RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0059-21

IN THE MATTER OF THE
CIVIL COMMITMENT OF
L.M., SVP-811-19.

———————————————

Argued December 6, 2022 – Decided February 3, 2023

Before Judges Gilson, Gummer, and Paganelli.

On appeal from the Superior Court of New Jersey, Law Division, Hunterdon County, Docket No. SVP-811-19.

Michael E. Soffer, Assistant Deputy Public Defender, argued the cause for appellant L.M. (Joseph E. Krakora, Public Defender, attorney; Susan Remis Silver, Assistant Deputy Public Defender, of counsel and on the briefs).

Victoria R. Ply, Deputy Attorney General, argued the cause for respondent State of New Jersey (Matthew J. Platkin, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Victoria R. Ply, on the brief).

PER CURIAM

L.M. appeals from an August 19, 2021 judgment, entered after a two-day hearing during which the judge had heard testimony from two expert witnesses,

civilly committing him to the Special Treatment Unit (STU) pursuant to the New Jersey Sexually Violent Predator Act (SVPA), N.J.S.A. 30:4-27.24 to -27.38.

Pursuant to the SVPA, "an involuntary civil commitment can follow service of a sentence, or other criminal disposition, when the offender 'suffers from a mental abnormality or personality disorder that makes the person [highly] likely to engage in acts of sexual violence if not confined in a secure facility for control, care and treatment.'" In re Civ. Commitment of A.Y., 458 N.J. Super. 147, 154 (App. Div. 2019) (quoting N.J.S.A. 30:4-27.26); see also N.J.S.A. 30:4-27.25 and -27.28(c). To civilly commit someone under the SVPA as a sexually violent predator, the State must prove by clear and convincing evidence:

> (1) that the individual has been convicted of a sexually violent offense, [N.J.S.A. 30:4-27.26]; (2) that he suffers from a mental abnormality or personality disorder, ibid.; and (3) that as a result of his psychiatric abnormality or disorder, "it is highly likely that the individual will not control his or her sexually violent behavior and will reoffend[.]"
>
> [In re Civ. Commitment of R.F., 217 N.J. 152, 173 (2014) (quoting In re Commitment of W.Z., 173 N.J. 109, 130 (2002)).]

Because the record evidence supports the committing judge's finding that the State met its burden, we affirm. See R.F., 217 N.J. at 175.

I.

We derive these facts from the record. In 2001, L.M. pleaded guilty to third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a), specifically, by "engaging in sexual conduct which would impair or debauch the morals of . . . the child." At the plea hearing, he pleaded guilty to and took full responsibility for an incident that had taken place in a closet in which an eight-year-old girl touched his penis after he had shown it to her. The child reported L.M. had made her perform oral sex on him. L.M. admitted to Dr. Roger Harris, who testified at the commitment hearing as a psychiatric expert, and to Dr. Nicole Paolillo, who testified at the commitment hearing as an expert in psychology, that he had had the child perform fellatio on him.[1] L.M. told Dr. Harris the child had initiated the sexual contact, asking him if he "wanted head" and "begging him" until he gave in. He described the victim as "a little hot ass," who was "being fresh." For that crime, L.M. was sentenced to a four-year term of imprisonment and community supervision for life (CSL).

In 2014, L.M. was charged with multiple parole-condition violations. He admitted to Dr. Harris that "he had a [sixteen]-year-old who was staying with

[1] Both experts had a specialty in "performing evaluations and assessments as to risk under the SVPA."

him" and "who hid under the bed when [p]arole came to his home." After parole officers conducted a search of his home and cellphone, defendant was charged with criminal sexual conduct and multiple counts of endangering the welfare of a child. In 2016, he pleaded guilty to second-degree and third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4, and fourth-degree violation of parole, N.J.S.A. 2C:43-6.4(d). During the plea hearing, L.M. admitted that on various dates in 2013 he knowingly had caused a thirteen- to fourteen-year-old girl to photograph herself engaging in a prohibited act and that he intended that act to be photographed. In his discussion with Dr. Harris, L.M. admitted having contact with underage girls, whom he claimed "were looking for advice" but denied the contact "turned sexual" and denied having the photographs on his phone, claiming either the victim's mother or parole officers had placed the photographs on his phone. L.M. was sentenced to an aggregate seven-year prison term, with a three-and-a-half-year period of parole ineligibility, and parole supervision for life.

On December 24, 2019, the State filed a petition to commit L.M. pursuant to the SVPA and L.M. was temporarily confined to the STU. On June 15, 2021, L.M. moved to "bar[] mention of unconvicted charges or unproven allegations in the reports and testimony of the State's experts." The court denied that motion

on July 14, 2021, declining to "preemptively bar such information" and finding defendant was "looking to bar right up front" and that "[y]ou have to have the testimony to determine . . . to what extent the doctors relied upon these either uncharged and/or charged but dismissed offenses."

At the commitment hearing, the State presented the testimony of Dr. Harris and Dr. Paolillo. The judge found both experts to be "highly credible" witnesses. L.M. did not present any witnesses.

Dr. Harris evaluated L.M. and reviewed records regarding him, including presentence reports, clinical certificates, and criminal records. Based on his evaluation and review of those records, Dr. Harris diagnosed L.M. with pedophilic disorder, other specified personality disorder with antisocial traits, and alcohol use disorder. According to Dr. Harris, based on his 2001 and 2014 offenses, L.M. demonstrated an inability "to control his arousal or his fantasies" regarding underage girls even to the point of being "willing to jeopardize his liberty." Dr. Harris testified that L.M.'s disorders do not spontaneously remit and that the combination of his pedophilic disorder and personality disorder "increases the risk to sexually reoffend." Noting L.M. had reoffended while in treatment, Dr. Harris found "the additional structure of sex offender treatment in the community was inadequate, even with the CSL, to keep him safe and keep

others safe while he was in the community." Dr. Harris believed L.M., despite his involvement in treatment, had a lack of understanding regarding the "core issues" of "sex offender treatment," which demonstrated L.M. had "[c]learly not" had enough treatment to control adequately his impulses. Dr. Harris concluded L.M. "would be a high risk to sexually reoffend if placed in a less restrictive setting than the STU."

Dr. Harris scored L.M. at a six on the Static-99R actuarial test, indicating he shares characteristics with sex offenders who reoffend at a "well above average" rate.[2] In applying the Static-99R test, Dr. Harris considered evidence he found to be credible, which he believed was consistent with the Static-99R guidelines. He included in his consideration L.M.'s statement to another doctor that in 1998, he had been accused of molesting two boys and a girl, who were between the ages of eight to ten years old, and had been charged with endangering the welfare of a child and aggravated sexual assault. L.M. reported

[2] "The Static-99R is an actuarial tool, designed to predict the recidivism risk of sexual offenses in adult male sex offenders who have been convicted of at least one sexual offense." Commonwealth v. George, 76 N.E.3d 217, 222 n.2 (Mass. 2017). The Static-99R is a revised version of the Static-99. Ibid.; see also R.F., 217 N.J. at 164 n.9 (describing the Static-99 and explaining "that actuarial information, including the Static-99, is 'simply a factor to consider, weigh, or even reject, when engaging in the necessary factfinding under the SVPA'") (quoting In re Commitment of R.S., 173 N.J. 134, 137 (2002)).

that those charges had been dismissed. According to Dr. Harris, had he not considered the 1998 charges in the Static-99R test, he would have scored L.M. at a five. Dr. Harris testified the 1998 charges had not "figure[d] into [his] diagnostic assessment" and, whether he scored L.M. at a five or six on the Static-99R test, he had the same opinion regarding L.M.'s risk to sexually reoffend.

Based on her evaluation of L.M. and review of his records, Dr. Paolillo diagnosed L.M. with other specified paraphilic disorder with hebephilic[3] traits, other specified personality disorder with antisocial traits, and alcohol use disorder. L.M. admitted to Dr. Paolillo having the eight-year-old girl fellate him, that a sixteen-year-old girl had been found under his bed, and that he had been in contact with a twelve-year-old girl and a fourteen-year-old girl but denied that contact was sexual or physical. When Dr. Paolillo asked L.M. about his involvement with adolescents, L.M., who was forty-one-years old, told her "he sometimes felt like he could relate better to a teenager than an adult." She

[3] "Hebephilia refers to a sexual preference in pubescent children, typically ages [eleven to fourteen]. In hebephilia, the focus of the sexual interest is on girls or boys who are just beginning to show secondary sex characteristics." In re Commitment of J.S., 467 N.J. Super. 291, 299 n.2 (App. Div. 2021) (alteration in the original) (quoting Skye Stephens & Michael C. Seto, Hebephilic Sexual Offending, 29-43 (Amy Phenix & Harry M. Hoberman eds., 2016)).

diagnosed him with a paraphilic disorder with hebephilic traits instead of a pedophilic disorder based on his description of having a focus on teenagers.

Dr. Paolillo found the combination of his paraphilic and personality disorders, neither of which spontaneously remit, "aggravates the risk" to sexually reoffend. She explained "the antisocial piece of the character will typically give license to impulses and urges without concern for the well-being of others" and "if there are impulses and urges that are of paraphilic nature, it kind of opens the gateway for those behaviors." Based on her discussions with L.M. regarding his experience in sex offense treatment and his apparent lack of understanding of the terms "arousal" and "relapse," she "didn't see any indication" treatment had had an effect on him. She concluded L.M. was "in a highly likely domain of sexually reoffending" and that he was at "[h]igh" risk to sexually reoffend if he were not committed to the STU for treatment. Dr. Paolillo scored L.M. at a six on the Static-99R test based in part on the 1998 charges. Had she not considered those charges as part of the test and had she scored him at a five, it would not have changed her ultimate conclusions.

In a decision placed on the record, the judge held the State had proven by clear and convincing evidence each prong of the SVPA and, accordingly, committed L.M. pursuant to the SVPA. Citing N.J.R.E. 703, the judge found

the experts had used source material "in a manner that was consistent with types of information and documents which similarly situated experts within their field so rely." The judge advised he had relied on hearsay contained in the experts' testimony and materials only to assess the experts' credibility and expressly stated he was "not relying on hearsay as fact to support [his] opinion." After an extensive analysis of their testimony, the judge rejected L.M.'s attempts to attack the credibility of the State's expert witnesses and found by clear and convincing evidence L.M. "suffers from a mental abnormality or personality disorder that affects . . . him emotionally, cognitively, or volitionally to such a degree that he is predisposed to commit acts of sexual violence" and that "[i]f released, he would have serious difficulty controlling his sexually violent behavior to such a degree that he would be highly likely within the reasonable foreseeable future to engage in acts of sexual violence." The judge stated he had considered and rejected the possibility of a conditional discharge given L.M.'s inability to comply with the "relatively simple conditions that he had under CSL . . . ."

L.M. appeals the decision, arguing the judge (1) used the wrong legal standard to commit him; (2) failed to require the State to prove quantification that his sexual recidivism risk was more than fifty percent and, thereby, failed to require the State to prove he was highly likely to reoffend; (3) improperly

shifted the burden to him to prove that he did not meet the SVPA standards; (4) erred in finding that his endangering conviction was a sexually-violent offense under the SVPA; and (5) erred when he ruled that hearsay in presentence reports could be considered for its truth. Unpersuaded by those arguments and because the judge's finding that the State had met its burden is supported by the record evidence, we affirm.

II.

Our scope of review of a judgment for commitment under the SVPA "is extremely narrow." R.F., 217 N.J. at 174 (quoting In re D.C., 146 N.J. 31, 58 (1996)). "We give deference to the findings of our trial judges because they have the 'opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.'" Ibid. (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). Moreover, "[t]he judges who hear SVPA cases generally are 'specialists' and 'their expertise in the subject' is entitled to 'special deference.'" Ibid. (quoting In re Civ. Commitment of T.J.N., 390 N.J. Super. 218, 226 (App. Div. 2007)).

Accordingly, a SVPA judge's determination either to commit or release an individual is accorded substantial deference and should not be modified by an appellate court "unless 'the record reveals a clear mistake.'" Id. at 175 (quoting

D.C., 146 N.J. at 58). Thus, "[s]o long as the trial court's findings are supported by 'sufficient credible evidence present in the record,' those findings should not be disturbed." Ibid. (quoting Johnson, 42 N.J. at 162); see also In re Civ. Commitment of J.M.B., 197 N.J. 563, 597 (2009).

"[T]o be considered a sexually violent predator, an individual must have committed a sexually violent offense." A.Y., 458 N.J. at 154 (citing N.J.S.A. 30:4-27.26). L.M. concedes his "2001 conviction is clearly a 'sexually violent offense' under the SVPA." Accordingly, the judge correctly found the State had established the first of the three required elements for commitment under the SVPA.[4]

Under the second required element, the State must prove the individual "suffers from a mental abnormality or personality disorder." R.F., 217 N.J. at 173. The SVPA defines a "[m]ental abnormality" as "a mental condition that affects a person's emotional, cognitive or volitional capacity in a manner that predisposes that person to commit acts of sexual violence." N.J.S.A. 30:4-27.26.

[4] L.M. argues at length that the judge erred in finding L.M.'s 2016 conviction for second-degree endangering the welfare of a child constituted a sexually violent act under the SVPA. Because the first required element for a commitment under the SVPA was met by L.M.'s 2001 conviction, we need not reach that issue. L.M.'s contention that the judge's finding regarding the 2016 conviction improperly tainted his findings regarding the remaining required elements is not supported by the record.

Although the SVPA does not define "personality disorder," "the nomenclature . . . is not dispositive." W.Z., 173 N.J. at 127. What matters is that "the mental condition . . . affect[s] an individual's ability to control his or her sexually harmful conduct." Ibid. However, it is "not necessary that an individual have a sexual compulsion, such as paraphilia, or a complete or total loss of control over his or her behavior to be deemed a sexually violent predator under the SVPA." A.Y., 458 N.J. Super. at 167; see also W.Z. 173 N.J. at 129 ("the diagnosis of each sexually violent predator susceptible to civil commitment need not include a diagnosis of 'sexual compulsion'").

The State is "entitled to call experts on the subject of commitment . . . ." A.Y., 458 N.J. Super. at 166. A testifying expert is permitted to rely on hearsay information in forming an opinion regarding an individual's mental condition "as long as the hearsay information 'was of a type "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."'" In re Civ. Commitment of J.H.M., 367 N.J. Super. 599, 612 (App. Div. 2003) (quoting Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 6 on N.J.R.E. 703 (2015) (quoting N.J.R.E. 703)). Thus, "to the extent the information the experts relied upon is of a type reasonably relied upon by experts in that field, the State can prove the grounds for commitment without

calling as a witness each person who provided information upon which the expert relied." A.Y., 458 N.J. Super. at 166.

Under that evidential framework, an expert at a commitment hearing may rely on presentence reports and may "testify about a defendant's prior criminal history in order to offer an opinion about a defendant's mental condition." J.H.M., 367 N.J. Super. at 612; see also J.M.B., 197 N.J. at 597 n.9. An expert may consider "[p]rior expert opinions [which] are admissible, not as substantive evidence, but as a basis for the expert's opinion." A.Y., 458 N.J. Super. at 167. And a judge is "entitled to consider the records [on which the experts base their opinions] in the course of weighing the credibility of the testifying experts." In re Commitment of A.X.D., 370 N.J. Super. 198, 202 (App. Div. 2004).

In finding the State had proven the second required element for commitment under the SVPA, the judge clearly and expressly followed that longstanding evidential framework. Both experts diagnosed L.M. with mental conditions affecting his ability to control his sexually harmful conduct. See W.Z., 173 N.J. at 127. In rendering their diagnoses, the experts did not focus on any single factor but considered a broad array of information, including information gleaned from their interviews and evaluation of L.M., statements L.M. had made to them directly, and records of the type reasonably relied on by

experts in their fields. A "judge conducting an initial hearing is 'not required to accept all or any part of' an expert's opinion . . . because the ultimate determination is 'a legal one, not a medical one, even though it is guided by medical expert testimony.'" A.Y., 458 N.J. Super. at 167 (some internal quotation marks omitted) (quoting R.F., 217 N.J. at 174). To determine whether he would accept all or part of the State's experts' opinions, the judge had to assess their credibility. In assessing their credibility, the judge appropriately considered the records on which they had based their opinions and expressly denied considering any hearsay in those records in rendering his ultimate decision. On that record, we discern no legal or other basis to disturb his decision.

Under the third required element, the State must prove "that as a result of his psychiatric abnormality or disorder, 'it is highly likely that the individual will not control his or her sexually violent behavior and will reoffend[.]'" R.F., 217 N.J. at 173 (quoting W.Z., 173 N.J. at 130). "'Likely to engage in acts of sexual violence' means the propensity of a person to commit acts of sexual violence is of such a degree as to pose a threat to the health and safety of others." N.J.S.A. 30:4-27.26. "The final decision whether a person previously convicted of a sexually violent offense is highly likely to sexually reoffend 'lies with the

courts, not the expertise of psychiatrists and psychologists. Courts must balance society's interest in protection from harmful conduct against the individual's interest in personal liberty and autonomy.'" A.Y., 458 N.J. Super. at 167 (quoting R.F., 217 N.J. at 174). The judge found L.M. would have serious difficulty controlling his sexually violent behavior and that he would be highly likely in the reasonably foreseeable future to engage in acts of sexual violence. That conclusion was supported by sufficient credible evidence in the record, including the unrebutted testimony of both experts.

In an effort to undermine the judge's findings, L.M. attempts in various ways to attack the credibility of the State's expert witnesses. We note that deference to a trial judge's findings is "especially appropriate" on issues regarding credibility of witnesses. MacKinnon v. MacKinnon, 191 N.J. 240, 254 (2007). Moreover, L.M.'s arguments are not persuasive.

L.M. faults the State's experts for not quantifying his sexual recidivism risk and asserts the judge somehow "eliminat[ed] th[e] 'highly likely' requirement" by deciding the case without that quantification. However, a statistical quantification is not required under the SVPA. See A.Y., 458 N.J. Super. at 170-72. "[I]t is [not] realistic to impose requirements of proof of some statistical differentiation of the risk of reoffense." Doe v. Poritz, 142 N.J. 1, 33

(1995). And the judge did not eliminate but considered at length the State's obligation to prove that as a result of his mental condition, it was highly likely that L.M. would not control his sexually violent behavior and would reoffend.

L.M. contends "neither State witness testified that L.M. was 'highly likely' to sexually reoffend." When asked how she characterized L.M.'s risk to sexually reoffend in the foreseeable future if he was not committed to the STU for treatment, Dr. Paolillo answered, "High." She also found L.M. to be "highly likely to potentially sexually reoffend." L.M. faults Dr. Harris for using the phrase "high risk" to sexually reoffend instead of the phrase "highly likely" to sexually reoffend. L.M. asserts his argument based on these minor distinctions "is not just a matter of semantics." But it is just a matter of semantics. Taken as a whole, the experts' testimony, which the judge found to be credible, supports the judge's finding that the State had proven the third required element for civil commitment under the SVPA.

Taking out of context isolated statements from the judge's opinion, which took up more than sixty-five transcript pages, L.M. argues the judge did not apply the correct legal standard, inappropriately weighing the seriousness of his past offenses and improperly shifting the burden to L.M. Reviewing the proceedings and the judge's opinion as a whole, we discern no improper burden

shifting and conclude the judge applied the correct legal standard. The judge clearly placed on the State the burden of proving the elements required for civil commitment under the SVPA and focused not on one particular issue, such as the seriousness of L.M.'s offenses, but on whether the State had proven those elements considering the admissible evidence presented. Noting the absence of evidence on a particular subject isn't burden shifting; it is an accurate recital of the evidence available to the judge for his consideration.

L.M. asserts that the judge "held that L.M. needed to present his own expert witness if he wanted to avoid commitment" and "ruled that hearsay in presentence reports can be used for its truth value." We carefully reviewed the transcript. L.M.'s assertion that the judge made those rulings is not supported by the record.

Finally, L.M. tells us we "can take judicial notice of" studies and documents that were not submitted in the commitment proceedings. But we cannot consider on appeal evidence that was not submitted to the trial court. See N.J. Div. of Youth & Fam. Servs. v. M.M., 189 N.J. 261, 278 (2007) (citing R. 2:5-4).

Applying our limited standard of review, we affirm the judge's order committing L.M. The judge's conclusions are amply supported by the evidence

presented at the commitment hearing and consistent with the law governing SVPA proceedings. From our careful review of the record, we are satisfied the judge determined based on appropriate consideration of the record evidence that the State had proven by clear and convincing evidence each of the required elements for civil commitment under the SVPA.

To the extent we have not addressed any other argument raised by L.M. in this appeal, it is because we find any such argument to have insufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.