2012 IL App (1st) 110732-U

SECOND DIVISION
October 30, 2012

No. 1-11-0732

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re COMMITMENT OF EUGENE BROWN,	)	Appeal from
	)	the Circuit Court
(The People of the State of Illinois,	)	of Cook County.
	)	
Petitioner-Appellee,	)	
	)	No. 03 CR 80004
v.	)	
	)	
Eugene Brown,	)	Honorable
	)	Vincent Gaughan,
Respondent-Appellant.)	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Harris and Justice Quinn concurred in the judgment.

O R D E R

¶ 1 *Held*: Respondent's mental health diagnosis was not inadmissible under *Frye v. United States*, 293 F.3d 1013 (D.C. Cir. 1923). The circuit court did not err in allowing the State's experts to present updated actuarial risk assessment scores at trial. There was sufficient evidence presented to support the jury's finding that respondent was a sexually violent person. Respondent forfeited his claims that the circuit court erred in preventing his attorney from questioning jurors during *voir dire* and that the State impermissibly shifted the burden to him to prove he was not a sexually violent person. Respondent's challenge to the constitutionality of the

Sexually Violent Persons Commitment Act (725 ILCS 207/1 *et seq.* (West 2000)) is procedurally defaulted.

¶ 2 Following a jury trial, respondent Eugene Brown was determined to be a sexually violent person under the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 *et seq*. (West 2000)) and was committed to the custody of the Department of Human Services (DHS). He now raises several issues on appeal, namely that: (1) his mental health diagnosis was inadmissible under *Frye v. United States*, 293 F.3d 1013 (D.C. Cir. 1923); (2) the circuit court erred in allowing the State's experts to update actuarial risk assessment scores immediately before or during trial; (3) the Act was unconstitutional as applied to respondent; (4) the State failed to prove beyond a reasonable doubt that respondent was a sexually violent person; (5) the circuit court erroneously prevented respondent's counsel from questioning prospective jurors during *voir dire*; and (6) the State impermissibly shifted the burden to respondent to prove that he was not a sexually violent person. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Brown had been convicted of five counts of aggravated criminal sexual assault and in May of 2003, was approaching the end of his prison sentence in the Illinois Department of Corrections. The State filed a petition to involuntarily commit Brown for treatment under the Act, alleging that his mental disorders created a substantial probability that he would engage in acts of sexual violence.

¶ 5 Brown's case proceeded to a jury trial in January of 2011. During *voir dire*, Brown's counsel was permitted to question prospective jurors individually. The following colloquy occurred:

"[BROWN'S COUNSEL]: Now, you heard Judge Gaughan talk to you about the presumption of innocence or the presumption of not being a sexually violent person in this case, correct?

[PROSPECTIVE JUROR]: Yes.

[BROWN'S COUNSEL]: Now, if you heard that Mr. Brown had previously been convicted of a sexually violent offense would you still be able to apply that presumption throughout these proceedings and presume that Mr. Brown is not a sexually violent person?

[PROSPECTIVE JUROR]: It would affect the way I perceived him but I would try to be objective.

[BROWN'S COUNSEL]: Could you listen to all the evidence and give Mr. Brown a fair trial?

[PROSPECTIVE JUROR]: Yes.

[BROWN'S COUNSEL]: Presume that he's not sexually violent –

[THE COURT]: You're jamming things together. There's a presumption that Mr. Brown is not a sexually violent person, do you have any qualms about that?

[PROSPECTIVE JUROR]: No.

[THE COURT]: Go ahead.

[BROWN'S COUNSEL]: Could you give him that presumption even though you know he's previously been convicted of sex crimes?

[PROSPECTIVE JUROR]: I'm sorry. I'm very confused right now.

[THE COURT]: It is. All right. [*sic*] Here's the whole thing, all right, as I asked people in the inner and outer part of the courtroom nobody has the presumption [*sic*] Mr. Brown is presumed to be not sexually violent. Now you're asking questions that are hypothetical and I'm not going to allow you to do it because what you're saying is if this happens and that happens, that doesn't go to fundamental fairness. All right. Do you have any qualms about the presumption that Mr. Brown as he sits there is presumed not to be a sexually violent person?

[PROSPECTIVE JUROR]: No, I do not.

[THE COURT]: As far as the individual evidence is concerned you're asking things, and I know there's no attempt to mislead but when you say if this is without – you know, you're just showing somebody about two percent of what is there and then asking them to draw a conclusion on that and that's not fair. All right? Not that you're not fair but the question itself isn't fair and it's confusing to the jurors. Move on.

[BROWN'S COUNSEL]: Okay."

¶ 6 At the start of trial, Brown's counsel objected to the use of updated actuarial risk assessment scores that the State's expert witness, Dr. Jacqueline Buck, provided a few days earlier. Brown's counsel stated that the score change indicated that he was now at a "higher level of risk [of recidivism] than [Buck] had previously indicated in her reports and her deposition." The State countered that Buck's "opinion is that based on these actuarial assessments[,] it is

substantially probable that Mr. Brown will commit a sexual offense in the future." The court concluded that Buck's opinion had stayed the same, but the calculations underlying it have changed, which is "different." The court then granted Brown's counsel "wide latitude on cross-examination [as to] why she changed her calculations but her opinion has stayed the same."

¶ 7 At trial, Buck testified as an expert in clinical psychology and sex offender evaluation and risk assessment. She testified that an offender under consideration for commitment under the Act must have been convicted of one or more specified sexually violent offenses, have a mental disorder that predisposes him to commit additional acts of sexual violence, and there must be a substantial probability that the offender will reoffend. She stated that mental health professionals review the files of inmates in the Illinois Department of Corrections to identify those that are candidates for commitment under the Act. The mental health professionals then interview those inmates. Those inmates that initially appear eligible for commitment can be detained pursuant to court order until a probable cause hearing occurs. The inmate then is tried before a judge or jury to determine whether he meets the standard for commitment under the Act.

¶ 8 Brown had been interviewed by another clinical psychologist, who initially identified Brown as a candidate for commitment. Buck attempted to conduct her own interview with Brown, but he exercised his right to refuse the interview. Buck then conducted her evaluation of Brown through a review of his criminal, psychiatric, and military records, which is a typical practice among experts in her field as long as it is documented that no personal interview occurred. She also reviewed Brown's interview with the other psychologist. Buck then prepared initial and supplemental reports concluding that Brown qualified for commitment under the Act

as a sexually violent person because his psychological disorders, left untreated, made it substantially probable that he would reoffend.

¶ 9 Buck then recounted the facts that formed the basis of her opinion. Brown began "peeping" at women through windows when he was 15 years old. He was arrested for peeping three times, but not charged. After his fourth arrest for peeping, which occurred after he had joined the Navy, Brown was convicted and sentenced to three years' probation. Seven days after that, he was arrested for peeping a fifth time, but his ship sailed before he was to appear in court.

¶ 10 Brown then returned to Chicago in 1988 after his discharge from the Navy. Between January and August of that year, Brown committed a series of home invasions, burglaries, and aggravated criminal sexual assaults. In the first offense, Brown placed a mirror under the door of a woman's apartment to see the layout and determine whether anyone was home. The door was unlocked; he entered the apartment and left almost immediately. The second time he entered that apartment, he watched the woman sleeping in her bed and then left. The third time, he again entered while the woman was asleep, but she woke up and confronted him. Brown ran away.

¶ 11 In the second offense, seven days later, Brown entered a different woman's apartment after first using a mirror to check it out. Brown hid in the woman's closet while she was in the shower. When she came out, Brown put a pillowcase over her head and tied her hands together with a scarf. He then sexually assaulted her orally, vaginally, and anally. He made the woman shower before he assaulted her again. He then stole money from the woman before he left.

¶ 12 About a month later, Brown entered a different woman's apartment after finding her door unlocked. He brought with him what Buck referred to as a "rape kit," which included a

pillowcase, a knife, and a length of towel. He put the pillowcase over the woman's head, gagged her with the towel, and tied her up with her own scarf before proceeding to orally, vaginally, and anally rape her several times.

¶ 13 Several months later, Brown broke into another woman's apartment building using a screwdriver. He followed the woman from the basement laundry room to her apartment. He ran up the stairs and listened at each floor to hear whether she was getting off the elevator. He waited on her floor until she returned to the laundry room. While she was in the basement, he entered her unlocked apartment, put one of her stockings over his face, and hid in her closet until she returned home. He later jumped out of the closet, gagged her, blindfolded her, tied her up, and raped her.

¶ 14 Three weeks after that, Brown committed his fifth attack. He again brought his "rape kit" to a woman's apartment and entered while she was in the shower. He bound and gagged the woman and repeatedly sexually assaulted her. He also burned her with a chemical hair remover. About a month later, he attacked a sixth woman after entering her apartment through a fire escape. On this occasion, after he raped her, Brown attempted to shave the woman's pubic hair with shaving cream and a razor he brought with him. He also took her into the shower to wash his semen off of her body. A week after that, he then entered a seventh woman's home, but he left after she started screaming.

¶ 15 Buck said that in all of these cases, Brown watched these women to determine their patterns and lifestyles. When he proceeded with an attack, he locked the door and completely undressed himself, which indicated to Buck that Brown "felt pretty confident that what he was

doing was not going to be interrupted."

¶ 16 Buck noted that Brown's attacks became increasingly violent. He began peeping at an early age, which would eventually aid him in finding women to attack. In the beginning, he used whatever he could find in the victims' apartments to facilitate the attack, but eventually began bringing his own "rape kit." He also increased the degree of pain and suffering he inflicted on his victims and spent more time with them. Brown reported having violent dreams about attacking women and would "enact" them the following day.

¶ 17 Buck testified that Brown pled guilty in all of the attacks mentioned above and was sentenced to 15 or 30 years' imprisonment in each case, which he served concurrently. Brown also told one of his doctors that he committed two additional rapes for which he had not been arrested. At his sentencing hearing, Brown told the court that he "had a problem for a long time and it's worse now," but if he could "get some treatment," he would be "fit for society." When he was first incarcerated, Brown participated in some group sex offender treatment sessions, but refused to participate in an inpatient intensive treatment program. He has not participated in any sex offender treatment since 1999, despite its availability. Since 2003, Brown has been in a DHS treatment and detention facility that exclusively provides sex offender treatment, but he has refused to participate.

¶ 18 Buck testified that based in part on the details of his sexual assaults, she diagnosed him as having several mental disorders recognized by the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV, TR), the authoritative reference manual in the field of clinical psychology. The first disorder was paraphilia not otherwise specified (NOS).

She explained that paraphilia is a subtype of a sexual disorder. Although there are more than 100 known paraphilias, the DSM-IV, TR contains specific diagnoses for just 10 of them. The remaining paraphilias are categorized as paraphilia NOS diagnoses. A paraphilia NOS diagnosis requires that the patient have repeated and intense sexually-arousing thoughts, urges, or behaviors that involve a non-consenting person or child; that the patient engage in such sexual activities or be unable to function in society because of the sexual thoughts and arousal; and that the patient is at least 16 years old.

¶ 19 Buck also explained that a paraphilia NOS diagnosis must be further refined by the use of qualifiers. She refined Brown's diagnosis by including three qualifiers: (1) "sexually attracted to non-consenting females"; (2) "exclusive type," meaning Brown had only been involved with non-consenting women and had never been in a consenting sexual relationship with a woman; and (3) "sadistic traits," which is illustrated by the fact that Brown subjected his victims to physical or emotional pain and humiliation.

¶ 20 Buck also diagnosed Brown with a personality disorder NOS with anti-social and narcissistic traits. Brown's repeated lawbreaking, his disregard for the victims' safety and feelings, and lying were all examples of Brown's anti-social traits. As to the narcissistic traits, Brown admitted he wanted the perfect sexual relationship marked by power and control. Finally, Buck diagnosed Brown with voyeurism, or peeping.

¶ 21 Buck concluded that Brown's mental disorders of paraphilia NOS, non-consenting females and voyeurism mean that he is predisposed to commit acts of sexual violence. She stated that completing attacks on non-consenting women satisfies his sexual urges and, because

he has never had a normal sexual experience, he requires intensive treatment to manage his dysfunctional urges.

¶ 22 Buck further concluded that it was substantially probable that Brown would commit another sexually violent offense in the future. She based that conclusion on the results of actuarial risk assessment tools that assess the likelihood that Brown will reoffend. Buck expressed her preference for the original version of the Static-99 assessment tool, as opposed to the revised version, based on the quality of the research subjects and length of time that the Static-99 has been in use. Brown's score on the Static-99 was "three times higher than the average sex offender," indicating that he was at a high risk to commit a future act of sexual violence.

¶ 23 Buck also used the original version of the Minnesota Sex Offender Screening Tool (MnSOST). Brown's score on the MnSOST indicated that he shared characteristics with a group of people of whom 63% reoffended. Buck testified that when she was preparing her trial testimony, she realized she made a mistake when initially scoring Brown on the MnSOST. After rescoring the MnSOST, Brown received a higher score that increased the likelihood that he would reoffend.

¶ 24 Buck also administered the Sex Offender Risk Appraisal Guide (SORAG). She explained that while other risk assessment tools were directed at offenders who committed violent crimes generally, SORAG specifically focused on sexually violent crimes. She stated that it was a well-researched tool and that she did not have any concerns about using it. Buck also tested Brown using the Psychopathy Check List (PCL), which is a personality test. His score on

this test, while high, indicated that he could still benefit from treatment.

¶ 25 On cross-examination, Buck acknowledged that some members of the psychiatric community do not agree that paraphilia NOS is a valid diagnosis. She was also cross-examined about the updated MnSOST score she gave Brown. She previously gave Brown a score of 7, which put him in a category of moderate risk to reoffend. Brown's updated score of 11 indicated a higher risk of reoffending.

¶ 26 The next day, Brown's counsel again objected to the State's production of updated actuarial risk assessment scores hours before the State's other expert, Dr. Robert Brucker, Jr., was scheduled to testify. The court questioned Brucker outside the presence of the jury. Brucker said that while preparing for his testimony the night before, he discovered some information in his files that affected the risk assessment scores he had previously calculated for Brown. Brucker told the court that the changes to the risk assessment did not change his ultimate opinion that Brown was a sexually violent person. The court then admonished the State for the last-minute change and again gave Brown's counsel "wide latitude" to cross-examine Brucker on his and the State's "methodology of preparing for trial, that this is a 2003 case and they don't do it until the night before."

¶ 27 Brucker then testified that he also performed an evaluation of Brown based only on records and documents after Brown declined to participate in a personal interview. Based on his evaluation, he diagnosed Brown with voyeurism and paraphilia NOS, sexually attracted to non-consenting adult females. Brucker testified that he arrived at his diagnoses in much the same way that Buck described: he reviewed Brown's prison and DHS records and the circumstances of

Brown's convictions. He began by discussing Brown's early peeping behaviors and recounted the increasingly violent nature of each successive assault for which Brown was convicted.

¶ 28 Brucker also discussed the actuarial risk assessment tools that he used to determine the likelihood that Brown would reoffend. He testified that risk assessment tools in general were developed in an effort to standardize psychologists' judgments about whether a person would reoffend. Brucker evaluated Brown using the original Static-99 assessment tool and the revised MnSOST-R assessment tool. He explained that he recently updated the scores he gave Brown on both of these instruments because he received more information about Brown's adolescent behavior that he was able to include in the analysis. Brown's scored increased to a 6 on the Static-99, which indicates that he is at a high risk to reoffend. On the MnSOST-R tool, Brown's score increased from a 7 to a 9, which moved him from a moderate-risk category to a high-risk category.

¶ 29 Brucker also provided his ultimate conclusion that because of Brown's mental disorders and his scores on the risk assessment tools, it is substantially probable, or more likely than not, that Brown will engage in future acts of sexual violence. He testified that despite having updated Brown's scores on the actuarial risk assessment tools, he has not changed his opinion with respect to that ultimate conclusion.

¶ 30 Brown then called his expert clinical psychologist, Erwin Baukus, to testify. Baukus conducted two personal interviews with Brown. He characterized Brown as intelligent, neatly groomed, and articulate. He also stated that Brown was an "exemplary" prisoner who was released after having served half of his sentence.

¶ 31 Baukus testified that he diagnosed Brown with paraphilia NOS, sexually attracted to non-consenting female adults, as Buck and Brucker did. He nevertheless referred to the paraphilia NOS diagnosis as "not very specific" and a "wastebasket category" that is used when there is no other adequate diagnosis available. Baukus also noted Brown's history of voyeurism. Baukus testified that Brown participated in sex offender treatment programs for eight years while in custody, but had never completed any program. Baukus also admitted that he is not familiar with the treatment protocol for sex offenders or what type of treatment Brown received.

¶ 32 Baukus also testified that he had no opinion as to whether the psychiatric diagnosis would predispose Brown to committing future acts of sexual violence, or whether he believed Brown to be a sexually violent person. He explained that his evaluation of Brown was based in part on historical data and some of the events he reviewed took place over 20 years earlier. For that reason, Baukus testified that he could not provide a valid assessment about Brown's risk of reoffending and that doing so would be akin to using a "Ouija board." Nevertheless, on cross-examination, Baukus admitted that "the best predictor of future behavior is past behavior."

¶ 33 Baukus then specifically criticized the use of the Static-99 to predict whether Brown would reoffend because it was created using data from white prisoners in the Canadian prison system, whereas Brown is African-American and governed by the American legal system. However, on cross-examination, Baukus admitted that that particular criticism had been "nullified." Nevertheless, Baukus admitted that he did perform a Static-99 assessment of Brown and his score was a 5, placing him in the moderate-to-high risk category. He also generally agreed that actuarial risk assessment tools are useful in predicting future behavior and are

"superior" to clinical judgment alone.

¶ 34 Following closing arguments, the jury returned a verdict finding Brown to be a sexually violent person and he was remanded to DHS custody. Brown filed a timely posttrial motion, which the circuit court denied.

¶ 35 ANALYSIS

¶ 36 We first must address the State's contention that two of the issues raised by Brown in his opening brief on appeal have been forfeited. To preserve an issue for review, a party must have made a contemporaneous objection at trial and also raised the issue in a posttrial motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Failure to do so results in forfeiture of appellate review. *Hillier*, 237 Ill. 2d at 545.

¶ 37 The State first contends that Brown forfeited the argument that the circuit court improperly prevented his counsel from questioning potential jurors during *voir dire*. We agree. During *voir dire*, Brown's counsel asked a potential juror whether she could honor the presumption that Brown is not a sexually violent person even though he had been previously convicted of a sex crime and she answered affirmatively. Counsel attempted to ask the same question again but worded differently, which caused the juror to respond, "I'm sorry. I'm very confused right now." The court then intervened and admonished counsel, instructing counsel to "[m]ove on," to which counsel replied, "[o]kay." Counsel did not attempt to object to the court's intervention or argue that his questions were not hypothetical or confusing. Counsel then "moved on" and began questioning the juror on a different topic altogether. Counsel made no contemporaneous objection at the time of the alleged error and, thus, failed to preserve the issue

for review on appeal. *Hillier*, 237 Ill. 2d at 545. Nor did Brown seek review of the issue notwithstanding forfeiture in his reply brief; consequently, Brown has forfeited any argument for plain error review. *Hillier*, 237 Ill. 2d at 545.

¶ 38 We also agree that Brown forfeited the argument that the State improperly shifted the burden of proof to him to demonstrate that he was not a sexually violent person. Brown provides five record citations which purport to show that his counsel objected to testimony establishing that Brown exercised his right to not participate in sex offender treatment while in DHS custody. On the contrary, in three of the instances cited, Brown's counsel failed to object during the State's expert witnesses' testimony. As stated above, absent a timely objection, the issue is forfeited on appeal. *Hillier*, 237 Ill. 2d at 545; see also *In re Detention of Ehrlich*, 2012 IL App (1st) 102300, ¶ 67.

¶ 39 In the two other instances Brown directs us to, his counsel objected generally when similar testimony was offered, but failed to provide a basis for the objection or make an argument in support of his objection. To preserve an issue for review, objections to the admission of evidence must specifically identify the testimony considered objectionable and identify the objectionable features of that testimony. *People v. Wilson*, 2012 IL App (1st) 101038, ¶ 34. A general objection is insufficient to preserve an issue for review. *Wilson*, 2012 IL App (1st) 101038, ¶ 34. Consequently, the issue is forfeited on this basis as well.

¶ 40 Brown also argues that the Act is unconstitutional as applied to him, specifically, that he was denied due process and equal protection of the laws. He complains generally that although the Act states that commitment proceedings are civil in nature, the proceedings in Cook County

are administered on the criminal docket and physically take place in the criminal courts building, whereas the commitment proceedings are administered on the chancery docket in other Illinois counties. Brown then presented United States Supreme Court cases that caution courts to ensure that sufficient expert medical testimony is presented to support a civil commitment. He then concludes, without more, that

> "It is a denial of equal protection of the law when one respondent is afforded completely different treatment (for example, being assigned to civil judges as opposed to criminal judges) over another merely based on the county where the proceedings take place. The application of the Act in this case was unconstitutional."

¶ 41 However, he has provided us with no legal framework to properly analyze this issue and we decline to address it. Pursuant to Illinois Supreme Court Rule 341(e)(7), appellants must present fully-developed arguments with adequate legal and factual support. Absent that, the issue is procedurally defaulted.[1] *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 493 (2002). A constitutional challenge to a statute based on equal protection grounds is a complex, multi-layered analysis. *People v. Masterson*, 2011 IL 110072, ¶¶ 23-25. It is the challenging party's burden to prove the statute's invalidity. *Masterson*, 2011 IL 110072, ¶ 23. In light of that burden, and the strong presumption that a legislative enactment is constitutional, we will not

[1] Although *Dillon* uses the term "waiver," we now understand that "waiver implies a knowing relinquishment of a right, whereas procedural default refers to the failure to preserve an issue for later appellate review." (Internal quotation marks omitted.) *People v. Whitfield*, 217 Ill. 2d 177, 187 (2005).

undertake an analysis of this issue when Brown has not met his initial burden to comply with the appellate rules. *Masterson*, 2011 IL 110072, ¶ 23. Thus, the issue is procedurally defaulted. See *Dillon*, 199 Ill. 2d at 493.

¶ 42 Turning to the issues that are preserved for review, we first address Brown's argument that the circuit court erred in permitting the State's experts to testify that they diagnosed him with paraphilia NOS because that diagnosis is not based on generally accepted scientific principles, in violation of *Frye v. United States*, 293 F. 1013 (D.C. Cir, 1923). He raised that issue in a motion *in limine*, which the circuit court denied without providing comment or rationale. Our review of the record also reveals that it contains no corresponding transcript of the hearing at which the issue was discussed.

¶ 43 Nevertheless, our standard of review of the denial of a motion *in limine* based on a *Frye* issue is *de novo*. *In re Commitment of Simons*, 213 Ill. 2d 523, 531 (2004). Under *Frye*, "scientific evidence is admissible at trial only if the methodology or scientific principle upon which the opinion is based is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.' " *Simons*, 213 Ill. 2d at 530 (quoting *Frye*, 293 F. at 1014). That is, an expert's opinion must be based on a scientific methodology that is reasonably relied upon by experts in the relevant field, but need not be accepted by all or even most experts in that field. *Simons*, 213 Ill. 2d at 530. The overarching goal in a *Frye* analysis is to "determine the existence, or nonexistence, of general consensus in the relevant scientific community regarding the reliability" of a challenged technique. *Simons*, 213 Ill. 2d at 532. Thus, our focus " 'is primarily on counting scientists' votes, rather than on verifying the soundness of a scientific

conclusion.' " *Simons*, 213 Ill. 2d at 532 (quoting *People v. Miller*, 173 Ill. 2d 167, 205 (1996) (McMorrow, J., concurring) (quoting *Jones v. United States*, 548 A.2d 35, 42 (D.C. App. 1988))). Significantly, however, the *Frye* test applies only to"new" or "novel" scientific methodologies. *Simons*, 213 Ill. 2d at 530.

¶ 44 In his motion *in limine* and in his postrial motion below, Brown sought to prevent the State's experts from testifying that he suffered from the "alleged" paraphilia NOS diagnosis, which he argued is "a diagnosis not specifically recognized in the DSM-IV[, TR] and [over] which substantial controversy exists." The State responded that paraphilia NOS is a recognized diagnosis located in subcategory 302.9 of the DSM-IV, TR, which is the authoritative text of psychiatric and psychological diagnoses. On appeal, Brown now concedes that paraphilia NOS is a DSM-IV, TR diagnosis, but focuses his criticism specifically on the "non-consenting females" qualifier, arguing that the diagnosis of "paraphilia NOS non-consenting diagnosis" is "new and novel and there is controversy about whether it is even legitimate and generally accepted."

¶ 45 Even if we generously read Brown's argument in the court below to have included this refined attack on the qualifier, we still reject his argument that the diagnosis was new and novel and subject to a *Frye* analysis. Buck explained on cross-examination that the qualifier is part of the diagnosis. She testified that the DSM-IV, TR requires a diagnostician to select from among 100 or more listed qualifiers, specifically the "non-consenting females" designation in this case, to apply as part of a paraphilia NOS diagnosis. Although Buck conceded that some psychologists do not recognize paraphilia NOS as a "legitimate" diagnosis, there need not be

unanimity among members of the scientific community about the legitimacy of the challenged technique. *Simons*, 213 Ill. 2d at 530. However, we note the irony of Brown's argument in light of the fact that his own expert diagnosed him with the same disorder he now challenges. Nevertheless, it is not our province to weigh in on the validity of a scientific conclusion. *Simons*, 213 Ill. 2d at 532. We are satisfied that the inclusion of the diagnosis in the DSM-IV, TR indicates that it is a "legitimate" diagnosis. Thus, we cannot agree that Brown's diagnosis is new and novel, which is a threshold consideration in deciding whether a *Frye* analysis is warranted. See *Simons*, 213 Ill. 2d at 530.

¶ 46 For that reason, we also find Brown's reliance on *People v. Shanahan*, 323 Ill. App. 3d 835 (2001) to be misplaced. Brown cites to *dicta* contained in *Shanahan* for the legal proposition that a psychiatric diagnosis can nevertheless be the subject of a *Frye* analysis. *Shanahan*, 323 Ill. App. 3d at 838. That misstatement of our opinion in *Shanahan* is fatal to Brown's argument. Unlike Brown's diagnosis, the condition at issue in *Shanahan* – alternately referred to as "battered child syndrome" or "battered victim syndrome" or "post-traumatic stress syndrome" – was not an actual psychiatric diagnosis contained in the DSM-IV, TR. *Shanahan*, 323 Ill. App. 3d at 837 (indeed, the defendant's argument relied on his contention that the syndrome was "analogous" to battered woman syndrome, but involved a differently-named victim).

¶ 47 Additionally, our holding in *Shanahan* was that the court abused its discretion in denying the defendant's request for a continuance at trial for the purpose of conducting a *voir dire* examination of his expert. *Shanahan*, 323 Ill. App. 3d at 837. Beyond that, our reference to

Frye followed layers of conjecture about what that examination might contain. *Shanahan*, 323 Ill. App. 3d at 837-38. Thus, we disagree with Brown's contention that *Shanahan* required the circuit court to conduct a *Frye* hearing in this case.

¶ 48 We also reject Brown's attempt to equate the "paraphilia NOS, non-consenting females" diagnosis with "paraphilic coercive disorder," which both parties' experts acknowledged was a new diagnosis proposed and rejected for inclusion in a forthcoming edition of the DSM. Although the experts all agreed that paraphilic coercive disorder relates to a sexual disorder involving non-consensual sex with an unwilling victim, that is not what Brown was diagnosed with and its mention in this context is unpersuasive.

¶ 49 Brown next argues that the circuit court erred in allowing Buck and Brucker to testify about updated actuarial risk assessment scores that the State tendered to him shortly before the experts took the stand. The State tendered Buck's updated scores a few days before her trial testimony and tendered Brucker's updated scores a few hours before his testimony. Brown contends that the State violated Illinois Supreme Court Rule 213 and that the experts' testimony should have been barred.

¶ 50 We review the admission of evidence pursuant to Rule 213 for an abuse of discretion. *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 847 (2010). That is, we will only reverse a trial court's ruling if it appears that no reasonable person would agree with the action taken by the trial court. *Wilbourn*, 398 Ill. App. 3d at 848. Furthermore, even if evidence is wrongly admitted, a party is only entitled to a new trial if he can demonstrate that he was substantially prejudiced by the error. *Wilbourn*, 398 Ill. App. 3d at 848.

¶ 51 Here, we cannot say that the court abused its discretion in permitting the experts to testify about the updated risk assessment scores indicating Brown was at a higher risk to reoffend. The court correctly concluded that the experts were not providing new opinions, as Brown claims, but rather, they were updating previously-disclosed scores that were part of the basis for their ultimate opinions. See *In re Detention of Hauge*, 349 Ill. App. 3d 283, 286 (2004). In *Hauge*, we held that as with an expert's opinions, actuarial risk assessment tools are "useful to the trier of fact, and [are] likewise subject to attack, but only as support for the expert's opinion," thus differentiating the assessment tools from the opinion itself. *Hauge*, 349 Ill. App. 3d at 286. Furthermore, we held that "cross-examination and rebuttal witnesses are the proper method to attack the expert's reliance upon the [actuarial risk assessment] instruments in question in the formation of his or her opinion." *Hauge*, 349 Ill. App. 3d at 286.

¶ 52 To that end, the circuit court in this case sharply admonished the State for its admittedly late disclosure of the updated scores and permitted Brown "wide latitude" to cross-examine the experts on the updated scores and the State's "methodology of preparing for trial" in light of the fact that "this is a 2003 case and they didn't do it until the night before." We cannot say that no reasonable person would have done the same; thus, the court did not abuse its discretion. See *Wilbourn*, 398 Ill. App. 3d at 848; *Hauge*, 349 Ill. App. 3d at 286.

¶ 53 Finally, Brown contends that the State presented insufficient evidence to sustain the verdict that he is a sexually violent person. The State has the burden of proving beyond a reasonable doubt that Brown: (1) has been convicted of a sexually violent offense; and (2) is dangerous because he suffers from a mental disorder that makes it substantially probable that he

will engage in acts of sexual violence. 725 ILCS 207/5(f) (West 2008); 725 ILCS 207/35(d)(1) (West 2008). On review, we must determine "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find the elements proved beyond a reasonable doubt." *In re Detention of Ehrlich*, 2012 IL App (1st) 102300, ¶ 72 (quoting *In re Detention of Erbe*, 344 Ill. App. 3d 350, 373 (2003)).

¶ 54 We find that the State has met its burden. First, Brown stipulated to the State's presentation of his five certified prior convictions for aggravated criminal sexual assault. Second, the State presented two expert witnesses who testified that Brown suffered from paraphilia NOS, non-consenting female, as did Brown's own expert. As Buck explained, and Brucker agreed, that disorder predisposes Brown to commit acts of sexual violence. Moreover, Buck and Brucker both testified that based on Brown's mental disorder as well as the actuarial risk assessment scores, it is substantially probable that Brown will engage in future acts of sexual violence. Although Brown's counsel cross-examined the experts extensively, we must view their testimony in the light most favorable to the State. Given that perspective, we conclude that any rational trier of fact could find the elements proved beyond a reasonable doubt. See *In re Detention of Lieberman*, 379 Ill. App. 585, 601-03 (2007).

¶ 55 CONCLUSION

¶ 56 For all of the foregoing reasons, we affirm the determination that Brown is a sexually violent person.

¶ 57 Affirmed.