2016 IL App (2d) 150170-U
No. 2-15-0170
Order filed March 7, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Ogle County
Petitioner-Appellee,	)	
v.	)	Nos. 99-CF-207 99-CF-209
RAYMOND A. GOUGH,	)	Honorable Robert T. Hanson,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Burke and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in finding that respondent's constitutional right to a speedy trial was not violated. The court did not abuse its discretion in allowing certain testimony or in denying a directed verdict. Additionally, the evidence was sufficient to support the jury's determination that respondent was a sexually dangerous person. Finally, the recent supreme court decision in *People v. New*, 2014 IL 116306, does not require a new trial.

¶ 2 In 2004, this court reversed and remanded this sexually-dangerous-persons case for a new trial. *People v. Gough*, 345 Ill. App. 3d 1155 (2004) (holding that a retrial was necessary where the jury had not been instructed that respondent's condition must affect his ability to control his

sexual behavior). Ten years later, in November 2014, the retrial commenced. The trial court entered an order of commitment for respondent, Raymond Gough. On appeal, respondent argues that the 10-year delay, the first five years of which respondent does not challenge, violated his constitutional right to a speedy trial. On its face, a 10-year delay certainly warrants further inquiry. However, mindful that a constitutional speedy-trial claim is different than a statutory speedy-trial claim brought under the Code of Criminal Procedure (725 ILCS 5/103-5 (West 2014)), we hold that the trial court did not err in balancing the relevant factors. In particular, the court's decision is supported by its finding that the State did not commit any intentional delays, whereas the respondent committed numerous intentional delays. Respondent also argues that the court allowed improper testimony, the court erroneously denied a directed verdict, the evidence did not support the jury's decision that he was a sexually dangerous person, and the court misapplied recent precedent (*New*, 2014 IL 116306). For the reasons that follow, we reject each of these arguments.

¶ 3 I. BACKGROUND

¶ 4 As will be set forth in greater detail below, in October 1999, the State charged respondent with two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1) (West 1999)), arising out of allegations that respondent had fondled the testicles of two different boys, ages 11 and 14. The next day, rather than pursue a criminal conviction, the State petitioned to commit respondent as a sexually dangerous person under the Sexually Dangerous Persons Act (Act) (725 ILCS 205/0.01 *et seq*. (West 2014)).[1] In 2000, the jury found respondent to be a sexually

[1] We note upfront that, to be classified as sexually dangerous under the Act, the State must prove as to the respondent: (1) the existence of a mental disorder for more than one year; (2) the existence of criminal propensities to the commission of sex offenses; and (3) the

dangerous person, and the trial court committed respondent to the Department of Corrections until he is no longer a sexually dangerous person. See *People v. Trainor*, 196 Ill. 2d 318, 332 (2001) (explaining petitions for release). Following direction from the supreme court (*People v. Gough*, 206 Ill. 2d 630 (2003)), this court ultimately reversed and remanded respondent's case for a new trial. *People v. Gough*, 345 Ill. App. 3d 1155 (2004). The mandate for the new trial was filed March 15, 2004. On March 18, 2004, respondent appeared in court and requested appointment of counsel. On March 23, 2004, respondent filed a speedy-trial demand.

¶ 5 A. Facts Concerning Respondent's Speedy-Trial Claim

¶ 6 1. 2004 to 2008

¶ 7 Respondent does not challenge any of the delays accruing between 2004 and 2008. However, for context, we briefly recount the various delays during that time. Between March 23, 2004, and June 14, 2004, each party filed pretrial motions. Respondent did not object. Between June 14, 2004, and September 24, 2004, psychiatrists completed reports as required by statute. The court noted that the time needed to complete these reports passed by agreement. In October 2004, respondent requested additional time to work on his case.

¶ 8 In late November 2004, the court granted respondent's attorney's, Donald Miller's, motion to withdraw. Respondent had filed what the court deemed to be a meritless ARDC

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existence of demonstrated propensities toward acts of sexual assault or acts of sexual molestation against children. *People v. Allen*, 107 Ill. 2d 91, 105 (1985), *aff'd* 478 U.S. 364. For the purposes of the Act, " 'criminal propensities to the commission of sex offenses' means that it is substantially probable that the person subject to the commitment proceeding will engage in the commission of sex offenses in the future if not confined." 725 ILCS 205/4.05 (West 2014).

complaint against the attorney. The court stated that the time necessary to secure new counsel would be charged to respondent.

¶ 9 On February 3, 2005, respondent's second attorney, Thomas Murray, appeared and renewed the speedy-trial demand. On respondent's motion, the court vacated the appointment of the prior two psychologists and ordered the parties to submit proposals for new psychologists. On November 21, 2005, the court again appointed new psychologists. In July 2006, the court appointed a new psychologist, Alexander Obolsky, because one of the psychologists no longer worked in the appropriate position. In December 2006 and again in June 2007, Obolsky informed the court that respondent refused to speak to cooperate with an evaluation.

¶ 10 On June 13, 2007, the court set the trial date for September 18, 2007. However, beginning July 31, 2007, respondent moved for a series of continuances related to Obolsky's evaluation. Respondent sought to block Obolsky's access to prior evaluations. In December 2007, the court denied respondent's request and sent Obolsky the prior reports. The court had previously noted that the prior reports were necessary, because respondent refused to cooperate with Obolsky. In May 2008, Obolsky completed his report. Thereafter, respondent moved to depose Obolsky, securing an October 2008 deposition date. Based on respondent's desire to begin trial 60 days after the deposition, the parties agreed to a January 2009 trial date. However, in November 2008, respondent indicated that he would be moving to substitute his attorney (which he did in April 2009).

¶ 11 2. 2009 to 2014 (Organized by Cause, With Overlap of Certain Dates)

¶ 12 i. January 6, 2009, to May 11, 2009: Witness Unavailability

¶ 13 On January 6, 2009, the State moved to continue, because it could not locate one of its material witnesses, J.D. Respondent objected to the continuance. However, on February 23,

2009, respondent moved to continue due to the unavailability of one of *his* witnesses. On respondent's motion, the court rescheduled trial for April 28, 2009. On March 9, 2009, the court reset the trial date to May 11, 2009, due to a scheduling conflict with its appointed psychologist. On April 22, 2009, respondent again moved to continue due to the unavailability of one of his witnesses. On respondent's motion, the court rescheduled trial for July 27, 2009.

¶ 14 ii. April 27, 2009 to July 12, 2010: Continuances Requested or Agreed to by Respondent

¶ 15 On April 27, 2009, the trial court heard respondent's *pro se* motion to substitute counsel, which alleged that Murray was ineffective. The court stated that Murray had *not* been ineffective. Nevertheless, the court allowed Murray to withdraw, and it allowed respondent to proceed *pro se*. While proceeding *pro se*, respondent filed numerous motions, which alleged a conspiracy against him.

¶ 16 During this same period, in May, July, and September 2009, respondent requested continuances due to medical problems with his eye. The trial court granted these motions, and respondent received eye surgery. On December 7, 2009, respondent appeared post-surgery, and he requested a further continuance. The court set the next hearing date for January 15, 2010. On February 9, 2010, the court set the trial date for July 12, 2010, though respondent objected that that was "too soon."

¶ 17 iii. May 27, 2010 to January 3, 2011: Continuances Due to a Fitness Evaluation

¶ 18 On May 27, 2010, the State moved for the appointment of a psychologist to determine respondent's fitness to stand trial. The State noted that respondent appeared consumed by the notion that there was a conspiracy against him. The court granted the motion, based, in part, on its own observations of respondent. The appointed psychologist, Jayne Braden, conducted a

fitness evaluation and opined in a letter that respondent was not competent to stand trial. Based on the letter, the court decided that the matter should proceed to hearing.

¶ 19 On August 5, 2010, over respondent's objection, the court appointed attorney Donald Delbert to represent respondent in the upcoming hearing. In October 2010, respondent moved for the appointment of Dr. Robert Meyer as an independent fitness evaluator. The court granted respondent's motion, but when Meyer met with respondent, respondent refused to cooperate. Also in October 2010, respondent moved to substitute counsel, and the court denied his motion.

¶ 20 On January 3, 2011, the parties appeared for the fitness hearing. The court informed the parties that it found case law holding that fitness is not required in a sexually dangerous persons proceeding. *People v. Akers*, 301 Ill. App. 3d 745 (1998). As such, the court cancelled the fitness hearing. However, the court stated that respondent's fitness remained a concern, and, over respondent's objection, it reappointed Delbert to represent respondent in subsequent proceedings.

¶ 21 iv. January 3, 2011 to February 21, 2014:
Continuances Due to Respondent's Motions to Substitute Counsel

¶ 22 On January 3, 2011, respondent objected to the court's appointment of Delbert. Between January 31, 2011, and December 19, 2013, respondent filed eight motions to substitute Delbert. In each motion, respondent argued that Delbert was ineffective and that respondent wished to proceed *pro se*. At each of the first six hearings, the court denied respondent's motion to substitute, noting that Delbert was not ineffective. We detail the final hearing on the matter as representative of respondent's conduct throughout the proceedings.

¶ 23 On January 23, 2014, the trial court heard respondent's eighth motion to substitute Delbert. Respondent again argued at hearing that Delbert should be removed because he was "deficient." Respondent complained that Delbert conceded in open court that respondent had

molested children in the past.[2] Respondent did not believe that a true advocate would ever make such an admission.

¶ 24 The court granted the motion, explaining:

> "At this point what I've observed *** is continued hostility and derogatory behavior by [respondent] towards Mr. Delbert.
>
> [interruption by respondent]
>
> Don't interrupt me. Of particular concern to me was the last time we were in court when Mr. Delbert indicated that there had been a physical attack by [respondent] on him with a pencil, and he had to defend himself. Also [at the last court appearance], [I heard respondent] talking to Mr. Delbert as they were leaving the courtroom, get the f**k out you white trash n***r shit head."

At this point, respondent interrupted *eight* times. A typical excerpt is as follows:

> "COURT: Sir, don't interrupt me. I heard you say it. You've also said it in your pleadings. You said the exact—similar things in your pleadings. You've admitted that you—
>
> RESPONDENT: Judge, he said that to—
>
> COURT: --said that to him.
>
> RESPONDENT: He said to you—
>
> COURT: No."

The court continued that Delbert had done an "exceptional job" in representing respondent. In the face of respondent's disruptions and "constant ridicule and harassment," Delbert managed to conduct depositions, file motions *in limine*, and move for a new trial. The court concluded that

[2] Respondent has a 1991 conviction based on his molestation of a six-year old child.

there had been a "complete breakdown" in communications between Delbert and respondent, for which it "primarily blame[d]" respondent, and it granted the motion for substitution of counsel. The court set a date for the appointment of new counsel, and respondent declared that he would be seeking to represent himself.

¶ 25 As the trial court wrapped up the hearing, respondent issued his 15th interruption. He continued to deride Delbert. The court told him to "let it go." Respondent turned his insults to the court: "you sit there and be dishonest with him, that's even worse." Respondent told the judge: "[i]f you can't stand the truth, get out of the courtroom." The judge told respondent that he was "done." The correctional officer put respondent in handcuffs and removed him from the courtroom. After a short recess, the court recalled respondent to the courtroom for bookkeeping matters.

¶ 26 On February 14, 2012, at the next hearing, the trial court stated that it was ready to appoint new counsel, and it believed that appointing new counsel was in respondent's best interest. However, the court acknowledged that respondent wanted to represent himself, and it acknowledged that a person has a sixth-amendment right to represent oneself. The court stated, however, that, "[i]t's somewhat complicated in a case like this."

¶ 27 The State expressed concerns about the efficacy of respondent proceeding *pro se*. The State acknowledged that, per *Akers*, there is no constitutional requirement that a respondent in a sexually dangerous person case be fit to stand trial. Nevertheless, it stressed, here, there had been serious concern that respondent was unfit to stand trial (and, typically, the court may override the sixth-amendment right to proceed *pro se* where the litigant is unfit).

¶ 28 The trial court agreed that the State made a valid point, stating, again, "that's why I say it's complicated." The court acknowledged that "[*Akers*] can be interpreted to say that a person

is not entitled to represent themselves in a case like this." However, the court decided that it would allow respondent to proceed *pro se*.

¶ 29 The trial court then addressed respondent, noting that respondent "had problems" with each of his previously appointed attorneys. The court admonished respondent of some of the disadvantages of representing himself, and asked that respondent continue to think about it until the next hearing.

¶ 30 On February 21, 2014, at the next hearing, respondent confirmed that he wanted to represent himself. The court acknowledged that respondent had a sixth-amendment right to represent himself. It noted that respondent had not been able to cooperate with his previous attorneys and that, as demonstrated at the February 14, 2014, hearing, respondent conducted himself in a more respectful manner when without an attorney. The court granted respondent's request to proceed *pro se*.

¶ 31 v. June 13, 2011 to January 13, 2012: First Speedy-Trial Claim

¶ Meanwhile, on June 13, 2011, respondent, through Delbert, moved to dismiss the case on speedy-trial grounds. He argued that the seven-month delay caused by the fitness proceedings violated respondent's constitutional right to a speedy trial. On June 27, 2011, respondent moved for the appointment of Meyer to evaluate whether the delay prejudiced respondent by causing his mental condition to deteriorate. The court appointed Meyer.

¶ 32 On December 21, 2011, the court heard the speedy-trial motion. Meyer opined that respondent's mental condition had not deteriorated during the delay. The State argued that some of the seven-month delay had been caused by respondent's refusal to cooperate with evaluators and that, in any event, the delay was not prejudicial. On January 23, 2012, the court denied the motion. It noted that the State brought the fitness motion in good faith, that respondent was not

prejudiced by the delay, and, in context, the delay was "a fairly short delay in a fairly complex case."

¶ 33 vi. April 27, 2011 to December 21, 2011: New Psychologists Delay by Agreement

¶ 34 On April 27, 2011, the State moved to have respondent reexamined, because the existing psychological evaluations, completed in May 2008, were no longer current. On May 27, 2011, the court granted the motion. On August 26, 2011, the court appointed Drs. Angeline Stanislaus and Jonathon Gamze as examiners. The court noted that the time necessary for the doctors to complete their reports would be a delay by agreement. Stanisulaus completed her report December 21, 2011.

¶ 35 vii. December 21, 2011 to July 9, 2012:
Continuances for Gamze to Complete his Report

¶ 36 Gamze took longer than Stanisulaus to complete his report. After the August 2011 appointment, Gamze requested certain documentation, including prior psychological evaluations. Respondent objected, arguing that prior psychological evaluations would be unduly prejudicial. The court ruled that, if respondent cooperated with Gamze, he would consider keeping out the prior evaluations. However, when Gamze came to visit respondent, respondent refused to talk to Gamze. Therefore, on December 21, 2011, the court ruled, generally, that Gamze could access prior evaluations. The State offered to compile a list of the exact documentation sought by Gamze. The court agreed to this course of action. Defense counsel stated that, if Gamze ended up getting any information that Stanisulaus did not receive, perhaps Stanisulaus should be given an opportunity to amend her report. The court stated it would wait to see the list. During this discussion, defendant interrupted, stating that he did not want Stanisulaus to amend her report.

¶ 37 On January 27, 2012, the court provided Gamze with the requested documentation. In March 2012, the State reported to the court that Gamze, who had several other upcoming trials,

was still reviewing the documentation. On May 30, 2012, the court asked about the status of Gamze's report. Respondent interrupted to request that Gamze be taken off the case. The State informed the court that Gamze was still working on the report. Gamze submitted his report approximately five weeks later, on July 9, 2012.

¶ 38 viii. August 13, 2013 to October 7, 2013: Witness Unavailability

¶ 39 On June 19, 2013, over respondent's objection, the trial was continued from August 13, 2013, to October 7, 2013, because Dr. Stanislaus was not available.

¶ 40 ix. October 7, 2013 to May 9, 2014: Act Amendment

¶ 41 In October 2013, the court informed the parties that the Act had been amended to add certain licensing requirements of the evaluators. Neither Stanisulaus nor Gamze met the licensing requirements. In November 2013, the State informed the court that no evaluators currently met the State's new licensing requirements. Respondent again issued a speedy-trial demand, and the court explained that it could not set a trial date until legally adequate evaluations were completed.

¶ 42 In February 2014, the State informed the court that it had been in contact with several evaluators who anticipated that they would soon be licensed. In April 2014, the State provided the court with a list of licensed evaluators. On May 9, 2014, the court appointed Timothy Brown and Jeffrey Sundberg (later substituting Robert Brucker for Sundberg). The court set the trial date for September 15, 2014.

¶ 43 x. August 20, 2014 to November 17, 2014: Second Speedy-Trial Claim

¶ 44 On August 20, 2014, respondent again moved to have the case dismissed due to a constitutional speedy-trial violation. On August 29, 2014, the court heard the motion. The court agreed that the 10-year delay was "presumptively prejudicial," as is a requirement to proceed

with the issue. However, aside from the fitness delay (May 27, 2010 to January 3, 2011), which was not intentional, respondent was responsible for the majority of the delays. Respondent requested many continuances, refused to cooperate with doctors, and refused to cooperate with counsel. Moreover, the court found that the delay did not prejudice respondent in conducting his defense. In balancing these factors, the court denied the motion to dismiss.

¶ 45 On September 4, 2014, the court set trial for November 17, 2014. Respondent requested stand-by counsel. The court appointed Alan Cooper.

¶ 46 B. Pre-Trial Evidentiary Ruling: Motion *in Limine* to Bar A.I.

¶ 47 On November 21, 2005, respondent moved to bar the testimony of A.I. Respondent argued that A.I.'s testimony concerning a fondling incident that occurred when A.I. was 17 years old was not relevant, in that it did not describe a criminal act. The State responded that the incident was relevant and showed respondent's criminal propensities. The incident could support the criminal charge of battery of a sexual nature, where A.I. did not consent to the contact. Moreover, the incident was relevant because, although A.I. was age 17 at the time, respondent was A.I.'s employer and held a position of trust and authority over him. The court denied the motion *in limine*, stating that the incident spoke to respondent's propensity to commit criminal acts in pursuit of his sexual urges. (In February 2009, respondent again moved to bar A.I.'s testimony, and, for the same reasons, the court denied the motion.)

¶ 48 C. Trial

¶ 49 At trial, the parties stipulated to a 1991 conviction for aggravated criminal sexual abuse. The State called three of respondent's victims: A.I., E.L, and J.D. It also called Dr. Brown, who opined that respondent was a sexually dangerous person. Respondent called only Dr. Brucker,

who opined that it was not substantially probable that respondent would reoffend, and, therefore, did not meet all the criteria to be declared a sexually dangerous person.

¶ 50 1. State's Case: Stipulations

¶ 51 Pursuant to the parties' stipulation, the trial court informed the jury that respondent had a 1991 conviction for aggravated criminal sexual abuse involving a six-year-old boy. Reports describing the incident indicate that, in 1989, respondent offered to take two children, the boy and his sister, to his horse farm. The children's own father was physically disabled and, therefore, unable to do such outdoor activities with the children. Respondent took the children to his farm several times before committing the offense. On the day of the offense, the sister had other plans, and respondent took only the boy. Respondent made the boy remove his clothes, and respondent touched the boy's penis in a "masturbating movement."

¶ 52 2. State's Case: A.I.

¶ 53 A.I. testified that, in 1989, he was 17 years old. A.I. met respondent at a restaurant where they both worked. Respondent asked A.I. if he would like to make extra money at respondent's horse farm. A.I. agreed, and, later, respondent drove A.I. to the horse farm. Respondent told A.I. that he wanted to perform a physical exam to make sure that A.I. would not sustain a hernia or injury to his genitals while bailing hay. He also wanted to make sure that A.I. was able to get an erection. A.I. told respondent that he could. Respondent told A.I. he needed to check so as to limit injury liability. A.I. was uncomfortable, but he went along with the request. A.I. tried to stimulate an erection but could not. Respondent then held A.I.'s underwear down with one hand and masturbated him with the other. Within 10 to 15 seconds, A.I. stepped back. Respondent released him. A.I. felt unsafe. Respondent did not verbally or physically threaten A.I., but A.I. felt unsafe because he was alone with respondent, many miles from home, and without his own

car. A.I. worked on the farm for six hours, and then respondent drove him home. A.I. felt scared and ashamed. Initially, he did not tell anyone what happened, because he felt afraid and embarrassed. He blocked the incident out of his mind. However, 10 years later, in 1999, he heard a news report that respondent had molested another child. This prompted A.I. to contact the police and tell them what happened.

¶ 54 On cross-examination, A.I. testified that, in 1989, he was five feet, seven inches tall and weighed about 125 pounds. He had gone through puberty.

¶ 55 3. State's Case: E.L.

¶ 56 E.L. testified that, in 1979, respondent and his then-wife adopted her and her sister. In approximately 1982, when she was between 13 and 15 years old, respondent assaulted her in the middle of the night in her bedroom. Respondent held her down, nearly suffocated her, and put his penis in her mouth. E.L. did not see respondent's face, but she recognized his voice when he stated: "that's better than playing with yourself." Because the assault happened when she had just been sleeping, the line between "nightmare" and nightmarish reality blurred. She felt disoriented. After it was over, she realized the assault was real, and she felt sick. She saw that her pajama top had been undone, her bed was "torn up," and her body was "red." She washed her face, she wrapped herself in a towel, and she sat in the corner of her room. Initially, E.L. did not tell anyone what happened, because she was terrified of respondent's explosive temper. (Reports indicate that respondent physically abused E.L. as well). As such, E.L. continued to live with respondent for several more years. E.L. came forward in 1999, after respondent was arrested.

¶ 57 On cross-examination, E.L. acknowledged that, in a letter to her therapist describing the incident, she did not tell her therapist that respondent put his penis in her mouth. She did not tell

her therapist about hearing respondent's voice. However, E.L. did put respondent's name near the top of her letter. E.L. also acknowledged that, after the assault, she went alone with respondent to a horse show.

¶ 58 4. State's Case: J.D.

¶ 59 J.D. testified that, in 1999, he was 14 years old. He responded to respondent's newspaper ad seeking a worker for the horse farm. Respondent came to J.D.'s home, met with his parents, and provided J.D. general information about the job. Respondent drove J.D. to the farm, where J.D. was to stay for several days. Respondent showed J.D. around the farm. He also showed J.D. the office with two cots one foot apart, where he and J.D. would sleep. Respondent told J.D. that he needed to perform a physical exam to make sure J.D. was healthy and could withstand the work. The exam consisted of push-ups, sit-ups, leg lifts, and a hernia exam, all to be done while naked. During the hernia "exam," respondent touched J.D.'s genitals.

¶ 60 At night, respondent told J.D. that he should sleep naked, because, otherwise, he might be hurt from a nighttime erection. J.D. refused and continued to sleep in his boxers. One morning, J.D. awoke to see respondent masturbating. Another morning, J.D. awoke to find himself naked. He did not remember how his boxers came off.

¶ 61 J.D. returned home to his family, but he did not tell them what happened. He was afraid and nervous. Nevertheless, J.D. returned for a second, week-long stint at the horse farm. He could not explain why he returned.

¶ 62 Once at the farm, respondent asked J.D. if he knew how to put on a condom. Respondent explained that this could be important if they met any women at the upcoming horse show. Respondent told J.D. to get an erection. When J.D. did not, respondent masturbated J.D. and put

his mouth on J.D.'s penis. J.D. never got an erection. Respondent began to masturbate himself, and he ejaculated.

¶ 63 J.D. stayed another day or two. J.D. continued to sleep in his boxers. Respondent told J.D. that, if J.D. would not sleep naked, he did not see why J.D. should work at the farm.

¶ 64 Soon after, when respondent left the farm to go to work, J.D. called his family. J.D. was scared, and he wanted to go home. J.D.'s grandmother and uncle came to get him. J.D. told his family that respondent asked him to remove his underwear, but he did not tell his family any other details. Then, a few months later, J.D. heard in a news report that respondent had molested another boy.[3] This prompted J.D. to come forward. He told his mother and the police about everything except that respondent had placed his mouth on J.D.'s penis. J.D. continued to withhold that detail, because he did not want people to know that happened to him.

¶ 65 5. State's Case: Dr. Brown

¶ 66 Dr. Brown testified concerning his evaluation of respondent. Very early into his testimony, the following query by the State prompted respondent's objection:

> "Q. ***. Can you describe *** how *** you go about to determine whether somebody is sexually dangerous?
>
> A. Sexually dangerous person is defined by statute as a person with a mental disorder lasting not less than one year, coupled with criminal propensities to commit sex

[3] The other boy did not testify at trial. Reports indicate that, in 1999, respondent touched the genitals of an 11-year-old boy. That boy had also applied to work at respondent's farm. Respondent touched the boy's genitals while conducting a physical "exam" and while teaching the boy to horseback ride.

offenses with a demonstrated propensity toward the sexual molestation of children. So in order to decide whether a person fits into that category, ***.

Q. Now, in fact, you're also, do you not, form an opinion as to whether its substantially probable that the person you're—

[RESPONDENT]: Objection ***."

Outside the presence of the jury, respondent argued that Dr. Brown should not be allowed to testify whether it was "substantially probable" that respondent would re-offend. He stated that it would violate section 4 of the Act (725 ILCS 205/4 (West 2014)), which required all evaluations to be in writing and Illinois Supreme Court Rule 213 (eff. January 1, 2007), which requires a party to disclose in advance of trial the opinions to which its witnesses will testify.

¶ 67 The State responded to the Rule 213 challenge, stating, "it's not a new opinion." The State had disclosed Dr. Brown's written report, which "indicated his opinion, to a reasonable degree of psychological certainty, [that respondent] meets the definition of [a] sexually dangerous person *and all that it entails*." (Emphasis added.)

¶ 68 The trial court asked to look at Dr. Brown's report. After reading Dr. Brown's report, the court overruled respondent's objection. The court noted that Brown's report opined that respondent was a sexually dangerous person and set forth the various reasons he thought respondent was likely to reoffend (although he may not have used the words "substantially probable"). The court stated that Brown is allowed to testify to and explain his opinion, and, in balance, respondent may cross-examine Brown. It would remain for the jury to weigh Brown's opinion and explanations.

¶ 69 The State resumed its examination. Dr. Brown testified that, normally, in performing an evaluation under the Act, he would conduct psychological, I.Q., personality, and sexual-

preference tests. He would also conduct clinical interviews and inquire into sexual history. However, in this case, respondent refused to speak with him. Therefore, he had to rely on records available to him, including the previous evaluations, police reports, indictments, and victim statements and depositions. Based on these records, Dr. Brown diagnosed respondent with pedophilia. Brown defined pedophilia as a mental disorder existing in a person older than 16, lasting more than six months, which is characterized by recurrent sexual urges, fantasies, and sexual acts against prepubescent children or intense apprehension and regret about the urges and fantasies. Brown opined that respondent had the disorder more than a year prior to the 1999 filing of the petition, and that respondent still had the disorder as of the 2014 trial date, because respondent had not yet received treatment.

¶ 70 Dr. Brown opined that respondent's mental disorder made it "substantially probable" that respondent would commit criminal sexual acts, including acts against children, in the future. He explained that, in reaching this "substantial probability" threshold, he used an "adjusted actuarial approach" as opposed to a static actuarial approach. An adjusted actuarial approach allowed for the consideration of "dynamic factors," such as mental illness, substance dependence, relationship problems, and intimacy deficits, in addition to the static results of an actuarial test. Dr. Brown stated that the psychiatric field was moving toward this more dynamic approach.

¶ 71 Dr. Brown looked at the Static-99R test as applied to respondent. Respondent scored a "2" on this test. He received points for having male victims, unrelated victims, stranger victims, and a multiple number of victims. However, he received negative "3" points for being relatively old, age 64 or 65. A score of "2" meant a low-to-moderate risk of reoffending, as compared to other sex offenders. Statistically, 12% of persons scoring a "2" reoffended within five years, and

20% of persons scoring a "2" reoffended within 10 years. In discussing these percentages, the following exchange took place:

> "Q. You're telling the jury that you have the ability to pick out which 12 to 20 people would reoffend and which 80 to 88 will not reoffend, correct?
>
> A. I'm telling—Yes.
>
> Q. And the numbers do not lie?
>
> A. I didn't say that."

Dr. Brown agreed that 20% odds did not meet the threshold for substantial probability.

¶ 72 However, Dr. Brown believed that respondent's static actuarial score underrepresented respondent's likelihood of reoffending. Specifically, Dr. Brown did not believe that, in this case, emphasis should be placed on respondent's age; any lowered risk associated with respondent's age is outweighed by the fact that respondent has never received treatment. Moreover, Dr. Brown felt that the static test did not adequately account for other factors, such as a seeming lack of empathy for his victims, no acceptance of personal responsibility, mood instability, intimacy defects, probation violations, and a persistence of the sexual deviance. Dr. Brown acknowledged the existence of an authoritative study, the 2004 Hanson, Morton-Bourgon Meta-Analysis study, that did not find a statistical link between victim empathy and increased recidivism. Nevertheless, based on his own clinical experience, Dr. Brown considered the empathy factor to be important. Given the additional dynamic factors that applied to respondent, and with less weight afforded to respondent's age, Dr. Brown considered respondent to have a 60 to 70% chance of reoffending. He considered this percentage to constitute a substantial probability.

¶ 73 At the close of the State's case, respondent moved for a directed verdict. Among his many arguments, he posited that Dr. Brown's opinion was speculative, because Dr. Brown considered factors that were not part of the actuarial assessment. The court denied the motion.

¶ 74 6. Respondent's Case: Dr. Brucker

¶ 75 Dr. Brucker testified that respondent refused to speak with him, and, so, Brucker had to rely on documentation similar to that relied upon by Dr. Brown. Like Dr. Brown, Dr. Brucker diagnosed respondent with pedophilia. However, given what he believed to be a "very high statutorily defined threshold of substantially probable," Dr. Brucker opined that respondent was not a sexually dangerous person.

¶ 76 Dr. Brucker looked at two actuarial tests, the Static-99R and the Static 2000-R, as applied to respondent. Respondent scored a "4" on the Static-99R (again, in contrast, Dr. Brown opined that respondent scored a "2" on the same test). A score of "4" meant a moderate-to-high risk of reoffending, as compared to other sex offenders. A score of "4" on the Static-99R is higher than that received by 74% to 85% of other sex offenders. Statistically, 20.1% of persons scoring a "4" reoffended within five years, and 29.6% of persons scoring a "4" reoffended within 10 years.

¶ 77 Respondent scored a "7" on the Static 2000-R. This test looked at different risk factors than the Static-99R. A score of "7" on the Static 2000-R is higher than the scores received by 91% to 95% of other sex offenders. Statistically, 29.3% of persons scoring a "7" reoffended within five years, and 39.7% of persons scoring a "7" reoffended within 10 years. Dr. Brucker acknowledged that respondent had additional risk factors not accounted for in the test, such as a sexual interest in children and non-completion of treatment. Dr. Brucker seemed to agree that respondent lacked victim empathy, but he did not consider this aspect of respondent's personality, because studies have not shown victim empathy to increase the chances of

recidivism. In Dr. Brucker's view, there was "no way to know" whether the additional risk factors, such as non-completion of treatment, added 0.5% or 20% to respondent's probability of reoffending.

¶ 78 Dr. Brucker concluded that respondent did not meet the statutory criteria to be declared a sexually dangerous person. He clarified in his written report that his opinion was:

> "not meant to suggest [respondent's] risk for sexual recidivism is low, as it is not. As I have already stated, his actuarially assessed risk places him in the Moderate-High risk category for sexual recidivism. At this time and based upon all available information, his risk assessment does not support that his risk of sexual recidivism meets the *very high requirement* necessitated to find that he has 'criminal propensities to the commission of sex offenses' and has 'demonstrated propensities to the commission of sex offenses'." (Emphasis added.)

¶ 79 Dr. Brucker acknowledged that he reached a different conclusion on this point than that reached by any of the other six evaluators who had worked on respondent's case over the last decade. Dr. Brucker further acknowledged that, although he had performed hundreds of evaluations of alleged sexually violent persons,[4] he had performed only one prior evaluation of an alleged sexually dangerous person.

¶ 80 At the close of evidence, respondent raised a second motion for directed verdict, noting that the two experts disagreed as to whether he was a sexually dangerous person. The court denied the motion, stating that the resolution of the competing expert opinions was a matter for

[4] To be declared a sexually violent person, the trier of fact must find, *inter alia*, that there is a substantial probability that the respondent will engage in acts of sexual violence in the future. 725 ILCS 207/5(f) (West 2014).

the jury. The jury found respondent to be a sexually dangerous person, and the court committed respondent to the Department of Corrections.

¶ 81 Respondent moved for a new trial, based on, *inter alia*, the supreme court's decision in *New* (2014 IL 116306). Additionally, respondent raised claims similar to those brought on appeal. The trial court denied the motion. This appeal followed.

¶ 82 II. ANALYSIS

¶ 83 On appeal, respondent argues that the trial court erred in: (1) denying his speedy-trial claim; (2) denying the motion *in limine* to bar A.I.'s testimony; (3) allowing Dr. Brown to testify to his opinion that it was "substantially probable" that respondent would reoffend; (4) denying the motion for a directed verdict, where there was a conflict between the two court-appointed evaluators; (5) entering the order of commitment where the evidence was insufficient to support the jury's finding; and (6) denying the motion for a new trial in light of *New* (2014 IL 116306). For the reasons that follow, we reject respondent's arguments.

¶ 84 A. Speedy-Trial

¶ 85 Proceedings under the Act implicate a respondent's liberty interests, and, as such, respondents are afforded certain due-process protections similar to those available at a criminal trial, such as the right to confront witnesses, the right against self-incrimination, and the right to a speedy trial. *Trainor*, 196 Ill. 2d at 328-29. However, as proceedings under the Act are civil in nature, the Criminal Code's Speedy Trial Act (725 ILCS 5/103-5 (West 2014)), with its precise 120-day requirement and rules of attribution, does not apply. *In re Detention of Hughes*, 346 Ill. App. 3d 637, 646 (2004). Instead, a respondent's right to a speedy trial is based on a constitutional right to due process. *Id.* at 646-48. The constitutional right to a speedy trial protects against "arbitrary and oppressive" delays during the pendency of a sexually dangerous

persons proceeding. *People v. Spurlock*, 388 Ill. App. 3d 365, 378 (2009). The constitutional right to a speedy trial is a vague concept, and the unique circumstances of each case must be taken into account. *People v. Crane*, 195 Ill. 2d 42, 47 (2001).

¶ 86 To determine whether a respondent's constitutional right to a speedy trial has been violated, the trial court should perform a balancing test, in which the conduct of both the State and the respondent are weighed. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). Even when attributing a delay to one party over the other, the court may consider the degree to which a given party is to blame. *Id*. at 531 (different weights are assigned to different reasons for delay). For example, intentional delays weigh heavily against the offending party. *Id*. Negligent delays weigh less heavily against the offending party but should still be considered. *Id*. Valid delays, such as missing a witness, may constitute a blameless delay. *Id*. In conducting a balancing test, "some of the factors" the trial court should consider include: (1) length of the delay; (2) reasons for the delay; (3) the respondent's assertion of the speedy-trial right; and (4) the prejudice to respondent. *Id*.; *Hughes*, 346 Ill. App. 3d at 646-48. A trial court's factual determinations of who is to blame for a particular delay and the weight to be given to that blame are afforded considerable deference. *Doggett v. United States*, 505 U.S. 647, 651 (1992); *People v. Bowman*, 138 Ill. 2d 131, 137 (1990). However, a reviewing court reviews *de novo* the ultimate decision of whether, in light of the trial court's factual assessment of the underlying circumstances, a respondent's speedy-trial right has been violated. *Crane*, 195 Ill. 2d at 52. In evaluating the trial court's decision, we look to each of the four factors set forth in *Barker*.

¶ 87 1. Length of the Delay

¶ 88 In assessing a constitutional speedy-trial claim, the court must first consider the length of the delay. *Crane*, 195 Ill. 2d at 52. The court need only examine the remaining factors if the

length of the delay is presumptively prejudicial. *Id*. Finding a presumptively prejudicial delay under this first factor does not mean that the delay will be found to have actually prejudiced the respondent. *People v. Holmes*, 2016 IL App (1st) 132357, ¶ 67 (citing *Doggett*, 505 U.S. at 656). Most courts consider a delay of one year to be sufficient to trigger a complete speedy-trial inquiry. *Id*. at 52-53. Here, there was a 10-year delay between the 2004 remand for a new trial and the 2014 trial. As such, the State concedes that the length of the delay requires a complete speedy-trial inquiry.

¶ 89 2. Reasons for the Delay

¶ 90 Respondent argues that the trial court erred in finding that the majority of the delays were attributable to him. He sets forth seven delay periods that he believes are attributable to the State. He maintains that, had the trial court found these delay periods attributable to the State, and had the trial court afforded the requisite degree of blame, the trial court would have been required to find a speedy-trial violation. We set forth the seven complained-of periods below, along with the reason for the delay, the party to whom the court attributed the delay, and the degree of blame assigned by the trial court:

Delay	Reason	Blame and Degree
1-6-09- 3-9-09 48 days	Witness Unavailability	State, valid
3-9-09- 5-11-09 63 days	Witness Unavailability	State, valid (respondent's counsel did not object)
5-27-10- 1-3-11 221 days	Motion for fitness evaluation	State, negligent
1-3-11- 2-21-14	Motions to Substitute Counsel	Respondent, intentional

1,145 days, which overlap with the next three complained-of delays		
12-21-11-7-9-12 203 days	Time above what was necessary to submit expert evaluation (Gamze)	Respondent, intentional
8-13-13-10-7-13 55 days	Witness Unavailability	State, valid
10-7-13-5-9-14 214 days	Continue to comply with Act amendments	State, valid

¶ 91 Respondent correctly notes that, technically, four additional delays may be attributed to the State, aside from the fitness delay. However, he acknowledges that these were valid delays, to which the trial court rightfully afforded minimal weight. In fact, the continuance caused by the amendment to the Act was completely outside the scope of the trial court's control; it did not have the option to ignore the amendment in favor of an earlier trial date. As such, respondent is left with three significant delays: (1) the fitness delay, which the trial court attributed to the State and assessed as negligent; (2) the period marked by respondent's eight motions to substitute counsel; and (3) the additional time it took Gamze to complete his evaluation as compared to the other expert.

¶ 92 First, we address the delay caused by the fitness evaluation. The State concedes that this was a seven-month delay, May 21, 2010, to January 3, 2011. However, we note that respondent himself moved for a valid delay during part of that period, requesting an eye surgery that pushed back the scheduled court date from November 30, 2009, to July 12, 2010. Due to this overlap, the fitness delay was arguably only five months.

¶ 93 Respondent appears to admit that, if this had been a criminal trial, the circumstances warranted a fitness determination. Thus, the question becomes whether the court erred in

determining that the State acted in good faith when it moved for a fitness evaluation in the context of a sexually-dangerous-persons proceeding. The State, apparently, was not aware of the legal proposition that fitness to stand trial is not required in sexually-dangerous-persons cases (*Akers*, 301 Ill. App. 3d 745, 746 (1998)). Whether this lack of awareness was sincere (and, thus, merely negligent) or feigned (and, thus, intentional) was for the court to determine. The court observed the State's conduct throughout this case, and it reasonably determined that its request for a fitness determination was made in good faith to protect the fairness of the proceedings. We note that respondent also appeared to struggle with *Akers*' application, his attorney asking for a fitness determination *after* the court had brought *Akers* to the parties' attention. Indeed, a request for a fitness determination usually is made to protect the *subject's* due-process rights. *Id*. at 749. We will not overturn the court's assessment of the State's good faith in this matter.

¶ 94 Second, we address the 37-month period marked by respondent's motions to substitute counsel. We reject respondent's premise that the trial court's *ultimate* decision to allow respondent to proceed *pro se* shows that the trial court had *previously* erred in denying respondent's requests to proceed *pro se*. Rather, as the trial court noted, the issue is more complicated than that.

¶ 95 Again, although proceedings under the Act are civil in nature, a respondent is afforded certain rights similar to those in a criminal proceeding. A defendant in a criminal trial has a sixth amendment right to self-representation. *Faretta v. California*, 422 U.S. 806, 822 (1975). However, the right to self-representation is not absolute. *Indiana v. Edwards*, 554 U.S. 164, 168 (2008). A court may limit a defendant's right to self-representation even if he is fit to stand trial, but, nevertheless, lacks the mental capacity to conduct his defense without representation (*id*.) or

if he engages in serious and obstructionist misconduct. *People v. Rasho*, 398 Ill. App. 3d 1035, 1041 (2010); *People v. Rohlfs*, 368 Ill. App. 3d 540, 545 (2006). A trial court's assessment of whether a person is capable of representing himself is a different question than whether that same person is fit to stand trial. *Edwards*, 554 U.S. at 168. A trial court's decision on whether a defendant may proceed *pro se* in light of obstructionist conduct and concerns of mental health and capacity is reviewed for an abuse of discretion. *Rohlfs*, 368 Ill. App. 3d at 545.

¶ 96 Here, we cannot say the trial court abused its discretion in its earlier rulings, where respondent's mental capacity and obstructionist conduct informed the court's decision. Respondent *was* allowed to represent himself from April 29, 2009, to August 5, 2010. During this time, respondent called into doubt his capacity to represent himself when he filed numerous motions alleging unfounded conspiracy theories and seeking relief unfounded in law (such as the arrest and prosecution of nearly every person involved in his case). In fact, respondent's behavior while acting *pro se* prompted the fitness hearing and subsequent appointment of Delbert. During the period in question, while represented by Delbert, respondent continued to engage in obstructionist conduct with his numerous interruptions, threats, and insults to the court, the attorneys, to law enforcement, and to the experts assigned to work with him. Thus, while respondent would like to characterize this period as one where he was improperly denied a right to act *pro se*, the court reasonably characterized this period as one where respondent engaged in obstructionist conduct.

¶ 97 We also reject respondent's argument that his comparative respect and cooperation toward the court while acting *pro se* is proof that the court erred in its earlier denials. This argument admits that respondent previously disrespected and obstructed the court, and we will not allow respondent to use his previous disrespect and obstruction to his advantage. The trial

court, at the time, reasonably inferred that respondent's previous failed self-representation combined with continuing obstructive conduct indicated that he could not represent himself. In the context of the speedy-trial claim, the court reasonably charged these delays to respondent.

¶ 98 Third, we address the seven-month period marked by Gamze's allegedly late evaluation. Gamze did not submit his report until July 9, 2012, whereas the other expert, Stanislaus, was able to submit her report by December 21, 2011. Respondent reasons that, if the other expert was able to complete her report by December 21, 2011, Gamze also should have been able to complete his report by December 21, 2011. Respondent concedes that any delay by the State was not intentional, but he argues that it should be given "more than a *di minimus* weight."

¶ 99 Respondent's expectation that Gamze complete his report at the same time as the other expert is not logical. It was not until January 27, 2012, *after* the other expert's December 21, 2011, submission, that Gamze even received the documentation he believed necessary to completing his report. The court reasonably accepted Gamze's position that the reports were necessary, because Gamze was not able to speak to respondent.

¶ 100 In any case, we reject respondent's argument that the circumstances surrounding the Gamze evaluation should weigh in respondent's favor. The initial assignment was agreed to by both parties, and the assignment was not so much of a delay as it was a necessary part of the proceedings. Respondent *intentionally* extended the amount of time necessary to complete a report by refusing to talk to Gamze. Little more than one month after Gamze received the documentation, in March 2012, the State reported that Gamze was busy with several other trials. On May 30, 2012, the court asked into the status of Gamze's report. Respondent interrupted to request that Gamze be taken off the case (which, if granted, would have resulted in another delay). The State informed the court that Gamze was still working on the report. Gamze

submitted his report approximately five weeks later, on July 9, 2012. Given these facts, the trial court reasonably afforded little weight to any role the State played in the Gamze delay, and it reasonably attributed a large portion of the delay to respondent.

¶ 101 Finally, we note that respondent's list of delays is self-serving. Respondent focuses on the delays caused by the State, only one of which was significant, and he omits any discussion of the delays he caused, including those in the first five years of the proceedings. Unlike the State's single negligent delay, respondent committed numerous intentional delays, including: failing to cooperate with his attorney in 2004; failing to cooperate with evaluator Obolsky in 2007 and 2008; failing to cooperate with a second attorney in 2008 and 2009; filing obstructionist motions alleging conspiracy theories and denigrating the court and its actors; and failing to cooperate with evaluators Meyer in 2010 and Gamze in 2011 and 2012. Throughout these delays, respondent never engaged in counseling or therapy.

¶ 102 3. Respondent's Request for a Speedy Trial

¶ 103 Here, there is no question that respondent requested a speedy trial. This requirement has been met. However, given respondent's obstructionist conduct and objections that suggested dates five months out were "too soon," the trial court may reasonably have viewed the request as perfunctory and afforded it little weight in balancing the factors before it.

¶ 104 4. Prejudice to Respondent

¶ 105 Respondent argues that, where the delay was 10 years, he does not need to allege actual prejudice. Respondent is wrong. Respondent appears to be referring to the presumptive prejudice described in the first factor. Even where first factor is met, and barring inexcusable conduct by the State, we must still consider prejudice. See, *e.g.*, *Holmes*, 2016 IL App (1st) 132357, ¶ 67. Where the State pursues its case with reasonable diligence, the court should

consider whether the respondent was actually prejudiced. See *Barker*, 407 U.S. at 534. "Prejudice is assessed in light of the interests of defendants that the speedy trial right was designed to protect—preventing oppressive pretrial incarceration, minimizing the defendant's anxiety and concern about the pending charge, and limiting the possibility that the defense will be impaired by the delay." *Holmes*, 2016 IL App (1st) 132357, ¶ 75.

¶ 106 Here, as acknowledged in our discussion of the first factor, respondent had a long pretrial incarceration. However, respondent does not allege that his mental condition deteriorated because he awaited trial. Indeed, and though focused on the seven-month fitness delay, an expert opined that respondent's mental state had not deteriorated while awaiting trial. Similarly, respondent does not allege, nor would he likely be able to prove, that his ability to prepare a defense was impaired. The State set forth similar evidence at the first trial as it did at the instant trial. And, if anything, the delay helped respondent's case. Because respondent himself caused a majority of the delays, we note that respondent aged 10 years and became able to present the argument that, as a senior, he presented a lower risk. Moreover, by delaying the case, respondent's unfavorable evaluations expired, and respondent received a second and third set of evaluations. Finally, the last expert, Dr. Brucker, submitted an arguably favorable evaluation. The trial court did not err in finding that respondent was not actually prejudiced.

¶ 107 In sum, the trial court did not err in its balancing of the four factors and its assessment that there was no speedy-trial violation. While the 10-year delay is concerning, a closer look at the reasons for the delay reveals no constitutional violation. Respondent himself intentionally caused a majority of the delays. Respondent was not prejudiced by the delay. To the contrary, the delay, if anything, helped his case. We cannot allow respondent to be rewarded for his obstructive behavior.

¶ 108 B. Motion *in Limine*: A.I's Testimony

¶ 109 Respondent argues that the trial court erred when it denied his motion *in limine* to exclude A.I's testimony. A trial court's ruling on a motion *in limine* is an evidentiary decision that we review for an abuse of discretion. *People v. Prather*, 2012 Il App (2d) 111104, ¶ 20. A court abuses its discretion where its decision is one that no reasonable person would have made, or where it is arbitrary or fanciful. *People v. Wheeler*, 226 Ill. 2d 92, 133 (2007). The court may admit evidence that is relevant to an issue in dispute if its probative value is not outweighed by its prejudicial effect. Ill. R. Evid. 402 (eff. January 1, 2011); *People v. Garcia Cordova*, 2011 IL App (2d) 070550-B, ¶ 82. Evidence is relevant if it tends to render a fact in controversy more or less probable. *In re A.W., Jr.*, 231 Ill. 2d 241, 256 (2008).

¶ 110 Respondent contends that A.I.'s testimony was not admissible, because it "had no bearing on the issue of whether [he] had the 'demonstrated propensities' " to commit a "sexual assault" or "sexually molest[] children." Respondent notes that, at the time of the encounter, A.I. was 17 years old and had gone through puberty, and, therefore could not be the victim of "child molestation." Respondent also notes that he did not forcefully touch A.I., and, therefore, the encounter cannot be considered a "sexual assault." In respondent's view, A.I.'s testimony was not relevant, and it only served to prejudice the jury.

¶ 111 Respondent's argument is misleading. Again, the State must prove three elements in order to show that a respondent is a sexually dangerous person: (1) the existence of a mental disorder for more than one year; (2) the existence of criminal propensities to the commission of sex offenses; and (3) the existence of demonstrated propensities toward acts of sexual assault or acts of sexual molestation against children. *Allen*, 107 Ill. 2d at 105. Respondent focuses only on whether A.I.'s testimony was relevant to the *third* element that the State must prove in a

sexually dangerous persons case, but the court's decision was based on its determination that A.I.'s testimony was relevant to the *second* element that the State must prove in a sexually dangerous persons case.

¶ 112 If A.I.'s testimony was relevant to any one of the three elements, it was relevant to the State's case. As the trial court found, A.I.'s testimony was clearly relevant to the second element. Again, the second element requires a showing of a criminal propensity to the commission of sex offenses. A "propensity" is "an often intense natural inclination or preference." *People v. Hancock*, 329 Ill. App. 3d 367, 378 (2002) (citing Merriam-Webster's Collegiate Dictionary 932 (10th ed. 2000)). Having "criminal propensities to the commission of sex offenses," means that it is "substantially probable" that the person will commit a sex offense in the future. 725 ILCS 205/4.05 (West 2014). Evidence that a respondent has committed a crime in the course of pursuing a sexual urge is relevant to the second element. See, *e.g.*, *Hancock*, 329 Ill. App. 3d at 379 (where the respondent broke into a home to watch a child sleep). Here, A.I.'s testimony, if believed, showed that respondent took advantage of a position of trust and authority to touch A.I. in a way that made A.I. feel afraid and ashamed. Thus, respondent's conduct, at a minimum, would have supported a battery conviction. See, *e.g*, *People v. DeRosario*, 397 Ill. App. 3d 322, 333 (2009) (citing 720 ILCS 5/12-3(a)(2) (West 2006)) (the defendant's act of sitting behind the victim and touching her back and hip with his knees was sufficient to sustain a battery in that the defendant knowingly made physical contact of an insulting or provoking nature with an individual). Because A.I.'s testimony, at a minimum, described a crime committed in the course of pursuing a sexual urge, it was relevant to the second element.

¶ 113 Even if the admissibility of A.I.'s testimony turned on its relevance to the third element, which it does not, respondent's argument would not convince us that the trial court abused its discretion. The third element requires that a respondent has a "demonstrated propensity" toward acts of "sexual assault" or acts of "sexual molestation against children." A "demonstrated propensity" does not necessarily require that the respondent has already committed the precise acts described in the third element. *Allen*, 107 Ill. 2d at 105.

¶ 114 The two categories of acts set forth in the third element involve either: (1) sexual assault, meaning force against a person who is capable of consenting to a sexual act *or* penetration of a person known to be incapable of understanding the nature of the act or of a person who was unable to give knowing consent; or (2) sexual molestation of a child, meaning an act of sexual interaction potentially less than penetration with a person not capable of consenting. *People v. Bingham*, 2013 IL App (4th) 120414, ¶¶ 53-54 (citing 720 ILCS 5/12-13 (West 2010)). The Criminal Code does not set forth a crime of "sexual molestation against children." And, for the purposes of determining whether a respondent is a sexually dangerous person, courts have determined that acts against victims as old as 18 could, potentially, be relevant to the question of whether a respondent has demonstrated a propensity toward the sexual molestation of children. *People v. Beksel*, 125 Ill. App. 2d 322, 328 (1970).

¶ 115 As such, the "non-force" offenses described in the third element are not so much about a strict age cut-off as they are about whether a respondent has demonstrated a propensity to commit a sexual act against a person who has not consented or is not fully capable of consenting. A.I.'s testimony is relevant to the question of consent, because A.I. testified that respondent deceived him as to the sexual nature of the act, calling it a physical exam. An older, wiser person would know for certain that the "exam" was not a legitimate employment procedure.

Moreover, even though A.I. was 17, A.I.'s testimony was relevant to the question of whether respondent had a *propensity* to target and molest children, because A.I.'s testimony tied into the other evidence to create a fuller picture of respondent's pattern. As with A.I., respondent later molested two children, ages 14 and 11, under the guise of a physical exam to work at the horse farm. Thus, A.I.'s testimony is relevant to the third element in that, if believed, it shows that respondent has a propensity to choose a young person, bring the young person far away from home, deceive the young person as to the sexual nature of the act by calling it a physical exam, and proceed to commit a sexual act to which the young person did not have the wherewithal to instantly object, but which left the young person feeling fear and shame thereafter. The court certainly did not abuse its discretion in allowing A.I. to testify.

¶ 116 C. Dr. Brown's Testiomony

¶ 117 Respondent contends that the trial court erred in allowing Dr. Brown to testify that, in his opinion, it was "substantially probable" that respondent would commit a sex offense in the future. Respondent raises the same arguments that he raised in the trial court: (1) Dr. Brown's opinion was given in violation of section 4 of the Act requiring the submission of a written evaluation; and (2) Dr. Brown's opinion was given in violation of Rule 213 requiring the disclosure of an expert's opinion prior to trial. We review the trial court's admission of testimony for an abuse of discretion. *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 109 (2004). For the reasons that follow, we find no abuse of discretion.

¶ 118 Section 4 of the Act states:

> "After the filing of the petition, the court shall appoint two qualified evaluators to make a personal examination of the alleged sexually dangerous person, to ascertain whether the person is sexually dangerous, and the evaluators shall file with the court a

> report in writing of the result of their examination, a copy of which shall be delivered to the respondent." 725 ILCS 205/4 (West 2014).

Respondent does not explain how Dr. Brown's testimony violated section 4 of the Act; he merely asserts as much in a single sentence. The plain language of section 4 requires that the evaluator file a written report of his examination with the court, a copy of which shall be delivered to the respondent. Dr. Brown filed his written report with the court, and respondent received a copy. There is no section 4 violation.

¶ 119 It appears that respondent was trying to link the section 4 writing requirement to the Rule 213 disclosure requirement. However, the Rule 213 disclosure requirement is a separate issue.

¶ 120 Rule 213 states, *inter alia*:

> "(f) Identity and Testimony of Witnesses. Upon written interrogatory, a party must furnish the identities and addresses of witnesses who will testify at trial and must provide the following information:
>
> * * *
>
> (3) Controlled Expert Witnesses. A "controlled expert witness" is a person giving expert testimony who is the party, the party's current employee, or the party's retained expert. For each controlled expert witness, the party must identify: (i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefor[e]; (iii) the qualifications of the witness; and (iv) any reports prepared by the witness about the case.
>
> (g) Limitation on Testimony and Freedom to Cross-Examine. The information disclosed in answer to a Rule 213(f) interrogatory, or in a discovery deposition, limits the

> testimony that can be given by a witness on direct examination at trial. Information disclosed in a discovery deposition need not be later specifically identified in a Rule 213(f) answer, but, upon objection at trial, the burden is on the proponent of the witness to prove the information was provided in a Rule 213(f) answer or in the discovery deposition. Except upon a showing of good cause, information in an evidence deposition not previously disclosed in a Rule 213(f) interrogatory answer or in a discovery deposition shall not be admissible upon objection at trial." Il. S. Ct. R. 213(f), (g) (eff. Jan. 1, 2007).

¶ 121 The purpose of Rule 213 is to avoid surprise and gamesmanship and to bring to the proceedings a degree of certainty and predictability that furthers the administration of justice. *Sullivan*, 209 Ill. 2d at 111. Rule 213 demands strict compliance. *Id*. at 110. However, a word-for-word disclosure of the anticipated testimony is not required in order to strictly comply. *Kovera v. Envirite of Illinois, Inc*., 2015 IL App (1st) 133049, ¶ 63. Rather, a witness may elaborate on a properly disclosed opinion, so long as the testimony is encompassed by the original opinion and is not a new reason for the opinion. *Id*.

¶ 122 If the court finds that there is a Rule 213 violation, it must decide whether exclusion of the testimony is a proper sanction. *Sullivan*, 209 Ill. 2d at 110. In deciding whether to exclude the testimony, the court should consider: (1) the surprise to the adverse party; (2) the prejudicial effect of the testimony; (3) the nature of the testimony; (4) the diligence of the adverse party; (5) the timely objection to the testimony; and (6) the good faith of the party calling the witness. *Id*.

¶ 123 Here, the trial court found no violation of Rule 213. Its finding was reasonable. Dr. Brown's written report, which was sent to respondent, stated that Dr. Brown would opine that respondent met the legal criteria required to be declared a sexually dangerous person. The legal

criteria include a finding that respondent is "substantially probable" to commit a sex offense in the future. 725 ILCS 205/4.05 (West 2014). Additionally, Dr. Brown's written report opined respondent's test score "underrepresented" the "probability" that respondent would reoffend. Dr. Brown then set forth the reasons he felt it was likely that respondent would reoffend, including respondent's history of grooming victims prior to the sexual assault and failure to attend sex-offender treatment. Dr. Brown's testimony was not a word-for-word recitation of his written report, but he did not reveal a new opinion.

¶ 124 Even if Dr. Brown's utterance of the specific words "substantially probable" constituted a new opinion, the trial court did not abuse its discretion in allowing it. Respondent cannot have been surprised by the opinion. He knew that Dr. Brown was going to testify that he met the statutory criteria required to be declared a sexually dangerous person, and he should have expected that Dr. Brown would elaborate on that criteria.

¶ 125 D. Directed Verdict Based on Competing Experts

¶ 126 Respondent argues that the court erred in denying his motion for a directed verdict at the close of evidence, because the experts disagreed on a material element of the case. "A motion for a directed verdict asserts only that as a matter of law the evidence is insufficient to support a finding or verdict of guilty. The motion requires the trial court to consider only whether a reasonable mind could fairly conclude the guilt of the accused beyond reasonable doubt, considering the evidence most strongly in the [State's] favor." *People v. Withers*, 87 Ill. 2d 224, 230-31 (1981). We review *de novo* the trial court's decision to deny the motion for a directed verdict. *Id*. at 230.

¶ 127 Respondent notes that, here, the experts disagreed on a material element of the case. Dr. Brown opined that it was substantially probable that respondent would reoffend, whereas Dr.

Brucker opined that it was not substantially probable that respondent would reoffend. Respondent, citing *People v. Covey*, 34 Ill. 2d 195 (1966), *People v. Olmstead*, 32 Ill. 2d 306 (1965), and *People v. Cole*, 5 Ill. App. 3d 836 (1972) (rejected by *People v. Antoine*, 286 Ill. App. 3d 920 (1997)), "respectfully suggests that[,] where the psych[iatrists] disagree on an essential element of the State's case, the trial court should be required to find that the State has not made a *prima facie* case by simply putting on the testimony of the one who supports the State's position."

¶ 128 We disagree that *Covey*, *Olmstead*, and *Cole* require the two psychiatrists to agree on each material element. *Covey* and *Olmstead* are inapposite. Those courts held, simply and in a single paragraph, that, although the Act requires two psychiatrists to file a written report, it does not require both psychiatrists to testify. *Covey*, 34 Ill. 2d at 197; *Olmstead*, 32 Ill. 2d at 312. The alleged danger in allowing one of the psychiatrists to abstain from testifying was that it could compromise a respondent's right to confront witnesses against him. *Olmstead*, 32 Ill. 2d at 315 (Schaffer, J., dissenting). However, the majority did not believe that a respondent's right to confront witnesses against him was compromised. So long as the testifying psychiatrist *agreed* with the abstaining psychiatrist that the respondent was a sexually dangerous person, the testimony of one psychiatrist would be sufficient to establish a *prima facie* case that the respondent was a sexually dangerous person. *Olmstead*, 32 Ill. 2d at 312. In *Covey* and *Olmstead*, the requirement that the psychiatrists be in agreement only applied where one of the two required psychiatrists did not testify. *Covey*, 34 Ill. 2d at 197; *Olmstead*, 32 Ill. 2d at 312. Those circumstances do not apply to the instant case.

¶ 129 In *Cole*, one psychiatrist submitted a report opining that the respondent, who made obscene phone calls of a sexual nature, was a sexually dangerous person, while the second

psychiatrist submitted a report opining that the respondent was not dangerous and was just "a nuisance." *Cole*, 5 Ill. App. 3d at 837. Only the first psychiatrist testified, and the trial court found the respondent to be sexually dangerous. *Id.* Relying on *Covey* and *Olmstead*, the appellate court reversed. It reasoned that, because *Covey* and *Olmstead* stated that the testimony of one psychiatrist would be sufficient to establish a *prima facie* case in the absence of contradictory reports, the converse must be true: the testimony of one psychiatrist is not sufficient to establish a *prima facie* case in the presence of a contradictory report. *Id.* at 838. The appellate court then extended the rule, stating, "the clear implication of th[e] statute [requiring two psychiatrists to file written reports] is that *both* psychiatrists in their preliminary report to the court should find that he is a sexually dangerous person." (Emphasis added.) *Cole*, 5 Ill. App. 3d at 837. Though the *Covey* and *Olmstead* courts merely held that the Act does not require both psychiatrists to testify so long as both psychiatrists agree that the respondent is sexually dangerous, *Cole* went further, stating that both psychiatrists must agree that the respondent is sexually dangerous.

¶ 130 The *Cole* court was simply wrong when it stated that, in general, both psychiatrists must agree that the respondent is sexually dangerous in order for the respondent to be declared sexually dangerous. The *Cole* court missed the point of *Covey* and *Olmstead*. The point of *Covey* and *Olmstead* was merely that, although the Act requires two psychiatrists to file a written report, it does not require both psychiatrists to testify in every instance. *Covey* and *Olmstead* did *not* hold that both psychiatrists must agree that the respondent is sexually dangerous in order for a respondent to be declared sexually dangerous.

¶ 131 We are not the first court to reject *Cole's* statement. In *Antoine*, the Fourth District rejected the argument that both psychiatrists must agree that the respondent is sexually

dangerous in order for the respondent to be declared sexually dangerous. *Antoine*, 286 Ill. App. 3d at 925-26. There, two psychiatrists submitted written reports, one opining that the respondent was a sexually dangerous person and the other opining that the respondent was not a sexually dangerous person. *Id*. at 921-22. The trial court dismissed the case, believing that *Cole* required a dismissal where the two experts did not agree that respondent was sexually dangerous. *Id*. at 922. The State appealed, and the appellate court reversed. *Id*. at 928. The appellate court explained:

> "*Nothing* in [section 4 requiring two qualified psychiatrists to evaluate the respondent] indicates that the court-appointed psychiatrists must agree in their court-ordered assessments that [the respondent] is a sexually dangerous person. Furthermore, no language in any other section of the Act explicitly states or even implies that a trial court must dismiss a petition if the psychiatrists do not so agree." *Id*. at 923.

The court further noted that it would be "unprecedented in Illinois law" to hold that a conflict in a material issue bars a trier of fact from hearing evidence on the issue and resolving it on the merits. *Id*. at 925-26. The court concluded that the statement in *Cole* that experts must agree was "so erroneous." *Id*. at 925.

¶ 132 The law does not require the two psychiatrists to agree that respondent is sexually dangerous in order for a court to declare respondent sexually dangerous. Therefore, the trial court did not err in denying respondent's motion for a directed verdict based on the experts' failure to come to a consensus on the sub-question of whether it was substantially probable that respondent would reoffend.

¶ 133 E. Sufficiency

¶ 134 Respondent argues that the trial court erred in entering the commitment order, because the evidence was insufficient to support the jury's verdict. When a respondent challenges the sufficiency of the evidence to find him sexually dangerous, the reviewing court must consider all the evidence adduced at trial in the light most favorable to the State and then determine whether any rational trier of fact could have found the essential elements to be found a sexually dangerous person to have been proven beyond a reasonable doubt. *Bingham*, 2014 IL 115964, ¶ 30. We will not reverse a jury's finding that respondent is sexually dangerous, unless the evidence is so improbable as to raise a reasonable doubt. *Allen*, 107 Ill. 2d at 106.

¶ 135 Again, to be classified as sexually dangerous under the Act, the State must prove as to the respondent: (1) the existence of a mental disorder for more than one year; (2) the existence of criminal propensities to the commission of sex offenses; and (3) the existence of demonstrated propensities toward acts of sexual assault or acts of sexual molestation against children. *Id.* at 105. For the purposes of the Act, " 'criminal propensities to the commission of sex offenses' means that it is substantially probable that the person subject to the commitment proceeding will engage in the commission of sex offenses in the future if not confined." 725 ILCS 205/4.05 (West 2014).

¶ 136 Respondent's sufficiency argument focuses only on whether the State proved that it was "substantially probable" that respondent will engage in the commission of sex offenses in the future if not confined. "Substantially probable" has been defined as "much more likely than not." *In re Detention of Hayes*, 321 Ill. App. 3d 178, 189 (2001). Respondent argues that the expert testimony did not support a "substantially probable" finding. Respondent points to what he perceives to be flaws in Dr. Brown's testimony, and he notes that Dr. Brucker did *not* find it substantially probable that respondent would commit a future sex offense.

¶ 137 In a sexually dangerous person case, as in other cases, the jury is free to believe one expert witness over the other. *People v. Dinwiddie,* 306 Ill. App. 3d 294, 299 (1999). The jury is not required to accept an expert's ultimate conclusion. *People v. Terrell*, 185 Ill. 2d 467, 496-97.

¶ 138 Here, respondent places too much emphasis on Dr. Brucker's ultimate conclusion that it is not "substantially probable" that respondent would commit a future sex offense. As Dr. Brucker clarified, his own interpretation of the substantially probable threshold as a "very high requirement" prevented him from opining that respondent was a sexually dangerous person. He did *not* believe that respondent's "risk for sexual recidivism is low, as it is not. As I have already stated, his actuarially assessed risk places him in the Moderate-High risk category for sexual recidivism." Further, Dr. Brucker opined that, based on the Static 2000-R test, respondent's probability of recidivism placed him in the top 5% to 10% as compared to other sex offenders. As such, the jury may reasonably have disagreed with Dr. Brucker's interpretation of the substantially probable threshold but still agreed with much of the damaging testimony he provided. The determination of whether it is substantially probable that respondent will reoffend is one that must be made by the jury, not the expert. See *Bingham*, 2014 IL 115964, ¶ 35.

¶ 139 However, even focusing on Dr. Brucker's ultimate conclusion, the jury had reasonable bases to favor Dr. Brown's opinion. Though Dr. Brucker recognized that dynamic factors, such as the fact that respondent has never received treatment, may increase the probability of recidivism, he did not use these factors to increase his assessment of respondent's probability of recidivism. He explained that there was no structured way to do so; in his view, there was no way to know whether the dynamic factors would increase the probability of recidivism by 0.5% or by 20%. The jury may well have preferred Dr. Brown's emphasis on respondent's lack of

treatment and Dr. Brown's willingness to apply that factor to his assessment of respondent's probability of recidivism.

¶ 140 Respondent also makes too much of certain weaknesses in Dr. Brown's testimony. Respondent points to a strange moment in Dr. Brown's testimony, where Dr. Brown stated that he could predict with certainty which subjects will reoffend and which will not. This is unfair of respondent. At trial, when the statement was repeated to Dr. Brown, Dr. Brown replied, "I didn't say that." And, many other times in his testimony, Dr. Brown correctly stated his view that it was only a substantial probability that respondent would reoffend. Respondent also argues that Dr. Brown's approach was too "clinical," and clinical approaches have a predictive value that is little better than chance. We disagree that Dr. Brown used a clinical approach. Dr. Brown explained that he used an adjusted actuarial approach, meaning that he looked at actuarial assessment, but then considered dynamic factors that the actuarial tests had not been able to capture. Lastly, respondent complains that Dr. Brown should not have considered respondent's lack of victim empathy, because a study showed no correlation between lack of empathy and chances of recidivism. The jury may very well have considered this a strike against Dr. Brown's position, but, nevertheless, found his opinion to be the most reliable overall. Respondent had the opportunity to point out this weakness to the jury. It was for the jury to resolve apparent inconsistencies in the expert testimony. The perceived weaknesses in Dr. Brown's testimony did not require a finding in respondent's favor.

¶ 141 Finally, we note that the expert testimony was not the only evidence in this case. The jury also heard a stipulation concerning a six-year-old victim, and it heard testimony from three victims. Together, respondent's pattern of taking children to his horse farm, his refusal to accept responsibility for his actions, and the fact that he has never participated in treatment may have

reasonably compelled the jury to find that it was substantially probable that respondent would reoffend if released without treatment. There was sufficient evidence to find respondent a sexually dangerous person.

¶ 142 F. Posttrial Motion Citing *New*

¶ 143 Finally, respondent argues that the trial court erred in denying his motion for a new trial based on the supreme court's ruling in *New* (2014 IL 116306). Typically, a trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. *Ponto v. Levan*, 2012 IL App (2d) 110355, ¶ 61. However, where, as here, the question is whether the exercise of discretion was within the bounds of the law, our review is *de novo*. *People v. Williams*, 188 Ill. 2d 365, 369 (1999). For the reasons that follow, we agree with the trial court that *New* does not require a retrial.

¶ 144 *New* is not on-point. In *New*, the State petitioned to commit the respondent as a sexually violent person, based on a diagnosis of "paraphilia not otherwise specified, sexually attracted to adolescent males." *New*, 2014 IL 116306, ¶ 3. Psychologists publishing academic literature also refer to the condition as hebephilia. *Id*. ¶ 4. Two psychologists diagnosed the respondent with hebephilia and were permitted to testify to the condition without the court first conducting a *Frye* hearing. *Id*. ¶ 23; *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The jury found the respondent to be a sexually dangerous person, and the court committed him. *Id*. ¶ 22. However, the appellate and supreme courts remanded the cause, holding that the trial court was required to hold a *Frye* hearing to determine whether a diagnosis of hebephilia is a generally accepted diagnosis in the psychiatric and psychological communities, before the experts could testify to the condition. *Id*. ¶ ¶ 53-54.

¶ 145 In contrast, pedophilia, the condition respondent has, is an accepted diagnosis within the psychiatric and psychological communities. See, *e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997). Therefore, the experts could testify to respondent's pedophilia without a *Frye* hearing. Indeed, respondent does not seem to suggest that the instant case should be remanded for a *Frye* hearing.

¶ 146 Instead, respondent's argument seems to be an indirect challenge to the sufficiency of the evidence. That is, by citing to a case where the condition of hebephilia, or attraction to adolescents, was called into doubt as a basis to seek commitment, respondent indirectly challenges the relevance of his prior acts against adolescents. However, as we have already discussed, respondent's prior acts against adolescents are relevant to the question of whether respondent has a criminal propensity to commit a future sex offense, and there was sufficient evidence to support the jury's finding that respondent is a sexually dangerous person.

¶ 147 III. CONCLUSION

¶ 148 For the aforementioned reasons, we affirm the trial court's judgment.

¶ 149 Affirmed.