

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In the Interest of Garrett Alan Loy

Haley L. Wamstad,
Assistant State's Attorney,

Petitioner and Appellee,

vs.

Garrett Alan Loy,

Respondent and Appellant.

Supreme Court No. 20140111

District Court No. 18-2013-MH-00065

ON APPEAL FROM THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE JUDGE LAWRENCE JAHNKE PRESIDING.

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

- I. The District Court did not err in qualifying Dr. Sullivan as an expert in the field of Forensic Psychology.
- II. The District Court did not violate Mr. Loy's statutory right to a qualified expert.
- III. The District Court did not err in considering Dr. Volk's expert testimony.
- IV. The District Court properly excluded irrelevant testimony from Rodney Ireland.
- V. The District Court properly concluded that the State had met its burden of proving, by clear and convincing evidence, that Loy is a sexually dangerous individual.
 - A. Mr. Loy engaged in sexually predatory conduct.
 - B. The District Court's conclusion that Mr. Loy suffers from a congenital or acquired condition that is manifested by a sexual disorder is supported by clear and convincing evidence.
 - C. The District Court properly concluded Mr. Loy's condition makes him likely to engage in further acts of sexually predatory conduct and that there is a nexus between the disorder and the dangerousness that shows Mr. Loy has serious difficulty controlling his behavior.

STATEMENT OF THE CASE

[¶1] Mr. Garrett Loy pled guilty to gross sexual imposition in Grand Forks District Court on November 17, 2005. (Appellant's App. 7). He was sentenced to ten years with the North Dakota Department of Corrections, with five years suspended, and ordered to complete the Intensive Sex Offender Treatment Program while incarcerated. (Appellant's App. 7). In addition to this five-year sentence, Loy was sentenced to serve a consecutive sentence from his 2004 conviction for gross sexual imposition. (Appellant's App. 7).

[¶2] In May of 2013, shortly before Loy was to be released from the Department of Corrections, the State petitioned to commit Loy as a sexually dangerous individual. (Appellant's App. 3). On March 24, 2014, after a commitment hearing was held, the Grand Forks County District Court found that Loy met the criteria for involuntary commitment as a sexually dangerous individual and remanded him to the custody of the Department of Human Services. (Appellant's App. 17).

STATEMENT OF THE FACTS

[¶3] On May 12, 2004, Loy was convicted of gross sexual imposition. (Appellant's App. 6). Loy engaged in oral sex and sexual intercourse with a fourteen-year-old girl. (Appellant's App. 6). Loy was subsequently sentenced to eighteen months with the North Dakota Department of Corrections and Rehabilitation. (Appellant's App. 6).

[¶4] Approximately six months after his release, Loy was charged again with gross sexual imposition after he was alleged to have forced a woman to have sexual intercourse with him. (Appellant's App. 6). However, this charge was dismissed after the victim left the Grand Forks area and could not be contacted. (Appellant's App. 6).

[¶5] In May of 2005, Loy was terminated from sex offender treatment by Northeast Human Service Center because he failed to comply with the rules of the treatment program. (Appellant's App. 6). His violations included engaging in regular contact with people under the age of eighteen, frequenting areas where children would congregate, lying, continuing to be sexually active, being charged with another sexual offense, and denying and minimizing his sexual behaviors to his treatment group. (Tr. p. 54).

[¶6] In June of 2005, Loy's probation was revoked after the State established that he had fondled and digitally penetrated a twelve-year-old girl. (Appellant's App. 6). Additionally, Loy also violated the terms of his probation by socializing with minor girls and failed to comply with his treatment program. (Appellant's App. 6).

[¶7] On November 17, 2005, Loy pled guilty to Gross Sexual Imposition. (Appellant's App. 7). Shortly after he was incarcerated, Loy was evaluated by Dr.

Peterson for referral to the Department of Corrections sex offender treatment program. (Appellant's App. 8). Dr. Peterson was concerned that Loy would commit further acts of sexually predatory conduct. (Appellant's App. 8). While in prison, Loy completed a low intensity sex offender treatment program. (Appellant's App. 8).

[¶8] The State filed a petition to involuntarily commit Loy as a sexually dangerous individual. Dr. Sullivan from the North Dakota State Hospital completed an evaluation of Mr. Loy. (Appellee's App. 4). Dr. Sullivan offered to interview with Loy, but Loy refused to speak with Dr. Sullivan. (Tr. p. 22). Dr. Sullivan reviewed Loy's records and reports, and found that Loy had engaged in sexual contact with a fourteen-year-old girl and a twelve-year-old girl when he was eighteen and nineteen-years-old. (Tr. p. 31). Loy digitally penetrated a twelve-year-old girl while he was on probation for his first sex crime. (Tr. p. 31). In addition to the sexually predatory conduct for which he was charged and convicted, Loy engaged in sexual acts with others when he was as young as six-years-old. (Tr. p. 32). Loy also engaged in sexual activities with children aged four to teenage. (Tr. p. 32). He has a history of engaging in sexual acts with his twin brother, other children, and a dog. (Tr. p. 34). Loy engaged in voyeuristic behaviors. (Tr. p. 34). Dr. Sullivan testified that Loy was masturbating from six times a week to six times per day, including doing so in semi-public places. (Tr. p. 35). Loy admitted to fantasizing about violent and forceful sexual behaviors such as holding down a young girl and having sex with her. (Tr. p. 36). Loy reported having difficulty controlling his sexual fantasies. (Tr. p. 37).

[¶9] After completing her evaluation, Dr. Sullivan diagnosed Loy with hypersexuality and other specified paraphilic disorder, hebephilia. (Tr. p. 7). Dr. Sullivan

also found, based on her clinical judgment, which was supported by the Static-99R, that Loy was at a high risk of engaging in further acts of sexually predatory conduct. (Tr. p. 53).

[¶10] Dr. Volk was appointed by the district court to serve as the independent evaluator. (Tr. p. 97). Dr. Volk also diagnosed Loy with other specified paraphilic disorder, hebephilia. (Tr. p. 107). Dr. Volk completed a personal interview with Loy, and he also completed a personality test. (Tr. p. 103). The personality test identified character traits of impulsivity, restlessness, moodiness, failing to exercise good judgment, and not considering the ramifications of his actions. (Tr. p. 103). Based on this information, and his clinical judgment, Dr. Volk diagnosed Loy with other specified personality disorder. (Tr. p. 101). Like Dr. Sullivan, Dr. Volk was concerned by the fact that Loy had committed a second sex offense while on supervised probation. (Tr. p. 144). Dr. Volk concluded that Mr. Loy was likely to engage in further acts of sexually predatory conduct. (Tr. pp. 142-43).

ARGUMENT

[¶11] The State has the burden of proving a person is a sexually dangerous individual by clear and convincing evidence. Interest of Johnson, 2013 ND 146, ¶ 5, 835 N.W.2d 806. The State must prove:

(1) the individual has engaged in sexually predatory conduct; (2) the individual has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction; (3) the condition makes the individual likely to engage in further acts of sexually predatory conduct which constitute a danger to the physical or mental health or safety of others; and (4) the individual has serious difficulty controlling his behavior.

Interest of Corman, 2014 ND 88, ¶ 8, 845 N.W.2d 335 (quoting In re Mangelsen, 2014 ND 31, ¶ 7, 843 N.W.2d 8).

[¶12] This Court’s review is limited to a review of the procedures, findings, and conclusions of the district court. N.D.C.C. § 25-03.3-19. The district court’s findings of fact are reviewed on appeal under a “modified clearly erroneous standard of review.” In re J.G., 2013 N.D. 28, ¶ 8, 827 N.W.2d 341. Under this standard, this Court “will affirm a district court’s order unless it is induced by an erroneous view of the law or [the Court is] firmly convinced [the order] is not supported by clear and convincing evidence.” In re Rubey, 2011 ND 165, ¶ 5, 801 N.W.2d 702 (quoting In re T.O., 2009 ND 209, ¶ 8, 776 N.W.2d 47). The Supreme Court “will not second-guess credibility determinations made by the court.” In re Whitetail, 2013 ND 143, ¶ 5, 712 N.W.2d 610.

I. THE DISTRICT COURT DID NOT ERR IN QUALIFYING DR. SULLIVAN AS AN EXPERT IN THE FIELD OF FORENSIC PSYCHOLOGY.

[¶13] Dr. Sullivan conducted a Sexually Dangerous Individual Evaluation of Loy and filed her report of evaluation in July of 2013. (Tr. p. 20). Dr. Sullivan testified and

was qualified as an expert witness at Loy's commitment hearing. (Tr. p. 18). A

"qualified expert" is defined as:

[A]n individual who has an expertise in sexual offender evaluations and who is a psychiatrist or psychologist trained in a clinical program and licensed pursuant to this state's law or psychologist approved for exemption by the North Dakota board of psychological examiners.

N.D.C.C. § 25-03.3-01(4).

[¶14] Dr. Sullivan is a "qualified expert" in accordance with the requirements of Section 25-03.3-01(4) of the North Dakota Century Code. Dr. Sullivan has an active license to practice in the State of North Dakota. (Tr. p. 16). In fact, she has been licensed as a psychologist in North Dakota since 2006. (Appellant's App. 37). Despite the issues raised on appeal, at trial Mr. Loy stipulated that Dr. Sullivan's licensure is not in dispute. (Tr. p. 79).

[¶15] Additionally, Dr. Sullivan has expertise in sex offender evaluations. She testified that her job duties over the past eight years have included "conduct[ing] evaluations of individuals referred by the Court for either Sexually Dangerous Individual Evaluations, ... and other Dangerous Risk Assessment Evaluations." (Tr. p. 16). She stated she has completed approximately 57 initial sexually dangerous individual commitment evaluations, and another 102 annual reviews of individuals already found to be sexually dangerous. (Tr. p. 19). Lastly, Dr. Sullivan's Curriculum Vitae exhibits the extensive experience and education she has received in the areas of psychology, sex offender treatment, and commitment of Sexually Dangerous Individuals. (Appellee's App. 1-15).

[¶16] Mr. Loy alleges that Dr. Sullivan did not have a "full, valid license as required by statute to qualify as an expert witness." (Appellant's Br. at 11). However,

Mr. Loy is unable to cite to statutory authority or any caselaw requiring a “full, valid license.” Rather, the statutory authority merely requires the expert be licensed, which Mr. Morrow stated on the record he is not disputing. (Tr. p. 79). Mr. Loy’s argument regarding a past driving under the influence charge and probation status goes to the weight and credibility of the witness, which this Court has established it “will not second-guess” those trial court determinations. In re Whitetail, 2013 ND at ¶ 5. The district court determined that she was qualified as an expert witness, despite the credibility issues raised. (Tr. p. 18).

II. THE DISTRICT COURT DID NOT VIOLATE LOY’S STATUTORY RIGHT TO A QUALIFIED EXPERT.

[¶17] After a finding of probable cause, the District Court must order the individual transferred to a facility for a full evaluation on whether he is a Sexually Dangerous Individual. N.D.C.C. § 25-03.3-11. The individual, “may retain an expert to perform an evaluation or testify on the respondent’s behalf.” N.D.C.C. § 25-03.3-12. Or, in the case of an indigent respondent, “the court shall appoint a qualified expert to perform an examination or participate in the commitment proceeding on the respondent’s behalf.” Id. The distinction between these two situations is that if the respondent is hiring their own expert, they may choose that person. Alternatively, if the court is appointing an expert on their behalf, there is no language in the statute indicating the respondent may select that expert. See In re B.V., 2006 ND 22, ¶ 18, 708 N.W.2d 877.

[¶18] In this case, the court initially made a finding of indigent status and appointed Dr. Gregory Volk to complete an evaluation on behalf of Mr. Loy. (Appellant’s App. 59). At the time, Mr. Loy was represented by court-appointed counsel, Mr. David Dusek. (Appellant’s App. 60). Subsequently, Mr. Loy retained private

counsel, Mr. Tyler Morrow. (Appellee's App. 16-17). Based on Mr. Loy's ability to retain private counsel, the court requested he complete an application for indigent status to determine his eligibility to pay for the independent evaluation. (Appellee's App. 16-17). The court determined that based upon Mr. Loy's cash assets, he shall be responsible for \$2,700 of the independent evaluation and the Department of Human Services would be responsible for the balance. (Appellee's App. 16-17). Between that order on August 9, 2013 and the commitment hearing on January 23, 2014, Mr. Loy had not made one payment in accordance with the court order. (Tr. p. 99). As a result, the court ordered the full cost of the evaluation be paid by the Department of Human Services. (Appellant's App. 17).

[¶19] Mr. Loy alleges that the district court's order for Mr. Loy to pay a portion of the independent evaluation "resulted in a negative recommendation by Dr. Volk." (Appellant's Br. 13). That is not true. Dr. Volk submitted his report to the court on October 29, 2013. (Appellee's App. 18-27). In his report, Dr. Volk indicates that Mr. Loy meets the criteria for civil commitment. Id. There is no reference in his report to his unpaid financial obligation as a basis for his opinion. Id. Further, Dr. Volk testified that it is new information since the completion of his report that would elevate the level of risk previously concluded. (Tr. pp. 98-99). He testified to each of the necessary elements and states that Mr. Loy's inability to fulfill this financial obligation does not change his opinion on whether each of those elements are met. (Tr. pp. 137-38). Further, the district court determined that "this factor is not pivotal" in the court's ultimate conclusion. (Appellant's App. 13). Therefore, even if it was in error for the court to order this financial obligation, it was harmless.

III. THE DISTRICT COURT DID NOT ERR IN CONSIDERING DR. VOLK'S EXPERT TESTIMONY.

[¶20] Loy argues Dr. Volk should not have been permitted to testify due to a “personal vendetta” he had against Loy. (Appellant’s Br. 16). Loy alleges that Dr. Volk raised Loy’s risk assessment due to an outstanding bill of \$2,700. (Appellant’s Br. 16). However, Dr. Volk testified that this did not change his ultimate decision on each of the required statutory elements. (Tr. pp. 137-38). Rather, Dr. Volk testified that failure to follow a court order and complete financial obligations was relevant to his level of risk. (Tr. pp. 137-38). Further, this is a factor that goes to the weight and credibility of the testimony, which is an assessment for the district court. See In re Wolff, 2011 ND 76, ¶ 14, 796 N.W.2d 644 (giving “great deference to a trial court’s credibility determinations of expert witnesses and the weight to be given to the testimony”).

[¶21] Furthermore, Dr. Volk testified that his concern regarding the outstanding bill of \$2,700 is “not about the finances.” (Tr. p. 99). Rather, his concern was regarding Loy’s inability or unwillingness to comply with a court order, which is a factor often considered by experts in making risk assessments. (Tr. p. 99). Dr. Volk stated that the risk level “was there prior to the assessment, prior to the information with the court order regarding the payment and those kinds of things, so the moderate-to-high level with risk remains.” (Tr. p. 137).

[¶22] Dr. Volk testified to his opinion that Loy was a moderate to high level of risk based on his clinical judgment, and corroborated by the results of the Static-99R. (Tr. p. 108). Dr. Volk further testified:

You know, that if we have history of not following through, history of impulsivity, poor decisions and we’re seeing that really right up through the present while he is in a structured setting, you have to, then, have

questions about what's going to occur if he goes into a less structured setting. So I think that a moderate-to-high-level risk certainly pertains to what I would say he currently is leaning more towards the higher end at this point.

(Tr. p. 110).

[¶23] The district court heard the testimony offered by Dr. Volk. Loy's attorney was permitted to cross-examine Dr. Volk regarding his statements. The district court gave this testimony its proper weight. Regardless of the weight this Court decides to give Dr. Volk's testimony, it was not clearly erroneous for the district court to allow his testimony.

IV. THE DISTRICT COURT PROPERLY EXCLUDED IRRELEVANT TESTIMONY FROM RODNEY IRELAND.

[¶24] Loy argues that the district court should have allowed him to call Rodney Ireland, a sexually dangerous individual committed at the North Dakota State Hospital, to testify in his commitment hearing. (Appellant's Br. ¶ 33). Loy alleges Mr. Ireland would testify to his personal opinions regarding the lack of treatment actually received at the North Dakota State Hospital sex offender treatment program and an apparent law suit that was filed in federal court. (Appellant's Br. ¶ 33).

[¶25] "Evidence is relevant if ... the fact is of consequence in determining the action." N.D.R. Evid. 401. Further, the district court may exclude evidence if it confuses the issues or is a waste of time. N.D.R. Evid. 403. The district court determined Mr. Ireland's testimony is not relevant to the matter before the court. (Tr. p. 8).

[¶26] A commitment hearing under Section 25-03.3 of the North Dakota Century Code is held to determine if:

- (1) the individual has engaged in sexually predatory conduct;
- (2) the individual has a congenital or acquired condition that is manifested by a

sexual disorder, a personality disorder, or other mental disorder or dysfunction; (3) the condition makes the individual likely to engage in further acts of sexually predatory conduct which constitute a danger to the physical or mental health or safety of others; and (4) the individual has serious difficulty controlling his behavior.

Interest of Corman, 2014 ND 88, ¶ 8, 845 N.W.2d 335 (quoting In re Mangelsen, 2014 ND 31, ¶ 7, 843 N.W.2d 8). Mr. Ireland's testimony would not assist the trier of fact in determining whether the above elements are met. Evidence is relevant if it tends to prove or disprove a fact at issue. State v. Haugen, 458 N.W.2d 288, 290 (N.D. 1990).

[¶27] Mr. Loy alleges that “[t]he main purpose for Mr. Ireland's appearance today here – today, was to establish a foundation to the federal lawsuit that has been filed in the District Court of Fargo in regards to the treatment at the North Dakota State Hospital or lack thereof.” (Tr. p. 6). The quality of the treatment program at the North Dakota State Hospital is not at issue in a commitment hearing under N.D.C.C. Ch. 25-03.3. As of the date of the commitment hearing, Mr. Loy had not participated in treatment at the North Dakota State Hospital. Further, committing an individual as a Sexually Dangerous Individual does not necessarily mean they will be treated at the North Dakota State Hospital. N.D.C.C. § 25-03.3-13. This section provides:

If the respondent is found to be a sexually dangerous individual, the court shall commit the respondent to the care, custody, and control of the executive director [of the Department of Human Services]. The executive director shall place the respondent in an appropriate facility or program at which treatment is available.

Id. Testimony regarding the quality of the State Hospital's treatment program is premature and irrelevant at the time of the commitment proceeding. Therefore, the district court properly excluded the irrelevant testimony of Mr. Ireland.

V. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE STATE HAD MET IT'S BURDEN OF PROVING, BY CLEAR AND CONVINCING EVIDENCE, THAT LOY IS A SEXUALLY DANGEROUS INDIVIDUAL.

[¶28] In order to commit an individual for sex offender treatment, the district court must find, by clear and convincing evidence, the individual is a sexually dangerous individual. N.D.C.C. § 25-03.3-13. A "Sexually Dangerous Individual" means:

[A]n individual who is 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 others.

N.D.C.C. § 25-03.3-01(8). Additionally, the court must also find that the individual facing commitment has "serious difficulty controlling his behavior." Kansas v. Crane, 534 U.S. 407, 413 (2002).

[¶29] In making its decision, the district court properly considered both expert's testimony. Loy alleges that Dr. Sullivan's testimony should not have been considered because she did not complete an interview of Mr. Loy. (Appellant's Br. 20). Dr. Volk did interview Mr. Loy. (Appellee's App. 3). Dr. Sullivan testified that it was Mr. Loy's decision not to participate in an interview based on the advice of his attorney. (Tr. p. 23). In fact, she states that approximately 40 percent of respondents choose not to interview with the State Hospital evaluator. Id.

[¶30] Loy argues that a personal interview is necessary for a psychologist to render a valid opinion. (Appellant's Br. ¶ 40). This Court in In re J.M. rejected a similar argument. 2013 ND 11, ¶ 3, 826 N.W.2d 315. In J.M., the State's expert, Dr. Krance, testified that she based her opinion as to whether J.M. remained a sexually dangerous

individual on a review of “his charts and history available from prior evaluations, information from his former and current therapists, his criminal history, and his prior evaluations and diagnosis.” Id. Dr. Krance testified that “she had not reviewed [J.M.’s] entire file at the state hospital” and that it was “not generally accepted in the scientific community of psychologists to render an opinion and diagnosis without reviewing the entire file.” Id. Even where the State’s expert fails to read the entire file, this Court has found that an expert’s opinion is valid. Id. at ¶ 1.

[¶31] In this case, Dr. Sullivan’s diagnosis was based on a variety of sources containing information regarding Loy, including: court documents, police records, medical and psychological records, statements by individuals, treatment notes, and reports of other evaluators. (Tr. p. 20). Dr. Sullivan testified that she reviewed the entire record. (Tr. p. 20). Dr. Sullivan testified that she had sufficient information to complete her evaluation, and that a personal interview is often unnecessary. (Tr. p. 25). Therefore, it was appropriate for the court to consider her testimony in light of a lack of interview.

A. Mr. Loy engaged in sexually predatory conduct.

[¶32] Loy stipulated to this element at the commitment hearing. (Tr. p. 26). Loy does not contest the fact that he engaged in sexually predatory conduct as illustrated in Petitioner’s exhibits 1-11. (Tr. pp. 10-12, 26).

B. The District Court’s conclusion that Mr. Loy suffers from a congenital or acquired condition that is manifested by a sexual disorder is supported by clear and convincing evidence.

[¶33] The second element addresses whether Loy has a “congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that makes the individual likely to engage in further acts of

sexually predatory conduct.” N.D.C.C. § 25-03.3-01(8). Both expert evaluators concluded this element was met.

[¶34] Dr. Sullivan diagnosed Loy with two disorders: other specified paraphilic disorder hebephilia, and hypersexuality. (Tr. p. 27). Also, Dr. Sullivan testified that she consulted other forensic psychologists at the State Hospital to ensure that her conclusions were sound. (Tr. pp. 20-21). Dr. Volk diagnosed Loy with other specified personality disorder histrionic, self-defeating, antisocial, and other specified paraphilic disorder hebephilia. (Tr. pp. 101, 107). Despite the differences in their conclusions, both experts testified that they would agree with the conclusions from the other expert. (Tr. p. 41, 101).

[¶35] Dr. Sullivan’s diagnosis of other specified paraphilic disorder, hebephilia, was supported by clear and convincing evidence. Dr. Sullivan based her diagnosis on the fact that Loy engaged in sexual contact with a fourteen-year-old girl and a twelve-year-old girl when he was eighteen and nineteen years old. (Tr. p. 31). Of further concern for Dr. Sullivan was the fact that Loy reported engaging in sexual contact with others beginning at age six, which Dr. Sullivan found “very unusual, even among sex offenders. (Tr. p. 32). Dr. Sullivan also considered Loy’s reports of masturbating to the thoughts of holding down a young girl and having sex with her. (Tr. p. 36). Of particular concern for Dr. Sullivan was that Loy described that his fantasies include “a fine line . . . between rape and dominance.” (Tr. p. 36). Further, Dr. Sullivan considered the fact that Loy sexually harassed thirteen-year-old girls over the course of a year by sending them sexually explicit letters. (Tr. p. 44). Dr. Sullivan testified that, although some of the behaviors she looked at occurred while Loy was a child, it is still relevant for her when

there is “this sort of problematic sexual behavior in a child or adolescent and then we see problematic sexual behavior occurring in adulthood, even if actual specific behaviors are not identical, it is more concerning.” (Tr. pp. 34-35).

[¶36] Dr. Sullivan testified that a paraphilia is “any intense and persistent sexual interest other than sexual interest in normal genital stimulation or other forms of appropriate sexual contact with consenting adult partners.” (Tr. p. 28). More specifically, hebephilia is a sexual attraction to individuals going through the process of sexual maturation and are developing secondary sexual characteristics, but have not yet attained full physical maturity. (Tr. p. 28).

[¶37] Loy argues that hebephilia is not a sexual disorder because it is not specifically referenced in the most recent Diagnostic and Statistical Manual (DSM). (Appellant’s Br. ¶ 49). Loy’s argument is contrary to both expert’s testimony, and this Court’s precedent. Hebephilia is not specifically referenced in the DSM, but both experts testified that it is recognized within the psychology community and literature. (Tr. pp. 29, 107). Dr. Sullivan testified that the DSM cannot specifically reference every single paraphilic disorder because there “are many hundreds of potential different paraphilic interests.” (Tr. p. 30). Rather, the “not otherwise specified” or NOS category is a “catch-all” for those disorders not specifically outlined in the DSM. (Tr. p. 30).

[¶38] This Court has consistently affirmed the civil commitment of sexually dangerous individuals who have been diagnosed with hebephilia. In In re Hannenberg, this Court upheld Dr. Sullivan’s diagnosis which included hebephilia. 2010 ND 8, ¶¶ 1, 3, 777 N.W.2d 62. In In re Johnson, the respondent was diagnosed with “paraphilia, not otherwise specified – hebephilia, non-exclusive type.” 2013 ND 146, ¶ 3, 835 N.W.2d

806. Johnson raised a similar argument that is raised in the instant case, that “hebephilia is not a sexual or mental disorder.” Id. at ¶ 6. This Court affirmed the district court’s opinion in Johnson because it was supported by the “expert’s report and the testimony in the record.” Id. at ¶ 8. This Court again rejected a similar argument in Interest of Corman, where this Court recognized: “This Court has upheld a diagnosis of paraphilia not otherwise specified hebephilia, when supported by clear and convincing evidence.” 2014 ND 88, ¶ 12, 845 N.W.2d 335 (citing Interest of Johnson, 2013 ND 146, ¶¶ 3, 6-8, 835 N.W.2d 806; Matter of G.R.H., 2008 ND 222, ¶¶ 8-11, 758 N.W.2d 719).

[¶39] Dr. Sullivan further testified that she diagnosed Mr. Loy as hypersexual. She believed this was based on Loy’s “total sexual outlet.” (Tr. p. 35). Dr. Sullivan described the phrase ‘sexual outlet’ as “meaning masturbation or sexual orgasm more than seven times per week.” (Tr. p. 35). Dr. Sullivan noted that Loy masturbated six times a week up to six times per day, and that Loy “admitted that his frequency of sexual outlet was greater than seven per week.” (Tr. pp. 35-36). Dr. Sullivan also considered Loy’s frequent fantasies about inappropriate or deviant sexual behaviors. (Tr. p. 36). Loy’s sexual fantasies became problematic, and Loy reported that he “constantly finds himself fantasizing and it’s like he can’t even stop it when he tries.” (Tr. p. 37). Dr. Sullivan also considered that Loy masturbated in semi-public places or places where masturbation would not normally be expected to occur, which is indicative of an inability to control sexual impulses. (Tr. p. 35).

[¶40] Both qualified experts, Dr. Sullivan and Dr. Volk, testified they believe this element is met.

C. The district court properly concluded Mr. Loy’s condition makes him likely to engage in further acts of sexually predatory conduct and that there is a nexus between the disorder and the dangerousness that shows Mr. Loy has serious difficulty controlling his behavior.

[¶41] The third element requires the State to prove, by clear and convincing evidence, that the respondent’s sexual or personality disorder makes him likely to engage in further acts of sexually predatory conduct. Matter of Rubey, 2013 ND 190, ¶ 10, 838 N.W.2d 446. “The phrase ‘likely to engage in further acts of sexually predatory conduct’ means the individual’s propensity towards sexual violence is of such a degree as to pose a threat to others.” Matter of E.W.F., 2008 ND 130, ¶ 10, 751 N.W.2d 686 (quotation omitted). In considering whether a Respondent is likely to engage in further acts of sexually predatory conduct, the court can consider any diagnosis that predisposes an individual to engage in further acts of sexually predatory conduct. Id. at ¶ 8. The court may also consider actuarial assessment tools, such as the Static 99-R. In re M.D., 2012 ND 261, ¶ 8, 825 N.W.2d 838.

[¶42] Additionally, Kansas v. Crane requires that there must be a nexus between the requisite disorder and future dangerousness. In re Wolff, 2011 ND 76, ¶ 7, 796 N.W.2d 644. There should be a showing that the diagnosis has manifested itself in a way to show the individual has serious difficulty in controlling his behavior. Id. The behavior, however, need not be sexual in nature. Id. This nexus must “distinguish a dangerous sexual offender whose disorder subjects him to civil commitment from the dangerous but typical recidivist in the ordinary criminal case.” In re Barrera, 2008 ND 25, ¶ 8, 744 N.W.2d 744 (citations omitted). In Wolff, the court considered the fact that the Respondent had difficulty controlling his behavior in a structured setting, was violating the rules and had made little progress in his treatment program, showed no

empathy for his victims, has psychopathic traits, including impulsivity, irresponsibility, and violations of social and legal norms. Id. at ¶ 9.

[¶43] Both Dr. Sullivan and Dr. Volk testified Mr. Loy was “likely to engage in future acts of sexually predatory conduct.” Dr. Sullivan testified that Mr. Loy’s sexual disorder diagnosis “predisposes him to engage in further contact.” (Tr. p. 45). She stated the behavior does not “just sort of disappear over time” and, as a result, it increases his likelihood to engage in sexually predatory conduct. (Tr. p. 45). Dr. Sullivan also testified that the presence of a personality disorder predisposes Loy to lack concern for his victims, as long as his own needs are met. (Tr. p. 46). Dr. Sullivan testified that persons with antisocial traits “are more prone to being aggressive, physically violent, intimidating; and all those features, combined with the impulsivity and irresponsibility, predispose someone who has engaged in predatory conduct to do it again.” (Tr. p. 46). Therefore, Dr. Sullivan testified that there is an increased risk of Loy recidivating. (Tr. p. 38).

[¶44] Dr. Sullivan also used actuarial testing to augment her clinical judgment in determining whether Loy would be likely to commit further acts of sexually predatory conduct. While actuarial instruments cannot predict an individual’s likelihood of reoffending with absolute certainty, they have been recognized as a useful tool in sexually dangerous individual cases. Interest of P.F., 2006 ND 82, ¶ 29, 712 N.W.2d 610. This Court recognized that a district court may properly consider actuarial scores as “one of many factors supporting [the court’s] conclusion” that an individual should be committed as a sexually dangerous individual. In re J.T.N., 2011 ND 231, ¶ 18, 807 N.W.2d 570; Interest of P.F., 2006 ND 82, ¶ 22, 712 N.W.2d 610.

[¶45] Dr. Sullivan used the Static-99R to assist her in reaching a conclusion as to whether Loy would be likely to engage in further acts of sexually predatory conduct. (Tr. pp. 47-48). The Static-99R includes a number of historical, relatively unchanging factors that have been shown through research to predict an individual's likelihood to commit future sexual offenses. (Tr. p. 50). The instrument considers, among other things, a person's age, victim types, criminal history, and past relationships. (Tr. p. 50). Dr. Sullivan's scoring of the instrument revealed a score of five. (Tr. p. 50). This score places Loy in the high-risk, high-needs category. (Tr. pp. 50-51). Dr. Sullivan stated that category is associated with the sample of individuals that 35.5 percent of them recidivated within ten years. (Tr. p. 51). Dr. Volk also found that, based on the instrument and his clinical judgment, Loy was a high risk to engage in further acts of sexually predatory conduct. (Appellee's App. 18-27).

[¶46] In addition to the actuarial instrument, Dr. Sullivan also considered the fact that Loy was unsuccessful in outpatient sex offender treatment. (Tr. p. 54). He was discharged from treatment in 2005 for engaging in regular contact with people under the age of eighteen, frequenting areas where children might congregate, lying, continuing to be sexually active, committing another chargeable sexual offense, and denying and minimizing his sexual behaviors to his treatment group. (Tr. p. 54). Dr. Sullivan also testified that Loy's high sex drive is problematic, and that his willingness to violate rules related to his sexual behavior would make him more likely to engage in further acts of sexually predatory conduct. (Tr. p. 58).

[¶47] In evaluating whether a person has serious difficulty controlling his behavior, this Court has looked at several factors in similar cases, including failure to

comply with the terms of probation, failure to complete sufficient sex offender treatment, and the fact that a person has several sex offenses. In re Corman, 2014 ND 88, ¶ 23, 845 N.W.2d 335. This Court also recognizes that “[t]he district court is the best credibility evaluator.” In re Hanenberg, 2010 ND 8, ¶ 17, 777 N.W.2d 62. In this case, the district court found that Loy would have difficulty controlling his behavior based on Loy’s convictions for multiple sex offenses, including a conviction while he was on supervised probation, the clinical judgment of both experts, and the actuarial instruments completed by both doctors which indicated that Loy was a moderate to high risk. (Appellant’s App. pp. 10-12). Further, the district court relied on testimony from Dr. Volk that Loy had not completed sufficient treatment to mitigate his risk factor. (Appellant’s App. p. 12).

[¶48] This Court in In re Barrera recognized that failure to participate in sex offender treatment is one factor that can be considered in determining whether a sexually dangerous individual would have difficulty controlling his behavior. In re Barrera, 2008 ND 25, ¶ 13, 744 N.W.2d 744. In this case, Loy failed to complete sex offender treatment in the community. (Tr. pp. 59, 20-22). Loy did complete low-intensity sex offender treatment while incarcerated. (Tr. p. 58). However, Dr. Sullivan testified that low-intensity sex offender treatment is insufficient to significantly reduce an individual’s risk for future sexual offending. (Tr. pp. 54-55).

[¶49] Additionally, Dr. Sullivan testified that there was a nexus between Loy’s disorders of hebephilia and hypersexuality and his dangerousness. Of particular concern for Dr. Sullivan was the link between the two disorders. Essentially, Loy has a high sex drive and an inappropriate sexual attraction to minor children that increases his risk level. (Tr. p. 38). Dr. Sullivan testified, “it is difficult to change a high sex drive and it indicates

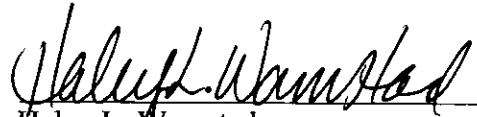
more of a drive to engage in potentially sexually predatory conduct.” (Tr. p. 38). Further, Loy is a repeat offender who has engaged in sexually predatory conduct while on supervised probation and while undergoing sex offender treatment in the community. (Tr. p. 31).

[¶50] Therefore, the district court did not clearly err in finding that Mr. Loy would be likely to engage in future acts of sexually predatory conduct or have serious difficulty controlling his behavior.

CONCLUSION

[¶51] For the above-stated reasons, the State requests that this Court deny the Defendant's appeal and affirm the District Court's judgment.

DATED this 25th day of August, 2014.



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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In the Interest of Garrett Alan Loy

Haley L. Wamstad,
Assistant State's Attorney,

Petitioner and Appellee,

vs.

Garrett Alan Loy,

Respondent and Appellant.

Supreme Court No. 20140111

District Court No. 18-2013-MH-00065

AFFIDAVIT OF SERVICE

BY EMAIL

SA#124191

STATE OF NORTH DAKOTA)
) SS
COUNTY OF GRAND FORKS)

The undersigned, being of legal age, being first duly sworn deposes and says that on the 25th day of August, 2014, she served via e-mail true copies of the following documents:

BRIEF OF APPELLEE
APPENDIX OF APPELLEE

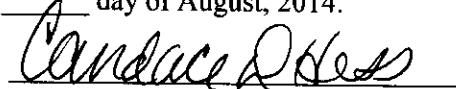
and that said email was served on the address of:

Tyler J. Morrow and said e-mail address is: tyler@ralawfirms.com



States Attorney's Office

Subscribed and sworn to before me this 25th day of August, 2014.



Notary Public

ja

CANDACE D. HESS
Notary Public
State of North Dakota
My Commission Expires Dec. 29, 2015