

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Detention of:

No. 28867-6-III

Ronald R. Timm.

RONALD R. TIMM,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

Division Three

UNPUBLISHED OPINION

Sweeney, J. —This appeal follows a civil commitment of the appellant as a sexually violent predator; it followed a jury finding to that effect. The appellant contends that the evidence is not sufficient to support the jury’s finding that he is a sexually violent predator. The evidence included standardized tests and so-called dynamic factors all calculated to evaluate whether the appellant was likely to reoffend (he had a number of convictions for raping and molesting young children). We conclude that the evidence is easily sufficient to support the jury’s conclusion and we therefore affirm the order

confining the appellant as a sexually violent predator.

FACTS

Ronald Timm was convicted of attempted first degree statutory rape in August 1989 for fondling a 7-year-old girl's private area. He was sentenced to 30-months' confinement with 24 months suspended under the special sex offender sentencing alternative (SOSSA). In July 1990, Mr. Timm violated the terms of his SOSSA by having sexual contact with other minors. He served 90 days of his suspended sentence for the violation. Mr. Timm again violated the terms of his SOSSA in August 1991, in part, by being alone with and in the presence of minors without an approved adult chaperone. He served the remainder of his suspended sentence for these violations.

In January 1997, Mr. Timm was convicted of first degree child rape for raping his 4-year-old stepdaughter. He was sentenced to 10 years in prison. Mr. Timm participated in a sex offender treatment program while incarcerated. But he was ultimately terminated from the program for aggressive behavior, for making minimal progress, and for keeping inappropriate materials in his cell. Mr. Timm admitted, while still in the program, that he had had sexual contact with 24 children since 1983. Twenty-three of those children were females between the ages of three and seven. Mr. Timm also admitted and a penile plethysmograph (PPG) confirmed that he was sexually attracted to girls between 4 and 12

years old. His primary offending pattern consisted of befriending single mothers, babysitting their children, fondling the child's vagina while the child slept, and then masturbating in a different room.

The State petitioned to civilly commit Mr. Timm as a sexually violent predator. The State alleged that Mr. Timm met the criteria for commitment as a sexually violent predator based on his two convictions for sex offenses; other sex offenses; his failure to complete sex offender treatment; and an evaluation by a psychologist, Dr. Harry Goldberg. Dr. Goldberg concluded that Mr. Timm suffers from a mental abnormality that makes him likely to engage in sexually violent behavior.

At trial, Dr. Goldberg testified that Mr. Timm suffers from pedophilia and that the pedophilia makes it difficult for Mr. Timm to control his sexually deviant behavior. The doctor also explained how he assessed the likelihood that Mr. Timm will commit sexual offenses in the future.

Dr. Goldberg applied 4 actuarial tests, 15 dynamic risk factors, and 3 mitigating factors to assess the risk that Mr. Timm would reoffend. The doctor explained that actuarial tests tend to underestimate the risk that a person will reoffend because the tests are based primarily on static factors (historical factors that do not change) and estimate only the risk that a person will be arrested for, charged with, or convicted of another

offense in the future, not the risk that the person will simply reoffend. Given the limitations of the actuarial tests, Dr. Goldberg and other psychologists rely on well-accepted dynamic aggravating and mitigating factors in addition to actuarial tests when assessing the risk that a sex offender will reoffend. When several dynamic aggravating or mitigating factors are present, the estimated risk of reoffending changes and actuarial test results can be adjusted upward or downward to reflect that change.

In this case, the results of the four actuarial tests diverged. Two of the tests estimated that Mr. Timm was less than 50 percent likely to be charged with or convicted of another sex offense in the next 5 to 10 years.¹ The remaining two tests estimated that Mr. Timm was 30 to 57 percent likely to be arrested for a new sex offense within 6 years of his release from custody² and 39 to 59 percent likely to be convicted of another sex or nonsex offense.³ Dr. Goldberg adjusted these results upward because Mr. Timm also exhibited eight dynamic aggravating factors: emotional identification with children, lack

¹ The Static 99R placed Mr. Timm in the low-moderate risk category and estimated that he is 15.8 percent likely to be charged with or convicted of another sex offense in 5 years and 24.3 percent likely to be charged with or convicted of another sex offense in 10 years. Report of Proceedings (RP) at 1120-21; Clerk's Papers (CP) at 957. The Static 2002R placed Mr. Timm in the moderate-high risk category and estimated that he is 29.3 percent likely to be charged with or convicted of another sex offense in 5 years and 39.7 percent likely to be charged with or convicted of another sex offense in 10 years. RP at 1121-22; CP at 959.

² Minnesota Sex Offender Screening Tool Revised (MnSOST-R) test results.

³ Sex Offender Risk Appraisal Guide (SORAG) test results.

of concern for others, use of sex as a coping mechanism, unstable adult relationships, negative emotionality, poor problem-solving skills, sexual deviance, and treatment failure. The doctor noted that Mr. Timm's age of 59 should mitigate his risk of reoffending but that this factor was not particularly strong because Mr. Timm was offending in his 40s and continued to express his desires for children in his 50s. Based on Mr. Timm's diagnosis and personal history, the actuarial test results, and the presence of several dynamic factors, Dr. Goldberg concluded that "Mr. Timm has a mental abnormality that makes him likely to commit sexually violent acts in the future." Report of Proceedings (RP) at 1142.

The jury agreed and found Mr. Timm to be a sexually violent predator. Mr. Timm was committed to the Special Commitment Center.

DISCUSSION

Mr. Timm first contends that the State's showing is not sufficient to support the conclusion that he is a sexually violent predator as defined. He notes that the evidence must show "that the person more probably than not will engage in such acts if released unconditionally from detention." RCW 71.09.020(7). Mr. Timm says the actuarial test results did not meet the more-likely-than-not standard. And he asserts that Dr. Goldberg's opinion, which is contrary to those test results and to established recidivism

rates, is also insufficient. Mr. Timm argues that Dr. Goldberg did not assign a specific percentage to the likelihood that Mr. Timm would reoffend and that the doctor relied on dynamic risk factors that the actuarial tests already accounted for and that his pedophilia diagnosis took into account (e.g., emotional identification with children, sexual preoccupation, and deviant sexual interest). He maintains that those factors should not be reconsidered as separate dynamic risk factors. He also maintains that the doctor should not have been allowed to rely on dynamic risk factors that are associated with personality disorders when Mr. Timm was not diagnosed with a personality disorder.

His challenge admits the truth of the State's evidence. *In re Det. of Stout*, 128 Wn. App. 21, 32, 114 P.3d 658 (2005), *aff'd*, 159 Wn.2d 357, 150 P.3d 86 (2007). So we will not second-guess the jury's decisions about what evidence was most persuasive and nor will we second-guess its assessment of each witness's credibility. *Id.* "The commitment will be upheld if any rational trier of fact could have found the essential elements beyond a reasonable doubt." *In re Det. of Audett*, 158 Wn.2d 712, 727-28, 147 P.3d 982 (2006).

Simply put, the State had to show that Mr. Timm is a sexually violent predator. RCW 71.09.060(1); *In re Det. of Boynton*, 152 Wn. App. 442, 450, 216 P.3d 1089 (2009), *review denied*, 168 Wn.2d 1023 (2010). A sexually violent predator includes a person who (1) has been convicted of a crime of sexual violence, (2) suffers from a

mental abnormality, and (3) is “likely to engage in predatory acts of sexual violence if not confined in a secure facility” because of that mental abnormality. Former RCW 71.09.020(16) (2006) (now RCW 71.09.020(18)). Mr. Timm does not dispute that he has been convicted of a crime of sexual violence or that he suffers from a mental abnormality. *See* Appellant’s Br. at 8-14. He contends only that the evidence does not show he is likely to reoffend. A person is “[I]likely to engage in predatory acts of sexual violence if not confined in a secure facility” if he “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).

Whether the “more probably than not” standard is satisfied depends on expert testimony, evidence of the statistical likelihood of reoffending, and the facts underlying the sexually violent predator petition. *In re Det. of Moore*, 167 Wn.2d 113, 124-25, 216 P.3d 1015 (2009). Here Dr. Goldberg opined that Mr. Timm is likely to reoffend based on his chronic pedophilia, his history of adjudicated and unadjudicated offenses, and a combination of actuarial test results and several aggravating dynamic factors.

Mr. Timm asserts that the actuarial test results show he is not likely to reoffend and that Dr. Goldberg’s opinion to the contrary is “unsound.” Appellant’s Br. at 8. He criticizes Dr. Goldberg for not assigning a specific percentage to his ultimate opinion that

Mr. Timm is likely to reoffend, for relying on dynamic risk factors associated with an antisocial personality disorder that he does not have, and for relying on dynamic risk factors that the actuarial tests and his pedophilia diagnosis already take into account.

First, Dr. Goldberg need not offer his opinion in percentage form. He apparently understands that the term “likely” means more than 50 percent:

Q All right. And let’s turn to the final criterion of the sexually violent predator law.

Can you discuss what – first, what does “likely” mean and then we’ll talk about predatory after that.

A Likely is defined as more likely than not.

Q So what does more likely than not mean to you in forming your opinion in this case as to whether a person is likely to engage in predatory acts of sexual violence?

A Whether it’s more than a 50 percent chance.

RP at 1113. The doctor, then, implied Mr. Timm is more than 50 percent likely to reoffend when he said, “Mr. Timm has a mental abnormality that makes him likely to commit sexually violent acts in the future.” RP at 1142.

Second, Mr. Timm offers no support for the assertion that Dr. Goldberg should not rely on factors used to assess antisocial personality disorder when assessing the risk that Mr. Timm will reoffend. He did not object to Dr. Goldberg’s testimony on these grounds, in any event. Dr. Goldberg testified that Mr. Timm possesses a psychopathic trait—lying and manipulative behavior. He explained that the trait was relevant to the

risk assessment “to highlight some of the issues that come to play in [Mr. Timm’s] personality when he does offend against children.” RP at 1139. This is relevant to whether Mr. Timm is likely to reoffend. And it was for the jury to determine how much weight to give the evidence. *Stout*, 128 Wn. App. at 32.

Finally, we reject Mr. Timm’s assertion that Dr. Goldberg considered dynamic risk factors multiple times to skew the results of Mr. Timm’s risk assessment. Dr. Goldberg explained that experts in his field recommend assessing dynamic risk factors to increase the predictive validity of actuarial instruments. Actuarial instruments primarily consider static risk factors, such as an offender’s age, criminal history, and victim type, not dynamic risk factors. Dynamic risk factors consider specific characteristics of the offender’s behaviors and offenses, including unadjudicated offenses. Actuarial instruments and dynamic risk factors, then, tend to rely on different factors to assess risk. And, while Dr. Goldberg considered sexual deviance twice, he did not consider it twice to artificially inflate the risk Mr. Timm will reoffend. Sexual deviance is an element of pedophilia and also a factor that, if present, increases the likelihood that a sex offender will reoffend. Consequently, Dr. Goldberg had to consider sexual deviance when diagnosing Mr. Timm with pedophilia and then considered it only once when assessing the risk that Mr. Timm will reoffend. Even if the doctor had assigned double weight to

the sexual deviance factor when assessing the risk that Mr. Timm will reoffend, we would defer to the jury's determination on the persuasive value of that testimony. *Stout*, 128 Wn. App. at 32.

It was the jury's duty to resolve the conflicts among the actuarial test results and between those results and Dr. Goldberg's opinion. The jury resolved those conflicts in favor of committing Mr. Timm. And the evidence here, when viewed in context and in a light most favorable to the State, is sufficient to show that Mr. Timm is likely to commit sexually violent offenses if not confined.

Statistically, two actuarial tests show he is up to 60 percent likely to reoffend if not confined. And the presence of several dynamic risk factors further supports that likelihood. Mr. Timm has a long history of deviant sexual behavior. He has admitted to sex offenses against 24 children. He has two convictions for child sex offenses and two probation violations for additional sex offenses. He has admitted he is obsessed with sexually deviant desires, a PPG test shows he is aroused by young children, and he has said that he will have nothing if he loses his deviant sexual interest in children. His lack of desire to change and his fear of change are further evidenced by his failure to accept responsibility for his actions or make progress in treatment. And he is in danger of reoffending if released unconditionally because of his lack of desire to change.

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The jury was entitled to believe Dr. Goldberg even though some evidence may have conflicted with Dr. Goldberg's opinion and the support for that opinion. *In re Det. of Halgren*, 156 Wn.2d 795, 811-12, 132 P.3d 714 (2006). The jury's finding is easily supported by this record.

We therefore affirm the order committing Mr. Timm as a sexually violent predator.

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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.

Sweeney, J.

WE CONCUR:

Kulik, C.J.

Siddoway, J.