No. 3--09--0771

Order filed January 13, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

IN RE COMMITMENT OF RICKY A. W.,	)	Appeal from the Circuit Court of the 9th Judicial Circuit, Fulton County, Illinois,
(The People of the State of Illinois,	)	
Petitioner-Appellee,	)	No. 02--MR--28
v.	)	
Ricky A. W.,	)	Honorable Steven R. Bordner,
Respondent-Appellant).	)	Judge, Presiding.

Justice O'Brien delivered the judgment of the court.
Justices Holdridge and Schmidt concurred in the judgment.

ORDER

Held: Respondent's adjudication as a sexually violent person was upheld because there was no speedy trial violation, the trial court did not abuse its discretion in allowing testimony regarding details of respondent's prior convictions, and police

reports were admissible as the bases for expert opinion testimony.

Following a jury trial, respondent, Ricky A. W., was adjudicated a sexually violent person under the Sexually Violent Persons Commitment Act (the Act) (725 ILCS 207/1 *et seq.* (West (2002)). The trial court involuntarily committed the respondent to the custody of the Illinois Department of Human Services for treatment in a secure facility. Respondent appealed, arguing that the trial court erred in denying his motion to dismiss on speedy trial grounds, denying his motion *in limine* to prohibit evidence of prior crimes, and allowing the State's expert witnesses to testify from hearsay reports. We affirm.

FACTS

The State filed a petition on April 30, 2002, alleging that the respondent was a sexually violent person under the Act. The petition noted that the respondent had pled guilty in 1992 to attempted criminal sexual assault on a seven-year-old female and had received a 22-year sentence of imprisonment. The respondent had also pled guilty in 1973 to two counts of attempted murder, one count of rape, and one count of indecent liberties with a child for attacks on three-year-old and five-year-old females. He was sentenced pursuant to his plea to 15 to 45 years in the Department of Corrections (DOC). The petition also stated that respondent had been evaluated by Dr. Marc Levinson, a clinical

psychologist, who diagnosed the respondent with pedophilia and antisocial personality disorder and opined that it was substantially probable that the respondent would engage in future acts of sexual violence. At the time of the filing of the petition, the respondent was incarcerated, and was scheduled to be released on May 4, 2002.

The trial court found probable cause to believe that respondent was a sexually violent person as set forth in the Act (725 ILCS 207/5(f) (West 2002)). After the probable cause hearing on May 6, 2002, the case was delayed many times. Over the State's objection, and with the respondent's agreement, the pretrial conference was set for July 11, 2002. However, the conference did not occur on July 11 and, on July 12, the respondent's attorney filed a petition for an order to produce the respondent for a pretrial conference on October 10, 2002. Also, on August 5, 2002, the respondent filed a *pro se* motion to have another attorney appointed. Delays from August 5, 2002, until June 5, 2003, and November 6, 2003, until February 20, 2004, were the result of the respondent's various motions, and continuances related to those motions. The respondent did not object to continuances from June 5, 2003, until July 24, 2003, and September 4, 2003, until November 6, 2003.

On November 6, 2003, the respondent filed five *pro se*

motions, which caused the delays until February 20, 2004. The respondent's motion to vacate was heard in the trial court on February 20, and was taken under advisement. The State was given leave to submit further authorities to the trial court within seven days, which were filed with the court on February 27, 2004. However, the matter was not put on the court's advisement docket, and the case was routinely reshelved. Two years later, on February 6, 2006, the respondent sent a letter to the clerk of the circuit court, asking for a status on his case. He sent another letter on April 10, 2006, again asking for a status on his case. On May 9, 2006, the trial court sent a letter to the State and the respondent, explaining that the matter was inadvertently not placed on the court's advisement docket but was instead routinely reshelved. In the letter, the trial court denied the motion to vacate, and set the case for a hearing on June 2, 2006, on other pending motions that had been filed by the respondent.

The respondent did not object to the continuances between June 2, 2006, and February 2, 2007. On February 2, the respondent filed four motions: a motion to dismiss on speedy trial grounds, a motion for summary judgment, a motion *in limine*, and a motion for supplemental discovery. The motion to dismiss and the motion *in limine*, which sought to prohibit the State from

introducing details of the respondent's prior convictions, were both denied on July 10, 2007. The State provided the requested supplemental discovery, and the motion for summary judgment was denied on September 27, 2007. Also on September 27, the court set the case for trial, without objection from the respondent. The respondent agreed to a new pretrial conference date on February 7, 2008, and he filed a motion to dismiss on February 28, 2008. The motion to dismiss was denied on April 24, 2008. On April 28, 2008, the trial court instructed both attorneys to obtain a trial date in May, June, or July 2008 with the scheduling clerk, which neither party did. In court on October 6, 2008, the State indicated that it was prepared and the respondent was to obtain the trial date. At that hearing, the respondent agreed to setting the jury trial in January 2009.

On December 10, 2008, the State filed a motion to continue because one of its experts was seriously ill, and that motion was granted on January 5, 2009. However, the respondent filed a motion to dismiss on statutory speedy trial grounds on January 12, 2009, which was withdrawn on February 4, 2009. On February 4, 2009, the parties agreed to an April trial date. But, on March 23, 2009, the respondent filed for leave to depose the State's experts, which was granted, and the trial was continued until June 15, 2009, to allow for the depositions.

The jury trial to commit the respondent started on June 15, 2009. During the trial, the State called two expert witnesses, Dr. Jacqueline Buck and Dr. Ray Quackenbush, both licenced psychologists, to present their opinions of the respondent's mental state. They both relied on information contained in the respondent's master file with the Illinois DOC, which included, among others, court records, police reports, prior evaluations, and medical and psychological records. The objection by the respondent's counsel that those records were inadmissible hearsay was overruled by the trial court. Both experts opined that if the respondent was released into the community there was a substantial probability that he would reoffend. The defense expert, Dr. Luis Rosell, agreed that the respondent continued to meet the diagnosis for pedophilia. He did not review the master file, other than the prior psychological evaluations of Quackenbush, Levinson, and another. However, he opined that the respondent was not a sexually violent person.

The jury found the respondent to be a sexually violent person under the Act. The trial court committed the respondent to the custody of the Illinois Department of Human Services for treatment. The respondent's posttrial motion was denied, and he appealed.

ANALYSIS

The respondent contends that the trial court committed three errors, which we will address in turn. First, the respondent argues that the trial court erred in denying his motion to dismiss for failure of the State to timely bring the case to trial. Second, the respondent argues that the trial court erred in denying his motion *in limine* to prohibit the State from offering detailed evidence of his prior crimes. Finally, the respondent argues that the trial court erred in allowing the State's expert witnesses to testify from hearsay records.

I. Speedy Trial

The respondent raises both a statutory and a constitutional speedy trial claim. In reviewing the trial court's denial of a motion to dismiss on speedy trial grounds, this court upholds factual findings unless they are against the manifest weight of the evidence, while the ultimate question of whether a speedy trial violation occurred is reviewed *de novo*. *People v. Crane*, 195 Ill. 2d 42 (2001). The State argues that the respondent waived the statutory issue by withdrawing his motion to dismiss on February 4, 2009. We find some merit to that argument, especially since that seems to be the motion that the respondent argues was erroneously denied. However, the respondent did raise the issue at trial, and again in his posttrial motion, so we will

consider whether the trial court erred in denying the posttrial motion.

The Act requires that trial commence within 120 days of the probable cause hearing, unless the delay is attributable to the respondent. 725 ILCS 207/35(a) (West 2002). The Act incorporates by reference the criminal speedy trial statute (725 ILCS 5/103--5(a) (West 2002)), and provides that delay is to be considered agreed to by a person unless he objects either with a written demand for trial or an oral demand on the record. 725 ILCS 207/35(a) (West 2002). The respondent bears the burden of establishing facts that show a speedy trial violation. *People v. Hall*, 194 Ill. 2d 305 (2000). Delays attributable to a defendant include delays necessary to resolve the defendant's motions and continuances requested by the defendant. *Hall*, 194 Ill. 2d 305. Any delay to which a defendant does not object is considered agreed. *People v. Cordell*, 223 Ill. 2d 380 (2006).

The probable cause hearing occurred on May 6, 2002, but the trial did not begin until June 15, 2009. While that is an unusually long delay, we find that all but 115 days of delay are attributable to the respondent. The State is charged with the initial delay from the date of the probable cause hearing, May 6, 2002, until July 11, 2002, the date that the original pretrial conference was scheduled, for a period of 66 days. At a minimum,

without further indication in the record, the respondent agreed to the delay until October 10, 2002, the date his counsel requested his appearance for another pretrial conference.

Arguably, the State is also charged with the delay from July 24, 2003, to September 4, 2003, for a period of 42 days. There is no explanation in the docket sheet as to why the pretrial conference did not occur on July 24, and instead a hearing was held on September 4. The State argues that the delay was caused by the respondent's February 27, 2003, request to proceed *pro se*, which was allowed on September 4, but we do not need to decide this issue.

Finally, the State is charged with the delay from January 5 to January 12, 2009, a period of seven days, because the continuance was granted on January 5 over the respondent's objection. But the time charged to the State ends on January 12, when the defendant filed a motion to dismiss. The other delays were either caused by the respondent, by his filing of motions, or continuances or dates agreed to by the respondent. Consequently, we find that the respondent did not suffer a statutory speedy trial violation.

Statutory and constitutional speedy trial rights are similar, but not necessarily co-extensive. *Cordell*, 223 Ill. 2d 380. Since an action under the Act is civil in nature, the

criminal speedy trial provision, the Sixth Amendment, does not apply. However, a deprivation of liberty could result from proceedings under the Act, so the respondent has the right to due process, which includes the right to a speedy trial. *People v. Lawton*, 212 Ill. 2d 285 (2004). In determining the extent of that constitutional speedy trial right, the Sixth Amendment provides some guidance. *People v. Hughes*, 346 Ill. App. 3d 637 (2004). Accordingly, we must balance four factors when determining whether a constitutional speedy trial violation has occurred: the length of the delay, the reason for the delay, prejudice to the defendant, and the defendant's assertion of the right. *Hughes*, 346 Ill. App. 3d 637. Balancing these factors, as applied to this case, we find no due process violation. Although there was a seven-year delay, most of the delay was either precipitated by the respondent's actions, agreed to by the respondent, or, at the very least, not objected to by the respondent.

II. Prior Offenses

The respondent filed a pretrial motion *in limine* seeking to limit trial testimony regarding the details of his prior convictions for sexually violent convictions. That motion was denied, and the respondent included the issue in his posttrial motion, but he never objected to such testimony at trial. For an

error to be preserved for review, there must be both an objection at trial and a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176 (1988). Thus, the issue was forfeited, but the respondent asks us to review the issue under the plain error doctrine.

Plain errors affecting a defendant's substantial rights may be reviewed even when they were not brought to the attention of the trial court. Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999). Under the plain error rule, a reviewing court may consider a forfeited issue when: (1) the evidence is close, regardless of the nature of the error; or, (2) the error is so serious that the defendant was denied a substantial right and a fair trial, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167 (2005). The burden of persuasion is on the defendant under either prong. *Herron*, 215 Ill. 2d 167. The first step is to determine whether an error occurred.

The respondent contends that the trial court committed plain error by allowing detailed testimony of the respondent's prior violent sexual crimes, rather than admitting certified copies of the convictions, under the second prong of the plain error test, *i.e.*, the error was so serious that the closeness of the evidence did not matter. We find that there was not plain error because there was no error.

To prevail under the Act, the State must prove that: (1)

the individual has been convicted of a sexually violent offense; (2) the individual suffers from a mental disorder; and (3) the mental disorder makes it substantially probable that the individual will engage in acts of sexual violence. 725 ILCS 207/5(f) (West 2002).

Relevant evidence is any evidence that has a tendency to fairly make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence. *In re Allen*, 331 Ill. App. 3d 996 (2002). While copies of the respondent's convictions were sufficient to prove the first element under the Act, the details of the prior crimes were relevant to prove the latter two elements. *People v. Winterhalter*, 313 Ill. App. 3d 972 (2000). In fact, the respondent's prior crimes were admissible to show propensity, which is the issue in an action under the Act. While the evidence might have been prejudicial, it was clearly relevant and admissible under the Act. It was within the trial court's discretion to determine whether the probative value outweighed the prejudicial effect. *Allen*, 331 Ill. App. 3d 996. Since we find no abuse of discretion, we find that the trial court did not err in allowing the testimony about the details of the respondent's prior sexual offenses because the details were highly probative as to whether the respondent had a mental

disorder and whether it was substantially probable that the respondent would commit future acts of sexual violence.

III. Expert

The respondent challenges the admissibility of the State experts' testimony, contending that it was based on inadmissible hearsay. The State responds that the trial court acted within his discretion in allowing the experts to disclose facts not in evidence that were reasonably relied on in explaining the bases for their opinions. A trial court's evidentiary ruling will only be reversed upon a showing of an abuse of that discretion. *People v. Caffey*, 205 Ill. 2d 52 (2001).

An expert witness can provide opinion testimony based on facts not in evidence if those facts are of a type reasonably relied upon by professionals in their field. *People v. Nieves*, 193 Ill. 2d 513 (2000). Even if the contents of the reports would be inadmissible hearsay if offered for the truth of the matter asserted, they can be disclosed by the expert for the limited purpose of explaining the basis of his opinion. *Nieves*, 193 Ill. 2d 513. In this case, specifically, the respondent challenges the experts' reliance on police reports that were contained in the respondent's master DOC file. He contends that the police reports themselves were hearsay and were not admissible as a business record exception. The trial court

overruled the respondent's objection at trial, ruling that the facts not in evidence, which would include the police reports, were not being admitted for proof of the matters asserted therein, but the bases for the expert opinions. We find no abuse of discretion in this ruling. Both of the State's experts testified that the documents contained in the master file were of the type reasonably relied on by professionals in their field. There is no contrary evidence in the record.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Fulton County is affirmed.

Affirmed.