

FILED
COURT OF APPEALS
DIVISION II

08 SEP 29 AM 9:51

NO. 37515-0-II

STATE OF WASHINGTON
BY  DEPUTY

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

In re the Detention of:

DANIEL ANDREWS,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S OPENING BRIEF

ROBERT M. MCKENNA
Attorney General

JANA R. FRANKLIN
Assistant Attorney General
WSBA #35524
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 389-3876

TABLE OF CONTENTS

I. ISSUES PRESENTED 2

 A. Was there sufficient evidence to establish that Petitioner would more likely than not engage in predatory acts of sexual violence if not committed to a secured facility? 2

II. STATEMENT OF THE CASE 2

 A. Procedural History 2

 B. Substantive History 3

 1. Andrews’ Criminal Sexual History 3

 2. Expert Opinion Evidence: Dr. Christopher North 4

III. ARGUMENT 7

 A. Substantial Evidence was Presented at Trial to Support a Finding that Andrews is a Sexually Violent Predator 8

 1. The Results of the Actuarial Tests Support the Conclusion that Andrews Will More Likely Than Not Reoffend if Not Civilly Committed 9

 2. Andrews’ Score on the Hare Psychopathy Checklist – Revised (PCL-R) Supports the Conclusion that He Will More Likely Than Not Reoffend 12

 3. The Dynamic Risk Factors Analyzed by Dr. North Are Relevant and Support the Conclusion that Andrews Will More Likely Than Not Reoffend 14

IV. CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Barefoot v. Estelle,
463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983)..... 9

In re C.A.,
146 N.J. 71, 679 A.2d 1153 (1996)..... 9

In re Commitment of R.S.,
173 N.J. 134, 801 A.2d 219 (2002)..... 9

In re the Detention of Bernard Thorell,
149 Wn.2d 724, 72 P.3d 708 (2003)..... 7, 8, 9, 12

Statutes

RCW 71.09.020(16)..... 7

RCW 71.09.020(7)..... 11

I. ISSUES PRESENTED

- A. **Was there sufficient evidence to establish that Petitioner would more likely than not engage in predatory acts of sexual violence if not committed to a secured facility?**

II. STATEMENT OF THE CASE

A. Procedural History

This Sexually Violent Predator (SVP) civil commitment action was initiated on February 7, 2007. CP at 2-3. On that date, Daniel Andrews was serving a sentence on a 1992 conviction for Child Molestation in the First Degree. Shortly before Andrews was scheduled to be released, the State filed the SVP Petition. His SVP commitment trial began on February 21, 2008. 5RP at 49.

At trial, the State presented the testimony of three of Andrews' victims, E.C., T.C. and A.T., as well as Dr. Christopher North, and Appellant Andrews. In his defense, Andrews presented the testimony of Dr. Theodore Donaldson. On March 5, 2008, the jury unanimously agreed that the State had proven Andrews was a SVP beyond a reasonable doubt. CP at 247. Andrews was committed to the SCC where he remains today. CP at 248. This appeal follows. CP at 263.

B. Substantive History

1. Andrews' Criminal Sexual History

Daniel Andrews has a history of molesting children. That history includes the following incidents, charges and convictions:

On October 24, 1992, Andrews molested twelve year old S.H. 7RP at 150-51, 10RP at 458. On two separate occasions in the same night, Andrews entered a bedroom where S.H. was sleeping and touched her breasts. *Id.* Andrews was subsequently arrested and pled guilty to Child Molestation in the First Degree. 7RP at 152.

In August 1991, Andrews sexually assaulted his seven year old daughter, M.M. During the assault Andrews told M.M. to take her panties off and sit on his lap. Andrews then told M.M. to touch his penis to M.M.'s vagina, but M.M. refused. 7RP at 153. Andrews pleaded guilty to Attempted Molestation of a Child/Dangerous Crimes against Children in the Second Degree in Maricopa County, Arizona. *Id.*

In addition to the above adjudicated offenses, Andrews has also molested at least three additional children. Beginning in approximately 1966, Andrews began molesting his five year old nephew, E.C. 7RP at 155. At Andrews' trial, E.C. testified via videotaped preservation deposition that over the course of approximately six years Andrews orally raped and molested E.C. on multiple occasions. Supp. CP at _____. Andrews' niece,

T.C. also testified via videotaped deposition that when she was six years old Andrews performed oral sex on her and attempted vaginal intercourse. Supp. CP at _____.

Finally, the jury heard the testimony of Andrews' oldest biological daughter, A.T. A.T. testified that over the course of approximately seven years, starting when she was four years old, Andrews repeatedly sexually molested her and on one occasion Andrews attempted vaginal intercourse. 6RP at 107-111.

2. Expert Opinion Evidence: Dr. Christopher North

At trial, the State offered the expert opinion testimony of clinical and forensic psychologist Christopher North, Ph.D. Dr. North has considerable experience in the evaluation, diagnosis, treatment, and risk assessment of sex offenders. 7RP at 137-147. Dr. North has been licensed as a psychologist since 1987 and holds licenses to practice psychology in California and Washington. 7RP at 138. Dr. North has evaluated approximately 16 individuals in Washington and hundreds of others in California to determine whether they meet the statutory criteria for civil commitment pursuant to SVP laws. 7RP at 146. Of those evaluations, Dr. North has found that the individual he is evaluating meets SVP criteria approximately two-thirds of the time. *Id.*

As part of his evaluation, Dr. North reviewed court documents, police reports, presentence investigation reports, criminal history information, Department of Corrections (DOC) records, Special Commitment Center (SCC) records that document Andrews' progress there, and witness depositions. 7RP at 147-149. Dr. North testified that the records he reviewed were of the type that he and other mental health professionals commonly rely upon when evaluating sex offenders. *Id.*

Dr. North testified that, in his professional opinion, Andrews suffers from a mental abnormality, specifically Pedophilia. 7RP at 178. Dr. North also diagnosed Andrews with a personality disorder consisting of paranoid and antisocial features. 7RP at 180. In diagnosing those conditions, Dr. North relied upon a classification system that is used universally by mental health workers, and is found in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR). 7RP at 171.

Dr. North also conducted a risk assessment to determine whether Andrews was more likely than not, as a result of his mental abnormality, to commit a predatory sex offense in the future. 7RP at 188. The risk assessment involved actuarial instruments, a psychopathy test, and an examination of dynamic risk factors that research in the field has identified as associated with sexual offending. 7RP at 187. An actuarial instrument is

a list of factors which are associated with sexual re-offense. 7RP at 188-89. When administered, an offender receives a score which is statistically associated with a likelihood of committing a future sex offense. *Id.*

Dr. North employed the use of two actuarial instruments in his risk assessment of Andrews: the Static-99 and the Minnesota Sex Offender Screening Tool, Revised (MnSOST-R). 7RP at 188, 203. Dr. North cautioned that these instruments underestimate an individual's overall risk because they assess the risk of committing an offense that is detected and results in re-arrest or re-conviction, rather than estimating the risk of an individual committing any offense. 7RP at 212-13. Dr. North testified that the actuarial instruments employed in Andrews' case indicate that Andrews is likely to engage in predatory acts of sexual violence if not confined to a secure facility. 7RP at 212.

Dr. North also scored Andrews on the Hare Psychopathy Checklist – Revised (PCL-R). The PCL-R measures an individual's psychopathy, or level of criminal orientation. 7RP at 214. Dr. North testified that the PCL-R was a standard part of any risk assessment he conducts, and that it is commonly used in sexual predator evaluations. *Id.*

Finally, Dr. North examined dynamic risk factors, which are factors that can change with time and may raise or lower an individual's risk of re-offense. 7RP at 187, 217. Research has shown certain risk factors can aide

in distinguishing those individuals who are likely to re-offend from those who are not. 7RP at 218.

Based upon his education and experience and his review of the evidence, Dr. North testified that it was his professional opinion that Andrews has a mental abnormality that causes him serious difficulty controlling his behavior and makes him more likely than not to commit predatory acts of sexual violence if he is not confined in a secure facility. 7RP at 179, 225.

III. ARGUMENT

Andrews makes one argument on appeal, which is without merit as there was more than sufficient evidence presented at trial for a finding that Andrews is a sexually violent predator. Therefore, this Court should deny Andrews' appeal and affirm his civil commitment as a sexually violent predator.

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." RCW 71.09.020(16). The quantum of evidence in SVP commitment hearing should be examined under a criminal standard. *In re the Detention of Bernard Thorell*, 149 Wn.2d 724, 743, 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.* at 744. This court must look at the evidence in the light most favorable to the State and determine whether any trier of fact could, based on that evidence, determine that he met SVP criteria.

A. Substantial Evidence was Presented at Trial to Support a Finding that Andrews is a Sexually Violent Predator

Andrews argues that the actuarial instruments, the PCL-R and the dynamic risk factors analyzed by Dr. North were insufficient evidence to establish that Andrews will more likely than not engage in predatory acts of sexual violence if not committed to a secure facility. Brf. Of Appellant at 1. Appellant’s argument lacks merit and should be rejected.

In this case, there is no doubt that sufficient evidence existed to support Andrews’ commitment as a sexually violent predator. Taken in the light most favorable to the State, the evidence overwhelmingly supported a finding that Andrews will, more likely than not, commit predatory acts of sexual violence if not confined in a secure facility.¹ The State’s expert, Dr. Christopher North, an extremely well-qualified expert, testified at length regarding his risk assessment of Andrews and the research and facts

¹ Appellant did not contest in his Opening Brief the presence of a qualifying sexually violent offense, nor the finding of “mental abnormality and/or personality disorder.”

comprising the basis for his opinions. Based on the evidence presented, no rational trier of fact could have found otherwise.

1. The Results of the Actuarial Tests Support the Conclusion that Andrews Will More Likely Than Not Reoffend if Not Civilly Committed

Andrews argues that the actuarial instruments used by Dr. North did not reach the “more likely than not” threshold. Andrews clearly ignores the sufficiency standard, the testimony of Dr. North and the substantial indications in the record that Andrews’ risk meets the statutory threshold.

“Actuarial risk assessment instruments may be admissible in evidence in a civil commitment proceeding under SVPA when such tools are used in the formation of the basis for a testifying expert’s opinion concerning the future dangerousness of a sex offender.” *Thorell*, 149 Wn.2d at 756, (citing *In re Commitment of R.S.*, 173 N.J. 134, 801 A.2d 219, 221 (2002), *In re C.A.*, 146 N.J. 71, 679 A.2d 1153 (1996)). “[P]redictions of future dangerousness should be admitted and evaluated by the fact finder.” *Thorell*, 149 Wn.2d at 756, (citing *Barefoot v. Estelle*, 463 U.S. 880, 896-903, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983)).

Dr. North employed the use of two actuarial instruments: the Static-99 and MnSOST-R. Dr. North testified that based upon Andrews’ score on the Static-99, Andrews’ was statistically associated with a 40% likelihood of re-conviction for a new sex offense within 15 years of release to the

community. 7RP at 200. Dr. North also testified that Andrews' score on the MnSOST-R correlated to a 25% probability of re-arrest within six years of release to the community. 7RP at 212. Dr. North indicated that both the Static-99 and the MnSOST-R have been widely researched and found to have moderate predicative accuracy. 7RP at 190, 204. Dr. North outlined the instruments strengths and weaknesses, explained their common use in the field among individuals conducting risk assessments, and ultimately concluded that given the wide breadth of research on the tools, they are considered useful predictors of sexual recidivism. 7RP at 189-91, 204.

In explaining how Andrews' score on the instruments allowed him to opine that Andrews was "more likely than not" to commit a new sexual offense, Dr. North testified that the actuarials were a starting point; it would not be appropriate to base on entire opinion on just the actuarial instruments. 7RP at 212. Furthermore, Dr. North outlined the many reasons that the actuarial estimates were an "underprediction" of Andrews' actual risk.

First, Dr. North gave Andrews the benefit of the doubt when scoring both actuarial tests, and as a result testified that they were an underestimate of his true risk. *Id.* Although there was available evidence that would have provided increased scores on both instruments, Dr. North erred on the side of caution and only gave points on those items that were unquestionably

supported in the record². Second, Dr. North testified that the Static-99 measures *re-conviction* rates and the MnSOST-R measures *re-arrest* rates, where the SVP statute simply asks if an individual will more likely than not *engage* in further sexually violent offenses, detected or otherwise. 7RP at 213. Third, both instruments underestimate Andrews' true risk because they are limited by time: 15 years on the Static-99 and 6 years on the MnSOST-R. In comparison, the statute does not impose a time limit for re-offense. *Id.*, RCW 71.09.020(7). Finally, both Dr. North and Dr. Donaldson testified that many sex offenders commit offenses for which they are never apprehended. 7RP at 200-02, 9RP at 404. Dr. North testified that research has shown that sex offenses are the most underreported of all crimes. 7RP at 201.

Andrews' expert, Dr. Theodore Donaldson, testified that if Andrews did in fact suffer from a mental abnormality, a risk assessment was unnecessary because Andrews would be predisposed to the commission of sexual acts. 9RP at 358, 385. Furthermore, Dr. Donaldson did not dispute Dr. North's scoring of the actuarial instruments. Rather he testified that since the actuarials had not been "normed" on a Washington sample they

² For example, Dr. North testified that although Andrews had engaged in prior non-sexual violence, a risk factor on the Static-99, he was not convicted of a "violent" offense and therefore Dr. North did not assign a point to that risk factor. 7RP at 196. On the MnSOST-R, Dr. North did not assign a point for Andrews' having committed a sexual offense while under supervision, however the record is clear Andrews absconded and changed his name to avoid prosecution and supervision. 7RP at 206.

could not be used on a Washington offender. 9RP at 361, 382. Dr. Donaldson provided no authority for this position. Since the jury found beyond a reasonable doubt that Andrews suffered from a mental abnormality or personality disorder, there is no factual dispute that Andrews was predisposed to the commission of sexually violent offenses.

The jury clearly found Dr. North's opinion on risk assessments more compelling than that of Dr. Donaldson. The actuarial instruments, when examined in light of Dr. North's entire opinion, clearly established beyond a reasonable doubt that Andrews was more likely than not to re-offend. Viewed in the light most favorable to the State, the evidence is more than sufficient to allow a finder of fact to conclude that Andrews' risk to re-offend in a sexually violent manner is more likely than not. But Dr. North also conducted a further analysis which strengthened his opinion.

2. Andrews' Score on the Hare Psychopathy Checklist – Revised (PCL-R) Supports the Conclusion that He Will More Likely Than Not Reoffend

Andrews asserts that his score on the PCL-R does not support a finding that he is "more likely than not to reoffend". Andrews provides no authority for his position.

The Washington Supreme Court has previously recognized that expert evaluators may consider additional factors not included in actuarial instruments to adjust actuarial measurements. *Thorell*, 149 Wn.2d at 753.

In the present case, Dr. North used the PCL-R to adjust Andrews' scores on the actuarials to accurately reflect Andrews' true risk of re-offense.

The PCL-R is a psychological test that examines an individual's criminal orientation. 7RP at 214. Scores on the PCL-R range from 0 to 40; an individual with a score of 30 or higher is considered a psychopath. 7RP at 215. Although not directly related to sexual recidivism, the PCL-R does give guidance on how likely an individual is to continue a life of crime. 7RP at 216.

Dr. North testified that research has shown the combination of a paraphilia and psychopathy, as scored on the PCL-R, to be a particularly dangerous combination that results in a high likelihood of re-offense. *Id.* Dr. Donaldson agreed that such a combination would create "especially dangerous individuals". 9RP at 406. Dr. North scored Andrews on the PCL-R, assigning him a score of 32. *Id.* Dr. North testified that given Andrews' combination of a paraphilia and psychopathy, his risk to re-offend is increased. 7RP at 217. Although Dr. North did not base his entire opinion upon Andrews' score on the PCL-R, he testified that it did in fact increase his risk of re-offense, which already had been underestimated by the actuarials. *Id.*

Since Dr. North testified that the PCL-R was considered in forming his opinions, there is no basis to argue it did not support his conclusion

regarding Andrew's risk. Research has shown that a person's general criminality is certainly related to their risk of re-offense, and when this evidence is viewed in the light most favorable to the State it is more than sufficient to allow a finder of fact to conclude that Andrews' risk to re-offend in a sexually violent manner is more likely than not.

3. The Dynamic Risk Factors Analyzed by Dr. North Are Relevant and Support the Conclusion that Andrews Will More Likely Than Not Reoffend

Finally, Andrews argues that the dynamic risk factors that were analyzed by Dr. North are too remote in time to be relevant to Andrews' risk assessment. This argument is also without merit.

Dr. North testified that "dynamic risk factors" have been developed by researchers who studied sex offenders that were released to the community. The research linked community factors to recidivism, with the focus on current risks as opposed to past static, unchanging, factors. 7RP at 218, 274. Dr. North originally examined five dynamic risk factors, one of which ceased to be used by the time the Andrews trial commenced. *Id.* Dr. North modified his opinions appropriately in light of the new research, and testified about the four remaining factors that applied to Andrews. *Id.*

The first factor, intimacy deficits, examines whether a person can form close relationships. 7RP at 218. Dr. North noted that Andrews had

never been able to maintain a relationship due to his paranoid and antisocial personality, and as a result, this was an aggravating factor that would increase his risk for re-offense. 7RP at 219. The second factor, sexual self regulation, analyzes an individuals control over their sex drive. Dr. North noted that this was a difficult dynamic factor to interpret due to Andrews' lengthy incarceration, however he noted that since Andrews had never completed a sex offender treatment program that it was unlikely he had learned to control his sexual drive. 7RP 219-20. The third factor, cooperation with supervision, looks at an individual's likely performance on probation or parole. Given Andrews' history of failing to abide by parole conditions this was an obvious risk factor for him. *Id.* Finally, Dr. North testified about general self-regulation, which examines general self-control. Andrews is impulsive and has no history of stability in the community, so Dr. North opined that this too would increase his risk of re-offense. 7RP at 221.

Dr. North testified the presence of these four dynamic risk factors indicated Andrews has a higher risk of re-offense than is otherwise reflected on the actuarial instruments alone. *Id.* Even Andrews' expert, Dr. Donaldson, testified that dynamic risk factors were useful in determining when a person is likely to re-offend. 9RP at 367. Given that dynamic risk factors address ones *current* risk, they are clearly not "too remote in time"

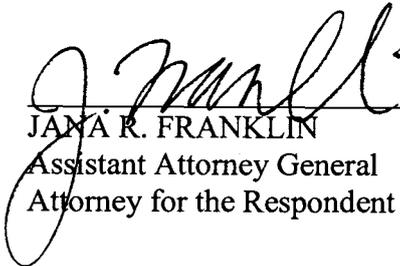
to be relevant to a risk assessment. When this evidence is viewed in the light most favorable to the State, the evidence is more than sufficient to allow a finder of fact to conclude that Andrews' risk to re-offend in a sexually violent manner is more likely than not.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court deny Andrews' appeal, and affirm his civil commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 30 day of September, 2008.

ROBERT M. MCKENNA
Attorney General



JANA R. FRANKLIN
Assistant Attorney General
Attorney for the Respondent

NO. 37515-0-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of:

DANIEL ANDREWS,

Appellant.

DECLARATION OF SERVICE

KELLY HADSELL declares as follows:

On September 26, 2008, I deposited in the United States mail, first-class postage prepaid, addressed as follows:

SHERI ARNOLD
PO BOX 7718
TACOMA WA 98406

a copy of the following documents: RESPONDENT'S OPENING BRIEF and DECLARATION OF SERVICE.

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

DATED this 26th day of September, 2008.

Kelly Hadsell
KELLY HADSELL
Legal Assistant

FILED
COURT OF APPEALS
DIVISION II
08 SEP 29 AM 9:51
STATE OF WASHINGTON
DEPUTY