2011 IL App (2d) 100615-U
Nos. 2-10-0615 & 2-10-1301, cons.
Order filed October 6, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re COMMITMENT OF JERRY COZART,	)	Appeal from the Circuit Court of Kane County.
	)	No. 07-MR-477
(The People of the State of Illinois, petitioner-appellee, v. Jerry Cozart, respondent-appellant).	)	The Honorable Allen M. Anderson, Judge Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

Held: Trial court properly admitted evidence of prior bad acts for the purpose of determining whether it was substantially probable that respondent would commit a future act of sexual violence, and there was no express indication in the record that the court did not weigh the probative value against the prejudicial effect of the evidence. Additionally, the trial court did not err in allowing the State to ask respondent's expert a hypothetical question aimed at discrediting the expert's logic.

¶ 1 On May 26, 2010, following a three-day trial, a jury found respondent, Jerry Cozart (b. 1965), to be a sexually violent person under the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 *et seq*. (West 2010) (a "sexually violent person" is 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). On September 30, 2010, following a dispositional hearing, the trial court ordered that respondent be committed to the secure custody of the Department of Human Services (DHS). Respondent appeals both his adjudication as a sexually violent person and his commitment, arguing that the trial court committed plain error when it: (1) failed to perform a *Montgomery* balancing test (*People v. Montgomery*, 47 Ill. 2d 510 (1971)), weighing probative value against prejudicial effect, before allowing evidence of prior bad acts; and (2) allowed the State to ask respondent's expert a certain hypothetical question. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 In 1992, respondent was convicted of aggravated criminal sexual assault (720 ILCS 5/12-14 (West 1992) (the predicate offense in this case)) and was sentenced to 30 years' imprisonment. On September 8, 2007, respondent was scheduled for placement into a mandatory supervised release in connection with his sentence. Prior to that date, the State petitioned for respondent's commitment under the Act. The trial court appointed counsel and found probable cause that respondent was subject to commitment, and the cause proceeded to trial.

¶ 4 A. State's Case

¶ 5 At trial, the State presented two experts: Martha Bellew-Smith and Robert Brucker, Jr., both clinical psychologists. Respondent refused to meet personally with each expert. However, each expert examined a wide range of documentary evidence, including police reports, victim statements, offender statements, prison records, pre-release reports, and medical reports. Each testified that these documents are of the type reasonably relied upon in the field of psychology. Additionally, each expert evaluated respondent according to two actuarial instruments, the Static 99-R and the MNSOST-R.

¶ 6 The documentary evidence that the experts relied upon indicated that, in 1984, defendant was convicted of second-degree assault in Omaha, Nebraska. In that crime, at approximately 2:30 a.m., respondent broke a window and entered an apartment where the victim was sleeping on a couch. The victim awoke to see defendant looming over her with a white cloth on his head. Defendant told her to shut up, and he put his hand over her. The victim screamed, and defendant slashed her across the shoulder with a knife, leaving a shallow gash. Defendant took off running but was ultimately apprehended, convicted, and sentenced to two years' probation.

¶ 7 Nebraska police reports also described a 1985 incident involving defendant, for which he was (inexplicably) not prosecuted. One of respondent's associates came to know two 14-year-old girls who had run away from home. The associate told the girls that they could stay at his place to avoid the police. When the girls arrived, they were met by a group of men, including respondent. The men separated the girls, taking one to the basement and one upstairs. According to the first girl, respondent pinned her down while another man took off her pants. Respondent forced her to have sex with him, threatening to beat her if she did not. Hospital reports indicate that the girl's hymen had been broken. The second girl told the men that she was menstruating, and the men forced her to perform oral sex on them. The second girl informed police that she had heard her friend downstairs, screaming and begging for help. Respondent ultimately admitted to police to having sex with the first girl. However, he told police that *he* did not threaten her; other men in the group did.

¶ 8 The records also indicated that respondent was either charged with, or convicted of, numerous non-sexual offenses, including: (1) a 1985 conviction for burglary; (2) a 1987 misdemeanor charge for possession of stolen property; (3) a 1988 conviction for (auto) theft; (4) a 1989 conviction for a controlled substance violation; (5) a 1990 battery charge; (6) a 1991

conviction for a motor vehicle offense (later overturned on appeal); (7) a 1991 conviction on a weapons charge; and (8) a 1991 conviction for criminal damage to property. Each expert testified that, although these charges and convictions were not sexual in nature, they were clinically relevant because they spoke to respondent's lack of inhibition and disrespect for the law.

¶ 9 Finally, the experts testified to the records pertaining to respondent's 1992 predicate offense. Respondent initiated contact with the victim, who had just left a payphone, where she had called her husband to let him know that she was in downtown Elgin looking at Christmas decorations and would be home soon. Respondent asked the victim for a cigarette. The victim told respondent that she did not smoke. Respondent then grabbed the victim and threw her backwards to the ground. Her head smashed down to the pavement. Respondent dragged the victim to a nearby vestibule, knocked her to the floor, and smashed her face against the floor of the building. Respondent raped the victim.

¶ 10 While in prison for the 1992 offense, respondent was cited for nearly 200 disciplinary infractions, including disobeying direct orders, unauthorized movements, insolence, possession of homemade alcohol, and sexual misconduct. Respondent was cited for sexual misconduct in 1997, when, during a routine pat-down search, he forced a correctional officer to grab his (respondent's) genitals, clamped his legs down on the officer's hand, and yelled, "there, motherf***er, feel that, that's it."

¶ 11 Based on the aforementioned documentation and actuarial instruments, Bellow-Smith diagnosed respondent as having "paraphilia, not otherwise specified [NOS], nonconsent" and "personality disorder, [NOS], with antisocial features." Bellow-Smith explained that paraphilia is "a congenital or acquired condition affecting an individual's emotional or volitional capacity." Individuals with this disorder have difficulty controlling behavior and can be predisposed to commit

acts of sexual violence. Individuals who have a personality disorder with antisocial features carry a pervasive pattern of "little respect for the law" and a "reckless disregard for the safety of other people." In respondent's case, his personality disorder exacerbates his paraphilia, making it even more difficult for him to control his behavior. Bellow-Smith stated that respondent scored a "five" on the Static 99-R, which placed him in the "moderate/high" risk range for re-offending. He scored a "ten" on the MNSOST-R, which placed him in the "high" risk range for re-offending. Bellow-Smith explained that these actuarial instruments tend to underestimate the risk for re-offending because they do not take into account other empirically established risk factors known to experts. For example, looking to respondent's particular case, respondent's numerous prison disciplinary citations and "self-regulation" problems raised future risk. Based on all of the foregoing, Bellow-Smith opined that respondent is, to a reasonable degree of psychological certainty, "substantially probable" and "much more likely than not" to commit sexually violent acts in the future.

¶ 12 Based on the aforementioned documentation and actuarial instruments, Brucker diagnosed respondent with "paraphilia, [NOS], sexually attracted to nonconsenting females, nonspecific type" and "personality disorder, [NOS], with antisocial traits." Brucker explained that these disorders predispose an individual to commit acts of sexual violence. Brucker agreed with Bellow-Smith that respondent's personality disorder interacts with his paraphilia in a way that increases the risk of re-offending. Brucker stated that respondent's score on the Static 99-R placed him on the "moderate" risk range for re-offending, in comparison to other sex offenders released from prison. Respondent's score on the MNSOST-R placed him on the "high" risk range for re-offending, in comparison to other sex offenders released from prison. In addition to the actuarial instruments, Brucker stated that respondent's disciplinary problems in prison showed that respondent has consistently refused to cooperate or follow the rules. Brucker noted several commonalities amongst respondent's prior

sexual offenses. For instance, the police reports indicated that respondent grabbed his victims by the face or throat to gain control over them, and respondent drank prior to the offenses. However, respondent never submitted to substance-abuse treatment or, for that matter, sex-offender treatment. Brucker stated that respondent's (somewhat older) age *might* reduce the risk for re-offending, but that the reduction would not be significant. In sum, Brucker identified seven additional risk factors for respondent that may not have been captured in the actuarial instruments: (1) global self-regulation difficulties; (2) deviant sexual interests; (3) personality disorder diagnosis; (4) hostility; (5) substance abuse history; (6) intoxicated at the time of offense; and (7) a pattern of recklessness/impulsiveness. Based on all of the foregoing, Brucker concluded that respondent is, to a reasonable degree of psychological certainty, "substantially probable to commit future acts of sexual violence." Brucker defined "substantially probable" as "much more likely than not."

¶ 13 After the State's two experts testified, the State introduced a certified copy of the judgment, sentencing order, and appellate court mandate in *People v. Cozart*, Kane County case No. 92-CF-2102, to prove that respondent had been convicted of a predicate offense under the Act.

¶ 14 B. Respondent's Case

¶ 15 Respondent's expert, Terence Campbell, a forensic psychologist, testified on behalf of respondent. Campbell likewise did not meet personally with respondent, but he critiqued the State's experts' findings. Campbell testified that paraphilia can be a controversial diagnosis because it is not in the DSM-IV-TR (The American Psychological Association's *Diagnostic and Statistical Manual of Mental Disorders* (4th ed., text revision 2000)). He admitted, however, that it can nevertheless be a legitimate diagnosis. He also stated that the Static 99-R and the MNSOST-R are flawed instruments with little to no predictive ability. Campbell also criticized the State's experts for considering individualized risk factors for re-offending, because, according to him, the majority

of sex offenders do not re-offend. Campbell stated that "only mathematical probabilities" should be used in assessing someone's future risk.

¶ 16 During cross-examination the State challenged Campbell's opinion that individualized risk factors should not be considered:

"Q. In order for you to know what [respondent] would do if he is released, wouldn't it be necessary for you to know what his thoughts and feelings are?

A. No, I would prefer to respond in an actuarial manner where I apply the relevant peer reviewed data regarding antisocial personality disorder in males over 40 years of age.

Q. What if you were to interview [respondent] and he were to tell you that he intended to rape the first woman that he met after he got out, would that affect your opinion?

RESPONDENT'S COUNSEL: Objection

A. Of course it would.

RESPONDENT'S COUNSEL: Objection.

COURT: Basis?

RESPONDENT'S COUNSEL: Hypothetical, Your Honor.

COURT: I am going to overrule it. It is a hypothetical, but it is—it is based on the testimony given so I will permit the answer. Please continue your answer, doctor.

***

Q. Doctor, if you were to interview [respondent] and he told you that his intention if released was to rape the first woman he saw, would that affect your opinion?

A. And as I said before, of course it would."

¶ 17 Respondent testified on his own behalf. He stated that, if released, he would work and become active in church. He stated that he had learned a lot while incarcerated, including how to

deal with adversity and anger.

¶ 18 However, during cross-examination, respondent admitted that he was working and going to church "every Sunday" in 1984 and 1985, when he was convicted of second-degree assault and when he participated in the rape of a 14-year old girl. He also acknowledged that he incurred numerous disciplinary citations while in prison, including sexual misconduct, and that, since entering DHS custody in 2007, he had been placed on "temporary special management status" five separate times.

¶ 19 C. Jury Verdict and Subsequent Dispositional Hearing

¶ 20 On May 26, 2010, the jury found respondent to be a sexually violent person. The trial court then continued the case for a dispositional hearing to determine whether respondent should be institutionalized or conditionally released.

¶ 21 On September 30, 2010, at the dispositional hearing, the State called Brucker. Brucker testified that he investigated various treatment possibilities for respondent if respondent were to be placed on conditional release. Brucker did not believe that any of the outpatient sex-offender treatment programs of which he was aware would be intensive enough for respondent. Brucker reasoned that an outpatient program was a poor fit for respondent because respondent has consistently refused sex-offender treatment in the past. Brucker recommended that respondent be placed in a sexually violent persons treatment and detention facility in Rushville. The trial court agreed and ordered that respondent be committed to the secure custody of DHS for care and treatment.

¶ 22 II. ANALYSIS

¶ 23 Respondent appeals both his adjudication as a sexually violent person and his commitment, arguing that the trial court committed plain error when it: (1) failed to perform a *Montgomery*

balancing test before allowing evidence of prior bad acts though the testimony of Bellow-Smith and Brucker; and (2) allowed the State to ask Campbell if he would change his approach of relying only on actuarial data if respondent told him that he intended to rape the first woman he saw upon release. A trial court's evidentiary decisions are reviewed according to an abuse-of-discretion standard. See, *e.g.*, *People v. Baugh*, 358 Ill. App. 718, 739 (2005).

¶ 24 A. Plain Error Review

¶ 25 Both parties agree that respondent forfeited his claims and that plain error review applies. As to the first issue, respondent did not object at trial or in a post-trial motion to the State's expert testimony regarding prior bad acts. As to the second issue, respondent did not object in a post-trial motion. Illinois law is clear that objection at trial and in a written post-trial motion are necessary to preserve any error for appellate review. *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 855 (2010). Where a party forfeits a claim, the jury's verdict should stand unless plain error occurred. *People v. Enoch*, 122 Ill. 2d 176, 185 (1998).

¶ 26 The parties dispute which plain error standard applies: the one set forth in criminal cases or the one set forth in civil cases. The well-known disjunctive criminal plain error standard is met where: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice, regardless of the seriousness of the error; or (2) the error was so serious that it compromised the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). As the supreme court recently clarified, satisfaction of the first prong requires a showing of prejudice. *People v. White*, __ Ill. 2d ___ (August 4, 2011).

¶ 27 The civil standard, in contrast, focuses only on whether the act complained of was a prejudicial error so egregious that it deprived the complaining party of a fair trial and substantially

impaired the integrity of the judicial process. *Wilbourn*, 398 Ill. App. 3d at 856. In other words, the civil standard does not allow for the possibility of reversal under the first prong of the disjunctive criminal standard (the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error).

¶ 28 The State argues that the civil standard is more appropriate, because proceedings under the Act are civil in nature. *In re Detention of Samuelson*, 189 Ill. 2d 548, 558-59 (2000). Respondent, however, notes that prior SVP cases have utilized the criminal plain error standard. See, *e.g.*, *In re Detention of Traynoff*, 358 Ill. App. 3d 430, 444 (2005) (focusing on the second prong of the disjunctive criminal standard), and *In re Detention of Hughes*, 338 Ill. App. 3d 224, 239 (2003) (same). However, the court's use of the standard in these instances was without analysis. Moreover, these cases turned on the second prong of the criminal standard, meaning that the result would have been the same regardless of whether the criminal or civil standard was cited.

¶ 29 For the reasons set forth below, no error occurred, and, therefore, respondent cannot meet either standard. As such, a determination of which standard is correct is not necessary to the resolution of this case, and we find it enough to flag this issue for a future case (perhaps one that turns on the first prong of the criminal standard). Thus, we reserve for another day a determination of which plain error standard is correct.

¶ 30 B. *Montgomery* Balancing Test

¶ 31 Respondent first complains that the trial court failed to perform a *Montgomery* balancing test before allowing evidence of prior bad acts though the testimony of Bellow-Smith and Brucker. Specifically, the evidence at issue relates to respondent's 1984 and 1985 crimes, where said reports and documents had not been admitted into evidence.

¶ 32 Respondent ultimately concedes in his reply brief that this testimony was proper. An expert

witness is free to discuss facts or data not in evidence so long as the facts and data are of a type reasonably relied on by experts in the particular field in forming opinions or inferences upon the subject. *Wilson v. Clark*, 84 Ill. 2d 186, 193 (1981). Case law supports that details of past crimes, and evidence of uncharged bad acts, are admissible in SVP proceedings because experts rely on this sort of information to determine a person's future dangerousness. See, *e.g.*, *In re Commitment of Doherty*, 403 Ill. App. 3d 615, 623-25 (2010); *In re Detention of Hardin*, 391 Ill. App. 3d 211-13 (2009); *In re Detention of Lieberman*, 379 Ill. App. 3d 585, 603-06; *In re Detention of Allen*, 331 Ill. App. 3d 996, 1005 (2002); *In re Detention of Isbell*, 333 Ill. App. 3d 906, 913-15 (2002); and *In re Bailey*, 317 Ill. App. 3d 1072, 1089-90 (2000).

¶ 33 However, respondent contends that the court failed to conduct a balancing test before admitting evidence of prior bad acts. In a *criminal* case, evidence of offenses, acts, and wrongs other than those for which the defendant is being tried are generally inadmissible. *People v. Bobo*, 375 Ill. App. 966, 971 (2007). This is because there is a risk that the jury may infer that, because the defendant has committed other wrongs, he is a bad person who deserves to be punished or he has a propensity to commit crimes. *Id*. However, evidence of other offenses or bad acts may be admissible to prove any material fact other than a defendant's propensity to commit a crime. *Id*. Such evidence may be admitted to show the existence of a common plan or design, *modus operandi*, identity, motive, intent, or absence of mistake. *Id*. Evidence admitted for one of these proper purposes must be more probative than prejudicial. *People v. Raymond*, 404 Ill. App. 3d 1028, 1045 (2010).

¶ 34 The rule that a trial court must determine whether evidence of a prior bad act is more probative than prejudicial was developed under *Montgomery* (47 Ill. 2d at 516-18). Under *Montgomery*, before admitting evidence of a prior bad act for impeachment purposes, the court must

balance its probative value against its prejudicial effect. *Id*. The following factors are relevant: (1) the nature of the prior crimes; (2) the length of the criminal record; (3) the age and circumstances of the defendant; and (4) the extent to which the evidence is important to the search for truth in a particular case. *Id*. (endorsing *Luck v. United States*, 348 F. 2d 763 (D.C. Cir. 1965)).

¶ 35 Respondent argues that, under *Montgomery*, many of his past acts would not be allowed because "they would suggest his propensity to commit a crime and therefore be sexually violent." The State responds, and we agree, that the *purpose* of a proceeding wherein the respondent's status as a sexually violent person is at issue is to determine the respondent's propensity to commit a sexually violent crime. See, *e.g.*, *People v. Hancock*, 329 Ill. App. 3d 367, 379 (2002) ("entire purpose of this civil proceeding is to determine respondent's propensity to commit illegal acts, specifically criminal sexual acts"). Therefore, the *Montgomery* test, which requires the exclusion of prior bad acts if admitted for the purpose of showing one's propensity to commit a crime, is not applicable to civil proceedings under the Act.

¶ 36 Although the trial court in a civil, SVP case should not consider the factors set forth in *Montgomery* with the aim of excluding evidence when the purpose of the evidence is to show a propensity to commit a crime, it does *not* mean that the court may indiscriminately admit all relevant evidence. Evidence that meets the standard of relevancy may still be "attended with disadvantages of sufficient importance to call for its exclusion. These disadvantages consist of unfair prejudice, confusion of the issues, misleading the jury, consideration of undue delay, waste of time, and the needless presentation of cumulative evidence." M. Graham, *Cleary and Graham's Handbook of Illinois Evidence* § 403.1 (10th ed. 2010). Loosely, this balancing test is still referred to as weighing probative value against prejudicial effect. *Id*.; see also *People v. Winterhalter*, 313 Ill. App. 3d 972, 979 (2000) (trial court in SVP case did not fail to weigh probative value against prejudicial effect

where respondent argued that the evidence at issue was cumulative and served only to inflame the passions of the jury).

¶ 37 A trial court is not required to make an express evaluation in open court of probative value against prejudicial effect; rather, absent an express indication that the trial court was unaware of its obligation to balance these factors, the reviewing court will assume that the trial court gave the factors appropriate consideration. *People v. Watkins*, 206 Ill. App. 3d 228, 245 (1990). Here, respondent points to no "express indication" in the record that the trial court was unaware of an obligation to determine the admissibility of testimony. Therefore, respondent cannot show that an error occurred.

¶ 38 Finally, although our finding that no error occurred is dispositive, we briefly address and reject respondent's argument that the evidence was close (a determination that is relevant only under the first prong of the criminal plain error standard). Respondent asserts that the evidence was closely balanced because the jury did not hear evidence of sexually violent conduct to support the diagnosis of paraphilia. This is simply not true; evidence showed that respondent: (1) was convicted of rape in 1992; (2) confessed to raping/sexually assaulting two 14 year-old girls in 1985; (3) and slashed a sleeping woman with a knife in 1984. If respondent meant to challenge the predictive authority of a paraphilia diagnosis, we note that respondent's paraphilia diagnosis is just one of many factors indicating that he is likely to re-offend. Other factors include respondent's anti-social tendencies and prior refusal to enter sex-offender treatment. The evidence here was not close.

¶ 39 In sum, the experts' testimony regarding prior bad acts was proper and there is no express indication in the record that the trial court failed to evaluate whether the testimony was attended with sufficient disadvantage to call for its exclusion. Admitting the experts' testimony regarding

respondent's prior bad acts was not error, let alone plain error.

¶ 40 B. Proper Cross Examination

¶ 41 Respondent next contends that he is entitled to reversal because the State asked Campbell, respondent's expert, the following hypothetical question during cross examination: "What if you were to interview [respondent] and he were to tell you that he intended to rape the first woman that he met after he got out, would that affect your opinion?" Respondent argues that this question improperly suggested that respondent *actually* stated that he would rape the first person he saw if he got out.

¶ 42 We agree with the State that respondent's argument relies on a strained and unsupportable reading of the record. An expert may be cross examined for the purpose of explaining, modifying, or discrediting his or her testimony. *People v. Stults*, 291 Ill. App. 3d 71, 79 (1997). That is what happened here. Campbell took the position that the State's experts had erred in considering individualized risk factors for re-offense and that "only mathematical probabilities" should be used in assessing a person's risk for re-offense. The State attempted to discredit Campbell's position by, as the State put it, using "the ancient rhetorical device of *reductio ad absurdum*." See Black's Law Dictionary 1304 (8th ed. 2004) (defining *reductio ad absurdum* as "in logic, disproof of an argument by showing that it leads to a ridiculous conclusion"). In this case, the State's hypothetical question showed that Campbell's position—that *only* mathematical probabilities should be used in assessing a person's risk for re-offense—could lead to an absurd result.

¶ 43 In this context, a reasonable juror could not have taken the State's hypothetical question as a statement of fact. The trial court did not abuse its discretion in allowing the hypothetical question, and respondent cannot show that an error occurred, let alone a plain error.

¶ 44 III. CONCLUSION

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

¶ 46 Affirmed.