

2019 IL App (2d) 190024-U
No. 2-19-0024
Order filed September 10, 2019

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

In re COMMITMENT OF RONALD S.) Appeal from the Circuit Court
GAPSKI) of Lee County.
)
) No. 14-MR-67
)
(The People of the State of Illinois, Petitioner-) Honorable
Appellee, v. Ronald S. Gapski, Respondent-) Jacquelyn D. Ackert,
Appellant).) Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* The State proved beyond a reasonable doubt that respondent is a sexually violent person: the State's experts' minor disagreements did not require the trial court to reject their shared conclusions, and the actuarial data and the experts' testimony were sufficient to establish respondent's risk of reoffending.

¶ 2 Respondent, Ronald S. Gapski, appeals a judgment under the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 *et seq.* (West 2018)) adjudicating him a sexually violent person (SVP) (*id.* § 65(b)(1)) and committing him to the Department of Human Services (DHS). He contends that the evidence was insufficient to prove that he is an SVP. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In 2009, respondent was convicted of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2008)) and sentenced to 10 years' imprisonment. The victim was a 13-year-old boy. In 2014, the State petitioned to have respondent declared an SVP, which the Act defines as "a person who has been convicted of a sexually violent offense *** and who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence." 725 ILCS 207/5(f) (West 2014).

¶ 5 The cause proceeded to a bench trial. The court qualified Deborah Nicolai as an expert in clinical psychology. On direct examination, she testified as follows.

¶ 6 In May 2014, Nicolai evaluated respondent, reviewing various records and interviewing him. She performed an updated evaluation in February 2018. In Nicolai's opinion, respondent met the criteria for an SVP. She based her conclusion in part on his criminal history. In 1985, in Wisconsin, he pleaded guilty to second-degree sexual assault and was sentenced to 120 days in jail and 36 months' probation. The victim was his wife's sister, whom he had sexually assaulted when she was between the ages of 9 and 12. In the 2014 interview, respondent admitted to performing oral sex on the victim but he said that she had kept seeking him out and he moved to get away from her. In 1993, in Lee County, a jury found respondent guilty of the criminal sexual assault of his 16-year-old daughter and unlawful possession of a weapon. According to police reports, respondent provided the victim with alcohol; she became intoxicated and passed out; and he sexually assaulted her as she went in and out of consciousness. Respondent boasted to his 18-year-old son about the assault. The son reported this to the Department of Children and Family Services (DCFS). After learning about the report, respondent took a loaded rifle and told his son that he would shoot him. During the 2014 interview with Nicolai, respondent called the victim a " 'drunken little bitch' " and denied that he had sexually assaulted her.

¶ 7 Nicolai also testified that, according to a DCFS report, a 14-year-old boy stated that respondent had tried to fondle his genitals. Also, respondent's 18-year-old son told DCFS that respondent had molested him and another minor. Respondent was not charged for these acts.

¶ 8 Nicolai testified about respondent's 2009 conviction. According to the police report, in 2005, respondent gave vodka to the victim. When the boy vomited, respondent removed his clothing, waited for him to pass out, then performed oral sex on him and penetrated him anally. In 2009, respondent fled to Wisconsin. When police found him, he threatened to kill himself and had to be subdued by a SWAT team. In the 2014 interview with Nicolai, respondent denied committing the offense and claimed that the victim surprised him by getting into his bed; when respondent reached over to touch his girlfriend, he discovered that a male was there.

¶ 9 Nicolai testified that, in the interview, she and respondent discussed other uncharged incidents. In one, when respondent was 15 years old and working at a carnival, he took two girls, ages 13 and 14, home with him. Later, his girlfriend told the police that he got them drunk and raped them. Respondent told Nicolai that he brought the girls home with him because they were drunk and he wanted to protect them from other carnival workers. Nicolai testified that, in addition to sexual offenses that would qualify under the Act, respondent had convictions of burglary, reckless driving, and driving under the influence of alcohol.

¶ 10 Nicolai testified about respondent's treatment history. In March 1985, after his arrest in Wisconsin, he started counseling voluntarily; the counseling became mandatory after he was convicted. Respondent's probation was transferred to Lee County, where he received treatment starting December 1986. In August 1987, his treatment was terminated because he had participated minimally and his sexually deviant behaviors and substance abuse placed his needs beyond the scope of the program. While in treatment, respondent admitted that in 1986 he

committed sexual acts with his 14-year-old daughter and that, in 1979, he used weapons to force a least six women to perform sexual acts. After he was terminated from treatment in Illinois, respondent was returned to Wisconsin, where, according to the treaters' notes, he lacked interest in the program. Respondent never participated in sex-offender treatment while in prison and was not currently doing so in the custody of the DHS.

¶ 11 Nicolai testified that, in their interview, respondent was unable to identify any high-risk situations or triggers for sexual offending. He could not say why relapse prevention was important or why it was important to understand his sexual-assault cycle.

¶ 12 Nicolai testified that respondent provided inconsistent reports about his substance use. During the interview, he said that he had no problems, but he also admitted that he began drinking at age 13 and first used LSD when he was 12. According to reports, he had used heroin for three years. He told Nicolai that he had participated in "Level 3 DUI treatment" from 1988 to 1989 but continued to drink during that period.

¶ 13 Nicolai testified that, while respondent was in prison between 2010 and 2014, he had one major disciplinary violation and several minor infractions. In the DHS, he had been disciplined on four occasions, two of them for major violations.

¶ 14 Nicolai testified that she diagnosed respondent with two mental disorders. The first was "other specified paraphilic disorder, sexually attracted to non-consent in a controlled environment." The second was antisocial personality disorder. The first diagnosis was based on respondent's "intense and persistent sexual interest in non-consenting persons over a span of 26 years," from his first offense to his last, generally involving males and females under 18 but non-consenting. The second diagnosis was based on respondent's long-term failure to conform to

social norms, deceitfulness, impulsivity, aggressiveness, reckless disregard for the safety of himself or others, and lack of remorse.

¶ 15 Nicolai testified that, in her 2014 report, her diagnoses had been “other specified paraphilic disorder sexually attracted to underage children” and antisocial personality disorder. She explained that the diagnosis of “other specified paraphilic disorder sexually attracted to underage children” was based on the same records and the same behavior as the 2018 diagnosis of “other specified paraphilic disorder, sexually attracted to non-consent in a controlled environment” but that, in 2018, she added “non-consent” to better denote respondent’s “specific arousal to not consent [*sic*].” In her report of 2018, she had forgotten to make this modification.

¶ 16 Nicolai testified that, in her expert opinion, respondent’s mental disorders affected his emotional or volitional capacity and predisposed him to engage in continued acts of sexual violence. She based this on the risk assessment she had performed as part of the evaluation. The assessment included the use of actuarial tools for static factors; in 2014, Nicolai used the Static-99R, and in 2018, she used the Static-99R and the Static-2002R. She supplemented these measures of static risk factors by considering dynamic factors.

¶ 17 Nicolai testified that respondent scored 5 on the Static-99R, placing him in the second-highest of the five risk ranges and the “88.7 percentile rank” of risk. He scored 8 on the Static-2002R, placing him in the highest of the five levels of risk and approximately the 95th percentile of risk. Nicolai also used the Hare Psychopathy Check List-Revised, a test not limited to sexual reoffending, which was based on a clinical interview and a review of documents. This test showed that respondent had a “high degree of psychopathic traits.” Offenders who score high on this test reoffend more frequently and more violently than those with lower scores.

¶ 18 Nicolai testified that, of the dynamic factors that raise risk over what actuarial tests show, seven applied to respondent. These were deviant sexual interests (his sexual attraction to pubescent and prepubescent children), offense-supportive attitudes (as shown by his derogatory comments about his victims), the lack of an intimate relationship with an adult (as shown by his marriage's history of domestic violence, infidelity, and substance abuse), grievance and hostility (demonstrated in the clinical interview), resistance to rules and supervision (as shown by his infractions in prison and DHS custody), lifestyle impulsivity (the inability to control his emotions in his own interest), and poor cognitive problem-solving (as shown by making choices that were not in his best interest, such as threatening suicide instead of going to jail).

¶ 19 Nicolai testified that there are three customary protective dynamic factors: age, a debilitating medical condition, and completion of sex-offender treatment. None applied to respondent, except insofar as age—respondent was born in 1959—had already been factored into the actuarial tests.

¶ 20 Nicolai testified that, to a reasonable degree of psychological certainty, it was substantially more probable than not that respondent would commit future acts of sexual violence. Thus, respondent met the Act's criteria for commitment as an SVP: (1) he had a conviction of a sexually-violent offense under the Act; (2) he suffered from mental disorders; and (3) these mental disorders affected his emotional or volitional capacity and predisposed him to commit continued acts of sexual violence.

¶ 21 Nicolai testified on cross-examination as follows. In her 2018 report, she had inadvertently failed to include the clarifying term “non-consent” in her first diagnosis. However, the 2014 diagnosis and the intended 2018 diagnosis were consistent: the underage children were

also non-consenting individuals. Nicolai did not diagnose respondent with a substance-abuse disorder, because the evidence had been limited and his reports had been inconsistent.

¶ 22 Nicolai testified that, although there are established ratios of the relative risk to reoffend for persons with different scores on the actuarial tests—for instance, between the group of people who score 2 on the Static-99R and those who score 5—these are group estimates. Individuals within the groups can vary widely, and their individual absolute risk cannot be quantified.

¶ 23 On redirect, Nicolai testified that, in revising her first diagnosis, she had intended to phrase the matter more clearly and not to change anything substantively. She did not diagnose respondent with pedophilia. There was an “indication it could be present” but insufficient evidence to support a formal diagnosis.

¶ 24 The State’s second witness was Kimberly Weitzl, whom the court qualified as an expert in forensic and clinical psychology and the evaluation and assessment of sex offenders. She testified on direct examination as follows.

¶ 25 Weitzl evaluated respondent in 2014, when he refused to be interviewed, and in 2016, when he agreed to an interview. Since 2016, she had reviewed new records from the DHS. Weitzl also reviewed Nicolai’s 2014 and 2018 reports. Her opinions had remained consistent throughout 2014 to the present.

¶ 26 Weitzl testified that she had reviewed respondent’s criminal history, including various uncharged offenses, and his disciplinary history in prison and the DHS. Her description of this history was consistent with Nicolai’s testimony. During the 2016 interview, Weitzl asked respondent about the 1985 Wisconsin conviction. He told her that the child had been sexually aggressive and had initiated the contact. Weitzl asked respondent about the 2009 Lee County case. He told her vaguely that he had had a disagreement with a neighbor and had told the boy to

leave his house, but, when he went to bed the same day, he reached over to fondle his girlfriend and discovered that he was touching the boy's penis. In general, respondent's descriptions of the incidents were inconsistent with the record, and he minimized his responsibility and omitted important information. During the interview, respondent admitted having a weakness for underage girls and how he had to restrain this urge.

¶ 27 Weitzl's testimony about respondent's treatment history in Illinois and Wisconsin was consistent with Nicolai's. During the 2016 interview, respondent said that he did not intend to participate in any sex-offender treatment, because he believed that it would not do any good.

¶ 28 Weitzl testified that in both 2014 and 2016 she diagnosed respondent with four mental disorders: (1) pedophilic disorder, nonexclusive type; (2) other specified paraphilic disorder in a controlled environment; (3) antisocial personality disorder; and (4) substance-abuse disorder. The first disorder is sexually violent as defined by the Act, and the diagnosis was supported by respondent's offenses against his wife's sister in the first case and the 13-year-old boy in the most recent case. The second disorder is also a qualifying one under the Act, and the diagnosis was based in part on respondent's rendering his nonconsenting victims even more vulnerable by using alcohol and on his self-report of having raped several women by force. The third disorder can interact with the previous two and increase the likelihood that a person will act on sexual urges. Respondent's diagnosis was supported by his history of criminal behavior, rules violations in custody, giving minors alcohol, unstable employment, and boasting about manipulating others. The fourth disorder is a qualifying one under the Act only insofar as it works with other qualifying disorders, such as the first two. Respondent's diagnosis was supported by his long-term use of alcohol and cocaine, his intoxicated driving, and his use of alcohol in committing his sex offenses.

¶ 29 Weigl testified that she had performed risk assessments of respondent, using the Static-99R and the Static-2002R and considering various dynamic risk factors. On the Static-99R, respondent scored 5, placing him in the second-highest risk category and the 88th percentile. On the Static-2002R, he scored 8, placing him in the highest risk category and “the 95.5 *** percentile.” The dynamic risk factors that applied to respondent included (1) deviant sexual interests; (2) antisocial lifestyle; (3) substance abuse; (4) antisocial personality disorder; (5) sexual preoccupation; (6) grievance and hostility; (7) intimacy deficits; (8) employment instability; (9) victim-blaming and lack of remorse; and (10) psychopathy, specifically narcissism and antisocial personality disorder. Weigl testified that none of the three protective factors that Nicolai had testified about applied to respondent. His age had already been factored in by the Static-99R.

¶ 30 Weigl testified that, in her expert opinion, it was substantially probable that respondent would commit further sexually violent offenses and that he met all the Act’s criteria for an SVP.

¶ 31 On cross-examination, Weigl agreed with respondent that the Static-99R and the Static-2002R “at best enjoy[] a moderate predictive accuracy.” By this, however, Weigl meant first that there is “a large range of *** correctness” for any risk assessment and second that the tools underestimate risk because (a) they do not include all the risk factors and (b) they apply only to the risk of reoffending over a limited period (5 or 10 years), not a person’s lifetime. Weigl conceded that, although there are relative-risk ratios for classes of people with different scores on the tests, these do not equate with an individual person’s absolute risk of reoffending.

¶ 32 The trial court held that the State had proved beyond a reasonable doubt that respondent was an SVP. At a subsequent dispositional hearing, the court committed respondent to the custody of the DHS until further order of the court. Respondent timely appealed.

¶ 33

II. ANALYSIS

¶ 34 On appeal, respondent contends that the evidence did not prove beyond a reasonable doubt that he was an SVP. For the following reasons, we hold that it did.

¶ 35 To establish that respondent was an SVP, the State had to prove beyond a reasonable doubt that (1) he was convicted of a sexually violent offense as defined in section 5(e) of the Act (725 ILCS 207/5(e) (West 2018)); (2) he has a mental disorder; and (3) the mental disorder makes it substantially probable that he will engage in acts of sexual violence (*id.* § 5(f); *In re Detention of Welsh*, 393 Ill. App. 3d 431, 454 (2009)). On appeal, we ask whether, viewing the evidence in the light most favorable to the State, any rational fact finder could conclude that the elements have been proved beyond a reasonable doubt. *Id.*

¶ 36 Respondent concedes the first element but contests the proof of the other two. On the second element, he concedes that both expert witnesses testified that he had mental disorders. He does not challenge the evidentiary basis of either expert's opinion. Instead, he argues solely that, although they relied on similar evidence, their opinions differed in some respects: Nicolai found only two mental disorders, while Weitzl found four; and Weitzl, but not Nicolai, diagnosed respondent with pedophilic disorder and substance-abuse disorder.

¶ 37 We fail to see how the two experts' modest differences required the trial court to reject *both* of their opinions. The court was free to resolve the discrepancies by finding Nicolai more credible than Weitzl, or vice versa. Or it could have reasoned that the two witnesses shared much common ground and differed on details. Respondent's sexual offenses against minors who were forced or tricked into submitting enabled the court to find that he had only "other specified paraphilic disorder" (as Nicolai concluded) or had that disorder and "pedophilic disorder" (Weitzl). Also, both experts diagnosed him with antisocial personality disorder.

¶ 38 Respondent’s challenge to the proof of risk is similarly without merit. The experts were predominantly in agreement, opining that respondent scored in the highest or next-highest categories on the actuarial measures of static factors and that numerous dynamic factors enhanced the risk of his reoffending. Respondent contests none of this.

¶ 39 Respondent notes that (1) Weitzl conceded that, in general, the Static-99R and Static-2002R have only “moderate” predictive accuracy and (2) both witnesses conceded that the tests’ relative-risk ratios for groups do not translate into absolute-risk measures for individuals. On the first point, Weitzl explained that, although these instruments are concerned with ranges of probability and not pinpoint percentages, they tend to *underestimate* risk because they do not include many risk factors and are limited to 5 or 10 years instead of an individual’s lifetime. Notably, both Nicolai and Weitzl testified that numerous dynamic risk factors that the actuarial instruments do not measure applied to respondent and that none of the dynamic protective factors did, except insofar as the actuarial instruments already accounted for his relatively advanced age.

¶ 40 On the second point, the State was not required to prove that respondent’s risk reaches a specific threshold or percentage. See *In re Commitment of Haugen*, 2017 IL App (1st) 160649, ¶¶ 23-25. The imperfections in the risk-measurement tools did not prevent the court from finding beyond a reasonable doubt that respondent was substantially likely to reoffend.

¶ 41

III. CONCLUSION

¶ 42 For the foregoing reasons, the judgment of the circuit court of Lee County is affirmed.

¶ 43 Affirmed.