

FILED
July 6, 2015
Court of Appeals
Division III
State of Washington

NO. 32882-1-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

IN RE THE DETENTION OF

JAMES JONES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Washington's conservative approach to the admission of scientific evidence is designed to prevent the use of forensic science which has not satisfied scientific standards for reliability. In seeking to commit Mr. Jones, the State used testimony regarding the SRA-FV (Structured Risk Assessment-Forensic Version), which is an unreliable risk assessment tool not yet accepted by the general scientific community.

Due process requires a finding of present dangerousness before a person can be involuntarily committed under RCW 71.09. Where a person has been released from total confinement, due process is only satisfied where the State is able to establish the person committed a recent overt act. A community custody violation which is not itself a recent overt act does not satisfy this requirement.

Mr. Jones was violated and incarcerated for marijuana use and not a recent overt act. Because the State did not establish a recent overt act, it failed to prove present dangerousness beyond a reasonable doubt.

B. ASSIGNMENTS OF ERROR

1. The courts failure to consider the evidence provided by Mr. Jones at the *Frye* hearing denied him his due process rights.

2. The court erred in ruling the SRA-FV satisfies the *Frye* standard for scientific evidence.

3. The State failed to demonstrate present dangerousness because it failed to plead and prove a recent overt act.

C. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. A fundamental principle of due process is the right to be heard. This right includes the right to have the court consider the evidence presented to it before making findings of fact. Where the court fails to consider evidence before making findings of fact, are the due process rights of the respondent violated?

2. Novel scientific evidence should not be admitted if it is not accepted by the scientific community and there are no methods for producing reliable results. The SRA-FV is a dynamic risk assessment tool used by the State's expert to establish likelihood to reoffend. It is an unproven tool still in its experimental stage. It has not been accepted by the scientific community and there are no methods to establish reliable results. Is Mr. Jones entitled to a new trial because the court erred when it found the SRA-FV satisfied *Frye*?

3. Due process requires to State to establish present dangerousness before a person may be involuntarily committed under

RCW 71.09. For a person who has been released from total confinement, the State must show a recent overt act in order to establish present dangerousness. It is not sufficient to establish the person was confined on a community custody violation, unless the violation itself would have constituted a recent overt act. Did the State fail to prove beyond a reasonable doubt that Mr. Jones was presently dangerous where he had been released from custody but was serving time for a community custody violation which would not itself have constituted a recent overt act?

D. STATEMENT OF THE CASE

1. Mr. Jones was released from total confinement in December, 2010.

Mr. Jones was sentenced to 198 months for two counts of rape in the second degree and an unlawful imprisonment on September 19, 1997. CP 1348.¹ He was ordered to serve 36 months community custody. *Id.* He was released from total confinement on or about December 19, 2010. 1 VR 12.

¹ The verbatim report of proceedings contains eight volumes. The first six volumes are consecutively paginated. These volumes will be referred to by the volume on their cover page. The remaining volumes will be referred to by the first dates of the proceedings contained within the volume, i.e. 2/12/13 and 5/16/2014. Clerk's Papers will be referred to by CP and their page number.

After returning to the community, Mr. Jones had three community custody violations, all for drug use.²

- December 22, 2010 – Verbal reprimand for consuming alcohol;
 - March 4, 2011 – Positive urinalysis for THC, for which he served 17 days in jail;
 - August 3, 2011 – Positive urinalysis for methamphetamines, for which he served 30 days in jail;
2. Mr. Jones was incarcerated for using marijuana when the State filed the 71.09 commitment petition.

Mr. Jones was then arrested on September 7, 2011 and charged with rape in the first degree. 1 VR 13. After the complaining witness testified in his case, the State offered a plea bargain to assault in the third degree, which Mr. Jones accepted. CP 1399. Although the standard range for this charge was 60 months, the court imposed an exceptional sentence of 12 months, based upon the recommendations of the parties. *Id.* Mr. Jones served this sentence prior to when the State filed for involuntary commitment.

Mr. Jones received his third administrative hearing regarding drug use on September 21, 2011 when he pleaded guilty to the violation

² A complete copy of the community custody violations is found at CP 1367-1391.

for marijuana use. CP 1393-96. For the drug use, Mr. Jones was sanctioned by the hearing officer to 525 days, which was the remainder of the time remaining on his 1997 sentence. 1 VR 14. According to the State, this sanction “had nothing to do with the kind of simultaneous rape charge.” *Id.* While serving out his sanction, the State moved to commit Mr. Jones.

3. Because Mr. Jones was ordered to serve the remainder of his sentence for violating his community custody by using marijuana, the court ruled the State did not need to prove Mr. Jones has committed a recent overt act.

Because Mr. Jones had been released from total confinement after serving his time for his 1997 conviction, Mr. Jones challenged whether the State could commit him at all. The court heard Mr. Jones had been returned to custody for the violation of conditions, mainly the consumption or use of marijuana. 1 VR 41. Because the administrative sanction for Mr. Jones’ violation was to return him to custody for the remainder of his time owed, the court ruled that the State did not need to prove a recent overt act. *Id.* The court found there is a distinction “between being held on a community custody violation versus having your sentence carried out.” *Id.* “Because he was serving out the remainder of his sentence, the State would, therefore, not be required to prove a recent overt act.” *Id.* The court declined to rule upon whether

Mr. Jones' conviction for assault in the third degree would constitute a recent overt act. 1 VR 41.

4. Mr. Jones challenged the admissibility of the SRA-FV in a *Frye* hearing.

Prior to the initial commitment trial, the court held a *Frye* hearing to determine whether a dynamic risk assessment tool called the SRA-FV could be used by the State to show the likelihood Mr. Jones would reoffend if released to the community. The State offered testimony from two witnesses, Dr. Harry Hoberman and Dr. Amy Phenix. Mr. Jones offered testimony from Dr. Brian Abbott. Both Mr. Jones and the State offered additional evidence. Mr. Jones offered a declaration from Dr. Theodore Donaldson, in addition to scientific studies and other literature.³

5. The court failed to consider all the relevant evidence introduced by the parties before ruling on whether the SRA-FV satisfies *Frye*.

The court found that the SRA-FV satisfied *Frye*. In making its ruling, the court stated it “didn't go through all of the attachments and the declarations” submitted to it by the parties. 5/16/14 VR 267.

Recognizing a limited knowledge of science and agreeing that “this is a

³ The testimony of Dr. Hoberman can be found at 5/16/14 VR 9-81. Dr. Phenix's testimony is at 5/16/14 VR 81-139. Dr. Abbott's testimony is from 5/16/14 139-234. The additional evidence offered by Mr. Jones is found at CP 277-438.

lot of science,” the court found the State had presented sufficient evidence on both the underlying scientific principle and the techniques used to employ to test to find it satisfied *Frye. Id.* There is no discussion in the record about why the court choose not to review the evidence submitted to it by the parties.

6. The court allowed the State to introduce evidence of unadjudicated allegations of sexual misconduct under ER 404(b) and ER 703.

Mr. Jones sought to preclude evidence under ER 404(b), ER 703 and ER 705. Mr. Jones asked the court to preclude evidence of prior uncharged bad acts, including alleged sexual assaults. 1 VR 363. The court found by a preponderance of the evidence that the incidents had occurred, they were relevant because they helped the expert form a basis for his opinion and that the probative value of the evidence outweighed the prejudicial effect. 1 VR 376-77. Only one of the incidents involved testimony from an alleged victim, while the remainder were introduced through the testimony of the State’s expert, Dr. Hoberman under ER 703 and ER 705. *See*, 5 VR 688-707.

7. The State’s expert utilized the SRA-FV to establish future dangerousness.

Dr. Hoberman used the SRA-FV to examine dynamic risk factors associated with Mr. Jones likelihood to reoffend. 4 VR 561. He

found Mr. Jones scored in the “very high category.” 4 VR 562. Even using this group, Dr. Hoberman found the likelihood of Mr. Jones reoffending was 36 percent over ten years. 4 VR 629. He then told the jury this was not a completely accurate prediction because most rapes are not reported or detected. *Id.*

Dr. Brian Abbott testified for Mr. Jones, providing expert opinion testimony that Mr. Jones did not meet the criteria for confinement. He stated Mr. Jones had “anti-social personality traits,” but he could not substantiate a current “full-blown personality disorder or antisocial personality disorder.” 5 VR 764-65. Dr. Abbott testified Mr. Jones did not suffer from sexual sadism. 5 VR 790. Dr. Abbott found Mr. Jones risk to reoffend fell below the statutory threshold of 50%. 5 VR 825. He found the likelihood Mr. Jones would reoffend within five years was 11.4 percent, stating it was possible then range was “between 8.2 percent to 15.6 percent when taking into account the error in trying to estimate recidivism risk.” *Id.*

The jury found the State had met its burden. 6 VR 988.

E. ARGUMENT

1. Mr. Jones due process rights were violated when the court did not consider the evidence he submitted.

a. The right to be heard includes the obligation of the court to consider evidence.

No person may be deprived of life, liberty, or property without due process of law. *Det. of Henrickson v. State*, 140 Wn.2d 686, 694, 2 P.3d 473, 477 (2000) (citing *In Re Pers. Restraint of Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993)); U.S. Const. amend. 5, U.S. Const. amend. 14; Const. art. I, § 3. The core of the right to due process is the right to be meaningfully heard. *Mathews. v. Eldridge*, 242 U.S. 319, 334, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976). This includes the due process right to present relevant, admissible evidence. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, 844 P.2d 1018, *cert. denied*, 508 U.S. 953, 113 S. Ct. 2449, 124 L.Ed.2d (1993). “Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.” *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976); *see also In re Det. of Anderson*,

166 Wn.2d 543, 551, 211 P.3d 994, 998 (2009) (court abused its discretion in failing to appoint an additional expert at public expense).

Courts are expected to fully consider the evidence presented before them. Keith Swisher, *The Modern Movement of Vindicating Violations of Criminal Defendants' Rights Through Judicial Discipline*, 14 Wash. & Lee J. Civil Rts. & Soc. Just. 255, 274 (2008); Code of Judicial Conduct 2.5(a).⁴ A court abuses its discretion where it fails to allow evidence to be considered which is material and relevant. *State v. Roberts*, 80 Wn. App 342, 356, 908 P.2d 892 (1996); *State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984). Misconduct may occur where a judge fails to allow a party to present evidence on their own behalf. *See, e.g., In re Dash*, 564 S.E.2d 672, 673 (S.C. 2002) (reprimanding judge for finding defendant guilty without allowing defendant to present evidence); *In re Milhouse*, 605 N.W.2d 15, 15 (Mich. 2000) (suspending judge for entering guilty verdict without a hearing); *In re Aucoin*, 767 So. 2d 30, 36 (La. 2000) (censuring and assessing costs against judge because he held immediate trials without warning to the defendant); *see also, In re Tucker*, 516 S.E.2d 593, 595 (N.C. 1999)

⁴ CJC 2.5(a) provides that “A judge shall perform judicial duties competently and diligently.”

(censuring judge because he prevented prosecution from presenting its case).

b. The court failed to consider the evidence submitted to it by Mr. Jones.

Prior to trial, the court held a *Frye* hearing to determine the admissibility of the SRA-FV, a predictive tool used to determine dynamic risk and likelihood to reoffend. *Det. of Ritter v. State*, 177 Wn. App. 519, 521, 312 P.3d 723 (2013) review denied sub nom. *In re Det. of Ritter*, 180 Wn.2d 1028, 331 P.3d 1172 (2014). Mr. Jones presented substantial evidence at this hearing demonstrating that the test did not satisfy *Frye*, including both live testimony and documentary evidence, including:

- Brian Abbott, PhD (live testimony and declaration). 5/16/14 VR 139-234, CP 277-305.
- David Thornton and Raymond Knight, *Construction and Validation of SRA-FV Need Assessment* (2013) CP 338-53.
- Brian Abbott, *The Utility of Assessing “External Risk Factors When Selecting Static-99R Preference Groups* (2013) CP 355-84.
- Declaration of Harry Hoberman, PhD (*In Re Det. of Botner*) CP 386-97
- Declaration of Theodore Donaldson, PhD CP 399-411
- Declaration of Amy Phenix, PhD (*In Re Det. of Parsons*) CP 419-38.

- Letters to Gov. Jerry Brown detailing the use and disuse of the SRA-FV by California as a risk assessment tool. CP 412-17

Before ruling on whether the SRA-FV satisfied *Frye*, the court stated “this is a lot of science.” 5/16/14 VR 267. The court also told the parties that it “didn't go through all of the attachments and the declarations” submitted to it by the parties. *Id.* The court recognized there are “some limitations” to the science behind the SRA-FV. 5/16/14 VR 269. Then, based on the evidence the court had considered, it determined the SRA-FV is “accepted generally in the community” and allowed the State to rely upon the test to prove its case. 5/16/14 VR 269.

c. The violation of Mr. Jones due process entitles him to a new *Frye* hearing and trial.

Because the Court failed to consider the evidence presented to it, Mr. Jones’ due process rights were violated. The declarations of experts, along with scientific articles critical of the SRA-FV were relevant to the decision the court had to make regarding the reliability of the SRA-FV as a forensic tool. Other than the declaration made by the court that it had not read the material, the court made no ruling why the evidence Mr. Jones submitted should not have been considered.

This violation of Mr. Jones due process rights requires reversal and remand for a new hearing and trial.

2. The SRA-FV is a new and novel tool, which does not meet the standards required by *Frye*.

a. The consequence resulting from the use of flawed forensic science require courts to closely scrutinize scientific evidence before it is admitted.

Courts must be wary when admitting scientific evidence. In an examination of 62 of the first 67 DNA exonerations of wrongful convictions, the Innocence Project concluded that more than a third of them had involved “tainted or fraudulent science.” Barry Scheck et al., *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted* 246, n. 60 (Signet 2000). “False positives-- that is, inaccurate incriminating test results--are endemic to much of what passes for ‘forensic science.’” *U.S. v. Bentham*, 414 F. Supp. 2d 472, 473 (S.D.N.Y. 2006). Courts have repudiated or questioned forensic science once thought reliable, including hair microscopy, serology, comparative bullet lead analysis, traditional ballistics identification, bite mark identification, and handwriting analysis, among other sciences which similarly lack a solid foundation in science. Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science,*

and the Search for Truth, 38 Seton Hall L. Rev. 893, 935-36 (2008). Although the National Academy of Science's Report ("NAS Report") on forensic science did not address forensic psychology, it recognized the "forensic science system, encompassing both research and practice, has serious problems" requiring "change and advancements, both systemic and scientific ... to ensure the reliability of [many] disciplines, establish enforceable standards, and promote best practices and their consistent application." National Research Council of the National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward* xx (2009).

This same scrutiny must be applied to psychological testing. In fact, much of the NAS Report-including the observed strengths and needs of forensic science, and the recommendations for improvement-are relevant to the science and practice of forensic psychology. Kirk Heilbrun, Stephanie Brooks, *Forensic Psychology and Forensic Science: A Proposed Agenda for the Next Decade*, 16 Psychol. Pub. Pol'y & L. 219, 228 (2010). Where psychological testing is not reliable, courts should prohibit or limit its admission. *See, e.g., State v. Black*, 109 Wn.2d 336, 349-50, 745 P.2d 12 (1987) (en banc) (rape trauma syndrome not established as a reliable means in which to prove rape

occurred); *In re Detention of Halgren*, 156 Wn.2d 795, 806, 132 P.3d 714 (2006) (en banc) (penile plethysmograph (PPG) test not accepted by itself as reliable indicator of recidivism of sex offender). Like other forensic sciences, forensic psychology must be closely scrutinized before it is admitted.

b. Washington’s approach to scientific evidence is designed to limit the use of untested and unreliable scientific evidence.

Washington utilizes the *Frye* test for novel scientific evidence. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 597, 600-01, 260 P.3d 857 (2011). *Frye* is by design a conservative approach to admitting new scientific evidence, requiring careful assessment of the general acceptance of the theory and methodology in order to exclude, among other things, “pseudoscience” from the courtroom. *State v. Copeland*, 130 Wn.2d 244, 259, 922 P.2d 1304 (1996). “Evidence deriving from a scientific theory or principle is admissible only if that theory or principle has achieved general acceptance in the relevant scientific community.” *State v. Martin*, 101 Wn.2d 713, 719, 684 P.2d 651 (1984). Before expert testimony may be considered, the reliability of the underlying principles must be accepted by the scientific community. *Copeland*, 130 Wn.2d at 255. “If there is a significant

dispute between qualified experts as to the validity of scientific evidence, it may not be admitted.” *Id.* (quoting *State v. Canaday*, 90 Wn.2d 808, 887, 585 P.2d 1185 (1978)).

Novel scientific evidence satisfies *Frye* if (1) the scientific theory or principle upon which the evidence is based has gained general acceptance in the relevant scientific community of which it is a part and (2) there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results. *Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 176 Wn. App. 168, 175, 313 P.3d 408 (2013), *rev. denied*, 179 Wn.2d 1019 (2014) (citing *Frye v. United States*, 293 F. 1013, 1014, 34 A.L.R. 145 (D.C. Cir.1923)). These stringent evidentiary rules regarding expert witnesses are intended to protect against “unreliable, untested or junk science.” 5B Karl Teglund, *Washington Practice: Evidence Law & Practice*, § 702.18, at 81 (5th ed.).

This Court reviews evidence admission under *Frye* de novo. *Det. of Ritter v. State*, 177 Wn. App. at 522 (citing *State v. Baity*, 140 Wn.2d 1, 9–10, 991 P.2d 1151 (2000)). In determining if novel scientific evidence satisfies *Frye*, this Court must perform “a searching review which may extend beyond the record and involve consideration

of scientific literature as well as secondary legal authority.” *Copeland*, 130 Wn.2d at 255–56 (citing *Cauthron*, 120 Wn.2d at 887–88).

c. The SRA-FV is not generally accepted in the relevant scientific community

The SRA-FV is a novel scientific tool not yet accepted by the scientific community. Had the court reviewed all of the evidence submitted to it by Mr. Jones, it would have concluded the test does not satisfy *Frye*. The SRA-FV is not based on established sound scientific methodology and has not achieved general acceptance in the scientific community for predicting future dangerousness.

The test is purported to be a structured clinical judgment tool for evaluating “stable dynamic risk factors” and integrating them with “static risk factors” considered by actuarial instruments. 5/16/14 VR 32, *see also, Ritter*, 177 Wn. App. at 523, *referencing* Raymond A. Knight & David Thornton, *Evaluating and Improving Risk Assessment Schemes for Sexual Recidivism*, 18–19 (Nat’l Inst. of Justice, U.S. Dep’t of Justice Document No. NCJ 217618, 2007) (“In general, [structured risk assessment] is better conceptualized as a heuristic framework that can be used to guide the selection and organization of variables from any relevant data set.”). It is a way of predicting future dangerousness that is “neither purely actuarial nor purely clinical.” *Id.*

The SRA-FV has not been properly validated, and has low inter-rater reliability and construct validity.⁵ It should not be considered as evidence in fact finding hearings.

Unlike static risk assessment tools, it does not appear that dynamic risk assessment tools like the SRA-FV have gained wide spread acceptance in the scientific community. There have been few judicial findings regarding the use of the SRA-FV. *See, Ritter*, 177 Wn. App. at 525; *see e.g. In re Civil Commitment of Radke*, Not reported in --- N.W.2d ---, No. A13-0795, 2014 WL 4494262, at *6 (Minn. Ct. App. Sept. 15, 2014) (finding the SRA-FV is a new test in Minnesota).⁶ Although Division 2 has found the SRA-FV satisfies *Frye*, Division 3 has yet to rule on this issue. *See, In Re Det. of Pettis*, - -- P.3d ---, No. 45499-8-II, 2015 WL 3533220 (Wash. Ct. App. June 4, 2015).

⁵ “Interrater reliability” refers to the likelihood of different evaluators reaching the same conclusions or score when examining the same individual. CP 267. “Construct validity” refers to the degree to which a test either as a whole or its parts measure what it claims to measure. CP 269.

⁶ Minn. State. Sec. 480A.08 provides that “Unpublished opinions of the Court of Appeals are not precedential. Unpublished opinions must not be cited unless the party citing the unpublished opinion provides a full and correct copy to all other counsel at least 48 hours before its use in any pretrial conference, hearing, or trial. If cited in a brief or memorandum of law, a copy of the unpublished opinion must be provided to all other counsel at the time the brief or memorandum is served, and other counsel may respond.” Per GR 14.1(b), a copy is attached.

Other states have stopped using the tool. California adopted the SRA–FV as its official dynamic risk assessment instrument for evaluating sex offenders' future dangerousness in February 2011. Letter from Janet Neely, Deputy Att'y Gen. of Cal., on Behalf of the Cal. State Authorized Risk Assessment Tool for Sex Offenders Comm., to Jerry Brown, Governor of Cal. (Feb. 25, 2011); see Cal.Penal Code §§ 290.04, .09. In September 2013, California switched to the Stable–2007/Acute–2007 for unspecified reasons. *Ritter*, 177 Wn. App. at 524.

While this appeal has been pending, the Static-99R authors published a peer-reviewed article confirming what Dr. Abbott foreshadowed. Karl Hanson, et al., *What Sexual Recidivism Rates Are Associated With Static-99R And Static-2002R Scores?* 15 *Sexual Abuse: J. Res. & Treatment* 1 (2015).⁷ The authors recognized that some in the field used the SRA-FV as a means of selecting an appropriate Static-99R reference group, but criticized that choice as premature: “empirically combining STATIC scores with other measures has the effect of creating a new actuarial measure, which

⁷ This article was published after the trial court’s *Frye* hearing and is not part of the record, but this Court has already stated its *Frye* analysis can extend beyond the record. *Ritter*, 177 Wn. App. at 522. An “in press” version of the article is available here: http://www.static99.org/pdfdocs/Research-Hanson_Thornton_Helmus_Babchishin-2015.pdf. (Last accessed, June 30, 2015.) Counsel for the appellant will provide a published copy upon request.

needs to be evaluated on its own merits.” *Id.*, at 21. The authors cautioned that “the ability of evaluators to improve accuracy by choosing reference groups has yet to be empirically tested.” *Id.*, at 24. The 2015 publication confirms that acceptance of a novel method only comes after an affirmative showing of reliability and validity.

d. Generally accepted methods of applying the SRA-FV in a manner capable of producing reliable results do not exist.

Frye also requires that there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results. *Lake Chelan Shores Homeowners Ass'n*, 176 Wn. App. at 175. The SRA-FV has not been shown to produce reliable results.

- i. The SRA-FV had not been properly validated and replicated.

Risk assessment tools are more likely to be accurate where they have been validated. The SRA-FV has not been properly validated. The only validation process SRA-FV has only been subjected to a process known as split-validation. 5/16/14 VR 112; 115. The testers split the developmental sample into groups, validating one part against the other. *Id.* There are significant limitations with this validation, which fails to consider whether observations about the developmental sample can be generalized for modern-day groups of sex-offenders. 5/16/14

VR 114. Because the SRA-FV had not been validated with another group of offenders, Dr. Abbott testified that

At this point, all we know is that the SRA-FV was able to predict sexual recidivism in the Bridgewater sample. We don't know that would happen in any other group of sex offenders. 5/16/14 VR 164.

The State's expert, Dr. Hoberman, agreed with this analysis stating, "Obviously, it's a concern that persons using a very particular data set that was described as thin, that was an older data set, that was collected prior to most of the contemporary research on sex offending risk factors didn't include all of the information, if you will, that might be relevant to making those ratings." 5/16/14 VR 44.

Because the SRA-FV validation results are limited to a particular population, cross validation is essential before it can be accepted by the scientific community. Declaration of Brian Abbott, CP CP 267; see also Thornton & Knight, *supra*, at 14. Cross validation is the process whereby the result of one study or test can be replicated on a subsequent, separate population, thereby establishing the integrity of the study or test. Failure to scientifically cross-validate a risk assessment tool can be fatal because characteristics of offender populations can vary dramatically, and a tool constructed on one population may not generalize, or cross over, to a different population.

Donna Cropp Bechman, *Sex Offender Civil Commitments: Scientists or Psychics?* 16 Crim. Just. 24, 28–29 (2001). Until the SRA-FV has been subjected to proper cross-validation, it cannot be found to be scientifically reliable and courts should reject its use at trial.

- ii. The low inter-rater reliability of the SRA-FV demonstrates that it cannot be relied upon at trial.

The SRA-FV has low inter-rater reliability. Inter-rater reliability refers to the likelihood of different evaluators reaching the same conclusion or score when examining an individual. CP 267. “High inter-rater reliability reflects that standardized rating criteria can be applied precisely when assessing the extent of the long-term vulnerabilities purportedly measured by each item.” CP 287. For forensic evaluations, inter-rater reliability should reach 80%, if not more. *Id.* Low inter-rater reliability undercuts the “trustworthiness” or helpfulness of a forensic tool like the SRA-FV. *Id.*

The inter-rater reliability falls below the rates expected for scientific acceptance. There have been two studies conducted on the inter-rater reliability of the SRA-FV. The first study showed an inter-rater reliability of 55%. 5/16/14 VR 59. The second study produced an inter-rater reliability of 64%. 5/16/14 VR 60. In fact, the extent of error

in measurement is nearly the same as what the SRA-FV intends to measure. CP 288. This means the SRA-FV will provide inaccurate information as often as it is accurate. CP 288.

- iii. The low inter-rater reliability of the SRA-FV suggests it may not be measuring what it intends to measure.

Construct validity refers to the degree to which something measures what it is intended to measure. 5/16/14 VR 75. A low inter-rater reliability score indicates the SRA-FV may not be measuring what it purports to be measuring. 5/16/14 VR 76. In the study of construct validity, the creators of the SRA-FV indicated their study did not provide a direct examination of the construct validity of the different factor ratings that are combined to produce the overall need score. *Id.* This means the SRA-FV may not measure levels of criminogenic needs. *Id.* Because the SRA-FV authors have not shown construct validity, the SRA-FV is an incomplete tool which remains in the early stages of its development.

e. The improper admission of the SRA-FV entitles Mr. Jones to a new trial.

Where there is a risk of prejudice and “no way to know what value the jury placed upon the improperly admitted evidence,” a new trial is necessary. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230

P.3d 583 (2010) (*quoting Thomas v. French*, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983)). The SRA-FV is a novel scientific instrument which has not been accepted by the general scientific community. In terms of validity and reliability, it is in its early stages of development. It lacks sufficient cross validation and has low inter-reliability. This court should find the SRA-FV does not meet the *Frye* standard and should also find that the SRA-FV was improperly introduced at trial. Because this error impacted Mr. Jones ability to receive a fair trial, this Court should remand for a new trial.

3. The State failed to establish Mr. Jones committed a recent overt act as he was incarcerated for a community custody violation for drug use when the State sought to commit him.

a. Mr. Jones may only be committed under RCW 71.09 if he was about to be released from incarceration for a sexually violent act or where the State is able to show a recent overt act occurred when the petition was filed.

Commitment under RCW 71.09 constitutes a severe deprivation of individual liberty that mandates strict adherence to the substantive and procedural restrictions of governing statutes and the constitutional right to due process of law. *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 1785, 118 L. Ed. 2d 434 (1992); *In re Det. of Thorell*, 149

Wn.2d 724, 732, 72 P.3d 708 (2003); U.S. Const. amend. 14; Const. art. I, § 3. Involuntary civil commitment is a substantial curtailment of individual liberty and due process is required before a person may be committed. *In re Det. of Lewis*, 163 Wn.2d 188, 193, 177 P.3d 708 (2008). Because involuntary commitment impinges on the fundamental right to liberty, RCW 71.09 must advance compelling state interests and be “narrowly drawn to serve those interests.” *Young*, 122 Wn.2d at 26. To satisfy due process, “an individual must be both mentally ill and presently dangerous before he or she may be indefinitely committed.” *Detention of Marshall v. State*, 156 Wn.2d 150, 157, 125 P.3d 111 (2005) (quoting *In re the Det. of Albrecht*, 147 Wn.2d 1, 7-8, 51 P.3d 73 (2002)).

If the State is seeking to commit a person who has been released from custody, it must prove a recent overt act.⁸ *Marshall*, 156 Wn.2d at 157, *Albrecht*, 147 Wn.2d at 8; *Young*, 122 Wn.2d at 41–42, 857 P.2d 989, *see also*, RCW 71.09.030(1). For a sex offender who has been released from prison, placed into community supervision, and confined

⁸ A “recent overt act” is defined as “any act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act or behaviors.” RCW 71.09.020(12).

for a community supervision violation for an act which would not qualify as an overt act, due process is not satisfied unless the State is able to prove a recent overt act. *Albrecht*, 147 Wn.2d at 3.⁹

Incarceration for a community custody violation, even when the underlying charge would justify holding the person, does not satisfy the due process requirements for commitment. After an offender has been released into the community, proof of a recent overt act is no longer an impossible burden for the State to meet and must be proven to establish current dangerousness. *Albrecht*, 147 Wn.2d at 10.

[O]nce the offender is released into the community ... due process requires a showing of current dangerousness. ... An individual who has recently been free in the community and is subsequently incarcerated for an act that would not in itself qualify as an overt act cannot necessarily be said to be currently dangerous. *Albrecht*, 147 Wn.2d at 10–11, 51 P.3d 73

The State's obligation to plead and prove a recent overt act beyond a reasonable doubt cannot turn on whether someone is found, by only a preponderance of the evidence, to have violated community placement terms which may be vague or relatively insignificant. *In re Detention of Davis*, 109 Wn. App. 734, 745, 37 P.3d 325 (2002) (incarceration for

⁹ If the violation itself constitutes a recent overt act, due process may be satisfied. See *In re the Det. of Hovinga*, 132 Wn. App. 16, 18, 130 P.3d 830 (2006) (distinguishing incarceration for a violent sexual offense or recent overt act from a community custody violation which is not an overt act for purposes of RCW 71.09).

community placement violation does not constitute incarceration for underlying sexually violent offense), *see also, In re Det. of Broten*, 115 Wn. App. 252, 256, 62 P.3d 514, 516 (2003) (new trial required because no recent overt act found where respondent was returned to serve remainder of sentence when his community custody status was revoked). Instead, the State must prove beyond a reasonable doubt Mr. Jones committed a recent overt act. By relying upon incarceration for his community custody violation for marijuana use, the State failed to do so.

b. The State failed to prove a recent overt act.

Because Mr. Jones had been released into the community and was serving time for a violation of his community placement, the State was required to prove a recent overt act.

- i. Mr. Jones had been released from custody.

Mr. Jones was released from total confinement on or about December 19, 2010 from his 1997 conviction. CP 1348. The State moved to commit him when he was incarcerated for a community custody violation for “recent drug use.” CP 1393-96. This violation, according to the State, “had nothing to do with the kind of simultaneous rape charge.” 1 VR 14.

- ii. He was incarcerated on the day the petition was filed.

Mr. Jones received his third administrative hearing regarding drug use on September 21, 2011 when he pleaded guilty to the violation for marijuana use. CP 1399. For the drug use, Mr. Jones was sanctioned by the hearing officer to 525 days, which was the remainder of his sentence. *Id.*

- iii. The charge upon which he was incarcerated did not constitute a recent overt act.

Mr. Jones was not incarcerated for conduct which would constitute a recent overt act when the State filed its commitment petition. Instead, Mr. Jones was incarcerated for violating his community custody by using marijuana. CP 1393. As with *Albrecht* and *Brotten*, proof of a recent overt act was “no longer an impossible burden for the State to meet.” *Brotten*, 115 Wn. App. at 257, quoting *Albrecht*, 147 Wn.2d at 10. Accordingly, to meet due process standards, the State must prove that Mr. Jones committed a recent overt act. *Id.*

c. Mr. Jones is entitled to a new trial.

Mr. Jones is entitled to a jury finding of proof beyond a reasonable doubt that he committed a recent overt act. *Brotten*, 115 Wn. App. at 263, citing RCW 71.09.050(3); .060(1). Because Mr. Jones was

released to the community after having served his time for the underlying sexual offense, the State had to prove a recent overt act. Mr. Jones is entitled to a new trial where the State must be required to prove a recent overt act before Mr. Jones is committed.

F. CONCLUSION

Mr. Jones was denied a fair trial. For the reasons stated above, Mr. Jones commitment should be reversed and a new trial ordered.

DATED this 6th day of July 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

ATTACHMENT

In the Matter of the Civil Commitment of Matthew Alan Radke

Not reported in --- N.W.2d ---, No. A13-0795, 2014 WL 4494262
(Minn. Ct. App. Sept. 15, 2014)

Minn. State. Sec. 480A.08 states:

Unpublished opinions of the Court of Appeals are not precedential. Unpublished opinions must not be cited unless the party citing the unpublished opinion provides a full and correct copy to all other counsel at least 48 hours before its use in any pretrial conference, hearing, or trial. If cited in a brief or memorandum of law, a copy of the unpublished opinion must be provided to all other counsel at the time the brief or memorandum is served, and other counsel may respond.

Per GR 14.1(b), a copy is attached.

2014 WL 4494262

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN.
ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

In the Matter of the CIVIL COMMITMENT OF Matthew Alan
RADKE.

No. A13–0795. | Sept. 15, 2014.

Freeborn County District Court, File No. 24–PR–12–625.

Attorneys and Law Firms

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Law, Mankato, MN, for appellant.

[Lori Swanson](#), Attorney General, St. Paul, MN, [Craig S. Nelson](#),
Freeborn County Attorney, Albert Lea, MN, for respondent.

Considered and decided by [HUDSON](#), Presiding Judge; [ROSS](#), Judge;
and [SCHELLHAS](#), Judge.

UNPUBLISHED OPINION

[HUDSON](#), Judge.

*1 In this appeal from his civil commitment as a sexually dangerous person (SDP), appellant argues that the district court clearly erred by discrediting one expert’s actuarial assessment, the SRA–FV, as a new measure, not yet widely used in Minnesota, and crediting the opinion of another expert, who relied partially on structured clinical judgment. He also argues that the district court’s findings reflect factor repetition, which is impermissible under *In re Civil Commitment of Ince*, 847 N.W.2d 13 (Minn.2014). He further challenges the district court’s determination that he failed to show the availability of a less-restrictive

alternative meeting his needs and public-safety requirements. We affirm.

FACTS

In April 2012, a petition was filed to commit appellant Matthew Alan Radke as an SDP. *See* [Minn.Stat. § 253D.02, subd. 16](#) (Supp.2013) (defining standards for commitment as a sexually dangerous person).¹ In 2008, appellant was convicted of second-degree criminal sexual conduct based on repeated sexual contact with his girlfriend's daughter when she was four to ten years old. In 2007, he pleaded guilty to fifth-degree criminal sexual conduct after grabbing a woman at a facility where he was undergoing chemical-dependency treatment. As a result of the second-degree criminal sexual conduct conviction, appellant was sentenced to 21 months in prison, with execution stayed and probation for 0–20 years.

In 2008, appellant entered outpatient sex-offender treatment at the Safety Center, Inc. After reports in 2009 and 2010 that he violated probation conditions by viewing and masturbating to adult and child pornography, his probation was restricted and treatment modified. In 2012, he was convicted of interference with privacy after he engaged in window peeping, masturbated when he returned home, and then reported his behavior. Appellant was suspended from treatment at the Safety Center, his probation was revoked, and he was sent to prison. In 1996, he was diagnosed with [major depression](#), borderline passive-aggressive personality traits, intense and unstable personal relationships, and a global assessment of impairment in social functioning.

At a hearing on the commitment petition, appellant's probation agent in the Minnesota Department of Corrections outpatient enhanced sex-offender program testified that appellant lacks impulse control and admitted to sexual fantasies about young children, raising concerns about a future sexual offense. The agent testified that he was also concerned because appellant had stated that he engaged in window peeping "because he deserved it" after treatment success.

Appellant's psychologist at the Safety Center testified that appellant showed positive effects from his three-hour-per-weekday treatment and

that he would be considered for readmission because his last offense occurred during the relapse-prevention phase. The psychologist testified, however, that he was concerned by appellant's window peeping near the end of treatment and his inability to use treatment techniques to stop this behavior.

*2 Appellant testified that he had learned from his treatment at the Safety Center and was able to control his impulses "to a certain point." He testified that he did not believe his attraction to children would go away, but he could control himself if he stopped and considered the consequences of an action. He testified that, since he was a teenager, he would attempt to engage in window peeping three to four times every five or six months on a regular basis; that, over a six-year period, he touched his girlfriend's daughter sexually "close to 200 times"; and that his attraction to young females had "stayed pretty much the same" since he was 10 or 11 years old. He stated that he still had sexual problems, but he did not "act on them as much as [he] used to."

The two court-appointed psychologists, Dr. Linda Marshall and Dr. Mary Kenning, submitted reports and testimony. Dr. Marshall gave her opinion that appellant met the threshold for commitment as SDP; Dr. Kenning gave her opinion that he did not meet that threshold.

Dr. Marshall administered the Minnesota Multiphasic Personality Inventory-2, which showed that appellant had clinical elevations in Axis I disorders relating to antisocial behavior, paranoia, and confused thinking. His scores on the Millon Clinical Multiaxial Inventory-III indicated that he had pervasive and enduring personality traits underlining his interpersonal difficulties. Dr. Marshall diagnosed appellant with Axis I disorders of pedophilia, voyeurism, a rule-out diagnosis of [paraphilia](#), not otherwise specified, and histories of [bipolar disorder](#), alcohol dependency, and cannabis abuse. She also diagnosed him with Axis II, [borderline personality disorder](#), which she believed affected his judgment, his relationship difficulties, and the chaos in his life.

The results of the Minnesota Sex Offender Screening Tool-3.1 (MnSOST-3.1), given during appellant's end-of-confinement review, showed that he had a predicted probability of sexual recidivism of 4 .36 percent, with a percentile rank of 79.40, placing appellant in the group

of sex offenders with a moderate risk of committing another sex offense within four years. Appellant scored a seven on the Static-99R, an actuarial instrument that measures recidivism with static factors. Dr. Marshall testified that this score placed him in the group of sex offenders at high risk for being charged or convicted of another sex offense. She also administered the Sexual Violence Risk-20 (SVR-20), an instrument that uses structured clinical judgment by assessing an organized list of risk factors found to correlate with a risk of sexual offenses. On the SVR-20, appellant scored 13 of 20 risk markers, placing him in the moderate-to-high-risk range for risk of sexual violence.

Dr. Marshall testified that, in evaluating appellant, she looked at “the big picture,” including his test scores and interview. She testified that it was a “red flag” that he had engaged in window peeping after three years in treatment and that he should have been able to identify triggers and stop any sexually deviant behavior before it occurred. She indicated that appellant’s difficulties in outpatient treatment validated her opinion that more secure treatment would be appropriate and that she was concerned for public safety, based on his lack of success in treatment and psychological instability.

***3** Dr. Marshall opined that the *Linehan* factors supported appellant’s commitment as an SDP.² She stated that his age of 37 did not significantly lower his risk to reoffend, that his last offense was in 2011, and that he had a history of early dysfunction and problems. She noted his criminal sexual conduct convictions, including the offense involving a child over a six-year period. She reported that base-rate statistics suggest a high risk of appellant reoffending: that, under the MnSOST-3.1, which looks at both static and dynamic factors, he scored as a moderate risk to reoffend and that on the Static-99R, he scored as a high risk of reconviction. She indicated that his designation as a Level 3 sex offender and possible problems finding employment would create additional stress, and he would be returning to the area in which his offenses took place and living with his mother, which had not previously stopped him from offending. She pointed out that appellant has not completed treatment and engaged in voyeurism during treatment, and that she would not recommend additional outpatient treatment because he needs more structured treatment in an inpatient program.

Dr. Mary Kenning, the second court-appointed examiner, testified that

appellant has had issues with deceitfulness, failure to conform to social norms, impulsivity, and reckless disregard for the safety of others; that ongoing characteristics of his personality disorder made treatment progress slow; and that his personality style required particular intervention. She opined that his disorders have affected his engaging in inappropriate sexual activity, but that she “[did not] think he quite gets to highly likely” to engage in future harmful sexual conduct.

Dr. Kenning agreed with Dr. Marshall’s assessment of appellant’s risk of recidivism based on his scores on the MnSOST–3.1, the Static–99R, and the Hare Psychopathy Checklist–Revised (HARE–PCL–R), on which he scored in the moderate range. But Dr. Kenning also administered the Structured Risk Assessment–Forensic Version (SRA–FV), a dynamic risk-assessment measure that examines factors of an offender’s sexual interest, relational style, and self-management. She testified that the SRA–FV “is more recent research that helps us understand additional factors that aren’t part of the person’s history” and “have to do with here and now.” Dr. Kenning reported that appellant’s score on the SRA–FV was associated with a moderate level of psychological or dynamic needs, which best matches with the norm group of people preselected for treatment need, and that this score would tend to moderate his score on the Static–99R. She opined that, within the group of persons who scored a seven on the Static–99R, appellant has a lower level of individual need and risk, suggesting a rate of recidivism of 25.4 percent within five years, 33 percent within ten years, and 50.8 percent over a lifetime.

Dr. Kenning also saw appellant’s voyeurism as separate from his pedophilia. She testified that appellant had a better prognosis than a person solely attracted to children, and she did not believe his voyeurism was similar to that of offenders preparing for home invasion or stranger assault. She testified that appellant was amenable to treatment and she would endorse additional outpatient treatment. She believed that any concerns about his ability to complete treatment within his five-year conditional-release period could be addressed. She testified that appellant’s behavior was annoying, inappropriate, and to some extent invasive, but that he did not present a public safety risk unmanageable by intensive supervised release, ongoing treatment, and interventions such as medication.

*4 Dr. Kenning also reported on the application of the *Linehan* factors. She opined that appellant's gender and socioeconomic status increased his risk of reoffense and noted his contact victims. She stated that "[i]nformation from current risk assessment measures indicates that [appellant's] risk of recidivism is somewhat higher than the base rates for the average offender." She reported appellant's past stress arising from the murder of his son, alcohol abuse, and sex-offender treatment. She noted that, although return to the community would be stressful, he would likely live with his mother and not seek employment. And she believed that appellant's progress in sex-offender treatment was appropriate, if slow.

Dr. Kenning also testified, however, that "we have newer and better data ... now than *Linehan* reflects"; that demographic factors are subsumed in actuarial measures, such as the SRA-FV; and that some *Linehan* factors are now examined as part of an individual dynamic risk factor assessment. She testified that in the last few years, risk assessment has been discussed at the national level, and that some people had chosen not to use the SRA-FV because of a belief that it was not well-normed for use in commitment proceedings. She testified that she had received initial training on use of the SRA-FV during the last year and that she has probably used it only in about ten cases, but that California legally mandates its use in all sex-offender assessments. She testified that the SVR-20 "did a good job of predicting risk," but that it was "not very common anymore."

The district court held an additional hearing on the issue of the psychologists' testing methods. At that hearing, the state's attorney told the district court that, he could "to a certain extent, stipulate" an answer to the district court's first question: whether the SRA-FV, used in conjunction with the Static-99R, is a valid testing technique. He stated that "[i]t certainly is appropriate that they can be used together. That's not the issue from the state's point of view." The following colloquy occurred:

THE COURT: So what you're telling me is that, in essence, you're stipulating that the SRA-FV, used in conjunction with the Static-99R, is a valid testing technique. Is—Did I miss—

STATE'S ATTORNEY: Well, or it's a valid combination of the two

to consider issues. That's how I would state it, but yes.

THE COURT: Mr. Magnus, anything on that?

APPELLANT'S ATTORNEY: No, your honor. I think that that is an accurate statement; that it's a commonly accepted tool for assessment of risk in these matters.

....

THE COURT: Maybe that's a better terminology. It's an acceptable tool.

STATE'S ATTORNEY: Certainly.

Dr. Marshall testified that it was acceptable practice to use the SRA-FV in conjunction with the Static-99R and she also had received training in its administration, but she would categorize the SRA-FV as "relatively new" and "not widely used" and she had come across only one person who was currently using it in court examinations. She stated that she used the SVR-20 because she was familiar with it, and it examined both static and dynamic factors.

*5 Dr. Marshall testified that, since she began performing court examinations in about 1995, more actuarial instruments have become available, including the MnSOST-3.1 and the Static-99R. She acknowledged that some portions of the SRA-FV relate to an inability to complete treatment and can predict a risk of recidivism. But she testified that she "would never make a recommendation for commitment based on an actuarial score. You really, really have to look at the complete picture ... [t]he psychological testing was also very imperative ... in my decision and it was important for me to look at how he was functioning psychologically." She testified that appellant's mental illness and personality disorder, as shown in her psychological testing, interfered with his ability to control his sexual urges. She stated that beyond actuarial determinations, she saw significant factors: appellant had not successfully completed treatment; had offended while he was in treatment; and had a history of psychological problems and alcohol use. Appellant's attorney declined to call Dr. Kenning for additional testimony.

The district court concluded that appellant met the standards for civil commitment as an SDP. The district court found that clear and convincing evidence existed that, as a result of his past course of harmful sexual conduct and his mental disorders, it was highly likely that he would engage in further harmful sexual conduct. The district court found that Dr. Kenning “noted that the SRA–FV is a new assessment measure, not yet widely used in Minnesota,” and determined that Dr. Marshall’s opinion on the likelihood of reoffense was credible and Dr. Kenning’s opinion was not credible. The district court found that appellant failed to present a less-restrictive program than the Minnesota Sex Offender Treatment Program (MSOP) to meet his needs and public-safety requirements and committed him to that program. Appellant filed this appeal, which was stayed pending the release of *In re Civil Commitment of Ince*, 847 N.W.2d 13 (Minn.2014). Following *Ince*, this court dissolved the stay and reinstated the appeal.

DECISION

This court reviews de novo whether clear and convincing evidence in the record supports the district court’s conclusion that appellant meets the standards for commitment as an SDP. *In re Civil Commitment of Crosby*, 824 N.W.2d 351, 356 (Minn.App.2013), *review denied* (Minn. Mar. 27, 2013). But we review a district court’s factual findings for clear error. *In re Civil Commitment of Stone*, 711 N.W.2d 831, 836 (Minn.App.2006), *review denied* (Minn. June 20, 2006). We view the record in the light most favorable to the district court’s decision, recognizing that the district court is in the best position to assess and weigh the credibility of the witnesses. *See In re Civil Commitment of Navratil*, 799 N.W.2d 643, 647 (Minn.App.2011), *review denied* (Minn. Aug. 24, 2011). “Where the findings of fact rest almost entirely on expert testimony, the [district] court’s evaluation of credibility is of particular significance.” *In re Knops*, 536 N.W.2d 616, 620 (Minn.1995).

*6 Commitment as an SDP requires that a person “(1) has engaged in a course of harmful sexual conduct ...; (2) has manifested a sexual, personality, or other mental disorder or dysfunction; and (3) as a result, is likely to engage in acts of harmful sexual conduct.” *Minn.Stat. §*

253D.02, subd. 16. The Minnesota Supreme Court has interpreted this standard to mean that the state must establish that the person is “highly likely [to] engage in harmful sexual acts in the future.” *In re Linehan*, 594 N.W.2d 867, 876 (Minn.1999) (*Linehan IV*). Information relevant to this issue includes evidence on the six *Linehan* factors. See *Linehan I*, 518 N.W.2d at 614 (stating *Linehan* factors). No single factor is determinative, and whether someone is highly likely to reoffend is a complex inquiry. See *Linehan III*, 557 N.W.2d at 189 (stating that “[s]tatistical evidence of recidivism is only one of the six factors” and “dangerousness prediction methodology is complex and contested”).

A psychologist’s specialized knowledge assists the trier of fact in assessing a person’s psychological state, which is relevant to the criteria used to determine whether the person meets the legal standards for commitment as an SDP. *In re Civil Commitment of Jackson*, 658 N.W.2d 219, 227 (Minn.App.2003), review denied (Minn. May 20, 2003). Appellant challenges the district court’s finding that clear and convincing evidence exists that he is highly likely to engage in acts of harmful sexual conduct, based on the psychologists’ expert testimony. He first argues that the district court clearly erred by finding that Dr. Kenning testified that the SRA–FV is a new assessment measure, which is not yet widely used in Minnesota. He points out that Dr. Kenning testified that the SRA–FV was not a new assessment, that Dr. Marshall testified that it was acceptable to use both the SRA–FV and the Static–99R, and that both experts indicated that the SRA–FV moderates the Static–99R in an attempt to make scoring more accurate. He also maintains that the district court’s finding contradicts the parties’ stipulation that the SRA–FV, used in conjunction with the Static–99R, was a “commonly accepted tool for risk assessment.”

We disagree with appellant’s arguments. The district court properly conducted a second hearing to fully examine the psychologists’ testing methods. See *In re Detention of Ritter*, 312 P.3d 723, 726 (Wash.Ct.App.2013) (remanding for a district court hearing in a civil commitment proceeding to determine whether the SRA–FV satisfies the *Frye* test for admissibility of novel scientific evidence). Although appellant correctly states that Dr. Kenning testified that the SRA–FV has “been around for a fair amount of time,” and is commonly used in California, Dr. Kenning also testified that the SRA–FV involved “more recent research[,]” and she has only used the SRA–FV in “probably

about ten” cases. And Dr. Marshall characterized the SRA–FV as a “relatively new” instrument and testified that, in her work as a court examiner, she had encountered only one person using it. In addition, the record shows that the state’s attorney did not stipulate that the SRA–FV was a “commonly acceptable tool,” but only agreed that its use, in combination with the Static–99R, was valid in risk assessment. Thus, the district court’s finding that the SRA–FV is a new test in Minnesota is supported by the record and is not clearly erroneous.

*7 Appellant also argues that the district court clearly erred by relying on Dr. Marshall’s use of the SVR–20, a structured-clinical-judgment measure, rather than Dr. Kenning’s use of the SRA–FV. He maintains that, based on the record, actuarial assessments such as the SRA–FV are more accurate at predicting recidivism, noting that Dr. Marshall acknowledged that some factors in the SVR–20 are not predictive of risk and that she used that instrument in part because she was familiar with it. But Dr. Marshall did not assess appellant’s risk of recidivism based exclusively on the SVR–20; she also used actuarial instruments such as the Static–99R and the MnSOST–3.1. And significantly, she testified that she looked generally at “the complete picture,” examining the results of appellant’s interview and psychological testing to evaluate how he was functioning. Based on this record, the district court did not clearly err by crediting Dr. Marshall’s opinion and finding that the evidence supported a determination that appellant was highly likely to reoffend.

Application of Ince

Appellant argues that the district court’s commitment decision is inconsistent with the Minnesota Supreme Court’s recent decision in *Ince*. In *Ince*, the supreme court reaffirmed the “highly likely” standard in determining whether a person is likely to engage in future acts of harmful sexual conduct. *Ince*, 847 N.W.2d at 21. The supreme court rejected the argument that the *Linehan* factors had been displaced by a recent emphasis on actuarial assessment, stating that “the need for a multi-factor analysis lies in the very purpose for civil commitment,” and the district court remains in the best position to evaluate the evidence, including expert-witness credibility. *Id.* at 22–24. The supreme court recognized the relevance of actuarial assessment evidence, but it cautioned against “potential factor repetition that can result from considering the *Linehan* factors in addition to multiple actuarial

assessments that use different approaches based on factors that are the same as or similar to the *Linehan* factors.”*Id.* at 24. The supreme court remanded the case for additional findings because the district court had “simply reviewed the *Linehan* factors after largely accepting [an expert’s] opinion [] on the actuarial evidence [and did not] indicat[e] the significance of any of those factors within the context of a multi-factor analysis.”*Id.*

Appellant argues that, based on *Ince*, the district court’s findings and analysis are clearly erroneous because it engaged in factor repetition by considering the same evidence in assessing the *Linehan* factors as it did in examining the actuarial testing results. He maintains that the district court could have avoided this repetition by crediting Dr. Kenning’s opinion because she used the SRA–FV in conjunction with the Static–99R, which provided a more complete and accurate picture of appellant’s risk level based on actuarial assessment.

***8** We reject this argument for two reasons. First, this case is factually dissimilar to *Ince*, in which the supreme court stated that the experts’ opinions provided “mixed, if not contradictory, results based on the actuarial evidence as compared to the *Linehan* factors.”*Id.* The supreme court noted the “difficult task the [district] court faced in this unique case” and determined that “the unusual nature of the facts and circumstances” required a remand. *Id.* at 25, 26. In contrast, in this case, although Dr. Marshall and Dr. Kenning disagreed on appellant’s risk to reoffend, Dr. Marshall’s evaluation of that risk based on her test results and interview was not inconsistent with her application of the *Linehan* factors.

Second, in *Ince*, the supreme court stated that it “[could] not determine whether the district court adhered to the *Linehan* factors,”*id.* at 25; but here, the district court specifically addressed and made findings on the *Linehan* factors. For instance, the district court found, with respect to the second *Linehan* factor, the history of violent behavior, that “Dr. Kenning’s focus on [appellant’s] last two offenses as ‘non-violent sexual offenses’ ignores the fact that these offenses occurred while [he] was under release conditions, subject to probationary supervision and involved in intensive outpatient sex offender treatment.” And with respect to the sixth *Linehan* factor, a person’s record with respect to sex therapy programs, the district court found that appellant had not

completed sex-offender treatment and most recently offended after several years in outpatient treatment. Thus, the district court's findings reflect its independent review of the record and its correct application of the applicable legal standard as articulated in *Ince*.

Appellant acknowledges that, by contending that the district court should have credited Dr. Kenning's opinion, he supports a policy argument that the *Linehan* factors should be replaced by actuarial tools like the SRA-FV, because the factors are now represented in the actuarial measurements. But the supreme court in *Ince* expressly considered and rejected that argument, reiterating the *Linehan* factors as part of the multi-factorial analysis used to evaluate whether a person is highly likely to reoffend. *Id.* at 26. Viewing the record in the light most favorable to the district court's decision, clear and convincing evidence supports the determination that appellant is highly likely to engage in further harmful sexual conduct and that he meets the criteria for commitment as an SDP.

Less-restrictive alternative

Appellant also argues, based on *Ince*, that the record does not support the district court's conclusion that he failed to show the availability of a less-restrictive treatment program meeting his needs and public-safety requirements. See [Minn.Stat. § 253D.07, subd. 3](#) (Supp.2013) (stating that if the requirements for committing a person as an SDP are met, the district court "shall commit the person to a secure treatment facility unless the person establishes by clear and convincing evidence that a less restrictive treatment program is available ... consistent with the person's treatment needs and the requirements of public safety"). In *Ince*, the supreme court concluded that the district court had made insufficient findings for meaningful appellate review on the issue of a less-restrictive alternative and ordered additional findings on remand. [Ince, 847 N.W.2d at 26.](#)

*9 Appellant argues that the district court failed to make particularized findings on how his proposed less-restrictive alternative-living at home

with his mother and attending treatment at the Safety Center-would not serve his needs and meet public-safety requirements. He points out that he presented evidence that, as a Level 3 sex offender, if released from custody, he would be placed on intensive supervised release (ISR), which would provide more supervision than his previous probation conditions. But the district court found that, under appellant’s proposed plan, he would “return[] ... to the same community and the same situation in which he was living at the time of his last criminal offense and his multiple probation and treatment violations.”The district court also found that, after a short period of time, appellant would be subject to the same conditions and terms as during his probation, and that the Safety Center could not provide appropriate treatment because it failed him when he reoffended after three-and-one-half years in the program. These findings are not clearly erroneous, and they sufficiently support the district court’s determination that appellant has failed to establish by clear and convincing evidence that a less-restrictive program is available that would meet his present needs and public-safety requirements.

Affirmed.

All Citations

Not Reported in N.W.2d, 2014 WL 4494262

Footnotes

¹ In 2013, the Minnesota legislature recodified the statutes governing civil commitment of sexually dangerous persons. *See* 2013 Minn. Laws, ch. 49 at 213–14 (codified at Minn.Stat. ch. 253D). We cite the current versions of the statutes because, for purposes of this case, the legislature clarified pre-existing law without making substantive changes. *See Braylock v. Jesson*, 819 N.W.2d 585, 588–89 (Minn.2012).

² The supreme court has identified six factors to consider in determining whether a person is highly likely to engage in harmful sexual acts in the future, supporting that person’s commitment as SDP. *In re Linehan*, 557 N.W.2d 171, 189 (Minn.1996) (*Linehan III*), *vacated on other grounds*, 522 U.S. 1011, 118 S.Ct. 596 (1997), *aff’d on remand*, 594 N.W.2d 867 (Minn.1999). These factors are:

(a) the person's relevant demographic characteristics (*e.g.*, age, education, etc.); (b) the person's history of violent behavior (paying particular attention to recency, severity, and frequency of violent acts); (c) the base rate statistics for violent behavior among individuals of this person's background (*e.g.*, data showing the rate at which rapists recidivate, the correlation between age and criminal sexual activity, etc.); (d) the sources of stress in the environment (cognitive and affective factors which indicate that the person may be predisposed to cope with stress in a violent or nonviolent manner); (e) the similarity of the present or future context to those contexts in which the person has used violence in the past; and (f) the person's record with respect to sex therapy programs.

In re Linehan, 518 N.W.2d 609, 614 (Minn.1994) (*Linehan I*).

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

IN RE THE DETENTION OF)	
)	
JAMES JONES,)	NO. 32882-1-III
)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 6TH DAY OF JULY, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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