

NO. 45120-4

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

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In re the Detention of Mark Robinson:

STATE OF WASHINGTON,

Respondent,

v.

MARK ROBINSON,

Appellant.

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**BRIEF OF RESPONDENT**

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## **I. ISSUE PRESENTED**

**Where the State's expert opined that Robinson was likely to commit a sexually violent offense if released and his opinion was supported by a broad array of information he considered, was there substantial evidence supporting the jury's finding that Robinson's mental abnormality made him likely to commit predatory acts of sexual violence if he was not confined in a secure facility?**

## **II. STATEMENT OF THE CASE**

### **A. Procedural History**

On May 10, 2012, the State filed a sexually violent predator (SVP) petition in Lewis County, seeking the civil commitment of Mark Robinson (Robinson) as a sexually violent predator (SVP), pursuant to RCW 71.09. CP at 1-2. A jury trial was held on June 25-28 and July 3 and 5, 2013. 1RP – 7RP. On July 5, 2013, the jury returned a verdict finding Robinson to be an SVP. 7RP at 843; CP 917. The trial court then entered an order civilly committing him, which Robinson timely appealed. CP 918.

### **B. Substantive History**

The State adopts Robinson's Statement of the Case in the Opening Brief of Appellant at 1-10, supplemented by additional facts presented in the argument below.

## **III. ARGUMENT**

Robinson argues that the State failed to produce substantial evidence he is likely to commit predatory acts of sexual violence if

released, because the group data percentages associated with his actuarial scores did not exceed 50 percent. The actuarial data, however, was merely one component relied on by the State's expert, Dr. Mark Patterson (Patterson), in a comprehensive risk assessment. The jury's finding was supported by Patterson's expert opinion testimony, as well as evidence about Robinson's sexually sadistic crimes against women.

**A. Standard of Review**

In reviewing the sufficiency of the evidence in an SVP trial, a reviewing court applies the criminal standard. *In re Detention of Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003). “Under this approach, the evidence is sufficient if, when viewed in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.*; *In re Detention of Audett*, 158 Wn.2d 712, 727-28, 147 P.3d 982 (2006). All reasonable inferences from the evidence are drawn in favor of the State and are interpreted most strongly against the appellant. *Audett*, 158 Wn.2d at 727. Appellate courts defer to the trier of fact regarding a witness’s credibility, conflicting testimony, and the persuasiveness of the evidence. *In re Detention of Broten*, 130 Wn. App. 326, 335, 122 P.3d 942 (2005).

**B. Substantial Evidence Supported the Jury’s Finding that Robinson is Likely to Commit Predatory Acts of Sexual Violence if not Confined in a Secure Facility**

The State was required to prove, among other things, that Robinson is “likely to engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.020(18). A person is “likely” to commit such offenses if they will do so “more probably than not[.]” RCW 71.09.020(7). Patterson testified that, in his opinion, Robinson was likely to engage in predatory acts of sexual violence if not confined in a secure facility. 3RP at 265.

Robinson first argues that “the actuarial tests that Dr. Patterson employed did not constitute evidence of what current risk Robinson was for reoffense. Rather, they only provided an assignment of risk many years into the future.” Opening Brief of Appellant at 18. This same argument was rejected by the Washington Supreme Court in *In re Detention of Moore*, 167 Wn.2d 113, 216 P.3d 1015 (2009). The appellant in *Moore* argued that the State must prove a person is likely to reoffend within the “foreseeable future.” 167 Wn.2d at 123. The Court disagreed, holding that proof of the required elements constitutes proof of current dangerousness: “We believe that, by properly finding all the statutory elements are satisfied to commit someone as an SVP, the fact finder impliedly finds that the SVP is currently dangerous.” *Id.* at 124.

Robinson next argues that Patterson’s opinion was unsupported by the actuarial instruments he used because Robinson’s scores on those instruments were associated with group recidivism rates that were under 50 percent; *i.e.*, they did not indicate Robinson “more probably than not” would reoffend. Opening Brief of Appellant at 18-19. His argument does not establish a lack of substantial evidence because it addresses only the weight to be given to Patterson's opinion, and this Court does not reweigh the evidence. *Keene Valley Ventures, Inc. v. City of Richland*, 174 Wn App. 219, 224, 298 P.3d 121 (2013).

Nevertheless, Patterson explained that actuarial estimates are considered underestimates and he relies on other factors not accounted for by those instruments. 3RP at 266, 268-69, 276. Additionally, the jury heard about Robinson's violent criminal sexual history – evidence that also supported Patterson's opinion and the element at issue.

In the common approach to sex offender risk assessment, actuarial data is only one component; Patterson also considered risk factors outside of the actuarial instruments, Robinson’s degree of psychopathy or antisociality, and “protective factors.” 3RP at 266. Patterson began by scoring Robinson on three commonly used actuarial instruments: The Static 99R; the Static 2002R, and the Sex Offender Risk Appraisal Guide (SORAG). 3RP at 269. On the Static 99R Robinson received a score of

three. 3RP at 406. Offenders with the same score recidivated at a rate of 23 to 24 percent within ten years after release. 3RP at 277. On the Static 2002R, Robinson received a score of eight. 3RP at 280-81. Offenders with the same score recidivated at a rate of 24 percent within ten years after release. 3RP at 281. On the SORAG, Robinson received a score of five, and the associated recidivism rate was 59 percent within ten years of release. 3RP at 281-82.

Actuarial instruments have limited applicability in SVP cases because of their small sample sizes and a variety of predictive shortcomings. *Thorell*, 149 Wn.2d at 753. Patterson testified about two specific weaknesses. 3RP at 268-69. First, they do not make a prediction about the specific person being evaluated because they generate only group percentages. 3RP at 268. Second, they give underestimates of risk because their data does not include undetected sexual offenses. 3RP at 268-69. The Static 99R, for example, measures only reconvictions, not crimes committed but never reported, or where the perpetrator was never found or charged. *In re Detention of Lewis*, 134 Wn. App. 896, 906, 143 P.3d 833 (2006).

The common practice in Patterson's field, therefore, is to also consider non-actuarial information. 3RP at 266; *Thorell*, 149 Wn.2d at 753 (2003) (actuarial results “may be adjusted (or not) by expert

evaluators considering potentially important factors not included in the actuarial measure.”). Patterson relied on a broad range of information, such as Robinson’s level of psychopathy (RP at 293-94), his dynamic, or changeable, risk factors (RP at 297-303), protective factors that tend to reduce risk (RP at 306-308), Robinson’s participation in sex offender treatment (RP at 308), and Robinson’s release plan, post-release supervision, and community support (RP at 308-311). There were a number of facts Patterson relied on that were not related to actuarial assessment. For example, when Robinson was interviewed by police about his serial rapes, he told a detective that he had a problem for which he needed help and it was getting “out of control.” 2RP at 175; 3RP at 263. Robinson also told police he raped approximately 60 women over a five-year period and kept a rape kit in his truck. 2RP at 178-79.

Patterson considered "dynamic," or changeable psychological factors that are correlated with recidivism. 3RP at 297-303; *see In re Jacobson*, 120 Wn. App. 770, 783-84, 86 P.3d 1202 (2004) (expert’s conclusion that person continued to meet SVP criteria supported by consideration of dynamic factors). For example, the dynamic factor "sexualized violence" applied to Robinson. 3RP at 298-99. This was based on Robinson’s violent rapes as well as his admitted sexual fantasies. 3RP at 299. Robinson’s last victim reported he raped her at knifepoint,

held her over a cliff and threatened to kill her if she reported the crime. 2RP at 118-19. Another applicable factor was "sexual preoccupation." 3RP at 299. Robinson collected pornography, frequently masturbated, engaged in multiple sexual acts with a victim and was diagnosed with more than one paraphilia, or sexual disorder. 3RP at 299. Other dynamic risk factors applied to Robinson, such as lack of intimate relationships, callousness, grievance thinking, lifestyle impulsiveness, resistance to rules and supervision, and dysfunctional coping. 3RP at 300-303. In considering these dynamic factors, Patterson employed an instrument called the Structured Risk Assessment – Forensic Version (SRA-FV). 3RP at 298. The resulting score on the SRA-FV helped Patterson determine the group of sex offenders to whom Robinson should be compared. 3RP at 303-306.

Patterson measured Robinson's psychopathic traits using the Psychopathy Checklist-Revised and explained his scoring of the instrument in detail. 3RP at 282-294. Robinson's psychopathic traits are in the moderate range. 3RP at 294.

Patterson also considered "protective factors" which, if present, would lower Robinson's risk. 3RP at 306-307. These included advanced age, several years in the community post-release without offending and

life span shortened by health issues. 3RP at 306. None of these reduced Robinson's risk. 3RP at 307.

Robinson argues that Patterson "omitted any consideration of his completion of the SOTP [Department of Corrections sex offender treatment] program." Opening Brief of Appellant at 18. But Patterson testified that he considered Robinson's past treatment efforts. 3RP at 307-308. Robinson participated in treatment for 12 months in prison. 3RP at 307. He did not do very well and according to the treatment providers made minimal progress. 3RP at 308. His shortcomings included failing to finish homework, not fully disclosing his life history or talking about his own risk factors, keeping secrets, and minimizing his offending. 3RP at 308. At one point Robinson became so upset he left the room in the middle of a treatment session; he later admitted he was afraid he would "strangle" the person with whom he was upset. 3RP at 265. Patterson did not believe treatment reduced Robinson's risk. 3RP at 308.

Robinson's release environment could affect his risk, for better or worse. 3RP at 309. Patterson considered Robinson's plans and was concerned that he would be living back in the same house and with or near some of the same family members he lived with when offending. 3RP at 308-309. Patterson also considered Robinson's requirement of 36 months of community custody upon release. 3RP at 310-311.

Robinson's community support, other than family, was limited to two sex offenders he met in prison. 3RP at 311.

Asked to summarize his risk assessment, Patterson gave a thoughtful synopsis of Robinson's history and prognosis. 3RP at 312-314. As a child Robinson lost a sister and was humiliated by bullying at school. 3RP at 313. He learned how to show his anger from his abusive father. *Id.* Over the years he developed an association between his anger and his sexuality that degraded into sexually sadistic behaviors with strangers. *Id.* Patterson explained:

His anger would fester in my term and reach a breaking point, a fuse would be lit, he would go out looking for a victim, perpetrate his offense which would calm him down to a certain degree but then the anger would build up again. So there's this offense cycle that you might hear about.

And he eventually started to broaden his target area. He didn't seek only prostitutes which might be the easiest targets as strangers and in his last known offense he selected a hitchhiker, another stranger still, but not somebody who was willing to have consensual sex with him. So his pool of victims was starting to broaden which is something we see with sexual sadism, it escalates in its intensity and dangerousness.

He had an opportunity to engage in treatment when he was in prison for an entire year. He didn't engage with that treatment very well at all. He didn't become intimate with the treatment, just like he hasn't been intimate in his life in general with people. And he made very limited progress in that treatment program. He's still experiencing fantasies related to his sexually sadistic behavior as recently ago as February when I spoke with him.

So the fact he didn't do so well in treatment, the fact that he's experiencing indicators of this predisposing mental disorder put him at high risk to reoffend sexually dangerously.

3RP at 313-314.

This ultimate opinion by Patterson, which was well-supported by a broad range of information, constituted substantial evidence that Robinson is likely to sexually recidivate if released unconditionally to the community.

In addition to Patterson's opinion, the jury learned about Robinson's sexually sadistic history, which included raping up to 60 women in a five-year period. 2RP at 178-79. A person's sexual history is admissible in SVP proceedings because it is highly probative of that person's recidivism risk. *In re Detention of Young*, 122 Wn.2d 1, 53, 857 P.2d 989 (1993) (“In assessing whether an individual is a sexually violent predator, prior sexual history is highly probative of his or her propensity for future violence.”). This evidence also helped prove that Robinson was likely to reoffend if released.

Looking at all of the evidence in a light most favorable to the State, and drawing all reasonable inferences in the State's favor, a rational jury could have found, beyond a reasonable doubt, that Robinson was likely to commit future sexually violent crimes if not confined. *Audett*, 158 Wn.2d

at 727-28. This Court should therefore affirm Robinson's commitment order.

#### IV. CONCLUSION

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

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of May, 2014.

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NO. 45120-4-II

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

In re the Detention of:

MARK ROBINSON,

Appellant.

DECLARATION OF  
SERVICE

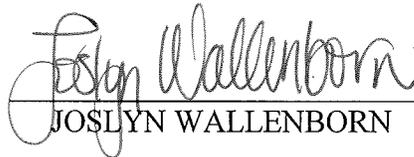
I, Joslyn Wallenborn, declare as follows:

On May 12, 2014, I sent via electronic and United States mail true and correct cop(ies) of BRIEF OF RESPONDENT and Declaration of Service, postage affixed, addressed as follows:

Peter Tiller  
P.O. Box 58  
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 12<sup>th</sup> day of May, 2014, at Seattle, Washington.

  
JOSLYN WALLENBORN

# WASHINGTON STATE ATTORNEY GENERAL

**May 12, 2014 - 11:03 AM**

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