

2014 IL App (2d) 130658-U
No. 2-13-0658
Order filed November 10, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> Commitment of JEREMY L. SCHLOSS)	Appeal from the Circuit Court
)	of Du Page County.
)	
)	No. 08-MR-1032
)	
(The People of the State of Illinois, Petitioner-)	Honorable
Appellee v. Jeremy L. Schloss, Respondent-)	Paul M. Fullerton,
Appellant).)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Burke and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* Respondent forfeited review of 7 of his 26 arguments in his *pro se* appeal because he did not clearly argue and/or cite pertinent authority for those issues. He forfeited another 10 arguments because he failed to object at trial, and we found no error regarding those issues, meaning there could be no plain error. We further concluded that: the SVP Act does not violate double jeopardy; the trial court did not err in denying respondent's motion to dismiss; the State's expert could opine that respondent was an SVP based on documents of record; the trial court did not err in denying respondent's jury instruction, because it added elements that the State was not required to prove; paraphilia, NOS, nonconsent was a constitutionally permissible diagnosis; and there was sufficient evidence to prove that respondent was an SVP beyond a reasonable doubt. Therefore, we affirmed.

¶ 2 Following a jury trial, respondent, Jeremy L. Schloss, was found to be a sexually violent person (SVP) under the Sexually Violent Persons Commitment Act (SVP Act) (725 ILCS 207/1

et seq. (West 2012)). After a dispositional hearing, respondent was committed to the care, custody, and control of the Department of Human Services (DHS). In his *pro se* appeal, respondent raises 26 issues for review. We affirm.

¶ 3

I. BACKGROUND

¶ 4 In March 2005, respondent pleaded guilty to the aggravated criminal sexual abuse (720 ILCS 5/12-16(a)(2) (West 2004)) of his wife, C.S. In June 2005, he entered a negotiated plea and was sentenced to 180 days in jail and 36 months' sex offender treatment probation. He was ordered to have no direct or indirect contact with C.S. Later that year, the State petitioned to revoke respondent's probation, alleging that he had contacted C.S. Respondent admitted the allegations, and in November 2005, the trial court resentenced him to seven years' imprisonment followed by two years' mandatory supervised release (MSR).

¶ 5 Respondent was scheduled to be released on MSR on July 3, 2008. The day before, on July 2, 2008, the State filed a petition requesting that respondent be adjudicated an SVP. The State submitted clinical psychologist Ray Quackenbush's report of his evaluation of respondent. Dr. Quackenbush diagnosed respondent with: (1) "Paraphilia Not Otherwise Specified, Non-consenting Persons"; (2) alcohol abuse in a controlled environment; and (3) "Personality Disorder Not Otherwise Specified, with Antisocial Features." Dr. Quackenbush opined that these mental disorders made respondent dangerous to others and made it substantially probable that he would engage in acts of sexual violence in the future. On August 4, 2008, following a hearing at which Dr. Quackenbush testified, the trial court found that there was probable cause to believe that respondent was an SVP.

¶ 6 On January 26, 2009, the trial court appointed Dr. Michael Fogel to evaluate respondent. On May 6, 2010, the trial court noted that Dr. Quackenbush had retired, and it ordered the Department of Corrections (DOC) to assign another evaluator.

¶ 7 On June 17, 2010, plaintiff filed a petition under the Post-Conviction Hearing Act (Post-Conviction Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He alleged that he had an agreement with the State that he would be sentenced to a maximum of seven years' imprisonment and two years' MSR, but the State violated his due process rights by unilaterally extending his MSR term through the SVP Act, under which his MSR term was indefinitely suspended. The trial court summarily dismissed the petition, and this court affirmed, reasoning that defendant was not challenging the proceedings which led to his conviction, as required by the Post-Conviction Act. *People v. Schloss*, No. 2-10-0393 (2011) (unpublished order under Supreme Court Rule 23).¹

¶ 8 On May 15, 2012, respondent filed a motion seeking to represent himself *pro se*. On May 17, 2012, the trial court granted the motion in part, appointing respondent's attorney as stand-by counsel.

¶ 9 Prior to trial, respondent filed 19 motions *in limine*. He also filed a motion to dismiss, arguing that the trial court's appointment of a second evaluator for the State, without a second evaluator for himself, violated his due process rights and caused the trial court to lose jurisdiction. The trial court denied the motion to dismiss on December 11, 2012. It also denied 17 of respondent's motions *in limine* but granted respondent's motion *in limine* #2, without objection, requiring that the State not refer to respondent as "defendant" during trial. The trial

¹ In a separate appeal, this court recently vacated the tolling of the MSR as void, because the tolling provision was enacted after the underlying crime took place. *Schloss v. Scott*, 2014 IL App (2d) 130933-U, ¶ 26.

court reserved ruling on respondent's motion *in limine* #14, regarding reference to "sexual deviance," but denied the motion on the morning of trial.

¶ 10 Respondent's trial took place from March 11 to 15, 2013. The State presented two expert witnesses, Dr. Vasiliki Tsoflias and Dr. Edward Smith. Dr. Tsoflias was accepted as an expert in clinical psychology, specifically in sex offender evaluations and risk assessment, and testified as follows. She evaluated respondent on behalf of the DOC to see if he qualified as an SVP. She reviewed respondent's criminal history, including police and probation reports, court documents and disciplinary history, his DOC medical file, and previous evaluations; these were the types of records experts in her field reasonably relied on in conducting evaluations. Respondent declined to meet with Dr. Tsoflias, but she could ethically evaluate him based on the aforementioned documents because she stated the limitations of her conclusions due to respondent's non-participation. Dr. Tsoflias completed her report in September 2010, and it was admitted into evidence.

¶ 11 Dr. Tsoflias relied on the facts and circumstance of respondent's previous crimes, among other things, in forming her ultimate opinions. Specifically, in February 2005, respondent pleaded guilty to aggravated criminal sexual abuse. The charges stemmed from a night when C.S. was sleeping in bed with their nine-month-old son. Respondent entered the room, pulled C.S. off the bed by her legs, and put his left hand over her mouth. With his other hand, he ripped off her sweatpants and underwear and inserted his fingers into her vagina. The baby started crying, and C.S. said that he needed a bottle. Respondent went to the kitchen to prepare a bottle, and C.S. grabbed the baby and ran to a neighboring apartment.

¶ 12 Respondent was sentenced to probation, and he told the probation officer that the encounter was a consensual act and that he did not think he should be banned from contacting

C.S. or seeing their son. Respondent subsequently violated the probation conditions by contacting C.S. using the talk-to-talk feature on their cell phones, and he initially denied the contact before admitting to it.

¶ 13 According to DHS records, respondent also admitted to sexually assaulting C.S. on three to five prior occasions. In one instance, he and C.S. were arguing, and he pulled her to the floor and forcibly penetrated her digitally. Another incident took place on Christmas Eve 2004, when they were getting ready to go to a party at a relative's house. Respondent pressed up against C.S. in the bathroom, suggesting that he wanted to have sex with her, but C.S. said that they did not have time. Respondent said that they were going to do it then and pushed her onto the toilet. C.S. resisted, and respondent grabbed her by the neck, whereupon C.S. fell into the bathtub. Respondent began choking her, and as a means to get away from him, C.S. said that they should go to the bedroom. Their son started crying in the living room, and C.S. went to get him, saying to leave her alone because their son was in the room. Respondent said, "this is how I want it," that he had always fantasized about raping a woman, and that this was a fantasy come true. He pulled her to the ground and had forcible intercourse with her. Later, any time they would argue, respondent would threaten to rape C.S. again.

¶ 14 Previously, in 2003, respondent was charged with criminal sexual abuse but pleaded guilty to battery. In that incident, a 17-year-old girl was sitting outside a house on the front steps, and respondent was sitting a couple of steps below her. Respondent asked if anyone was home and if she wanted to have sex, to which the girl replied in the negative. He touched her vagina between her legs, and she pushed his hand away and told him to stop. He repeated this action five to six times, with the girl repeatedly pushing his hand away.

¶ 15 Outside of sexual offenses, respondent had been convicted five times for offenses such as theft, battery, and driving under the influence (DUI). Records indicated respondent started drinking alcohol in his teens or even before then, and he was drinking on a regular basis as an adult. He also had a history of using marijuana, cocaine, and LSD. Respondent had attended some Alcoholics Anonymous groups and had completed a substance abuse education program, but he had not participated in substance abuse treatment.

¶ 16 Regarding sex offender treatment, respondent attended such treatment for five weeks while on probation, until his probation was revoked. In the DOC, he was offered treatment but stated that he did not need it. He began treatment with DHS, dropped out for one year, but then started treatment again. Respondent was still in phase two out of five phases of treatment.

¶ 17 Applying this information to the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), Tsoflias diagnosed respondent with “paraphilia not otherwise specified, nonconsent; alcohol abuse in a controlled environment; and personality disorder not otherwise specified with antisocial and narcissistic features.” The first diagnosis of paraphilia had two criteria, with the first that, for at least six months, an individual either (a) experiences recurrent and intense sexually arousing urges or fantasies, or (b) engages in behavior involving objects, the suffering and humiliation of himself or a partner, or children or other nonconsenting persons. The second criteria is that these feelings or behaviors cause the person clinically significant distress or impairs his social, occupational, or other forms of functioning. Respondent met these criteria based at least three sexual assaults against nonconsenting women in two years and his fantasy about rape prior to the acts. The behaviors had caused him clinically significant distress in that they caused problems with his marriage, and his probation and incarceration for the offenses impaired his functioning.

¶ 18 Respondent met the criteria for alcohol abuse in a controlled environment because he had a history of alcohol abuse that caused problems in his marriage, he had a DUI arrest, and the 2005 offense was committed while he was under the influence. The “controlled environment” meant that a person was currently residing in an environment where alcohol was not available.

¶ 19 The personality disorder with antisocial features was based on respondent’s repeated engagement in criminal acts in a short period of time. He showed a disregard for the safety of himself and others, as evidenced by his drug use, his DUI, the sexual offenses, and fights he had engaged in. The narcissistic features were that respondent had a grandiose sense of self-worth and had a lack of remorse for his crimes, for which he generally did not take responsibility. Dr. Tsoflias could not make a full diagnosis of antisocial personality disorder because it generally required some manifestation before the age of 15, and she was missing information of respondent’s juvenile history. Still, personality disorder not otherwise specified was itself a mental disorder that was listed in the DSM. Respondent’s mental disorders predisposed him to commit acts of sexual violence because they made it more likely that he would act out his sexual urges and fantasies.

¶ 20 Dr. Tsoflias also used actuarial instruments to assess respondent’s likelihood of future sexual offenses. Respondent scored a five on the “Static-99R,” which was in the moderate/high category for reoffending relative to other adult male sex offenders. He scored 11 on the “MnSOST-R,” which placed him in the high risk category. The “Hare Psychopathy Checklist Revised” (Hare PCLR) required an interview with respondent, so Dr. Tsoflias could not conduct that test, but she was able to look at another evaluator’s results. Respondent scored a 30 on that test, which indicated a high level of psychopathic traits.

¶ 21 Dr. Tsoflias further looked at dynamic risk factors to assess respondent's risk of reoffending. These factors included general criminality or lifestyle instability; intimacy deficit; difficulty in self-regulation; and lack of cooperation with supervision. These factors all applied to respondent. Protective factors, which decrease an individual's likelihood of reoffending, included older age; medical condition; being in the community for an extended period of time without reoffending; and successful completion of a sex offender treatment. None of the protective factors applied to respondent.

¶ 22 Based on Dr. Tsoflias's overall evaluation of respondent, she concluded that it was substantially probable, meaning more likely than not, that respondent would engage in future acts of sexual violence. She opined that he met the criteria to be found an SVP.

¶ 23 Dr. Tsoflias agreed that none of the DOC mental health evaluations indicated that respondent had a disorder impairing his ability to control himself such that he needed to be housed in a specialized mental health unit. There was also no indication from DOC records of violent behavior. Even though respondent did not engage in any inappropriate sexual behaviors while in custody, it could mean that he just did not act on urges because he was in a controlled environment where he was being monitored. The DSM-IV did not have paraphilia not otherwise specified nonconsent listed as a disorder, but it did have paraphilia not otherwise specified. The nonconsent was a qualifier Dr. Tsoflias used to let the reader know what the paraphilia was; nonconsent was an example of paraphilia in the manual's definition. Such paraphilia did not mean that a person would not be aroused by consensual sexual encounters as well.

¶ 24 We next summarize the testimony of Dr. Smith, who was accepted by the trial court as an expert in clinical psychology in the treatment and risk analysis of criminal sex offenders. He was assigned to evaluate respondent in 2008 pursuant to the SVP Act. He submitted a report in

September 2008, and he submitted an addendum in November 2011; the documents were admitted into evidence.

¶ 25 Dr. Smith relied on the same types of records as did Dr. Tsoflias in conducting the evaluation, and he also interviewed respondent. Dr. Smith described respondent's criminal history. In discussing the 2003 incident with him, respondent tried to minimize his behavior by saying that he did not actually grab the girl's vagina, but rather pulled her underwear to the side. He also said that she was dressed like a whore, indicating that he believed that this meant that she welcomed his behavior. Respondent did not describe in detail the incidents with his wife, thereby attempting to minimize their significance, and he did not acknowledge or accept responsibility for what he had done. Respondent had been offered sex offender treatment while in the DOC, but he described the program as "bullshit" and said that he did not need treatment at that time.

¶ 26 Dr. Smith believed that respondent also had an anger management problem. He became extremely angry early in his life, after his parents divorced. In school, he once said something regarding climbing a clock tower and shooting people. In his interview, respondent acknowledged previous anger problems but thought that he was now better at controlling himself. However, records from the DHS facility indicated that there were episodes where he would lash out at other people or become disruptive.

¶ 27 As part of the evaluation, Dr. Smith used the "Multiphasic Sex Inventory II" test. It showed that respondent was not particularly open and honest about the type of behaviors he engaged in, and he minimized their significance. He also denied engaging in either deviant sexual fantasies or masturbatory behaviors, but as part of his sex offender treatment, respondent admitted masturbating to a violent fantasy of raping his wife, after his arrest. Respondent had

verbalized remorse for his crimes, but to significantly show remorse there would have to be a change in behavior. Respondent said he had felt bad after the 2004 Christmas Eve incident, but he sexually assaulted his wife again a few months later.

¶ 28 Dr. Smith diagnosed respondent with “paraphilia not otherwise specified,” “alcohol dependence with physiological dependence in a controlled environment,” and “antisocial personality disorder.” These mental disorders predisposed him to engage in acts of sexual violence based on the underlying urges, desires, and behaviors.

¶ 29 Dr. Smith had used the Static-99, the Static-99R, and the MnSOST-R as actuarial instruments to help gauge the level of risk to reoffend. Respondent scored a 4 on the Static-99 and a 5 on the Static-99R, which placed him in the moderate/high range of risk to reoffend as compared to a typical sex offender. Respondent scored in the high risk range on the MnSOST-R. Additional risk factors not accounted for in the tests, including intimate relationship conflicts, paraphilia, and alcohol abuse, indicated a likelihood to reoffend. Protective factors, such as successful sex offender treatment, significant medical condition, or older age, could potentially lower a person’s risk to reoffend but did not apply to respondent.

¶ 30 Dr. Smith opined that respondent’s risk for sexually reoffending was substantially probable, meaning that it was much more likely than not, and that respondent met the criteria for being an SVP.

¶ 31 Dr. Smith agreed that in the eight years respondent had been with the DOC and DHS, there was no record of him engaging in sexually inappropriate conduct. Dr. Smith also agreed that some non-offending males also engage in rape fantasies. Respondent had described having a number of different sexual partners in his lifetime, and Dr. Smith was not aware of any abuse in relationships prior to that with C.S.

¶ 32 Respondent offered the testimony of himself and Dr. Fogel. Respondent testified in narrative form as follows, in relevant part. Regarding the 2003 incident, the girl was a neighbor that he had known for one year, and he had consensual sexual fantasies about her. He asked her if she wanted to have intercourse, and she said no. He pulled her underwear to one side, exposing her vagina. The girl giggled and pushed his hand away. He pulled her underwear three more times. She told him again to stop, and he did. Respondent pleaded guilty to battery for that incident based on the advice of his attorney.

¶ 33 Respondent's relationship with C.S. was dysfunctional and abusive. His own unresolved issues, including sexual abuse against him and the resulting feelings of powerlessness and lack of control, "fueled a lot of domestic violent situations that [he] had perpetrated***." He was seeking to engage C.S. in consensual sex in December 2004 and February 2005, but his feelings of extreme powerlessness, anger, lack of control, and emasculation were triggered. Still, he was not seeking to sexually abuse her for his own deviant sexual arousal. He had fantasies before about his wife being submissive and consenting to any of his wishes, including sex. He did not recall ever having a rape fantasy.

¶ 34 When the offenses against C.S. took place, respondent was drinking heavily. Afterwards, he did not want to deal with the incidents or talk about them, which may have been related to not wanting to deal with his own past abuse. However, he was later forced to deal with his history, and in turn he started gaining an understanding for his actions and their impact on the victims, their families, and others. Respondent did not have sexually arousing fantasies any more, and it had been over eight years since he had drunk alcohol. He was not an SVP.

¶ 35 Dr. Fogel, a clinical psychologist specializing in sexual offenders, was stipulated to be an expert in his field and provided the following testimony. He evaluated respondent to determine

whether he was an SVP, and he completed a report in December 2009. Dr. Fogel met with respondent for over 12 hours and spoke to many of his family members to better understand the offending behavior and family dynamics. As far as respondent's early childhood, respondent was exposed to an alcoholic father who physically and emotionally abused respondent's mother. The father also directed anger toward respondent, demeaning him. Respondent's parents divorced when he was nine, which left him feeling abandoned and unloved. He reported that he began using anger and aggression to protect himself from being hurt. One of his older sisters was physically abusive towards him, and she also disclosed touching his penis about two times.

¶ 36 Respondent was small in stature and did not have much money for clothing, so he was teased and beaten up by other kids. When respondent was about 13, a man² befriended him. Respondent convinced his mom to let him spend the night at the man's house. The man gave respondent alcohol without his knowledge, anally raped him, and forced him to perform oral sex. Respondent described himself as feeling very powerless afterwards. He used his anger to lash out at others and drank alcohol to numb his feelings, and he began having more trouble in school. Around age 14 or 15, he got in trouble with the law for shooting someone with a pellet gun, but based on the presentence report and talking to respondent, it was an accident. Respondent dated someone for about two years, from about the ages of 18 to 20, and there was no evidence of any type of abuse.

¶ 37 Respondent tried some drugs between the ages of 19 to 21 but did not like the way they made him feel. He did like using marijuana and alcohol, and when he drank, he would become angry. The anger was a result of being raised in a home with domestic violence, being

² Fogel's report stated that respondent indicated that the man was five or six years older.

physically and sexually abused by his sister, being sexually assaulted as a teenager, and never dealing with the issues through treatment.

¶ 38 Respondent met C.S. in August 2002. Her reaction to the 2003 incident with the 17-year-old was saying not to do something like that again. They moved in together afterwards, and they began arguing. When C.S. became pregnant, they argued even more. Respondent was verbally and emotionally abusive towards her, which he described as reinforcing his power and control of the relationship. Sexual abuse was one component of a domestic violence relationship, along with emotional, physical, and financial abuse.

¶ 39 After the baby was born, C.S. appeared to have postpartum depression, and her sexual relations with respondent essentially stopped. Around mid-November 2004, respondent woke up with ejaculate in his underwear, and C.S. said that she had performed oral sex on him while he had slept. Respondent attempted to do the same thing to her at the beginning of December, but she got mad and told him to stop, which he did. About a week later, C.S. asked respondent to get something out of the car. He had taken on a caretaker role since the pregnancy and was feeling resentful and angry, like he was her “whipping boy.” Respondent became angry, they argued, and respondent disrobed C.S. and forced his fingers into her vagina. Afterwards, respondent talked to his father about the incident and was remorseful. Around this time, respondent had sexual fantasies that C.S. would submit to his instructions. One study found that one-third of individuals tested in the non-offending population had rape fantasies.

¶ 40 Regarding the Christmas Eve 2004 incident, when C.S. said no to sex, respondent persisted because domestic abusers feel entitled to get what they want from their partners. When C.S. said that respondent was hurting her and suggested moving to a different location, he agreed, which showed that respondent was not aroused by her unwillingness to engage in the act.

¶ 41 C.S. was a teacher with a bachelor's degree while respondent had one semester of courses at a community college. He quit his job to stay home and take care of their son and do household tasks while C.S. worked because it was less expensive than daycare. Respondent reported feeling a power differential and a level of inferiority as a result, which led to anger. Respondent had these feelings during the February 2005 incident. Respondent stopped forcing himself on C.S. when the baby started crying, which spoke to the issue of impulsivity and showed that he was able to stop.

¶ 42 Dr. Fogel reviewed reports from other evaluators. He also administered the MMPI-2, which showed that respondent had difficulty expressing his hostility, tended to blame others, tended to be suspicious of others, and was sensitive to rejection by others. Dr. Fogel further administered the "SKID-2," which did not indicate any personality disorders, and the Personality Assessment Inventory, the HARE PCLR and the Static 99. Dr. Fogel opined that respondent did not manifest an arousal to the unwillingness of the victim. Dr. Fogel did not find evidence of deviant sexual arousal. He opined that respondent did not have a condition that predisposed him to engage in acts of sexual violence and that respondent did not have a mental disorder, as required under the SVP Act.

¶ 43 The jury found respondent to be an SVP. Respondent filed a motion for a new trial, which the trial court denied on May 28, 2013. At the same hearing, Dr. Smith testified regarding the treatment options available through DHS, and the trial court ordered respondent committed to DHS custody. Respondent timely appealed.

¶ 44

II. ANALYSIS

¶ 45 In his *pro se* appeal, respondent lists the following 26 issues in his brief:

"1. Whether the trial court properly found probable cause to set this cause for trial.

2. Whether sexually violent persons involuntary commitment violates double jeopardy.
3. Whether [the] motion to dismiss stated a due process violation, requiring dismissal of proceedings.
4. Whether the Court erred in denying 18 of 19 motions in limine while granting all five of the Government's motions in limine.
5. Whether the court erred in denying all jury instruction[s] I submitted, specifically Non-Pattern Instruction No. 37.
6. Whether the Government proved, beyond a reasonable doubt, that I am a sexually violent person, based upon a present clinically significant valid psychiatric condition.
7. Whether actuarials are appropriate to be introduced at trial and were unduly prejudicial in the presentation to improperly sway the jury to render an improper verdict.
8. Whether introducing police reports and criminal trial transcripts at trial was harmful error and unduly prejudicial to myself.
9. Whether a "Not otherwise specified, Non-consent" disorder is constitutionally permissible to be involuntarily committed under.
10. Whether Paraphilia NOS, Non-consent (or any derivative of a PNOS, Non-consent diagnosis) is a constitutionally permissible medical diagnosis comporting with due process.
11. Whether evidence or documents of record during discovery could be held to a reasonable degree of reliability.
12. Whether it was proper for the Government to refer to myself as 'this rapist' during closing arguments, unduly prejudicing me in front of the jury.

13. Whether the 2005 criminal conviction and indictments entered into evidence as Exhibit 4 and brought back to the jury improperly influenced the jury in rendering an improper verdict.
14. Whether the application of the Illinois Sexually Violent Persons Commitment Act is a punitive application of [the] criminal code.
15. Whether excluding the term 'commitment' within the context of the law deliberately mislead [*sic*] the jury in the actual function of the law.
16. Whether the court improperly denied my Motion for New Trial/Post-Trial Motion.
17. Whether it was appropriate for a second IDOC, non-examining evaluator to testify to documents of record to render an opinion for commitment as a sexually violent person.
18. Whether the court improperly considered testimony from an examining expert in determining incarceration to the IDHS for care, treatment, and control until no longer sexually violent.
19. Whether introduction of criminal transcripts not produced at discovery unduly prejudiced myself and violated due process.
20. Whether experts testifying to my juvenile record is a violation of due process, unfairly prejudicing myself during trial.
21. Whether relitigating all past crimes and offenses breaches issue preclusion or collateral estoppel.
22. Whether the Government alleging causation of 2005 sexual offense due to a mental illness (paraphilia) is a violation of *Apprendi* doctrine.

23. Whether the Court's failure to admonish me of my rights, privileges and immunit[i]es, as well as the nature of the proceedings and what they entail, is violative of due process.

24. Whether compelled statements and testimony written in clinical notes is a reliable source of information, comporting with Rules of Evidence in Illinois.

25. Whether being subject to inability to terminate Quackenbush interview resulted in an involuntary proceeding, violative of due process and compelled statements.

26. Whether the SVP Commitment Act, as applied, is a violation of double jeopardy and same elements test under *Blockburger*, and double jeopardy under *Kennedy* doctrine, supportive of *Hudson*.”

¶ 46

A. Forfeited Issues

¶ 47 The State argues that respondent has forfeited issues 4, 11, 12, 15, 16, 18, and 23 by presenting them in a cursory fashion and without citation to relevant authority. We agree. Although respondent has listed 26 issues for review, the argument section of his brief has a total of eight sections/subsections. Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) states that argument in the appellant's brief shall state the appellant's contentions “and the reasons therefor, with citation of the authorities ***.” Further, points not argued are forfeited and may not be raised in the reply brief. *Id.* A reviewing court is not a repository into which an appellant may dump the burden of argument and research, and the failure to clearly define issues and support them with authority results in forfeiture of the argument. *People v. Olsson*, 2014 IL App (2d) 131217, ¶ 16. The authority cited must be pertinent to the issues raised. *People ex rel. Illinois Department of Labor v. E.R.H. Enterprises*, 2013 IL 115106, ¶ 56. The courts do not apply more lenient standards to *pro se* litigants. *In the Interest of A.H.*, 215 Ill. App. 3d 522,

529-30 (1991). Respondent has failed to clearly argue and/or cite relevant authority for the above-listed issues, thereby forfeiting them for review.

¶ 48 B. Failure to Object/Plain Error

¶ 49 The State argues that respondent has also forfeited issues 1, 7, 8, 13, 19, 20, 21, 22, 24, and 25 because he did not object to the challenged testimony and evidence at trial. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve an issue for review, the defendant must object at trial and raise the issue in a written posttrial motion). The State further argues that respondent has not attempted to demonstrate that the forfeited claims should be reviewed on the basis of plain error, and even otherwise, he cannot establish that the errors were severe enough to be reviewable under either the civil or criminal plain error doctrines.

¶ 50 We agree that respondent did not timely object at trial to the issues listed by the State. He also did not discuss the plain error doctrine in his opening brief. However, he discusses plain error in his reply brief, thereby allowing for review. See *People v. Williams*, 193 Ill. 2d 306, 347-48 (2000) (it would be unfair to require a defendant to assert plain error in his opening brief, because the State may “waive an argument that the defendant waived an issue”).

¶ 51 The State maintains that we should apply the civil plain error rule because the SVP Act is civil in nature. However, in *People v. Gavin*, 2014 IL App (1st) 122918, ¶¶ 53-55, which the State does not address, the appellate court held that the criminal plain error rule should apply because proceedings under the SVP Act, while civil in nature, are quasi-criminal in the respect that they implicate sixth amendment rights such as the right to: counsel; call and confront witnesses; an impartial jury; and a speedy trial. Accordingly, we proceed under the criminal plain error rule. This doctrine allows a reviewing court to consider an unpreserved error where either (1) a clear error occurs and the evidence is closely balanced, or (2) a clear error occurs that

is so serious that it affected the fairness of the trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007). Under the second prong, the error must be a structural error. *People v. Eppinger*, 2013 IL 114121, ¶ 19. In applying the plain error test, the first step is to determine whether error occurred at all. See *Piatkowski* at 565.

¶ 52 For issue 1, respondent argues that the court found probable cause based upon materially false statements by Dr. Quackenbush. Respondent argues that Dr. Quackenbush opined that respondent had a congenital condition based only upon his criminal history, without a medical test such as a brain scan, and without establishing a present mental condition. Respondent maintains that Quackenbush lied during the hearing by referencing a false drug possession conviction and by saying that respondent was a dangerous person.

¶ 53 The State argues that nothing in the record supports respondent's contention that Dr. Quackenbush's testimony at the probable cause hearing was false, and that respondent appears to deem the testimony false simply because he disagrees with it. The State also argues that it was not required to show at that hearing that respondent was an imminent danger, but rather it had to make a plausible showing of (a) a conviction of a sexually violent offense, (b) a mental disorder, and (c) a substantial probability of future acts of sexual violence. See *In re Detention of Harding*, 238 Ill. 2d 33, 43, 48 (2010). The State maintains that any contentions about the probable cause hearing are, in the end, moot because respondent was subsequently found to be an SVP at trial.

¶ 54 In an SVP probable cause hearing, the trial court does not need to ignore blatant credibility problems, but it should also not decide between conflicting facts or inferences. *Id.* at 53. Rather, as the State points out, the "standard in a probable cause hearing is relatively low" (*id.*), and the State just needs to show a plausible account that the defendant has been found

guilty of a sexually violent offense, has a mental disorder, and is a danger to others because the mental disorder creates a substantial probability that he will commit sexually violent acts (*id.* at 43, 48). An SVP finding may not be based on prior criminal convictions alone, but such convictions may provide “substantial evidence” of behaviors and traits that combine to meet the diagnostic criteria for a mental disorder. *Id.* at 51.

¶ 55 We agree with the State that the record does not reflect that Dr. Quackenbush blatantly lied at the probable cause hearing, and we find no error in the trial court’s finding of probable cause based on Dr. Quackenbush’s testimony. *Cf. id.* at 53 (the trial court improperly relied on a full and independent evaluation of Dr. Quackenbush’s credibility and methodology, which was not appropriate at the probable cause stage of SVP proceedings). Finally, we also agree with the State that the issue of probable cause is moot, as respondent was found to be an SVP after a full trial. See *In re T.W.*, 381 Ill. App. 3d 603, 607 (2008) (issue of probable cause for delinquency was moot because the respondent had been found delinquent of the charges); *People v. Henderson*, 36 Ill. App. 3d 355, 378 (1976) (issue of sufficiency of evidence to establish probable cause became moot when the defendants were later indicted by the grand jury).

¶ 56 In issue 7, respondent argues that the statistical/actuarial tools introduced at trial were unduly prejudicial. Respondent argues that the MnSOST-R and Static-99 should not have been used at all, citing articles in his appendix criticizing the tests. However, attachments to briefs that are not otherwise part of the record are, in general, not properly before a reviewing court. *People v. Stewart*, 343 Ill. App. 3d 963, 975 (2003). There is an exception for issues involving *Frye* hearings³ (see *People v. Zapata*, 2014 IL App (2d) 120825, ¶ 10), but issue number 7 does not challenge the tests on such a basis. See also *In re Commitment of Walker*, 2014 IL App (2d)

³ See *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

130372, ¶ 74 (*Frye* hearing not necessary regarding paraphilia, NOS, nonconsent diagnosis). Even otherwise, the State's experts testified that professionals in their field reasonably rely on such tests (and even respondent's expert administered such tests), so the trial court did not err in allowing testimony about the tests into evidence.

¶ 57 Respondent also argues that the experts agreed that the assessments are not 100% accurate. He notes that Dr. Fogel informed the jury that the Static-99 had limited utility in assessing recidivism upon a person whose crime was not a monitored variable within the focus groups validating the Static-99, in this case marital rapists such as respondent.

¶ 58 Respondent's argument is without merit, as our supreme court has held that actuarial risk assessments that are generally accepted by experts who assess sexually violent offenders are admissible, and that experts may rely on them in assessing risks of recidivism. *In re Commitment of Simons*, 213 Ill. 2d 523, 535 (2004). Respondent brought out some of the assessments' limitations through his cross-examination of the State's experts and his direct examination of Dr. Fogel, and it was the jury's role to assess the credibility of expert witness testimony, weigh the evidence, and resolve any conflicts. See *Clayton v. County of Cook*, 346 Ill. App. 3d 367, 383 (2004).

¶ 59 In issues 8, 13, 19, and 20, respondent argues that the trial court erred in allowing police reports and criminal trial transcripts to be introduced, in allowing testimony regarding his juvenile record, and in allowing his 2005 criminal conviction to be admitted into evidence.

¶ 60 To prove that an individual is an SVP, the State must show that the person: (1) has been found guilty, delinquent, or not guilty by reason of insanity or mental disorder of a sexually violent offense; (2) has a mental disorder; and (3) is a danger to others because the mental disorder creates a substantial probability that he will commit acts of sexual violence. 725 ILCS

207/5(f), 15(b) (West 2012); *In re Detention of Hardin*, 238 Ill. 2d 33, 43 (2010). The State must prove these elements beyond a reasonable doubt. 725 ILCS 207/35(d)(1) (West 2012); *In re Commitment of Gavin*, 2014 IL App (1st) 122918, ¶ 49. Therefore, the trial court did not err in allowing evidence of respondent's 2005 criminal conviction to be admitted into evidence. See also 725 ILCS 207/35(b) (West 2012) ("[I]t shall be competent to introduce evidence of the commission by the respondent of any number of crimes together with whatever punishments, if any, were imposed."). The trial court did not allow the remaining criminal documents in as substantive evidence but rather allowed the experts to testify about the documents in explaining their opinions. Experts in SVP proceedings may testify regarding facts upon which their opinions are based, including facts surrounding past crimes. *In re Detention of Lieberman*, 379 Ill. App. 3d 585, 604-05 (2007). Accordingly, we find no error.

¶ 61 In issue 21, respondent argues that relitigating all past crimes and offenses violates collateral estoppel. Collateral estoppel applies where: (1) the court entered a final judgment in the prior case; (2) the party against whom estoppel is asserted was a party to or was in privity with a party to the prior adjudication; and (3) the issue decided in the prior adjudication is identical to the one presented in the current suit. *In re Detention of Ehrlich*, 2012 IL App (1st) 102300, ¶ 64. The third element is not present here, for the issue for the prior offenses was whether respondent committed the crimes, whereas the issue at the SVP trial was respondent's current mental condition and the probability that he would engage in future acts of sexual violence. See *id.*

¶ 62 For issue 22, respondent argues that the State's allegation at the SVP trial that he committed the 2005 sexual offense due to the mental condition of paraphilia violates *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because the indictment from the 2005 offense did not include

the element of a mental illness. However, this court has held that *Apprendi* does not apply to civil proceedings such as trials under the SVP Act. *In re Commitment of Walker*, 2014 IL App (2d) 130372, ¶ 19.

¶ 63 Regarding issue 25, respondent argues that he was not able to terminate his interview with Dr. Quackenbush, resulting in an involuntary proceeding that produced compelled statements and violated his due process. In issue 24, which also appears to relate to Dr. Quackenbush, respondent argues that compelled statements and “testimony written in clinical notes” are not reliable sources of information and do not comply with evidentiary rules.

¶ 64 We agree with the State’s argument that nothing in the record shows that respondent’s statements to Dr. Quackenbush were compelled. Rather, according to Dr. Quackenbush’s report, at the outset of the interview he had respondent read a form that informed him that, among other things, his participation was voluntary and he could stop the interview at any time. Indeed, respondent refused to participate in Dr. Tsoflias’s evaluation, showing that he later chose to exercise this right. As for clinical notes that Dr. Quackenbush relied on, as stated, experts in SVP proceedings may testify regarding facts upon which their opinions are based. *In re Detention of Lieberman*, 379 Ill. App. 3d at 604-05; see also *People v. Thill*, 297 Ill. App. 3d 7, 11 (1998) (the trial court has the responsibility to determine whether the facts or data upon which an expert bases an opinion are a type reasonably relied upon by experts in the field).

¶ 65 As we have found no error for the issues that respondent has set forth, there can be no plain error, either. See *People v. Bannister*, 232 Ill. 2d 52, 71 (2008). Therefore, the issues are forfeited.

¶ 66

C. Remaining Arguments

¶ 67 In issues 2, 14, and 26, respondent argues that the SVP Act violates double jeopardy. He maintains that the State has transformed what was intended as a civil remedy into a criminal penalty, and he is being held indefinitely in a maximum security facility based on crimes for which he has already served his sentences. Our supreme court has already addressed this issue and determined that the SVP Act is not subject to challenge on either double jeopardy or *ex post facto* grounds because the proceedings are civil and the law has no retroactive effect, in that a defendant cannot be involuntarily committed based on past conduct, but rather only where the defendant currently suffers from a mental disorder that creates a substantial probability that he will engage in sexually violent acts in the future. *In re Detention of Samuelson*, 189 Ill. 2d 548, 559 (2000). We do not address this issue further, as we are bound to follow the decisions of our supreme court. *People v. Dodds*, 2014 IL App (1st) 122268, ¶ 46.

¶ 68 In issue 3, respondent argues that the trial court erred in denying his motion to dismiss. In that motion, respondent argued that the appointment of a second evaluator for the State, without a second evaluator for himself, violated his due process rights and caused the trial court to lose jurisdiction. Relatedly, in issue 17, respondent argues that it was inappropriate for a second DOC, non-examining evaluator to render an opinion for commitment as an SVP based on documents of record.

¶ 69 Here, the trial court allowed the DOC to appoint a second evaluator, Dr. Tsoflias, after Dr. Quackenbush retired. In *In re Commitment of Brown*, 2012 IL App (2d) 110116, ¶ 13, this court noted that section 35(b) of the SVP Act (725 ILCS 207/35(b) (West 2002)) allowed the State to present the testimony of both a DOC evaluator and a DHS psychologist. As in this case, the original DOC evaluator retired, and the State was allowed to have another DOC evaluator appointed. *Id.* ¶ 14. This court stated that nothing in section 35(b) prevents the State from

obtaining more than two evaluations, but rather only limits the testimony it may present at trial. *Id.* ¶ 15. Accordingly, we find no error in the State allowing DOC to appoint a second evaluator.

¶ 70 As far as respondent not having an equal number of evaluators, this court has previously held that the SVP Act does not violate procedural due process by not providing an indigent respondent with the same number of expert witnesses as the State. *In re Detention of Allen*, 331 Ill. App. 3d 996, 1004 (2002). We noted that the quantity of experts does not equate with the quality of their testimony, and that the respondent can compensate for the lack of additional experts appointed for him through thoroughly cross-examining the State's experts and exposing the weaknesses of the State's case. *Id.*

¶ 71 Regarding respondent's argument that Dr. Tsoflias should not have been able to opine that he was an SVP, because she relied on documents of record and did not interview him, it was respondent himself who declined to be interviewed. Further, Dr. Tsoflias testified that the documents she relied on were the types relied on by experts in her field and that she disclosed any limitations in her conclusions due to the lack of a personal interview. As stated, it is the trial court's responsibility to determine whether the information on which an expert bases an opinion are of a type reasonably relied upon by experts in the field (*Thill*, 297 Ill. App. 3d at 11), and we find no abuse of discretion here (see *id.* (admission of expert testimony is within trial court's discretion)).

¶ 72 In issue 5, respondent argues that the trial court erred in denying all of the jury instructions he submitted, specifically non-pattern instruction number 37. As respondent does not specifically discuss any of his jury instructions other than number 37, we find any argument as to the others forfeited for review. See *Olsson*, 2014 IL App (2d) 131217, ¶ 16 (failure to clearly define issues and support them with authority results in forfeiture of the argument).

¶ 73 Whether to provide the jury with a particular instruction is within the trial court's sound discretion, we will not disturb its determination absent a clear abuse of discretion. *In re Detention of Melcher*, 2013 IL App (1st) 123085, ¶ 50. An abuse of discretion occurs where the instructions mislead the jury, resulting in prejudice to the litigant. *Id.* Whether a jury instruction accurately conveyed the applicable law to the jury is an issue we review *de novo*. *In re Commitment of Butler*, 2013 IL App (1st) 113606, ¶ 45.

¶ 74 Respondent's proposed instruction 37 stated as follows:

“The State has the burden of proving each of the following propositions:

1. That Respondent has been convicted of a sexually violent offense, as identified within the language of the Illinois sexually violent persons Commitment Act;
2. That the sexually violent offense was sexually motivated;
3. That Respondent has a mental disorder which caused him to engage in the sexually violent act;
4. The mental disorder is directly linked to the sexually violent act.
5. That Respondent lacks the ability to control his behavior, rather Respondent lacks volitional control at all times as a result of these mental disorders;
6. That Respondent is dangerous because the mental disorder is directly linked to Respondent engaging in future acts of sexual violence.

If you find from your consideration of all the evidence that each of these propositions has been proven beyond a reasonable doubt, you should find that respondent is a sexually violent person.

On the other hand, if you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find that Respondent is NOT a sexually violent person.”

¶ 75 The trial court instead accepted the State’s instruction and instructed the jury on the State’s burden as follows:

“The State has the burden of proving each of the following propositions:

First: That the Respondent has been convicted of a sexually violent offense; and

Second: That the Respondent suffers from a mental disorder; and

Third: That the Respondent is dangerous because said mental disorder makes it substantially probable that he will engage in acts of sexual violence.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find that the Respondent is a sexually violent person.

On the other hand, if you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should not find that the Respondent is a sexually violent person.”

The trial court also gave a separate instruction on the principles that respondent was presumed not to be a sexually violent burden and that the State had the burden of proving that he was a sexually violent person beyond a reasonable doubt.

¶ 76 In deciding which instruction to give the jury, the trial court noted that the concluding two paragraphs in both respondent’s and the State’s instruction were almost identical. It stated that it was accepting the State’s instruction over respondent’s because the State’s instruction laid out what the statute actually specified, whereas respondent had added additional language.

¶ 77 Respondent argues that his instruction expands the elements of the statute’s criteria, making it more understandable, rather than “concluding SVP status on crime alone and label alone.”

¶ 78 We conclude that the instruction given to the jury accurately conveys the law as set forth in the applicable statutes. See 725 ILCS 207/5(f), 15(b) (West 2012); *In re Detention of Hardin*, 238 Ill. 2d at 43. In contrast, respondent’s instruction adds elements that the State was not required to prove, such as that respondent lacks volitional control at all times. Accordingly, the trial court did not abuse its discretion in refusing respondent’s proposed jury instruction 37.

¶ 79 We next address respondent’s issues 9 and 10, in which he argues that paraphilia NOS, nonconsent, or any “Not otherwise specified, Non-consent” disorder is not a constitutionally permissible diagnosis under which he could be involuntarily committed. Respondent argues that there “has not ever been any general acceptance of POS Non consent.” Respondent argues that numerous articles criticize the diagnosis, and that it is inadmissible under *Frye*.

¶ 80 As stated, this court has held that a *Frye* hearing is not necessary regarding a paraphilia, NOS, nonconsent diagnosis. *In re Commitment of Walker*, 2014 IL App (2d) 130372, ¶ 74. We stated that a *Frye* analysis does not involve an inquiry into a methodology’s validity (*id.* ¶ 73), and it is sufficient that a significant subset of experts reasonably relies upon the methodology (*id.* ¶ 69). Even if a majority of experts do not accept a methodology or there are methodological defects in the diagnosis, these factors go to its weight rather than its admissibility. *Id.* ¶¶ 73-74; see also *McGee v. Bartow*, 593 F.3d 556, 580-81 (7th Cir. 2010) (paraphilia, NOS, nonconsent or rape has been criticized as a diagnosis in professional literature, but it is not so unsupported by science that it should be excluded absolutely from consideration by the trier of fact). Therefore, under *In re Commitment of Walker*, the diagnosis of the State’s experts was permissible and

admissible into evidence. Respondent was able to bring out limitations in the diagnosis, including that non-consent was not a listed paraphilia in the DSM IV, through his cross-examination of the State's experts and his direct examination of Dr. Fogel.

¶ 81 Respondent also argues that the DSM-V has been published since trial, making the DSM-IV no longer a valid authority in psychiatric diagnosis. However, our review is whether there were errors in respondent's 2012 trial, at which time the experts testified that the DSM-IV was the relevant authority. Dr. Tsoflias testified that while the DSM-IV did not have paraphilia not otherwise specified nonconsent listed as a disorder, it did have paraphilia not otherwise specified, and she used nonconsent as a qualifier for the paraphilia. As stated, it was the jury's role to assess the expert witnesses' credibility, weigh the evidence, and resolve any conflicts. See *Clayton*, 346 Ill. App. 3d at 383.

¶ 82 Respondent further argues that antisocial personality disorders and alcohol abuse are not disorders that can lead to commitment. As we have determined that respondent could have been found mentally ill based on the diagnosis of paraphilia, NOS, nonconsent, we need not address this issue further. We do note that Dr. Tsoflias related the personality and alcohol disorders to her opinion that respondent was an SVP, in that she opined that his mental disorders as a whole made it more likely that he would act out his sexual urges and fantasies.

¶ 83 Last, we examine issue 6, in which respondent argues that the State failed to prove beyond a reasonable doubt that he was an SVP based on a clinically valid psychiatric condition. In a challenge to the sufficiency of the evidence, we look at whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could find that the elements were proven beyond a reasonable doubt. *In re Commitment of Fields*, 2014 IL 115542, ¶ 20. As stated, in order to establish that respondent was an SVP, the State was required to prove that he:

(1) had been found guilty, delinquent, or not guilty by reason of insanity or mental disorder of a sexually violent offense; (2) has a mental disorder; and (3) is a danger to others because the mental disorder creates a substantial probability that he will commit acts of sexual violence. 725 ILCS 207/5(f), 15(b) (West 2012); *In re Detention of Hardin*, 238 Ill. 2d at 43. A mental disorder is defined as a “congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence.” 725 ILCS 207/5(b) (West 2012).

¶ 84 Here, respondent does not dispute the first element, that he was convicted of a sexually violent offense. Rather, he disputes the evidence that he has a mental disorder and that he is a danger to others because the disorder makes it substantially probable that he will commit acts of sexual violence. Respondent argues that paraphilia NOS nonconsent is not a valid psychiatric diagnosis, but we have already addressed this issue and determined that such a diagnosis is admissible. *In re Commitment of Walker*, 2014 IL App (2d) 130372, ¶ 74.

¶ 85 Respondent further points to his testimony that he did not have deviant sexual fantasies or urges, and he argues that these statements were supported by Dr. Fogel’s testimony that any arousal to the criminal behavior he exhibited did not support a paraphilia diagnosis or qualify him as an SVP. However, the jury had to weigh this testimony with contrary opinions from the State’s two experts. See *Clayton*, 346 Ill. App. 3d at 383.

¶ 86 Respondent maintains that he does not have a clinically significant disorder because such a disorder must cause a significant disruption in a person’s life and prevent his functioning in the general population without disturbing or endangering himself or others. Respondent argues that neither of the State’s experts could articulate such a condition in 2003, 2005, or in his condition at trial. However, Dr. Tsoflias testified that the disorder caused respondent clinically significant

distress in that it had caused marriage problems, and that the disorder impaired his functioning because it had led to his probation and incarceration for the offenses. Dr. Tsoflias testified that even though he had not engaged in violent or sexually inappropriate behavior while in prison, that could be the result of being in a controlled, monitored environment, and that it did not undermine her diagnosis. A rational trier of fact could have accepted this testimony.

¶ 87 Respondent also argues that the State failed to prove the third element, that he is a danger to others because his mental disorder creates a substantial probability that he will commit acts of sexual violence. Respondent challenges the State's experts' reliance on actuarial tools, but, as stated, our supreme court has held that experts may rely on them in assessing risks of recidivism. *In re Commitment of Simons*, 213 Ill. 2d at 535. Respondent contends that if he was so dangerous, the criminal court would not have originally sentenced him to probation. However, the issue of whether respondent was an SVP was not before the court at that time, and the State's experts here considered, among many other things, respondent's violation of probation conditions in opining that he is an SVP.

¶ 88 In the end, in determining whether respondent was proven beyond a reasonable doubt to be an SVP, we must look at the evidence in the light most favorable to the State (*In re Commitment of Fields*, 2014 IL 115542, ¶ 20), and the testimony of the State's experts was sufficient to support an SVP finding.

¶ 89 III. CONCLUSION

¶ 90 For the reasons stated, we affirm the judgment of the Du Page County circuit court.

¶ 91 Affirmed.