No.3–09–0561

Order filed January 11, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
	)	Will County, Illinois,
Plaintiff-Appellee,	)	
	)	
v.	)	No. 97–CF–2580
	)	
WARREN C. SNAPP, SR.,	)	Honorable
	)	Carla Alessio-Policandriotes,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice McDade concurred in part, dissented in part in the judgement.

ORDER

Held: The jury's determination that defendant remained a sexually dangerous person and was not suitable for conditional release was not against the manifest weight of the evidence. The trial court did not err by denying defendant's request for the appointment of an independent evaluator, and statements made by the prosecutor during closing argument did not prejudice defendant or shift the burden of proof to the defense.

Appellant Warren C. Snapp, Sr., filed an "Application for Discharge or Conditional

Release" from his civil commitment to the Department of Corrections (DOC), pursuant to section 9 of the Sexually Dangerous Persons Act (Act) (725 ILCS 205/9 (West 2008)), after being found sexually dangerous in 1999. Based on a jury's determination that defendant continued to be a sexually dangerous person, the court denied defendant's application and continued his commitment to DOC. We affirm.

BACKGROUND

Appellant Warren C. Snapp, Sr., was found to be a sexually dangerous person in March of 1999. On September 22, 2007, Snapp filed a *pro se* "Application for Discharge or Conditional Release" pursuant to section 9 of the Act. 725 ILCS 205/9 (West 2008). Snapp's appointed counsel filed an amended application for discharge on January 14, 2008. In that pleading, Snapp stated he had been committed to the Big Muddy Correctional Center (Big Muddy) after being found sexually dangerous in 1999. Snapp claimed that, as a result of the counseling and treatment he received since 1999, he was no longer a sexually dangerous person and was, now, an appropriate candidate for conditional release from detention.

According to the statutory requirements, the court ordered the director of DOC to prepare and file a socio-psychiatric report as to Snapp's current status with the court on or before March 13, 2008. Issues arose regarding whether the clerk sent notice to DOC and, therefore, the court specifically directed the State to send notice of the court's order to the DOC director to complete the socio-psychiatric evaluation. On April 14, 2008, the court ordered the director to complete the report by June 2, 2008, or appear on that date and show cause why the report had not been completed. On June 2, 2008, Mark Carich, PhD, a psychologist and the Public Service Director at Big Muddy, appeared in court and told the court the report could be completed by August 15,

2008.

Snapp filed a motion for an independent evaluator on June 16, 2008, due to DOC's delay in filing the socio-psychiatric report. On July 8, 2008, the court held a hearing on Snapp's motion, at which time Snapp's attorney acknowledged that he received the DOC, court-ordered report on July 7, 2008. The court ruled that Snapp was not entitled to the appointment of an independent evaluator under the circumstances. The jury trial on Snapp's application for discharge began on May 27, 2009.

Dr. Angeline Stanislaus

Dr. Angeline Stanislaus, M.D., a psychiatrist at Big Muddy, testified that she is part of a team that conducted Snapp's socio-psychiatric evaluation, along with Dr. Carich and Karen Spillman, a social worker at Big Muddy. In that capacity, Dr. Stanislaus reviewed Snapp's prior psychiatric reports and treatment records, investigative reports regarding Snapp's sexual offenses, and records containing Snapp's social history, sexual history, criminal history, and psychiatric history while in and out of DOC. Additionally, the team conducted a three-hour interview with Snapp on June 5, 2008.

Dr. Stanislaus discussed some of the details of this three-hour interview with Snapp, who was then 59 years old. She said the team asked Snapp to describe his prior sexual activities. Snapp told them he imitated sexual intercourse with a girl when he was six years old. Snapp engaged in sexual behavior with his prepubescent siblings, starting when they were 7 years old and continuing until his siblings were approximately 12 years old. These sexual relations with his siblings included having sexual intercourse with two of his sisters and two of his brothers

while they were between the ages of seven and twelve. Snapp also admitted molesting his prepubescent cousins when he was home from the Marine Corps. According to Dr. Stanislaus, prior psychiatric reports from 1974 showed Snapp stated that, while in the Marines, he also had homosexual experiences with boys, ages 10 to 15 years.

Snapp told the team that he was 22 years old when he became interested in a 14-year-old girl and her 12-year-old sister. He later married the 14-year-old when she reached 16 years of age and was with child. Both prior to and during the course of his marriage, Snapp engaged in ongoing sexual relations with his wife's 10-year-old brother.

Dr. Stanislaus reported that, in 1973, Snapp was charged with three counts of indecent liberties with a child and served four years in DOC for sexual misconduct. Snapp admitted the molestation occurred when he was instructing boys in karate classes and involved both kissing and oral sex with boys who were 10, 11, and 12 years of age. Snapp sent letters to these boys and their parents asking for their forgiveness and telling them he could not control his behavior.

Prior reports indicated that Snapp previously said, although charges were not filed, he also had sexual relations with two other karate students, aged 13 and 15 years. While released on parole in 1977 for the 1973 convictions, Snapp molested his eight year old niece, and his parole was revoked without separate charges being filed.

During the interview, Snapp denied any sexual molestation of any minors after 1977. Dr. Stanislaus said Snapp's records indicate that between 1982 and 1987, Snapp coached youth baseball. During this time frame, a boy on his youth baseball team accused Snapp of fondling him but no charges resulted from the incident. In 1991, Snapp was charged with fondling a player on Snapp's baseball team, but Stanislaus testified that Snapp denied that this incident

occurred. Snapp informed the evaluators that he pled guilty to that offense in 1992 to avoid getting a longer sentence. He served 22 months in DOC for that offense, participated in a sex offender treatment program while incarcerated, and was discharged in 1996.

According to Stanislaus, in 1997, Snapp was arrested for molesting his 10 year old nephew which was the basis for the initial commitment ordered by the court in 1999, after finding that Snapp was a sexually dangerous person. As a result, criminal charges were not filed. Snapp claimed, during the interview with the team, that his nephew lied about the sexual abuse and it never happened.

Dr. Stanislaus diagnosed Snapp as an "undifferentiated pedophile," meaning he has no preference between prepubescent boys or girls, with a secondary diagnosis of alcohol abuse, and a "borderline personality disorder not otherwise specified with narcissistic personality traits." Dr. Stanislaus stated that, since there is no cure for pedophilia, the goal of treatment and recovery means that a person has to learn to control his or her impulses. Dr. Stanislaus said that Snapp's narcissistic personality traits cause Snapp to believe he is superior to others and that rules applying to others do not apply to him. According to Stanislaus, this trait impedes progress in treatment.

Dr. Stanislaus testified, in her opinion, Snapp's participation in therapy has been superficial and his participation minimal. He refuses to discuss details of his admitted offenses and denies committing acts that resulted in criminal convictions following guilty pleas. Snapp claimed he made a pact with his siblings that he would not discuss the details of their molestation because he felt it would re-victimize them. Additionally, Dr. Stanislaus stated that, although Snapp participated regularly in treatment at Big Muddy, he did not work hard enough in his

existing groups to change the behaviors that caused him to sexually offend in the past. She stated that, in her opinion, Snapp had not reduced his propensity to re-offend. In her opinion, Snapp was not a candidate for conditional release because there was a substantial probability that he would engage in acts of sex offenses against children if released, and he had not made sufficient progress "where he could be safely managed in the community."

Dr. Steven Carich

Dr. Steven Carich testified that he has worked for DOC since 1985, and has been in charge of DOC's sexually dangerous persons program since 1993. Dr. Carich was part of the team that evaluated Snapp for the recovery hearing. According to Dr. Carich, Snapp has suffered from pedophilia, an attraction to prepubescent children and teenagers, since becoming an adult.

Dr. Carich expressed a strong disapproval of Snapp's decision to associate with a much younger sexually dangerous person confined at Big Muddy because this inmate fit Snapp's past victim type. According to Carich, "Snapp refers to taking him under his wing and so forth," which fits into a "power dynamic" for Snapp. Carich testified this young man looked "like he's about twelve at best and he acts like he's about five or six, maybe ten," When Dr. Carich suggested to Snapp that he not associate with this inmate, Snapp told Carich that he could hang around with anyone he wanted, and the staff could not stop him.

Dr. Carich described Snapp's response as a "control thinking error." Snapp also told Dr. Carich that Snapp could have sex with anyone he chose, including the doctor if he wanted. In his treatment, Dr. Carich said Snapp was inconsistent in showing empathy for his victims. Dr. Carich stated Snapp compensates for his inferiority issues by acting superior, grandiose, and by offending.

Dr. Carich described the two standardized tools or risk tests that were used as part of Snapp's evaluation, the STATIC-99 Tool and the Minnesota Sex Offender Screening Tool-Revised (MnSOS-R), which are both based on actuarial numbers for risk assessments. Dr. Carich said the STATIC-99 test used only "static" factors such as historic data which includes the number of victims, the number of convictions, the consequences of convictions, and other considerations, such as marriage, to reach a raw score. These scores never change because they are based on statistics and numbers relating to a person's offenses. Snapp's STATIC-99 score was a 6, which placed Snapp in a high risk category with a risk of re-conviction of 52 percent over 15 years and 45 percent over 10 years.

The MnSOS-R test uses static data to obtain an initial raw score, then dynamic or subjective factors are used to adjust the raw scores. In this test, Snapp scored in the low risk category where his likelihood to re-offend was 16 to 20 percent. Dr. Carich said the static tests scores are helpful but involve a general underestimation of the offender's probability of re-offending because the probability is determined by the offender's re-arrest and conviction statistics only, and do not consider sexual misconduct which does not involve re-arrest and subsequent conviction.

Dr. Carich referred to Dr. Abel's 1998 study to support Carich's point "that sex offenders commit much more offenses -- many more offenses that are not documented legally," and the risk probability statistics in this MnSOS-R test are derived from "re-arrest statistics." For example, Carich explained that Snapp's 1977 parole violation, resulting from the molestation of Snapp's eight year old niece, did not factor into Snapp's MnSOS-R score because the State did not file the underlying criminal charges following the parole violation. Dr. Carich also said that

this tool does not factor in chemical dependency which is also relevant to risk assessment.

Dr. Carich testified that these risk assessment tools are actuarial and "we have to look at the dynamic factors to clinically adjust the scores and that's what's emphasized in the literature." In Dr. Carich's opinion, Snapp had made some progress in therapy but not to the point where he was no longer a sexually dangerous person who could re-enter the community.

Sergeant Michael Klaich, Sr.

The State called Sergeant Michael Klaich, Sr., of the Joliet Police Department, as a witness. He testified that he investigated an allegation in 1992 where Snapp coached a youth baseball team and a baseball player accused Snapp of fondling him. The sergeant said he spoke to Snapp at that time. According to the officer, Snapp told him that Snapp had sexual thoughts about his players, and he would be thinking about sex with children forever.

Closing arguments

Snapp presented no evidence for the jury to consider. During closing arguments, Snapp's attorney argued that the State's own witnesses testified that the tests administered as part of treatment calculated defendant's likelihood of re-offending to be low. Based on the neutral actuarial information gathered by DOC, defense counsel argued:

> "The Department of Corrections gave Mr. Snapp this test. They reported the scores, albeit it inaccurately, in the report. This is their evidence. Their table, their numbers that show somebody that gets that score, 16 to 20 percent of the time might re-offend. Is that proof beyond a reasonable doubt? 16 to 20 percent?"

Counsel then urged the jury to conclude the State had not met its burden of proof by showing that Snapp "needs to stay where he is." Defense counsel went on to argue:

"The State has proven to you one thing in this case, that Mr. Snapp has been dangerous in the past. There is no question about it. We spent half an hour this afternoon[,] I believe it was[,] passing around those certified statements and convictions that show his past. And we haven't disputed any of that from day one. The State has done a marvelous job of proving what Mr. Snapp has done in the past.

But they have failed to prove what he will do or even what he is substantially likely to do in the future. That is what this trial is about. Not what he did four years ago or 30 years ago or 15 years ago. They failed to prove beyond a reasonable doubt that he needs to stay where he is.

Because they failed to meet that burden, the only finding you can make in this matter is in favor of Mr. Snapp."

The prosecutor's rebuttal argument included these remarks:

"Nobody seems to be arguing about the first three factors of the definition of a sexually dangerous person. We know he is a pedophile. We know he has been a pedophile for more than a year. The evidence has shown that the pedophilia that the defendant has suffered from his entire life is coupled with propensities toward the commission of sex offenses and that he has demonstrated acts of sexual molestation of children over and over again.

We have also shown you that it is substantially probable that this man will engage in sex offenses in the future if he is not confined. You know that because you had two expert witnesses who were subject to cross examination. And they could have been asked anything by Mr. Swanson about the conclusion, who told you that the

defendant has not sufficiently progressed in his treatment such that he should be released.

And I want to point out to you that these experts aren't knee jerk reactions about that. In fact, Dr. Carich either yesterday or this morning told you that he is making progress. You heard testimony that he is working through workbooks. But he is just not ready yet. That is the way it is. That is a slow process to change a lifetime of behavior. It can't happen over night. And it has to happen with extreme effort and desire to change on the part of the person who is trying to change.

Now, I want to point out to you in opening statements Mr. Swanson told you that the evidence would show you that the defendant has sufficiently progressed in his treatment such that you would find he should be released. Well, it didn't did it? There really is no testimony, no evidence whatsoever that has been presented to you that shows his progress and his treatment is such that he should be released on a conditional discharge or just released in general."

On May 28, 2009, the jury was instructed by the court to decide whether the evidence, presented by the State during the hearing, established beyond a reasonable doubt that Snapp remained a sexually dangerous person. The jury returned a verdict finding that Snapp was "still a sexually dangerous person." Based upon that verdict, the court issued an order of commitment. The court denied Snapp's posttrial motion, and Snapp filed a timely appeal.

ANALYSIS

Snapp raises three issues on appeal. First, Snapp claims the State did not establish beyond a reasonable doubt that Snapp remained a sexually dangerous person. Second, Snapp

contends the trial court erred by not appointing an independent evaluator for Snapp. Finally, Snapp argues the prosecutor's closing arguments improperly prejudiced Snapp and shifted the burden of proof to him. The State argues that no errors occurred, and this court should affirm the trial court's order.

Burden of Proof and Standard of Review

The Sexually Dangerous Persons Act dictates the procedures to follow in the case at bar. 725 ILCS 205/0.010 *et seq.* (West 2008). Effective January 1, 2006, the legislature amended section 9 of the Act expressly requiring the lesser burden of proof of clear and convincing evidence to be used when determining whether a person remains sexually dangerous and should not be discharged from commitment. 725 ILCS 205/9(b) (West 2008). Although the proper burden of proof at trial was clear and convincing evidence, the jury was instructed under the greater burden of proof of beyond a reasonable doubt. Applying that standard, the jury found that Snapp remained a sexually dangerous person beyond a reasonable doubt.

The standard of review for this court to apply is whether the jury's determination was against the manifest weight of the evidence. *In re Cornica J.*, 351 Ill. App. 3d 557, 570 (2004); *In re Shirley M.*, 368 Ill. App. 3d 1187, 1194 (2006). Applying the manifest weight standard, the jury's determination is given great deference because the jurors are in the best position to observe the conduct and demeanor of the parties and witnesses. Consequently, a reviewing court should not substitute its judgment regarding the credibility of witnesses, the weight to be given to the evidence, or the inferences to be drawn. *People v. Deleon*, 227 Ill. 2d 322, 332 (2008). To conclude that a decision is against the manifest weight of the evidence, the opposite result must be clearly evident or the decision must be unreasonable, arbitrary, and not based on the evidence

presented. *Deleon*, 227 Ill. 2d at 332; *Cornica J.,* 351 Ill. App. 3d at 570. Using either burden of proof, that is, proof beyond a reasonable doubt as applied by this jury or the lesser standard of clear and convincing, we conclude the jury's determination in this case was not contrary to the manifest weight of the evidence.

In the case at bar, the jury heard evidence that, during the interview with the team on June 5, 2008, Snapp denied any sexual molestation of any minors after 1977. Dr. Stanislaus informed the jury that in 1992, Snapp was charged with and pled guilty to fondling a player on Snapp's baseball team. According to Stanislaus' testimony, then, in 1997, Snapp was arrested for molesting his 10 year old nephew, but was not convicted because the State pursued sexually dangerous proceedings under the Act rather than criminal charges.

In addition, both Dr. Stanislaus and Dr. Carich detailed Snapp's history of sexual misconduct which did not result in criminal convictions, including multiple incidents of molestation involving his siblings, for the jury's consideration. Dr. Stanislaus testified that Snapp refused to discuss details of his admitted sexual abuse of his siblings because he felt it would re-victimize his siblings. Snapp also refused to discuss the details of other incidents with young relatives and other victims or simply denied committing the acts entirely.

Dr. Stanislaus testified that, as part of treatment, it was important for Snapp to open up about these details in order to gain the insight necessary to avoid similar situations. Based on his failure to acknowledge some of his previous sexual misconduct, Stanislaus concluded Snapp's voluntary participation in therapy had been superficial and not beneficial to him.

Dr. Carich informed the jury that he suggested to Snapp that Snapp should not associate with a certain inmate who seemed to fit the type of person that precipitated Snapp's inappropriate

sexual advances in the past. In response, Snapp told Carich that Snapp would "hang around" with anyone he wanted to associate with and the staff could not stop him. Snapp also told Dr. Carich that he (Snapp) could have sex with anyone he chose, including the doctor. Dr. Carich described Snapp's response as a "control thinking error."

Dr. Carich also advised the jury of Snapp's actuarial results based on scores from STATIC-99 and the MnSOS-R test. According to Carich, Snapp's STATIC-99 score placed Snapp in a high risk category. However, Snapp scored in the low risk category on the MnSOS-R test, where his likelihood to re-offend was 16 to 20 percent. Dr. Carich said the static actuarial numbers are helpful but underestimate the probability of re-offending because risk is calculated based on re-arrest and conviction statistics. Thus, according to Carich, even though Snapp molested his eight year old niece shortly after his release on parole for the 1973 indecent liberties convictions, the incident was not scored on the MnSOS-R because the State did not file separate criminal charges in 1977, after Snapp's parole was revoked due to the molestation.

In Dr. Carich's opinion, Snapp has made some progress in therapy but not to the point where he was no longer a sexually dangerous person who could safely re-enter the community. Similarly, Dr. Stanislaus testified that Snapp was not a candidate for conditional release because there was a substantial probability that he would commit sex offenses against children if released.

In this case, the jury was assigned the task to evaluate the testimony set out above. Although defendant's actuarial scores on the MnSOS-R test supported Snapp's contention that his likelihood to re-offend was low, Dr. Carich and Dr. Stanislaus both testified, based on their own separate opinions, Snapp had not improved enough to be considered recovered or suitable for conditional release. The jury evaluated this evidence and concluded the State proved Snapp

had not recovered beyond a reasonable doubt.

We conclude the jury's determination was not against the manifest weight of the evidence using either standard, proof beyond a reasonable doubt as instructed or the lesser burden of clear and convincing evidence required by statute.

Independent Evaluator

Snapp contends that the trial court erred when it did not appoint an independent evaluator to prepare the socio-psychiatric report for the court. Our supreme court has held that due process does not automatically entitle a person to appointment of an independent psychiatric evaluator upon seeking discharge under section 9 of the Act. *People v. Burns*, 209 Ill. 2d 551, 560 (2004); *People v. Trainor*, 196 Ill. 2d 318, 339, 341 (2001); *People v. Capoldi,* 37 Ill. 2d 11, 18-19 (1967). A person must demonstrate to the court that the Department experts are biased and prejudiced against him when requesting the appointment of an independent psychiatric expert (*Burns*, 209 Ill. 2d at 569). Here, Snapp has not included any facts in his pleading or presented any evidence during the hearing that would correlate DOC's delay in the filing of the report to his conclusory assertion that DOC's experts were biased or prejudiced against him. Accordingly, the trial court did not err by denying Snapp's request for the appointment of an independent evaluator.

Prosecutor's Statements

Snapp claims that the prosecutor made improper statements during closing arguments regarding Snapp's failure to present evidence or testify which implicated his right against self-incrimination, thereby shifting the burden of proof to Snapp. The State claims that the prosecutor's statements were not improper or, alternately, that if the statements were improper,

they did not result in substantial prejudice to defendant.

Prosecutors are given wide latitude during closing arguments and improper remarks are reversible error only when they result in substantial prejudice to the defendant, given the content and context of the language, its relationship to the evidence, and its effect on the defendant's right to a fair and impartial trial. *People v. Edgecombe*, 317 Ill. App. 3d 615, 620 (2000); *People v. Kliner*, 185 Ill. 2d 81, 151-52 (1998). When considering whether the prosecutor's rebuttal closing argument improperly shifted the burden of proof to the defense, we begin by carefully reviewing all the closing arguments in this case.

In part, Snapp's attorney conceded that the defense did not dispute Snapp was dangerous in the past "from day one." Then, Snapp's attorney stated:

> "The State has done a marvelous job of proving what Mr. Snapp has done in the past. But they have failed to prove what he will do or even what he is substantially likely to do in the future. That is what this trial is about. Not what he did four years ago or 30 years ago or 15 years ago. They failed to prove beyond a reasonable doubt that he needs to stay where he is."

Counsel then argued to the jury that the State's own actuarial evidence demonstrated defendant's likelihood of re-offending to be 16 to 20 percent. Based on the actuarial information, counsel asserted the statistics defeated the State's ability to prove that defendant had not recovered beyond a reasonable doubt.

In rebuttal, the prosecutor responded to defense counsel's arguments by stating:

> "Now, I want to point out to you in opening statements Mr. Swanson told you that the evidence would show you that the defendant has sufficiently

progressed in his treatment such that you would find he should be released. Well, it didn't, did it? There really is no testimony, no evidence whatsoever that had been presented that shows [Snapp's] progress and his treatment is such that he should be released on a conditional release or just released generally."

We construe this comment by the State as an acknowledgment that the *State's* evidence demonstrated progress by Snapp, but not *sufficient* progress to warrant conditional release because both experts agreed that there was a substantial probability Snapp would re-offend by committing other sex offenses in the future if he was not confined. After reviewing the record, we conclude these statements by the prosecutor during closing argument did not improperly prejudice defendant or shift the burden of proof to the defense. See *People v. Glasper*, 234 Ill. 2d 173, 212 (2009); *Edgecombe*, 317 Ill. App. 3d at 620-21.

CONCLUSION

Accordingly, the judgment of the Will County circuit court is affirmed.

Affirmed.

JUSTICE McDADE, concurring in part, and dissenting in part:

The majority has affirmed the trial court's denial of defendant's application for discharge or conditional release and order continuing defendant's commitment to DOC based on its findings that (a) the trial court did not err by not appointing an independent evaluator for defendant, (b) the State established beyond a reasonable doubt that defendant remains a sexually dangerous person, and (c) the prosecutor's closing arguments did not improperly prejudice defendant and shift the burden of proof. I agree with the majority's finding that the trial court did not err by not

appointing an independent evaluator and concur in that portion of the judgment. I find, however, that the State failed to prove beyond a reasonable doubt that defendant remains a sexually dangerous person and that the State's closing argument was improper and dissent from the majority's contrary conclusion.

First, the majority finds that the jury's determination, that the State proved--at minimum by clear and convincing evidence but also beyond a reasonable doubt--that defendant remains a sexually dangerous person, is not contrary to the manifest weight of the evidence. Slip order at 12. The majority conceded that "defendant's actuarial scores on the MnSOST-R test supported [defendant's] contention that his likelihood to re-offend was low" (slip order at 13), but nonetheless the jury could find that the manifest weight of the evidence was clear and convincing that defendant remained a sexually dangerous person. The evidence available to the jury to make that determination consists of those test scores, and the testimony and opinions of Drs. Stanislaus and Carich.

Defendant admitted the acts of sexual misconduct occurring before 1977 but denied that any had occurred since. The doctors' testimony, therefore, focused on an allegation against defendant of an act of sexual misconduct sometime between 1982 and 1987 (see slip order at 4, 13), a charge to which defendant pled guilty in 1992 (which defendant denied actually occurred) (see slip order at 5, 12), and an arrest for sexual misconduct in 1997 (slip op. at 5, 12). The doctors also testified concerning defendant's associations while confined, which did *not* involve sexual misconduct, defendant's conduct in therapy, and defendant's actuarial test results. The experts opined that defendant's "participation in therapy had been superficial and not beneficial to him" (slip order at 12) and, therefore, he "was not a candidate for conditional release" (slip order

at 13). Carich conceded that, while defendant "has made some progress in therapy" (slip order at 13), he has not progressed to the point in his therapy that "he [is] no longer a sexually dangerous person ***" (slip order at 13). Dr. Carich opined that "the static actuarial numbers *** underestimate the probability of re-offending." Slip order at 13-14.

To prove that defendant is still a sexually dangerous person, the State had to prove the following:

> "[A]n explicit finding that it is 'substantially probable' the person subject to the commitment proceeding will engage in the commission of sex offenses in the future if not confined." *People v. Masterson*, 207 Ill. 2d 305, 330 (2003).

Before this court the State conceded that the objective evidence alone was insufficient because "defendant's scores on the [tests] do not necessarily indicate a 'substantial probability' to re-offend." It argued, however, that "the dynamic factors considered by the doctors reveal defendant to be a high risk." The State argued to this court that most notable among those "dynamic" factors its experts relied on is "defendant's unwillingness to fully commit to the treatment he needs to help resolve his issue." Thus, the State's argument was that the evidence was clear and convincing that it is substantially probable that defendant will commit a sex offense in the future if he is not confined, essentially because Drs. Carich and Stanislaus opined that it is substantially probable.

I find the attack on the validity of the objective evidence, based on the tests' use of historic data, unwarranted and unpersuasive. The argument that it is illogical that the MnSOST-R views an individual at lower risk to re-offend when they have a history of offending for more than six

years, but higher when they have a criminal history of less than six years, is not persuasive. That argument is premised on accepting the experts' opinions, which are based in part on the objective tools, while simultaneously ignoring the evidence provided by the objective tools independent of the experts' opinions. I refuse to acquiesce in allowing the State to rely on the tests when it suits its needs and to ignore the test results when they run afoul of the State's position absent compelling evidence that the test lacks independent validity and requires interpretation by an "expert." The State points to no evidence to refute the tests' independent methodology.

Nor does the State provide evidence that the likelihood of re-offense after treatment is actually higher in subjects with a longer history of committing offenses. Rather, the State relies only on supposition to persuade this court to infer the test is flawed. I decline, because "the reviewing court must identify facts of record, and not suppositions, upon which each inference may reasonably be based.' [Citation.]" *People v. Martin*, 401 Ill. App. 3d 315, 322 (2010). The attack on the tests' alleged failure to account for future sexual offenses that may not lead to arrest or conviction is similarly flawed. The supreme court and the State's expert have both expressed confidence in the static tests as independent risk assessment tools. When the experts assessed the quality of the tests as risk assessment tools, that assessment necessarily included the tests' methodology and criteria. See *In re Commitment of Simons*, 213 Ill. 2d 523, 542 (2004).

In *Simons*, 213 Ill. 2d at 542, our supreme court noted that

> " '[r]espected researchers urge the "complete replacement of [clinical] practice with actuarial methods," and suggest that the use of clinical methods, where actuarial ones are available, would be "unethical." ' [Citations.]" *Simons*, 213 Ill. 2d at 542.

While the *Simons* court did not expressly adopt actuarial methods as the sole means of risk assessment, it did expressly find that "actuarial risk assessment has gained general acceptance in the psychological and psychiatric communities" (*Simons*, 213 Ill. 2d at 542), and that the broad acceptance was based in large part on the fact that " 'overall research has increasingly revealed that actuarial risk instruments *** exhibit more predictive reliability and validity than the clinical judgment of psychologists and psychiatrists alone' [and] [i]n a wide variety of medical and social science studies, actuarial assessments consistently meet or surpass the accuracy of clinical assessments.' [Citations.]" *Simons*, 213 Ill. 2d at 543.

Although the *Simons* court based its judgment on its finding that, "whether or not actuarial risk assessment is subject to *Frye,* there is no question that it is generally accepted by professionals who assess sexually violent offenders and therefore is perfectly admissible in a court of law" (*Simons*, 213 Ill. 2d at 535), the court relied on other courts' findings "that 'expert opinion testimony regarding propensity to commit acts of sexual violence in the future which is based in part on use of *** risk-assessment instruments' *satisfies* the *Frye* test." (Emphasis added.) *Simons*, 213 Ill. 2d at 539. Moreover, in Illinois, no scientific method will be admissible if it is of "dubious validity." See *In re Detention of Erbe,* 344 Ill. App. 3d 350, 367 (2003), citing *Donaldson v. Central Illinois Public Service Co.,* 199 Ill. 2d 63, 76-78 (2002). Indeed, it has been noted that "reliability is *** part of the *Frye* test itself." *Whiting v. Coultrip*, 324 Ill. App. 3d 161, 171 (2001) (McDade, J., specially concurring in part, dissenting in part); *Donaldson*, 199 Ill. 2d at 76-78. Finally, according to Carich's own testimony, the MnSOST-R is one of the most statistically valid sexual re-offense predictors available.

Illinois has recognized the independent value of the objective tools as evidence of risk

assessment. The State has failed to point this court to any independent findings, testimony, or evidence to counterbalance the wide acceptance the tests have gained. The only valid purpose of the State's argument that the tests are flawed that I can see is an attempt to bolster the weight of its experts' opinions. Carich's testimony attacks the validity of the tests themselves. Indeed, Carich's own opinion that a substantial probability exists that defendant will re-offend is primarily based on this attack on the validity of the objective actuarial tests rather than independent evidence of the likelihood that defendant will re-offend. Specifically, his complaint regarding scoring based on the length of time the subject has been offending goes to the validity of the test itself. Carich did not testify nor did the State produce actual evidence that clinical assessment of dynamic factors provides a more reliable risk assessment than the actuarial tests themselves. As demonstrated, the weight of authority is to the contrary.

Stanislaus' testimony attacked defendant's progress in and commitment to therapy. The question presented by the proceedings is not whether defendant has succeeded (or even enthusiastically participated) in therapy. Nor is it whether defendant was less than substantially likely to commit sex offenses in the future if not confined *because* he has progressed in therapy. Stanislaus offered no other bases for her opinion that there was a substantial probability defendant would reoffend if not confined. All of the testimony attacking defendant's involvement in therapy implicitly assumes that success in therapy is a necessary element of proof of *less* than a substantial probability of reoffending--which is not an element of proof in section 9(a) proceedings. Attacking defendant's progress in therapy is a misdirection in that it reflects a view that defendant had to prove his success in therapy to earn his release.

Again, the question presented by the proceedings is not whether defendant has succeeded

in therapy. The test results directly address the question presented by the proceedings. Thus, for all of the reasons I have discussed, the objective tests provide the evidence which most guides me in assessing whether the State met its burden of proof. I also believe that a substantial probability must be something "great in degree" above a "50% chance."

> "The 'substantially probable' standard was recently examined in *In re Detention of Bailey,* 317 Ill. App. 3d 1072 (2000). In *Bailey,* the reviewing court was presented with a certified question asking whether the Act violated substantive due process because the phrase 'substantial probability' was vague. [Citation.] As we have, the *Bailey* court found the Wisconsin Supreme Court's analysis in *Curiel* persuasive. [Citation.] The *Bailey* court concluded that 'substantially probable' is not vague and defined the phrase as 'much more likely than not.' [Citation.]" *In re Detention of Hayes*, 321 Ill. App. 3d 178, 189 (2001).

"More likely than not" means something greater than a 50% probability of occurrence. See *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 498 (2002) ("To meet the 'reasonably certain' standard, courts have generally required plaintiffs to prove that it is more likely than not (a greater than 50% chance) that the projected consequence will occur"). "Much" is defined as "great in quantity, amount, extent, or degree." http://www.merriam-webster.com/dictionary/much (visited September 16, 2010).

The test results undoubtedly reveal less than a "substantial" probability defendant will reoffend. The Static 99 results reveal, at most, a 52% probability that defendant will commit

sexual offenses in the future. In this case, "much" more likely than not should mean more than a 2% greater probability of occurrence. The MnSOST-R results show a likelihood of 16% that defendant will reoffend. The objective test results show that it is not “much” more likely than not that defendant will reoffend.

The majority has also concluded that certain "statements by the prosecutor *** did not improperly prejudice defendant or shift the burden of proof to the defense." Slip order at 16. The relevant portion of the comments is, again, as follows:

> "[The defense] told you that the evidence would show you that the defendant has sufficiently progressed in his treatment such that you would find he should be released. Well it didn’t, did it? There really is no testimony, no evidence whatsoever that had been presented that shows [defendant’s] progress and his treatment is such that he should be released on a conditional release or just released generally."

The majority finds that the above comments are simply "an acknowledgment that the *State’s* evidence demonstrate[s] progress by [defendant] but not *sufficient* progress [in therapy] to warrant conditional release ***." (Emphases in original.) Slip order at 16. I agree with the majority’s finding as to the substance of the State’s comment but disagree with its effect. The State is making the point that the evidence failed to show sufficient progress in therapy to warrant release. The inherent assumption in that statement is that anyone, defendant or State, had to prove that sufficient progress had been made in therapy to warrant release. The State’s argument improperly highlights an absence of proof which was not actually required from defendant or by

the proceedings. The effect of the statement is to create the impression that defendant had the burden to prove sufficient progress in therapy to justify his own release. That was not defendant's burden. Therefore, the State's improper comment was not harmless.

As demonstrated above, the State's entire theory of the case seemed to be that there was a lack of progress in therapy that would demonstrate that defendant has progressed to the point where it is less likely than not that he will commit sex offenses in the future if not confined. All of the State's evidence directed the jury to determine whether defendant had been successful in therapy. At the end of its case, the State told the jury that "[t]here really is no testimony, no evidence whatsoever that has been presented to you that shows his progress and his treatment is such that he should be released on a conditional release or just released generally." Defendant did not have the burden to prove that his therapy had been successful, or that he "should be released."

The supreme court explained the test this court must use to determine whether a prosecutor's argument violated a defendant's right to remain silent as follows:

> " 'The appropriate test for determining whether a defendant's right to remain silent has been violated is whether "the reference [was] intended or calculated to direct the attention of the jury to the defendant's neglect to avail himself of his legal right to testify." [Citations.] The prosecutor may comment on the uncontradicted nature of the State's case [citations], and, where motivated by a purpose of demonstrating the absence of any evidentiary basis for defense counsel's argument rather than a purpose of calling attention to the fact that defendant had not testified, such argument is

permissible.' [Citation.]." *People v. Smith*, 402 Ill. App. 3d 538, 543 (2010).

Defendant did not testify that he would not offend in the future or that he felt his therapy had been successful. Defendant had the right not to so testify and had no burden to do so. Nonetheless, the State's improper comments highlighted that fact. See *Smith*, 402 Ill. App. 3d at 543. As I have discussed, the comments also suggested to the jury that it needed to find that defendant proved that he had been successful in therapy.

> "It is reversible error for the prosecution to attempt to shift the burden of proof to the defense, notwithstanding the fact that the jury is properly instructed regarding the burden of proof. [Citation.] Given the cumulative effect of the prosecutor's comments and the nature of the evidence in this case, we believe that defendant was denied a fair trial." *People v. Dear*, 316 Ill. App. 3d 272, 276 (2000).

> " 'Included within th[e] restriction are statements that in effect distort the burden of proof by suggesting incorrectly what the jury must find in order to reach a certain verdict.' [Citation.]" *People v. Young*, 347 Ill. App. 3d 909, 925 (2004).

The State's comments were a culmination of its approach throughout the proceedings to shift the burden to defendant to prove that his therapy had succeeded to the point where he was not likely to reoffend. Were I to reach this issue, given the cumulative effect of the evidence at trial and the final argument suggesting that the jury find that defendant had not satisfied his non-

existent burden to prove that therapy had succeeded, I would find that the State's comments denied defendant a fair trial (*Dear*, 316 Ill. App. 3d at 276; *Young*, 347 Ill. App. 3d at 925), and reverse on those grounds alone.

Nonetheless, I would have no need to reach this issue because the State failed to satisfy its burden of proof. The precedent in this area provides guidance with regard to the proper weight to be afforded the type of evidence presented in this case, and the standard of proof the State must meet to satisfy its burden of proof. Our role in this appeal was to examine the evidence to determine whether the manifest weight of the evidence reveals a substantial probability that defendant will reoffend. In applying the evidence to that standard, I believe this court must afford greater weight to the actuarial evidence, based on *Simons*, 213 Ill. 2d at 542, and the evidence that the MnSOST-R is one of the most statistically valid predictors of sexual re-offense.

Applying these principles of weight and sufficiency of evidence, established by the court with regard to a section 9(a) application, I find that the manifest weigh of the evidence does not support finding that the State proved by clear and convincing evidence that it is much more likely than not that defendant will commit sex offenses in the future if not confined. I would reverse the circuit court of Will County's order.

Accordingly, I respectfully dissent on this issue.