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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re the Detention of:

NORMAN ORR,

Appellant,

v.

THE STATE OF WASHINGTON,

Respondent.

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STATE OF WASHINGTON
BY [Signature]
IDENTITY

COURT OF APPEALS
DIVISION II

BRIEF OF RESPONDENT

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COURT OF APPEALS
DIVISION II

ORIGINAL

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I. ISSUE PRESENTED

- A. **Whether there was sufficient evidence at trial that Norman Orr is likely to engage in predatory acts of sexual violence if not confined in a secure facility where Dr. Hupka's risk assessment was based on an empirically guided clinical approach that is generally accepted by mental health evaluators conducting sex offender risk assessments and where the evidence overwhelmingly supported the presence of a mental abnormality and a high risk for reoffense?**

II. STATEMENT OF THE CASE

A. Procedural History

On July 1, 2009, the State filed a sexually violent predator (SVP) petition seeking the involuntary civil commitment of Norman Orr (hereafter, Orr) pursuant to RCW 71.09. CP 1-2. When the petition was filed, Orr was serving a prison sentence for two counts of assault in the third degree and was scheduled to be released into the community on July 5, 2009. CP 4-7; Ex. 18. On July 16, 2009, the trial court found probable cause to believe Orr is an SVP and transported him to the Special Commitment Center on McNeil Island. CP 38-39. Orr subsequently waived his right to trial within 45 days. CP __.¹ Trial was continued to February 1, 2010 at Orr's request. CP __.

¹ Respondent has filed a Supplemental Designation of Clerk's Papers and Exhibits with the superior court and will file an amended brief with specific notations to the record where appropriate upon receipt of the Index from the court.

On February 1, 2010, Orr's civil commitment jury trial commenced. RP1, 9.² On February 11, 2010, the jury found beyond a reasonable doubt that Orr is an SVP. CP 249. The trial court entered an order committing Orr to the custody of the Department of Social and Health Services for control, care, and treatment. CP 250. Orr filed a timely appeal. CP 256-58.

B. Sexually Violent Predator Trial

1. Dr. John Hupka

At trial, the State presented expert testimony from licensed psychologist, Dr. John Hupka, Ph.D. RP2, 78-79. Dr. Hupka's area of expertise involves sex offender assessments. RP2, 79-87. Although Dr. Hupka was not currently involved in treating sex offenders at the time of Orr's trial, he had previous experience treating sex offenders and other offenders. RP2, 87. Since 1996, Dr. Hupka has specialized in SVP evaluations. RP2, 80, 85. Since that time, Dr. Hupka has evaluated approximately 600 individuals to determine if they meet the statutory criteria as an SVP. RP2, 91.

Dr. Hupka was retained to evaluate Orr and determine if he met the statutory criteria as an SVP. RP2, 94-95. As part of the evaluation,

² For the Court's convenience, the Respondent will use the Verbatim Report of Proceedings citation system used by Appellant as outlined in Brief of Appellant at page 4, footnote 1.

Dr. Hupka reviewed extensive records involving Orr, including criminal history records, treatment records, police reports, and medical records. RP2, 94-98, 128. He testified that these records were the type that mental health professionals in the field typically rely on in evaluating sexually violent predators. RP2, 96-98, 128. Dr. Hupka also interviewed Orr. RP2, 94-95.

2. Prior Sex Offenses

Orr has an extensive history of molesting young children. RP2, 133-51; Ex. 1-9, 11-18.³ Dr. Hupka testified about the records he reviewed regarding Orr's sexual offending history that served as the basis for his opinions as to Orr's mental abnormality and risk to reoffend. RP2, 133-51. Orr does not dispute any of his sexual offending history. RP2, 129.

Orr first committed a sexual offense against a young child in 1958, when Orr was approximately 35 years old. RP2, 133. Despite being married for approximately twelve years, Orr started having sexual fantasies and sex with young boys. *Id.* In the early 1960s, Orr started to molest his 12-year-old foster son. RP2, 134. During his late 30s and early

³ Orr also testified about some of his sexual offending history in his videotaped deposition, portions of which were played for the jury at trial. Ex. 22-23; CP 70-216; RP5, 581-82.

40s, Orr had regular sexual contact with this boy. *Id.* This occurred on a weekly basis over a four-year period. *Id.*

In 1971, Orr was arrested for molesting two small boys. *Id.* Orr entered sex offender treatment after this incident. *Id.* In 1973, at the age of 50, Orr fondled the penises of two young boys, ages four and eight. RP2, 135. Orr was convicted of indecent liberties for the incident involving the older boy. RP2, 135-36; Ex. 1, 2. He was given a deferred sentence and ordered to resume sex offender treatment. RP2, 135-36; Ex. 3.

In 1974, Orr molested several young boys between the ages of ten and fourteen. RP2, 137-38. Orr fondled the boys' penises and masturbated in front of them until ejaculation. RP2, 137. Charges were dismissed for these offenses when Orr was ordered into the Western State Sexual Psychopath Program. RP2, 138-39; Ex. 4-8. Orr remained at the Western State Hospital program⁴ from 1975 until 1978. RP2, 138-40.

In 1980, approximately two years after Orr's release from the Sexual Psychopath Program, Orr molested his girlfriend's 12-year-old son. RP2, 141. Orr, who was age 57 at the time, performed oral sex on the boy. *Id.* This offense occurred while Orr was on probation for his prior

⁴ This program involved fourteen months of intensive inpatient sex offense treatment with eighteen months of follow up outpatient treatment. RP2, 140. Orr completed the program at age 55. *Id.*

sex offense. *Id.* In 1983, Orr was convicted of indecent liberties against a child under age fourteen. RP2, 141-43; Ex. 11, 12, 13. This incident involved Orr fondling the penis of a 13-year-old boy. RP2, 141-44. Orr molested several other children around this same time, including two boys between the ages of 11 and 12 and a 7-year-old girl. RP2, 142-45. Orr received a ten year prison sentence for the indecent liberties conviction and was released in 1992, at the age of 69. RP2, 145-47, Ex. 13.

Within six years of Orr's release into the community, Orr committed another sex offense against a young child. RP2, 147. Orr was age 75 at the time. *Id.* Orr sexually assaulted this young girl in 1998 and again in 2002, at the age of 79. *See* RP2, 147-48. The incident came to the attention of the authorities in 2002 when Orr called the police because of his sexual urges towards the girl. RP2, 148. According to the reports, the girl reported that Orr had fondled her on multiple occasions and put her hand on his penis. *Id.* Orr told Dr. Hupka that he had molested the girl just prior to calling the police in 2002. RP2, 149. Orr admitted to Dr. Hupka that he was sexually aroused by this girl. RP2, 165. In 2002, Orr was convicted of two counts of assault in the third degree for his offenses involving the girl. RP2, 149-51; Ex. 15-18.

3. Pedophilia

Dr. Hupka testified that in his professional opinion, Orr currently suffers from a paraphilia known as Pedophilia. RP2, 107-08, 119. Pedophilia involves sexual attraction to prepubescent children. RP2, 108. Dr. Hupka testified that Pedophilia is a chronic, lifelong condition that involves recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving young children. RP2, 108, 119. Dr. Hupka testified about Orr's long and extensive pattern of sexual behavior with young children over the years and about Orr's long history of having sexual urges for children, including Orr's own acknowledgement of having ongoing sexual fantasies of children. RP2, 116. Dr. Hupka testified about how Orr has continued to act on his pedophilic urges over the years despite various interventions:

[W]e see in his history, a pattern, repetitive pattern, of sex with children that has continued despite his -- despite arrest, conviction, incarceration, inpatient treatment and outpatient treatment. Essentially everything that society has done to try to intervene with Mr. Orr has been not enough, has been ineffective in rising to the level of countering his pedophilic urges. So diagnostically we see in his history behavior the evidence of his disorder of sexual deviance, pedophilia.

RP2, 151-52. Dr. Hupka testified that Orr committed sex offenses against children while on supervision in the community, while involved in romantic relationships with adult women, and while involved in sex

offender treatment. RP2, 152-53. "He can do well in treatment, present himself very well, at the same time unbeknownst to his therapist molest children." RP2, 152.

Orr acknowledged repeated sexual activity with children and ongoing fantasies of children since 1971. RP2, 118. Orr admitted that since 1971, his masturbatory fantasies have only involved children rather than adults and that he has not had sexual relations with adults since that time. RP2, 118, 174-75. His masturbatory fantasies consisted of orally copulating prepubescent boys, having them orally copulate him, and fondling the boys. RP2, 175. Orr reported first being sexually attracted to children when he was in his late forties. *Id.* When asked if he was currently sexually attracted to children, Orr admitted that he imagined he would be attracted to them if released.⁵ RP2, 176.

Dr. Hupka testified that Orr's pedophilia has been a problem for Orr for approximately 50 years.⁶ RP2, 116. Dr. Hupka explained that Orr has been persistently and repeatedly been sexually attracted to children for

⁵ Orr's own expert at trial, Dr. Wollert, testified that Orr was still currently sexually attracted to children. RP4, 479.

⁶ Orr's Pedophilia "took the place of his marriage" and caused him other social problems. RP2, 116-17. When Orr was released into the community from a hospital or prison, Orr would quickly reoffend and be returned to custody. RP2, 117. "His pedophilia has largely been the central focus of his life for nearly 50 years. So relationships, his work, social function, all have been impaired." *Id.*

decades. *See* RP2, 120. Dr. Hupka explained the pervasive nature of Orr's Pedophilia:

He has been incarcerated for substantial periods of time and gets out and returns to children. He's been in treatment programs for a substantial period of time where he doesn't have access to children; he gets out and returns to sex with children. Most recently he has been incarcerated since 2002, so he has been incarcerated now for about seven years where again he has had no contact whatsoever with children. That doesn't mean, in my opinion, his sexual orientation has spontaneously gone away. It's never spontaneously gone away before; it generally does not happen with people I see no reason to think that his pedophilia is any different now than it was, well, in 2002 when he entered -- last entered custody. It's true that he's had no sexual contact with any young boys since he has been in prison, but that doesn't change his overall sexual orientation, it just says boys weren't available to him.

RP2, 120-21.

Dr. Hupka testified that Orr's Pedophilia affects his emotional and volitional capacity and that when he's around children he is not able to control himself. RP2, 166-68. Dr. Hupka testified that Orr's Pedophilia is a mental abnormality and it causes him serious difficulty controlling his behavior:

We see in his history when he has access to children, time and again he's unable to contain his urges, fantasies and urges, but instead acts out with molesting children.

RP2, 168-69. Orr's participation in treatment over the years has not helped his ability to control his behavior:

Well, he's done well in treatment by all accounts, each time he has been in treatment. But, no, it hasn't curbed his propensity to molest children. He has participated in outpatient treatment from the time of his first documented offense. While he has been participating in outpatient treatment, he has continued to molest children, at the same time that his treatment providers have said he's doing well in the treatment setting. By all accounts, he did well and completed the Western State Hospital treatment program, the sexual psychopath treatment program. Despite completing that treatment, when he was released into the community, he continued to molest children. So he has participated in treatment; does well. He's a very cooperative fellow; it just doesn't help. It doesn't sink in. Kind of like water off a duck's back for him.

RP2, 170.

4. Risk Assessment

Dr. Hupka testified that in his opinion, to a reasonable degree of psychological certainty, Orr's Pedophilia makes him likely to engage in predatory acts of sexual violence if he's not confined in a secure facility.

RP2, 170-77. Dr. Hupka testified that he was familiar with the various types of risk assessments conducted in SVP evaluations and that there are different ways of approaching sex offender risk. RP2, 177. Both the actuarial approach and the empirically guided clinical approach are generally accepted methods of conducting a risk assessment. RP2, 177-81.

Dr. Hupka testified in detail about actuarial risk assessment, including the limitations in using a pure actuarial approach to assess risk.

RP2, 181-216. Dr. Hupka described in detail the weaknesses in using a pure actuarial approach. RP2, 188-99. He explained that it would not be appropriate to use the actuarial instruments in the sense of applying risk percentages to Orr. RP3, 277-81. “You have to use these instruments with a very big grain of salt with someone like Mr. Orr, because they...weren’t developed on people of his age and circumstance.” RP2, 193-96; RP3, 282, 324. Because of this, Dr. Hupka used the empirically guided approach to risk assessment. RP3, 285-86.

Dr. Hupka testified that the actuarial instruments can give a sense of general risk categories for someone like Orr. RP2, 196. For example, on the Static-99, Orr scored in the highest risk bin possible for the instrument:

[The] highest score you can get is six and above. He received a score of 7 but there’s so few people that score above 6 that anything six and above is just put in one category.

RP2, 195. Orr’s score on this actuarial instrument is higher than approximately 97 percent of sex offenders in the study. RP2, 215. Orr scored as a moderate risk on the Static-2002R and as a moderate-high reoffense risk on both the Static-99R and the Static-2002. RP2, 195-200. Orr’s score on the Static-2002 is higher than more than 93 percent of sex offenders in the sample. RP2, 215.

Dr. Hupka also looked at other empirically based risk factors that research has shown to be associated with sexual reoffending. RP2, 216-18. He used an instrument known as the Stable-2007, which includes dynamic risk factors that have been linked in the research to sexual recidivism.⁷ RP2, 217-18. Dr. Hupka testified that dynamic risk factors are an important part of risk assessment and that mental health professionals in the field commonly and regularly rely on them. RP2, 218-19.

Dr. Hupka testified in detail about the dynamic risk factors that are contained in the Stable-2007⁸ and about how all of these factors increase Orr's risk. RP2, 219-24. Orr has no community supervision if released and lacks positive social support. RP2, 219-20. Orr's capacity for normal adult intimacy is impaired. RP2, 220. Since 1971, his primary emotional sexual identification has been with children. RP2, 220-21. Orr uses sex with children as a coping mechanism and has a history of deviant sexual interest in children. RP2, 221. He has violated rules of supervision in the past by molesting children. RP2, 223. Orr gives in to his impulses quite readily and has poor problem-solving skills. RP2, 223-24. Virtually all of

⁷ Dynamic risk factors are factors that can change, as opposed to the mostly static factors in the actuarial instruments that generally do not change. RP2, 217-18.

⁸ The Stable-2007 includes the following dynamic risk factors: significant social influences, intimacy deficits, sexual self-regulation, cooperation with supervision, and general self-regulation. RP2, 219-24.

the factors included in the Stable-2007 indicate that Orr has a higher risk of reoffending. *See* RP, 216-24.

Dr. Hupka also looked at potential protective factors that might mitigate Orr's risk, including age and health status. RP2, 225-30. However, he concluded that Orr's advanced age and current health status did not mitigate his risk to below the "likely to reoffend" standard. *See* RP2, 225-31. Dr. Hupka testified that Orr's age is not a mitigating factor because Orr committed his last sex offense at the age of 79, at a time when the research indicates very few people reoffend. RP2, 227-28.

Dr. Hupka also testified that Orr's health would not prevent him from sexually reoffending because of the nature of his offending history. *See* RP2, 228-29. Dr. Hupka explained that Orr is still capable of engaging in the types of sexual offenses that he engaged in during the past. RP2, 228-29. Orr reported being impotent since approximately 1971, yet he still continued to molest children over the next several decades. *See* RP2, 229. "Again, when you look at the pattern of his sex offenses, he's not using his penis, so impotence itself really hasn't been a factor. And there's a big difference between sexual desire and whether the penis can perform." RP2, 229. Dr. Hupka testified that Orr's age and health status were really the only potential mitigating factors for Orr, and those

were simply not enough to counteract all the other risk factors he possessed. RP2, 228-29.

III. ARGUMENT

Appellant argues on appeal that the trial court erred when it committed Orr as an SVP because the State failed to prove beyond a reasonable doubt that he would likely engage in predatory acts of sexual violence. Orr's argument is without merit, as there was substantial evidence presented at trial that Orr is likely to engage in predatory acts of sexual violence if not confined in a secure facility. Because of the overwhelming evidence at trial regarding Orr's likelihood to reoffend, this Court should affirm Orr's commitment as an SVP.

A. Standard of Review

The criminal standard of review applies to sufficiency of the evidence challenges under the SVP statute. *In re the Detention of Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003). "Under this approach, the 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 of the crime beyond a reasonable doubt." *Id.*

In reviewing the sufficiency of the evidence, the reviewing court does not determine whether *it* believes the evidence at trial was proven beyond a reasonable doubt. *State v. Hughes*, 154 Wn.2d 118, 152,

110 P.3d 192 (2005), *overruled on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed.2d 466 (2006). This Court must look at the evidence in the light most favorable to the State and the commitment must be upheld if any rationale trier of fact could have found the essential elements beyond a reasonable doubt. *In re Detention of Audett*, 158 Wn.2d 712, 727-28, 147 P.3d 982 (2006).

In this sufficiency challenge, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against Appellant. *See id.* at 727. An appellate court should not second guess the credibility determinations of the fact-finder. *In re the Detention of Halgren*, 156 Wn.2d 795, 811, 132 P.3d 714 (2006); *see also In re Davis*, 152 Wn.2d 647, 680, 101 P.3d 1 (2004) ("A trial court's credibility determinations cannot be reviewed on appeal, even to the extent there may be other reasonable interpretations of the evidence.") Appellate courts defer to the trier of fact regarding a witness's credibility, conflicting testimony, and the persuasiveness of the evidence. *In re Detention of Broten*, 130 Wn. App. 326, 335, 122 P.3d 942 (2005). "Determinations of credibility are for the fact finder and are not reviewable on appeal." *Hughes*, 154 Wn.2d at 152.

B. The State presented sufficient evidence that Orr meets the definition of a sexually violent predator.

In this case, a review of the record indicates that there was sufficient evidence for the trial court to find, beyond a reasonable doubt, that Orr meets criteria as an SVP. Taken in the light most favorable to the State, the evidence overwhelmingly supported a finding that Orr's mental abnormality causes him serious difficulty controlling his behavior and makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility.

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."⁹ RCW 71.09.020(18). The definition of mental abnormality is tied directly to present dangerousness. *In re Detention of Henrickson*, 140 Wn.2d 686, 692, 2 P.3d 473 (2000). This tie to current dangerousness is required because due process requires that an individual be both

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 unconditionally released. RCW 71.09.020(7). 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 constituting such person a menace to the health and safety of others." RCW 71.09.020(8).

mentally ill and presently dangerous before he may be civilly committed. *See In re Young*, 122 Wn.2d 1, 27, 857 P.2d 989 (1993).

When a person is incarcerated prior to the civil commitment trial, the State may rely on the offender's offense history, mental condition, expert testimony, and other relevant, probative evidence to establish the offender's current dangerousness. *See Froats v. State*, 134 Wn. App. 420, 438-39, 140 P.3d 622 (2006). "The point of *Young* is that an individual's conduct during incarceration is not necessarily probative of current dangerousness given the relative difficulty, if not impossibility, of committing an offense during incarceration." *Id.* at 439. The Washington Supreme Court has held that by properly finding all the statutory elements are satisfied to commit someone as an SVP, the fact-finder impliedly finds that the person is currently dangerous. *In re Detention of Moore*, 167 Wn.2d 113, 124-25, 216 P.3d 1015 (2009). Unchallenged findings are verities on appeal. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004); *In re Detention of Anderson*, 166 Wn.2d 543, 549, 211 P.3d 994 (2009).

A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences must be drawn in favor of the State. *Audett*, 158 Wn.2d at 727. Dr. Hupka testified in detail about how he assessed Orr's risk. *See RP2*, 181-231. Dr. Hupka testified that in his

expert opinion, to a reasonable degree of psychological certainty, Orr is likely to commit predatory acts of sexual violence if not confined in a secure facility. RP2, 170-71, 177. Viewing the evidence in the light most favorable to the State, with all reasonable inferences drawn in favor of the State, a rationale trier of fact would have found that Orr is likely to reoffend.

1. **Dr. Hupka's risk assessment of Orr was based on an empirically guided clinical approach that is generally accepted by mental health evaluators conducting sex offender risk assessments.**

Orr argues that Dr. Hupka's conclusion of risk based on empirical factors is "unreliable and irrelevant as a predictor of future behavior, and is not supported by evidence in the record." *See* Brief of Appellant, at 19. First, Orr raises his claim of unreliability for the first time on appeal. By not raising this argument below, he has failed to preserve the issue for appeal. Second, Dr. Hupka's conclusions are supported by the evidence at trial and his review of the records involving Orr.

- a. **Orr failed to preserve the issue for appeal.**

RAP 2.5(a) states that the appellate court may refuse to review any claim of error which was not raised in the trial court. The general rule is that appellate courts will not consider issues raised for the first time on

appeal. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).¹⁰ The Washington Supreme Court has “steadfastly adhered to the rule that a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal.” *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Objections must be made at the time the evidence is offered. *State v. Davis*, 141 Wn.2d 798, 850, 10 P.3d 977 (2000). “Without an objection, an evidentiary error is not preserved for appeal.” *Id.* The Washington Supreme Court recently applied the preservation of error doctrine to SVP cases because, among other reasons:

[O]pposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted errors or new theories and issues for the first time on appeal.

Audett, 158 Wash.2d at 726.

Here, Dr. Hupka laid the proper testimonial foundation pursuant to ER 702 and ER 703 regarding his risk assessment. *See* RP2, 177-81, 216-19. Orr did not object to this testimony at trial and did not raise any *Frye* challenge at the trial court level.¹¹ RP1, 51-68; RP2, 216-31; CP __.

¹⁰ RAP 2.5(a) does list limited exceptions to this rule; however, none of them are applicable here.

¹¹ The *Frye* Rule is outlined in *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923) and states that if an expert’s opinion is based on a scientific theory or method than it should be generally accepted in the scientific community.

Yet now, for the first time, Orr claims Dr. Hupka's method of risk assessment is unreliable. Because Orr never challenged this under ER 703, *Frye* or in any other manner at trial, he is precluded from raising this argument now.

Nevertheless, Washington courts have routinely admitted testimony about predictions of future dangerousness, despite the inherent uncertainties of such psychiatric predictions. *Young*, 122 Wn.2d at 55-57. An expert's testimony about risk assessment using clinical judgment is admissible. *See id.* at 15-18, 55-57; *see also In re Detention of Campbell*, 139 Wn.2d 341, 356-58, 986 P.2d 771 (1999). Such testimony is relevant and the accuracy of the assessment is properly a matter of weight to be determined by the fact-finder. *See id.* "[T]he *Frye* standard has been satisfied by both clinical and actuarial determinations of future dangerousness." *Thorell*, 149 Wn.2d at 756.

- b. Dr. Hupka's method of risk assessment is commonly and reasonably relied on by evaluators conducting risk assessments and the factors he considered are relevant to Orr's likelihood to reoffend.**

The State presented sufficient evidence at trial for the jury to find that Orr was likely to reoffend. Dr. Hupka testified that he was familiar with the various types of risk assessments conducted in SVP evaluations and that there are different ways of approaching sex offender risk.

RP2, 177. He testified that the empirically guided clinical approach to risk assessment that he used in this case is a generally accepted method of risk assessment.¹² RP2, 177-81. He also testified that this type of risk assessment is commonly and reasonably relied on by mental health professionals who conduct these types of evaluations. RP2, 218-19.

In assessing Orr's risk, Dr. Hupka looked at empirically based risk factors that research has shown to be associated with sexual reoffending. RP2, 216-18. He used an instrument known as the Stable-2007, which includes dynamic risk factors that have been linked in the research to sexual recidivism.¹³ RP2, 217-18. These dynamic risk factors were developed by researching factors about sex offenders that are associated with either a greater or lesser chance of sexual reoffending. RP2, 218. Dr. Hupka testified that in conducting a sex offender risk assessment, it is "absolutely" important to consider variables that change, such as the factors listed in the Stable-2007. *See* RP2, 218.

¹² Risk assessments used to be conducted based on pure clinical judgment, which is a personal opinion of the evaluator without being aware of the research in the field. RP2, 178-81. This is also referred to as unguided clinical judgment and has poor predictive accuracy. RP3, 284. Dr. Hupka testified that this method is no longer generally accepted in the field. RP2, 178-81. Dr. Hupka did not use this method of risk assessment. RP3, 284-86. Dr. Hupka used an empirically guided approach that is based on research linked to recidivism. *See* RP3, 285-86.

¹³ The risk factors identified in the Stable-2007 were identified and developed by Dr. Hanson, who also researched and developed the Static-99 and Static-2002 actuarial instruments. RP2, 182-86, 202, 212-17.

The Stable-2007 looks at the following risk factors: significant social influences, intimacy deficits (emotional identification with children, lack of intimate partners), sexual self-regulation (sex as coping, deviant sexual interests), cooperation with supervision, and general self-regulation (impulsive acts, poor problem solving skills). RP2, 219-24. Dr. Hupka testified in detail about how these dynamic risk factors increase Orr's risk. RP2, 219-24. Orr lacks any positive social support in the community and has no community supervision if released. RP2, 219-20. Orr's capacity for normal adult intimacy is impaired. RP2, 220. Since 1971, his primary emotional sexual identification has been with children. RP2, 220-21.

Regarding sexual self-regulation, Orr has deviant sexual interest in children and uses sex with children as a coping mechanism. RP2, 221. Orr reported that he was not surprised when he sexually reoffended in the early 1980s. RP2, 141-43, 163. Orr said that he reoffended because he was stressed and frustrated. RP2, 163. Orr reported, "[The victim] was desirable and I forgot and passed over my stop signs."¹⁴ RP2, 163-64.

Dr. Hupka explained how this affects Orr's risk:

Essentially what he's telling me there is that when he's under stress, he copes with stress by offending against – by having sex with children, one of his coping mechanisms for dealing with stress, which is not a good sign in terms of his reoffense risk.

¹⁴ By "stop signs," Orr was referring to the information he learned in the sex offender treatment program. RP2, 164.

RP2, 163. Dr. Hupka described Orr's pattern of coping with stress by having sex with children. RP2, 164-65. Furthermore, Dr. Hupka testified that Orr has no insight whatsoever as to why he sexually offended against so many children:

[Orr] just really doesn't have a clue. This is something that he's not inclined to think about. I said earlier that his treatment has kind of rolled -- has been like water on a duck's back with him. He is cooperative with treatment, participates well, gets good -- good marks from his providers, and yet it doesn't really sink in, doesn't translate to a meaningful insight and meaningful plan to avoid reoffending. Doesn't just -- doesn't sink in.

RP2, 224-25.

Furthermore, Orr has violated rules of supervision in the past by molesting children. RP2, 223. Dr. Hupka testified about how Orr has continued to act on his pedophilic urges over the years despite various interventions:

[W]e see in his history, a pattern, repetitive pattern, of sex with children that has continued despite his -- despite arrest, conviction, incarceration, inpatient treatment and outpatient treatment. Essentially everything that society has done to try to intervene with Mr. Orr has been not enough, has been ineffective in rising to the level of countering his pedophilic urges. So diagnostically we see in his history behavior the evidence of his disorder of sexual deviance, pedophilia.

RP2, 151-52. Dr. Hupka testified that Orr committed sex offenses against children while on supervision in the community, while involved in

romantic relationships with adult women,¹⁵ and while involved in sex offender treatment. RP2, 152-53. “He can do well in treatment, present himself very well, at the same time unbeknownst to his therapist molest children.” RP2, 152.

Regarding general self-regulation, Orr gives in to his sexual impulses quite readily and has poor volitional control. RP2, 223-24. He also has poor problem-solving skills:

Equally important is his poor problem-solving skills when it comes to things like developing a relapse prevention plan, thinking about how he's going to avoid reoffending, using treatment, using the skills that he's got in treatment from the Western State Hospital and the other treatment that he's been in, bringing some, you know, realistic problem-solving skills to bear to avoid reoffending. He's woefully lacking in that. He doesn't have a clue and really never has in his past, from what I can tell, had any meaningful problem-solving skills to bring to bear to avoid reoffending.

RP2, 224. Moreover, Orr has been unable to express any insight whatsoever as to why he sexually assaulted so many children. *Id.* This is particularly relevant to Orr's risk in the community because this lack of insight and understanding of his offending means that he is unable to develop a meaningful plan to avoid reoffending. *See* RP2, 224.

Thus, virtually all of the dynamic risk factors included in the Stable-2007 indicate that Orr has a higher risk of reoffending.

¹⁵ This is relevant to both diagnosis and risk because it indicates that even when Orr has access to adults, he still turns to children. *See* RP2, 153.

See RP, 16-24. Orr's good behavior in prison is irrelevant to his risk when released into the community. *See Froats v. State*, 134 Wn. App. at 439 (conduct during incarceration is not necessarily probative of current dangerousness given the difficulty, if not impossibility, of committing an offense during incarceration). Orr did not have access to young children while incarcerated. RP2, 120-21. As Dr. Hupka testified, it's when Orr is released into the community that the problems begin. RP2, 168. When Orr has access to children in the community, he quickly reoffends. RP2, 117. "He has been incarcerated for substantial periods of time and gets out and returns to children." RP2, 120.

Dr. Hupka also looked at research based protective factors that might be applicable to Orr to mitigate his risk and found none. RP2, 225-30. Dr. Hupka concluded that Orr's advanced age and current health status did not mitigate his risk to below the "likely to reoffend" standard. *See* RP2, 225-31. Dr. Hupka testified that Orr's age is not a mitigating factor because Orr committed his last sex offense at the age of 79, at a time when the research indicates very few people reoffend. RP2, 227-28. Although most people may be considered low risk by the time they reach the age of 70, that is not the case for Orr. *See* RP3, 324. Orr sexually reoffended at the age of 79. RP3, 324. At the time of trial,

Orr was not much older than he was when he reoffended at age 79.¹⁶
RP2, 227-28.

Dr. Hupka also testified that Orr's health would not prevent him
from sexually reoffending:

There's probably been some decline with this man from 79 to 86, but looking how he engages in sex offenses in what does he do, orally copulates young boys and he fondles young boys and young girls. So I want to know: Is his health such he would not be able to do that, and is his age such he would not be able to do that? And I think he's certainly capable of orally copulating young boys and fondling both young boys and girls at his present age. He does have problems with impotence, but his penis has really never been a major part of his sex offenses. He has, in the distant past, tried to get boys to orally copulate him, but for the most part, he's using his mouth and hands as part of his sexual offenses. I think his age and health status, again he's probably slowed down a little bit from where he was at 79, but he's still capable of engaging in those types of sex offenses he's engaged in in the past. And since his age and health status really the only mitigating factor we have with him that I can tell, I just don't think it's enough to counteract all the other risk factors.

RP2, 228-29. Dr. Hupka explained that Orr reported being impotent since approximately 1971, yet he still continued to molest children over the next several decades. *See* RP2, 229. "Again, when you look at the pattern of his sex offenses, he's not using his penis, so impotence itself really hasn't been a factor. And there's a big difference between sexual desire and whether the penis can perform." RP2, 229.

¹⁶ Orr was 86 years old at the time of trial. RP5, 652.

Orr argues that “it is difficult to envision how, with his limited mobility, diminished vision and difficulty hearing, Orr could obtain unsupervised access to a child while residing in a supervised senior assisted living facility.” *See* Brief of Appellant, at 19. The “supervised senior assisted living facility” Orr is referring to is the Cedar Hills Adult Family Home. RP5, 633. While it was Orr’s desire to reside there if released into the community, it was not clear that this was a viable option for him or that he would be precluded from having access to children. *See* RP5, 633-51. The individual homes opened up to a large, shared courtyard where children of other residents could easily be present and Orr could have contact with them. *See* RP5, 633, 636. Furthermore, one of the residency requirements of the facility is that the residents have dementia. RP5, 643. Orr does not suffer from dementia, has never been diagnosed with dementia, and nothing in the records indicates he suffers from dementia. RP4, 449-50.¹⁷ Moreover, the Cedar Hills facility knew virtually nothing about Orr’s criminal history of committing sexual offenses against children.¹⁸

¹⁷ Orr’s own expert at trial, Dr. Wollert, confirmed this. RP4, 449-50. Dr. Hupka did not assign a diagnosis of dementia and there was no evidence at trial that Orr suffered from dementia. Furthermore, since all residents at the facility suffer from dementia, there are obvious concerns with these residents knowing that they need to keep their grandchildren or great grandchildren from having contact with Orr.

¹⁸ Kristyan Calhoun testified that Cedar Hills was only aware of the information that she knew about Orr’s sexual crimes. RP5, 649. Ms. Calhoun testified that she did not know Orr was a diagnosed pedophile, did not know that he had molested

As Dr. Hupka testified, with Orr, the issue comes down to whether

Orr is going to have access to children:

What is his likelihood of having access to children that he could reoffend with? That's what it comes down to. . . . And I think in that regard, that there's children all over the place out there. You see them running around all over. If he's in a nursing home somewhere, he doesn't have any children that will visit him, but if there's grandparents there that have their grandchildren visit or great grandchildren and he's there in his wheelchair, and if the children come and sit on his lap because he's a nice guy, he will have access to children. And in that circumstance, he's likely to reoffend.

If he goes out to the shopping center and if he's in his wheelchair, can't chase children down, children are around, come sit on his lap, he is at high risk to reoffend. Comes down to what's his likelihood of having access to children? I think his likelihood of that is pretty high, over 51 percent. I think in that context, I think he's as likely to reoffend as he always was, which we can see in his history is quite high.

RP3, 327-28.¹⁹

Dr. Hupka summarized his analysis of Orr's risk and his opinion that Orr is likely to reoffend as follows:

I consider what risk factors have been identified generally in the research. . . . Things like do you have stranger victims, does one offend against boys? These kind of things put people in a generally higher risk level. . . . I consider very heavily ... the fact that Mr. Orr has highly

approximately 15 to 20 children, did not know that his sexual offending history dated back to at least 1970, and did not know that he had molested children who lived with him. RP5, 641-45. She also believed that Orr committed his last sexual crime against a child 20 years ago, as opposed to as recently as 2002. RP5, 639.

¹⁹ At the time of trial, Orr typically used a walker, not a wheelchair. RP5, 653.

entrenched sexual disorder. He has a highly entrenched pedophilic disorder. ... So I think that's something to consider very heavily because sexual deviance is a primary factor in what causes people to offend to begin with and to reoffend. So I put a great deal of weight into that. I then next consider whether this is someone who has an adequate relapse prevention plan to address his pedophilia. And he does not. Never has. Nothing's been effective to work with him to alter this sexual deviance. And he tells me he molested his last victim because she was handy. That's kind of his approach. So I put these factors together, which I think are reasonable risk factors to consider. I remember the principle that past behavior is the best predictor of future behavior. . . . Then I look for mitigating risk factors could be perhaps age or health. I don't think his age or health reduces his risk. And I put all that together and I say, "What is the likelihood this man will reoffend?" In my opinion nothing has changed about this man since [his offenses in the 1970s].

RP3, 325-27. Viewing the evidence in the light most favorable to the State, with all reasonable inferences drawn in favor of the State, a rationale trier of fact could have found that Orr was likely to reoffend. *See Audett*, 158 Wn.2d at 727-28. There was substantial evidence at trial that Orr was more likely than not to commit predatory acts of sexual violence unless he was confined in a secure facility.

c. Dr. Hupka did not base his opinion on actuarial instruments in assessing Orr's likelihood to reoffend.

Orr argues that the actuarial instruments do not establish that Orr is likely to reoffend if released. Brief of Appellant, at 17. Dr. Hupka did not rely on the results of the actuarial instruments in his assessment of Orr's

likelihood to reoffend. *See* RP3, 277-78. As Dr. Hupka explained, there are different ways of assessing a person's likelihood to reoffend. RP2, 177. Although he prefers to use an actuarial approach when he can, there are times when actuarial instruments are inappropriate to use for certain sex offenders. RP3, 277-83, 302-03, 310-11, 324.

Dr. Hupka testified about the limitations with using a pure actuarial approach to assess risk. RP2, 181-216. For example, the actuarial instruments only include a finite number of items on each instrument. RP2, 188. Yet it defies logic to say that there are only ten items that one needs to consider in coming to an opinion about whether someone is likely to reoffend.²⁰ RP2, 188. "There's certainly many more factors than just ten that we want to look at. And the authors of the instrument certainly acknowledge that." RP2, 188. Second, the instruments only tell us about groups and group norms, as opposed to about the individual you are evaluating. RP2, 189-90.

Moreover, the instruments can only be applied to the people who are similar to the groups on which the instrument was developed.²¹

²⁰ The Static-99 includes only ten questions and the Static-2002 includes only fourteen questions. RP2, 186, 199.

²¹ For example, the average age of the sample group of people in the Static-99 was approximately 35 years old. The instruments predict risk out approximately 15 years, or to age 50. Orr only came to the attention of the authorities around the time this instrument would no longer apply. "It is just not based on people like him; it's based on younger people." Most people begin their sex offending career when they are young. And stop by the time they're 50; not get started at 50." RP2, 191-92.

RP2, 189-91. Third, actuarial instruments do not indicate that the person you are evaluating will reoffend at a certain percentage rate.²²

RP2, 198-99. Finally, the instruments underestimate risk because they measure risk in terms of an individual being arrested or convicted, as opposed to being caught. RP2, 184.

Dr. Hupka testified that it would not be appropriate to use the actuarial instruments in the sense of applying percentage risks to Orr. RP3, 277-81. “You have to use these instruments with a very big grain of salt with someone like Mr. Orr, because they...weren’t developed on people of his age and circumstance.” RP2, 193-96; RP3, 282, 324.

Dr. Hupka testified that the actuarial instruments can give a sense of general risk categories for someone like Orr. RP2, 196. For example, on the Static-99, Orr scored in the highest risk bin possible for the instrument:

[The] highest score you can get is six and above. He received a score of 7 but there’s so few people that score above 6 that anything six and above is just put in one category.

RP2, 195. Orr’s score on this actuarial instrument is higher than approximately 97 percent of sex offenders in the study. RP2, 215. Orr scored as a moderate risk on the Static-2002R and as a moderate-high

²² In other words, a score on an actuarial instrument will translate into a particular risk percentage. If that risk percentage is 30 percent, that does not mean Orr’s risk is 30 percent. It simply means that of the people who scored similar to Orr, 30 percent of those people reoffended within a certain time frame. The instrument does not tell you which 30 percent reoffended. *See* RP2, 198-99.

reoffense risk on both the Static-99R and the Static-2002. RP2, 195-200. Orr's score on the Static-2002 is higher than more than 93 percent of sex offenders in the study. RP2, 215. Because actuarial instruments involve finite, static factors and were developed on individuals in an entirely different age range than Orr, they have limited applicability in assessing Orr's risk.²³ Because of this, Dr. Hupka used an empirically guided risk assessment approach that is an accepted method of risk assessment in the field. *See* RP2, 177-81.

2. There was sufficient evidence at trial that Orr is likely to commit "predatory" acts of "sexual violence."

The State presented sufficient evidence at trial for the jury to find that Orr would likely commit predatory²⁴ acts in the future. Dr. Hupka testified that future acts committed by Orr would likely be predatory because many of his prior offenses were predatory in nature. RP2, 171-73. Orr's victims have included children who were strangers and children with whom he had no substantial personal relationship. *Id.*

²³ Orr's expert, Dr. Wollert, used the Static-99 to assess Orr's likelihood to reoffend. *See* RP4, 504. Despite Orr receiving the highest score on this actuarial instrument, Dr. Wollert testified that his risk translated to well below 50 percent. *See* RP4, 504. However, the risk assessment and charts that Dr. Wollert used indicate that no individual over the age of 25 would ever be likely to reoffend. RP4, 505-06. Clearly, this method of risk assessment would have been wrong time and time again for Orr, who did not even start his sexual offending until he was approximately 35 years old. *See* RP2, 133. Orr then reoffended multiple times over the next four decades.

²⁴ "Predatory" means acts directed towards: (a) strangers; (b) individuals with whom a relationship has been established or promoted for the primary purpose of victimization; or (c) persons of casual acquaintance with whom no substantial personal relationship exists. RCW 71.09.020(10).

Dr. Hupka explained that the best predictor of future behavior is past behavior. RP2, 171. Orr sexually assaulted at least two stranger victims and had no substantial personal relationship with many of his other victims. RP2, 173. Viewing the evidence in the light most favorable to the State, a rationale trier of fact could have found that Orr's future acts of sexual violence would be predatory. *See Thorell*, 149 Wn.2d at 744; *see also Audett*, 158 Wn.2d at 727-28.

The State also presented sufficient evidence at trial for the jury to find that Orr's future offending would involve acts of "sexual violence."²⁵ Sexual contact with a child under age fourteen constitutes a sexually violent offense. CP 243-46. Orr was convicted of indecent liberties against a child under age fourteen, which is a sexually violent offense. RP2, 143; Ex. 11, 12, 13; CP 243; RCW 71.09.020(17). Moreover, virtually all of Orr's history of sexual offending, starting in the early 1960s until 2002, involved conduct that would qualify as a sexually violent offense. *See* RP2, 133-49. Orr had sexual contact with numerous children under the age of fourteen over a period of four decades. Orr's sexual conduct with these young children involved not only fondling, but

²⁵ "Sexually violent offense" includes rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree. For a complete list of all sexually violent offenses, *see* RCW 71.09.020(17).

also oral copulation. RP2, 135, 137, 141-44, 148-49. Viewing the evidence in the light most favorable to the State, a rationale trier of fact could have found that Orr's future reoffending would involve acts of sexual violence. See *Thorell*, 149 Wn.2d at 744; see also *Audett*, 158 Wn.2d at 727-28.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm Orr's civil commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 12th day of November, 2010.



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NO. 40433-8-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of:

NORMAN ORR,

Respondent.

DECLARATION OF
SERVICE

I, Kelly Hadsell, declare as follows:

On this 12th day of November, 2010, I deposited in the United States mail true and correct cop(ies) of Respondent's Opening Brief and Declaration of Service, postage affixed, addressed as follows:

Stephanie Cunningham
4616 25th Avenue NE, #552
Seattle, WA 98105

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 12th day of November, 2010, at Seattle, Washington.

Kelly Hadsell
KELLY HADSELL

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