2024 IL App (5th) 231371-U

NO. 5-23-1371

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Christian County.
	)	
v.	)	No. 23-CF-185
	)	
JAMES EISKANT,	)	Honorable
	)	Bradley T. Paisley,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE VAUGHAN delivered the judgment of the court.
Justices Barberis and Boie concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order granting the State's petition to deny pretrial release is affirmed where the trial court's findings were not against the manifest weight of the evidence, the order denying pretrial release was not an abuse of discretion, and either insufficient argument, or no argument, was presented regarding defendant's claims of an unfair hearing.

¶ 2 Defendant timely appeals the trial court's order denying his pretrial release pursuant to Public Act 101-652, § 10-255 (eff. Jan. 1, 2023), commonly known as the Safety, Accountability, Fairness and Equity-Today (SAFE-T) Act (Act). See Pub. Act 102-1104, § 70 (eff. Jan. 1, 2023); *Rowe v. Raoul*, 2023 IL 129248, ¶ 52 (lifting stay and setting effective date as September 18, 2023). For the following reasons we affirm the trial court's order.[1]

[1]Pursuant to Illinois Supreme Court Rule 604(h)(5) (eff. Dec. 7, 2023), our decision in this case was due on or before March 21, 2024, absent a finding of good cause for extending the deadline. Based on the high volume of appeals under the Act currently under the court's consideration, as well as the

¶ 3 I. BACKGROUND

¶ 4 On December 12, 2023, defendant was charged by information with one count of aggravated criminal sexual assault in violation of section 11-1.30(c) of the Criminal Code of 2012 (720 ILCS 5/11-1.30(c) (West 2022)). The information alleged that between January 1, 2023, and July 19, 2023, defendant placed his penis in the mouth of G.S., a person of severe or profound intellectual disability.

¶ 5 On the same day, the State filed a verified petition to deny defendant's pretrial release. The petition alleged that the proof was evident and presumption great that defendant committed an offense listed in section 110-6.1(a) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/110-6.1(a) (West 2022)) and posed a real and present threat to the safety of any person(s) or the community. Attached to the petition was a statement by the prosecutor that swore and attested the following information as true and correct: "The Defendant solicited a mentally challenged individual who was unable to give consent due to his mental disability and performed oral sex on the young man. No condition or combination of conditions would prevent the defendant from committing the same act again." The statement was signed by the prosecutor.

¶ 6 On December 14, 2023, defense counsel filed a motion to strike the State's verified petition. In support, defendant claimed that the charges filed on December 12, 2023, were "nearly identical and refer to the same conduct as previously charged in Case No. 2023-CF-93, which the State has now dismissed." The motion claimed the State's petition was untimely because the first appearance occurred on July 20, 2023, when the charges were originally filed, and defendant remained in continuous custody since that time pursuant to a monetary bond. The motion alleged

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complexity of issues and the lack of precedential authority, we find there to be good cause for extending the deadline.

that the State previously filed a verified petition to detain in the initial case on September 18, 2023, the petition was dismissed as untimely by the trial court on October 16, 2023, and the State did not appeal that ruling. The motion argued that the court should not allow the State to use newly filed charges to circumvent the statutory requirements for timely filed petitions. Attached to the motion was a copy of the original information in case No. 2023-CF-93 filed July 20, 2023, and the history of case No. 2023-CF-93—as seen on Judici.com—including the prior denial of the State's verified petition, the setting of defendant's motion to remove monetary conditions, and the State's dismissal of the charge filed in July 2023 on December 12, 2023.

¶ 7 The newly filed case proceeded to hearing on December 14, 2023. The court first addressed defendant's motion to strike. Defense counsel's argument was consistent with that provided in the previously filed motion to strike. The State responded by stating that nothing prohibited it from proceeding in this manner. The trial court denied the motion to strike, stating it did not find the State's "re-prosecution to be in bad faith" because

> "there was no way for the State to be able to comply with the law and be able to seek detention because of the way that the new statute was written. So, I don't find it fundamentally unfair that the State does get an opportunity to do what they would've been able to do had he been arrested on or after September 18th."

The trial court also found this was not a case where the speedy trial clock was ready to run, or the State did not seek detention after it had an opportunity to seek detention.

¶ 8 Following the denial of defendant's motion, the case proceeded to hearing on the State's petition to detain. Defense counsel asked to make a record of the materials tendered. Upon the court's allowance, counsel stated that she "received discovery with regard to the prior case" and wanted to confirm that since it was same case it had received "all prehearing materials that would

be required for this first appearance." Thereafter, the State confirmed that it provided, "Anything and everything."

¶ 9 The State called Chief Dwayne Wheeler of the Taylorville Police Department who testified that G.S. and his grandmother came to the police department on July 17, 2023. The grandmother had previously called and requested a meeting for the police to advise G.S. as to actions that could be considered inappropriate, *i.e.*, places he should not frequent and riding his bike at night. Chief Wheeler testified that G.S. was mentally disabled and he was talking to him about the danger of riding his bike at night and not listening to his grandmother, when the topic moved to G.S. spending time with the defendant. Chief Wheeler testified that G.S. became nervous and anxious and "wasn't acting right" so he asked G.S. what happened at defendant's house. G.S. then pointed to his penis and his butt area and stated, "It hurt." Thereafter, Chief Wheeler requested Detective Wood come to his office. When the detective arrived, Chief Wheeler asked for a full investigation immediately. A forensic interview was performed at the Child Advocacy Center (CAC) and Detective Wood attended that interview. Chief Wheeler did not watch the interview but read the transcript. Chief Wheeler testified that during the CAC interview, G.S. stated that defendant sucked his penis and further indicated that he felt something like soap in his buttocks area. He stated the actions occurred at defendant's residence. G.S. also stated in his interview that he watched TV with two individuals doing the things that he was doing with defendant. Subsequent to G.S.'s statements, the Taylorville Police Department arrested defendant.

¶ 10 Chief Wheeler testified that he spoke with defendant after his *Miranda* rights were provided. They initially discussed defendant's drug abuse and later moved the discussion to defendant's activities with G.S. Chief Wheeler stated that defendant initially denied the allegations but later told the officer bits and pieces of what happened. Eventually, defendant admitted that

G.S. had sucked his penis on a couple of occasions and he did not want G.S. to do it. He later stated that G.S. never sucked his penis but G.S. made defendant suck his penis. Chief Wheeler stated that a search warrant was obtained for defendant's phone which revealed phone calls from defendant to G.S. and a video of two individuals having sexual activity that could not be identified. Given G.S.'s mental deficiency, they also put G.S. on a bike and told him to ride to defendant's apartment. The officers videotaped the ride. G.S. went directly to defendant's apartment without any need to ask for directions.

¶ 11 On cross-examination, Chief Wheeler agreed that defendant claimed it was a consensual relationship between the two of them. He further stated he could not remember, without looking at his report, if G.S. performed the acts on defendant or if defendant performed the acts on G.S. He also confirmed that the persons in the sexual activity found on the phone were not identified and clarified that the video on defendant's phone revealed pornography, not child pornography.

¶ 12 Following Chief Wheeler's testimony, the State proffered that G.S. was 19 years old at the time of the incident. His I.Q. test taken in 2013 revealed a score of 48 and a second test in 2019 revealed an I.Q. of 43, which was "extremely low" on the Wechsler Intelligence Scale for children. The State indicated this was evidence of "a profound intellectual disability."

¶ 13 Defense counsel advised the court that it had no evidence to present but requested the court consider the pretrial investigation report. That report, originally filed on July 20, 2023, revealed that defendant was 64 years old, divorced, and had seven children to support. He had family in the area for support, a driver's license, and a vehicle allowing him the ability to attend future court dates. He lived in the same building for four years and completed ninth grade in school. He retired in 2011 and received social security benefits equating to approximately $700 a month. He also received a LINK card. Defendant had a history of drug abuse involving methamphetamines for

four or five years and 16 pinched nerves in his back with 2 bulging discs. His VPRAI-R assessment score was 6, classifying him as a level 3 (out of 6 levels) with a 14.9% recidivism risk. His past criminal history involved two convictions for possession of methamphetamine in 2022, a criminal trespass conviction in 2017, and convictions for driving on a suspended license in 2016, twice in 2014, and once in 2013. Additional convictions from 1985 to 2005 included failure to register as a sex offender (1999), disorderly conduct (1997), two counts of possessing child pornography (1994), public indecency/lewd exposure (1990), and resisting a peace officer (1985).

¶ 14 The State argued that the proof was evident or presumption great that the offense occurred by defendant's own admission and stated defendant was dangerous based on the factors including defendant's prior history and conviction for possession of child pornography. It argued that defendant was dangerous to the victim, who although was over 18, had intellectual disabilities that put him in a position where he could not fully understand the nature and circumstances of defendant's actions. He stated that G.S. "does not know—does not understand completely right and wrong. He acts or has the intellectual capability of a four or five year old, Judge, and I'd submit that to the Court." The State further argued that no condition, or combination of conditions, would alleviate defendant's dangerousness as defendant had his own residence and the victim did not have the mental capability to understand the gravity of the situation. The State asked the court to deny pretrial release.

¶ 15 Defense counsel again objected to the timeliness of the State's petition and requested it be denied for that reason. As to the merits, defense counsel argued that there were conflicting stories and evidence as to who performed the acts on the other. Counsel also argued, pursuant to section 2-10.1 of the Criminal Code of 2012 (720 ILCS 5/2-10.1 (West 2022)), that the victim's I.Q. was not below 40 and, while it may have been below 50, there was no additional evidence regarding

significant mental illness as required by the statute to show that the person's ability to exercise rational judgment was impaired. Here, the victim was 19, and there was no evidence submitted that he did not have the intellectual ability to consent to sexual activity, and therefore, no clear and convincing evidence of the offense charged. Counsel further argued that defendant was not dangerous. His criminal incarcerations were well in the past and the current issues involved methamphetamine possession. Counsel argued that defendant was an elderly man whose dangerousness could be mitigated with conditions of no contact and electronic home confinement.

¶ 16 In response, the State pointed to Chief Wheeler's testimony that the victim did not know, could not know, and was "incapable of knowing the right and wrong of him exercising sexual contact with [defendant]." Defense counsel replied that the grandmother's concern was G.S.'s riding his bicycle at night, and nothing indicated the victim's ability to exercise rational judgment. The State reiterated its reliance on Chief Wheeler's testimony and conceded it had no evidence regarding G.S.'s ability to exercise rational judgment. The trial court stated that it was the State's burden to show the mental deficiency since the I.Q. was not low enough. Thereafter, the following exchanged occurred:

> "[THE STATE]: I don't have that evidence candidly, Judge, and that's what my previous statement was. I don't have that evidence.
>
> THE COURT: Then how am I supposed to find that you've met your burden of proof to grant the petition?
>
> [THE STATE]: Based on your statements, Judge, I don't believe I have.
>
> THE COURT: It's not based on my statements. It's based on the law, and you keep coming in here half prepared on everything and you want me to save you from—

[THE STATE]: I'm not asking you to save me. I'm asking you to take into consideration what Chief Wheeler has testified to.

THE COURT: What is that specifically, though? That's what I'm asking you.

[THE STATE]: That [G.S.'s] grandmother came into the police station *** and that based on the context of everything taking into consideration [G.S.] is of an intellectual context in which he does not know right from wrong[,] and I know this—this Court has seen the CAC interview. The Court understands—and I know that the Court can't take that into consideration at this point because it's not before the Court.

However, I know the Court knows of *** the circumstances surrounding [G.S.] and he doesn't understand the wrongfulness of the acts that [defendant] did. Chief Wheeler testified—actually I move to strike that. I don't have anything else to submit to the Court, Judge, and I can rely on my arguments."

¶ 17 Thereafter, the court found defendant was charged with a qualifying offense. It did not find the conflicting evidence, *i.e.*, which party performed the act on the other, relevant. It found the real question was whether the State proved that G.S. was a person of severe and profound intellectual disability. It found the State met its burden on that issue by taking judicial notice of the August 31, 2023, hearing held in case 23-CF-126, on the State's motion to introduce hearsay statements pursuant to section 115-10 of the Code (725 ILCS 5/115-10 (West 2022)). The court noted that it viewed the CAC interview in the prior hearing in which G.S. made certain disclosures. The court stated:

"It was evident to the Court after reviewing that evidence *** that [G.S.] has a significant mental illness and he is not able to exercise rational judgment. *** I think the statements

were made that he functions at a level of about a five-year-old and that's certainly consistent with what I observed watching that video."

The court found the proof evident or the presumption great that defendant committed the qualifying offense.

¶ 18 Thereafter, the court considered the relevant factors found in section 110-6.1(g). 725 ILCS 5/110-6.1(g) (West 2022). The court found this was a "very serious sex offense" that weighed in favor of a dangerousness finding. The court also noted defendant's "prior history indicative of assaultive or abusive behavior" including felony convictions for possessing child pornography and failing to register as a sex offender. The court found the persons in danger by defendant's actions included the alleged victim as well as any other similarly situated individuals that defendant might encounter. The court also noted defendant's statements admitting sexual contact between the parties and the fact that defendant was on probation at the time of the alleged offenses. Thereafter, the court found the State met its burden and defendant posed a real and present threat to the safety of persons in the community. The court found that it could not impose any less restrictive conditions of release that would mitigate its concerns of dangerousness. It again noted the current charge, defendant's past charge of possessing child pornography, previous failure to register as a sex offender, and current admission of a sexual relationship. It considered electronic monitoring but found the condition would not assure the safety of the alleged victim or any other potential victims since the alleged incident occurred at defendant's house. Thereafter, the court ordered defendant detained and advised defendant of his appeal rights. Defendant advised the court that he wanted to appeal. Defense counsel stated it would file the notice of appeal and would "be incorporating the record from the old case as well as the new case particularly *** in light of the Court taking judicial notice of the hearing that occurred in the dismissed case." The trial court

responded, "[M]y order is send it all. They need both cases to do their job so I'm going to direct the Clerk to send both cases up." Defense counsel clarified that she was also requesting the transcript of the hearing held on August 31, 2023, and requested its inclusion in the court's order. The trial court responded that the transcript and actual video would "be part of that record on appeal as well" and requested defense counsel follow up with the clerk to ensure the materials were included.

¶ 19 Following the hearing, the trial court issued a detention order finding defendant dangerous. The order stated the only possible condition that could mitigate the dangerousness of defendant's release was electronic monitoring, but that condition would not assure the safety of the alleged victim, or other potential victims, because the offense charged occurred in defendant's home. The order stated defendant was charged with a sex offense and had a history of possessing child pornography, failing to register as a sex offender, and possessing methamphetamine. Defendant made statements to the police of sexual conduct between himself and the alleged victim, although different from the conduct charged. The alleged victim had a significant intellectual disability which made him more vulnerable, and defendant was on probation at the time of the offense. Defendant timely appealed. Ill. S. Ct. R. 604(h)(2) (eff. Dec. 7, 2023).

¶ 20 II. ANALYSIS

¶ 21 Pretrial release—including the conditions related thereto—is governed by statute. See Pub. Act 101-652, § 10-255 (eff. Jan. 1, 2023); Pub. Act 102-1104, § 70 (eff. Jan. 1, 2023). A defendant's pretrial release may be denied only in certain statutorily limited situations. 725 ILCS 5/110-6.1 (West 2022). In order to detain a defendant, the State has the burden to prove by clear and convincing evidence that (1) the proof is evident or the presumption great that the defendant has committed a qualifying offense, (2) the defendant's pretrial release poses a real and present

threat to the safety of any person or the community or a flight risk, and (3) less restrictive conditions would not avoid a real and present threat to the safety of any person or the community and/or prevent the defendant's willful flight from prosecution. *Id.* § 110-6.1(e), (f).

¶ 22 In considering whether the defendant poses a real and present threat to the safety of any person or the community, *i.e.*, making a determination of "dangerousness," the trial court may consider evidence or testimony concerning factors that include, but are not limited to, (1) the nature and circumstances of any offense charged, including whether the offense is a crime of violence involving a weapon or a sex offense; (2) the history and characteristics of the defendant; (3) the identity of any person to whom the defendant is believed to pose a threat and the nature of the threat; (4) any statements made by or attributed to the defendant, together with the circumstances surrounding the statements; (5) the age and physical condition of the defendant; (6) the age and physical condition of the victim or complaining witness; (7) whether the defendant is known to possess or have access to a weapon; (8) whether at the time of the current offense or any other offense, the defendant was on probation, parole, or supervised release from custody; and (9) any other factors including those listed in section 110-5 of the Code (*id.* § 110-5). *Id.* § 110-6.1(g).

¶ 23 To set appropriate conditions of pretrial release, the trial court must determine, by clear and convincing evidence, what pretrial release conditions, "if any, will reasonably ensure the appearance of a defendant as required or the safety of any other person or the community and the likelihood of compliance by the defendant with all the conditions of pretrial release." *Id.* § 110-5(a). In reaching its determination, the trial court must consider (1) the nature and circumstances of the offense charged; (2) the weight of the evidence against the person; (3) the history and characteristics of the person; (4) the nature and seriousness of the specific, real, and present threat to any person that would be posed by the person's release; and (5) the nature and seriousness of

the risk of obstructing or attempting to obstruct the criminal justice process. *Id.* The statute lists no singular factor as dispositive. *Id.*

¶ 24 Our standard of review of pretrial release determinations is twofold. The trial court's factual findings are reviewed under the manifest weight of the evidence standard. *People v. Swan*, 2023 IL App (5th) 230766, ¶ 12. " 'A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented.' " *Id.* (quoting *People v. Deleon*, 227 Ill. 2d 322, 332 (2008)). We review the trial court's ultimate determination regarding the denial of pretrial release for an abuse of discretion. *Id.* ¶ 11. "An abuse of discretion occurs when the decision of the circuit court is arbitrary, fanciful, or unreasonable, or when no reasonable person would agree with the position adopted by the trial court." *Id.*; see also *People v. Heineman*, 2023 IL 127854, ¶ 59. "[I]n reviewing the circuit court's ruling for abuse of discretion, we will not substitute our judgment for that of the circuit court, 'merely because we would have balanced the appropriate factors differently.' " *People v. Simmons*, 2019 IL App (1st) 191253, ¶ 15 (quoting *People v. Cox*, 82 Ill. 2d 268, 280 (1980)).

¶ 25 Defendant's notice of appeal requests reversal of the trial court's order denying pretrial release. The notice of appeal lists five issues for this court's consideration. Defendant's counsel on appeal, the Office of the State Appellate Defender (OSAD), filed a Rule 604(h) memorandum stating it "fully incorporates all of the arguments raised" in defendant's notice of appeal and addressed two arguments in the notice of appeal.

¶ 26 The State filed a Rule 604(h) memorandum on March 4, 2024. The memorandum limited the response solely to the issues raised in OSAD's memorandum, pursuant to *People v. Forthenberry*, 2024 IL App (5th) 231002, ¶ 42. The State argued that sufficient evidence was

presented to show a qualifying offense, the court's taking judicial notice of the prior CAC interview was proper pursuant to *People v. Willard*, 2023 IL App (5th) 230895-U, and defendant's attempt to raise the issue of the dismissal of the prior charges and refiling of the current charges was not a proper order for consideration by the court. The State further argued that, even if the denied motion was a proper order, the defendant could not show prejudice under *Forthenberry*, 2024 IL App (5th) 231002, ¶ 27.

¶ 27 Two of the arguments raised by defendant claim he was not afforded a fair hearing. Both arguments relate to the trial court's factual findings, as well as its ultimate disposition. As such, we will address those arguments first. The initial argument contends the trial court should not have allowed the State to dismiss the previously filed charges and then refile the same case in order to allow the State to timely seek detention when it was previously found to have untimely filed its petition to detain in a prior case. The second argument claims the trial court erroneously relied on judicial notice related to evidence obtained in the prior case to determine the mental acuity of the victim in the current case although defendant concedes the victim was the same in both cases.

¶ 28 As to the first argument, defendant's notice of appeal argues that the State's petition was untimely because defendant's first appearance occurred on July 20, 2023, in case No. 23-CF-126, which was dismissed and refiled as the current case. The notice further argues that the refiling was solely for the purpose of creating a first appearance, which the State claims attaches to the case number, rather than the conduct. The notice contends the State did not tender any materials prior to the current first appearance, "recognizing its own farce." OSAD's memorandum contends "the State engaged in bad faith gamesmanship by dropping the identical charge" filed against defendant on July 20, 2023 (case No. 23-CF-126) and refiling the charges in the current case on the same day defendant's motion to remove monetary conditions of bail was set for hearing. OSAD argues

that the trial court's interpretation of the statute ran afoul of the intent of the amended Code, rendering sections 110-7.5(a) and (b) and 110-5(e) (725 ILCS 5/110-75(a), (b), 110-5(e) (West 2022)) superfluous, obsolete, and meaningless, and claimed the decision ignored *People v. Rios*, 2023 IL App (5th) 230724.

¶ 29 This court is well aware of the amended statutes related to pretrial release. The trial court correctly noted that nothing therein prohibits the actions taken by the State. "The voluntary dismissal of criminal charges before trial is, in effect, a *nolle prosequi*." *People v. Van Schoyck*, 232 Ill. 2d 330, 340 (2009). While it well settled that the "State may not avoid a speedy-trial demand by dismissing a charge only to refile the identical charge for the identical offense based on the identical acts," absent speedy-trial right concerns, "[t]he State has the discretion not only to decide what charges to bring, but to decide whether charges should be dismissed." *Id.* at 339.

¶ 30 "A *nolle prosequi* is not a final disposition of the case, and will not bar prosecution for the same offense." (Internal quotation marks omitted.) *People v. Milka*, 211 Ill. 2d 150, 172 (2004). "The decision to nol-pros a charge lies within the discretion of the prosecutor, and a trial court may not deny the motion under normal circumstances." *People v. Murray*, 306 Ill. App. 3d 280, 282 (1999). "[I]f a *nolle prosequi* is entered before jeopardy attaches,[2] the State may reprosecute the defendant subject to other relevant statutory or constitutional defenses [citation] and ' "absent a showing of harassment, bad faith, or fundamental unfairness." ' " *People v. Hughes*, 2012 IL 112817, ¶ 23 (quoting *People v. Norris*, 214 Ill. 2d 92, 104 (2005), quoting *People v. DeBlieck*, 181 Ill. App. 3d 600, 606 (1989)). In order to reprosecute a defendant following a *nolle prosequi*,

[2]" '[J]eopardy attaches when the jury is empaneled and sworn.' " *Martinez v. Illinois*, 572 U.S. 833, 839 (2014) (quoting *Crist v. Bretz*, 437 U.S. 28, 35 (1978)); *People v. Moon*, 2022 IL 125959, ¶ 67. Jeopardy attaches in a bench trial "when the first witness is sworn and the court begins to hear evidence." (Internal quotation marks omitted.) *People v. Bellmyer*, 199 Ill. 2d 529, 538 (2002). As to jeopardy in the context of a guilty plea, "jeopardy attaches when the trial court unconditionally accepts defendant's plea." *People v. Gaines*, 2020 IL 125165, ¶ 34.

the State must commence a new proceeding and file a new charging instrument. *Id.* ¶ 24. That was done in the case at bar and the court correctly noted that no speedy trial issue was raised.

¶ 31 No claim of harassment was made. As such, we consider the arguments presented by defense counsel at trial related to bad faith and fundamental unfairness. "Bad faith *** is a term of variable significance and rather broad application." (Internal quotation marks omitted.) *Cernocky v. Indemnity Insurance Co. of North America*, 69 Ill. App. 2d 196, 205 (1966). In the civil context, the words "good faith" and "bad faith" have been interpreted as "either being faithful or unfaithful to the duty or obligation that is owed." *Id.* at 205-06. Similarly, the term " 'bad faith' has been held to be the sematic equivalent of 'vexatious and unreasonable' conduct." *Emerson v. American Bankers Insurance Co. of Florida*, 223 Ill. App. 3d 929, 936 (1992). Considering the courts have long allowed the prosecutor to determine which cases to prosecute, dismiss, or refile (see *Van Schoyck*, 232 Ill. 2d at 340), we cannot find the State's actions were in bad faith.

¶ 32 "Fundamental fairness" relates to due process. "[D]ue process is implicated 'whenever the State engages in conduct towards its citizens deemed oppressive, arbitrary[,] or unreasonable.' " *People v. Stapinski*, 2015 IL 118278, ¶ 51 (quoting *People v. McCauley*, 163 Ill. 2d 414, 425 (1994)). "[S]ince the essence of due process is 'fundamental fairness,' due process essentially requires 'fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal constitutional protections.' " *Id.* (quoting *McCauley*, 163 Ill. 2d at 441). "The case law acknowledges two distinct strands of due process analysis: substantive due process and procedural due process." *People v. Pollard*, 2016 IL App (5th) 130514, ¶ 29. Each requires a different analysis. A procedural due process claim requires the court to consider the *Mathews* (see *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)) factors. *People v. Cardona*, 2013 IL 114076, ¶ 15. A substantive due process claim requires the court to determine if the

government's conduct shocked the conscience and violated decencies of civilized conduct. *Stapinski*, 2015 IL 118278, ¶ 51.

¶ 33 On appeal, defendant fails to present any argument regarding either procedural or substantive due process and also fails to address its previously argued claim of fundamental fairness except to classify the State's action as "gamesmanship." Regardless, at a bare minimum, "[t]he fundamental requirements of [procedural] due process are notice of the proceeding and an opportunity to present any objections." *Cardona*, 2013 IL 114076, ¶ 15. Here, defendant was provided notice of the hearing on the State's petition to deny pretrial release and defense counsel presented objections at that hearing. Without further argument of a procedural due process violation, we decline to find defendant's procedural due process was violated. Further, given the State's discretion in determining which charges to bring, dismiss, or reprosecute following a *nolle prosequi* (see *Van Schoyck*, 232 Ill. 2d at 340), as well as the lack of an explanation of how refiling a case to obtain a pretrial detention hearing under the Act affected defendant's substantive due process, we decline to find the State's action shocked the conscience or violated decencies of civilized conduct. As such, defendant's argument that the State's actions were fundamentally unfair must fail.

¶ 34 While defendant argues that the "State did not tender any materials required prior to a first appearance, recognizing its own farce," our review of the record makes it difficult to ascertain whether the record created by defense counsel simply indicated the materials were the same as those previously provided in the prior case or if no discovery was provided in the current case. In either event, we note that no actual objection was raised by defense counsel.

¶ 35 The importance of a timely objection is well established. See *People v. Trefonas*, 9 Ill. 2d 92, 98 (1956). "[W]hen a defendant procures, invites, or acquiesces in the admission of evidence,

even though the evidence is improper, [the defendant] cannot contest the admission on appeal." *People v. Bush*, 214 Ill. 2d 318, 332 (2005) (citing *People v. Caffey*, 205 Ill. 2d 52, 114 (2001); *People v. Payne*, 98 Ill. 2d 45, 50 (1983)). "This is because, by acquiescing in rather than objecting to the admission of the allegedly improper evidence, a defendant deprives the State of the opportunity to cure the alleged defect." *Id.* Finally, nothing in *Rios* addresses the actions taken herein. Accordingly, we cannot find either the State's action, or inaction, denied defendant a fair hearing.

¶ 36 Defendant next argues that his hearing was unfair because the trial court took judicial notice of its viewing of a CAC interview involving the same victim from a different case. Defendant also claims the court's taking judicial notice saved the State from meeting its burden in this case and it was improper for the court to adopt "the role of advocate for one of the parties."

¶ 37 However, once again, our review of the record reveals that defense counsel presented no objection to any testimony or argument related to the CAC interview, the court taking judicial notice of the victim's CAC interview, and at no time complained that the court was advocating on behalf of the State. Accordingly, defendant is precluded from raising these as issues on appeal. See *Bush*, 214 Ill. 2d at 332. Further, defendant presented no basis for this court to excuse the forfeiture. See *People v. Hillier*, 237 Ill. 2d 539, 545 (2010); *People v. Nieves*, 192 Ill. 2d 487, 502-03 (2000). For these reasons, we cannot find that defendant was denied a fair hearing.

¶ 38 Moving to the trial court's findings, defendant first argues that the State failed to meet its burden of proving by clear and convincing evidence that the proof was evident or the presumption great that defendant committed the offense charged. More specifically, defendant argues that the State failed to prove the element of severe or profound intellectual disability by its own admission,

and even if the court could take judicial notice of the CAC interview, it failed to show "significant mental illness" to support the charge by clear and convincing evidence. We disagree.

¶ 39 The issue raised is one of evidentiary sufficiency. Typically, when considering the sufficiency of the evidence, "the reviewing court must view the evidence 'in the light most favorable to the prosecution.' " *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "This means the reviewing court must allow all reasonable inferences from the record in favor of the prosecution." *Id.* "In other words, the question is 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' (Emphasis in original.)" *Id.* at 278 (quoting *Jackson*, 443 U.S. at 319).

¶ 40 The State was required to show "by clear and convincing evidence" that "the proof is evident or the presumption great that the defendant has committed the offense" at issue in the pretrial release hearing. 725 ILCS 5/110-6.1(e)(1) (West 2022). Such requirement, by its own terms, does rise to a level that would necessitate the State proving beyond a reasonable doubt that defendant committed the offense charged. See *People v. Craig*, 403 Ill. App. 3d 762, 768 (2010) (clear and convincing standard is "more than a preponderance of the evidence and not quite approaching the beyond-a-reasonable-doubt standard necessary to convict a person of a criminal offense"). As such, we review the evidence, in a light most favorable to the prosecution, to determine if any rational trier of fact could have found that the State presented clear and convincing evidence that the proof was evident, or the presumption great, that the victim was of "severe or profound intellectual disability." The trial court found the State met its burden. We consider whether the trial court's finding was against the manifest weight of the evidence. *Swan*, 2023 IL App (5th) 230766, ¶ 12. As noted above, "[a] finding is against the manifest weight of the evidence

only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented." *Deleon*, 227 Ill. 2d at 332.

¶ 41 Here, Chief Wheeler testified that the 19-year-old victim had a forensic interview at the Child Advocacy Center and later testified that the victim "had a disability" and was "mentally disabled" with "retardation." Chief Wheeler's testimony—related to the victim's statements about what occurred in defendant's apartment—also infers a profound intellectual disability. Despite being asked what happened at defendant's apartment, the victim did not go into detail with the chief regarding the acts. Instead, in a very child-like manner, the victim pointed to his body parts, more specifically his penis and his butt, and stated, "It hurt." The evidence also revealed that the victim's I.Q. was most recently measured at 43 in 2019, and the State submitted to the court that the victim had the "intellectual capability" of a four- or five-year-old child.

¶ 42 Despite the fact that defendant raises a sufficiency argument on appeal and that defense counsel requested that the materials from the prior case, including the transcript from the CAC interview hearing and the video, be included in the record on appeal, those materials were not included in the record. Nor did OSAD move to supplement the record. See Ill. S. Ct. R. 329 (eff. July 1, 2017). As such, we cannot evaluate whether the trial court's inference, drawn from its viewing of the CAC interview hearing, was against the manifest weight of the evidence.

¶ 43 Defendant, as the appellant, has the burden of presenting a sufficiently complete record to support his argument or claim of error on appeal. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984). "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Id.* at 392. In such instances, "it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Id.* Here, given the evidence that was included in the record on appeal, and the presumption triggered by defendant's

failure to provide a complete record on appeal, we find the trial court did not err in finding the proof was evident or the presumption great that defendant committed the charged offense.

¶ 44 Defendant also argues that the State failed to prove by clear and convincing evidence that he posed a real and present threat to the safety of any person(s) or the community based on the facts of this case. In support, defendant argued that the State presented "no evidence that there is a real and present ongoing threat based on the specific articulable facts of the case." After providing the definition for clear and convincing evidence, defendant further asserted that "specific articulable facts must be those facts which are specific to the accused and not hypotheticals regarding sex abuse cases."

¶ 45 The trial court found defendant was dangerous because he had a "prior history indicative of assaultive or abusive behavior" along with prior convictions for possessing child pornography, failing to register as a sex offender, and possessing methamphetamine. The court found the persons in danger by defendant's actions included the alleged victim as well as any other similarly situated individuals that defendant might encounter. The court also noted defendant's statements admitting sexual contact between the parties and the fact that defendant was on probation at the time of the alleged offense. Nothing in the trial court's order is based on a hypothetical. Indeed, defendant's pretrial investigative report confirmed defendant's criminal history and defendant admitted to sexual contact between himself and the victim. As such, we find it difficult, if not impossible, to state the trial court's finding of dangerousness was against the manifest weight of the evidence.

¶ 46 Finally, defendant argues that the State failed to prove by clear and convincing evidence that no condition, or a combination of conditions, could mitigate his dangerousness. In support, defendant contends that a no-contact order or GPS monitoring would mitigate any threat to the victim. However, the trial court correctly noted that GPS monitoring was of no avail due to the

fact that the alleged incident occurred in defendant's apartment. Here, the evidence also revealed that the victim knew how to get to defendant's apartment. Therefore, GPS would not mitigate the dangerousness. Further, given the victim's intellectual disability, it is unlikely that he would understand the legal significance of a no-contact order. Finally, as noted by the court, the alleged incident occurred while defendant was on probation. Given these facts, we hold that the trial court's finding that no condition, or combination of conditions, would mitigate defendant's dangerousness, was not against the manifest weight of the evidence.

¶ 47 None of the trial court's findings related to a qualifying offense, dangerousness, or a lack of condition, or combination of conditions, available to mitigate defendant's dangerousness were against the manifest weight of the evidence. As such, we hold that the trial court's ultimate disposition, denying pretrial release, was not an abuse of discretion.

¶ 48 III. CONCLUSION

¶ 49 For the reasons stated herein, the trial court findings were not against manifest weight of the evidence and its ultimate disposition was not an abuse of discretion. Therefore, we affirm the trial court's order.

¶ 50 Affirmed.