2016 IL App (1st) 130795-U

SIXTH DIVISION
March 31, 2016

No. 1-13-0795

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

In Re: DETENTION OF HAROLD POWELL,	)	Appeal from the Circuit Court of Cook County.
(The People of the State of Illinois,	)	
Petitioner-Appellee,	)	
v.	)	No. 00 CR 80003
Harold Powell,	)	Honorable Timothy Joyce,
Respondent-Appellant).	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Rochford and Justice Delort concurred in the judgment.

O R D E R

¶ 1 *Held*: This court affirmed both the jury's verdict finding the respondent to be a sexually violent person and the trial court's determination that the respondent be committed to the

Department of Human Services. In affirming the jury verdict, we determined the following: (1) the respondent was not entitled to the constitutional protections contained in section 35(b) prior to its amendment in 2001 on *ex post facto* grounds; (2) the respondent was not entitled to counsel prior to the filing of the petition to have him declared a sexually violent person; (3) the respondent's counsel was not ineffective for stipulating to the contents of the petition; (4) the respondent did not preserve his right to a speedy trial; (5) the respondent's retrial after a mistrial was not barred by double jeopardy; (6) the respondent failed to make a *prima facie* showing of a *Batson* violation; (7) the State's use of the respondent's out-of-state convictions was proper; (8) the State's expert witnesses' testimony relating facts contained in the respondent's prison disciplinary reports and criminal history was proper as a basis for their opinions, and the State did not argue those facts as substantive evidence; (9) the admission of testimony by the State's expert witness interpreting the Act was error, but the error did not require reversal since there was no prejudice to the respondent, and the error did not affect the jury's verdict; (10) actuarial tests to determine the risk of recidivism are generally accepted by the experts in the field, and it was the jury's function to determine the weight to be given the evidence from the testing; (11) the State's expert witnesses were properly permitted to conduct evaluations and testify; (12) the respondent's failure to comply with the supreme court rules forfeited any error in the denial of his request to submit his special interrogatories to the jury; (13) the State's verdict form did not improperly shift the burden of proof to the respondent; and (14) the trial court's failure to hold a separate dispositional hearing did not require the vacation of the disposition order.

¶ 2 A jury found the respondent, Harold Powell, to be a sexually violent person under the Sexually Violent Persons Commitment Act (the Act) (725 ILCS 207/1 *et seq*. (West 2012)). Immediately following the verdict, the trial court committed the respondent to the Department of Human Services (DHS) for care and treatment.

¶ 3 The respondent appeals contending that: (1) application of the 2001 amendment to section 35(b) of the Act in his case violated the constitutional prohibition against *ex post facto* laws; (2) he was denied his right to counsel; (3) he was denied the effective assistance of counsel; (4) he was denied his speedy trial rights; (5) the State lacked authority to try him a second time; (6) the State's use of its preemptory challenges violated *Batson*; (7) the State's use of the respondent's out-of-state convictions was improper; (8) the State's expert witnesses' reliance on the respondent's prison incident and disciplinary reports and their use by the State as substantive evidence was improper; (9) the State's expert witness's testimony interpreting

the Act was improper; (10) the State failed to establish a proper foundation for its expert witnesses' testimony as the use of various actuarial instruments; (11) the State's substitution of its expert witnesses violated the respondent's sixth amendment rights; (12) the trial court's refusal to give the respondent's special interrogatories to the jury was error; (13) the State's verdict form, which was given to the jury, improperly shifted the burden of proof to the respondent; and (14) he was denied his statutory right to a dispositional hearing. We affirm the judgment of the trial court.

¶ 4 BACKGROUND

¶ 5 On September 25, 2000, pursuant to the Act, the State filed a petition to commit the respondent as a sexually violent person. The petition set forth the respondent's history of convictions in Tennessee and Illinois for sexually violent offenses and his disciplinary record for acts of violence while incarcerated. The petition alleged that the respondent refused to participate in sexual offender treatment and refused to take responsibility for any of the sexual offenses of which he was convicted. The petition further alleged that the respondent suffered from mental disorders and that as a result of these disorders, there was a substantial possibility that he would continue to engage in acts of sexual violence. The petition further alleged that actuarial testing placed the respondent at a high risk to reoffend.

¶ 6 Based on the allegations in the petition and the fact that the respondent was scheduled for entry into mandatory supervised release on September 30, 2000, the State requested that the respondent be committed to the DHS for control, care and treatment until he was no longer a sexually violent person. The petition for commitment was supported by certified copies of the respondent's Illinois and Tennessee convictions and a report prepared by Dr. Agnes

Jonas, the DOC evaluator. Based on her psychological evaluation of the respondent, Dr. Jonas recommended the respondent for commitment in accordance with the Act.

¶ 7 Following a hearing on October 25, 2000, the trial court found that there was probable cause to believe that the respondent was subject to commitment under the Act. The respondent filed a motion to dismiss the petition on the grounds that it had been filed more than 90 days prior to his scheduled entry into the MSR. See 725 ILCS 207/15(b-5)(1) (West 2000). The trial court denied the motion to dismiss, but this court reversed. See *In re Powell*, 344 Ill. App. 3d 97 (2003). In 2005, the supreme court reversed this court's decision and affirmed the trial court's denial of the respondent's motion to dismiss the petition. *In re Powell*, 217 Ill. 2d 123 (2005).

¶ 8 The respondent's first trial ended in a mistrial when the jury could not reach a verdict, and the case was rescheduled for trial. Following the selection of the jury, the respondent's retrial commenced on September 18, 2012. Since the respondent does not challenge the sufficiency of the evidence, a summary of the evidence presented at the retrial will suffice.

¶ 9 The State presented the testimony of Dr. Jacqueline Buck and Dr. Kimberly Wietl, both of whom were clinical psychologists, and who performed psychological evaluations of sexually violent persons. In arriving at their separate opinions in this case, both Dr. Buck and Dr. Wietl reviewed the respondent's criminal records from Tennessee and Illinois, his disciplinary record during his incarceration in Illinois and his conduct while in the custody of the DHS. Both Dr. Buck and Dr. Wietl attempted to interview the respondent, but he refused to be interviewed by either doctor. Both doctors used actuarial tests to determine the respondent's potential to reoffend.

¶ 10 Dr. Buck diagnosed the respondent as suffering from the following mental disorders: paraphilia, not otherwise specified; sexually attracted to non-consenting persons, nonexclusive type; an antisocial personality; and a narcissistic personality. These disorders predisposed him to engage in further acts of sexual violence, and the results of the actuarial tests she performed placed the respondent in the medium to extremely high risk to reoffend. Dr. Buck opined that within a reasonable degree of psychological certainty, the respondent was a sexually violent person as defined by the Act.

¶ 11 Within a reasonable degree of psychological certainty, Dr. Wietl opined that the respondent suffered from the following mental disorders: paraphilia, not otherwise specified, sexually attracted to non-consenting adults; and an antisocial personality. The doctor opined that these mental disorders limited the respondent's abilities to control his sexually violent behavior. Based on the results of the actuarial tests and external factors, such as his behavior while in custody and the fact that he had not received any sexual offender treatment, Dr. Wietl opined that the respondent was considered a high risk to reoffend.

¶ 12 Dr. Diane Lytton, a forensic psychologist, testified on behalf of the respondent. After reviewing all of the respondent's records, Dr. Lytton opined within a reasonable degree of psychological certainty that the respondent was not suffering from a mental disorder that predisposed him to commit acts of sexual violence and that it was not probable that the respondent would reoffend. Dr. Lytton was critical of the actuarial tests used by Drs. Buck and Wietl, maintaining that the tests were no longer accepted by the psychological community or had been replaced by newer tests.

¶ 13 Testifying on his own behalf, the respondent denied that he committed any sexual offenses. He maintained that many of the disciplinary reports were the result of his filing

grievances and lawsuits against the DOC and the prison officers. The respondent denied that during his incarceration in 1997, he sexually assaulted his roommate. He acknowledged exchanging curses with the staff of the facilities where he was confined, but he denied using improper language to female staff members.

¶ 14 Following deliberations, the jury returned its verdict finding the respondent a sexually violent person. The trial court committed the respondent to a DHS secure facility for treatment.

¶ 15 This appeal followed.

¶ 16 ANALYSIS

¶ 17 I. *Ex Post Facto*

¶ 18 The respondent maintains that since the State filed its petition in 2000, he was entitled to all the constitutional rights available to a defendant in a criminal proceeding as provided in section 35(b) of the Act (725 ILCS 207/35(b) (West 2000)). He contends that since the 2001 amendment to section 35(b) eliminated that provision, application of the amended version to his case violated the constitutional prohibition against *ex post facto* laws because the amended section 35(b) was less favorable to him.

¶ 19 Proceedings under the Act are civil in nature. 725 ILCS 207/20 (2000). In *In re Detention of Stanbridge*, 2012 IL 112337, ¶ 84, our supreme court recognized that constitutional principles prohibiting *ex post facto* laws apply only to criminal proceedings. Since the constitutional prohibition against *ex post facto* laws does not apply to civil commitment proceedings under the Act, the respondent is not entitled to the constitutional rights contained in section 35(b) prior to its amendment in 2001 on *ex post facto* grounds.

¶ 20 In *In re Detention of Lieberman*, 201 Ill. 2d 300 (2002), our supreme court noted that an amendment to the Act expanding the list of sexually violent offenses, enacted after the filing of the commitment petition, did not apply to the respondent. *Lieberman*, 201 Ill. 2d at 321 n.3 (citing *Commonwealth Edison Co. v. Will County Collector*, 196 Ill.2d 27, 38-39 (2001) ("A statutory amendment cannot be given retroactive effect in the absence of a clear expression of legislative intent to do so")). The respondent maintains that, in the absence of any clear legislative intent to apply the amendment to section 35(b) retroactively, he is entitled to the constitutional protections afforded him under the version of section 35(b) effective in 2000, when the commitment petition was filed in this case. While we agree with the respondent that he was entitled to the pre-amended version of section 35(b), the constitutional protections under that section are not as broad as he believes.

¶ 21 The constitutional protection language the respondent relies on in the pre-amended section 35(b) was intended to provide a general protection for subjects where the Act was otherwise silent. *In re Detention of Tiney-Bey*, 302 Ill. App. 3d 396, 401 (1999). Where the Act specifically defined these rights, they prevail over the general provisions of section 35(b). *Tiney-Bey*, 302 Ill. App. 3d at 401 (the right to remain silent applied only at hearings under section 25(c)(2) of the Act). Moreover, section 35(b) relates generally to the respondent's rights at trial. *Tiney-Bey*, 302 Ill. App. 3d at 401; see 725 ILCS 207/35 (West 2000).

¶ 22 We conclude that the 2001 amendment does not violate the constitutional bar against *ex post facto* laws. The respondent is entitled to the protections in section 35(b) prior to the 2001 amendment, insofar as they relate to his rights at trial and where the Act is otherwise silent.

¶ 23 II. Right to Counsel

¶ 24 The respondent contends that his constitutional right to counsel was violated by the trial court's failure to appoint counsel for him prior to his initial psychological evaluation and by the State's psychologists' attempts to contact him without obtaining a court order or contacting his counsel.

¶ 25 A. Standard of Review

¶ 26 Whether an individual's constitutional rights have been violated is reviewed *de novo*. *People v. Cotton*, 393 Ill. App. 3d 237, 251 (2009).

¶ 27 B. Discussion

¶ 28 Section 25 of the Act expressly provides that, "at any hearing conducted under this Act, the person who is the subject of the petition has the right: (1) [t]o be present and to be represented by counsel. If the person is indigent, the court shall appoint counsel." 725 ILCS 207/25 (West 2012). The respondent's right to counsel in this case is purely statutory, and he is entitled to counsel as provided in the Act. Compare *People v. Ligon*, 392 Ill. App. 3d 988, 997 (2009) (recognizing that, since the right to counsel was wholly statutory, a postconviction petitioner was entitled to the level of assistance set forth in the statute).

¶ 29 As provided in the Act, the respondent's right to counsel was limited to "any hearing." Since the initial psychological evaluation, conducted by Dr. Jonas was performed prior to the filing of the petition for commitment and prior to any hearing, the respondent was not entitled to have counsel appointed at the time of the first psychological evaluation. Likewise, the Act did not require Dr. Buck and Dr. Wietl to inform the respondent's counsel that they wished to interview the respondent or to obtain a court order to do so. See *In re Anders*, 304 Ill. App. 3d 117, 121 (1999) (the legislature's use of the term "at any hearing" was meant to

limit the application of the safeguards of section 25 of the Act to hearings conducted after the filing of the petition).

¶ 30 Finally, the respondent argues that the trial court erred when it barred Dr. Lytton from testifying that she personally examined the defendant in the course of formulating her opinions in this case. Section 30 of the Act provides that "[i]f the person who is named in the petition refuses to speak to, communicate with, or otherwise fails to cooperate with the examining evaluator from the Department of Human Services or the Department of Corrections, that person may only introduce evidence and testimony from any expert or professional person who is retained or court-appointed to conduct an examination of the person that results from a review of the records and may not introduce evidence resulting from an examination of the person." 725 ILCS 207/30(c) (West 2012).

¶ 31 Both Dr. Buck and Dr. Wietl testified that their efforts to interview the respondent were unsuccessful. The respondent does not maintain that he agreed to be interviewed by Dr. Buck and Dr. Wietl. Instead, he argues that the State failed to carry its burden of proving that the respondent made a knowing and intelligent waiver of his right to due process. The respondent's argument relies for support on cases involving the constitutional rights belonging to criminal defendants, not respondents in a civil proceeding whose rights are statutory. The respondent's rights are set forth in section 25 of the Act and do not include the right to present a complete defense, particularly where the Act itself bars the admission of the evidence the respondent seeks in support of his defense. While the respondent suggests that the State could have obtained a court order requiring the respondent to cooperate with Dr. Buck and Dr. Wietl or be deposed, neither of these is required under the Act.

¶ 32 The trial court complied with section 30(c) of the Act by permitting Dr. Lytton to testify and give her opinion based on her review of the records but barring her from referring to her examination of the respondent in her testimony. We find no error on the part of the trial court.

¶ 33 We conclude that the respondent's statutory right to counsel was not violated in this case.

¶ 34 III. Ineffective Assistance of Counsel

¶ 35 The respondent contends that he was denied the effective assistance of counsel. He further contends that the trial court denied him a probable cause hearing.

¶ 36 A. Standard of Review

¶ 37 Where the issue of counsel's ineffectiveness was not raised below, our review is *de novo*. *People v. Kirklin*, 2015 IL App (1st) 131420, ¶ 104.

¶ 38 B. Discussion

¶ 39 The parties agree that persons committed under the Act are entitled to the effective assistance of counsel as measured by the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *In re Commitment of Bushong*, 351 Ill. App. 3d 807, 817 (2004). "To establish ineffective assistance of counsel, a defendant must first demonstrate that his counsel's performance was deficient in that 'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the [s]ixth [a]mendment.' " *Bushong*, 351 Ill. App. 3d at 817 (quoting *Strickland*, 466 U.S. at 687). There is a strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy, not incompetence. *Bushong*, 351 Ill. App. 3d at 817. Second, a defendant must demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Bushong*, 351

Ill. App. 3d at 817. The defendant must satisfy both prongs of the *Strickland* test or his ineffectiveness claim fails. *Bushong*, 351 Ill. App. 3d at 817.

¶ 40 At the October 25, 2000 probable cause hearing, the State and the respondent's counsel stipulated to the contents of the petition for commitment under the Act. Based on the stipulation, the trial court found probable cause to believe the respondent was a sexually violent person. The respondent argues that by stipulating to the contents of the State's petition to commit him, counsel's performance was deficient.

¶ 41 Even if stipulating to the contents of the petition constituted deficient performance, the respondent's claim, that he was prejudiced because the State was never required to establish the contentions made in the petition and that he was never permitted to cross-examine the State's psychologist, fails. In *In re Commitment of Walker*, 2014 IL App (2d) 130372, the appellate court rejected the respondent's claim of ineffective assistance where counsel allowed him to stipulate that he was a sexually violent person. The respondent argued that the stipulation ended his chances for the adversarial hearing he was entitled to under section 35 of the Act (725 ILCS 207/35(a) (West 2006)). The court found no prejudice since "the opportunity to engage in an adversarial hearing says nothing as to whether the outcome of that hearing would have been different. [Mr. Walker] points to nothing to establish a 'reasonable probability that ***the outcome of [the proceedings] would have been different.' " *Walker*, 2014 IL App (2d) 130372, ¶ 51 (quoting *In re Commitment of Dodge*, 2013 IL App (1st) 113603, ¶ 20.

¶ 42 Likewise in the present case, the respondent does not demonstrate that, but for counsel's stipulation, the trial court would not have found probable cause or how counsel's stipulation to the contents of the petition would have changed the ultimate outcome of his subsequent

jury trial. At trial, the State was required to prove that the respondent was a sexually violent person under the Act. While Dr. Jonas did not testify, the State presented the expert testimony of Dr. Buck and Dr. Wietl to establish the State's case.

¶ 43 We further reject the respondent's claim that the trial court denied him a probable cause hearing. The respondent failed to develop this claim of trial court error by way of argument or citation to authority. Therefore, the error is forfeited. Ill. S. Ct. R. 341(h)(7) (eff. February 6, 2013). Moreover, the Act does not mandate an adversarial probable cause hearing as opposed to a hearing by way of a stipulation to the evidence that would be presented at the hearing.

¶ 44 We conclude that the respondent was not denied the effective assistance of counsel, and he was not denied a probable cause hearing.

¶ 45 IV. Speedy Trial

¶ 46 The respondent contends that his right to a speedy trial under both the sixth amendment of the United States Constitution and article I, section eight of the Illinois Constitution was violated. However, those provisions relate to criminal trials. The respondent's right to a speedy trial in these proceedings is not constitutionally protected. Rather, the respondent's right to a speedy trial is governed by statute. Section 35(a) of the Act provides in pertinent part as follows:

> "A trial to determine whether the person who is the subject of a petition under Section 15 of this Act is a sexually violent person shall commence no later than 120 days after the date of the probable cause hearing under Section 30 of this Act. Delay is considered to be agreed to by the person unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record. *** The

> court may grant a continuance of the trial date for good cause upon its own motion, the motion of any party or the stipulation of the parties provided that any continuance granted shall be subject to Section 103-5 of the Code of Criminal Procedure of 1963 (the Criminal Code) (725 ILCS 5/103-5 (West 2012))." 725 ILCS 207/35(a) (West 2012).

¶ 47 A. Standard of Review

¶ 48 Generally, a trial court's ruling on a speedy-trial challenge is reviewed for an abuse of discretion. *People v. Bauman*, 2012 IL App (2d) 110544, ¶ 19. Where the issue on appeal requires construction of a statute, our review is *de novo*. *Bauman*, 2012 IL App (2d) 110544, ¶ 19.

¶ 49 B. Discussion

¶ 50 Both the State and the respondent rely on cases addressing a criminal defendant's speedy-trial rights as set forth in section 103-5 of the Criminal Code. 725 ILCS 5/103-5(a) (West 2012). Section 103-5(a) applies to persons in custody and provides that "[d]elay shall be considered to be agreed to by the defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record." 725 ILCS 5/103-5(a) (West 2012). The delay provision in section 103-5(a) mirrors the delay provision in section 35(a) of the Act.

¶ 51 The record reveals that the respondent filed his demand for trial on November 18, 2008. While the record does not contain the respondent's motion for dismissal based on his demand for a speedy trial, the State does not dispute that such a motion was filed on October 1, 2010, and the clerk's entry on the half-sheet indicates that the motion to dismiss was denied on October 21, 2010. The respondent does not argue that the trial court erred in denying the

motion to dismiss. Rather, he argues that dismissal of his case is now required because "very nearly" all of the delay of 842 days between his November 18, 2008, demand for trial and the commencement of his first trial on February 28, 2011, is attributable to the State's inability to provide documentation to permit respondent's expert to complete her report.

¶ 52 The respondent's reliance on *People v. McDonald*, 168 Ill. 2d 420 (1995), *abrogated on other grounds by People v. Clemons*, 2012 IL 107821, and *People v. Healy*, 293 Ill. App. 3d 684 (1997) (for the argument that the delay can be charged only to the State) is misplaced. Prior to 1999, section 103-5(a) did not require a defendant to make a written or oral objection to any delay in his trial to keep the speedy-trial clock from tolling. *People v. Cordell*, 223 Ill. 2d 380, 386 (2006). Under this version of section 103-5(a), a defendant's mere silence or the failure to object to continuances requested by the prosecution was not an affirmative act attributable to the defendant that caused or contributed to the delay in bringing the case to trial. *Cordell*, 223 Ill. 2d at 386. In 1999, the legislature amended section 103-5(a) to state that "delay should be considered agreed to by a defendant unless he or she objects to the delay by making a written or oral demand for trial." *Cordell*, 223 Ill. 2d at 388; see Pub. Act. 90-705 (eff. January 1, 1999).

¶ 53 The respondent made a demand for trial on November 18, 2008. However, our supreme court determined in *Cordell* that a simple request for trial before any delay is proposed is not the equivalent to an objection for purposes of section 103-5(a). Applying the *Cordell* analysis of "delay" in section 103-5(a) of the Code to the same "delay" provision in section 35(a) of the Act, the respondent's demand for trial in 2008 and his attribution of the delays in this case to the State do not constitute an objection for purposes of section 35(a) of the Act. Even if the State caused the delay, the respondent did not identify the places in the record

where he objected to a delay after it was proposed, in order to preserve his right to a speedy trial under section 35(a). The respondent did not distinguish *Cordell* or acknowledge the holding in that case in his opening brief and did not address the State's argument based on *Cordell* in his reply brief.

¶ 54 We conclude that the respondent did not preserve his statutory right to a speedy trial under section 35(a) of the Act.

¶ 55 V. Retrial

¶ 56 The respondent contends that his retrial was barred by the constitutional ban against double jeopardy. However, the doctrine of double jeopardy, in either its constitutional or common law sense, has been applied to criminal law prosecutions only and does not apply to civil actions. *Janson v. Illinois Pollution Control Board*, 69 Ill.App.3d 324, 327 (1979). The respondent then contends that section 35(f) of the Act contemplates only one trial and therefore bars his retrial.

¶ 57 A. Standard of Review

¶ 58 Where the issue on appeal requires construction of a statute, our review is *de novo*. *Bauman*, 2012 IL App (2d) 110544, ¶ 19.

¶ 59 B. Discussion

¶ 60 The Act requires that the State prove the allegations of the petition beyond a reasonable doubt. 725 ILCS 207/35(d) (West 2012). Section 35(f) provides in pertinent part that "[if] the jury is not satisfied beyond a reasonable doubt that the person is a sexually violent person, the court shall dismiss the petition and direct that the person be released ***." 725 ILCS 207/35(f) (West 2012). The respondent reasons that since the jury in his first trial was

unable to reach a verdict, the jury was not satisfied beyond a reasonable doubt that he was a sexually violent person. We disagree.

¶ 61 Under section 25(d) of the Act, the verdict of the jury is not valid unless it is unanimous. 725 ILCS 207/25(d) (West 2012). A trial court may declare a mistrial where the jury is unable to reach a verdict. *People v. Henry*, 204 Ill. 2d 267, 291 (2003). In this case, the jury in the first trial was unable to reach a unanimous verdict and thus made no determination as to whether the State proved that the respondent was a sexually violent person beyond a reasonable doubt before the mistrial was declared. Under such circumstances, the trial court was not required to dismiss the petition under section 25(d).

¶ 62 The respondent maintains that under due process the State was not permitted to augment its case on retrial by adding evidence. The respondent's reliance on *Tibbs v. Florida*, 457 U.S. 31 (1982) and *Burks v. United States*, 437 U.S. 1 (1978) is misplaced. In both cases double jeopardy did not bar retrials where the defendants' convictions were overturned on appeal on the basis of the weight of the evidence, not the sufficiency of the evidence. The retrial in this case did not result from an appeal implicating either the weight or the sufficiency of the evidence as the basis for a retrial. The respondent's retrial was occasioned by the jury's inability to agree on a verdict. The respondent provided no support for his contention that in the retrial of a civil case after a mistrial, the parties are barred from presenting new evidence.

¶ 63 We conclude that section 35(f) of the Act does not bar a retrial of a respondent where the trial court declares a mistrial based on the jury's failure to reach a verdict.

¶ 64 VI. *Batson Violation*

¶ 65 The respondent contends that the trial court erred when it denied his request that the court conduct an analysis pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). He maintains that he showed a *prima facie* case of discrimination based on the State's use of its peremptory challenges to exclude African-American males from the jury panel.

¶ 66 During *voir dire*, the respondent's counsel objected to the jury selection process on the basis of *Batson*. The trial court sought to clarify the basis for the *Batson* challenge as follows:

> "[Respondent's Counsel]: My point is that Mr. Powell is obviously an older African-American man and a jury that doesn't include a representation, including older African-American men, is not a representative jury for Mr. Powell's purposes. They have intentionally singled out in our view African-Americans and in our view on the basis of *Batson*.
>
> * * *
>
> THE COURT: Here is what happens when there is a *Batson* challenge. Is the *Batson* challenge on the basis of peremptory challenges against African-American jurors or against male African-American jurors or older male African-American jurors?
>
> [Respondent's Counsel]: Male African-American jurors.
>
> THE COURT: I don't know that *Batson's* analysis permits that kind of particularization to male African-American jurors. I believe *Batson* and its progeny speak to African-American jurors or any series of peremptory challenges against some particular discrete class of persons. I don't know that male African-American jurors is one of them."

¶ 67 A. Standard of Review

¶ 68 The standard for reviewing a trial court's decision on whether a defendant has made a *prima facie* showing of discrimination under *Batson* is whether the determination is against the manifest weight of the evidence. *People v. Andrews*, 146 Ill. 2d 413, 424-25 (1992). The question of whether *Batson* forbids the exercise of a peremptory challenge against a particular group is one of law and is reviewed *de novo*. *Lawler v. MacDuff*, 335 Ill. App. 3d 144, 150 (2002).

¶ 69 B. Discussion

¶ 70 Illinois Supreme Court Rule 341(h) (7) (eff. Feb. 6, 2013) provides that the argument section of the appellant's brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). "Citations to authority that set forth only general propositions of the law and do not address the issues presented do not constitute relevant authority for purposes of Rule 341(h)(7)." *Robinson v. Point One Toyota, Evanston*, 2012 IL App (1st) 111889, ¶ 54.

¶ 71 As "relevant authority," the respondent cites *Snyder v. Louisiana*, 552 U.S. 472 (2008), *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) and *Batson*. The respondent cites these cases for general principles applicable in determining discrimination in jury selection. See *Snyder*, 552 U.S. at 478 (the wrongful exclusion of even a single prospective juror violates the Constitution); *J.E.B.*, 511 U.S. at 146 (banning prosecutors from considering gender as a factor in jury selection); and *Batson* , 476 U.S. at 96-98 (setting forth a three-part test for determining whether discrimination on the basis of race occurred in the selection of jurors). While the respondent frames his issue as one of showing a *prima facie* case of discrimination

in jury selection under *Batson*, he must first persuade this court with argument and citations to relevant authority that *Batson* applies to a combined race-gender discrimination claim. See *Lawler*, 335 Ill. App. 3d at150 (before determining whether the exercise of the peremptory challenge was done on the basis of age, the court first must determine if *Batson* and its progeny barred age discrimination during *voir dire*). None of the above cited cases advance the argument that *Batson* applies to a combined race-gender discrimination claim.

¶ 72 The respondent did not address the State's citation to *People v. Washington*, 257 Ill. App. 3d 26 (1993), a case in which this court examined the issue of a combination race-gender discrimination claim. In *Washington*, we held that the trial court did not err in ruling that the defendant failed to make a *prima facie* showing of discrimination in the State's use of its preemptory challenges against black males because "the principles of *Batson* cannot be applied to 'black men' as a cognizable group." *Washington*, 257 Ill. App. 3d at 33-34. This court determined that the creation of hybrid subcategories would destroy the use of the peremptory challenge, and the ever-increasing subcategories would result in "some potential jurors with certain characteristics who could never be challenged without making a full blown *Batson* hearing necessary." *Washington*, 257 Ill. App. 3d at 33. As an appellate court, this court is not bound to follow a decision of an equal or inferior court. *People v. Cummings*, 375 Ill. App. 3d 513, 519 (2007), *overruled on other grounds by People v. Ligon*, 2016 IL 118023.

¶ 73 The United States Supreme Court has not addressed whether gender-race combinations are protected from discrimination in the jury selection process. Our own research reveals that other states have recognized combined gender-race groups as discrete groups protected under *Batson*. See *Commonwealth v. Jordan*, 439 Mass. 47, 59-61 (2003) (cases collected

therein); see also *State v. Daniels*, 109 Haw.1, 6 (2005). This court is not yet persuaded that combined gender-race groups should always be denied the protection of *Batson*. However, decisions of a sister state may be considered persuasive authority only in the absence of Illinois authority on the point of law in question. *K&K Iron Works, Inc. v. Marc Realty, LLC*, 2014 IL App (1st) 133688, ¶ 47.

¶ 74 Subsequent to the decision in *Washington*, in *People v. Harris*, 164 Ill. 2d 322 (1994), our supreme court noted that "[t]he focus of *Batson* and its progeny has been on the exclusion of the members of a single, identifiable group, not different groups considered together." *Harris*, 164 Ill. 2d at 344. The court ruled that the *Batson* inquiry to include multiple ethnic groups in a single claim of discrimination would make the establishment of a *prima facie* case even more difficult. The court therefore declined "to expand the *Batson* rule to embrace the simultaneous consideration of different racial or ethnic groups." *Harris*, 164 Ill. 2d at 344; see *People v. Rivera*, 221 Ill. 2d 481, 494 (2006) (the court noted that the opinion in *Harris* cited the holding in *Washington* "as an analogous proposition lending support to our own decision, 'declin[ing] *** to expand the *Batson* rule to embrace the simultaneous consideration of different racial or ethnic groups.' " *Rivera*, 221 Ill. 2d at 494 (quoting *Harris*, 164 Ill. 2d at 344).

¶ 75 We conclude that, in the absence of a decision by our United States Supreme Court to the contrary and since our Illinois courts have thus far declined to extend *Batson* to consideration of multiple groups in a single claim of discrimination, we conclude that the respondent cannot show a *prima facie* case of discrimination.

¶ 76 VII. Tennessee Convictions

¶ 77 The respondent contends that the Act did not permit the State to use his Tennessee convictions to prove he was a sexually violent person.

¶ 78 A. Standard of Review

¶ 79 Where the issue on appeal requires construction of a statute, our review is *de novo*. *Bauman*, 2012 IL App (2d) 110544, ¶ 19.

¶ 80 B. Discussion

¶ 81 The respondent maintains that he may not be involuntarily committed based on his Tennessee convictions, relying on *In re Detention of Samuelson*, 189 Ill. 2d 548 (2000). In

¶ 82 *Samuelson*, the supreme court held that "[a] defendant cannot be involuntarily committed based on past conduct. Involuntary confinement is permissible only where the defendant presently suffers from a mental disorder and the disorder creates a substantial probability that he will engage in acts of sexual violence in the future." *Samuelson*, 189 Ill. 2d at 559 (citing 725 ILCS 207/15 (West 1998)).

¶ 83 Before an individual can be involuntarily committed, the Act requires that the State establish beyond a reasonable doubt not only that the respondent was convicted of a sexually violent offense in the past but also that he is dangerous because he *is presently* suffering from a mental disorder that makes it substantially probable that he will reoffend in the future. 725 ILCS 207/5(f) (West 2012); see also 725 ILCS 207/35(e) (West 2012) (evidence of an individual's prior convictions for sexually violent offenses is not sufficient to prove beyond a reasonable doubt that he has a mental disorder). In this case, the respondent was subject to involuntary commitment based on the jury's verdict that the State proved all three elements necessary to find the respondent a sexually violent person beyond a reasonable doubt.

¶ 84 The respondent then maintains that since section 35(b) does not specify that crimes committed in other jurisdictions were admissible in Illinois proceedings under the Act, his Tennessee convictions could not be used to satisfy the State's burden of proving beyond a reasonable doubt that he was convicted of sexually violent offenses. Section 35(b) of the Act provides in pertinent part that "[a]t trial on the petition it shall be competent to introduce evidence of the commission by the respondent of any number of crimes together with whatever punishments, if any, were imposed." 725 ILCS 207/35(b) (West 2012).

¶ 85 The respondent argues that since the legislature did not specifically provide for the use of out-of-state convictions in section 35(b), his Tennessee convictions could not be used to establish that he had been convicted of sexually violent offenses. The respondent points out that section 5(e) defines "sexually violent offenses" in terms of offenses in the Criminal Code. 725 ILCS 207/5(e) (West 2000). He relies on *People v. Shaw*, 189 Ill. App. 3d 808 (1989) and *People v. Weakley*, 176 Ill. App. 3d 274 (1988). In both cases, the reviewing courts held that specific references to sections of the Illinois Motor Vehicle Code (Vehicle Code) but not to foreign jurisdictions precluded the State from using out-of-state convictions to convict or elevate to a higher felony class an offense committed in Illinois by an out-of-state resident. See *Shaw*, 189 Ill. App. 3d at 810 (Ill. Rev. Stat. 1987, ch. 95 ½, par. 6-303(d); *Weakley*, 176 Ill. App. 3d at 275-76 (Ill. Rev. Stat. 1979, ch. 95 ½, par. 6-303(a)).

¶ 86 The sections of the Vehicle Code at issue in *Shaw* and *Weakley* were penal in nature, requiring the court to strictly construe them in favor of the defendant. *Shaw*, 189 Ill. App. 3d at 810. A statute imposing a disability for the purpose of punishment is penal, but if it imposes a disability, not to punish but for some other legitimate governmental purpose, then it is not penal. *People v. Adams*, 198 Ill. App. 3d 74, 79 (1990) (sex offender registration was

not punishment under the eighth amendment). The Act is not penal in nature, and therefore, unlike the statutory provisions in *Shaw* and *Weakley*, we are not required to construe the provisions of section 35(b) in favor of the respondent.

¶ 87 Section 35(b) allows the State to introduce "evidence of the commission of *any* number of crimes." (Emphasis added.) 725 ILCS 207/35(b) (West 2012). Nothing in section 35(b) requires that these crimes be committed in Illinois. Moreover, in enacting the Act, the legislature's clear intent was "to keep our communities safe from predatory sex offenders who pose an ongoing threat to our citizens." *Lieberman*, 201 Ill. 2d at 319. It would defeat the legislative purpose of the Act if an individual's out-of-State convictions for offenses, particularly those which would constitute sexually violent offenses under Illinois law, were barred. Given the legislative intent behind the Act, we determine that section 35(b) does not bar the State from introducing evidence of a respondent's out-of-state convictions and punishments.

¶ 88 VIII. Hearsay

¶ 89 The respondent contends that the trial court erred by permitting Dr. Buck and Dr. Wietl to include in their testimony facts derived from the respondent's DOC disciplinary reports and DHS reports. He further contends that the error was compounded when the State argued facts from the reports and the respondent's criminal history as substantive evidence.

¶ 90 A. Standard of Review

¶ 91 "Whether to admit expert testimony is within the sound discretion of the trial court." *In re Estate of Bennoon*, 2014 IL App (1st) 122224, ¶ 30. "A court abuses its discretion only if it acts arbitrarily, without the employment of conscientious judgment, exceeds the bounds of

reason and ignores recognized principles of law; or if no reasonable person would take the position adopted by the court." *Payne v. Hall*, 2013 IL App (1st) 113519, ¶ 12.

¶ 92 B. Discussion

¶ 93 The respondent maintains that the admission of testimony by Dr. Buck and Dr. Wietl that they relied on the hearsay evidence contained in the DOC disciplinary and incident reports and the DHS reports violated his right to confront the witnesses against him. This same argument was rejected in *In re Detention of Hunter*, 2013 IL App (4th) 120299.

¶ 94 "Illinois courts have 'long held that prohibitions against the admission of hearsay do not apply when an expert testifies to underlying facts and data, not admitted into evidence, for the purpose of explaining the basis of his opinion.' " *Hunter*, 2013 IL App (4th) 120299, ¶ 32 (quoting *People v. Lovejoy*, 235 Ill. 2d 97, 142 (2009)); see *In re Commitment of Gavin*, 2014 IL App (1st) 122918, ¶ 68 ("[e]xperts may give their opinions based on facts not in evidence if the facts are of a type reasonably relied on by experts in their particular field"). The court in *Hunter* noted that the United States Supreme Court recently held that " '[o]ut-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause.' " *Hunter*, 2013 IL App (4th) 120299, ¶ 37 (quoting *Illinois v. Williams*, 567 U.S. ___, 132 S. Ct. 2221, 2228 (2012)). Moreover, " '[a]n expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true.' " *Hunter*, 2013 IL App (4th) 120299, ¶ 37 (quoting *Williams*, 567 U.S. ___, 132 S. Ct. at 2228).

¶ 95 The respondent's reliance on *People v. Smith*, 141 Ill. 2d 40 (1990) is misplaced. In that case, the supreme court held that prison incident reports were not admissible under the

business records exception to the hearsay rule when offered to prove the facts contained in them. *Smith*, 141 Ill. 2d at 74. Prison incident reports lacked trustworthiness and reliability, which are the bases for the business records exception. *Smith*, 141 Ill. 2d at 73.

¶ 96 In contrast, in the present case, the respondent's DOC and DHS reports were neither relied on for the truth of the facts related in the reports nor admitted as substantive evidence. Both Dr. Buck and Dr. Wietl testified that the records from the DOC and the DHS were the types of documents reasonably relied on for sex offender evaluations by other psychologists in that field and that they used facts contained in those records in arriving at their opinions in this case. Therefore, we find no error in permitting Dr. Buck and Dr. Wietl to relate the facts contained the respondent's DOC and DHS reports in their testimony.

¶ 97 The respondent maintains that in closing argument, the State argued to the jury that the facts contained in the DOC and DHS reports and the facts underlying his criminal convictions were substantive evidence. Noting that the State must prove that the respondent was suffering from a mental disorder, the prosecutor stated as follows:

> "You have heard the testimony from the State's evaluators, Dr. Buck who was with the [DOC], and Dr. [Wietl] who was with the [DHS] that the respondent based on their evaluations of him suffers from two mental disorders, anti-social personality disorder and paraphilia not otherwise specified with non-consenting individuals.
>
> You have heard testimony about the factors [Dr. Buck and Dr. Wietl] took into consideration in making those determinations, [the respondent's] past history, and various things that he's done, and a number of different factors. The anti-social personality disorder is clearly shown by the conducts and behaviors he's engaged in during his life, starting with early onset of delinquent and criminal behavior going

through the burglaries that he committed, the rapes, the aggravated criminal sexual assault in Illinois. You have heard testimony of a sexual assault on another inmate in the Illinois prison system. You have heard testimony about various altercations and tickets he's got while in the prison system, as well as incidents he's been involved in while in the [DHS].

[Respondent's Counsel]: Objection. Not in evidence.

THE COURT: Overruled.

[Prosecutor]: The experts rely on these things in making their diagnosis ***."

¶ 98 In *In re Commitment of Butler*, 2013 IL App (1st) 113606, the reviewing court rejected the respondent's contention that the State had improperly argued the basis of the opinion evidence as substantive evidence. The court noted that the State argued that the facts and circumstances of the respondent's history of violent and sexual offenses were relied upon by their expert witnesses and supported their expert witnesses' opinions. *Butler*, 2013 IL App (1st) 113606, ¶ 34. In addition, the prosecutors prefaced and qualified their remarks "as relating solely to their expert witnesses opinions." The reviewing court concluded that the State's remarks in closing argument were not improperly made. *Butler*, 2013 IL App (1st) 113606, ¶ 34.

¶ 99 In contrast, in *Gavin*, the State repeatedly referred to the underlying facts as something other than the basis of the experts' opinions. The State argued the explicit facts as a narrative only occasionally prefacing its recitation of the facts by noting that the experts relied on these facts to form their opinions but did not mention how these facts were relied on by the experts. The effect of the narrative was to disconnect the facts from the experts' opinions and to make

it seem as though the respondent was on trial for the crime of rape. *Gavin*, 2014 IL App (1st) 122918, ¶¶ 73-74.

¶ 100 The court in *Gavin* distinguished *Butler*, pointing out that in *Butler*, the State framed the facts underlying the respondent's past convictions as a " 'deviant pattern' " of behavior the experts relied on in reaching their diagnoses. While there might have been some avoidable prejudice in the depicting of the substantive facts, the court in *Gavin* noted that in *Butler*, the State qualified its remarks by repeatedly referencing the experts' reliance on the substantive facts. *Gavin*, 2014 IL App (1st) 122918, ¶ 70. In *Gavin*, the court determined that the State insufficiently tied the underlying facts to the testimony that the respondent had a mental disorder. *Gavin*, 2014 IL App (1st) 122918, ¶ 71.

¶ 101 We find the closing argument in the present case to be similar to the closing argument in *Butler*. Here, the State prefaced its reference to the facts of the respondent's criminal and custodial history by explaining to the jury that it was necessary to establish that the respondent suffered from a mental disorder. Unlike the closing argument in *Gavin*, the State here pointed out how the various facts from the respondent's history were relied on and supported the doctors' opinions that the respondent did suffer from a mental disorder. Unlike *Gavin*, the State's argument did not make it appear as though the respondent was on trial for a substantive offense.

¶ 102 A prosecutor's remarks in closing argument result in reversible error where the prejudice to the defendant is such that it is impossible to determine if the jury's verdict was caused by the comments or the evidence. *Gavin*, 2014 IL App (1st) 122918, ¶ 69. The court in *Gavin* reversed and remanded for a new trial based on "the prejudicial impact of all the prosecutorial errors." *Gavin*, 2014 IL App (1st) 122918, ¶ 81 (the court also found error in

the prosecutor's extreme sarcasm and mockery in her rebuttal argument). In the present case, the State's closing argument was not improper, and any prejudice was not so substantial as to require a new trial.

¶ 103 We conclude that the testimony of Dr. Buck and Dr. Wietl referring to the facts contained in the respondent's DOC disciplinary reports, criminal history and DHS reports was admissible. We further conclude that the facts from the respondent's DOC disciplinary reports, criminal history and DHS reports were not argued by the State as substantive evidence and that the State's closing argument was proper.

¶ 104 IX. Admission of Expert Opinions

¶ 105 The respondent contends that the trial court erred when it allowed Dr. Buck to testify that the respondent suffered from a mental disorder and that he met all the criteria of a sexually violent person as defined by the Act. The trial court sustained the respondent's objection to whether in Dr. Buck's opinion the respondent had a conviction for a sexually violent offense as defined by the Act. Over the objections of the respondent, the court allowed Dr. Buck to testify that within a reasonable degree of psychological certainty, the respondent had a mental disorder as defined by the Act, that because of his mental disorder, it was substantially probable that he would commit future acts of sexual violence, that he met all the criteria and was a sexually violent person as defined by the Act

¶ 106 A. Standard of Review

¶ 107 "Whether to admit expert testimony is within the sound discretion of the trial court." *Bennoon*, 2014 IL App (1st) 122224, ¶ 30. "A court abuses its discretion only if it acts arbitrarily, without the employment of conscientious judgment, exceeds the bounds of reason

and ignores recognized principles of law; or if no reasonable person would take the position adopted by the court." *Payne*, 2013 IL App (1st) 113519, ¶ 12.

¶ 108 B. Discussion

¶ 109 The respondent argues that the complained-of testimony by Dr. Buck was improper because it invaded the province of the jury as the fact-finder. "It is the duty of the trial court to decide the legal issues; while the role of the jury is to decide factual issues. *** [N]o expert can opine as to the law." *Todd W. Musburger, Ltd. v. Meier*, 394 Ill. App. 3d 781, 800-01 (2009) (barring of an expert witness's testimony as to legal conclusions was not an abuse of discretion). The State responds that in both civil and criminal cases an expert witness's testimony on the ultimate issue of the case is no longer barred on the basis that it intrudes on the jury's role because the fact-finder is not required to accept the expert's conclusion. *Zavala v. Powermatic, Inc.*, 167 Ill. 2d 542, 545 (1995) (expert's opinion testimony as to cause of the plaintiff's loss of two fingers was proper).

¶ 110 The Act defines the term "mental disorder" as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." 725 ILCS 207/5(b) (West 2012). The Act defines the term "sexually violent person" as "a person who has been convicted of a sexually violent offense *** and who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence." 725 ILCS 207/5(f) (West 2012).

¶ 111 An expert witness is not competent to give testimony amounting to statutory interpretations. *LID Associates v. Dolan*, 324 Ill. App. 3d 1047, 1058 (2001). The complained-of testimony by Dr. Buck was not permissible opinion testimony insofar as it

related to an interpretation of the Act. We agree with the respondent that, by opining that the respondent had a mental disorder "as defined in the Act," that he met all the criteria and that he was a sexually violent person "as defined in the Act," Dr. Buck was interpreting the Act. Therefore, the trial court erred when it overruled the respondent's objections to that testimony.

¶ 112 While the admission of Dr. Buck's testimony interpreting the Act was error, "a party is not entitled to a reversal based upon rulings on evidence unless the error was substantially prejudicial and affected the outcome of the trial." *U.S. Bank v. Lindsey*, 397 Ill. App. 3d 437, 456 (2009); *Crawford County State Bank v. Grady*, 161 Ill. App. 3d 332, 343 (1987) (improperly admitted expert testimony was cumulative, and an independent and an undisputed basis existed to assess liability against the medical center). The reviewing court will not assume that the error prejudiced the party. *Crawford County State Bank*, 161 Ill. App. 3d at 343. The party seeking reversal bears the burden of establishing prejudice. *Martin v. Sally*, 341 Ill. App. 3d 308, 316 (2003).

¶ 113 The respondent claims he was prejudiced because Dr. Buck's improper testimony denied him his constitutional right to confront witnesses under the fifth and fourteenth amendments to the United States Constitution. U.S. Const. amends. V, XIV. In this case, the respondent's right to confront witnesses is statutory, not constitutional. See 725 ILCS 207/25 (c)(3) (West 2012) (giving the respondent the right to cross-examine witnesses against him). The respondent argues that he was denied full discovery and therefore, unable to properly cross-examine the expert witnesses as to the facts they relied on in arriving at their opinions. He fails to explain how he was denied discovery. Moreover, a review of the trial transcript reveals that respondent's counsel conducted a thorough cross-examination of the State's

expert witnesses. In addition, the respondent raised error only with regard to Dr. Buck's testimony as to the interpretation of the Act. Without the modifying "as defined in the Act," Dr. Buck's opinion that the respondent suffered from mental disorders and was likely to reoffend was not testimony interpreting the Act. Further, the respondent did not raise an error with regard to Dr. Wietl's expert testimony. Dr Buck's and Dr. Wietl's expert testimony that the respondent suffered from mental disorders and was likely to reoffend, along with the State's evidence of the respondent's convictions for sexually violent offenses, was more than sufficient to support the jury's verdict in this case. *Lindsey*, 397 Ill. App. 3d at 457-58 (reversal of the judgment was not warranted where, even without the improperly admitted testimony, the competent evidence of negligence was overwhelming, and there was no appearance of prejudice or a showing that the improper testimony affected the result).

¶ 114 We conclude that the complained-of opinion testimony by Dr. Buck was an interpretation of the Act to which she was not competent to testify. However, we further conclude that the respondent failed to establish that he was prejudiced by the admission of the improper testimony, and we find that the error did not affect the jury's verdict in this case.

¶ 115 X. Actuarial Tests

¶ 116 The respondent contends that the trial court erred in denying his motion to strike the testimony of Dr. Buck and Dr. Wietl because they failed to establish that the actuarial tests they used in determining the probability that the respondent would reoffend were generally accepted in the psychological community evaluating sexually violent offenders.

¶ 117 Both Dr. Buck and Dr. Wietl performed actuarial tests as part of their determinations of the probability of the respondent's reoffending. The tests utilized in this case were: the STATIC-99 and the STATIC-99R, the revised version of the STATIC-99, the Sex Offender

Risk Appraisal Guide (SORAG) and the Minnesota Sex Offender Screening Tool Revised (MnSOST-R).

¶ 118 A. Standard of Review

¶ 119 The *de novo* standard of review applies to a trial court's ruling granting or denying a *Frye* hearing. *In re Commitment of Simons*, 213 Ill. 2d 523, 530 (2004).

¶ 120 B. Discussion

¶ 121 In Illinois, the admission of expert testimony is governed by the standard set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Simon*, 213 Ill. 2d at 529. Under the *Frye* standard, 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.' " *Simon*, 213 Ill. 2d at 529-30 (quoting *Frye*, 293 F. at 1014). " 'General acceptance' does not mean universal acceptance, and it does not require that the methodology in question is accepted by unanimity, consensus or even a majority of experts." *Simon*, 213 Ill. 2d at 530. The *Frye* test applies only to new or novel scientific methodologies; it must be original or striking. *Simon*, 213 Ill. 2d at 530.

¶ 122 After a thorough review of the case law and statutory law from this state and other jurisdictions and the academic literature, the court in *Simon* held that, whether or not actuarial risk assessments were subject to *Frye*,

> "[W]e are more than convinced that actuarial risk assessment has gained general acceptance in the psychological and psychiatric communities." *Simon*, 213 Ill. 2d at 543.

¶ 123 The respondent does not argue that the tests performed by Dr. Buck and Dr. Wietl were not actuarial risk assessment tests and does not challenge the methodology, *i.e.*, that actuarial

tests can predict recidivism. Rather, he argues that the actuarial tests used in this case are not generally accepted, or are no longer in use by the psychological community.

¶ 124 The respondent relies on *Matter of State of New York v. Rosado*, 889 N.Y.S. 2d 369 (Sup. Ct., Bronx County 2009). *Rosado* is a trial court decision from our sister state, New York. As an appellate court, this court is not bound to follow a decision of an equal or inferior court. *Cummings*, 375 Ill. App. 3d at 519. Moreover, decisions of a sister state may be considered persuasive authority only in the absence of Illinois authority on the point of law in question. *K&K Iron Works, Inc.*, 2014 IL App (1st) 133688, ¶ 47. Our supreme court in *Simon* recognized that actuarial risk assessment tests were generally accepted as a means to determine the risk of reoffending in sexually violent individuals. See *Simon*, 213 Ill. 2d at 543.

¶ 125 In any event, *Rosado* is distinguishable from the case before us in that it addressed whether actuarial testing was admissible at trial to prove that the individual suffered from a mental abnormality, the only issue at the trial stage of New York's bifurcated commitment proceeding. The trial court in *Rosado* acknowledged that actuarial tests were scientifically accepted as a means of determining recidivism but concluded that such tests were not relevant to whether an individual had a mental abnormality. *Rosado*, 889 N.Y.S. 2d at 416 (the STATIC-99 was not scientifically accepted under *Frye* to inform the trier of fact as to the existence of a mental abnormality). The commitment proceeding in Illinois differs from the New York proceeding. In Illinois, evidence of recidivism is necessary at trial to prove that the individual is a sexually violent person under the Act. 725 ILCS 207/5(f), 15(b)(5) (West 2012). Moreover, the court in *Rosado* recognized that actuarial tests were generally accepted to determine an individual's recidivism risk. *Rosado*, 889 N.Y.S. 2d at 414

(testimony as to the raw score and the relative risk from the STATIC-99 test was presumptively admissible at the disposition stage).

¶ 126 The trial court is required to determine if the foundational standards have been met. *Baley v. Federal Signal Corp.*, 2012 IL App (1st) 093312, ¶ 74. After the proper foundation has been laid, the jury determines the weight to be given the expert witness's testimony as to the testing. *Baley*, 2012 IL App (1st) 093312, ¶ 74. Since the methodolgy was approved by our supreme court in *Simon*, the respondent's argument goes to the weight the jury should give the testimony of Dr. Buck and Dr. Wietl. The respondent's counsel thoroughly cross-examined Dr. Buck and Dr. Wietl as to which actuarial tests they performed, how they were performed and the results they obtained from the tests, and whether the tests they utilized had been criticized by and/or were still accepted by the psychological community. Having seen the doctors and heard their testimony on direct and cross-examination, it was up to the jury to determine if the testimony was credible and supportive of the State's burden to prove the risk that the respondent would reoffend.

¶ 127 We conclude that the trial court did not abuse its discretion in denying the respondent's motion to strike the testimony of Dr. Buck and Dr. Wietl as to the actuarial tests and the test results.

¶ 128 XI. Substitution of Evaluators

¶ 129 The respondent contends that the substitutions of Dr. Buck for Dr. Jonas and Dr. Wietl for Dr. Ray Quackenbush violated section 35(b) of the Act (725 ILCS 207/35(b) (West 2012)). Dr. Jonas was the DOC evaluator when she evaluated the respondent in 2000. Dr. Quackenbush was the DHS psychologist when he evaluated the respondent in 2001.

¶ 130 A. Standard of Review

¶ 131 Where the issue on appeal requires construction of a statute, our review is *de novo*. *Bauman*, 2012 IL App (2d) 110544, ¶ 19.

¶ 132 B. Discussion

¶ 133 Section 35(b) provides in pertinent part as follows: "[a]t the trial on the petition *** [t]he petitioner may present expert testimony from both the [DOC] evaluator and the [DHS] psychologist." 725 ILCS 207/35(b) (West 2012). The respondent notes that the use of the article "the" rather than the more general "a" before the terms DOC evaluator and DHS psychologist in section 35(b) particularizes the subject which it proceeds. See *Sibenaller v. Milschewski*, 379 Ill. App. 3d 717, 722 (2008). The respondent reasons that section 35(b) limits the State to presenting only the evaluation testimony of Dr. Jonas, "the DOC evaluator," and the testimony of Dr. Quackenbush, "the DHS psychologist," in support of its case. Therefore, he concludes, the substitution of Dr. Buck and Dr. Wietl was erroneous.

¶ 134 A similar objection to Dr. Buck's participation in a commitment proceeding was raised in *In re Commitment of Brown*, 2012 IL App (2d) 110116. In that case, since performing the initial evaluation of the respondent in 2001, Dr. Schaab, the DOC's evaluator, had retired and moved out of state. In 2008, the trial court granted the State's motion for an updated evaluation of the respondent, and Dr. Buck, under contract to the DOC, was appointed to conduct a second evaluation of the respondent. Dr. Buck testified at the respondent's commitment hearing, as did Dr. Quackenbush, the DHS psychologist.

¶ 135 On appeal from a jury verdict finding him to be a sexually violent person, the respondent argued that section 35(b) restricted the State to two evaluations. The reviewing court rejected that argument, stating as follows:

> "The plain language of section 35(b) speaks to the testimony the State may present at trial, not the number of evaluations it may obtain, by providing that the petitioner may present expert testimony from both the DOC evaluator and the [DHS] psychologist. Nothing in the language of this section or any other section of the statute prohibits the State from obtaining more than two evaluations." *Brown*, 2012 IL App (2d) 110116, ¶ 16.

¶ 136 Likewise, in the present case, the State is not required to present only the testimony of "the" DOC evaluator or "the" DHS psychologist. The use of the term "may" indicates a permissive reading of section 35(b). *Hoffman Estates Professional Firefighters Ass'n v. Village of Hoffman Estates*, 305 Ill. App. 3d 242, 250 (1999) (use of the term "may" in the statute gave the Village the option to deposit particular funds into an established pension fund). Therefore, the State was not limited to presenting the testimony of Dr. Jonas and Dr. Quackenbush in support of its case. In addition, the State was not required to present the testimony of Dr. Jonas or Dr. Quackenbush. See Brown, 2012 IL App (2d) 110116, ¶ 16 (the State was not obliged to call Dr. Schaab even if he was available).

¶ 137 We conclude that section 35(b) did not bar the substitution of Dr. Buck or Dr. Wietl in this case.

¶ 138 XII. Special Interrogatories

¶ 139 The respondent contends that the trial court erred when it refused to give the jury with his special interrogatories.

¶ 140 The respondent's appellant's brief violates Rule 341(h)(7). Rule 341(h)(7) provides that the argument section of the appellant's brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied

on." Ill. S. Ct. R. 341(h)(7) (eff. February 6, 2013). "Citations to authority that set forth only general propositions of law and do not address the issues presented do not constitute relevant authority for purposes of Rule 341(h)(7)." *Robinson*, 2012 Ill App (1st) 111889, ¶ 54.

¶ 141 In the argument portion of his appellant's brief, the respondent did not provide citations to the record in support of his contention that his special interrogatories were in proper form and should have been given to the jury.[1] According to the transcript of the instructions conference, the trial court refused to give special interrogatory No. 1, and the respondent orally offered modified versions of special interrogatories Nos. 2, 3 and 4. The trial court refused to give either the original or the modified special interrogatories because they were not in the proper form. While the respondent cited to general propositions of law applicable to giving special interrogatories to the jury, he failed to present argument demonstrating that either version of the special interrogatories he submitted was in proper form. See *Brannen v. Seifert*, 2013 IL App (1st) 122067, ¶ 81 (a trial court has discretion to refuse to submit a special interrogatory to the jury that is not in proper form).

¶ 142 The respondent has fallen afoul of the well-settled principle that this court is not a depository in which the appealing party may dump the burden of argument. *Wolfe*, 364 Ill. App. 3d at 348. "Arguments that do not comply with Rule 341(h)(7) do not merit consideration on appeal and may be rejected by this court for that reason alone." *Hendry*, 409 Ill App. 3d at 1019. A conclusory assertion, without supporting analysis, is insufficient. *Wolfe*, 364 Ill. App. 3d at 348.

¶ 143 Based on the respondent's violations of our appellate rules, the issue is forfeited.

¶ 144 XIII. Verdict Form

[1] The State did provide a record cite for the original version of the special interrogatories in its appellee's brief.

¶ 145 The respondent contends that giving the State's verdict form to the jury was error because it improperly shifted the burden of proof to him. Over the respondent's objection, the trial court gave the following verdict form to the jury:

> "We, the jury, find that the Respondent, Harold Powell, is not a sexually violent person."

The respondent argues that the State's verdict form required the jury to affirmatively find beyond a reasonable doubt that the respondent was not a sexually violent person and ignored the possibility of finding in the respondent's favor if the jury believed that the State did not carry its burden of proof. The respondent likens the State's verdict form to giving a verdict form in a criminal case that states, " 'We the jury unanimously find that the Defendant is not a murderer.' "

¶ 146 A. Standard of Review

¶ 147 " 'The decision to give or deny an instruction is within the trial court's discretion. The standard for determining an abuse of discretion is whether, taken as a whole, the instructions are sufficiently clear so as not to mislead and whether they fairly and correctly state the

¶ 148 law.' " *Doe v. University of Chicago Medical Center*, 2014 IL App (1st) 121593, ¶ 72 (quoting *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 505 (2002)).

¶ 149 B. Discussion

¶ 150 The respondent relies on *United States v. Rodriguez*, 735 F.3d 1 (1st Cir. 2013). On appeal, the defendants contended that the verdict form tendered to the jury in their case was faulty because it erroneously instructed the jury that to find the defendants not guilty, it had to find them innocent beyond a reasonable doubt. The verdict stated in pertinent part that "We the jury, unanimously find, beyond a reasonable doubt, that [defendant] as to

Count Three is: _____ Not Guilty _____ Guilty." *Rodriguez*, 735 F.3d at 10. Because the defendants failed to object to the verdict form at trial, the court of appeals reviewed their claim for plain error. *Rodriguez*, 735 F.3d at 11.

¶ 151 The court of appeals determined that the verdict form constituted clear and obvious error because it suggested to the jury that it could only find the defendants not guilty if it found that their innocence was established beyond a reasonable doubt. Therefore, the district court should not have allowed the verdict form to go to the jury. *Rodriguez*, 735 F.3d at 11. However, there was no plain error. The court of appeals determined that the error made no difference in the result, since the jury received other instructions that provided a thorough and accurate explanation of the burden of proof and the defendants' presumption of innocence. The jury was also instructed as to the elements the government was required to prove beyond a reasonable doubt before it could find the defendants guilty of the charges. The district court read the instructions to the jury prior to its deliberations, and the jury had a copy of the instructions during its deliberations. *Rodriguez*, 735 F.3d at 12. Since the result of the trial would have been the same, and other than the existence of the error, the defendants failed to establish prejudice, the error did not warrant a new trial. *Rodriguez*, 735 F.3d at 13.

¶ 152 Unlike the verdict form in *Rodriguez*, the verdict form in the present case did not require the jury to find "unanimously and beyond a reasonable doubt" that the respondent was "not" a sexually violent person. Therefore, giving the jury verdict form in this case was not error since it did not shift the burden of proof to the respondent. Even if the verdict form was faulty, it would not have misled the jury as to which party had the burden of proof. The jury in the present case was instructed that the State had the burden of proving that the respondent

was a sexually violent person, that the burden of proof remained on the State throughout the case and that the respondent was not required to prove that he was not a sexually violent person. The jury received an instruction setting forth each of the propositions the State was required to prove beyond a reasonable doubt, and providing that if any one of the propositions was not proved beyond a reasonable doubt, the jury should find that the respondent was not a sexually violent person.

¶ 153 We conclude that giving the State's verdict form to the jury was not error. In any event, considering the instructions as a whole, the jury was not misled as to which party had the burden of proof.

¶ 154 XIV. Failure to Hold a Dispositional Hearing

¶ 155 The respondent contends that the trial court denied him a dispositional hearing to which he was entitled pursuant to section 40(b)(1) of the Act (725 ILCS 207/40(b)(1) (West 2012)). If the respondent is found to be a sexually violent person by the trier of fact, the court must order the respondent committed to the DHS for either institutional care or conditional release pursuant to a "hearing held as soon as practicable after the judgment is entered." 725 ILCS 207/40(b)(1) (West 2012). If the court lacks sufficient information to determine whether the respondent should be confined to a secure institution or may be conditionally released, immediately after trial, it may adjourn the dispositional hearing and order the DHS to conduct a predisposition investigation and/or a supplementary mental examination. 725 ILCS 207/40(b)(1) (West 2012).

¶ 156 A. Standard of Review

¶ 157 Since this issue presents a claim of statutory interpretation, our review is *de novo*. *In re Commitment of Fields*, 2012 IL App (1st) 112191, ¶ 68.

¶ 158 B. Discussion

¶ 159 Section 40(b)(1) of the Act requires that a dispositional hearing must be held. *Fields*, 2012 IL App (1st) 112191, ¶ 73. This court has construed section 40(1)(b) of the Act "as granting the trial court discretion not to adjourn the proceedings where the court believes neither a supplemental examination nor a predisposition investigation is required in framing its commitment order." *Fields*, 2012 IL App (1st) 112191, ¶ 73. During the dispositional phase, the trial court must allow the respondent his right to present evidence and testimony addressing the statutory factors governing the disposition or in mitigation of commitment to a secure facility. *Fields*, 2012 IL App (1st) 112191, ¶ 73; 725 ILC 207/40(b)(2) (West 2012); see *Butler*, 2013 IL App (1st) 113606, ¶ 63. Because the trial court denied Mr. Fields's request to allow him to present a witness in support of a conditional release disposition, the court in *Fields* vacated the commitment order and remanded for a dispositional hearing. *Fields*, 2012 IL App (1st) 112191, ¶ 80.

¶ 160 While it is error to deny a dispositional hearing to a respondent, the error does not require that the commitment order be vacated where the respondent did not inform the court that he had a witness or evidence to present at the dispositional hearing. *In re Melcher*, 2013 IL App (1st) 123085, ¶ 66; *Butler*, 2013 IL App (1st) 113606, ¶ 64 (the respondent only requested a continuance for a supplemental mental examination, a decision solely in the discretion of the trial court).

¶ 161 In the present case, immediately after the verdict, the State moved to have the respondent committed to a secure facility. The respondent's counsel asked for a continuance. While the court determined that it had heard sufficient evidence and wished to proceed immediately with the disposition, it requested a response from the respondent's counsel. Counsel

requested conditional release for the respondent. Based on the evidence at the trial, the court ordered the respondent committed to a secure facility approved by the DHS. The respondent's counsel did not object to proceeding with the disposition on the grounds that there was additional testimony or a witness he wished to present on the dispositional issue.

¶ 162 In the absence of the respondent's request to present additional witnesses or evidence, we conclude that the failure to continue the dispositional hearing did not require that the commitment order be vacated.

¶ 163 CONCLUSION

¶ 164 For the reasons stated, we affirm the judgment of the circuit court.

¶ 165 Affirmed.