2011 IL App (3d) 100573-U

Order filed December 13, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Whiteside County, Illinois
Respondent-Appellee,	)	
v.	)	Appeal No. 3-10-0573 Circuit No. 90-CF-340
DAVID M. HANDEL,	)	
Petitioner-Appellant.	)	Honorable John L. Hauptman, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Carter and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held*: The State proved by clear and convincing evidence that appellant is still a sexually dangerous person.

¶ 2 Appellant, David Handel, was declared a sexually dangerous person in 1991. Since that time, he has filed a number applications for recovery, all were denied. On May 4, 2006, he filed his latest application for recovery. A jury found that he is still a sexually dangerous person. He

appeals, arguing that the evidence presented was not sufficient to prove he is still a sexually dangerous person. For the following reasons, we affirm.

¶ 3 FACTS

¶ 4 At trial, the State first called Dr. Angeline Stanislaus, a forensic psychiatrist. Appellant stipulated to her testifying as an expert regarding the treatment and diagnosis of sex offenders. Stanislaus testified that her evaluation of the appellant included an interview with appellant and a review of appellant's criminal history, investigative reports, prior psychiatric and psychological evaluations, whole psychiatric history, Department of Corrections records, violations of program rules, and treatment progress. Stanislaus also indicated that, as a psychiatrist, she has seen appellant since 2004. During the interview with Stanislaus, appellant estimated that prior to his civil commitment, he had abused 80 to 90 children between the ages of 5 and 15.

¶ 5 Stanislaus testified that appellant currently suffered from the mental disorder of pedophilia, and he had so suffered for more than one year. She also testified that appellant currently had a propensity to commit sex offenses. She based this on the diagnosis of appellant's pedophilia and appellant's statements that he still fantasizes about children and masturbates to those fantasies. Finally, she testified that it was substantially probable that appellant would engage in future sexual offenses if not confined. She based this opinion on his diagnosis with pedophilia, his lack of progress in treatment, and his continued fantasies regarding children.

¶ 6 The State then called Dr. Mark Carich, administrator of the sexually dangerous person's

program where appellant was located. Carich has a Ph.D. in counseling; appellant stipulated that he was an expert in the diagnosis and treatment of sexually dangerous persons. Carich testified that appellant had admitted having up to 90 victims. He also explained that appellant had a history of missing group sessions and noncompliance with the rules of the program. He explained that after appellant filed his application for release, he either attempted to, or did, sexually assault another inmate by grabbing that inmate's rear end. Appellant admitted doing this to Carich.

¶ 7 In evaluating appellant, Carich used two different actuarial risk assessment instruments. These instruments rely on the patient's history. One of the instruments he used was the Static-99, the most accepted instrument in the field worldwide. Appellant's score placed him well into the high risk group for reoffending. The Static-99 projected that appellant had a 52% chance of reoffending over 15 years, 45% over 10 years, and 39% over 5 years. A second instrument, the Minnesota Sex Offender Screening Tool Revised, projected that appellant had a 70% risk of recidivism. Carich also discussed a number of dynamic factors he has developed over the last 20 years to help him evaluate whether people in the program are likely to reoffend. He discussed those factors and how they indicate appellant is likely to reoffend.

¶ 8 Carich testified that appellant suffered from a mental disorder that predisposes him to acts of sexual violence, and that he has had the disorder his entire adult life. He also testified that appellant has had propensities to commit sex offenses his entire life, and that those propensities still exist. Finally, Carich testified that it was much more probable than not that

appellant would commit sex offenses if released.

¶ 9 Following Carich, appellant testified on his own behalf. He explained that he did not grab another inmates rear end in 2008, just his arm. He admitted he told Carich that he had grabbed the other inmates rear end as that is what he thought Carich wanted to hear. He also claimed he lied when he told Carich that he masturbated to children every night. Again, he explained that he had to tell Carich what he wanted to hear in order to progress in the program. Appellant explained that he sometimes missed his group sessions to attend GED classes "[b]ecause, obviously [he was] not getting anywhere with the group stuff."

¶ 10 On cross-examination, appellant testified that he does not follow all of the rules of the program. He also explained that when he gets frustrated and feels he is not getting the help he needs, he acts out and victimizes someone. He admitted that at the at the time of the trial, he still got frustrated and acted out. Appellant stated that his normal pattern of sexual assault was to promise children something so they would agree to let him spank them. He also admitted that he still followed the same pattern with other inmates. Appellant stated that he lied so that he would be released since release was his highest priority. He also admitted that obtaining his GED was more important than his treatment. Appellant stated: "I could be molesting every f*** day, but I'm not. Okay? The last time I molested anybody was two or three years ago. Now, that's an accomplishment for me, but you don't see that."

¶ 11 The jury found that appellant was still a sexually dangerous person.

¶ 12 ANALYSIS

¶ 13 In a recovery proceeding, the State has the burden of proving by clear and convincing evidence that the petitioner: (1) presently suffers from a mental disorder that has existed for at least one year; (2) which is "coupled with criminal propensities to the commission of sex offenses;" (3) that the petitioner has demonstrated "propensities toward acts of sexual assault or acts of sexual molestation of children;" and (4) that it is substantially probable the person will commit sex offenses in the future if not confined. 725 ILCS 205/1.01 and 9(b) (West 2008); *People v. Masterson*, 207 Ill. 2d 305, 330 (2003). The clear and convincing evidence standard requires proof beyond "a preponderance of the evidence and not quite approaching the beyond-a-reasonable-doubt standard ***." *People v. Craig*, 403 Ill. App. 3d 762, 768 (2010).

¶ 14 In reviewing this challenge to the sufficiency of the evidence, we will affirm the verdict if after viewing the evidence in the light most favorable to the State, we determine that any rational trier of fact could have found the essential elements to be proved by clear and convincing evidence. *Id.* at 767–68; *People v. Trainor*, 337 Ill. App. 3d 788, 793 (2003).

¶ 15 Appellant argues that the State failed to prove by clear and convincing evidence that at the time of the trial, he suffered from a mental disorder, he had the criminal propensities to commit sex offenses, and that it was substantially probable he would commit sex offenses in the future if not confined. There is no question that Carich and Stanislaus each testified to the elements that appellant claims the State failed to prove. Appellant recognizes this and attacks Stanislaus's and Carich's basis for testifying to the contested elements.

¶ 16 Appellant argues that both doctors testified that they considered the fact that appellant

fantasized about children daily and masturbated to those fantasies as important proof that appellant still had propensities to commit sex offenses and was likely to reoffend if released. Appellant points out that he only made those statements since he thought it was what the doctors wanted to hear. He now states that he does not fantasize about children and masturbate to those fantasies daily.

¶ 17 This argument is of no help to appellant. Our review entails viewing the evidence in the light most favorable to the State. Where conflicting evidence was before the jury, we will not reweigh the evidence and substitute our judgment for that of the jury. See *Pavnica v. Veguilla*, 401 Ill. App. 3d 731, 755 (2010); *Hardy v. Cordero*, 399 Ill. App. 3d 1126, 1130 (2010). Viewed in the light most favorable to the State, the evidence shows that appellant still fantasizes about children daily and masturbates to those fantasies. It does not advance appellant's argument that he testified differently at trial.

¶ 18 Appellant argues that Stanislaus's diagnosis that appellant presently suffered from pedophilia, and that it was substantially probable he would engage in sex offenses if not confined, was not supported by clear and convincing evidence. This argument shows a misunderstanding of the State's burden. As described above, the State must establish the required elements by clear and convincing evidence. That is not the same as saying that each factor relied upon by an expert in making a diagnosis must be established by clear and convincing evidence. Appellant has cited to no authority that supports this argument.

¶ 19 Appellant cites to *People v. Bailey*, 265 Ill. App. 3d 758 (1994), which held that the issue

to be decided in a hearing on whether a person is sexually dangerous is whether they are sexually dangerous at the time of the hearing. *Id.* at 763. *Bailey* also held that it was ineffective assistance of counsel for the appellant's trial counsel to oppose the State's motion to have the appellant reexamined by two doctors, who had initially examined the appellant three years earlier, since the relevant issue was whether the appellant was a sexually dangerous person at the time of trial. *Id.* at 759–60, 764. However, *Bailey* does not provide any support for appellant's theory that Stanislaus's diagnoses must be supported by clear and convincing evidence. Appellant also does not argue that Stanislaus's diagnoses occurred too far in advance of the trial to show his current mental state at trial, which would be supported by *Bailey*. He argues she relied on inappropriate data in making her diagnoses, this is not supported by *Bailey*.

¶ 20 The other case cited by appellant is *People v. Howell*, 12 Ill. App. 2d 84 (1956). The *Howell* court found that the jury's verdict that appellant was a sexually dangerous person was against the manifest weight of the evidence. *Id.* at 92. The court focused on the fact that one doctor testified that the appellant was sexually dangerous, another doctor testified that he was not sexually dangerous, and a deputy sheriff testified that the appellant showed no abnormal behavior during the four months he was in jail. *Id.* *Howell* says nothing of the evaluation of expert testimony or whether the basis of an expert's testimony must be supported by clear and convincing evidence.

¶ 21 Expert testimony is subject to admissibility under the *Frye* standard. *In re Commitment of Simons*, 213 Ill. 2d 523, 529 (2004). The *Frye* standard is that "scientific evidence is

admissible at trial only if the methodology or scientific principle upon which the opinion is based is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.' [Citation.]" *Id.* at 529–30. A particular methodology is generally accepted if "the underlying method used to generate an expert's opinion is reasonably relied upon by experts in the relevant field." *Id.* In light of this, the proper argument to make when attacking the basis upon which an expert bases his or her conclusions, is that the basis is not reasonably relied upon by experts in the field. *People v. Lind*, 307 Ill. App. 3d 727, 737 (1999). No such objection was made at trial, and no such argument was advanced before this court. Therefore, any objection to the basis for Stanislaus's diagnoses is waived. *In re Detention of Sveda*, 354 Ill. App. 3d 373, 376–77 (2004); Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 22 Assuming, *arguendo*, that appellant is correct that we should review the facts relied upon by Stanislaus to see if they support her diagnoses by clear and convincing evidence, appellant's argument still fails. Specifically, he argues that the factors she relied on were all of a historical nature and could not support a present finding of a mental disorder. Stanislaus's testimony indicated that she based her diagnoses on appellant's complete history: group session reports and appellant's treatment progress; an interview with the appellant; and reports from his group therapist. This shows that appellant's claim that she relied entirely on historical data is not true. He also argued that she was not present for the majority of his treatment so she could not base her diagnoses on his progress in treatment. Stanislaus testified that she received numerous reports from the therapist who ran the group session. The fact that Stanislaus did not participate

in group sessions does not prove she was not informed of appellant's progress by written or oral report. The argument that she did not run the group sessions so she could not rely on appellant's progress in group sessions fails.

¶ 23 Finally, appellant attacks the reliability of the actuarial instruments and dynamic factors used by Carich. First, he argues that the Static-99 and Minnesota Sex Offender Screening Tool Revised rely entirely on historical data and, therefore, are not proper methods to establish a future probability of appellant committing sex offenses. Appellant made no objection to the use of these actuarial instruments at trial and has forfeited any objection to them here. *In re Detention of Sveda*, 354 Ill. App. 3d at 376–77. We note that even were we to consider the merits of this argument, the Illinois Supreme Court held in *In re Commitment of Simmons*, 213 Ill. 2d 523, that expert testimony based in part on these exact actuarial instruments is admissible to prove a person's risk of committing sexual offenses if released. *Id.* at 535, 543. The argument concerning the admissibility of the dynamic factors used by Carich was also forfeited by appellant's failure to object to them at trial.

¶ 24 CONCLUSION

¶ 25 We find that the State proved appellant was still a sexually dangerous person at the time of trial by clear and convincing evidence. For the foregoing reasons, the judgment of the circuit court of Whiteside County is affirmed.

¶ 26 Affirmed.