



section A of the statement of facts entitled "Background," on the basis that the history of his sexual assaults is irrelevant to the issues presented in this appeal. We deny respondent's motion to strike.

¶ 4

#### BACKGROUND

¶ 5 In 1997, respondent, then age 23, pled guilty to aggravated criminal sexual abuse after admitting to having sex with his stepbrother's 15-year-old girlfriend on more than one occasion. He was sentenced to six months in jail and two years of probation. While on probation for this offense, respondent violated the terms of his probation by falsely registering as a sex offender at an incorrect address. He was living with a family with three young children, and it was strongly suggested by his probation officer that he live somewhere else. In April 1998, respondent was arrested for again failing to register at the proper address.

¶ 6 In August 1998, respondent, then age 24 and still serving probation for his 1997 conviction for aggravated criminal sexual abuse, gave alcohol to S.C., a 16-year-old girl, put his hands down her pants and his finger in her vagina, and forced her hand on his penis until he ejaculated. On June 21, 1999, respondent pled guilty to aggravated criminal sexual assault of S.C. and received a 10-year sentence in the Department of Corrections (DOC). At the same time, respondent pled guilty to aggravated criminal sexual assault of T.M., a 12-year-old girl he assaulted on multiple occasions while living with T.M.'s mother for free in exchange for babysitting T.M. and her two siblings while the mother was at work. Respondent received a consecutive five-year sentence for this offense. A presentence investigation report prepared in May 1999 indicates additional allegations of sexual molestation that were either not reported or not charged, including sexual intercourse with a 12-year-old and a 15-year-old in 1998 and fondling a 9-year-old girl's buttocks in 1999.

¶ 7 In April 2006, respondent was eligible for release from DOC, with a mandatory

release date scheduled for April 13, 2006. On April 7, 2006, Dr. Jacqueline Buck, a clinical psychologist, evaluated respondent at the request of DOC. The evaluation was performed pursuant to DOC's sexually violent person screening procedure for convicted sex offenders who are scheduled for mandatory supervised release or discharge. Dr. Buck's detailed report concluded as follows:

"Based on the information available to me in the [DOC] Master File, Medical File, Illinois State Police reports and other Washington County records, as reported above, including the use of actuarial tools and a personality inventory, and in conjunction with my clinical judgment and knowledge of the research literature, it is my professional opinion, within a reasonable degree of psychological certainty, that [respondent's] untreated Axis I disorders of Paraphilia, Not Otherwise Specified, Sexually Attracted to Non-consenting Females, Exclusive Type; Alcohol Dependence, Without Physiological Dependence, In a Controlled Environment; and Cannabis Abuse, In a Controlled Environment, and the Axis II disorder of Personality Disorder, Not Otherwise Specified, With Antisocial and Narcissistic Traits make it substantially probable that he will engage in continued acts of sexual violence should he be released today. [Respondent] is therefore referred as a candidate for civil commitment as a Sexually Violent Person under Public Act 90-0040 [725 ILCS 207/1 to 99]."

On April 11, 2006, the State filed a petition for sexually violent person commitment, asking that the court find respondent to be a sexually violent person and commit him to the Department of Human Services (DHS) for control, care, and treatment. The petition was accompanied by the written mental health evaluation by Dr. Buck.

¶ 8 The trial court also appointed an attorney, Julie Keehner Katz, to represent respondent and entered an order for detention under which respondent would be committed to a facility

to be approved by DHS at the completion of his sentence with DOC. The trial court scheduled a probable cause hearing for April 12, 2006.

¶ 9 On April 12, 2006, respondent filed a waiver of probable cause hearing signed by both him and his attorney. An initial order of commitment was entered ordering respondent to be detained at a facility approved by DHS and ordering respondent undergo an evaluation by DHS. Respondent filed a motion for appointment of expert witness, asking the trial court to appoint an expert to examine him to determine whether he was a sexually violent person. Respondent also filed a jury demand.

¶ 10 On May 9, 2006, respondent was scheduled to be interviewed by Dr. David M. Suire, an evaluator with DHS, to determine whether respondent qualified as a sexually violent person. Respondent declined to participate in the interview. Dr. Suire reviewed respondent's records and concluded there was a substantial probability that respondent would again engage in acts of sexual violence.

¶ 11 On June 20, 2006, Dr. Kirk Witherspoon was appointed as respondent's expert. The following day, the State filed a motion to bar evidence of the examination of respondent by his expert pursuant to section 30(c) of the Act, which provides in relevant part as follows:

"If the court determines after a hearing that there is probable cause to believe that the person named in the petition is a sexually violent person, the court shall order that the person be \*\*\* transferred within a reasonable time to an appropriate facility for an evaluation as to whether the person is a sexually violent person. If the person who is named in the petition refuses to speak to, communicate with, or otherwise fails to cooperate with the examining evaluator from the [DHS] or the [DOC], that person may only introduce evidence and testimony from any expert or professional person who is retained or court-appointed to conduct an examination of the person that results from a review of the records and may not introduce evidence resulting from

an examination of the person." 725 ILCS 207/30(c) (West 2004).

The State asserted that because respondent refused Dr. Suire's examination, he should not be permitted to introduce evidence or testimony from his own expert regarding any personal examination or interview.

¶ 12 A hearing was held on October 26, 2006. After a hearing, the trial court specifically found as follows:

"The Respondent has indicated here this morning that it [is] his intention to refuse to speak, communicated with, and cooperate with the examining evaluator for the [DHS], and the [DOC], and as provided by law then [respondent] will only be allowed to introduce evidence and testimony from any expert or professional person who he retains or is appointed for him that results from a review of the records, and further it is the order of the Court that he may not introduce evidence resulting from examination of the person."

Prior to the bench trial in this matter, the trial court entered a formal order granting the State's motion to bar evidence of the examination of respondent by his expert.

¶ 13 On November 13, 2006, the State filed a "Motion to Permit Dr. Buck to Interview Respondent and To Review His Records" in which the State alleged that Dr. Buck needed to interview respondent again and review his records at DHS in order to update her opinion. The State's motion was granted and an interview was scheduled. On April 16, 2008, Dr. Buck attempted to conduct another interview, but respondent refused to participate.

¶ 14 In March 2009, respondent waived his right to a jury trial and stipulated to the admission of Dr. Witherspoon's report in substitution for Dr. Witherspoon's direct testimony. On March 27, 2009, respondent filed a motion to vacate waiver of jury trial in which he asserted that he did not think he was given adequate legal advice before entering into the waiver. On that same day, attorney Katz filed her motion to withdraw. Respondent later

filed a *pro se* explanation as to why appointed counsel filed a motion to withdraw and motion for appointment of new counsel. On April 16, 2009, respondent filed a motion to vacate the stipulated order as to a bench trial and obtain a trial by jury. On June 16, 2009, the trial court refused to set aside respondent's waiver of trial by jury, denied attorney Katz's motion to withdraw, and denied the motion to vacate the stipulated order.

¶ 15 On July 17, 2009, respondent filed a motion *in limine*, seeking to bar the testimony of Dr. Buck based upon her original interview of respondent. The trial court denied respondent's motion *in limine* and admitted the testimony of Dr. Buck based upon her interview with respondent on April 7, 2006. During the bench trial, Dr. Buck and Dr. Suire both opined that respondent was a sexually violent person. Respondent testified on his own behalf. Respondent also offered into evidence the report of Dr. Witherspoon, which was a records review. Dr. Witherspoon's report was dated November 13, 2006, and was addressed to respondent's attorney. It specifically stated, "As I have shared in the past, since [respondent] has refused to be interviewed by me, I regard it as inappropriate to offer a definitive psychodiagnostic opinion about him." The report went on to criticize the reports by Dr. Buck and Dr. Suire. After hearing all the evidence, the trial court found respondent to be a sexually violent person and ordered him committed to institutional care in a secure facility. Respondent filed a timely notice of appeal.

¶ 16

## ANALYSIS

¶ 17

### I. EXAMINING WITNESS

¶ 18 The first issue raised by respondent on appeal is whether the trial court erred in allowing the State to present an examining witness when it barred him from presenting an examining witness. Respondent contends the trial court committed reversible error by allowing the State to present an examining witness, Dr. Buck, but barred him from presenting his own examining witness. The State responds that respondent waived his statutory right

to present an examining witness when he refused to be interviewed not only by the State's witness but also by his own expert, Dr. Witherspoon. We agree with the State.

¶ 19 The purpose of section 30(c) of the Act is to prevent the State or the respondent from having an evidentiary advantage and to guarantee both parties have the opportunity to present evidence substantially equal in character. *In re Detention of Trevino*, 317 Ill. App. 3d 324, 330, 740 N.E.2d 810, 814 (2000). In the instant case, both parties had the opportunity to present evidence substantially equal in character. Respondent was scheduled to be interviewed by Dr. Suire, the State's expert from DHS, but respondent refused the examination. The trial court also appointed an expert, Dr. Witherspoon, at respondent's request, but respondent also refused to be interviewed by him. The record reflects that Dr. Witherspoon attempted to interview respondent on more than one occasion, but respondent refused. Accordingly, we agree with the State that respondent, in essence, waived the possibility of calling Dr. Witherspoon as an examining witness by refusing to meet with Dr. Witherspoon and is estopped from asserting this issue on appeal. It is "manifestly unfair to allow a party a second trial upon the basis of error which that party injected into the proceedings." *In re Detention of Swope*, 213 Ill. 2d 210, 217, 821 N.E.2d 283, 287 (2004). Here, both parties were given the opportunity by the trial court to present substantially similar evidence.

¶ 20 Respondent relies on *Trevino* in support of his contention that he was denied a fair trial. In that case, our colleagues in the Second District held that the respondent's right to due process was violated because the State was allowed to present one examining and one nonexamining expert witness, but the respondent was only allowed to present one nonexamining expert. *Trevino*, 317 Ill. App. 3d at 331, 740 N.E.2d at 815. The respondent met with a DOC evaluator, Dr. Levinson, but then refused to meet with a DHS expert, indicating that he was exercising his right to remain silent pursuant to section 25(c)(2) of the

Act (725 ILCS 207/25(c)(2) (West 1998)) and that he would not cooperate with the State in preparation for trial; however, the respondent sought to have an independent mental health expert appointed to evaluate him. *Trevino*, 317 Ill. App. 3d at 328, 740 N.E.2d at 812. The trial court granted the respondent's request for an independent evaluation, but limited the evaluation to only the materials that Dr. Levinson used. The State later announced its intention to call Dr. Heaton to testify as to his review of the respondent's expert, which the trial court allowed. *Trevino*, 317 Ill. App. 3d at 328, 710 N.E.2d at 813. The *Trevino* court specifically stated:

"[W]e agree with the respondent that section 30(c), as it was applied to him, denied him due process by barring him from presenting the testimony of an examining expert to contradict the testimony offered by the State's examining expert. Despite the respondent's refusal to cooperate with court-ordered DHS evaluation, the State was nonetheless able to call Dr. Levinson as an examining expert. Although the trial court permitted the respondent to call a nonexamining expert, the expert's evaluation was limited to a consideration of materials relied upon by Dr. Levinson. As section 30(c) deprived the respondent of the same opportunity to present an examining expert, we believe that the respondent was not able to defend himself on a level playing field and that his due process rights were violated." *Trevino*, 317 Ill. App. 3d at 331, 740 N.E.2d at 815.

The instant case is distinguishable because here respondent refused to speak not only with the State's evaluator, Dr. Suire, but also with his own evaluator, Dr. Witherspoon.

¶ 21 The trial court gave respondent the opportunity to present evidence substantially equal in character to the State, but respondent created his own problem by refusing to be evaluated by his own evaluator. While neither party is to have an evidentiary advantage under section 30(c), it would be wrong to allow respondent to control the prosecution of the case.

Respondent is a convicted sex offender who is sexually attracted to adolescent girls. Under the circumstances presented here, section 30(c) did not operate to deprive respondent of the same opportunity as the State to present the testimony of an examining witness, and we refuse to reverse on this basis.

¶ 22

## II. MOTION TO WITHDRAW

¶ 23 The second issue raised on appeal is whether the trial court erred in denying respondent's attorney's motion to withdraw. Respondent contends the trial court erred in denying his attorney's motion to withdraw because there is no showing in the record that anyone would be prejudiced by granting the motion and there was no mention that granting the motion would delay the trial. The State replies that the trial court did not abuse its discretion in denying the motion to withdraw, and, even assuming *arguendo* that the trial court erred in denying the motion, respondent has failed to show how that ruling prejudiced his case. Again, we agree with the State.

¶ 24 The sixth amendment guarantees an accused the right to assistance of counsel, but it does not include the right to select counsel of choice, especially where the exercise of that claimed right would delay or impede the effective administration of justice. *People v. Barrow*, 133 Ill. 2d 226, 252, 549 N.E.2d 240, 251 (1989). While a defendant has the right to be represented by *retained* counsel of his own choosing (*People v. Johnson*, 75 Ill. 2d 180, 185, 387 N.E.2d 688, 690 (1979)), he or she does not have the right to choose *appointed* counsel. *People v. Lewis*, 88 Ill. 2d 129, 160, 430 N.E.2d 1346, 1361 (1981). It is within the trial court's discretion to deny a request for substitute counsel. *People v. Wanke*, 303 Ill. App. 3d 772, 782, 708 N.E.2d 833, 841 (1999). "Dissatisfaction with one's counsel, a deteriorated relationship, or the fact that defense counsel and defendant argue or disagree about trial tactics, alone, will not constitute good cause for substitution." *Wanke*, 303 Ill. App. 3d at 782, 708 N.E.2d at 841.

¶ 25 In the instant case, attorney Katz filed a motion to withdraw because respondent believed she was not advising him properly and she reported "irreconcilable differences of opinion." Respondent later filed a *pro se* pleading in which he set forth reasons he believed he should receive new counsel, including the fact that he believed Katz (1) improperly advised him regarding his refusal to speak with the DHS evaluator, (2) provided "ineffective, uniformed and flat out wrong representation and advice to [r]espondent," and (3) refused to consider or investigate respondent's defense that his recent testicular cancer and removal of a testicle significantly decreased his sex drive. The trial court conducted a hearing on the motion to withdraw, during which time Ms. Katz advised the trial court that respondent was not comfortable with her representation. The trial court gave respondent the opportunity to give a statement, but respondent declined. Ultimately, the trial court denied the motion to withdraw and refused to substitute counsel.

¶ 26 Respondent relies on *In re Rose Lee Ann L.*, 307 Ill. App. 3d 907, 718 N.E.2d 623 (1999), in support of his argument; however, respondent's reliance on that case is misplaced. In that case, the attorney seeking leave to withdraw was the public guardian who had been appointed to represent both the parents and the child in a petition for adjudication of wardship of the child. The record revealed that neither parent objected to the public guardian's motion to withdraw, neither parent would have been prejudiced by granting the motion, and no other party objected to the motion. *In re Rose Lee Ann L.*, 307 Ill. App. 3d at 912, 718 N.E.2d at 627. The public guardian expressed to the court numerous times that he was having difficulty in representing both the parents and the child, which was described as an "ethical dilemma." *In re Rose Lee Ann L.*, 307 Ill. App. 3d at 913, 718 N.E.2d at 628. The instant case, however, fails to present such an ethical dilemma because the attorney's loyalty was to only one party, not three separate parties.

¶ 27 Here, neither respondent nor Ms. Katz alleged anything more than a deteriorated

relationship or a disagreement about trial tactics. When given the opportunity at the hearing to argue more, respondent declined to do so. The State, while not outright objecting to Ms. Katz's motion, pointed out that there was nothing in respondent's *pro se* petition which would warrant Ms. Katz's removal. After careful consideration, we cannot say the trial court abused its discretion in denying defense counsel's motion to withdraw or respondent's *pro se* motion to substitute.

¶ 28

### III. EFFECTIVE ASSISTANCE OF COUNSEL

¶ 29 The final issue raised on appeal is whether respondent was denied the effective assistance of counsel. Respondent contends that his attorney's failure to present evidence of his testicular cancer and its treatment constituted ineffective assistance of counsel. He argues that evidence of his testicular cancer was potentially relevant both to his defense and to his ineffective assistance of counsel claim and, thus, the cause must be remanded so that such evidence may be evaluated. The State replies that respondent has made no showing that his attorney was constitutionally ineffective for failing to present evidence related to his testicular cancer and its effect on his likelihood of committing future acts of sexual violence.

¶ 30 Normally, whether a defendant was denied the right to effective assistance of counsel is determined in accordance with the familiar two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). The State asserts *Strickland* may not be applicable to sexually violent persons cases, but assuming *arguendo* it is applicable, respondent cannot prevail because he had not demonstrated that counsel was deficient or that he was prejudiced. We agree with the State.

¶ 31 Under *Strickland* a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) the deficient performance so prejudiced the defense as to deny the defendant a fair trial. *Strickland*, 466 U.S. at 687. Both prongs of the test must be satisfied, as failure to establish either prong will be fatal to the claim. *People*

*v. Richardson*, 189 Ill. 2d 401, 411, 727 N.E.2d 362, 369 (2000).

¶ 32 Attorney Katz presented evidence of respondent's condition during the cross-examination of Dr. Buck. She specifically raised awareness of the issue by pointing out that respondent had been diagnosed with testicular cancer and that one of his testicles was removed as a result. The State's expert then refuted the proposition that the loss of a testicle would lessen respondent's risk of reoffending, specifically stating:

"Males, as you may know, can have an orgasm with a less than erect penis. In his activities with the children, he does have them masturbate him while he puts his fingers in their vagina and so on. We also have lots of data about even men who have been castrated, chemically or physically castrated, it does not reduce the rate of reoffending, so that in and of itself does not speak to me to reduce risk."

Therefore, the record refutes that counsel was deficient, because she raised the issue over which he now complains.

¶ 33 Assuming that his counsel did not present strong enough evidence in this regard and thus her representation was deficient, respondent has failed to convince us that he was in any way prejudiced by the deficient performance. In this appeal, respondent has failed to present any evidence via affidavit or medical records that the testicular cancer and the loss of his testicle would lessen the likelihood of his reoffending, and as previously stated, Dr. Buck actually refuted this claim. Under these circumstances, respondent has failed to convince us that he was prejudiced by his counsel's performance.

¶ 34 **CONCLUSION**

¶ 35 For the foregoing reasons, we hereby affirm the trial court's judgment finding respondent to be a sexually violent person and ordering him committed to institutional care in a secure facility.

¶ 36 Affirmed.