

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Detention of:

No. 27200-1-III

JUSTIN J. MACKEY.

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Division Three

UNPUBLISHED OPINION

Schultheis, C.J. — Justin Mackey appeals a jury finding that he is a sexually violent predator (SVP) under chapter 71.09 RCW and an order committing him to involuntary confinement. He claims that the State’s evidence failed to show that he is likely to engage in predatory acts of sexual violence if not confined to a secure facility. We find ample support for the jury’s finding that Mr. Mackey is a SVP. We, therefore, affirm the order of the trial court.

FACTS

When Mr. Mackey was 13, he was found guilty of three counts of first degree rape of a child based on sexual contacts he had over the course of a year with his 6- and 7-year-old half-siblings. Mr. Mackey was confined to a juvenile institution for 21 to 28 weeks.

After release from the juvenile institution, Mr. Mackey was not allowed to return home and was transferred to a group home.

At 16, while a resident of a group home, Mr. Mackey was convicted of communicating with a minor for immoral purposes based on an incident in which he exposed himself and masturbated in front of another resident. Mr. Mackey was given a 13- to 16-week confinement for the offense.

In 2002, Mr. Mackey, who was 22, was convicted of third degree child molestation for trying to engage in sex with a 14-year-old male. Mr. Mackey was given a sentence of 60 months. Prior to Mr. Mackey's scheduled release date, the State filed a petition alleging that Mr. Mackey was a SVP as defined in chapter 71.09 RCW.

The case was tried to a jury. Dr. Kathleen Longwell, a psychologist, testified for the State. Dr. Longwell testified that Mr. Mackey suffers from paraphilia not otherwise specified (NOS), pedophilia, attention deficit disorder, and antisocial personality disorder. She explained that paraphilia NOS is a disorder that involves sexual fantasies or behaviors involving arousal to children or other nonconsenting persons. She based this diagnosis on Mr. Mackey's history of sexual offenses with children and other nonconsenting persons, his reports of sexual fantasies of raping boys, and his persistence with these behaviors despite treatment and arrests. She noted that other inmates complained that Mr. Mackey exposed himself and sexually harassed them. She also

noted that Mr. Mackey was terminated from a sex offender treatment program after another inmate complained that Mr. Mackey tried to engage in sex with the inmate.

Dr. Longwell then explained the basis for the diagnosis of pedophilia. She explained that pedophilia is a disorder that involves a person who is at least 16 years old and 5 years older than the victim, who has fantasies or sexual urges, or who actually engages in sexual behavior with a prepubescent child. Dr. Longwell testified that Mr. Mackey's records revealed that he had "a history that indicates that he has urges, fantasies, towards children." Report of Proceedings (RP) at 118. She noted that when he was in the group home he targeted children who were younger than him and that in his twenties, he admitted to sexual fantasies involving children.

Next, Dr. Longwell testified that Mr. Mackey suffers from antisocial personality disorder, which she characterized as a failure to follow rules and persistent criminal behavior. To support her opinion, Dr. Longwell cited Mr. Mackey's pattern of violating the rights of others since the age of 15, his conduct disorder, and his repeated criminal acts.

Dr. Longwell concluded that Mr. Mackey's mental abnormalities impaired his volitional control. She testified that the antisocial personality disorder contributed to his volitional impairment because he lacked pro social traits, such as feelings of guilt or compassion, which might inhibit him from acting on his sexually deviant urges.

Dr. Longwell also assessed the likelihood that Mr. Mackey would reoffend. To do so, she used several actuarial and predictive tests, the HARE Psychopathy Checklist (PCLR), the Sex Offender Risk Appraisal Guide (SORAG), the Static-99, and the Minnesota Offender Screening Tool Revised (MnSOST-R). She testified that Mr. Mackey scored a 28 on the PCLR, which scores for general recidivism and measures psychopathy. Dr. Longwell explained that Mr. Mackey's score placed him in the "high range for psychopathy." RP at 165. Further, according to Dr. Longwell, Mr. Mackey's SORAG score indicated "a 100% risk of a violent offense in the first seven years after someone is released from custody." RP at 231.

Dr. Longwell testified that Mr. Mackey's score on the Static-99, the most commonly used instrument for assessing sex offense recidivism, indicated that Mr. Mackey was 39 percent likely to be convicted of a new sex offense within 5 years if released. Finally, Dr. Longwell testified that Mr. Mackey's score on the MnSOST-R placed him in the highest risk category—a 72 percent chance of being charged with a new sex offense in the first six years after release from custody.

Dr. Longwell explained that she also examined Mr. Mackey's dynamic risk factors, which she explained are factors that change with time and may raise or lower an individual's risk of re-offense. She found that none of these factors, which are detailed below, changed her opinion that Mr. Mackey is a SVP. Ultimately, Dr. Longwell

concluded that Mr. Mackey's mental abnormalities place him at high risk of committing another sex offense.

Dr. Robert Halon, a psychologist, testified as an expert witness on Mr. Mackey's behalf. He testified that in April 2007 he gave Mr. Mackey the Rorschach Ink Blot Test (Rorschach) and an intelligence screening test. Based on the Rorschach, Dr. Halon concluded that Mr. Mackey was depressed but not a psychopath. He also concluded that Mr. Mackey could control his behaviors. He testified:

[W]hat you see here is a person that has that control. He has great control over his emotions. And he has control over his behavior more than most people will have. His problem is he doesn't have control over how he comes across to people. He is socially awkward and inadequate. But it isn't the kind of thing where he has a mental disorder that makes him commit crimes.

RP at 425.

Dr. Halon testified that an alternative explanation for Mr. Mackey's behaviors was that he "has been desperate for an intimate relationship and he can't get it." RP at 425.

Dr. Halon rejected all of Dr. Longwell's diagnoses of Mr. Mackey, including pedophilia, stating, "You can't make a pedophile out of somebody who is just promiscuous." RP at 429. He noted that most of Mr. Mackey's victims were molested when Mr. Mackey himself was under the age of 20. He explained:

[Mr. Mackey] has just been promiscuous. He has used sex to try to make intimate contact with people because he is so awkward socially and finds himself rebuffed so often and he doesn't know how to court. He can't hold

a courtship with anybody, so he resorts to sex for two reasons; to get sexual gratification and for intimate intimacy, however short it is.

RP at 429.

Dr. Halon also found no evidence that Mr. Mackey suffers from antisocial personality disorder. He testified, “[Y]ou would hardly diagnose him with an Antisocial Personality Disorder because it’s not a pervasive thing. It’s related only to his social relationships. His awkwardness and transgressions are related to his social relationships.”

RP at 473.

The jury concluded that Mr. Mackey is a SVP and the trial court entered a civil commitment order. Mr. Mackey appeals.

ANALYSIS

Mr. Mackey contends the State failed to show that he suffers from mental abnormalities or that the alleged mental abnormalities impact his ability to control his sexually violent behavior. Mr. Mackey contends that Dr. Longwell placed undue reliance on his past crimes, arguing that “[s]imply attaching a diagnosis to criminal history does nothing more than allow continued indefinite confinement for past crimes.” Br. of Appellant at 15.

In order to uphold the commitment of an individual as a SVP on appeal, the reviewing court must find that the jury at the commitment trial had sufficient evidence to

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find beyond a reasonable doubt that: (1) the individual has been convicted or charged with a crime of sexual violence; (2) the individual suffers from a mental abnormality or personality disorder; and (3) the mental abnormality or disorder “makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.”

Former RCW 71.09.020(16) (2006); *In re Det. of Thorell*, 149 Wn.2d 724, 742, 72 P.3d 708 (2003).

When viewed in the light most favorable to the State, there must be sufficient evidence supporting the finding of mental illness to allow a rational trier of fact to conclude beyond a reasonable doubt that the person facing commitment has “serious difficulty” controlling his sexually violent behavior. *Thorell*, 149 Wn.2d at 744-45; *In re Det. of Audett*, 158 Wn.2d 712, 147 P.3d 982 (2006). The State must establish a link between the mental disorder and the difficulty controlling the behavior. *Thorell*, 149 Wn.2d at 738.

Mental Abnormality and Personality Disorder

The sexually violent predators act defines a mental abnormality as “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 constituting such person a menace to the health and safety of others.” RCW 71.09.020(8).

Dr. Longwell testified extensively about Mr. Mackey’s mental abnormalities.

Regarding Mr. Mackey's diagnosed pedophilia, she noted that in addition to Mr. Mackey's criminal history, records indicated that as late as 2004 Mr. Mackey admitted to sexual urges and fantasies about younger children. Dr. Longwell testified that treatment notes from Mr. Mackey's sex offender treatment program in 2004 revealed that he stated, "I have deviant issues and am attracted to minors (males)." Clerk's Papers (CP) at 50. She noted that Mr. Mackey admitted to having 15 minor victims and an inability to control his deviant sexual urges toward children.

As to the diagnosis of paraphilia NOS, Dr. Longwell noted Mr. Mackey's history of forcing unwanted sex on children and adults. She also noted that even while incarcerated and awaiting adjudication on the SVP petition, Mr. Mackey continued to harass other inmates for sex and engaged in inappropriate sexual activities during treatment, which resulted in termination from a treatment program. She also pointed out that he lost his job in the prison kitchen for masturbating in front of another inmate.

To support the diagnosis of antisocial personality disorder, Dr. Longwell cited Mr. Mackey's high score on the PCLR, his repeated arrests for sex offenses, his deceit about these offenses, and his blaming of victims. Finally, Dr. Longwell noted that Mr. Mackey was manipulative and insincere about treatment.

Dr. Longwell's testimony amply supports a finding that Mr. Mackey suffers from mental disorders and a personality disorder. Although Dr. Halon disagreed with Dr.

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Longwell's diagnoses, the jury was entitled to give more weight to the State's expert. *In re Det. of Halgren*, 156 Wn.2d 795, 811-12, 132 P.3d 714 (2006).

Lack of Control

We next must determine whether there is a link between Mr. Mackey's mental disorders and difficulty controlling his behavior. Mr. Mackey contends that the State presented insufficient evidence to establish this link, arguing that the PCLR, relied upon by Dr. Longwell, does not predict sexual offense recidivism and that Dr. Longwell failed to review current dynamic risk factors.

As indicated, a diagnosis of a mental abnormality or personality disorder is not, in itself, sufficient evidence for a fact finder to find a lack of control. *Thorell*, 149 Wn.2d at 761-62. The mental illness element of the "sexually violent predator" definition also requires proof that "the mental abnormality or personality disorder, coupled with the person's sexual offense history, supports the finding that the person has serious difficulty controlling his behavior." *Id.* at 759.

Contrary to Mr. Mackey's claim, Dr. Longwell did not state that the PCLR predicts the probability of future sexual offenses. Rather, she stated that it tests for general recidivism and also measures psychopathy. She explained that high scores on the PCLR are associated with poor parole adjustment and future violent offenses. She emphasized that Mr. Mackey's high PCLR score, *in conjunction with* his high scores on

the SORAG, the Static-99, and the MnSOST-R, indicated that Mr. Mackey was in the highest category of future risk of reoffending if not confined.

We next address Mr. Mackey's contention that the dynamic risk factors are not reliable predictors of how he would behave upon release from confinement because he has been in a controlled prison environment since 2002. He claims that Dr. Longwell's opinion is invalid because she relied upon information that predated Mr. Mackey's incarceration. His argument is without merit.

The record indicates that a substantial portion of Dr. Longwell's evaluation of dynamic risk factors¹ was based on Mr. Mackey's relatively current in-custody behaviors, not simply his past crimes. In analyzing these factors, Dr. Longwell noted Mr. Mackey's high level of sexual deviance as an adult and his in-custody failures at sex offender treatment. As to intimacy deficits, Dr. Longwell noted that Mr. Mackey did not have a current romantic partner, does not make friends easily, prefers children as sex objects because they are easy to manipulate, and lacks concern for others.

Regarding sexual self-regulation, Dr. Longwell noted that Mr. Mackey harassed and molested other inmates while incarcerated and that his deviant sexual interests

¹ Dr. Longwell explained that the dynamic risk factors include: (1) sexual deviance variables, (2) dropping out of treatment, (3) general criminality/lifestyle instability, (4) intimacy deficits, (5) sexual self-regulation, (6) attitudes tolerant of sexual assault, (7) cooperation with supervision, (8) general self-regulation, and (9) diagnosed personality disorder.

include children, teenagers, and other nonconsenting persons. Additionally, Dr. Longwell opined that Mr. Mackey harbors attitudes that permit him to sexually molest children.

As to Mr. Mackey's general self-regulation, she noted that he "seems to have or exercise little control over himself. . . . He frequently acts out sexually when feeling angry, lonely or upset." CP at 59. Finally, Dr. Longwell noted Mr. Mackey's antisocial personality disorder and lack of "humanistic traits such as guilt, remorse, compassion and empathy that might otherwise mitigate his acting out sexually deviant impulses." CP at 59.

Contrary to Mr. Mackey's contention, Dr. Longwell's opinion that Mr. Mackey's mental disorders placed him at a high risk to commit a sexually violent offense was not based solely on Mr. Mackey's past crimes or behaviors. As detailed above, her opinion was substantially based on Mr. Mackey's current behaviors.

CONCLUSION

Viewing the facts in the light most favorable to the State, there was sufficient evidence presented at trial for the jury to find that Mr. Mackey is a SVP. Dr. Longwell's testimony sufficiently established that Mr. Mackey suffers from mental disorders and a personality disorder and that these disorders make him likely to commit acts of sexual

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violence if not confined in a secure facility. We therefore affirm the order of commitment.

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.

Schultheis, C.J.

WE CONCUR:

Brown, J.

Kulik, J.