

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Detention of:

JOSEPH CARL TOWNSEND,

Petitioner.

No. 39631-9-II

UNPUBLISHED OPINION

Penoyar, C.J. — Joseph Carl Townsend appeals a jury verdict finding that he is a sexually violent predator (SVP) who should be civilly committed under chapter 71.09 RCW. He argues that there is insufficient evidence that he is an SVP. We affirm.

FACTS

The State filed a petition to civilly commit Townsend as an SVP under chapter 71.09 RCW. Trial began on July 27, 2009.

At the age of seven, Townsend’s father sexually abused him for a period of six months. That same year, Townsend engaged in sexual contact with his 5-year-old stepsister. At age 13, he had sexual contact with his 13-year-old foster sister and his 9-year-old female neighbor. When Townsend was 15 years old, he had vaginal and oral sex with his cousin, leading to a sexual intercourse without consent conviction in Montana.

Townsend married at the age of 19. He described himself as being “very sexual and very violent during that relationship.” Report of Proceedings (RP) at 103. Townsend’s wife divorced him, and he described her decision “as the best thing that she ever did for herself because he feared that his violence toward[] her was escalating and that he might be in danger of causing her

more severe harm, even perhaps killing her.” RP at 104.

Townsend reported that, between the ages of 17, when he was released from the juvenile treatment facility, and 23, the age he was incarcerated for first degree child rape in 1995, he perpetrated sexual offenses against approximately 35 victims. All but one of the victims were female, and they were between the ages of 3 and 15. He knew some of the victims but some were strangers. He sometimes committed these offenses in public, highly trafficked places, such as department stores and parks.

On May 8, 1995, Townsend pleaded guilty to one count of first degree child rape. The victim was an 8-year-old girl whom Townsend had never met before.

At the SVP trial, the State called Edward Neiland, Townsend’s primary sex offender treatment provider in the Sex Offender Treatment Program (SOTP) at the Twin Rivers Correctional Facility. Neiland treated Townsend from December 2004 to September or October 2005. Townsend disclosed to Neiland that he had groomed a developmentally delayed teenage girl by playing games with her. He also admitted “to having molested and orally raped” a 3-year-old female whom his wife was babysitting. RP at 158. At the beginning of Townsend’s treatment, Neiland noted that Townsend “reported an unusual or atypical number of sexual thoughts, fantasies, [and] preoccupations throughout the day.” RP at 165. At the end of treatment, Townsend told Neiland that he felt he was still at risk to reoffend; however, Neiland noted that Townsend had improved his ability to regulate his sexual behavior and to resolve conflict.

The State also presented Dr. Harry Goldberg, a forensic psychologist. Dr. Goldberg met with and evaluated Townsend in September 2005. Before meeting with Townsend, he reviewed

Townsend's legal records, institutional records, medical reports, psychiatric reports, and psychological reports. During his 2005 interview, Townsend told Dr. Goldberg what happened during his crimes, his fantasies, and information about other offenses he had committed. He admitted to Dr. Goldberg that he had difficulty controlling his sexual impulses. Townsend also told Dr. Goldberg that he wanted to be civilly committed.

In 2007, Townsend was transferred to the Special Commitment Center (SCC). While at the SCC, Townsend went to a few group treatment sessions, but he then declined to seek further treatment.

Between 2005 and trial, Dr. Goldberg continued to periodically receive and review Townsend's records, including records from the SCC, records from the time Townsend was at the SOTP, defense counsel's psychologist's evaluation, institutional records, Townsend's deposition testimony, and additional arrest reports.

He met with Townsend again in 2009. During that meeting, Townsend denied having any thoughts of sexual deviancy since completing treatment in 2005. Dr. Goldberg testified, "In 2009, I felt like I was talking to somebody who's never been in treatment." RP at 320.

Dr. Goldberg diagnosed Townsend with the chronic mental abnormalities of pedophilia and paraphilia, not otherwise specified. He also diagnosed Townsend with polysubstance abuse and antisocial personality disorder. Dr. Goldberg testified that Townsend's polysubstance abuse and antisocial personality disorder, combined with his mental abnormalities, cause him difficulty controlling his sexually violent behavior.

Dr. Goldberg testified that Townsend's disorders make him likely to engage in predatory acts of sexual violence if he is not confined. He based his opinion on the results of four actuarial

tests (the Static-2002, the Static-99, the Minnesota Sex Offender Screening Tool (MnSOSTR), the Sex Offender Risk Appraisal Guide (SORAG)), dynamic factors, and his meetings with Townsend. Dr. Goldberg testified that actuarial tests are based on “nonchangeable factors” such as the number of sexual offenses committed and the types of victims, but that dynamic factors change over time. RP at 268. Dr. Goldberg further testified that actuarial tests “sometimes underestimate a person’s risk because [the method used] to identify whether a person has committed a sexual crime is whether they’ve been arrested, charged or convicted. And we know through the research that people commit a lot of crimes that never get adjudicated.” RP at 269-70.

Townsend scored a 9 on the Static-2002 test, putting him at a “high risk” of reoffending relative to other offenders. RP at 282. Under this score, there was a 19.7 to 32.9 percent chance that Townsend would reoffend within 5 years and a 23.6 to 40.8 percent chance that he would reoffend within 10 years. Townsend obtained a score of 5 on the Static-99 test, placing him in “moderate high risk category,” indicating that he had a 30 percent chance of recidivism over 5 years and a 38 percent chance of recidivism over a period of 10 years. RP at 287. He obtained a high risk level score of 8 on the MnSOSTR. Under the MnSOSTR, Townsend had a 30 to 57 percent chance of reoffending within 6 years. According to Townsend’s SORAG results, there was an 80 percent chance that he would reoffend within 10 years. Dr. Goldberg testified that he believed the actuarial tools underpredicted Townsend’s risk of reoffense, noting that Townsend had reported a number of unadjudicated offenses, that Townsend was no longer in treatment, and that Townsend had a positive urinalysis for marijuana while at the SCC.

Dr. Goldberg also used the Hare Psychopathy Checklist-Revised (PCL-R), which

measures the degree of an individual's antisocial personality traits. Townsend's score of 31 indicated that he had psychopathy. Townsend's psychopathy, combined with his deviant sexual interest with young children, increased his risk of reoffense.

Dr. Goldberg also considered dynamic risk factors in reaching his opinion. Aggravating dynamic factors included Townsend's lack of sexual self-regulation and his inability to cooperate with supervision. Additionally, Dr. Goldberg looked at protective factors, factors that would reduce Townsend's risk for reoffense. He noted that one factor included Townsend's completion of the SOTP program. Dr. Goldberg testified that the test results and "the high psychopathy index, the unadjudicated victims, and the fact that he's not in treatment right now and is using drugs" led him to believe that Townsend was at a high risk for reoffending. RP at 396.

Townsend testified that he had two behavioral management reports written when he was in the SCC. He testified that he walked away from the first altercation, and, during the second altercation, the investigator determined that Townsend acted in self defense. He testified that he had some verbal altercations with SCC staff, but he denied an incident in which he allegedly told security staff, "You can't f***ing tell me what to do." RP at 489. He testified that he would receive treatment through a sex offender treatment program while he was on probation. Townsend stated that the treatment offered at the SCC was not what he "was looking for." RP at 504.

Dr. Robert Halon, a forensic psychologist, testified as an expert for Townsend. On cross-examination, Dr. Halon testified that Townsend is an impulsive person, an individual who tends to resent and disregard authority, is unlikely to seek therapy on his own, and his record suggests that it is reasonable to consider him a continuing danger of impulsively acting out sexually.

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The jury found that Townsend is an SVP. The trial court ordered him committed to the SCC.

ANALYSIS

Townsend's only argument on appeal is that there was insufficient evidence to support the jury's verdict that he is an SVP. We disagree.

To civilly commit a person as an SVP, the State must prove beyond a reasonable doubt that the person is an SVP. RCW 71.09.060(1). An SVP is an individual "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18). "Likely to engage in predatory acts of sexual violence if not confined in a secure facility" means "that the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition." RCW 71.09.020(7).

In order to uphold Townsend's civil commitment, we must hold that the jury had sufficient evidence to find that: (1) Townsend had been convicted of or charged with a crime of sexual violence, (2) Townsend suffers from a mental abnormality or personality disorder, and (3) such mental abnormality or personality disorder makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility. See *In re Det. of Audett*, 158 Wn.2d 712, 727, 147 P.3d 982 (2006) (quoting *In re Det. of Thorell*, 149 Wn.2d 724, 758-59, 72 P.3d 708 (2003)). Proof is sufficient if, when viewed in the light most favorable to the State, a rational trier of fact could have found those elements beyond a reasonable doubt. *Thorell*, 149 Wn.2d at 744. We defer to the trier of fact regarding a witness's credibility, conflicting testimony, and the persuasiveness of the evidence. *In re Det. of Broten*, 130 Wn. App. 326, 335, 122 P.3d 942 (2005) (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

Townsend contends that the evidence is insufficient, because he finds fault with Dr. Goldberg's opinion.¹ Specifically, he argues that Dr. Goldberg based his opinion on speculation and actuarial tests conducted four years before trial. He also contends that Dr. Goldberg's opinion was based "on an inaccurate understanding of Mr. Townsend's actions [while] at the SCC." Appellant's Br. at 14. Finally, he asserts that "Dr. Goldberg's own testimony establishes that Mr. Townsend cannot be said to have been more likely than not to reoffend beyond a reasonable doubt." Appellant's Br. at 17.

First, Dr. Goldberg testified that the actuarial tests are based on "nonchangeable factors" such as the number of sexual offenses committed and the types of victims.² RP at 268. According to Dr. Goldberg, "Townsend's score on the actuarial instrument is going to be the same today as it is going to be 20 years from now." RP at 269. After Dr. Goldberg evaluated Townsend in 2005, he continued to periodically receive and review Townsend's records, including records from the SCC, records from the SOTP, defense psychologist's evaluation, institutional records, Townsend's deposition testimony, and additional arrest reports. He also met with Townsend in 2009. Dr. Goldberg also considered dynamic and protective factors. Thus, Townsend's assertion that Dr. Goldberg relied on outdated tests is incorrect.

Next, Townsend argues that Dr. Goldberg's diagnoses of Townsend's present condition were based on speculation. Townsend reads Dr. Goldberg's statements out of context. The State

¹ Townsend asserts that this "is not an attack on the credibility of Dr. Goldberg. . . . [E]ven if this court were to deem Dr. Goldberg was 100% credible and view his testimony in the light most favorable to the State, Dr. Goldberg's testimony is still irrelevant to the issue before the jury, based on incorrect facts, and based on speculation and conjecture." Appellant's Br. at 8, n.1.

² One of the tests considers age at the time a person is scheduled to be release as a factor. At trial, Dr. Goldberg calculated Townsend's score using his current age.

asked Dr. Goldberg how he could state that Townsend currently suffered from paraphilia.

Townsend responded:

Well, this is a lot of times the situation we're faced with because they were incarcerated when they committed these crimes and now they're in an environment where the opportunity to engage in this type of behavior is severely limited. But we have to know about the nature of a sexual disorder, as I mentioned yesterday, it is chronic. It's something that people learn how to manage but it doesn't go away like any other sexual desire, it's still there. And so we must assume that it's still there, we must infer that it's still there. And in Mr. Townsend's own words, he needs more treatment for it after 2005, and yet he has not received treatment and he's elected not to comply with treatment after that point. So we must assume that, you know, it's still present, it's a chronic condition and he's just been unable to act upon that condition in such a closed environment as the SCC.

RP at 256. Further, defense counsel cross-examined Dr. Goldberg and asked him, "What are the current signs and symptoms Mr. Townsend has . . . of pedophilia not in remission." RP at 345.

Dr. Goldberg replied:

As you just mentioned, that's the problem. Most sexual offenders, especially those that are being evaluated in context such as these, are not going to admit to fantasies, urges or behaviors so we have to infer from other information. And if you just look at common sense, you know, urges and behaviors do not disappear. They're chronic but they need to be managed. In 2005, he said he had pervasive urges, fantasies about pedophilia and paraphilia, and now he's saying they've disappeared. I just don't find that credible.

RP at 345. Dr. Goldberg's diagnoses are not based on conjecture. He testified that Townsend was in a facility, limiting his opportunity to act on urges or desires. He also testified that paraphilia and pedophilia are chronic, life-long conditions that people can learn to manage but not eliminate.

Next, Townsend contends that Dr. Goldberg's opinion was based on "an inaccurate understanding" that Townsend used drugs and exhibited violent behavior while at the SCC. Appellant's Br. at 14. Dr. Goldberg testified that Townsend had recently had a positive urinalysis

for marijuana and that Townsend had told him that “[o]nce he starts using drugs, he’s more at risk to reoffend. And since he now[,] even in the most restrictive environments[,] [sic] has been found positive of marijuana screen [sic], indicates that he is at more risk.” RP at 221. Dr. Goldberg acknowledged that false positive results are possible and that no follow-up tests were conducted. Dr. Goldberg did not have an inaccurate understanding of Townsend’s drug use.

With regard to Townsend’s behavior, Dr. Goldberg testified that Townsend had participated in one fight and some verbal altercations while at the SCC. Defense counsel impeached Dr. Goldberg, asking him if he was aware that Townsend walked away from one fight and that the second fight “did not fit the definition of physical aggression.” RP at 370. Dr. Goldberg conceded that he did not have this information and that “[i]t seems like [Townsend] has gained some better control over [his anger].” RP at 371. But as the State points out, Townsend’s own expert testified that he regarded Townsend as an impulsive person, and that “once he gets upset and he thinks he’s been wronged, he will act out impulsively.” RP at 632. Additionally, Dr. Goldberg maintained that Townsend had “verbal altercations” at the SCC, and Townsend also admitted that he had some verbal exchanges with staff.³ RP at 372.

³ Townsend did deny some incidents.

Finally, Townsend argues that there was no evidence that he was more likely than not to reoffend.⁴ Dr. Goldberg testified that he believed that the actuarial tools underpredicted Townsend's risk of reoffense because Townsend had reported a number of unadjudicated offenses, Townsend was no longer in treatment, and Townsend had a positive urinalysis for marijuana while at the SCC. According to Townsend's SORAG results, there was an 80 percent chance that Townsend would reoffend within 10 years. Under the MnSOSTR, Townsend had a 30 to 57 percent chance of reoffending within 6 years. All of the tests placed Townsend in a "moderate high risk" or "high risk" category of reoffending. RP at 282, 287. Dr. Goldberg testified that the test results and "the high psychopathy index, the unadjudicated victims, and the fact that he's not in treatment right now and is using drugs" led him to believe that Townsend was at a high risk for reoffending. RP at 396. Viewed in the light most favorable to the State, we hold that sufficient evidence supports the jury's verdict.

⁴ Townsend also argues that Dr. Goldberg relied on his clinical judgment, even though he testified it was "no better than a crap shoot." Appellant's Br. at 18. This language comes from defense counsel, who asked Dr. Goldberg, "Didn't you tell me we developed [the actuarial tests] because clinical judgment was no better than a crap shoot?" RP at 396. Dr. Goldberg responded, "Yes." RP at 396.

Dr. Goldberg's testimony was that "clinical judgment alone is not very reliable." RP at 271. Thus, psychologists and psychiatrists use actuarial tools in addition to clinical judgment. Dr. Goldberg testified that the actuarial tests put Townsend at a "starting point" and then he used his clinical judgment to determine whether Townsend was at a higher or lower risk of reoffending. RP at 397. Otherwise, "we [would] just give him the test and [he] wouldn't need us to evaluate after that." RP at 397.

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Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Armstrong, J.

Quinn-Brintnall, J.