found at respondent's host site, one parole agent described it as enough to take up "the entire back seat of a Chevrolet Impala was filled to above window level." Respondent was again found in violation of his parole and reincarcerated.

¶ 10 During his final round of incarceration, the State filed a sexually violent person petition alleging respondent to be a sexually violent person as defined in the Act and seeking an order of commitment pursuant to section 40 of the Act. 725 ILCS 207/40 (West 2008). The petition alleged that respondent suffers from paraphilia and a personality disorder with narcissistic and antisocial tendencies, making it substantially probable that he would reoffend. The trial court found probable cause existed to support the allegation that respondent was a sexually violent person and ordered him transferred to the custody of the Department of Human Services (the Department).

¶ 11 The matter proceeded to jury trial on February 23, 2011. The State presented two experts, Barry Leavitt and Raymond Wood, both of whom concluded respondent met the definition of a

sexually violent person pursuant to the Act. Respondent presented Kirk Witherspoon as an expert, who concluded he was not a sexually violent person. Respondent also called his sister to testify.

¶ 12 Dr. Leavitt testified that he is a clinical forensic psychologist who has been licensed to practice for 25 years. He discussed the procedures through which one becomes committed as a sexually violent person, including the probable cause hearing, which takes place following the filing of a petition by the State.

¶ 13 Later in his testimony, the State asked Dr. Leavitt, "What did your review of the records reveal?" Dr. Leavitt answered, "That since, I believe, August 8 of 2008 when he was -- this was after the Court had found probable cause --." Respondent's counsel immediately objected to any findings by the court noting, "the question wasn't asked." A side bar took place after which the court sustained respondent's objection. Respondent did not move to strike Dr. Leavitt's statement. Later, respondent moved for a mistrial, claiming the jury heard Leavitt mention the court's probable cause determination and that it is "difficult to unring a bell." The trial court denied the motion, stating that "I don't believe that the jury has heard anything with regard to a previous finding by a court that there was probable cause to believe that Mr. Siever was a sexually dangerous person or a sexually violent person, excuse me, so I'm going to deny the motion for mistrial ***."

¶ 14 Dr. Leavitt continued his testimony, noting that he first evaluated respondent in January of 2007 while respondent was serving a five-year sentence for aggravated criminal sexual abuse

of a 16-year-old girl. Based on his initial evaluation, Dr. Leavitt did not refer respondent to the Attorney General as a possible sexually violent person. Respondent was released on February 24, 2007. One of the conditions of his release prohibited him from having unauthorized contact with children.

¶ 15 Given the parole violation report mentioned above, Dr. Leavitt again evaluated respondent in July of 2008. This evaluation led Dr. Leavitt to conclude that respondent did, in fact, meet the criteria for being a sexually violent person. In reaching this conclusion, he relied upon the facts and circumstances of respondent's crimes, his demonstrated inability to conform to rules and regulations such as his conditions of parole, his unwillingness to seriously pursue sex offender treatment, his mental condition and the presence of risk factors of recidivism.

¶ 16 Dr. Leavitt explained that the offense for which respondent was incarcerated occurred when respondent was 27 years old and the victim 16. Respondent had been acquainted with the victim for five years and there had been a progression of sexual contact. Respondent supplied alcohol to the victim on the night of the offense. At the time of his arrest, respondent displaced blame onto the victim and refused "to accept responsibility for having initiated the sexual contact or offense."

¶ 17 Dr. Leavitt noted respondent had been convicted in 1998 of aggravated criminal sexual abuse as well. Respondent was 21 years of age and the victim 13. Respondent also had a "steady progression of sexual contact" with that victim as well, starting when she was only 12 years old. On the night of that offense, the victim ran away from home to spend the night with respondent

when he sexually abused her. Upon being convicted, respondent was sentenced to two years of probation and ordered to complete sex offender treatment. Following this conviction, respondent was required to register as a sex offender but he failed to do so, leading to a felony conviction for failing to comply with the registration requirement in 2000.

¶ 18 Dr. Leavitt further noted that treatment or therapy records he reviewed indicate that respondent admitted to sexually penetrating his 6-year-old sister when he was approximately 10 years old and had continued to abuse her "over a fairly extended period of time." Respondent also admitted to displaying his penis to one of his sister's friends and acknowledged to counselors to having "a long-standing history of deviant sexual fantasies or urges as well as masturbatory behavior to those fantasies involving both prepubescent, usually under the age of 13, and teenage girls." Respondent identified his "ideal victim profile" as between the age of 13 to 16.

¶ 19 Dr. Leavitt noted that respondent had been offered sex offender treatment numerous times but failed to complete it for such reasons as "poor attendance, lack of motivation or interest," repeated dishonesty and "showing a disdain for the conditions of the treatment program." While incarcerated, he refused inpatient sex offender treatment.

¶ 20 Dr. Leavitt diagnosed respondent as having paraphilia not otherwise specified based upon respondent's "history of recurrent sexual urges, fantasies, and/or behaviors which extend over at least a six-month period involving either in his case prepubescent age and/or teenaged children." Paraphilia not otherwise specified is a congenital or acquired mental condition that affects respondent's mental or volitional capacity. Respondent also suffered from a personality disorder

with both antisocial and narcissistic traits. This personality disorder would, in Dr. Leavitt's opinion, "increase his likelihood of acting out in a sexually aggressive or sexually violent manner."

¶ 21 Actuarial tools, such as the Static 99 and Static 2002, helped Dr. Leavitt quantify respondent's risk of reoffending if released into the community. Dr. Leavitt testified that these tools placed respondent in the "moderate high category" of reoffending. The Minnesota Sex Offender Screening Tool Revised placed respondent in the moderate risk category. Dr. Leavitt concluded that respondent "would be much more likely than not or has a substantial probability of committing future acts of sexually violent behavior."

¶ 22 The State also called Dr. Raymond Wood, a clinical psychologist with extensive experience in the evaluation and treatment of sex offenders, to testify. Dr. Wood also diagnosed respondent as suffering from paraphilia not otherwise specified and a personality disorder with antisocial and narcissistic features. Dr. Wood used various actuarial tools, such as the Static 99, which place respondent in the "moderate high" risk category. Dr. Wood opined that respondent's test scores made him "more than twice as likely" to reoffend than the average sex offender. Dr. Wood concluded that it was "substantially probable" that respondent would "commit future acts of sexual violence."

¶ 23 Respondent called Dr. Kirk Witherspoon to testify. Dr. Witherspoon stated that respondent "registered absolutely no sexual deviance at all," claiming that "The guy's not interested in teenage girls. He's certainly not interested in children. The whole issue is a false

issue." Dr. Witherspoon concluded that respondent did "not exhibit a personality disorder" or "sexual psychopathology." Dr. Witherspoon stated that respondent suffers from "the attentional problem and the reading problem and that's it."

¶ 24 On cross-examination, Dr. Witherspoon denied that respondent had a "negative attitude toward intervention," explaining, "I don't think he's opposed to getting treatment if, indeed, it were needed." Despite acknowledging that respondent missed six treatment sessions at the Robert Young Center, he disagreed with the statement that respondent resisted treatment, noting that respondent failed to appear due to "weather issues." Dr. Witherspoon maintained that repeated violations of terms of release had little relevance as "they weren't related to what was presumed to be a risk of him offending against teenagers" and were insignificant as "he's not someone who has any sexual psychopathology so the whole issue is moot." Dr. Witherspoon further opined that the repeated violations may be due to attentional defects. Dr. Witherspoon noted that: "technically, he committed a sex offense. It's about as limited a one as one could envision and there being still intercourse having occurred. He didn't ejaculate. He didn't -- it was --I'm not minimizing it but it certainly is not a heinous thing. He didn't go and snatch somebody and attack them and beat them up and torture them and do anything awful." Ultimately, Dr. Witherspoon opined that respondent does not meet the definition of a sexually violent person.

¶ 25 Respondent called his sister to testify. She stated that he never sexually abused her or her friends.

¶ 26 Ultimately, the jury found respondent to be a sexually violent person. Respondent filed a

motion for a new trial, which the trial court denied. On the same day, the trial court denied respondent's motion; the matter proceeded to a dispositional hearing in which respondent presented evidence that if released, he intended to live with his grandmother. The grandmother testified that she could transport respondent to and from any necessary treatment.

¶ 27 Dr. Wood provided the court with a predisposition investigative report recommending that respondent be committed to institutional care. He explained that sexually violent persons released into the community receive approximately one hour of treatment per week. By contrast, those in the Department of Health Services Treatment and Detention facility participate in up to ten, 90-minute treatment session per week.

¶ 28 The trial court ordered respondent committed to institutional care in a secure facility. The court emphasized that respondent had previously been offered outpatient treatment and failed to complete it, his proposed living arrangement was identical to what it had been when he violated the terms of his release, and being placed back in the same environment under similar circumstances "was not the answer." The court concluded that "a more intense program and a better controlled situation" was necessary to ensure that respondent followed through with sex offender treatment. Respondent filed a timely notice of appeal following the court's order committing him to institutional care.

¶ 29 ANALYSIS

¶ 30 Respondent raises four issues on appeal. Initially, respondent claims the trial court erred when denying his motion for a new trial, as the jury's verdict finding him to be a sexually violent

person is against the manifest weight of the evidence. Second, respondent argues that the State's comments made during closing argument denied him a fair trial. Third, respondent claims the trial court erred in committing him to institutional care. Finally, respondent suggests the trial court erred when denying his motion for a mistrial.

¶ 31 I. The Jury's Verdict

¶ 32 Respondent's initial claim is that the trial court erred in denying his motion for a new trial, as the jury's verdict finding him to be a sexually violent person is against the manifest weight of the evidence. We disagree.

¶ 33 The Act defines a sexually violent person as a "person who has been convicted of a sexually violent offense *** and who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence." 725 ILCS 207/5(f) (West 2010). The State must prove all the allegations in its petition beyond a reasonable doubt. 725 ILCS 207/35(d)(1) (West 2010). On review of an allegation that the State failed to adduce sufficient evidence to prove the allegations of its petition, "we ask only whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find the elements proved beyond a reasonable doubt." *In re Detention of Lieberman*, 379 Ill. App. 3d 585, 598 (2007); *In re Detention of Welsh*, 393 Ill. App. 3d 431, 454 (2009); *In re Detention of Sveda*, 354 Ill. App. 3d 373, 380 (2004).

¶ 34 Respondent does not deny that his conviction constituted a qualifying sexually violent offense. Rather, he submits that the State failed to prove that it was substantially probable that

he will engage in acts of sexual violence in the future or that he has a mental disorder. To support these allegations, he claims that Dr. Leavitt relied solely on respondent's parole violations and that Dr. Wood relied on outdated actuarial tests when reaching their respective opinions that respondent was more likely than not to reoffend. Respondent notes that in 2007 when Dr. Leavitt first reviewed his case, Dr. Leavitt did not believe respondent was a sexually violent person within the meaning of the Act. After respondent violated the terms of his release, Dr. Leavitt changed his opinion to indicate respondent did meet the definition of a sexually violent person under the Act. This, respondent claims, was improper as none "of these violations were related to any sex offense or any criminal offense; rather they were simple parole violations." Respondent continues that given Dr. Witherspoon's testimony that "research does not support any increased risk for parole violations," the jury's finding that he is a sexually violent person must be erroneous. Respondent also criticizes the actuarial instruments used by Dr. Wood in coming to his conclusion that respondent is substantially likely to reoffend. Respondent notes that Dr. Witherspoon discredited these actuarial instruments and, as such, he claims that "based on Dr. Witherspoon's testimony, no rational jury would have given any weight to Dr. Wood's testimony." Continuing this theme, respondent concludes by claiming that Dr. Witherspoon "vehemently disagreed with" Dr. Leavitt's and Dr. Wood's application of the mental disorder of paraphilia not otherwise specified. Respondent argues that the emphasis of the parole violations, actuarial instruments used by Dr. Wood and diagnosis of paraphilia not otherwise specified lead to the inescapable conclusion that the State failed to prove that it is substantially

probable that he will reoffend. We disagree.

¶ 35 We must note that respondent cites no authority holding that it is improper for experts such as Dr. Leavitt or Dr. Wood to consider parole violations when analyzing a potentially sexually violent person's likelihood of reoffending. While Dr. Witherspoon opined that respondent's parole violations were irrelevant to gauging future risk, Dr. Leavitt and Dr. Wood disagreed. Respondent also cites no authority holding that one adjudicated a sexually violent person is entitled to a new trial when experts disagree on which actuarial table should be used to best predict the likelihood of reoffending. Respondent's claims simply attack the weight of the evidence and witness credibility.

¶ 36 It is not the function of this court, in reviewing a challenge to the sufficiency of the evidence, to retry the respondent. *In re Detention of Welsh*, 393 Ill. App. 3d 431, 455 (2009). The task of evaluating witness credibility, resolving conflicts in the evidence and drawing reasonable inferences therefrom lies with the trier of fact. *Id.* As noted above, the State's burden was to prove beyond a reasonable doubt that it is "substantially probable" that respondent would reoffend (725 ILCS 207/5(f) (West 2010)) leaving our task to determine, when viewing the evidence in the light most favorable to the State, whether any rational trier of fact could have found the elements proven beyond a reasonable doubt. *Lieberman*, 379 Ill. App. 3d at 598. We hold that when viewing the evidence in the light most favorable to the State, a reasonable trier of fact could find that the State proved all elements beyond a reasonable doubt.

¶ 37 The State's evidence shows that respondent suffered from not one, but two mental

disorders: paraphilia not otherwise specified and a personality disorder with antisocial and narcissistic features. While Dr. Witherspoon disagreed with Dr. Leavitt's and Dr. Wood's diagnoses, it was for the jury to decide who was more credible. Dr. Witherspoon's statement that respondent "is not interested in teenage girls" despite the fact that he has twice been convicted of sexually abusing them could have led the jury to find him less than credible. Additionally, Dr. Witherspoon's assertion that respondent was receptive to sex offender treatment, despite the evidence that he failed to complete such treatment numerous times in the past, might have led the jury to conclude that Dr. Leavitt and Dr. Wood were more credible.

¶ 38 Both Dr. Wood and Dr. Leavitt testified it is more probable than not that respondent would reoffend. They based their opinions on respondent's mental condition and actions. These actions include criminal sexual activity with underage girls, refusal or reluctance to acknowledge wrongdoing and seek treatment and a refusal to comply with the conditions of parole. The latter were relevant, according to the doctors, as the substance of the conditions centered around refraining from being near children and possessing pornography. In the opinion of the State's experts, disregard for those conditions by someone with respondent's proclivities aided their analysis of whether respondent was likely to reoffend. Ultimately, both concluded that respondent's mental state made it substantially probable that he would.

¶ 39 The evidence adduced at trial, when viewed in the light most favorable to the State, shows respondent has been convicted of a sexually violent offense and is dangerous because he suffers from a mental disorder making it substantially probable that he will reoffend. As such,

we hold a rational trier of fact could have indeed found that the State proved all necessary elements beyond a reasonable doubt.

¶ 40 Additionally, we note that in conjunction with attacking the credibility of the State's experts, given their consideration of the parole violations and actuarial tables, respondent argues that Dr. Witherspoon's testimony "vehemently disagreeing" with the assertion that paraphilia not otherwise specified qualifies as a mental disorder under the Act leads to the singular conclusion that the State failed to prove he suffered from a mental disorder, making it substantially probable that he would reoffend. We disagree. Courts have long acknowledged that paraphilia not otherwise specified coupled with narcissistic and antisocial disorders constitutes such mental disorders under the Act. *In re Detention of Hardin*, 391 Ill. App. 3d 211 (2009); *Lieberman*, 379 Ill. App. 3d 599-600. Respondent has put forth no authority or argument distinguishing *Hardin* or *Lieberman*. Both Dr. Leavitt and Dr. Wood testified that respondent suffered from these conditions and that they create a substantial probability that he will reoffend. Undoubtedly, these conditions qualify as a mental disorder under the Act. See also *In re Commitment of Stevens*, 345 Ill. App. 3d 1050, 1061 (2004); *In re Detention of Tittlebach*, 324 Ill. App. 3d 6, 11-12 (2001).

¶ 41

II. Fair Trial

¶ 42 Respondent's next contends that the State's remarks during closing arguments violated his right to a fair trial. Specifically, respondent alleges that the State improperly attacked Dr. Witherspoon and his religious beliefs when stating, "the whole reason we're here today is to search for the truth and that's what I was taught and that's what I still believe with all my heart.

Apparently, that's not what Kirk Witherspoon believes." Respondent notes the State continued its closing, stating that "he promptly pushed those off and wrote down everything that Brad Siever told him as if it were gospel. Maybe the word gospel's a little bit of a joke to Mr. Witherspoon too ***." Respondent believes these statements were improperly made to insult Dr. Witherspoon's character and to inflame the passions and prejudices of the jury.

¶ 43 The State correctly notes that respondent failed to contemporaneously object to these statements during trial. To preserve an issue for appeal, an appellant must both object at trial and file a written posttrial motion raising the issue. *In re Detention of Ehrlich*, 2012 IL App (1st) 102300, ¶ 67. Issues not properly preserved are forfeited. *People v. Hillier*, 237 Ill. 2d 539 (2010).

¶ 44 Respondent argues, however, that his forfeiture should be excused and this issue analyzed under the plain-error doctrine. Plain-error analysis is appropriate in sexually violent person cases. *In re Commitment of Hooker*, 2012 IL App (2nd)101007; *In re Detention of Traynoff*, 358 Ill. App. 3d 430, 444 (2005). The first step in any plain-error analysis is to determine whether any error occurred. *In re Detention of Sveda*, 354 Ill. App. 3d 373, 377 (2004). "Manifestly, there can be no plain error where there is no error." *Hooker*, 2012 IL App (2nd) 101007, ¶ 55. Here, there was no error.

¶ 45 Again, respondent alleges that the prosecutor erred by suggesting that Dr. Witherspoon did not believe in the importance of a "search for the truth" and by remarking that "[m]aybe the gospel's a little bit of a joke to Mr. Witherspoon, too ***." Citing to *People v. Wheeler*, 226 Ill.

2d 92 (2007), respondent analogizes these remarks to those made in *Wheeler* when the prosecutor characterized a witnesses' testimony as "conducted 'at the behest of [defendant's] attorney' and 'revolting to any person who values the truth.'" *Id.* at 125. The prosecutor continued in *Wheeler*, comparing the witness's testimony to that of former President Clinton in regard to the Monica Lewinsky affair. *Id.* at 125-26.

¶ 46 The factual distinctions between the case at bar and *Wheeler* are significant. In *Wheeler*, our supreme court noted that the State improperly commented during closing arguments on matters such as the fact that it was "disadvantaged considering that each defendant had two attorneys working together, seeking to trick and deceive the jury" and that defense counsel cumulatively possessed " 'in excess of 100 years of legal practice.' " *Wheeler*, at 123-24. The *Wheeler* court identified many more instances of the State attacking defense counsel during closing arguments. The State's comment regarding testimony which should be " 'revolting to any person who values the truth' " was directed toward the defendant's former lawyer who testified in the case. *Id.* at 125-26. The *Wheeler* court found the State's closing improperly prejudicial not due to the reference to a witness's veracity, but, instead, due to the fact that the "closing argument in this case, considered in its entirety, appears deliberately designed to forge just the sort of 'us-versus-them' mentality decried by this court" in previous opinions and "foster a situation where the jurors might feel compelled to side with the State and its witnesses in order to ensure their own safety." *Id.* at 129. Nothing of the sort happened in the case at bar.

¶ 47 It has long been held that comments made during closing arguments which "can be

characterized as a discussion on the credibility of *** the witnesses, based on the testimony or the reasonable inferences which can be drawn therefrom, *** are permissible." *People v. Jones*, 108 Ill. App. 3d 880, 889 (1982); see also *People v. Rader*, 178 Ill. App. 3d 453, 465 (1988); *People v. Morrison*, 137 Ill. App. 3d 171, 184 (1985); *People v. Baugh*, 358 Ill. App. 3d 718,742 (2005) (It is not improper for the State to argue during closing arguments that "someone lied on the stand."). We do not find the State's comments ran afoul of the general proposition that it is permissible to discuss a witness's credibility during closing arguments so long as that discussion is based upon reasonable inferences drawn from facts in evidence. *Jones*, 108 Ill. App. 3d at 889. As noted by our supreme court, "closing arguments must be viewed in their entirety, and the challenged remarks must be viewed in context." *Wheeler*, 226 Ill. 2d at 122.

¶ 48 When commenting on the veracity of Dr. Witherspoon's testimony, the State discussed the facts indicating that respondent failed to complete treatment or refused treatment numerous times. The State noted that despite that history being "repeated in a number of these letters that Dr. Witherspoon saw and that Dr. Witherspoon reviewed for purposes of his report but when he sat down to write his report, he promptly pushed those off and wrote down everything that [respondent] told him as if it were gospel. Maybe the word gospel's a little bit of a joke to Mr. Witherspoon too since – given a few of his comments today but never mind that."

¶ 49 We hold these statements did not constitute error in light of the facts of this case. As such, the State committed no error when making them. As there is no error, there can be no plain error. *Hooker*, 2012 IL App (2nd) 101007, ¶ 55.

¶ 50

III. Commitment for Institutional Care

¶ 51 Respondent claims the trial court erred in committing him to institutional care. Once a jury determines that a person is a sexually violent person, the trial court "shall order the person to be committed to the custody of the Department for control, care and treatment ***." 725 ILCS 207/40(a) (West 2010). An "order for commitment" under the Act "shall specify either institutional care in a secure facility *** or conditional release." 725 ILCS 207/40(b)(2) (West 2010). The Act directs the trial court to consider the nature and circumstances of the behavior that was the basis of the allegation in the petition, the person's mental history and present mental condition, and what arrangements are available to ensure that the person has access to and will participate in necessary treatment when "determining whether commitment shall be for institutional care." 725 ILCS 207/40(b)(2) (West 2010). We review the trial court's decision to commit respondent to a secure facility under an abuse of discretion standard. *Lieberman*, 379 Ill. App. 3d at 609. An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court. *Id.*

¶ 52 Specifically, respondent argues the trial court did not "properly consider" all the statutorily prescribed elements necessary to determine whether a sexually violent person should be committed to a secure facility or granted conditional release. Respondent claims the court did not consider the nature and circumstances of his behavior that formed the basis for the allegations in the petition. Respondent avers that the "court failed to consider that the predicate offense was

non-violent and would not have been criminal had the victim not been underage." Instead, respondent concludes that the trial court improperly focused on his parole violations.

¶ 53 Respondent also claims the trial court improperly considered a factor the legislature removed from the Act. Noting that Public Act 96-1128 (eff. January 1, 2011) removed language directing a court to consider "where the person will live, how the person will support himself or herself," respondent argues the trial court improperly focused on the fact that he would live with his grandmother if conditionally released. The State acknowledges that the legislature removed the language directing a court to consider where a sexually violent person will live and how they will support themselves. This, the State argues, does not render a respondent's living arrangements irrelevant. We agree.

¶ 54 The Act in its current form still mandates that a court consider "what arrangements are available to ensure that the person has access to and will participate in necessary treatment" as well as "the nature and circumstances of the behavior that was the basis of the allegation in the petition." 725 ILCS 207/40(b)(2) (West 2010). The petition in this case alleges that it is substantially probable that without treatment, respondent will reoffend.

¶ 55 Considering all of the evidence before the trial court, including the testimony of the State's expert witnesses, the nature of the circumstances of respondent's behavior, including evidence of approximately 40 young victims, and respondent's refusal or reluctance to undergo treatment, we cannot say the trial court committed an abuse of discretion in committing respondent to a secure facility. While respondent argues that the trial court abused its discretion

by improperly focusing on his parole violations and living arrangements, we find them relevant as did the trial court. Respondent was living with his grandmother, where he would purportedly live if granted conditional release, when he chose to engage in prohibited interaction with children.

¶ 56 Moreover, he was also living with his grandmother when he chose not to participate in and missed six treatment sessions at the Robert Young Center. Respondent has offered no authority supporting the proposition that a trial court is prohibited from considering a sexually violent person's potential living arrangements. He merely makes the observation that the legislature removed certain language from the statute mandating that the trial court consider such matters. We cannot say the trial court abused its discretion when committing respondent to institutional care in a secure facility, given the statutory directive that a trial court consider facts relevant to ensuring a sexually violent person will participate in necessary treatment, respondent's refusal to do so while living with his grandmother, respondent's repeated parole violations while living with his grandmother, including the ability to accumulate large quantities of prohibited pornography and his request to again live with his grandmother upon conditional release.

¶ 57 Furthermore, we have no doubt, based upon this record, that the result would have been the same even without consideration of respondent's living arrangements.

¶ 58 IV. Denial of Motion for Mistrial

¶ 59 Finally, respondent contends that the trial court erred in denying his motion for a mistrial. The decision to declare a mistrial lies within the discretion of the trial court, and a mistrial should

be declared only if there is some occurrence at trial of such a character and magnitude that the party seeking a mistrial is deprived of a fair trial. *In re Commitment of Kelley*, 2012 IL App (1st) 110240, ¶ 49. "The party moving for a mistrial bears the burden of making a showing that he has been prejudiced." *People v. Campbell*, 126 Ill. App. 3d 1028, 1036 (1984); see also *Glassman v. St. Joseph Hospital*, 259 Ill. App. 3d 730 (1994); *Wojcik v. City of Chicago*, 299 Ill. App. 3d 964 (1998).

¶ 60 Specifically, respondent argues that Dr. Leavitt's reference to "probable cause" created a manifest necessity for a mistrial in that "the jury learned that the judge had already rendered a decision in the case." While discussing his review of respondent's records, the State asked Dr. Leavitt what "did your review of the records reveal?" Dr. Leavitt responded that "since, I believe, August 8 of 2008 when he was -- this was after the court had found probable cause --." Respondent's attorney immediately objected. The court sustained the objection and questioning proceeded for another 11 pages of transcribed testimony until the court interrupted the proceedings for a short recess.

¶ 61 Prior to calling the jury back into the courtroom, the judge indicated he wanted "the record to reflect" certain information about objections made during Leavitt's testimony. After summarizing the objection to the Leavitt's statement regarding probable cause, the trial court noted that Dr. Leavitt never actually testified to "a probable cause finding by the court as to the sexual dangerousness of the -- of Mr. Siever." Respondent's counsel acknowledged that Leavitt's comment was not made in response to any question offered by the State to produce a discussion

of probable cause. Counsel then continued:

"But I think that a statement may have been made regarding the probable cause hearing on a couple of occasions and that the judge found and the objection was made just prior is my recollection to anything else coming out.

My concern being Mr. Siever's attorney in a case of this nature would be that if the jury heard that and there was a couple of times when there was some reference made by the witness as to a judge or a probable cause hearing when I made the objection, my position would be that there should be a mistrial declared at this point in time because I think they did hear it. "

In denying the motion for a mistrial, the trial court noted that the jury never "heard anything with regard to a previous finding by a court that there was probable cause to believe that Mr. Siever was a sexually dangerous person or sexually violent person."

¶ 62 While we acknowledge that the jury heard the term probable cause, the record reflects the trial court was correct that the jury was never informed by Dr. Leavitt that a court found probable cause to believe that he was a sexually violent person. The record by no way supports respondent's assertion to this court that "the jury learned that the judge had already rendered a decision in this case."

¶ 63 We hold the trial court did not abuse its discretion in denying respondent's motion for a

mistrial. Respondent failed to satisfy his burden of showing how Dr. Leavitt's reference to probable cause prejudiced him.

¶ 64

CONCLUSION

¶ 65 For the foregoing reasons, we affirm the judgment of the circuit court of Knox County.

¶ 66 Affirmed.