2016 IL App (1st) 132662-U
No. 1-13-2662

THIRD DIVISION
July 13, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN RE THE COMMITMENT OF STEPHEN MISLICH,	)	Appeal from the Circuit Court of Cook County.
(The People of the State of Illinois	)	
Petitioner-Appellee,	)	No. 98 CR 80010
v.	)	The Honorable Michael B. McHale,
Stephen Mislich,	)	Judge Presiding.
Respondent-Appellant).	)	

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* circuit court's order revoking respondent's conditional release under the Sexually Violent Person's Commitment Act affirmed where the court's procedural and evidentiary rulings did not deprive him of his right to a fair hearing and where its judgment was not against the manifest weight of the evidence.

¶ 2 Respondent Stephen Mislich appeals the judgment of the circuit court revoking his conditional release under the Sexually Violent Persons Commitment Act (SVP Act or Act) (725 ILCS 207/1 *et seq.* (West 2012)). He contests the propriety of the underlying proceedings,

arguing that: (1) the circuit court violated his due process rights when it declined to hold a fitness hearing prior to the start of his conditional release revocation hearing; (2) the circuit court committed a number of other evidentiary and procedural errors that individually and collectively rendered the lower court proceedings fundamentally unfair; and (3) the circuit court's judgment was not supported by the evidence. For the reasons set forth herein, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 On March 23, 1982, respondent was found guilty but mentally ill of several sexually violent offenses, including attempted rape, rape, and deviate sexual assault and was sentenced to 36 years' imprisonment. His convictions were based on his attack on two different women in 1980, when he was 17-years-old.

¶ 5 The Involuntary Commitment Petition

¶ 6 On August 5, 1998, the day before respondent's mandatory supervised release (MSR) period was to begin, the State filed a petition to involuntarily commit him to the Illinois Department of Human Services (the Department) on the grounds that he was a "sexually violent person" as that term is defined in the SVP Act. In support of its involuntary commitment petition, the State referenced respondent's sexually violent offenses as well as his history of mental illness. In pertinent part, the State indicated that respondent had been diagnosed with sexual sadism and borderline personality disorder and alleged that respondent constituted a "danger[] to others because his mental disorders create a substantial probability that he will engage in acts of sexual violence." The State further alleged that "respondent ha[d] been experiencing violent sexual fantasies since the age of 16" and that his "recurrent, intense violent sexual fantasies *** ha[d] continued even while in the Department of Corrections Sex Offender

Treatment Program." Moreover, the State contended that respondent had a "history of manipulating the Sex Offender Treatment Program" during his confinement and that he intermittently "refused sex offender treatment or used the treatment program to fulfill his sexually violent fantasies." Based on respondent's history of mental illness, sexual violence, and manipulation of the Sex Offender Treatment Program, as well as his admitted lack of remorse toward his victims, the State requested the circuit court to commit respondent "to the custody of the Department of Human Services for control, care and treatment until such time he is no longer a sexually violent person."

¶ 7 Attached to the State's petition was a diagnostic report completed by Jacqueline Buck, PhD, following her evaluation of respondent. During her four and a half hour interview with respondent, he "provided a lengthy and detailed account of [his] two prior occasions of sexual and physical violence," and discussed his repeated acts of self-mutilation while incarcerated. He also described his erratic participation in sex offender treatment, his confrontations with therapists and other participants in the treatment program, as well as his manipulation of Illinois Department of Corrections (IDOC) officials. In her report, Buck noted that it was "clear" that respondent "relished the telling of the details of [his sex crimes] and how powerful and potent these behaviors made him feel." She further noted that respondent's "ability to control his thoughts, emotions and behaviors appear[ed] to be quite limited" and that he "continue[d] to display behaviors which indicate that he is at a high risk to reoffend as a sexually violent person." Accordingly, Buck referred respondent for civil commitment as a sexually violent person under the SVP Act.

¶ 8 Following a hearing, the State's petition was granted. Respondent was found to be a sexually violent person and was committed in accordance with the SVP Act. Accordingly, beginning in 1998, respondent was detained by the Department in various secure facilities.

¶ 9 Conditional Release Proceedings

¶ 10 In 2006, however, respondent filed a petition for conditional release. In the petition, respondent alleged that he had "successfully completed *** four phases of treatment" and requested the court to find that he had "made sufficient progress" to warrant conditional release. After review, the circuit court entered an order granting respondent's petition for conditional release. In its order, the court referenced the reports and examinations completed by four different evaluators, all of whom found that respondent had made substantial progress over the years and that he no longer posed a danger to the public. In accordance with the circuit court's order, a conditional release plan was drafted by the Department, which itemized 38 specific conditions of respondent's release. Respondent agreed to all of the conditions articulated in the plan and the plan was approved by the circuit court. Respondent was then released from confinement in 2007.

¶ 11 The State subsequently sought to revoke respondent's conditional release several times over the years based on his purported violations of various conditions of his release plan. Respondent was briefly recommitted for 60 days back in 2007 when he failed to participate in sex offender treatment as required by the terms of his release plan. After completing that brief recommitment period, however, respondent was re-released. He was not subject to re-confinement until the State initiated revocation proceedings again in 2013 by filing a petition to revoke, and later the amendment thereto, which gave rise to this appeal. The State's petition was filed after respondent incurred problems with both of his eyes, which ultimately left him blind.

¶ 12 The State's Conditional Release Revocation Petition

¶ 13 In its amended petition,[1] the State made the following allegations:

"The Respondent has violated paragraph 3 of his Conditional Release Plan which states 'to the extent appropriate to you based upon the recommendations made in the DHS evaluation or based upon any subsequent recommendations by the DHS management team, attend and fully participate in assessment, treatment, including the use of any prescribed medications, and behavioral monitoring, including but not limited to, medical, psychological or psychiatric treatment specific to sexual offending, drug addiction, or alcoholism, and attend and fully participate in periodic polygraph examinations, plethysmograph testing and Abel screening.'

a. Approximately 6 months ago, Respondent told the case management team that he was suffering from a fungal infection and that his eye pressure was high which was symptomatic of glaucoma. Respondent refused to allow the case management team access to his medical providers in order to communicate and discuss his condition. At the same time, Respondent told the case management team that he was going to lose vision in his other eye within weeks or months.

b. On January 10, 2013, Respondent signed a waiver of medical confidentiality for the case management team to have access to his medical provider and records to discuss his condition while in court.

c. Since the waiver of confidentiality, the DHS management team has discovered that what Respondent has reported in treatment and to the DHS management team is

[1] The State's amended petition to revoke respondent's conditional release was filed following the first day of the hearing on its original petition to revoke. In its amended petition, the State removed language alleging that respondent intentionally caused injuries to his eyes.

not supported by the Respondent's medical records or the statements of his treating physicians. ***

Through Respondent's secrecy, deceit and lack of cooperation with his DHS case management team[,] he obstructed the team's ability to manage the Respondent in the community while on conditional release. ***

The People seek that the Respondent's Conditional Release be revoked based on both his violation of Paragraph 3 of his Conditional Release Plan as well as the fact that the DHS Case Management Team['s] ability to manage Respondent in the community has been compromised by his own actions pursuant to 725 ILCS 207/40(b)(4)."

¶ 14 The Revocation Hearing

¶ 15 The circuit court subsequently presided over a hearing on the State's conditional release revocation petition. At the hearing, Doctor Anjali Tannan, an ophthalmology resident at Chicago Rush University Hospital Eye Center, was qualified, over respondent's objection, as "a medical expert for purposes of explaining the treatment of t[he] [r]espondent." Doctor Tannan testified that she first encountered respondent on June 5, 2012, after he had arrived at the emergency room with an alkali injury to his left eye. At that time, respondent relayed that he had been attempting to unclog a sink using Liquid Plumber the day before and that the substance had splashed into his eye. Although he had flushed out his eye with water, respondent indicated that his eye became increasingly painful overnight. Doctor Tannan testified that emergency room personnel immediately irrigated respondent's left eye with one liter of saline solution. Following his initial treatment in the emergency room, Doctor Tannan conducted her own examination of the "anterior segment" of respondent's left eye. After consulting with Doctor Jonathan Rubinstein, a cornea specialist and her attending physician, Doctor Tannan arrived at a course of

treatment. She testified that she placed a "bandage contact lens" over respondent's eye, wrote out a prescription for eye drops to lubricate the eye as well as another prescription for vitamin C to help prevent further destruction of his eye tissue. She then instructed respondent to return the following day for a follow-up examination.

¶ 16 When respondent returned the following day, his vision had stabilized. His bandage, however, needed to be replaced. Doctor Tannan continued to monitor respondent's progress over the next few days. On June 10, 2012, respondent complained of worsening pain and vision in his left eye. When Doctor Tannan examined him, she noted that his eye pressure had increased and that his lens had become "completely opacified." She prescribed "pressure lowering drops" and an oral steroid.

¶ 17 On June 29, 2012, respondent again returned to the eye center and expressed his frustration that he continued to experience light sensitivity and pain in his left eye. He then inquired whether he could have his eye removed. Because respondent still had some vision in his eye, Doctor Tannan informed him that eye removal was not the preferred method of treatment. She explained to him that complete eye removal is typically considered "an end resort in patients who have really no other options" and suggested that he was a good candidate for a corneal transplant and cataract surgery once the inflammation in his eye subsided. This course of treatment would likely leave him with "functional vision" in his left eye. Respondent, however, informed her that he "some moral apprehension or misgivings about having any sort of transplantation tissue of foreign tissue in his body" and reiterated that he wanted his eye removed. Because she could see that respondent was in obvious discomfort, she relayed his wishes to her attending physician. After this conversation, Doctor Tannan provided respondent with ointment to "help with comfort in the eye" and suggested that he return to the eye clinic to

speak with Doctor Cohen, the physician who conducted all of the "enucleation," or eye removal procedures at the clinic.

¶ 18 In accordance with her suggestion, respondent returned to the clinic on July 5, 2012, and met with Doctor Cohen and another colleague, Doctor Chu, to discuss a possible enucleation procedure. At that time, respondent was provided with specific details about the prospective procedure as well as the potential risks and benefits of enucleation in his case. He was also given a prescription for an anti-inflammatory to help with his pain. Respondent next returned to the clinic on July 9, 2012. At that time, respondent informed Doctor Tannan that his "pain continued to be at a high level" and he confirmed that he wanted "to undergo the enucleation of the eye." Respondent's surgery was then scheduled for July 12, 2012. On that date, Doctors Tannan and Cohen operated on respondent. Doctor Tannan described the procedure as "uneventful." Respondent's eye was removed and "a silicone prosthesis was placed in the place of the eyeball." She testified that she provided post-operative care to respondent over the course of the next several weeks. She confirmed that on the date of respondent's left eye enucleation procedure, he voiced no complaints about his right eye.

¶ 19 Doctor Tannan testified that respondent subsequently returned to the clinic on January 12, 2013. At that time, respondent was accompanied by Edward Sweis, his conditional release monitor, as well as his father. Respondent informed her that he had begun experiencing severe pain in his right eye the previous night and that he no longer had vision in that eye. He also reported that he had noticed some "floaters" in his right eye before he began experiencing "excruciating" pain. When Doctor Tannan conducted her examination of respondent's right eye, she noted that the eye was "incredibly inflamed" and that he was unable to see light. She was very concerned as to reason for respondent's condition and asked if he had experienced any

trauma to his right eye. Respondent, however, denied experiencing any trauma. She then considered various potential causes of respondent's condition, including an autoimmune disorder or a bacterial or viral infection. After conferring with several attending physicians, Doctor Tannan decided to admit respondent to the hospital. He was immediately started on a high dose of intravenous steroids and was given oral antiviral medications.

¶ 20 When Doctor Tannan checked on respondent the following day, she discovered that the inflammation had worsened. After she again conferred with various attending physicians, Doctor Tannan injected antibiotics directly into respondent's right eye. She also took "cultures" or "samples" from the anterior and posterior chambers of respondent's right eye and sent them for viral and bacterial analysis. She testified that the sample taken from the posterior part of respondent's right eye ultimately tested positive for a bacterial organism identified as "bacillus." Doctor Tannan testified that the organism is generally "benign," but explained that it can become problematic in "patients who have had traumatic injuries to the eyes or patients who [are] severely immunal compromised." She further testified that there was no evidence that respondent was "severely immunal compromised" at the time of his admission to the hospital because he was not running a fever and his HIV test had come back negative. However, she nonetheless requested an infectious disease consult. The infectious disease doctor conducted an examination and could not find an "endogenous source for [respondent's] infection." That is, the doctor could find no internal source within respondent's body that could have caused the infection and damage to his right eye. As a result, Doctor Tannan concluded that respondent's infection was most likely caused by an unknown external source. Doctor Tannan confirmed that it was "possible" that respondent's infection could have occurred as a result of something being injected into his eye.

¶ 21 Doctor Tannan testified that respondent's inflammation continued to worsen following his admission to the hospital. As a result a vitrectomy[2] was performed "to help decrease the inflammatory load in the eye." Additional antibiotics were also injected into the eye. Following that procedure, respondent "appeared to be less uncomfortable;" however, he was still unable to see any light after the surgical procedure.

¶ 22 Doctor Tannan denied that she had ever informed respondent that he had a fungal infection. She further denied telling respondent that he was going to lose vision in his right eye when she was treating respondent for the alkali burn in his left eye. Finally, she denied that she ever informed respondent that there was a concern that the bacteria in his blood was going to travel to his brain and kill him.

¶ 23 On cross-examination, Doctor Tannan testified that it was "possible" but "unlikely" that one of the attending physicians involved in respondent's care informed him that he had a fungal infection when he sought out treatment for his right eye. She also agreed it was possible that some other physician told him he had a blood infection. Doctor Tannan, however, testified that no attending physician would have told respondent that he would lose sight in his right eye before he presented with issues in that eye because there was nothing in his medical records that would lead a physician to draw such a conclusion. She confirmed that when she examined respondent's right eye, she did not observe any obvious signs of trauma.

¶ 24 Doctor Tannan also confirmed that prior to respondent's decision to seek the enucleation of his left eye, he had experienced weeks of pain as a result of his alkali injury. She categorized alkali injuries "ultimately one of the worst injuries [a person] can have in the eye." She also testified that respondent would have had to wait until the inflammation in his left eye subsided

[2] A vitrectomy is a surgical procedural in which the vitreous gel from the middle of the eye is removed.

before he could have undergone a corneal transplant procedure, her recommended form of treatment. She estimated that it would have likely taken "weeks or months" for the inflammation to subside before a corneal transplant could have been performed. Doctor Tannan acknowledged that when respondent indicated his desire for enucleation, he stated that he "was tired of being in pain." She also acknowledged that the enucleation procedure succeeded in relieving respondent's pain.

¶ 25 Rhona Meachem, a licensed clinical social worker and a sex offender evaluator and treatment provider, testified that she began providing sex offender treatment to respondent in 2010. She counseled him in a group therapy setting as well as on an individual basis. Meacham testified that respondent first reported having problems with his eyes on June 7, 2012, during an individual therapy session. He stated that he had contracted a fungal infection and had also been diagnosed with glaucoma. During their next session on June 12, 2012, respondent "was reporting that the doctors were unsure what was occurring" and that "he had lost full sight in [his left] eye." Thereafter, on June 19, 2012, respondent told Meacham that he had met with a specialist who had informed him that he would not regain sight in his left eye and that "it was only a matter of time before he would lose sight in the other eye." Respondent also relayed his concerns that he would be forced to return to a treatment and detention facility if he became blind; however, Meacham assured him that his "case management team would not move for that based solely on a medical condition." Meacham did, however, inform respondent that it "was imperative that he sign a consent for release of information to allow [his case management team] to consult with his physician so that [they] could get the care in place for him." Respondent, however, refused to provide his consent at that time, and during his next therapy session, respondent expressed "irritation with the case management team regarding the intrusive nature of

[the team's] interactions with him around the medical condition." He indicated that he did not want anyone to speak to his doctors about his eye condition. On July 10, 2012, respondent told Meacham that he had contracted a secondary bacterial infection that his doctors had been unable to successfully treat. Because the doctors were concerned that the bacteria could enter his bloodstream, travel to his brain and kill him, they were going to remove his eye.

¶ 26 Meacham stated that respondent never informed her that he had an option for a corneal transplant in lieu of complete eye removal or that he had a religious belief that prohibited the introduction of any foreign substances into his body. He also failed to disclose that his doctors had not actually recommended that his left eye be removed; rather, it was his wish to have his eye removed. Based upon what respondent did tell her, Meacham recommended that he seek out services that would prepare him for his eventual blindness. Respondent initially informed Meacham that he sought out services at an organization called The Lighthouse; however, he was told that he was not eligible for services until he became completely blind. Meacham testified that his case management team subsequently learned that Patricia, an employee at The Lighthouse, was actually waiting for respondent to contact her about services. As a result, during a therapy session on August 14, 2012, Meacham confronted respondent with the discrepancy. She testified that respondent "didn't really address th[is] discrepancy. In general, he just minimized the fact that he had misled [the team] and again became more focused on the intrusiveness of [the team's] involvement with the issue." He relayed that "it was the only area of his life that he believed he had complete control over and that he did not want the case management team to interfere." Meacham, in turn, requested that respondent provide his case management team with a proposal that identified the products that he believed he needed in order to prepare his home for his eventual blindness as well as the associated costs for those products.

Respondent, however, did not complete the proposal. Instead, he stated that the only thing he needed was an iPhone.

¶ 27 Meacham testified that she continued to meet with respondent on a weekly basis after his left eye was removed. During that time, they continued to discuss his eye condition and Meacham continued to reiterate her request that respondent sign a release that would allow his case management team to have access to his medical information. Respondent, however, continually refused to provide his consent. Beginning in December 2012, respondent reported that he was experiencing diminished capacity in his right eye and that the doctors were running tests to determine the cause. Thereafter, on January 10, 2013, respondent reported to a therapy session with a bloodshot right eye and complained that he had "four blind spots where he could not see." Meacham subsequently received a phone call on January 12, 2013, from Ed Sweis, respondent's conditional release supervisor, informing her that respondent had been admitted to the hospital. At that point, Meacham believed that the cause of respondent's problem was either a fungal infection or glaucoma. When she visited respondent in the hospital on January 15, 2013, however, he informed her that he a "contracted a rare bacterial infection." She testified that her role at that time was to discuss his emotional status and to prepare him for his eventual discharge.

¶ 28 Sometime shortly thereafter, Meacham learned that the representations made by respondent concerning his eyes were untrue. She testified that respondent's misrepresentations rendered her unable to provide him with effective sex offender treatment during the seven month period when respondent developed issues with his eyes and ultimately lost his sight. She explained:

"For me to [provide treatment] safely and to feel that we are ensuring the safety of the community to the greatest extent possible, I have to rely on several things, and one of those things is self-report. It's not the only thing, but to some degree, I have to have some confidence that I will get some accurate self-reporting from the clients, which I did not get [from respondent] for seven months[3] despite consistently focusing on it.

The other issue is that we need to be able to collaborate with the individuals [who] are involved with the clients. In Mr. Mislich's case, he prevented the case management team from doing that."

¶ 29 On cross-examination, Meacham acknowledged that although she began to have concerns about respondent's truthfulness in August 2012 when she learned of his misrepresentations about the availability of services at the Lighthouse, she still continued to provide treatment to him. She also acknowledged making notations in her files that respondent was being "productive" in group therapy and that he "honestly participated" during that time. Meacham explained, however, that after she learned of the "level of deception" that respondent employed during that period, she now had reason to "question most of [respondent's] self-report" and her opinions. She reiterated that "sex offender specific therapy requires transparency" and that respondent did not provided the requisite transparency to obtain successful treatment.

¶ 30 After presenting the aforementioned live testimony, the State requested the court to take judicial notice of the report authored by Doctor Jacqueline Buck in 1998 that was attached to the State's initial petition to commit respondent under the SVP Act. The State argued that the information contained in the report "supports a pattern of behavior" that was relevant to the petition to revoke respondent's conditional release. Specifically, the report contained evidence

[3] Respondent first sought treatment for his left eye on June 5, 2012. He did not sign a waiver releasing his medical records until January 10, 2013. It thus appears that his misrepresentations to Meacham took place over an eight month period, rather than a seven month period.

that respondent had a history of being "deceitful and manipulative" and inflicting injuries upon himself or threatening to inflict injuries upon himself to obtain "secondary gain." The court, over respondent's objection, agreed to take judicial notice of Doctor Buck's report given that it was "part of the court file and part of the court record." The court also agreed to take judicial notice of the most recent version of respondent's conditional release plan. The State then rested its case-in-chief.

¶ 31 In response, counsel for respondent sought a continuance so that he could call Doctor Buck to testify about the information contained in her report. Counsel's request, however, was denied. Counsel then informed the court that he had fitness concerns about respondent and requested the court to continue the proceedings until his client was restored to fitness and was able to testify. The court, however, also denied that request. As a result, counsel indicated that he was "compelled to rest under objection." The parties then both delivered closing arguments.

¶ 32 After hearing the arguments of the parties and reviewing the evidence in open court, the circuit court found that the State had proved by clear and convincing evidence that respondent had violated the terms of his conditional release. Specifically, the court held: "I ultimately make my finding upon the fact that [respondent] is lying to his case management team. And as a result, he cannot be trusted with regard to himself and that also means that he cannot be trusted with safety of others in the community. The petition for revoking conditional release is hereby granted. Mr. Mislich is to be remanded to the TDF until further proceedings." This appeal followed.

¶ 33 ANALYSIS

¶ 34 Fitness Evaluation

¶ 35 On appeal, respondent first argues that he is entitled to a new conditional release revocation hearing because the circuit court failed to make an inquiry into his fitness after his attorney had relayed concerns that there existed *bona fide* doubts as to his fitness to participate in the hearing. Respondent argues that he had a constitutional right to be fit during the hearing and that he was he was unconstitutionally deprived of his liberty interests when the court granted the State's conditional release revocation petition without making any inquiries into his fitness.

¶ 36 The State responds that individuals subject to proceedings under the SVP Act are not entitled to fitness evaluations. The State observes that this court has previously concluded that persons subject to commitment proceedings under the SVP Act have neither a statutory nor a due process right to a fitness evaluation. The State argues that the same rule should apply to conditional release revocation proceedings under the Act.

¶ 37 Because a fundamental understanding of the SVP Act and the procedures outlined therein is necessary to evaluate the specific arguments raised by respondent, we will first provide a brief overview of the Act and the provisions relevant to this appeal. The SVP Act was enacted by the Illinois legislature and became effective in 1998. *People v. Botruff*, 212 Ill. 2d 166, 170 (2004); *In re Detention of Samuelson*, 189 Ill. 2d 548, 552 (2000). Its purpose is "to identify sexually [violent] persons and force them into treatment for their own good and for the safety of society." *In re Commitment of Gavin*, 2014 IL App (1st) 122918, ¶ 75. A sexually violent person is defined as "a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of a sexually violent offense by reason of insanity 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). To fulfill its purpose, the SVP Act permits the State

to file a petition in the circuit court to extend a respondent's incarceration period beyond the time that he would otherwise be subject to release. 725 ILCS 207/15 (West 2012); *Samuelson*, 189 Ill. 2d at 552; *In re Commitment of Dodge*, 2014 IL App (1st) 113603, ¶ 19. Following an initial probable cause determination, the circuit court will preside over a hearing on the petition. 730 ILCS 207/30 (West 2012); 730 ILCS 207/35 (West 2012). Although proceedings under the SVP Act are civil rather than criminal in nature, the State must prove beyond a reasonable doubt that the subject of the petition is a sexually violent person. 725 ILCS 207/20 (West 2012); 725 ILCS 207/35(d)(1) (West 2012). During the proceedings, the respondent is afforded the right: to be present and represented by counsel; to remain silent; to present and cross-examine witnesses; and to have the hearing recorded by a court reporter. 725 ILCS 207/25(c)(1)-(4) (West 2012). If the State's burden is satisfied, the circuit court will then commit the individual to the custody of the Department "for control, care and treatment until such times as the person is no longer a sexually violent person." 725 ILCS 207/40(a) (West 2012).

¶ 38 Once an individual is committed to the care, custody and control of the Department, he will be subject to periodic examinations to determine whether he has made sufficient progress in treatment such that he is no longer a sexually violent person and is eligible for discharge or conditional release. 725 207/55 (West 2012). Based on the results of the periodic evaluations, a Department evaluator or the committed person may petition the court for conditional release. 725 ILCS 207/60(a) (West 2012). If the court "finds probable cause to believe the individual had made sufficient progress in treatment to the point where he or she is no longer substantially probable to engage in acts of sexual violence if on conditional release," the court will preside over a full hearing on the petition. 725 ILCS 207/60(c) (West 2012). Unless the State proves by "clear and convincing evidence that the person has not made sufficient progress in treatment to

the point where he or she is no longer substantially probable to engage in acts of sexual violence if on conditional release," the court will grant the petition, and direct the Department to "prepare a plan that identifies the treatment and services, if any, that the person will receive in the community." 725 ILCS 207/60(d), (f) (West 2012).

¶ 39 If it is determined that an individual on conditional release has violated any condition or rule contained in his conditional release plan or that the safety of others requires revocation of the individual's conditional release, the State may file a petition to revoke. 725 ILCS 207/40(b)(4) (West 2012). Once the petition is filed, the circuit court will preside over a hearing and it is the State's burden to prove "by clear and convincing evidence that a rule or condition of release has been violated, or that the safety of others requires that the conditional release be revoked. If the court determines after hearing that any rule or condition of release has been violated, or that the safety of others requires that conditional release be revoked, it may revoke the order for conditional release and order that the released person be placed in an appropriate institution until the person is discharged from the commitment *** or until again placed on conditional release." 725 ILCS 207/40(b)(4) (West 2012).

¶ 40 Having provided a brief overview of the Act, we will now address respondent's fitness argument. He argues that constitutional due process guarantees require that individuals subject to conditional release revocation proceedings be fit. Due process is a "flexible concept" designed to ensure fundamental justice and fairness. *Lyon v. Department of Child and Family Services*, 209 Ill. 2d 264, 272 (2004); see also *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). To determine whether a specific procedure accords with constitutional due process requirements, courts balance three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the

probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. These three factors are applicable to due process analysis under both federal and state due process clauses. *Botruff*, 212 Ill. 2d at 179. The issue of whether a person's due process rights have been violated presents a question of law, and is thus subject to *de novo* review. *Lyon*, 209 Ill. 2d at 271.

¶ 41 In *In re Commitment of Weekly*, 2011 IL App (1st) 102276, this court was called upon to consider whether individuals subject to commitment proceedings under the SVP Act were entitled to fitness hearings. We concluded that persons subject commitment proceedings pursuant to the Act have neither a statutory nor a due process right to fitness evaluations. In finding that the SVP Act provides no statutory right to fitness evaluations, we noted that the "plain language of section 25 [of the Act] specifically lists a number of rights available to individuals subject to petitions for commitment. A well-known rule of statutory construction provides that *expressio unius est exclusion alterius*, the expression of one thing in a statute excludes all others. [Citations.] Applying the rule, the right to a fitness evaluation is not afforded to individuals subject to petitions under the Act because it is not among the specifically enumerated rights." *Id*. ¶ 40.

¶ 42 In finding that the principles of due process did not entitle individuals subject to commitment petitions under the SVP Act to fitness hearings, we analyzed the three factors relevant to such analysis. With respect to the first factor, we acknowledged that the private interests at issue—the liberty interests of individuals subject to commitment proceedings under the Act—were significant. Pursuant to the SVP Act, persons who are deemed sexually violent

"may be committed for an indefinite period of time in a secure facility," thus impacting their fundamental liberty interests. *Id.* ¶ 47. Given the significant interest involved, we concluded that this factor "weigh[ed] in favor of finding a right to a fitness evaluation." *Id.* ¶ 48.

¶ 43 However, we found that the second factor—the risk of an erroneous deprivation of the relevant private interest through the procedures used and the probable value of any additional safeguards—weighed against a finding of a right to a fitness hearing. Specifically, we concluded that "the procedural safeguards of the Act ensure that the risk of erroneous deprivation of liberty is slight." *Id.* ¶ 49. In doing so, we noted that the SVP Act guaranteed that those individuals subject to commitment petitions are afforded the right to a trial, during which they have the following additional rights: to be present; to be represented by counsel; to remain silent; to present and cross-examine witnesses; to have the hearing be recorded by a court reporter; to retain expert witnesses; and to have the matter be decided by a jury. Moreover, during that hearing, it is the burden of the State to prove the allegations in the commitment petition beyond a reasonable doubt. We further noted that the Act provides additional protections once an individual is committed. Specifically, the SVP Act mandates that a committed individual be regularly re-examined to determine whether he has made sufficient progress to be conditionally released or discharged and permits the committed individual to petition for his own conditional release or discharge. In addition to finding that these aforementioned procedural safeguards rendered the risk of erroneously depriving an individual his liberty rights to be "slight," we determined that "finding a right to a fitness evaluation would likely add minimal value to the proceedings." We reasoned: "At any hearing pursuant to the Act, the respondent is represented by counsel, who will have had the opportunity to examine the reports of psychologists performing the mental examinations. These reports, as well as the respondent's prior offenses

[not the respondent's own account], will generally form the basis of the probable cause finding or the finding that the respondent is a sexually violent person." *Id*. ¶ 52.

¶ 44 With respect to the final factor—the governmental interest involved—we found that the State had a strong "interest in protecting its citizens from violent sexual offenders and *** in treating the mental disorders of those offenders." *Id*. ¶ 54. Given the strong governmental interest involved, we concluded that that "the State's interest in public safety and providing treatment to sexually violent persons provides sufficient justification to deny a right to a fitness evaluation, especially given that there is no statutory template for courts to apply. *** '[W]e see no reason why the public interest in committing sexually dangerous persons to the care of the treatment center must be thwarted by the fact that one who is sexually dangerous also happens to be incompetent.' " *Id*. ¶ 54 (quoting *Commonwealth v. Nieves*, 846 N.E. 2d 379, 385 (2006)).

¶ 45 Respondent acknowledges this court's previous decision in *Weekly*; however, he argues that the decision is not dispositive because "this case presents an issue of first impression: whether SVP Act respondents have a constitutional right to be fit during conditional release revocation proceedings (as opposed to [commitment proceedings])." We disagree. Although respondent is correct that *Weekly* addressed the issue of fitness in the context of commitment proceedings under the Act, we believe that the same rationale applies in the instant case and that due process does not require that individuals subject to conditional release revocation petitions under the SVP Act be fit.

¶ 46 The same liberty interests are impacted in initial commitment proceedings and conditional release revocation proceedings. Like respondents subject to petitions for commitment, respondents who are subject to conditional release revocation petitions, face confinement in "an appropriate institution" until they are deemed appropriate candidates for

discharge from commitment "or until again placed on conditional release." 725 ILCS 207/40(b)(4) (West 2012). Accordingly, the first due process factor weighs in favor of finding a due process right to a fitness evaluation. The remaining two factors, however, do not. As we found in *Weekly*, the SVP Act contains sufficient procedural safeguards that render the risk that an individual will be erroneously deprived of his liberty interests "slight." Like a respondent subject to initial commitment proceedings, a respondent subject to conditional release revocation proceedings is entitled to an initial probable cause hearing, and if the court finds that probable cause exists concerning the allegations contained in the petition, the respondent is entitled to a full hearing on the matter. 725 ILCS 207/40(b)(4) (West 2012). During that hearing, the respondent is afforded the same rights to which he was entitled during initial commitment proceedings, including the right: to be present and be represented by counsel; to remain silent; to present and cross-examine witnesses; and to have the hearing recorded by a court reporter. 725 ILCS 207/25 (c)(1)-(c)(4) (West 2012). Moreover the burden of proof is on the State to prove "by clear and convincing evidence that a rule or condition of release has been violated, or that the safety of others requires that the conditional release be revoked." 725 ILCS 207/40(b)(4) (West 2012). Given these procedural protections contained within the Act, fitness evaluations would "likely add minimal value to the proceedings." *Weekly*, 2011 IL App (1st) 102276, ¶ 52. Finally, the same strong governmental interest in "public safety and providing treatment to sexually violent persons" is implicated in both commitment proceedings and conditional release revocation proceedings under the SVP Act. *Id*. ¶ 54. Ultimately, after reviewing our prior decision in *Weekly* as well as the relevant due process factors, we conclude that respondents subject to conditional release revocation petitions under the SVP Act are not entitled to fitness hearings.

¶ 47 In so finding, we are unpersuaded by respondent's reliance on *People v. Davis*, 127 Ill. App. 3d 49 (1984), a case in which the Second District held that the defendant was entitled to a fitness hearing prior to his conditional release revocation hearing under the Sexually Dangerous Persons Act (SDP Act) (725 ILCS 205/0.01 *et seq*. (1984)), a related statutory enactment.[4] In doing so, the Second District found that the "issue c[an] be analogized to the rights which a [criminal] parolee or probationer enjoys prior to the revocation of his parole or probation." *Id*. at 57. Notwithstanding the fact that conditional release revocation proceedings under the SDP Act are civil, the *Davis* court concluded that the due process rights afforded to criminal defendants should apply equally to individuals subject to conditional release revocation proceedings and thus "a defendant is entitled to a fitness hearing prior to the [conditional release] revocation proceeding if his competency is questioned by the court or the parties." *Id*. at 60-61.

¶ 48 The *Davis* court's analogy and rationale, however, has subsequently been rejected by other courts. In *People v. Cooper*, 132 Ill. 2d 347 (1989), the supreme court was called upon to answer another question pertaining to the SDP Act and, in doing so, expressly "decline[d] to follow the *Davis* court's logic," explaining: "The fundamental difference between probation and conditional release bars any application of probation's automatic discharge rule to conditional releases [under the SDP Act]. Probation is a sentence imposed for criminal convictions, whereas

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¶ 1 [4] The SVP and SDP Acts share the same underlying goals and legislative intent, which is to protect society from sexually dangerous individuals and provide necessary care and treatment to them. *People v. Trainor*, 196 Ill. 2d 318, 336 (2001). However, while the Sexually Dangerous Persons Act provides for commitment as an alternative to criminal prosecution, the SVP Act may be pursued in addition to criminal proceedings. *Id*. fn 1.

conditional release is one aspect of the treatment of sexually dangerous persons who are committed to the supervision of the Department of Corrections instead of being prosecuted for a criminal offense." *Id*. at 357. Thereafter, in *People v. Akers*, 301 Ill. App. 3d 745 (1998), the Fourth District highlighted the civil nature of proceedings under the SDP Act, and ultimately concluded that constitutional due process guarantees did not require that an individual be fit for SDP Act commitment trials. *Id*. at 750-51. Given these subsequent rulings, we do not find that the *Davis* decision compels a different result in the instant case. Rather, we conclude that the principles of due process do not entitle respondents subject to conditional release revocation proceedings under the SVP Act to fitness hearings. There is no constitutional requirement that individuals subject to such proceedings be fit.

¶ 49 Trial Court's Refusal to allow Respondent to Issue Subpoenas to Depose Witnesses

¶ 50 Respondent next argues that the circuit court "committed numerous procedural and evidentiary errors which individually and in sum denied [him] a fair hearing." He first contends that the circuit court erred when it *sua sponte* precluded him from issuing a subpoena to depose Doctor Tannan.

¶ 51 The State responds that the circuit court did not abuse its discretion when it denied respondent's request to depose Doctor Tannan because discovery is "impermissible" in postjudgment proceedings. The State argues that a conditional release revocation proceeding under the SVP Act is a postjudgment proceeding and, as such, discovery civil practice rules "are not intended to apply" to such proceedings.

¶ 52 Because proceedings under the SVP Act are civil in nature, they are governed in accordance with Illinois Civil Practice Law (735 ILCS 5/2-101 *et seq*. (West 2012)) unless a specific contrary provision is contained in the SVP Act itself. 725 ILCS 207/20 (West 2012); *In*

re Detention of Hardin, 238 Ill. 2d 33, 41 (2010); *In re Detention of Carpenter*, 2015 IL App (1st) 133921, ¶ 19; *People v. Coyne*, 2014 IL App (1st) 123105, ¶ 14. The Civil Practice Law is part of the Illinois Code of Civil Procedure (735 ILCS 5/1-101 *et seq*. (West 2012)). *Coyne*, 2014 IL App (1st) ¶ 14. The Code of Civil Procedure, in turn, incorporates the Illinois Supreme Court Rules. *Id*. The SVP Act is silent as to the issuance of subpoenas and the taking of depositions; however, "[t]he Civil Practice Law allows subpoenas to be issued in pending cases (735 ILCS 5/2-1101 (West 2008)) and discovery to be conducted as soon as all the defendants have appeared in the matter (Ill. S. Ct. R. 201(d) (eff. Jan. 1, 2013))." *Clark*, 2014 IL App (1st) 133040, ¶ 13.

¶ 53 In this case, prior to the start of the hearing on the State's conditional release revocation petition, respondent's attorney informed the court that he had been unable to speak with Doctor Tannan and indicated that he wanted to subpoena and depose her. The circuit court responded as follows: "I don't see depositions happening on a conditional release violation. *** The way I read the statute, the State is supposed to have a hearing within thirty days. That indicates to this Court that is intended to be a somewhat expedited proceeding, and is not pretrial, not to be bogged down in depositions and lengthy delays." The court acknowledged counsel's argument that the thirty day requirement could be waived by respondent, but stated: "I still don't perceive depositions in this matter. That is going to drag on for months. That is not appropriate."

¶ 54 Respondent contends that the reasoning employed by the circuit court in denying his request to subpoena Doctor Tannan was "flawed." In support, he cites to this court's previous decision in *In re Commitment of Clark*, 2014 IL App (1st) 133040, in which we held that a respondent subject to a petition for commitment under the SVP Act was entitled to issue a subpoena *duces tecum* prior to a probable cause hearing. In so holding, we noted that the SVP

Act did not contain a specific provision concerning the issuance of subpoenas prior to probable cause hearings. *Id.* ¶ 21. However, because " [c]ivil practice law provides parties with the right to issue subpoenas in pending cases," we concluded that respondents subject to commitment proceedings had such a right. *Id.* ¶ 19. In doing so, we were unpersuaded by the State's argument that the expedited nature of SVP Act proceedings was indicative of the fact that the legislature did not contemplate that respondents would have a right to issue subpoenas prior to probable cause hearings; rather, we emphasized that "the plain language of the SVP Act gives a respondent the right to issue a subpoena in the pending case pursuant to civil practice law." *Id.* ¶ 19.

¶ 55 The State, acknowledges this court's prior holding in *Clark*, but argues that respondent's reliance on *Clark* is "misplaced" because it involved the issuance of subpoenas prior to a pretrial probable cause hearing. The State contends that a conditional release revocation proceeding occurs postjudgment in an SVP case and that the civil practice rules are silent as to whether discovery depositions or other discovery devices may be used posttrial. Given that both the Act and the civil practice rules are silent as to whether depositions may be used in posttrial proceedings, the State argues that respondent had no right to issue a subpoena and depose Doctor Tannan and thus, the court did not err in denying respondent's request. See generally *Darrough v. White Motor Co.*, 74 Ill. App. 3d 560, 563 (1979) (noting that rules "providing for discovery in civil cases are silent as to whether discovery depositions may be taken or other discovery devices used post trial"). We are unpersuaded by the State's characterization of conditional release revocation proceedings as posttrial proceedings. The SVP Act does not characterize such proceedings as posttrial or postjudgment proceedings. Rather, the Act provides that conditional release revocation hearings are instituted when the State files a new pleading to revoke a

respondent's conditional release. 725 ILCS 207/40(4) (West 2012). That in turn, triggers a probable cause hearing, and if probable cause to revoke is found, the cause proceeds to a full hearing on the matter. *Id*. Those proceedings ultimately result in a final appealable judgment. It thus appears that conditional release revocation proceedings are new proceedings rather than simply postjudgment proceedings. Although we acknowledge the State's argument that discovery is not permitted in conditional release revocation proceedings under the SDP Act, we note that the limitation of discovery in that context has not been based on the fact that the proceedings are considered postjudgment; rather, it is because the SDP Act contains specific language indicating that such proceedings are governed by the Uniform Code of Corrections rather than rules of civil procedure or relevant supreme court rules. See *In re Detention of Kish*, 395 Ill. App. 3d 546, 553-54 (2009). The SVP Act, however, contains no similar language.

¶ 56 Therefore, we believe our decision in *Clark* applies and that respondents subject to conditional release revocation proceedings are not precluded from issuing subpoenas or engaging in discovery. This is true even though conditional release revocation proceedings are expedited. *Clark*, 2014 IL App (1st) 133040, ¶ 19. Although we agree that the rationale employed by the circuit court to deny respondent's request to issue subpoena and depose Doctor Tannan was incorrect, we do not believe that reversal is warranted. We note that the purpose of discovery rules is to prevent unfair surprise or advantage and aid in the search for the truth and reiterate that the circuit court is afforded broad discretion to regulate discovery. *Kaull v. Kaull*, 2014 IL App (2d) 130175, ¶ 79. Here, there is no dispute that respondent's attorney was in possession of all of respondent's medical records at the time he made the request to subpoena and depose Doctor Tannan. Counsel was thus able to ascertain the substance of Doctor Tannan's testimony from those records. Indeed, there is no indication that respondent's attorney was unfairly

surprised by Doctor Tannan's testimony at the hearing or that respondent was prejudiced by the circuit court's discovery ruling. Therefore, the court's denial of respondent's discovery request does not warrant reversal of the judgment.

¶ 57 Allowing Doctor Tannan to Testify as an Expert

¶ 58 Respondent next argues that the circuit court erred in allowing Doctor Tannan to testify as "an expert in the field of ophthalmology to the degree and knowledge of a resident of her stage." He contends that the circuit court's qualification of Doctor Tannan as an expert was "arbitrary and exceeded the bounds of reason."

¶ 59 The State responds that the circuit court "correctly allowed [Doctor] Tannan to testify about her treatment of respondent and any medical opinions she rendered related to that treatment."

¶ 60 It is well-established that the admissibility of evidence is left to the discretion of the circuit court. *Snelson v. Kamm*, 204 Ill. 2d 1, 33 (2003); *People v. Swanson*, 335 Ill. App. 3d 117, 125 (2002). More specifically, the decision whether to allow expert testimony is within the sound discretion of the circuit court. *People v. Becker*, 239 Ill. 2d 215, 234 (2010); *In re Detention of Lieberman*, 379 Ill. App. 3d 585, 606 (2007). As a general rule, an individual will be permitted to testify as an expert where her experiences and qualifications afford her knowledge that is not common to lay persons and where such testimony will aid the trier of fact in reaching its conclusion. *Lieberman*, 379 Ill. App. 3d at 606. On review, the circuit court's decision to admit expert testimony will not be disturbed absent an abuse of the court's discretion. *Becker*, 239 Ill. 2d at 234; *Lieberman*, 379 Ill. App. 3d at 606. An abuse of discretion will only be found where the circuit court's decision is arbitrary, fanciful, or unreasonable, or where no

reasonable person would take the view adopted by the circuit court. *Swanson*, 335 Ill. App. 3d at 125.

¶ 61 At the hearing, the State, over respondent's objection, sought to qualify Doctor Tannan as "a medical expert for purposes of explaining the treatment of [respondent]." In finding that Doctor Tannan could testify as an expert, the court stated:

> "Okay. An expert is someone that assists the trier of fact, which is me at the moment. And while she would not be an expert in the field of ophthalmology at this point, I do find that she's qualified to testify as to what she has testified to is her position, as a resident, *as a treating physician whose actions were reviewed by an attending physician*. She is qualified to testify under those parameters. She will aid this trier of fact in understanding more about the practice of medicine and with respect to an ophthalmology resident." (Emphasis added.)

¶ 62 On review, we find no abuse of discretion. Respondent concedes that "there was nothing stopping Doctor Tannan from testifying as a treating physician and explaining the things she did in the course of her treatment of" him; however, he contends that the court did not qualify her as a treating physician. Respondent's assertion that the circuit court did not qualify Doctor Tannan as a treating physician but merely "as an expert in the field of ophthalmology to the degree of knowledge of a resident at her stage" is belied by the record. The court's reference to Doctor Tannan's residency status was immediately followed by an explanation that her status merely pertained to the weight to afford her testimony, not its admissibility. The mere fact that Doctor Tannan was a resident and had her work overseen by various attending physicians did not, as the circuit court found, preclude her from testifying about her treatment of respondent. Respondent cites no controlling case law to the contrary. Therefore, we find that the circuit court's

conclusion that Doctor Tannan possessed qualifications and experience not common to lay persons and that her testimony would aid it in making its decision as to whether to revoke respondent's conditional release, was not an abuse of discretion.

¶ 63 Admission of Doctor Buck's 1998 Evaluation of Respondent

¶ 64 Respondent next argues that the circuit court erred in taking judicial notice of the evaluation that Doctor Buck completed of respondent in 1998 that was attached to the State's initial petition seeking commitment of him under the SVP Act. Respondent contends that this "stale, 15-year old evaluation" constituted inadmissible hearsay.

¶ 65 The State responds that the SVP Act expressly permitted the circuit court to take judicial notice of Doctor Buck's report. Moreover, the State argues that the report was relevant to determine whether respondent "was regressing in treatment by engaging in behaviors that had served as triggers for his sexually violent offenses." Therefore, the State argues that the circuit court did not abuse its discretion in taking judicial notice of Doctor Buck's report.

¶ 66 Because judicial notice is an evidentiary matter, it is reviewed for an abuse of discretion. *In re S.M.*, 2015 IL App (3d) 140687, ¶ 13. As a general rule, a court may take judicial notice of matters generally known to the court and not subject to reasonable dispute, including matters of record in the court's own proceeding. *In re A.B.*, 308 Ill. App. 3d 227, 237 (1999).

¶ 67 The State cites Section 30(c) of the SVP Act, which provides in pertinent part, as follows: "Notwithstanding the provisions of Section 10 of the Mental Health and Disabilities Confidentiality Act, *all* evaluations conducted pursuant to this Act and all Illinois Department of Corrections and treatment records shall be admissible at *all* proceedings held pursuant to this Act ***." (Emphasis added.) 725 ILCS 207/30(c) (West 2012). The State argues that pursuant to the plain language of section 30(c) of the Act, Doctor Buck's evaluation report was properly

considered by the circuit court because all evaluations are admissible under the Act. We agree. This court has already recognized that section 30(c) of the Act "rather explicitly provides" for the admission of all evaluations in all proceedings. *In re Commitment of Rendon*, 2014 IL App (1st) 123090, ¶ 39. Doctor Buck's 1998 evaluation of respondent was the first evaluation submitted in connection with respondent's SVP Act proceedings. As such, based on the plain language of the Act it was admissible. *Clark*, 2014 IL App (1st) 133040, ¶ 21 (*quoting In re Commitment of Trulock*, 2012 IL App (3d) 110550, ¶ 21 (" 'A court may not depart from the plain language of the statute and read into it exceptions, limitations, or conditions that are not consistent with the express legislative intent' "). The mere fact that the report was issued years prior to the hearing on the State's conditional release revocation petition was immaterial. See, *e.g., Lieberman v. Budz*, 356 Ill. App. 3d 932, 938 (2005) (rejecting the respondent's argument that the circuit court erred in considering an "out-dated" mental health evaluation prior to ordering that he be detained under the SVP Act).

¶ 68 Respondent is correct that the circuit court generally errs if it takes judicial notice of the contents of a case file without first considering the relevancy and admissibility of those contents. See, *e.g., In re Nylani M.*, 2016 IL App (1st) 152262, ¶ 42 (recognizing that in a parental termination proceeding, the circuit court errs if it does not consider the admissibility of the contents of a court file prior to taking judicial notice of the entire file). Although section 30(c) of the Act contains no express requirement that the court consider the relevancy of an evaluation prior to admitting that evaluation into evidence, it is clear from the record that the court did consider the relevancy of the 1998 evaluation prior to granting the State's request to take judicial notice of the document. The court explained: "SVP cases by their very nature involve patterns of behavior going back as far as 20 or 30 years. Here we're talking about something 15 years ago. I

do find that it's relevant. I do find that it's attached to the original petition, that I can take judicial notice of."

¶ 69 Nonetheless, even if the court improperly took judicial notice of Doctor Buck's 1998 evaluation, we note that it had no impact on the hearing result. In making its finding that revocation of respondent's conditional release was warranted, the court relied on the testimony of Doctor Tannan and Rhona Meacham. The court expressly stated that it "ha[d] not relied on [the 1998 evaluation]" in making its determination. Therefore, respondent suffered no prejudice. See, *e.g.*, *In the Interest of J.G.*, 298 Ill. App. 3d 617, 629 (1998) (finding that although the circuit court erred in taking judicial notice of a court file, its error was harmless because it did not prejudice the respondent given the strength of the State's evidence). Moreover, given that the 1998 evaluation did not form the basis for the circuit court's decision, it follows that respondent also suffered no prejudice when the court refused his motion to admit his additional psychological evaluations into evidence, which he had argued were necessary to prevent the court from getting a "skewed idea of what happened" over the years.

¶ 70 Denial of Respondent's Motion for a Continuance

¶ 71 Respondent next argues that the circuit court improperly denied his request for a continuance to allow him to call Doctor Buck and "each subsequent evaluator" to testify about their evaluations of respondent and the progress he had made in treatment since his initial commitment in 1998.

¶ 72 The State responds that the circuit court "did not abuse its discretion in denying respondent's unsupported motion for a continuance to present immaterial and cumulative evidence known to him years before the hearing."

¶ 73 It is well-established that a litigant does not have an absolute right to a continuance; rather, the decision to grant or deny a motion for a continuance is within the sound discretion of the circuit court. *K&K Ironworks, Inc. v. Marc Realty, LLC.*, 2014 IL App (1st) 133688, ¶ 22. As such, the circuit court's denial of a motion for a continuance will not be disturbed absent an abuse of discretion that resulted in palpable injustice to moving party. *ICD Publications, Inc. v. Gittlitz*, 2014 IL App (1st) 133277, ¶ 88; *K&K Ironworks*, 2014 IL App (1st) 133688, ¶ 22.

¶ 74 Here, after the circuit court agreed to take judicial notice of Doctor Buck's 1998 evaluation of respondent, his attorney made an oral motion to "continue the matter." Counsel explained: "I believe it's incumbent on us to call Dr. Buck to explain her conclusions in the report that you have, as well as to call each and every evaluator who has seen [respondent] in the period of time from when this petition was filed to the time he was granted conditional release. I am certain that the fact that he was granted conditional release would be considered as evidence, that he addressed all of the deficiencies in the original report and the original petition, and therefore the court should consider that as to making a decision on this petition for conditional release." The circuit court, however, denied counsel's motion. On review we find no abuse of discretion.

¶ 75 Initially, we acknowledge that the State is correct that respondent's attorney failed to fulfill the affidavit requirement set forth in Illinois Supreme Court Rule 231(a), which provides as follows: "If either party applies for a continuance of a cause on account of the absence of material evidence, the motion shall be supported by the affidavit of the party so applying." Ill. S. Ct. R. 231(a) (eff. Jan. 1, 1970). The lack of affidavit, however, is not necessarily fatal given that reviewing courts have "been willing to dispense with an affidavit in some cases." *In re S.B.*, 2015 IL App (4th) 150260, ¶ 24 (citing *Jack v. Pugeda*, 184 Ill. App. 3d 66, 76 (1989); *Rutzen v.*

Pertile, 172 Ill. App. 3d 968, 974 (1988)). More problematic for respondent, however, is that counsel's motion for a continuance was made after the hearing already commenced and the State had rested its case. Illinois Supreme Court Rule 231(f) specifically precludes motions for continuance from being made after the cause proceeds to trial "unless a sufficient excuse is shown for the delay." Ill. S. Ct. R. 231(f) (eff. January 1, 1970); see also *K&K Ironworks*, 2014 IL App (1st) 133688, ¶ 23 ("Once the case reaches the trial stage, the party seeking a continuance must provide the court with especially grave reasons for the continuance because of the potential inconvenience to the witnesses, the parties, and the court"). Although respondent argues counsel's that motion was made immediately after he "was surprised by the additional evidence the State introduced," we note that Doctor Buck's report as well as all of the additional evaluations were part of respondent's case file and were thus available to his counsel prior to the hearing. The record thus does not support respondent's contention that there was a sufficient excuse for counsel's delay in seeking a continuance. The record further fails to support his contention that the evidence that counsel sought to obtain and present was relevant and material. See Ill. S. Ct. R. 231(b) (eff. Jan. 1, 1970) ("If the court is satisfied that the evidence would not be material *** the continuance shall be denied). The relevant inquiry during the hearing was whether respondent violated a condition of his conditional release plan or whether the safety of the community required the revocation of respondent's conditional release. There was no dispute that respondent had made progress since his commitment in 1998. That is why respondent was eligible for conditional release in the first place. The observations of all of respondent's evaluators over the years who documented his prior progress would thus yield no material or relevant evidence as to whether respondent recently violated a term of his conditional release or

whether his current behavior posed a threat to the safety of the community. As such, we find no abuse of discretion.

¶ 76 Rhona Meacham's Testimony

¶ 77 Respondent next raises several issues concerning Rhona Meacham's testimony. He first argues that the circuit court erred in allowing her to testify about a statement made by an employee at The Lighthouse. He contends that the statement was inadmissible hearsay. Respondent also argues that the court erred in limiting his attorney's cross-examination of Meacham.

¶ 78 The State responds that the court's rulings concerning the scope of Meacham's testimony as well as the scope of respondent's cross-examination of Meacham were proper.

¶ 79 As set forth above, the admissibility of evidence is within the discretion of the circuit court. *Snelson*, 204 Ill. 2d at 33; *Swanson*, 335 Ill. App. 3d at 125. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible. *Brawner v. City of Chicago*, 337 Ill. App. 3d 875, 888 (2003). An out-of-court statement that is used to show its effect on the listener and explain why listener responded in a certain way is not considered hearsay and, as such, is admissible. *Fakes v. Eloy*, 2014 IL App (4th) 121100, ¶ 124.

¶ 80 At the hearing, Meacham testified that respondent had informed her that he was not eligible for services at The Lighthouse until he was completely blind. Thereafter, during a meeting with other members of respondent's conditional release team, she learned that respondent's representations regarding his interaction with personnel at The Lighthouse were untrue. Over respondent's objection, Meacham was then permitted to testify that she confronted him with the information that she learned during that meeting. Specifically, she testified as follows: "I informed Mr. Mislich that Patricia, who was a woman who worked at The

Lighthouse, was waiting for him to contact her regarding services." She further testified that respondent "didn't really address the discrepancy" and simply "minimized the fact that he had misled [her]." The State argues that the disputed statement was not offered to prove the truth of the matter asserted; rather it was admissible to explain Meacham's treatment of respondent and to highlight respondent's reaction to being questioned. We agree that the statement did not constitute hearsay. Meacham did not relay any specific out-of-court statement made by Patricia to respondent. She simply informed respondent that Patricia was waiting to hear from him about obtaining services. Even if the disputed testimony did constitute inadmissible hearsay, its admission was harmless given the strength of the State's case against respondent. See *Swanson*, 335 Ill. App. 3d at 126 (even where the court makes an erroneous evidentiary ruling, reversal is not required unless the ruling deprived the respondent of a fair trial or affected the outcome of the lower court proceedings). Here, there was an abundance of evidence that respondent relayed inaccurate information about the causes of his eye injuries, the recommended treatment options, and his decisions concerning those treatment options. It was respondent's misrepresentations concerning his medical treatment, not his misrepresentations concerning his eligibility for services at The Lighthouse, that formed the crux of the State's conditional release revocation petition. As such, we cannot agree that the admission of such evidence, even if improper, had any effect on the hearing's result.

¶ 81 In a related claim, respondent argues that the circuit court erred when it improperly limited the scope of his attorney's cross-examination of Meacham and prevented him from fully inquiring about respondent's statements concerning his eligibility for services at The Lighthouse. As a threshold matter, we note that the scope and extent of cross-examination is another matter

that is left to the sound discretion of the circuit court. *People v. Blue*, 205 Ill. 2d 1, 13 (2001); *Adams v. Sarah Bush Lincoln Health Center*, 369 Ill. App. 3d 988, 998 (2007).

¶ 82 At the hearing, Meacham, on cross-examination, classified respondent's statement concerning his eligibility for services at The Lighthouse as a "small discrepancy." Counsel then asked Meacham to confirm that respondent's statement was a "small discrepancy" as opposed to a "misrepresentation," and Meacham again stated that it was a "small discrepancy." When counsel asked Meacham to explain the difference between a small discrepancy and a misrepresentation, however, the State objected and the objection was sustained. We do not find that the court's ruling amounted to an abuse of discretion. The basis for the State's petition to revoke was respondent's repeated misrepresentations of his medical condition to Meacham and his treatment team, not his statements concerning his eligibility for services at The Lighthouse. As such, the manner in which Meacham categorized respondent's statements concerning The Lighthouse was not relevant and the court did not err in sustaining the State's objection. See *Marut v. Costello*, 34 Ill. 2d 125, 128 (1965) (recognizing that matters inquired into during cross-examination must be relevant); see also *Preston ex re. Preston v. Simmons*, 321 Ill. App. 3d 789, 803 (2001) (holding that the circuit court did not err in restricting the party's cross-examination to matters that were relevant to the matter at hand).

¶ 83 Respondent also argues that the court improperly limited counsel from inquiring into Meacham's treatment records. At the hearing, Meacham testified that she was unable to provide effective sex offender treatment to respondent during the seven month period that he made misrepresentations about his eyes. She explained that effective treatment requires transparency and accurate self-report, both of which respondent failed to provide. On cross-examination, Meacham acknowledged that her treatment notes during that time period reflected her belief that

respondent was making progress and was honestly participating in therapy; however, she questioned her prior opinions after learning of the level of his deception. Respondent's attorney then inquired whether any of her treatment notes from that period indicated that respondent's treatment was compromised. The State objected, arguing that Meacham had just explained that she had not become aware of respondent's deception until January 2013, and therefore her notes contained no references to respondent's deception prior to that time. The circuit court agreed stating, "Enough. Sustained." We find no abuse of discretion. In response to counsel's previous questions, Meacham acknowledged that her notes contained positive evaluations of respondent. As such, the question posed regarding the lack of negative evaluations in her files during the relevant time period essentially sought to elicit a response that was cumulative of Meacham's prior statements about the contents of her notes. Thus, there was no error.

¶ 84 Finally, respondent contends that the circuit court erred when it precluded counsel from asking Meacham whether respondent had reoffended or used drugs during the time that she provided treatment to him. Immediately after counsel posed the question, the State objected. The circuit court sustained the State's objection, reasoning that counsel's question was outside of the scope of Meacham's direct examination and that it was "not relevant either." We agree with the circuit court's ruling. Again, we reiterate that the basis for the State's petition to revoke was that respondent violated a term of his conditional release plan by failing to "attend and fully participate" in treatment. The theory of the State's case was that respondent's repeated lies to his treatment team constituted a failure to fully participate in treatment. While respondent was also prohibited from reoffending and from abusing drugs while out on conditional release, the State never claimed that he failed to abide by those requirements. As such, counsel's question not only exceeded the scope of Meacham's direct examination, but it was also irrelevant. Therefore, the

circuit court did not abuse its discretion in sustaining the State's objection. See, *e.g.*, *Preston*, 321 Ill. App. 3d at 803 (circuit court did not abuse its discretion in limiting cross-examination to relevant issues); *Carter v. Azaran*, 332 Ill. App. 3d 948, 957-58 (2002) (circuit court did not abuse its discretion in excluding testimony that was beyond the scope of the witness's testimony on direct examination).

¶ 85 Denial of Respondent's Request to Appoint an Ophthalmology Expert

¶ 86 Respondent next argues that the circuit court erred when it denied his request to provide him with an expert to help his attorney understand his medical records. He argues that the court's decision failed to accord with the express provisions of the SVP Act and deprived him of his constitutional right to mount a fair defense.

¶ 87 The State responds that the circuit court did not err in denying respondent's request for a court-appointed expert because he had neither a statutory nor a constitutional right to such an expert.

¶ 88 In support of his argument that he was statutorily entitled to a court-appointed expert, respondent cites section 25(e) of the SVP Act, which provides as follows:

> "*Whenever the person who is subject to the petition required to submit to an examination under this Act*, he or she may retain experts or professional persons to perform an examination. The State has the right to have the person evaluated by an expert chosen by the State. All examiners retained by or appointed for any party shall have reasonable access to the person for the purpose of the examination, as well as to the person's past and present treatment records and patient health care records. If the person is indigent, the court shall, upon the person's request, appoint a qualified and available expert or professional person to perform an examination. Upon the order of the circuit court, the

> county shall pay, as part of the costs of the action, the costs of a court-appointed expert or professional person to perform an examination and participate in the trial on behalf of an indigent person." (Emphasis added.) 725 ILCS 207/25(e) (West 2012).

¶ 89 Based on a plain reading of this statutory provision, the right of a respondent to retain an expert is triggered whenever he or she is required to submit to an examination. Respondent, however, was not required to submit to any examination in connection with the State's petition to revoke his conditional release; rather, respondent, on his own accord, sought out treatment for his eyes from Doctor Tannan. During the time that he obtained treatment from Doctor Tannan, respondent misrepresented his diagnoses and treatment options to his sex offender treatment team and those representations formed the basis of the State's conditional release revocation petition. Respondent was never ordered to submit to an examination by Doctor Tannan or any other witness. As such, the statutory right to an appointed expert set forth in section 25(e) of the Act did not apply. The circuit court therefore committed no error in denying respondent's request.

¶ 90 We further disagree with respondent that the court's denial of his request for an expert precluded him from advancing an effective defense. This court has already held that section 25(e) of the SVP Act comports with the constitutional requirements of due process. See *In re Detention of Allen*, 331 Ill. App. 3d 996, 1003-04 (2002). Moreover, it is apparent from the record that respondent's attorney was able to carefully cross-examine Doctor Tannan about the condition and treatment of respondent's eyes and the representations that other doctors could have potentially made to him outside of her presence. We therefore find that respondent had an adequate opportunity to present his claim fairly during the adversarial process and that the court's

denial of his request for an appointment of an expert did not preclude him from obtaining a fair hearing.

¶ 91 Manifest Weight of the Evidence

¶ 92 Finally, respondent challenges the circuit court's judgment revoking his conditional release, arguing that it was not supported by sufficient evidence. Specifically, he argues that there was insufficient evidence that he violated a rule of his conditional release plan or that the "safety of others" required his conditional release to be revoked. Respondent also argues that the "safety of others standard" is unconstitutionally vague.

¶ 93 The State responds that the circuit court "correctly revoked respondent's conditional release because clear and convincing evidence established that his acts and omissions violated paragraph three of his conditional release plan and/or endangered the safety of others."

¶ 94 During a conditional release revocation proceeding, it is incumbent upon the State to prove "by clear and convincing evidence that a rule or condition of release has been violated, or that the safety of others requires that the conditional release be revoked." 725 ILCS 207/40(b)(4) (West 2012). " 'Clear and convincing evidence is defined as the quantum of proof that leaves no reasonable doubt in the mind of the fact finder as to the veracity of the proposition in question.' " *In re Commitment of Rendon*, 2014 IL App (1st) 123090, ¶ 32 (*quoting In re Gloria C.*, 401 Ill. App. 3d 271, 282 (2010)). A circuit court's ruling on conditional release revocation petition will not be disturbed unless it is against the manifest weight of the evidence. *Id*. A finding is against the manifest weight of the evidence only if "the opposite conclusion is clearly evident" or where the conclusion is "unreasonable, arbitrary, and not based upon any of the evidence." *Snelson*, 204 Ill. 2d at 25.

¶ 95 In this case, Condition 3 of respondent's conditional release plan required that respondent "attend and *fully participate* in assessment, treatment, including the use of any prescribed medications, and behavioral monitoring, including but not limited to, medical psychological or psychiatric treatment specific to sexual offending, drug addiction, or alcoholism, and attend and fully participate in periodic polygraph examinations, plethysmograph testing and Abel screening." (Emphasis added.) At the hearing, Meacham testified that in order to provide safe and effective sex offender treatment, she relies on the self-report of the individual to whom she is providing that treatment. She further testified that she learned that respondent had relayed inaccurate information about his eye issues during his treatment sessions for approximately seven months. Specifically, he relayed inaccurate information about the causes of his eye injuries, the recommended treatment options, and his decisions concerning those treatment options. After Meacham learned of the "level of deception" that respondent employed, she concluded that he had failed to provide the "transparency" required to obtain successful treatment.

¶ 96 The circuit court ultimately relied on Meacham's testimony regarding respondent's lack of transparency to find that he failed to fully participate in therapy as required by his conditional release plan. After reviewing the record, we do not agree with respondent that the circuit court's finding is against the manifest weight of the evidence. Although respondent is correct that he attended his required treatment sessions, mere attendance was not enough because his conditional release required him not only to attend treatment but also to "fully participate" in treatment. Meacham's testimony established that respondent failed to fully participate in treatment because he was deceptive and lacked the requite transparency to obtain successful treatment. As such, the circuit court's conclusion that revocation of respondent's conditional

release was warranted due to his failure to comply with Condition 3 of his plan is not against the manifest weight of the evidence.

¶ 97 We note that the circuit court also found that revocation of respondent's conditional release was warranted because his lack of candor in sex offender treatment also posed a threat to the safety of the community. Having found that the evidence was sufficient to support the court's finding that respondent violated a condition of his conditional release plan we need not address his argument concerning the sufficiency of the court's alternative finding. We similarly need not consider his argument that the "safety of others" standard is unconstitutional. See *Lyon*, 209 Ill. 2d at 272 (recognizing that a reviewing could should avoid constitutional questions if a case can be resolved on other grounds); *Rendon*, 2014 IL App (1st) 123090, ¶ 27 (same).

¶ 98 CONCLUSION

¶ 99 The judgment of the circuit court is affirmed.

¶ 100 Affirmed.