No. 126176

IN THE
SUPREME COURT OF ILLINOIS

IN RE COMMITMENT OF WARREN SNAPP (PEOPLE OF THE STATE OF ILLINOIS, Petitioner-Appellant, v. WARREN SNAPP, Respondent-Appellee).	)	Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-19-0024 There on appeal from the Circuit Court of the Twelfth Judicial Circuit Will County, Illinois No. 97 CF 2580 The Honorable Sarah Jones, Judge Presiding.

BRIEF OF PETITIONER-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

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POINTS AND AUTHORITIES

NATURE OF THE CASE

Respondent is civilly committed under the Sexually Dangerous Persons Act (SDP Act). Following a 2018 bench trial, the trial court denied respondent's third application for recovery, finding that he remained a sexually dangerous person (SDP). The People appeal the appellate court's judgment, which held that the trial court erred when announcing its verdict — and that a new trial is automatically required — because the trial court did not expressly state that respondent remains substantially probable to reoffend, as required by *People v. Masterson*, 207 Ill. 2d 305 (2003). No issue is raised on the pleadings.

ISSUES PRESENTED

1. Whether *Masterson* is no longer controlling, and trial courts are no longer required, upon ruling that a respondent remains an SDP, to also explicitly state that the respondent is "substantially probable to engage in the commission of sex offenses," because in response to *Masterson,* the legislature amended the SDP Act to include that language in the statutory definition of an SDP.

2. Alternatively, if *Masterson* remains viable, whether (1) respondent failed to preserve his *Masterson* claim, (2) the trial court's error was harmless, and (3) the proper remedy is to remand to the trial court to clarify its ruling, rather than order a new trial.

JURISDICTION

Jurisdiction lies under Supreme Court Rule 315. This Court allowed the People's petition for leave to appeal on September 30, 2020.

STATEMENT OF FACTS

A. Respondent's Convictions and Civil Commitment

In 1973, when respondent was 28 years old, he engaged in sexual acts on multiple occasions with a nine-year-old boy, an 11-year-old boy, and a 12-year-old boy. R2169-73.[1] He pleaded guilty to three counts of indecent liberties with a child and was sentenced to four-to-twelve years of imprisonment. R2169-70. Later, while on parole for the 1973 conviction, respondent fondled his eight-year-old niece's vagina, and his parole was extended by one year. R2173.

In 1992, respondent pleaded guilty to aggravated criminal sexual abuse of a child and was sentenced to four years in prison. R2174. The conviction was based on respondent's act of fondling a boy's penis on multiple occasions when the boy was 11 and 12 years old. R2174-75.

In 1997, respondent was charged with criminal sexual abuse of a child after he kissed a nine-year-old boy, fondled the boy's penis, and exposed his penis to the boy. R2177. Following those charges, the People filed a petition under the SDP Act, which permits the People to seek commitment of dangerous sex offenders in lieu of criminal prosecution. 725 ILCS 205/0.01.

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[1] The common law record, report of proceedings, and secured common law record are cited as "C_," "R_," and "SCR_," respectively.

Following a jury trial, respondent was found to be an SDP and committed to the custody of the Director of the Illinois Department of Corrections. C225. The appellate court affirmed the judgment, concluding that there was "overwhelming evidence" that respondent was an SDP. C237.

In 2004 and 2007, respondent sought release from his civil commitment by filing an application for recovery; on each occasion, a jury concluded that respondent remained an SDP, and the appellate court affirmed. C449-59, 732-58.

B. Respondent's Third Application for Recovery

Respondent subsequently filed a third application for recovery. C700. Resolution of that application was delayed for a number of reasons, including respondent's repeated, unsuccessful attempts to obtain a favorable expert report. *See, e.g.,* R1858-62; C950. A bench trial was held in 2018. R2148.

Dr. Kristopher Clounch, a clinical psychologist, testified for the People that he had evaluated respondent to determine whether he was still an SDP. R2162. As part of his evaluation, Clounch reviewed (1) prior evaluations of respondent, (2) police reports and court records regarding respondent's past offenses, and (3) respondent's treatment records. R2163-64. He also interviewed respondent and conducted a risk assessment to assess the likelihood that respondent would reoffend. R2165.

Based on this evaluation, Clounch (1) diagnosed respondent with pedophilic disorder, sexually attracted to both females and males, nonexclusive type, and (2) concluded that respondent remains an SDP.

R2186, 2205-06. As part of this conclusion, Clounch testified that respondent is "substantially probable to reoffend if not confined." R2205.

A key factor in Clounch's conclusions was respondent's sexual offense history, which included the criminal offenses discussed above as well as respondent's lengthy history of sexually abusing his younger siblings (which respondent admitted, but for which he was never prosecuted). R2167-79. Clounch further noted that respondent has "great difficulty" recognizing his past offenses "as being molestation." R2184. For example, respondent stated that he was "teaching" his underaged victims about sex and he was "in love" with one of the boys. *Id.* These distorted thoughts further increased his risk of reoffending. *See, e.g.*, R2184-86.

Clounch also testified that individuals with pedophilic disorder, like respondent, "will continue to have that sexual arousal to children for the remainder of their life." R2190. A pedophile's desire to abuse children does "not just go away" and does "not just pass with time." *Id.*

Clounch evaluated the probability that respondent would reoffend by using two risk assessment tools: the Static-99R and the Stable 2007. R2191-94. When combined as directed by the scientific literature, the scores from the Static-99R and the Stable 2007 placed respondent in the "well-above average" category for risk of reoffending. R2195. That meant that respondent was likely to reoffend at three-to-four times the rate of the average sex offender. R2196.

Clounch also identified other risk factors, not included in those risk assessment tools, that further increased respondent's risk of reoffending in the future, including that he (1) has a high degree of sexual preoccupation, (2) offends against children, (3) demonstrates "emotional congruence with children," meaning that he believes that he was in love with his victims and thought the sexual conduct was consensual, and (4) has a history of substance abuse. R2196-98. Clounch further noted that "on each occasion that [respondent] has been back in the community since his first arrest, he has reoffended." R2205. And respondent had made no meaningful progress in therapy due to, among other things, his "unwillingness" to participate fully in treatment. R2202-03.

Clounch thus concluded that respondent is "substantially probable to reoffend if not confined" and "still meets [the] criteria to be found a sexually dangerous person." R2205-06.

Respondent testified on his own behalf. He admitted that he is a pedophile and stated, "I don't believe there is a cure for any type of sexual offending." R2247. Nevertheless, he claimed that he would not reoffend again. R2253. On cross-examination, respondent admitted that officials at his facility have repeatedly expressed concern about him befriending younger males at the facility who "look like boys and [have] the emotional maturity of [a] ten-year-old." R2260. The evidence showed that one of the relationships included a "young lower-functioning" individual who "resembles

[respondent's] victims," and that "there had been allegations of inappropriate sexual contact." SCR376; R2232-33.

In closing argument, the People argued that the evidence showed that respondent remained an SDP because he had a high risk of reoffending. R2263-65. Respondent's counsel conceded that there was no dispute that respondent "suffers from pedophilia" and had "demonstrated propensities towards acts of sexual assault or [acts of] sexual molestation of children." R2266. But he maintained that the People had failed to prove that it was "substantially probable that respondent will engage in the commission of sex offenses in the future if not confined." R2266-67.

The trial court ruled that respondent "is still a sexually dangerous person and in need of confinement" and denied the recovery application. R2278; C1185.

C. The Appellate Court's Decision

On appeal, respondent argued, in part, that his case should be remanded for a new trial because the trial court did not expressly state that he is substantially probable to reoffend. A2. The appellate majority agreed that such an express finding is required by *Masterson*, 207 Ill. 2d at 330, and remanded for a new trial. A1-2. The majority addressed neither the People's argument that *Masterson* had been obviated by legislative amendment nor respondent's alternative argument that he was no longer an SDP. *See id.*

In dissent, Justice Schmidt agreed with the People that *Masterson* is no longer applicable, observing that

> In *Masterson*, the court reversed and remanded due to the trial court's failure to make an explicit finding that respondent was substantially probable to reoffend. [*Masterson*, 207 Ill. 2d at 330]. The flaw in the majority's reliance on *Masterson* is the legislature subsequently amended the Act to include the "substantially probable" definition. In *Masterson*, only the lack of an express definition in the Act led the court to determine that due process required trial courts to make an express finding of substantial probability. *See id.* at 328-30[].
>
> The *Masterson* court did not hold that an express finding must be made of any element explicitly included in the Act. Rather, trial courts needed to make an express finding of the "substantially probable" factor because at the time it was not expressly included in the statutory definition of an SDP. *See id.*
>
> In response to *Masterson*, our legislature amended the Act to explicitly include "substantially probable" in the definition of an SDP. . . . Consequently, it is unnecessary for a trial court to find that a respondent is an SDP and then expressly state for the record that respondent is substantially probable to reoffend. Under the plain language of the amended statute, the court's finding that respondent is an SDP necessarily encompasses the conclusion that respondent is substantially probable to reoffend.

A2-3 (Schmidt, J., dissenting). Turning to respondent's alternative argument, Justice Schmidt found that the People proved that respondent is still an SDP. A3.

STANDARD OF REVIEW

The effect of a statutory amendment is reviewed *de novo*. *People v. J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 27.

ARGUMENT

The SDP Act permits the People to seek the civil commitment of an SDP in lieu of criminal prosecution. *See* 725 ILCS 205/0.01, *et seq*. An SDP may seek release from commitment by filing an application for recovery, as respondent did here. 725 ILCS 205/9. The SDP is then entitled to a trial at which the People bear the burden of proving by clear and convincing evidence that he remains an SDP. *Id.* Under the current version of the SDP Act (which became effective in 2013, after *Masterson* was decided), continued commitment is permitted only if (1) the person suffers from a mental disorder, (2) that is associated with criminal propensities to the commission of sexual offenses; (3) the person has demonstrated such a propensity toward acts of sexual assault or acts of sexual molestation of children; and (4) it is substantially probable that the person will engage in the commission of sex offenses in the future if not confined. *See* 725 ILCS 205/1.01 & 205/4.05 (2013).

I. The Legislature's Amendment of the SDP Act in 2013 Obviated *Masterson*.

This Court should hold that *Masterson* is no longer controlling because it was obviated by the legislature's 2013 amendment of the SDP Act. At the time *Masterson* was decided, the SDP Act did not expressly require the People to prove that a respondent was "substantially probable" to reoffend. *See Masterson*, 207 Ill. 2d at 318-19 (citing pre-2013 version of SDP Act). *Masterson* observed that the omission of such a requirement would "impact"

the SDP Act's "compliance" with Supreme Court precedent regarding the commitment of SDPs. *Id.* at 328-29. But because the "closely related" Sexually Violent Persons Commitment Act *did* expressly require a showing of a substantial probability to reoffend, *Masterson* reasoned that it was "merely a matter of legislative oversight that the [SDP Act] has not been amended to make its terminology consistent with [the Sexually Violent Persons Commitment Act]." *Id.* at 329. To "mak[e] explicit what, perhaps, has been heretofore implicit," *Masterson* held that in SDP bench trials, the trial judge must make "an explicit finding that it is 'substantially probable' the person subject to the commitment proceeding will engage in the commission of sex offenses in the future if not confined." *Id.* at 330.

To remedy the issue identified by *Masterson*, in 2013, the legislature amended the SDP Act to expressly include the "substantially probable" requirement. *See* 725 ILCS 205/4.05 (2013); *see also* Ill. Senate Tr., 2013 Reg. Sess. No. 31 (Apr. 10, 2013) (legislative history, stating that the amendment "comports with *People v. Masterson*, an Illinois Supreme Court case"). The SDP Act now provides that an SDP is someone who, among other things, has "criminal propensities to the commission of sex offenses," 725 ILCS 205/1.01, which is now expressly defined by the statute to mean "that it is *substantially probable* that the person subject to the commitment proceeding will engage in the commission of sex offenses in the future if not confined," 725 ILCS 205/4.05 (emphasis added).

This legislative amendment obviates *Masterson* and the need for trial courts to announce an express finding of substantial probability to reoffend, for it was solely due to the absence of an express substantial probability requirement in the SDP Act that *Masterson* held that trial courts were required to make this express finding. *Masterson*, 207 Ill. 2d at 328-30.

Moreover, it is settled that reviewing courts "must presume" that the trial court "knows and follows" relevant statutory provisions, despite the trial court's failure to expressly mention a relevant provision of a statute. *E.g., People v. Jordan*, 218 Ill. 2d 255, 268-69 (2006); *see also People v. Blair*, 215 Ill. 2d 427, 449 (2005). Following the amendment of the SDP Act, it is unnecessary (and, indeed, redundant) for a trial court to find that a respondent is an SDP and also expressly state that he is substantially probable to reoffend. Under the plain terms of the amended statute, the court's judgment that the respondent is an SDP necessarily encompasses the conclusion that the respondent is substantially probable to reoffend.

In addition, the presumption that trial courts are aware of the statutory requirement to prove "substantial probability" is bolstered by the nature of SDP trials, where the "substantial probability" element is repeatedly addressed during the parties' testimony and argument, and is quite often the most contested issue at trial. In this case, for example, the People's expert testified that the statutory definition of an SDP requires proof that the individual is "substantially probable" to reoffend. R2191. The

expert went on to testify that respondent was, in fact, "substantially probable" to reoffend and provided ample support for that conclusion, including actuarial scores and other factors that predicted his likelihood of reoffending. R2205; *supra* pp. 3-5. In closing argument, the People argued that respondent had a high risk of reoffending, R2263-65, and respondent's counsel challenged the sufficiency of the People's evidence solely on that point, repeatedly arguing that the People had failed to prove that it was "substantially probable that respondent will engage in the commission of sex offenses in the future if not confined," R2266-67. Such testimony and argument provide a further basis for concluding that the trial judge's determination that respondent was an SDP necessarily included the finding that respondent was substantially probable to reoffend. *E.g., Jordan*, 218 Ill. 2d at 268-69 ("no reason to believe" that judge ignored statutory provision, despite his failure to expressly mention it, where parties "present[ed] evidence pertinent to" that provision and discussed it in closing argument).

For much the same reasons, *People v. Bingham*, 2014 IL 115964, ¶ 35, which states that "*Masterson* plainly requires an explicit finding, and the trial court erred by failing to make this explicit finding," should not control. The trial in *Bingham* occurred before the legislature amended the SDP Act in 2013 and, thus, the effect of that amendment was not before the Court. *Id.* n.1. Indeed, the People conceded in *Bingham* that (under the pre-amendment version of the SDP Act then in effect) the trial court was required

to make an express finding of substantial probability, but argued that the failure to make such an express finding could be deemed harmless in some circumstances; the *Bingham* Court declined to resolve "whether the lack of an explicit finding alone constitutes reversible error," because it concluded that the People had failed to prove the respondent was an SDP. *Id.* ¶¶ 34-35. Here, by contrast, respondent's trial occurred after the amendment of the SDP Act and, therefore, the effect of the legislature's amendments and the continued viability of *Masterson* are squarely at issue.

In sum, the inadvertent omission in the SDP Act that *Masterson* was intended to address — *i.e.*, the lack of an express requirement that the People prove the respondent is substantially probable to reoffend — has since been cured by legislative amendment. *Masterson's* requirement that trial courts make an express finding of substantial probability thus serves no purpose and instead results in unnecessary remands. Accordingly, this Court should (1) hold that there is no longer a need for a trial court to separately announce that the People have proved that an SDP respondent is substantially probable to reoffend, and (2) reverse the appellate court's judgment.

II. If *Masterson* Still Applies, This Court Should Hold that Respondent Forfeited His Claim, the Trial Court's Error Was Harmless, and the Appellate Court Applied the Wrong Remedy.

Even if *Masterson* remains viable, there remain three additional independent bases to reverse the appellate court's judgment.

A. Respondent Forfeited His *Masterson* Claim.

Respondent's *Masterson* claim is forfeited because in the trial court he failed to object to the court's ruling on the ground that the court failed to make an express finding of substantial probability. After closing arguments, the trial court scheduled a hearing to announce its decision. R2268-69. At that hearing, the court asked respondent's counsel what he was asking the court to do and counsel responded: "we would be asking that you find that [respondent] is no longer a sexually dangerous person and that you make preparation for him to be released from the Department of Corrections." R2277. Counsel did not mention the need for any other express findings. *See id.* The trial court then discussed the evidence and announced that it found that respondent "is still a sexually dangerous person and in need of confinement." R2277-78. Notably, respondent's counsel did not (1) object that the court also had to expressly state that it had found that respondent was substantially probable to reoffend or (2) file a post-trial motion raising this issue. R2278-79.

Just as a defendant may not complain on appeal about jury instructions where the defendant did not bring the alleged error to the trial court's attention, an SDP respondent should not be permitted to seek a new trial based on *Masterson* if he did not alert the trial court to the alleged *Masterson* error and thereby give the court an opportunity to address it. *See People v. Patrick*, 233 Ill. 2d 62, 76 (2009) ("[Defendant] forfeited the issue by

failing to object to the instructions and failing to raise his claim of error in a posttrial motion."). To hold otherwise would create a perverse incentive for respondents to remain silent when a trial court announces its judgment without making an express finding regarding the substantial probability factor so as to obtain another bite at the apple by creating an appealable issue and perhaps a new trial, a result that is contrary to a just and efficient judicial system.

B. Any Error Was Harmless.

Even if *Masterson* remains viable and respondent did not forfeit his claim, this Court should hold that the trial court's failure to state that respondent is substantially probable to reoffend was harmless. There is no dispute that (1) Dr. Clounch testified that substantial probability to reoffend is a requirement of the SDP Act, (2) Clounch testified — without rebuttal — that respondent was substantially probable to reoffend and supported that conclusion with substantial evidence, and (3) the parties' closing argument focused on the substantial probability requirement. Thus, the trial court's omission is harmless because it cannot reasonably be disputed that the trial court was aware of the substantial probability requirement and concluded that respondent was substantially probable to reoffend. *E.g., Jordan*, 218 Ill. 2d at 268-69 (no reason to believe that trial judge ignored statutory provision, despite his failure to mention it, where parties presented evidence related to the provision and discussed it in closing argument); *see People v. Davis*, 233

Ill. 2d 244, 273 (2009) (collecting cases holding that "most constitutional errors are subject to harmless error analysis," including jury instructions that omit a "material element" of the charged crime).

C. The Appellate Court Applied the Wrong Remedy.

Lastly, if *Masterson* remains viable, this Court should hold that the appropriate remedy is to allow the trial court to clarify whether its judgment encompassed the substantially probable requirement, rather than automatically remanding for a new trial in all cases. The People raised this argument below, but the appellant court, relying on its own precedent, instead held that the proper remedy is an automatic remand for a new trial. *See* A2 (citing *People v. Bailey*, 2015 IL App (3d) 140497, ¶ 25). Given the subsequent amendment of the SDP Act, and the presumption that trial courts know and follow the law, even if this Court concludes that *Masterson* is still controlling, the appropriate remedy would be to allow the trial court to clarify whether it determined that the respondent was substantially probable to reoffend. The appellate court's automatic retrial rule wastes judicial resources and is unnecessary to protect a respondent's interests. *E.g., In re Samantha V.*, 234 Ill. 2d 359, 380 (2009) (remanding for trial court to clarify its order); *People v. Housby*, 84 Ill. 2d 415, 435 (1981) (same).

CONCLUSION

This Court should reverse the appellate court's judgment and remand for the appellate court's consideration of respondent's alternative claim that he is no longer an SDP.

January 14, 2021

Respectfully submitted,

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RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service and those matters to be appended to the brief under Rule 342(a), is 16 pages.

/s/ Michael L. Cebula
MICHAEL L. CEBULA
Assistant Attorney General

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2020 IL App (3d) 190024

Appellate Court of Illinois, Third District.

IN RE COMMITMENT OF Warren C. SNAPP Sr.
(The People of the State of Illinois, Petitioner-Appellee,
v.
Warren C. Snapp Sr., Respondent-Appellant).

Appeal No. 3-19-0024
|
Opinion filed June 8, 2020

Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois. Circuit No. 97-CF-2580, Honorable Sarah Marie Francis-Jones, Judge, Presiding.

Attorneys and Law Firms

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OPINION

PRESIDING JUSTICE LYTTON delivered the judgment of the court, with opinion.

***1** ¶ 1 Respondent, Warren C. Snapp Sr., having been found a sexually dangerous person (SDP), filed a *pro se* application alleging recovery under the Sexually Dangerous Persons Act (725 ILCS 205/9(a) (West 2018)). Following a bench trial, the circuit court found that he remained an SDP. On appeal, respondent argues that the trial court failed to make the requisite finding that it was substantially probable he would reoffend if not confined, as required by *People v. Masterson*, 207 Ill. 2d 305, 330, 278 Ill.Dec. 351, 798 N.E.2d 735 (2003). We vacate the trial court's order and remand for a new hearing on respondent's recovery petition.

¶ 2 I. BACKGROUND

¶ 3 In March 1999, respondent was found to be an SDP and was committed to the custody of the Department of Corrections (DOC). He filed his third application for discharge or conditional release in 2010. Resolution of the application was delayed for several years, due, in part, to respondent's unsuccessful attempts to obtain a favorable expert report. After respondent waived his right to a jury, a bench trial began on September 11, 2018. At the conclusion of the proceedings, the trial court concluded that respondent was "still a sexually dangerous person and in need of confinement" and remanded him to the custody of the DOC.

¶ 4 II. ANALYSIS

¶ 5 On appeal, respondent claims that the trial court failed to make an explicit finding that he was substantially probable to sexually reoffend if not confined. In the alternative, he argues that the court's denial of his application was against the manifest weight of the evidence.

¶ 6 The statutory elements of an SDP are (1) a mental disorder existing for at least one year before the petition was filed, (2) criminal propensities to the commission of sex offenses, and (3) demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children. 725 ILCS 205/1.01 (West 2018). In recovery proceedings, the State must prove by clear and convincing evidence that the applicant remains an SDP. *Id.* § 9(b). A finding of sexual dangerousness must "be accompanied by an explicit finding that it is 'substantially probable' the person subject to the commitment proceeding will engage in the commission of sex offenses in the future if not confined." *Masterson*, 207 Ill. 2d at 330, 278 Ill.Dec. 351, 798 N.E.2d 735.

¶ 7 Since our supreme court's decision in *Masterson*, courts have rejected the suggestion that the requirement of an explicit "substantially probable" finding may be satisfied where the evidence at trial would be sufficient to support such a finding. *People v. Bingham*, 2014 IL 115964, ¶ 35, 381 Ill.Dec. 472, 10 N.E.3d 881; *People v. Bailey*, 2015 IL App (3d) 140497, ¶ 13, 396 Ill.Dec. 954, 40 N.E.3d 839. "*Masterson* plainly requires an explicit finding" of substantial probability to reoffend in civil commitment proceedings. *Bingham*, 2014 IL 115964, ¶ 35, 381 Ill.Dec. 472, 10 N.E.3d 881. The explicit finding requirement applies in initial proceedings, as well as recovery proceedings. *Bailey*, 2015 IL App (3d) 140497, ¶ 14, 396 Ill.Dec. 954, 40 N.E.3d 839.

¶ 8 A trial court's failure to make a finding that there is a substantial probability defendant would engage in the commission of sex offenses in the future if not confined may not amount to harmless error. *Id.* ¶ 21. In *Bailey*, this court held that, absent other errors, the appropriate remedy for the lack of an explicit finding is to remand the cause for a full rehearing on the recovery application. *Id.* ¶¶ 22, 25.

***2** ¶ 9 Here, the trial court failed to make an explicit finding regarding respondent's probability of engaging in future sexual offenses if not confined. Respondent asks us to remand for a rehearing on his application. Relying on our holding in *Bailey*, we find that a new hearing is not only appropriate but required. See *id.* ¶ 25. Accordingly, we vacate the trial court's order and remand the matter for a full rehearing on respondent's application.

¶ 10 III. CONCLUSION

¶ 11 The judgment of the circuit court of Will County is vacated, and the cause is remanded for a new hearing on respondent's recovery application.

¶ 12 Vacated and remanded with instructions.

Justice McDade concurred in the judgment and opinion.

Justice Schmidt dissented, with opinion.

¶ 13 JUSTICE SCHMIDT, dissenting:

¶ 14 The majority vacates and remands the cause for a rehearing on respondent's application for discharge or conditional release. *Supra* ¶ 11. The majority finds that the trial court erred when it failed to expressly state that it found a substantial probability that respondent would sexually reoffend if not confined. I respectfully dissent. I would presume the trial court followed the law and did not need to make an explicit finding on the record.

¶ 15 In relevant part, the Act defines an SDP as someone with "criminal propensities to the commission of sex offenses." 725 ILCS 205/1.01 (West 2018). Originally, the Act did not define what constituted "criminal propensities to the commission of sex offenses." However, in 2013, our legislature amended the Act to provide:

> "For the purposes of this Act, 'criminal propensities to the commission of sex offenses' means that it is *substantially probable* that the person subject to the commitment proceeding will engage in the commission of sex offenses in the future if not confined." (Emphasis added.) *Id.* § 4.05.

¶ 16 This court must presume that the trial court knew and followed the Act, including the definition of an SDP, and the State's obligation to prove a substantial probability respondent would reoffend. See *People v. Jordan*, 218 Ill. 2d 255, 268-69, 300 Ill.Dec. 270, 843 N.E.2d 870 (2006) (reviewing court "must presume" that the circuit court "knows and follows" relevant statutory provisions, despite the trial court's failure to mention key provisions). We must, therefore, presume that the trial court's ultimate finding that respondent remains an SDP necessarily encompasses a determination that respondent is "substantially probable" to reoffend. No express finding is necessary under the amended version of the Act.

¶ 17 The majority reaches the opposite conclusion. The majority's conclusion that the absence of an explicit finding warrants reversal is based on our supreme court's decision in *Masterson*, 207 Ill. 2d at 330, 278 Ill.Dec. 351, 798 N.E.2d 735. In *Masterson*, the court reversed and remanded due to the trial court's failure to make an explicit finding that respondent was substantially probable to reoffend. *Id.* The flaw in the majority's reliance on *Masterson* is the legislature subsequently amended the Act to include the "substantially probable" definition. In *Masterson*, only the lack of an express definition in the Act led the court to determine that due process required trial courts to make an express finding of substantial probability. See *id.* at 328-30, 278 Ill.Dec. 351, 798 N.E.2d 735. The *Masterson* court did not hold that an express

finding must be made of any element explicitly included in the Act. Rather, trial courts needed to make an express finding of the "substantially probable" factor because at the time it was not expressly included in the statutory definition of an SDP. See *id.*

***3** ¶ 18 In response to *Masterson*, our legislature amended the Act to explicitly include "substantially probable" in the definition of an SDP. See 725 ILCS 205/4.05 (West 2018); see also 98th Ill. Gen. Assem., Senate Proceedings, Apr. 10, 2013, at 26-27. Consequently, it is unnecessary for a trial court to find that a respondent is an SDP and then expressly state for the record that respondent is substantially probable to reoffend. Under the plain language of the amended statute, the court's finding that respondent is an SDP necessarily encompasses the conclusion that respondent is substantially probable to reoffend. There is no longer a need to separately announce that the State proved this element as required by *Masterson*. Contrary to the majority's decision, there is no need to reverse and remand for a rehearing.

¶ 19 Although the majority resolved the appeal on the above issue alone, I must address respondent's alternative argument challenging the sufficiency of the evidence presented at the hearing. Specifically, respondent contends the trial court erred when it concluded that he remained an SDP. A person is sexually dangerous if (1) the person suffered from a mental disorder for at least one year prior to filing the petition, (2) the mental disorder is associated with criminal propensities to the commission of sexual offenses, (3) the person demonstrated that propensity toward acts of sexual assault or acts of sexual molestation of children, and (4) there is an explicit finding that it is substantially probable that the person would engage in the commission of sex offenses in the future if not confined. *People v. Donath*, 2013 IL App (3d) 120251, ¶ 37, 369 Ill.Dec. 586, 986 N.E.2d 1222 (citing 725 ILCS 205/1.01 (West 2008)). In this case, respondent only challenges the sufficiency of the evidence as to the fourth element: that he is substantially probable to reoffend if released.

¶ 20 To succeed on this challenge, respondent must show that the circuit court's judgment was against the manifest weight of the evidence. *Id.* ¶ 38. To that end, he must show that it "is clearly apparent" that he is not substantially probable to reoffend. *Id.* Upon review, I would find that the trial evidence overwhelming supports the trial court's conclusion.

¶ 21 Respondent's criminal history is as follows. In 1973, he (then 28 years old) pled guilty to three counts of indecent liberties with a 9-year-old boy and was sentenced to an indeterminate term of 4 to 12 years imprisonment. While on parole for the 1973 conviction, respondent fondled his eight-year-old niece's vagina, and his parole was extended by one year. In 1992, respondent pled guilty to aggravated criminal sexual abuse of a child and received a four-year prison sentence.

¶ 22 In 1997, the State charged respondent with criminal sexual abuse of a child after he kissed a nine-year-old boy, fondled the child's penis, and exposed his penis to the child. Based on these charges, the State filed a petition under the Act, seeking an order indefinitely committing respondent. Following a trial, the jury found respondent to be an SDP, and the court committed respondent to the custody of the Director of the Illinois Department of Corrections. On appeal, this court affirmed, finding the overwhelming evidence supported the conclusion that respondent was an SDP. Thereafter, respondent made two unsuccessful applications for discharge of conditional release.

¶ 23 This appeal involves respondent's third application for discharge or conditional release. At the trial on his application, Dr. Kristopher Clounch, a clinical psychologist, testified that respondent is "substantially probable" to reoffend if not confined. He based his conclusion on (1) respondent's long history of sexually abusing minors; (2) the undisputed fact that respondent is a pedophile, and pedophilia is a lifelong disorder that does not go away; (3) respondent's combined scores on the Static-99R and Stable 2007 scores actually underestimated respondent's risk of reoffending; (5) respondent's unwillingness to fully participate, and failure to progress, in therapy; (6) respondent's continued distorted thoughts about his victims, and his refusal to accept responsibility for his crimes; and (7) a finding that protective factors did not meaningfully reduce his risk of reoffending. Respondent did not offer an expert to rebut Dr. Clounch's testimony. The court found Dr. Clounch credible, and a reviewing court will not substitute its judgment for the trial court's credibility determination. See *Id.* ¶ 41. Based on this, I would find that respondent failed to show the trial court's judgment is against the manifest weight of the evidence. See *Id.* ¶ 38.

***4** ¶ 24 I would affirm the trial court.

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PROOF OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On January 14, 2021, the foregoing **Brief of Petitioner-Appellant People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my email address to the email addresses below:

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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

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