

**ORIGINAL**

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SUPREME COURT

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

20030304

IN THE INTEREST OF )  
D.V.A. )  
Respondent-Appellant. )

Supreme Court No.  
20030304  
District Court No.  
08-03-R-1253

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

FEB -4 2004

**BRIEF OF PETITIONER-APPELLEE**

STATE OF NORTH DAKOTA

Appeal from the Burleigh County District Court  
Findings of Fact and Order for Commitment  
Entered September 18, 2003  
South Central Judicial District  
The Honorable Robert O. Wefald, Presiding

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ISSUES PRESENTED FOR REVIEW

- I. Whether there was sufficient evidence to sustain the trial court's finding that D.V.A. was a sexually dangerous individual.
- II. Whether the trial court relied upon inadmissible hearsay evidence in finding that D.V.A. is a sexually dangerous individual.

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STATEMENT OF THE CASE

This is an appeal from an order of committal of a sexually dangerous individual under Chapter 25-03.3 of the North Dakota Century Code. The petition for committal, alleging the Appellant, D.V.A. (hereinafter referred to as Don), to be a sexually dangerous individual, was filed on June 18, 2003. (Register of Actions, Appendix, p.a-1; and Petition for Commitment of a Sexually Dangerous Person , Appendix, pp.a2 - a7). The preliminary hearing was held on June 25, 2003 and probable cause was established that Don was a sexually dangerous individual. (See Preliminary Hearing Transcript, p.19).

Don was evaluated by Drs. Joseph Belanger and Rosalie Etherington, psychologists employed at the North Dakota State Hospital in Jamestown, North Dakota. Both of these evaluators concluded that Don is a sexually dangerous individual under the definition in Chapter 25-03.3 of the North Dakota Century Code. (Evaluation Reports, Appendix, pp. A1 - A43). The hearing on the petition was held on September 17, 2003. Both of the evaluators testified. (Trial Transcript, hereinafter "TT"). The trial court found Don to be a sexually dangerous individual and ordered his committal to the care, custody and control of the Executive Director of the

1 North Dakota Department of Human Services.  
2 (Findings of Fact and Order for Commitment,  
3 Appendix, pp. a8, a9; TT, pp. 93, 94). The trial  
4 court's decision was rendered on September 17, 2003,  
5 but signed and entered on September 18, 2003.  
6 (Appendix, pp. a8, a9). Don filed his Notice of  
7 Appeal from the order of committal with the Clerk of  
8 District Court on October, 17, 2003. (Register of  
9 Actions; Appendix, p. a10).

10  
11 **STATEMENT OF FACTS**

12 Don was charged with and convicted of the  
13 criminal offense of gross sexual imposition  
14 (hereinafter GSI) in 1996. (See Information and  
15 Criminal Judgment admitted as State's Exhibit #2,  
16 Register of Actions at Appendix p. a1). Don was  
17 sentenced to a prison term of ten years with two  
18 years suspended for a period of ten years upon  
19 various conditions of probation. Several months  
20 prior to Don's scheduled release from prison, the  
21 North Dakota Prisons Division requested the Burleigh  
22 County State's Attorney to consider filing a  
23 petition for commitment of Don as a sexually  
24 dangerous individual. The request was made after  
25 the results of a risk assessment of Don indicated  
26 he was an individual much more likely than not to  
27 commit new sex offenses upon his release. (See

1 Appendix, pp. a6, a7).

2 A Petition was filed alleging Don is a  
3 Sexually Dangerous Individual pursuant to Chapter  
4 25-03.3 of the North Dakota Century Code.

5 (Appendix, p. a2 - a7). After a Preliminary  
6 Hearing, finding probable cause consistent with the  
7 chapter, Don was transported to the North Dakota  
8 State Hospital in Jamestown for evaluation.

9 The experts who evaluated Don were Joseph  
10 Belanger, Ph.D and Rosalie Etherington, Ph.D. Both  
11 completed and filed reports in accordance with the  
12 statute. (Register of Actions, Appendix, p. a1).  
13 Dr. Belanger's Psychological Evaluation, starts at  
14 Appendix page A1. Dr. Belanger described the  
15 process by which the evaluation was performed. (TT.  
16 11) Dr. Belanger first reviewed everything that is  
17 known about all index offenses, the history of  
18 charges and convictions both as an adult and as a  
19 juvenile and all treatment records available to him.  
20 (TT. 11). Dr. Belanger confirmed that such records  
21 were generally relied upon by experts in his  
22 profession in arriving at an opinion as to whether  
23 an individual is a sexually dangerous person. (TT.  
24 11). Dr. Belanger described the records he  
25 reviewed in the course of evaluating Don. (TT. 11,  
26 12). In addition to reviewing records, Dr. Belanger  
27 conducted interviews of Don and used risk assessment



1 inventories as part of his evaluation of Don. (TT.  
2 13). Dr. Belanger, when questioned as to whether he  
3 had accepted the underlying records at face value in  
4 conducting his evaluation stated:

5 "I haven't even accepted it as face value.  
6 What I've done I've gone through the material,  
7 and as I attempted to say before, I've looked  
8 for convergence of cross sources; and where I  
9 have not had convergence of cross sources,  
10 which is to say that more than one source is  
11 exactly the same thing, I have looked at the  
12 sources carefully and tried to assess each  
13 source of the validity. And this is the  
14 ordinary standard of the profession of  
15 clinical psychology."

16 (TT. 25).

17 In his report, Dr. Belanger first concluded  
18 that Don had a mental disorder, namely, Pedophilia,  
19 Sexually Attracted to Both, Nonexclusive Type;  
20 Sexual Sadism; and Antisocial Personality Disorder.  
21 Dr. Belanger's report went on to state the basis for  
22 the diagnosis of Antisocial Personality Disorder.  
23 (Appendix p. A2; TT, p.14). Dr. Belanger addressed  
24 the question of "some reason to believe Don is  
25 likely to engage in further acts of Sexually  
26 Predatory Conduct" as follows:  
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"Yes. The diagnosis of pedophilia directly and necessarily implies a drive exists towards sexual contact with children. Such a drive by itself addresses the issues of whether the action of child sexual abuse would be completely voluntary (and hence just criminal conduct). The drive, by definition, lowers the completely voluntary nature of the action, not below the threshold for criminal responsibility, but enough to establish the element of driven behavior. Identical reasoning applies to the Sexual Sadism diagnosis. Here the drive is towards inflicting pain, distress, and humiliation. Don has shown willingness to act on this with nonconsenting partners in the past. This is demonstrated by the Index Offense victim's statement as well as by the two charges of GSI against boys and his conviction of disorderly conduct for sexual harassment by spanking. The homemade Sexually Explicit Material found in his cell shows further that he continues to have such interest. All of this is exacerbated by the existence of Antisocial Personality Disorder. The core behavioral manifestation of ASPD is the willingness to act as one wishes without regard or

1 consideration for the rights of others. This  
2 definitely drives the risk of the patient  
3 abandoning such voluntary over-rides as he may  
4 have with regard to the behavioral expression  
5 of pedophilic and sadistic sexual interests.  
6 Therefore the existence of the mental  
7 disorders creates an initial reason to believe  
8 that Don is likely to engage in further acts  
9 of Sexually Predatory Conduct... notably  
10 sadistic pedophilic behavior.

11 Appendix page A7.

12 Dr. Belanger's Report then addressed the Risk  
13 Assessment Inventories. Dr. Belanger specified the  
14 scores assigned to Don in the Risk Assessment  
15 Inventories. (Appendix, pp. A8, A9). The purpose  
16 of these inventories was to assess Don's likelihood  
17 to engage in further acts of sexually predatory  
18 conduct. (TT.32). Dr. Belanger's conclusion from  
19 the results of the inventories was that Don "stands  
20 out as having uniformly high risk across all of the  
21 instruments utilized." (Appendix, p.A9; TT.33, 35,  
22 36).

23 Dr. Belanger also addressed other facts that  
24 might serve as protective factors against Recidivist  
25 Sexual Offense. (Appendix, p.A9, A10; TT. 36-39).  
26 Dr. Belanger was unable to find any factors that  
27 would mitigate Don's risk to re-offend. (TT. 39).

1 Dr. Belanger's conclusion on the ultimate  
2 issue of whether Don has a congenital or acquired  
3 condition that is manifested by a sexual disorder, a  
4 personality disorder or other mental disorder or  
5 dysfunction that makes Don likely to engage in  
6 further acts of sexually predatory conduct was that  
7 Don "is likely to engage in additional acts of  
8 Sexually Predatory Conduct per virtue of mental  
9 disorder and personality disorder." (Appendix p.  
10 A10) In stating is conclusion, Dr. Belanger  
11 explained that Don "has Pedophilia, Sexual Sadism,  
12 and Antisocial Personality Disorder." His scores on  
13 the risk assessments "provide strong nomothetic  
14 corroboration of the diagnostically derived risk  
15 estimate. He has not completed a course of Sex  
16 Offender Specific Treatment that might constitute a  
17 protective factor. His idiosyncratic factors only  
18 increase his risk estimate and raise the possibility  
19 he may be moving in the direction of more seriously  
20 sadistic offenses." (Appendix p. A10) Dr. Belanger  
21 further concluded that Don is a Sexually Dangerous  
22 Individual. Id.

23 Dr. Etherington's testimony and evaluation  
24 generally echoed that of Dr. Belanger. (See  
25 Evaluation Findings, Appendix, pp. A39- A43; TT. 59-  
26 73). Dr. Etherington emphasized Don's risk of re-  
27 offending in her evaluation when discussing the

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1 results of the risk assessment inventories. Dr.  
2 Etherington stated that "A high degree of  
3 psychopathy, as measured by the PCL-R, and a deviant  
4 sexual arousal pattern, as evidenced by either the  
5 Pedophilia and/or the Sexual Sadism, is particularly  
6 disturbing combination. This combination  
7 contributes to risk beyond that which the risk  
8 assessment instruments measure." (Appendix p. A42).

9 Dr. Belanger and Dr. Etherington were the only  
10 witnesses who testified at the commitment hearing.  
11 Both doctors concluded that Don was a sexually  
12 dangerous individual likely to engage in further  
13 acts of predatory conduct. (TT. 39,40, 73). There  
14 was no evidence to the contrary.

#### 16 LAW AND ARGUMENT

17 I. There was sufficient evidence to sustain the  
18 trial court's finding that D.V.A. was a  
19 sexually dangerous individual.

20 There was sufficient evidence to sustain the  
21 finding of the trial court that Don is a sexually  
22 dangerous individual. Sufficiency of the evidence  
23 specific to Chapter 25-03.3 of the North Dakota  
24 Century Code is an issue addressed previously by  
25 this Court in In the Interest of M.D., 1999 ND 160,  
26 ¶ 34, 598 N.W.2d 799 and In the Interest of M.B.K.,  
27 2002 ND 25, ¶9; 639 N.W. 2D 473. This Court will  
affirm a trial court's order of committal "unless it

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is induced by an erroneous view of the law or if we  
are firmly convinced it is not supported by clear  
and convincing evidence." Id.

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In order for Don to prevail on the issue of  
insufficient evidence, he must show the finding of  
the trial court to be clearly erroneous. The trial  
court's findings were not clearly erroneous, but  
instead were supported by clear and convincing  
evidence that Don is a sexually dangerous  
individual.

A person is deemed to be a sexually dangerous  
individual if he has been "shown to have engaged in  
sexually predatory conduct and who has a congenital  
or acquired condition that is manifested by a sexual  
disorder, a personality disorder, or other mental  
disorder or dysfunction that makes that individual  
likely to engage in further acts of sexually  
predatory conduct which constitute a danger to the  
physical or mental health or safety of the victim of  
the conduct. N.D.C.C. §25-03.3-01(8). An  
individual may not be committed as a sexually  
dangerous individual unless evidence is admitted  
establishing that at least two experts have  
concluded the individual meets this definition as a  
sexually dangerous individual. N.D.C.C. §25-03.3-  
13.

1 Evidence of Don's sexually predatory conduct  
2 was admitted through certified copies of the  
3 Information and Judgment showing his conviction for  
4 Gross Sexual Imposition and testimony regarding the  
5 circumstances that led to the conviction. (See  
6 Information and Criminal Judgment admitted as  
7 State's Exhibit #2, Register of Actions at Appendix  
8 page a1; TT. 15, 17, 26, and 66). These documents  
9 and testimony established that Don had previously  
10 engaged in a sexual act with a minor child at a time  
11 when Don was an adult. This is sexually predatory  
12 conduct. See N.D.C.C. §25-03.3-01(9)(a)(7). The  
13 remainder of the evidence establishing Don to be a  
14 sexually dangerous individual was in the form of  
15 expert testimony.

16 Dr. Belanger testified to his expertise in  
17 performing sexual offender risk assessments. (TT.  
18 4- 19). Dr. Belanger described the process by which  
19 he evaluated Don. (TT. 11). Dr. Belanger first  
20 reviewed everything that was known about all of  
21 Don's index offenses, the history of the charges  
22 and convictions both as an adult and as a juvenile,  
23 as well as all treatment records available to him.  
24 (TT. 11). In addition to reviewing such records,  
25 Dr. Belanger conducted interviews with Don, and used  
26 risk assessment inventories in evaluating Don.  
27 (TT. 12, 13).

1 Dr. Belanger determined that Don suffers from  
2 a mental disorder or disorders, and diagnosed Don  
3 with pedophilia, sexual sadism, and antisocial  
4 personality disorder. (TT. 14). After testifying  
5 in great detail as to the information which  
6 supported these diagnoses, Dr. Belanger opined that  
7 the mental disorders diagnosed in Don made it likely  
8 that Don would engage in further acts of sexually  
9 predatory conduct. (TT. 31).

10 Dr. Belanger testified that after forming his  
11 initial opinion that Don is likely to engage in  
12 sexual predatory conduct based upon the diagnosed  
13 mental disorders, he the used three additional  
14 methods of evaluation to further assess Don's  
15 likelihood to re-offend. (TT. 32). The first of  
16 such methods was the psychometric analysis, which  
17 included three risk assessment inventories and the  
18 PCL-R. (TT. 32). The second was the analysis of  
19 treatment benefit that would lower the risk estimate  
20 predicted from the psychometric analysis. (TT. 32).  
21 The third was idiosyncratic factors unique to Don,  
22 which would raise or lower the risk estimate. (TT.  
23 32).

24 Dr. Belanger testified in detail about the  
25 administration and results of the risk assessment  
26 inventories utilized in the psychometric analysis.  
27 (TT. 32 - 35). The first instrument Dr. Belanger



1 described was the Rapid Risk Assessment for Sex  
2 Offense Recidivism, usually referred to by the  
3 acronym RRASOR. (TT. 33). Don's numerical score on  
4 the RRASOR indicated a 73 percent incident of  
5 recidivist sexual offense. (TT. 33). Don also  
6 scored high on the second instrument, the Static-99,  
7 which indicated a high likelihood to re-offend.  
8 (TT. 34). The third instrument was the Minnesota  
9 Sex Offense Screening Test, Revised (MnSOST-R).  
10 (TT. 35). Don's numerical score on the MnSOST-R was  
11 a plus 20, with the verbal descriptor of that score  
12 being in the very highest risk category. (TT. 35).

13 Finally, Dr. Belanger also described Don's  
14 results on the Psychopathic Check List, Revised  
15 (PCL-R), which indicated Don to be a psychopath with  
16 a very high score. (TT. 35).

17 Dr. Belanger testified that he searched for  
18 countervailing positive idiosyncratic factors that  
19 would lessen Don's risk of re-offending and was  
20 unable to find any. (TT. 39). In addition, Don had  
21 failed to complete any sex offender treatment to  
22 date. (TT. 36). Therefore, he had no treatment  
23 benefit which would lower the risk assessed through  
24 the psychometric analysis.

25 Dr. Belanger's ultimate conclusion based on  
26 Don's diagnoses of pedophilia, sexual sadism and  
27 antisocial personality disorder, Don's scores on the

1 risk assessment inventories and the PCL-R, and the  
2 lack of any positive idiosyncratic factors was that  
3 Don is a sexually dangerous individual. (TT. 39,  
4 40).

5           The second witness, Rosalie Etherington, Ph.D,  
6 also an expert in conducting sexually dangerous  
7 individual evaluations, testified to her diagnostic  
8 procedures and, risk assessment inventories in  
9 evaluating Don. (TT. 63, 64). Dr. Etherington  
10 also determined that Don suffered the mental  
11 disorders of pedophilia, sexual sadism and  
12 antisocial personality disorder. (TT. 64). Dr.  
13 Etherington reached the same conclusion as Dr.  
14 Belanger, stating that it was her opinion that Don  
15 was likely to engage in future predatory conduct.  
16 (TT. 73).

17           Don argues the evidence was insufficient for  
18 committal because neither expert testified that Don  
19 was or was not mentally retarded. This argument  
20 fails to recognize that each expert diagnosed Don  
21 and each did not conclude that Don was mentally  
22 retarded within those diagnoses. (TT. 14, 64).

23           A "sexually dangerous individual" is one who  
24 is shown to have engaged in sexually predatory  
25 conduct and who had a congenital or acquired  
26 condition that is manifested by a sexual disorder, a  
27 personality disorder, or other mental disorder or

1 dysfunction that makes the individual likely to  
2 engage in further acts of sexually predatory conduct  
3 which constitute a danger to the physical or mental  
4 health or safety of others. N.D.C.C. §25-03.3-  
5 01(8). Mental retardation cannot be the sexual  
6 disorder, personality disorder, or other mental  
7 disorder or dysfunction. Id. For a court to commit  
8 an individual, it must find that he is a sexually  
9 dangerous individual. N.D.C.C. §25-03.3-13. There  
10 is no specific requirement that the court find that  
11 a respondent is not mentally retarded. The court  
12 must only make a finding that the respondent suffers  
13 from some sexual disorder, personality disorder, or  
14 other mental disorder or dysfunction which is not  
15 mental retardation.

16 Both experts testified to their diagnoses of  
17 Don. Neither found him to be mentally retarded.  
18 Each expert found that Don suffered from some sexual  
19 disorder, personality disorder, or other mental  
20 disorder or dysfunction, other than mental  
21 retardation, that made Don likely to engage in  
22 further acts of sexually predatory conduct. For Dr.  
23 Belanger, those disorders were pedophilia, sexual  
24 sadism, and antisocial personality disorder. (TT.  
25 14). For Dr. Etherington, those disorders were  
26 pedophilia, sexual sadism, and antisocial  
27 personality disorder. (TT. 64).

1           There was absolutely no evidence presented to  
2 the trial court even suggesting Don was mentally  
3 retarded. If the respondent believed he was  
4 mentally retarded, he had every opportunity to  
5 present evidence of the same to the trial court, and  
6 have his own independent evaluation. His suggestion  
7 that references in the record as to "low  
8 functioning" equate to mental retardation is  
9 completely lacking in factual support. Neither  
10 psychologist testified Don was mentally retarded  
11 despite his alleged low functioning. Don is asking  
12 this Court to make a clinical assessment for which  
13 there is no lay or expert testimony supporting the  
14 same.

15  
16 **II. The trial court did not rely upon inadmissible**  
17 **hearsay evidence in finding that D.V.A. is a**  
18 **sexually dangerous individual.**

19           Don argues that the opinions provided by the  
20 State's experts were flawed and unreliable because  
21 they were based upon inadmissible hearsay. He  
22 further argues that those opinions should not have  
23 been admitted into evidence because they were based  
24 upon inadmissible facts. Neither of those arguments  
25 justify reversal in this case.

26           First, the opinions expressed by each expert  
27 as to Don's likelihood to engage in further acts of

1 sexually predatory conduct were not based upon  
2 inadmissible hearsay. Those opinions were based, in  
3 part, upon interviews each expert had with Don, upon  
4 psychological tests administered to Don by each  
5 expert, and upon the criminal conduct Don had  
6 engaged in. None of these things are inadmissible  
7 hearsay. The statements made by Don during the  
8 interviews and the results of the psychological  
9 tests were admissible as non-hearsay statements of a  
10 party-opponent. See Rule 803(8) of the North Dakota  
11 Rules of Evidence.

12 In addition, records or other documentation of  
13 other sexually predatory conduct or criminal conduct  
14 by Don, including records of the juvenile court, are  
15 admissible by statute. See N.D.C.C. §25-03.3-15.  
16 Any reliance upon those matters by the expert  
17 psychologists was permissible.

18 Finally, to the extent that any other matters  
19 not otherwise admissible were relied upon by the  
20 experts, that reliance and the discussion thereof  
21 was wholly permissible. Rule 703 of the North  
22 Dakota Rules of Evidence states:

23 "The facts or data in the particular case upon  
24 which an expert bases an opinion or inference  
25 may be those perceived by or made known to the  
26 expert at or before the hearing. If of a type  
27 reasonably relied upon by experts in the

1 particular field in forming opinions or  
2 inferences upon the subject, the facts or data  
3 need not be admissible into evidence.”

4 Most courts agree an expert should be permitted to  
5 describe otherwise inadmissible hearsay relied upon  
6 in order to give the basis for the opinion. State  
7 v. Messner, 1998 ND 151, ¶26, 583 NW2d 109.

8 Further, ordinarily any weakness in an expert’s  
9 opinion affects credibility, not admissibility.

10 Myer v. Rygg, 2001 ND 123, ¶20, 630 NW2d 62.

11 Both experts testified that the information  
12 gleaned from records outside those matters described  
13 above were items generally relied upon by experts in  
14 their profession of psychology in formulating an  
15 opinion whether an individual is likely to engage in  
16 further sexually predatory conduct. (TT. 11, 24,  
17 25, 62, 63). They were not only permitted to  
18 express their opinions on that subject, but to  
19 describe the matters upon which they based their  
20 opinions regardless whether those matters were  
21 otherwise admissible into evidence.

22 The opinions expressed by the experts were  
23 also reliable, despite reliance upon any hearsay  
24 information. As each expert noted, the opinion  
25 expressed was not based solely upon records which  
26 had been obtained. The opinion was based  
27 additionally upon the expert’s psychological

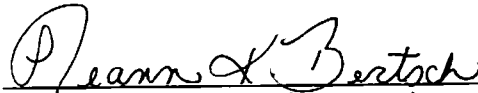
1 diagnoses, his or her interviews with Don, the  
2 results of psychological testing administered to  
3 Don, and his or her identification and assessment of  
4 idiosyncratic factors and treatment benefits  
5 achieved by Don. In addition, Dr. Belanger  
6 specifically noted he did not take the record  
7 information simply at face value. (TT. 25). He  
8 looked for convergence of cross sources. (TT. 25).  
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CONCLUSION

For the reasons stated above, the State of North Dakota respectfully requests that this Court AFFIRM the Findings of Fact and Order for Commitment.

Respectfully submitted this 3rd day of February, 2004.



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