2015 IL App (5th) 140161-U

NO. 5-14-0161

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re COMMITMENT OF RUBEN A. HOSIER	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois, Petitioner-Appellee, v. Ruben A. Hosier, Respondent-Appellant).	)	Franklin County.
	)	
	)	13-MR-50
	)	
	)	Honorable T. Scott Webb,
	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Goldenhersh and Schwarm concurred in the judgment.

ORDER

¶ 1 *Held*: In proceedings under the Sexually Violent Persons Commitment Act, trial counsel was not ineffective for declining the appointment of an expert witness whose evaluation of the respondent would be subject to discovery by the State because this decision constituted sound trial strategy. The prosecutor's remark in closing arguments mischaracterizing two of the respondent's four offenses as sexually violent offenses was not prejudicial enough to warrant reversal.

¶ 2 The respondent, Ruben Hosier, appeals a judgment finding him to be a sexually violent person under the Sexually Violent Persons Commitment Act (SVP Act) (725 ILCS 207/1 *et seq*. (West 2012)). Prior to trial, counsel for the respondent filed a motion for the appointment of a psychologist to act as a consulting expert. The court denied that motion, but ruled that it would appoint the psychologist chosen by the respondent to act

as an expert witness whose evaluation report would be subject to discovery by the State. Counsel declined the appointment on this basis. On appeal, the respondent argues that (1) counsel provided ineffective assistance by declining the appointment of an expert witness; and (2) the respondent was denied a fair trial because the prosecutor misstated the evidence during closing arguments. We affirm.

¶ 3 In 2006, the respondent pled guilty to two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2004) (now at 720 ILCS 5/11-1.60 (West 2012))). One charge involved sexual intercourse with the respondent's nine-year-old stepdaughter, who was also his biological niece. The other charge involved an incident of digital penetration of the respondent's stepdaughter's 10-year-old friend. On July 17, 2013, shortly before the respondent was set to be released from prison, the State filed a petition under the Sexually Violent Persons Commitment Act seeking to have the respondent committed pursuant to that Act. The petition alleged that licensed clinical psychologist Dr. Deborah Nicolai diagnosed the respondent with pedophilia.

¶ 4 On July 31, 2013, the respondent filed a motion for the appointment of an expert consultant. He alleged, "Appointed counsel lacks the requisite knowledge and experience in [psychology, statistics, and actuarial analysis] to be able to adequately identify any shortcomings in the evaluations of the State's experts." He requested the appointment of Dr. Angeline Stanislaus "on a *consultative* basis only at this point, reserving the right to later serve timely notice to the State should he desire to call the consultant as his own expert witness." (Emphasis in original.)

¶ 5 On August 9, the court held a hearing on the respondent's motion. At issue in the hearing was the proper interpretation of section 25(e) of the SVP Act (725 ILCS 207/25(e) (West 2012)). In pertinent part, that statute provides as follows:

> "Whenever the person who is the subject of the petition is required to submit to an examination under this Act, he or she may retain experts or professional persons to perform an examination. *** 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 *** 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." 725 ILCS 207/25(e) (West 2012).

¶ 6 At the hearing, the respondent's counsel informed the court that he wanted "expert input" to help him adequately prepare a defense "without causing any additional delay." He noted that the respondent filed a jury demand as well as a speedy trial demand. He further noted that the trial was set for early October and indicated that the respondent did not want the matter to be delayed beyond that setting. Counsel argued that the applicable statute does not require a respondent to declare at the outset whether a court-appointed expert will be an expert witness or a consulting expert who will not testify. As such, he contended, the court could appoint an expert consultant for the respondent that day and reserve ruling on the question of whether the appointed expert's material would be discoverable by the State.

¶ 7 The State countered by arguing that the statutory language does not call for the appointment of a consultant. Rather, the State argued, it calls for the appointment of an expert witness. The court then noted that problems could arise if it were to appoint Dr. Stanislaus that day and reserve ruling on whether she could be a consultant or must be deemed an expert witness. The court explained that the respondent could be disadvantaged if the court followed this course of action and subsequently determined that Dr. Stanislaus could only be appointed as an expert witness whose findings would be subject to discovery by the State.

¶ 8 In response, counsel again emphasized that he wanted Dr. Stanislaus appointed as an expert to examine the respondent and provide advice to counsel without delaying the trial to allow the State to depose her. Counsel noted that he previously spent six years handling SVP cases for the State as an Assistant Attorney General. He explained that in his experience, this scenario was what normally occurred when a respondent had a court-appointed expert. Counsel then acknowledged, "I am not going to deny that there is some strategy to that." He went on to explain that, "depending on what she has to say, [he] may or may not choose to convert her [from a consultant to an expert witness]."

¶ 9 The court ruled that it would appoint Dr. Stanislaus that day, but she would only be appointed as an expert witness whose findings would be subject to discovery by the State. The court stated, however, that it would reconsider this ruling if counsel could find case law authorizing the appointment of a consulting expert under the SVP Act.

¶ 10 On August 14, the respondent filed a motion to reconsider the denial of his request for an appointed consultant. He argued that the express statutory language does not

require that an appointed defense expert be a testifying witness subject to discovery by the State. He further argued that the court's and State's interpretation of the statute would have a "chilling effect" by forcing respondents in SVP proceedings to forego the assistance of a consulting expert or risk providing the State with an extra expert witness. He explained that if a court-appointed defense expert found that a respondent was a sexually violent person, the respondent could not cure this problem by simply choosing not to call the expert as a witness because the State could choose to call the expert as a witness against the defendant.

¶ 11 On September 3, the court entered a written order denying the respondent's motion to reconsider. The court reasoned that the plain language of section 25(e) allows for the appointment of an expert to evaluate the respondent, not to consult with respondent's counsel. The court found that due process is satisfied by right to appointed counsel and the right to a court-appointed expert.

¶ 12 The matter proceeded to a jury trial early in October 2013. Two psychologists, Dr. Deborah Nicolai and Dr. Joseph Proctor, testified for the State, and their reports were entered into evidence. Both considered the respondent's four previous convictions for sexual behavior with children in determining whether the respondent suffered from a mental disorder and assessing his likelihood to reoffend. Those previous convictions included a 1986 conviction for battery for fondling the breast of a 12-year-old girl, a 1992 conviction in Arkansas for two counts of incest with his 13-year-old niece, a 2004 conviction for aggravated criminal sexual abuse of a 13-year-old girl, and the 2006

conviction of two counts of aggravated criminal sexual abuse involving his 9-year-old stepdaughter and her 10-year-old friend.

¶ 13 Dr. Nicolai reviewed the respondent's prison records and treatment records and conducted a four-hour interview with him. She diagnosed the respondent as suffering from pedophilia and alcohol and cannabis dependency. The basis of the pedophilia diagnosis was the fact that he had repeated sexual encounters with girls ranging in age from 9 to 13 years and admitted to having fantasies involving girls this age, including his victims. During Dr. Nicolai's examination of the respondent, he reported to her that "he began having sexual fantasies involving children around the time period of his first known offense in 1986." The respondent also indicated to Dr. Nicolai that his urges and fantasies were "overwhelming and difficult for him to control."

¶ 14 Dr. Nicolai administered two tests to the respondent to assess his likelihood of reoffending, the STATIC-99R and the Hare Psychopathy Checklist. The STATIC-99R results placed the respondent in the moderate-high category for risk to reoffend, while the Hare Psychopathy Checklist results placed him in the moderate risk category. In addition, Dr. Nicolai found several dynamic and case-specific risk factors that increased the likelihood that the respondent would reoffend. These included impulsivity, a general resistance to rules, a sexual preoccupation, beliefs that justify his behavior, his lack of progress in sex offender treatment programs in Illinois, and the fact that he reoffended after completing a treatment program in Arkansas. Dr. Nicolai did not find any protective factors, which are factors that reduce the likelihood of reoffending.

¶ 15 Dr. Proctor likewise reviewed the respondent's records. He also conducted a one-hour interview with the respondent. Dr. Proctor diagnosed the respondent as suffering from pedophilia, drug and alcohol dependence, a personality disorder with antisocial features, and a "rule out" diagnosis of mild neurocognitive disorder due to a traumatic brain injury. Dr. Proctor noted that the respondent was the victim of at least four instances of sexual abuse as a child, the first of which occurred when he was seven or eight years old. The respondent told Dr. Proctor, "When I'm drinking, all that stuff that happened to me as a kid comes back and I want to hurt a kid so they will feel the way I feel." Dr. Proctor noted that the respondent made a similar admission to Larry Slater, an evaluator who performed a prerelease screening of the respondent for the Department of Corrections. He also noted that the respondent told police that he needed help because he could not control himself.

¶ 16 Dr. Proctor used two different tests to assess the respondent's likelihood to reoffend. On the STATIC-99R, the respondent's results placed him in the moderate-high risk category. On the MnSOST-R, the respondent fell within the highest risk category. Dr. Proctor noted that the respondent had difficulty in completing sex offender treatment programs in the past because he demonstrated a "superficial level of remorse" and attempted to manipulate his therapist and other participants. Finally, Dr. Proctor noted that the respondent assessed his own risk of reoffending as follows: "If I don't maintain my sobriety, I will be a ten to reoffend. If I remain sober, I will be a zero."

¶ 17 The respondent did not offer any testimony in his defense. However, he cross-examined both State experts and offered into evidence three exhibits. These exhibits

consisted of a certificate of completion from a sex offender treatment program and two mental health evaluations performed at Menard Correctional Facility in December 2004 and March 2006. The December 2004 evaluation was performed by psychologist Dr. William Holt upon the respondent's arrival at Menard. Dr. Holt did not include a diagnosis of pedophilia or any other sexual disorder. He noted only that the respondent self-reported a prior diagnosis of mental retardation. The March 2006 evaluation was performed by counselor Karen Kirschke, the supervisor of the sex offender treatment program at Menard. Ms. Kirschke evaluated the respondent to screen him for participation in Menard's sex offender treatment program. She included a provisional diagnosis of "rule out" pedophilia. A "rule out" diagnosis means that further investigation is warranted to determine whether the particular disorder can be ruled out, but there is insufficient evidence at this time to make a definitive diagnosis.

¶ 18 On cross-examination, Dr. Nicolai acknowledged that during her four-hour interview with the respondent, she did not discuss with him the specific circumstances involved in any of his offenses. She also acknowledged that she did not know when the respondent last offended. Dr. Proctor testified on direct examination that he was aware of at least one incident of uncharged criminal sexual behavior. On cross-examination, however, Dr. Proctor acknowledged that the respondent did not disclose any such incidents to him.

¶ 19 In closing arguments, the prosecutor told the jury that in order to carry its burden the State must prove three things: (1) that the respondent has been convicted of a sexually violent offense; (2) that the respondent suffers from a mental disorder; and (3) that he is

dangerous because his mental disorder makes it substantially likely that he will engage in future acts of sexual violence. In addressing the first element, the prosecutor argued, "Mr. Hosier has a history of sexually violent offenses stretching back over two decades." He then noted that the respondent had a 1986 conviction for fondling the breast of a 12-year-old girl, a 1992 conviction on two counts of incest involving his 13-year-old niece, a 2004 conviction for aggravated criminal sexual abuse, and a 2006 conviction for two counts of aggravated criminal sexual abuse.

¶ 20 The jury returned a verdict finding the respondent to be a sexually violent person, and the court entered judgment on that verdict. On October 22, the respondent filed a motion for the appointment of an expert to evaluate the respondent to determine whether he would be suitable for conditional release. Once again, he requested that the court appoint Dr. Angeline Stanislaus. The respondent acknowledged that her evaluation would not be confidential. On October 25, the court entered an order appointing Dr. Stanislaus. On November 4, the respondent filed a motion for a judgment of acquittal notwithstanding the verdict or, in the alternative, for a new trial. In relevant part, he argued that the evidence was insufficient to find him to be a sexually violent person beyond a reasonable doubt and that the court's denial of his request to have Dr. Stanislaus appointed as a consultant "gravely effected [*sic*]" counsel's ability to prepare a defense. The court denied this motion.

¶ 21 In March 2014, the court held a dispositional hearing, after which the court ordered the respondent to be committed to a secure facility for treatment. This appeal followed.

¶ 22 The respondent first argues that counsel was ineffective for declining the appointment of an expert to evaluate him and testify at trial once his request for the appointment of a consulting expert was denied. We disagree.

¶ 23 Although the SVP Act is civil in nature, it affords respondents with several of the protections ordinarily associated with criminal proceedings, including the right to counsel. The right to counsel entails a right to the effective assistance of counsel. *In re Commitment of Dodge*, 2013 IL App (1st) 113603, ¶ 20. Claims of ineffective assistance of counsel are governed by the familiar standard set forth in *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In order to prevail, a respondent must show that (1) counsel's performance fell below an objective standard of reasonableness; and (2) but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceedings would have been different. *In re Commitment of Dodge*, 2013 IL App (1st) 113603, ¶ 20. Both prongs of the *Strickland* test must be satisfied for the respondent to prevail. *In re Commitment of Dodge*, 2013 IL App (1st) 113603, ¶ 20.

¶ 24 We first note that it is virtually impossible to determine whether the respondent in this case has met the prejudice prong. We have no way to know what Dr. Stanislaus' findings would have been. Nevertheless, it is possible to resolve this case without resolving the prejudice prong of *Strickland*. As noted previously, the respondent must satisfy *both* parts of the *Strickland* test to prevail. We find that his claim must fail because he has failed to show that counsel's performance was deficient.

¶ 25 To show that counsel's performance was deficient, a respondent must overcome the strong presumption that counsel's decisions were the result of sound trial strategy. In

addition, this assessment must be made without the benefit of hindsight. *In re Commitment of Dodge*, 2013 IL App (1st) 113603, ¶ 20. Here, counsel explicitly stated on the record that his request for the appointment of a consultant, rather than an expert witness, was a matter of strategy. Counsel explained that from his experience handling SVP cases as a prosecutor, he knew that if she were appointed as a witness and reached the same conclusion as the State's witnesses, the State would learn of her opinion through discovery and would likely call her to serve as yet a third witness against the respondent. We also note that, although there were no cases directly on point at the time the court held hearings in this matter, a panel of the First District has subsequently held that the applicable statute does not preclude the court from appointing an expert to serve as a consultant rather than an expert witness. See *People v. Coyne*, 2014 IL App (1st) 123105, ¶¶ 15-16. In light of these factors, we find that counsel's decision constituted sound trial strategy.

¶ 26 The respondent contends, however, that once the court denied his request to appoint Dr. Stanislaus as a consultant, he had everything to gain and nothing to lose by accepting her appointment as an expert witness from the outset. He argues that even if she agreed with the State's experts, she might have been able to help respondent's counsel prepare a more meaningful defense by pointing to flaws in the State's case. Moreover, he argues that three witnesses against him would not have been any more detrimental than two. We are not persuaded.

¶ 27 First and foremost, our review of the record indicates that counsel *did* subject the State's case to meaningful adversarial testing. See *In re Commitment of Dodge*, 2013 IL

App (1st) 113603, ¶ 21. Counsel cross-examined both State witnesses. He asked each witness about the apparent inconsistencies between their diagnoses of pedophilia and both the lack of any such diagnosis in the respondent's initial mental health evaluation when he entered Menard Correctional Facility and the provisional diagnosis of "rule-out" pedophilia in the evaluation performed before he entered Menard's sex offender treatment program. Counsel asked Dr. Nicolai about the potential for evaluator bias in administering the Hare Psychopathy Checklist and whether the STATIC-99R was an appropriate assessment tool in a respondent with a low intelligence quotient. Thus, we find that the respondent was not prevented from presenting a meaningful defense without the assistance of Dr. Stanislaus.

¶ 28 Further, we will not second-guess counsel's determination that the risk of facing a third adverse witness outweighed the benefit of having Dr. Stanislaus' assistance. As previously discussed, counsel's performance enjoys a strong presumption of reasonableness. See *In re Commitment of Dodge*, 2013 IL App (1st) 113603, ¶ 20. Because we find that the respondent is unable to overcome that presumption here, we reject his claim of ineffective assistance of counsel.

¶ 29 The respondent next argues that he was deprived of a fair trial when the prosecutor misstated the evidence during closing arguments. Specifically, he challenges the prosecutor's remark that the respondent had a "history of sexually violent offenses stretching back over two decades." He contends that this statement mischaracterized the evidence.

¶ 30 The respondent acknowledges that he did not object to the remark during trial, but he asks us to consider it under the plain error doctrine or as part of his claim of ineffective assistance of counsel. The State argues that because proceedings under the SVP Act are civil in nature, we should apply the civil plain error rule, which allows review of forfeited errors in a far more limited set of circumstances than the criminal plain error rule. See *In re Commitment of Gavin*, 2014 IL App (1st) 122918, ¶ 53 (quoting *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 856 (2010)). We note that other districts of the Illinois Appellate Court have applied the criminal plain error rule in SVP Act cases. See *In re Commitment of Gavin*, 2014 IL App (1st) 122918, ¶¶ 53-55 (finding the criminal plain error rule applicable due to the sixth amendment concerns implicated in SVP proceedings and the possibility of indefinite commitment that is at stake); see also *In re Commitment of Curtner*, 2012 IL App (4th) 110820, ¶ 26 (citing *In re Ottinger*, 333 Ill. App. 3d 114, 117-18 (2002)) (applying the criminal plain error rule in an SVP case). We need not resolve this question because we would not find reversal to be warranted even if the argument were not forfeited.

¶ 31 The State has wide latitude in its closing arguments. The prosecutor may comment on the evidence presented and may draw any reasonable inference supported by that evidence. *In re Commitment of Gavin*, 2014 IL App (1st) 122918, ¶ 47. However, the State may not argue facts that are not in evidence or assumptions that are not supported by the evidence. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). Even improper remarks during closing argument do not require reversal unless they result in substantial prejudice to the respondent. This standard is met if it is impossible to discern

whether the verdict was based on the evidence or the improper remarks. *In re Commitment of Gavin,* 2014 IL App (1st) 122918, ¶ 69. In assessing the prejudicial impact of challenged remarks, we must consider them in the context of the closing arguments as a whole. *In re Commitment of Gavin,* 2014 IL App (1st) 122918, ¶ 69.

¶ 32 In support of the respondent's contention, he points to the language used by the prosecutor in questioning Dr. Nicolai about the respondent's criminal history and the role it played in her diagnosis of pedophilia. He notes that Dr. Nicolai was asked whether the first three offenses were for "sexually deviant behavior," and she responded that they were. Those convictions include a 1986 battery conviction for fondling a 12-year-old girl, a 1992 conviction in Arkansas on two counts of incest, and a 2004 conviction for aggravated criminal sexual abuse. By contrast, Dr. Nicolai was asked whether the respondent's 2006 conviction for aggravated criminal sexual abuse of his stepdaughter and her friend was for sexually violent behavior. Thus, he contends, the evidence presented did not support the prosecutor's statement that he had a history of sexually violent offenses stretching back two decades.

¶ 33 Although we do not agree with this reasoning, we agree that the statement mischaracterized the evidence. Section 5 of the SVP Act defines a sexually violent offense as any one of a specified list of offenses. Aggravated criminal sexual abuse is one of the listed offenses; however, battery and incest are not. See 725 ILCS 207/5(e) (West 2012). Thus, the respondent has two convictions for sexually violent offences as defined by statute. Both of these convictions involved conduct that occurred in 2004. Although the two older convictions involved conduct which could have supported a

conviction for a sexually violent offense, they were not technically sexually violent offenses. However, we do not find the remark prejudicial enough to warrant reversal.

¶ 34 The respondent acknowledges, as he must, that the State must only show that he was convicted of one sexually violent offense in order to support a finding that he is a sexually violent person. See 725 ILCS 207/5(f), 15(b)(1)(A) (West 2012). He also acknowledges that there is no dispute that this element is satisfied. He argues, however, that the prosecutor's remark was substantially prejudicial because "arguing to the jury that the respondent has a 20-year history of committing sexually violent offenses when the evidence does not support that argument *** preys on the fears of jurors." We are not persuaded. The conduct underlying the earlier convictions was relevant to the determinations of the two psychologists that the respondent suffered from pedophilia and that he was substantially likely to reoffend as a result of this diagnosis. Thus, testimony concerning the earlier offenses was properly before the jury. We do not believe that jurors were more likely to be swayed by fear simply because the prosecutor mischaracterized the offenses as sexually violent offenses when this label is not applicable. As such, the remark would not warrant reversal even if the respondent had not forfeited this claim.

¶ 35 For the foregoing reasons, we affirm the judgment of the trial court finding the respondent to be a sexually violent person and committing him to a secure facility for treatment.

¶ 36 Affirmed.