

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Detention of

KEITH WYMAN ELMORE,

Appellant.

No. 39490-1-II

UNPUBLISHED OPINION

Johanson, J. — In 2001, Keith Wyman Elmore stipulated to involuntary civil commitment as a sexually violent predator (SVP) as defined in chapter 71.09 RCW. In 2009, he¹ received an evidentiary hearing to determine whether he should be unconditionally released. The trial court found that Elmore continues to meet the definition of an SVP and ordered his civil commitment to continue. Elmore appeals, arguing that the State failed to prove that he is currently dangerous. We hold that because sufficient evidence supports the trial court’s findings of fact and those findings support the trial court’s conclusions of law, the State proved that Elmore continues to meet the SVP definition and is therefore currently dangerous. We affirm.

¹ Elmore is transgendered and self-identifies as a woman. Because the Department of Social and Health Services classifies Elmore as a male, we refer to Elmore using male pronouns. Elmore has not begun any sexual reassignment therapy and is not eligible to do so at this time due to his ongoing sex offender issues. Also, the record shows that Elmore has changed his name to Rebecca, but it is not clear whether that was a legal name change. All court captions list Elmore’s first name as “Keith,” we do as well.

FACTS

Keith Elmore is a sexual sadist.² Beginning around age 14, Elmore developed a cannibalistic sexual fantasy. Elmore found the cannibalistic fantasy sexually arousing and would masturbate to it frequently. Elmore was significantly aroused by the idea that his victim would experience fear and terror when she realized he planned to kill her. The feelings of power and control over the woman intensified his arousal until he reached ejaculation. Having someone completely under his control was a part of his sexual arousal.

As an adult, Elmore attempted to carry out his cannibalistic fantasy against his wife. Elmore admitted that he was sexually aroused during the attack and that he masturbated afterwards to his longstanding cannibalism fantasy. Elmore was not prosecuted for this attack.

In July 1994, Elmore again attempted to act out his cannibalistic fantasy and lured a female companion to his home. The woman escaped physical further harm. Elmore pleaded guilty to second degree kidnapping with sexual motivation and second degree assault with sexual motivation.

In 2001, Elmore stipulated to involuntary civil commitment as an SVP. Elmore stipulated that he “currently suffer[ed] from a mental abnormality” that made him likely to engage in predatory acts of sexual violence if he was not confined to a secured facility. Clerk’s Papers (CP) at 4.

In 2004, the superior court conducted a show cause hearing³ to determine whether Elmore

² Sexual sadism is essentially deviant sexual arousal to causing pain, torture, or harm, either physically or psychologically, to another person.

³ Former RCW 71.09.090(2)(a) (2001) permits an SVP to receive an annual show cause hearing to determine whether probable cause exists to warrant a hearing on whether: (1) the person’s

continued to meet the commitment criteria. *In re Det. of Elmore*, 162 Wn.2d 27, 31, 168 P.3d 1285 (2007). The trial court had granted Elmore a full evidentiary hearing⁴ based on a doctor's findings that Elmore's condition had "'so changed' based on his increase in age alone." *Elmore*, 162 Wn.2d at 34. The State appealed. But during the pendency of the State's appeal, the legislature amended former RCW 71.09.090 (2001), eliminating age as a single, determinative factor for a change in SVP status. *Elmore*, 162 Wn.2d at 34-35; Laws of 2005, ch. 344, § 2. Applying the new statutory amendment retroactively to Elmore, this court held that the trial court's granting an evidentiary hearing based on Elmore's age alone was error. *Elmore*, 162 Wn.2d at 35.

The Washington Supreme Court reversed. It held that the 2005 amendment to RCW 71.09.090 did not apply retroactively, the pre-2005 criteria applied at Elmore's show cause hearing, and that Elmore met the pre-2005 criteria for probable cause to proceed to a full evidentiary hearing and remanded the case to the trial court. *Elmore*, 162 Wn.2d at 36-38.⁵

At the evidentiary hearing, Elmore sought unconditional release. Dr. Robert Wheeler performed the initial SVP evaluation of Elmore in 1999 and testified about his findings and

condition has so changed that he or she no longer meets the definition of an SVP, or (2) conditional release to a less restrictive alternative would be in the SVP's best interest and conditions can be imposed that would adequately protect the community.

⁴ If an SVP succeeds at the show cause hearing, former RCW 71.09.090(3) provides for a full evidentiary hearing to determine whether the person should be released either unconditionally or to a less restrictive alternative.

⁵ Because the 2005 amendments did not apply at Elmore's evidentiary hearing, the Supreme Court's recent decision in *In re Det. of McCuiston*, 169 Wn.2d 633, 238 P.3d 1147 (2010), does not affect our analysis. In *McCuiston*, the court held that the 2005 amendments violate substantive due process. *McCuiston*, 169 Wn.2d at 636.

Elmore's disclosures at the time. Dr. Wheeler did not offer an opinion on Elmore's current status.

Dr. Henry Richards, superintendent of the special commitment center (SCC), testified about Elmore's behavior there. Elmore has engaged in a relationship with fellow SCC resident, H.P., and H.P.'s wife. SCC staff believe that Elmore and H.P. have a sexual relationship, despite rules against such behavior. Even though this relationship interferes with Elmore's treatment, he persists and has gone so far as to lie about being threatened so he could be moved closer to H.P. Elmore wanted to be released to live with H.P.'s wife, but Dr. Richards expressed concern that Elmore has a masked envy of H.P.'s wife. Dr. Richards believes that Elmore persists in his relationship with H.P. and H.P.'s wife as part of his pattern of acquiring a victim, and that he intends to make H.P.'s wife his next victim.

Dr. Amy Phenix also testified for the State. Dr. Phenix interviewed Elmore on December 1, 2008 and reviewed his institutional records. She concluded that Elmore suffers from sexual sadism and personality disorder, not otherwise specified (NOS), with borderline and dependent features. These conditions cause Elmore to have serious difficulty with volitional control. When Dr. Phenix interviewed Elmore, he denied planning the 1994 crime, that he ever had deviant fantasies, or that he had knives and tools to cut up his victim. Elmore's denials indicated a stall or regression in treatment.

Dr. Phenix rejected actuarial data in predicting Elmore's reoffense risk because actuarial tests are accurate only if the subject is similar to the test's study sample, and Elmore, as a sexual sadist with a cannibalistic paraphilia, was not represented by any actuarial study. Instead, Dr.

Phenix relied upon the Stable 2007, which looks at dynamic factors and is useful for a person who has been in long-term treatment, as Elmore has. Under this test, she concluded that Elmore posed a high risk of reoffending. She also opined that Elmore's advancing age did not affect his risk because studies suggest that for offenders with paraphilias, risk plateaus at age 50 and remains the same until 60.⁶ In fact, although Elmore was over 50 at the time of the evidentiary hearing, he was sexually interested, and likely sexually involved with, a fellow SVP despite rules against such relationships. Dr. Phenix did not believe that Elmore's condition had so changed that he no longer met the definition of SVP.

Dr. Richard Wollert testified on Elmore's behalf. Dr. Wollert testified that (1) Elmore did not meet the SVP definition, (2) Elmore is not a sexual sadist, (3) personality disorder had no relevance to the SVP diagnosis, and (4) based on actuarial data, Elmore had only a five percent chance of reoffending.

The trial court denied Elmore's petition for unconditional release. The trial court found Dr. Phenix's testimony more persuasive than Dr. Wollert's, and faulted Dr. Wollert's reliance on actuarial data and his "clear and obvious bias." CP at 98. The trial court found that Elmore's condition had not so changed that he no longer fit the SVP definition. In particular, the trial court found persuasive Elmore's (1) lack of progress in treatment, (2) relationship with and reliance upon a fellow SVP, and (3) regression in treatment exemplified by Elmore's recent disavowal of his prior symptoms and fantasies. The trial court found that Elmore continued to suffer from sexual sadism, the condition was chronic, and Elmore's claims that he no longer experienced

⁶ Because so little data is available on offenders over 60, Dr. Phenix stated that science could not offer opinions for recidivism over age 60.

sexually deviant fantasies were not credible. Elmore appeals.

ANALYSIS

I. Current Dangerousness

Elmore argues that the State failed to meet its burden to prove that he continues to meet the SVP definition because he claims the State failed to prove that he is currently dangerous. In order to commit an individual, due process requires the State to prove that the alleged SVP is mentally ill and currently dangerous. *In re Det. of Moore*, 167 Wn.2d 113, 124, 216 P.3d 1015 (2009). By properly finding all the statutory elements are satisfied to commit someone as an SVP, the fact finder impliedly finds that the SVP is mentally ill and currently dangerous. *Moore*, 167 Wn.2d at 124. Here, the trial court found satisfied all the statutory elements required to commit someone as an SVP. Former RCW 71.09.090. Thus, if the trial court's findings of fact and conclusions of law meet the sufficient evidence standard, the trial court's implied finding of current dangerousness must stand.

II. Sufficient Evidence

Elmore argues that insufficient evidence supports the trial court's order and assigns error to findings of fact 8, 13, and 14, and conclusions of law 4, 6, 7, 8, and 9. He argues that Dr. Phenix's opinion about his impaired volitional control is not supported by the evidence, but that Dr. Wheeler's testimony was supported. We disagree.

In reviewing SVP findings, we apply a criminal sufficiency of the evidence standard. *In re Det. of Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003), *cert. denied*, 541 U.S. 990 (2004). Evidence is sufficient if, when viewed in the light most favorable to the State, a rational trier of

fact could have found the essential elements beyond a reasonable doubt. *Thorell*, 149 Wn.2d at 744. We review challenges to the trial court's findings of fact and conclusions of law by determining whether substantial evidence supports the challenged findings and whether those findings support the trial court's conclusions. *State v. Madarash*, 116 Wn. App. 500, 509, 66 P.3d 682 (2003).

Where, as here, the issue at an evidentiary hearing is whether the person should be unconditionally discharged, the State must prove beyond a reasonable doubt that the committed person's condition remains such that the person continues to meet the SVP definition. Former RCW 71.09.090(3)(b). A sexually violent predator is a person 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 to a secure facility. Former RCW 71.09.020(16) (2003).⁷ Evidence of the prior commitment trial and disposition is admissible. Former RCW 71.09.090(3)(b).

Elmore does not dispute that he was convicted of a crime of sexual violence.⁸ He disputes whether the State proved he suffers from a mental abnormality or personality disorder and whether he is likely to engage in predatory acts of sexual violence. We hold that substantial evidence supports the challenged findings of fact and those facts in turn support the conclusions of law.

⁷ Although the legislature has amended RCW 71.09.020, the SVP definition remains unchanged. Laws of 2009, ch. 409, § 1.

⁸ A sexually violent offense includes second degree kidnapping and second degree assault if found at the time of sentencing or during civil commitment proceedings to have been sexually motivated. Former RCW 71.09.020(15)(c).

In finding of fact 8, the trial court found that Elmore suffers from sexual sadism and personality disorder, NOS. Although Elmore did not provide argument or citation to authority in support of this assignment of error, substantial evidence supports it.

Sexual sadism is a deviant sexual arousal to causing pain, torture, or harm, either physically or psychologically, to another person. Elmore receives sexual pleasure from torturing, killing, and consuming a woman. Specifically, he derives pleasure from the fear she would feel when she realized he planned to kill her. Dr. Phenix also testified that sexual sadism is a mental abnormality. II-B VRP at 319.

A personality disorder is an enduring pattern of behaviors that cause problems for a person. II-B VRP at 354. A person with borderline features tends to either idealize or completely devalue a person. II-B VRP at 356. Dr. Phenix identified Elmore as having borderline and dependent features because of his pattern of unstable, intense, interpersonal relationships. II-B VRP at 355. He completely devalued his mother and has an intense relationship with H.P. despite rules prohibiting the relationship. II-B VRP at 356. Substantial evidence supports finding of fact 8. This finding of fact, in turn, supports conclusion of law 9, that Elmore suffers from a mental abnormality, sexual sadism.

In finding of fact 13, the trial court found the State's evidence more persuasive than Elmore's as to diagnosis, volitional control, the likelihood of recidivism, the effect of advancing age, and as to whether Elmore's condition had so changed since his original commitment. We do not review persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

In finding of fact 14, the trial court found that, on the issue of reoffense risk, although actuarial data is admissible in Washington, based on the evidence in this case, actuarial data was not helpful. Substantial evidence supports this finding of fact.

Actuarial data does not provide the rate at which the subject will offend, but provides the rate that a similar study sample was re-arrested. If the offender is statistically similar to those in the study sample, one could expect the offender's recidivism rate to be within six to seven percent of that sample. According to Dr. Phenix, most actuarial samples are composed almost completely of child molesters or rapists. No sample contains a significant number of sexual sadists. In fact, sexual sadists make up only two to five percent of all sex offenders. Because Elmore is not only a sexual sadist, but also a cannibalistic paraphilia, he is even further removed from the actuarial samples in terms of similarity. Thus, Dr. Phenix concluded that actuarial data was not helpful in determining Elmore's recidivism rate because his paraphilia is markedly underrepresented in the actuarial samples. Furthermore, actuarial data is limited because it predicts reoffense only over a certain period of time, generally from 5–15 years, rather than over an offender's entire life. Finally, actuarial tests like the Static-99 used static factors, factors that do not change over time, such as whether a person has a conviction. Instead, Dr. Phenix relied on the Stable 2007 test, which looks at dynamic (changing) factors to more accurately predict a person's risk.

Elmore argues that Dr. Wheeler testified that he (Elmore) has volitional control and that his cannibalistic fantasies had decreased. Elmore misconstrues Dr. Wheeler's testimony. Dr. Wheeler agreed on cross-examination that Elmore's refusal to carry through with the 1994 attack indicated some volitional control, but qualified his statement by stating that volitional control

exists along a continuum. Dr. Wheeler also indicated that Elmore reported to him that the sadistic fantasies had decreased in prison, but Dr. Wheeler did not believe Elmore's claims. Significantly, Dr. Wheeler did not render an opinion on Elmore's current status because he had not recently reviewed Elmore's records. Substantial evidence supports finding of fact 14.

In conclusions of law 6 and 7, the trial court concluded that Elmore's sexual sadism and personality disorder NOS cause him serious difficulty controlling his sexually violent behavior. The trial court also relied on Elmore's prior sexually violent behavior and Dr. Phenix's testimony linking Elmore's mental disorders to a serious difficulty controlling his behavior. Findings of fact 13 and 14 support conclusions of law 6 and 7. In addition, Dr. Phenix testified that Elmore's sadism affects his volitional control because he does not empathize with his victim and cannot understand the hurt he would perpetrate. Despite knowing that he is going to harm someone, that there are legal sanctions, that he would be caught and imprisoned, and that his fantasy is highly socially unacceptable, Elmore had acted on his cannibalistic fantasy twice. Dr. Phenix saw no evidence that Elmore had gained sufficient volitional controls over his deviance to ensure that he would not act out again. The findings of fact support conclusions of law 6 and 7.

In conclusion of law 8, the trial court concluded that Elmore's mental abnormality and personality disorder make him likely to engage in predatory acts of sexual violence unless he remains confined to a secure facility. A mental abnormality is a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree making such person a menace to the health and safety of others. Former RCW 71.09.020(8).⁹ "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. Former RCW 71.09.020(7). In conclusion of law 7 and 8 and finding of fact 13, the trial court found that Elmore’s sexual sadism affects his volitional capacity. Further, Dr. Phenix testified that she believed Elmore was more likely than not to commit predatory acts of sexual violence in the future. The findings of fact support conclusion of law 8.

Finally, in conclusion of law 9, the trial court concluded that the evidence presented proved beyond a reasonable doubt that Elmore continues to be a sexually violent predator, as defined by former RCW 71.09.020(16), and that his condition had not so changed that he is no longer a sexually violent predator.

Elmore stipulated in 2001 that he was a sexually violent predator. Dr. Phenix testified that Elmore had not so changed since his initial commitment trial such that he no longer meets the SVP definition. She noted Elmore’s lack of progress and regression in treatment, his ongoing relationship with a fellow SVP, his inability to recognize his offense cycle, and Elmore’s refusal to journal his sexual fantasies. She also stated that Elmore had a high risk of reoffending, largely due to his refusal to internalize his own offense cycle. She testified that Elmore remains intent on living his life the way he wants, and places himself in high-risk situations, even when confined to the SCC. As a result, she concluded that Elmore poses a serious risk to the community. The trial court found this evidence persuasive in finding of fact 13. Further, the trial court found all

⁹ The legislature amended RCW 71.09.020 in 2009 to define “[p]ersonality disorder,” but that definition was not in effect at the time of Elmore’s annual review hearing or his evidentiary trial. Laws of 2009, ch. 409 § 1.

challenged elements of the SVP definition met. The trial court found that Elmore suffers from sexual sadism, a mental abnormality or personality disorder, and that abnormality or disorder makes Elmore likely to engage in predatory acts of sexual violence if not confined to a secure facility. The findings of fact support conclusion of law 9 that Elmore's condition has not so changed that he no longer meets the SVP definition.

Substantial evidence supports the trial court's findings of fact, and those findings in turn support the trial court's conclusions of law. Because the trial court found satisfied all the statutory elements required to continue Elmore's commitment as an SVP, the trial court impliedly found that Elmore is currently dangerous. We affirm.

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

Johanson, J.

We concur:

Quinn-Brintnall, J.

Penoyar, C.J.