[Cite as *State v. Halk*, 2018-Ohio-984.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	
	)	
PLAINTIFF-APPELLEE	)	
	)	CASE NO. 17 MA 0030
VS.	)	
	)	OPINION
EDSON D. HALK	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas, of Mahoning County, Ohio Case No. 2009 CR 79
JUDGMENT:	Affirmed.
APPEARANCES: For Plaintiff-Appellee	Attorney Paul Gains Mahoning County Prosecutor Attorney Ralph Rivera Assistant Prosecutor 21 West Boardman Street, 6th Floor Youngstown, Ohio 44503-1426
For Defendant-Appellant	Attorney Ross T. Smith Huntington Bank Building 26 Market Street, Suite 610 Youngstown, Ohio 44503

JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: March 2, 2018

[Cite as *State v. Halk*, 2018-Ohio-984.]
ROBB, P.J.

{¶1} Defendant-Appellant Edson D. Halk appeals the decision of the Mahoning County Common Pleas Court classifying him as a sexual predator under the law in effect at the time of his offense. Appellant contends the court improperly admitted unreliable hearsay at the classification hearing. He concludes his classification as a sexual predator was not supported by clear and convincing evidence. For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} On January 29, 2009, Appellant was indicted on three counts of rape in violation of R.C. 2907.02(A)(1)(b), which prohibits sexual conduct with a child under the age of thirteen. Each count was charged as felony/life and specified he purposely compelled the victim to submit by force or threat of force. Count one was based on 2006 conduct; count two was based on 2007 conduct; and count three was based on 2008 conduct. The victim's date of birth was February 4, 1998. Appellant's date of birth was February 21, 1967. The bill of particulars for each count stated: Appellant was the live-in boyfriend of the victim's mother; he was an authority figure to the victim for at least nine years; he inserted his fingers into the victim's vagina on a regular basis beginning when the victim was eight years old; and he performed oral sex on the victim.

{¶3} Appellant entered into a negotiated plea agreement on June 1, 2009. The state agreed to dismiss counts two and three. In addition, the indictment was amended to omit any reference to force or threat of force in count one, which was changed from felony/life to a first-degree felony. Appellant pled guilty to this amended count. In the June 18, 2009 sentencing entry, the court imposed the agreed-upon sentence of eight years. Appellant was designated a Tier III sexual offender. Tier III was the highest tier and was automatically required (based on the offense committed) under S.B. 10 (also called the Adam Walsh Act). S.B. 10 was effective January 1, 2008. It called for classification under the new tier system

regardless of when the offense was committed.[1]

{¶4} Before this, the Supreme Court had consistently held the sex offender classification and registration scheme contained in Chapter 2950 was remedial (and could thus be applied to those who were imprisoned prior to the enactment of the scheme). *See State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, ¶ 10-11. However, the S.B. 10 changes to the sex offender classification and registration scheme were found to render the scheme punitive and thus violative of the ex post facto clause of the Ohio Constitution when applied retroactively to defendants who committed sex offenses prior to the January 1, 2008 effective date. *Id.* at ¶ 21-22. As the offense to which Appellant pled guilty occurred prior to this date, he could not be subject to the newer tier system in S.B. 10. Accordingly, he was provided notice of a sexual classification hearing, and a warrant for his removal from prison to appear at this hearing was issued.

{¶5} At the February 13, 2017 hearing, the state called a Springfield Township police detective to present information he gained while reviewing the case file; he was not involved in this case during the investigation in 2008. During his testimony, the state introduced exhibits such as: a printed docket from Cuyahoga County showing Appellant's prior 1999 conviction for sexual battery, a third-degree felony; the offender background investigation completed by the Adult Parole Authority (APA) in September 2009 (which contained a description of the recurring rape of this victim and listed the prior conviction); investigative notes regarding the reporting of the offense against this victim to the Springfield Police Department; a report from the Child Advocacy Center; a sworn statement by the victim's adult sister who witnessed an incident of oral sex; and the activity report of Children Services from September and October of 2008, which included the child's statement. Although already part of the file, the indictment and the judgment of sentence in this case were also presented

[1] S.B. 10 also required the attorney general to reclassify sex offenders into tiers even though they had already been classified by a court under the former law (as a sexual predator, habitual sex offender, or sexually oriented offender). This provision was invalidated as a violation of the separation-of-powers doctrine in *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753.

as exhibits during the detective's testimony.

{¶6} Defense counsel objected to the detective's testimony on the basis that he was testifying based solely on a file review. The defense noted although hearsay can be admissible in sexual predator hearings, it must be reliable. On this ground, an objection was also lodged as to some of the exhibits, with a concession the court could use the offender background investigation and the documents constituting the record of this case. With the court admitting the state's exhibits, the defense asked to admit other hearsay, such as a packet of emergency room documents from 2008 and the additional notes of Children Services from 2007 (when the incident witnessed by the sister was reported and found "unsubstantiated and closed, as child denied allegations.").

{¶7} The court found Appellant was a habitual sex offender due to the prior sexually oriented offense in addition to the sexually oriented offense against the victim in this case. The court also found he was a sexual predator because he was likely to engage in a sexual offense in the future. The court made various findings on the record as to the statutory factors and specified there was clear and convincing evidence to support the conclusions reached. Appellant filed a timely notice of appeal from the February 14, 2017 classification entry.

ASSIGNMENT OF ERROR ONE: HEARSAY

{¶8} Appellant sets forth two assignments of error, the first of which contends:

"The Trial Court improperly admitted hearsay evidence at the re-classification hearing."

{¶9} Appellant complains the state presented only one witness who was not involved in the original investigation, noting he merely reviewed the file due to the upcoming hearing. Appellant contends the hearsay presented by the detective was unreliable.

{¶10} In *Cook*, the state agreed to stand silent at the hearing as part of a plea, and the trial court reviewed the presentence investigation report (PSI) and the victim

impact statement before finding the defendant to be a sexual predator. In reviewing the PSI, the trial court noted the defendant was previously involved in an act of sexual contact with a girl in Florida two years before the offense under consideration and had a prior conviction for disorderly conduct (which originally involved allegations of sexual contact with two young girls). *State v. Cook*, 83 Ohio St.3d 404, 423, 700 N.E.2d 570 (1998). The appellate court ruled the trial court erred in relying on hearsay in the PSI, but the Ohio Supreme Court disagreed, holding: "the Ohio Rules of Evidence do not strictly apply to sexual predator determination hearings. Thus, reliable hearsay, such as a presentence investigation report, may be relied upon by the trial judge." *Id.* at 425, citing Evid.R. 101(C) (which excepts miscellaneous criminal proceedings such as sentencing from the Rules of Evidence).

{¶11} This court has noted the evidence considered by the trial court in *Cook* included double hearsay statements regarding uncharged sexual conduct with a minor. *State v. Johnson*, 7th Dist. No. 10 MA 32, 2010-Ohio-6387, ¶ 12, 15, citing *Cook*, 83 Ohio St.3d at 424-425, and *State v. Cook*, 3d Dist. No. 1-97-21 (Aug. 7, 1997). "Various appellate courts, including this one, have also held that evidence of uncharged sexual assaults is admissible at a sexual predator hearing." *State v. Jones*, 7th Dist. No. 02 BE 36, 2003-Ohio-1219, ¶ 24, citing cases including *State v. Reed*, 7th Dist. No. 00 JE 22 (May 16, 2001). *See also State v. Baird*, 7th Dist. No. 07 CO 25, 2008-Ohio-3328, ¶ 39, 41 (appellant's prior arrests and other information in PSI can be considered).

{¶12} A defendant must object in order to preserve a claim that hearsay relied upon at sexual predator hearing was not reliable. *Johnson*, 7th Dist. No. 10 MA 32 at ¶ 16, citing *Cook*, 83 Ohio St.3d at 426. Hearsay can be considered reliable at sentencing where there is no indication it is false or unreliable. *Id.* at ¶ 16. Here, the defendant objected and argued the detective's testimony as to his file review was unreliable because he merely read the file. However, under *Cook,* testimony was not even required at the sexual predator hearing, and statements are not unreliable merely because they relate hearsay.

{¶13} The defense also attempted to show certain hearsay was unreliable by pointing to a medical examination finding no physical evidence of trauma and to the results of a 2007 Children Services investigation of an allegation that Appellant was observed performing oral sex on the victim. This investigation was initiated by a counselor when the victim's sister disclosed what she witnessed. Children Services closed the case as "unsubstantiated" because the victim denied the sexual conduct at that time. However, the victim thereafter reported the sexual abuse directly to her mother and then to individuals involved in her case. Her sister then signed a sworn statement about what she witnessed.

{¶14} In any event, the defense acknowledged the trial court could utilize the offender background investigation report generated by the APA upon Appellant's imprisonment in this case. The offender background investigation report takes the place of a PSI when one was not generated prior to imprisonment. *See* R.C. 2951.03(A)(2), citing R.C. 5120.16(A) ("The investigation and report shall be conducted in accordance with division (A) of section 2951.03 of the Revised Code and the report shall contain the same information as a presentence investigation report prepared pursuant to that section."). The 1999 sexual battery conviction in Cuyahoga County was contained in the offender background investigation report; the docket from that case printed by the prosecutor was merely duplicative. The surrounding circumstances and the details of the offense against this victim were contained in the offender background investigation report as well. Some of the notes introduced were likely the source for this report. In any event, the offender background investigation report itself can support a sexual predator classification in this case. Finally, as counsel conceded, the court was permitted to view the indictment and the sentencing entry, showing the charges eliminated by the negotiated plea.

{¶15} As there is no indication the trial court's decision was tainted by unreliable hearsay, this assignment of error is overruled. This leads to Appellant's next assignment of error on the trial court's ultimate classification decision, which

partially relies on the arguments under the first assignment of error.

ASSIGNMENT OF ERROR TWO: CLASSIFICATION

{¶16} Appellant's second assignment of error provides:

"The Sexual Predator classification is not supported by clear and convincing evidence."

{¶17} A person is to be classified as a habitual sex offender if he is convicted of a sexually oriented offense that is not registration-exempt and he was previously convicted of a sexually oriented offense. *See* R.C. 2950.01(B). Counsel acknowledged Appellant's status as a habitual sex offender was established due to his prior sexual battery conviction. (Tr. 80). A sexual predator is a person who has been convicted of committing a sexually oriented offense that is not registration-exempt and who is likely to engage in the future in a sexually oriented offense. R.C. 2950.01(E)(1). Prior offenses are unnecessary in order to classify an offender as a sexual predator. *See id.*

{¶18} Statutorily, the standard for the trial court's sexual predator classification decision is clear and convincing evidence. R.C. 2950.09(B)(4). Clear and convincing evidence is a measure of proof that will produce in the mind of the fact-finder a firm belief or conviction as to the allegations sought to be established. *State v. Eppinger*, 91 Ohio St.3d 158, 164, 743 N.E.2d 881 (2001), citing *Cross v. Ledford,* 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954). It is an intermediate standard requiring more than a preponderance of the evidence, but requiring less certainty than the beyond a reasonable doubt standard applicable to criminal trials; clear and convincing does not mean clear and unequivocal. *Id.*

{¶19} In determining whether to classify an offender as a sexual predator, the trial court "shall consider all relevant factors, including, but not limited to all of the following": the offender's age; the victim's age; the number of victims; the offender's entire prior criminal record, not limited to sexual offenses; whether the offender used drugs or alcohol to impair the victim; whether the offender completed any disposition for a prior offense or participated in any available programs for sexual offenders if the

prior offense was sexually oriented; any mental illness or mental disability of the offender; the nature of the offender's sexual act and whether it was part of a demonstrated pattern of abuse; whether the offender displayed cruelty or made threats of cruelty; and any additional behavioral characteristics contributing to the offender's conduct. R.C. 2950.09(B)(3). These factors are guidelines for the trial court judge who is to determine how much weight, if any, to give each sexual predator factor in a given case. *State v. Thompson*, 92 Ohio St.3d 584, 587-588, 752 N.E.2d 276 (2001). The list is non-exhaustive, and other factors can be considered. *Id.* at 588.

{¶20} The trial court expressed its consideration of all of the statutory factors and listed them in the entry and at the hearing. The court voiced why some factors did not apply to the case. At the hearing, the court highlighted its emphasis on Appellant's age, the child's age, the ongoing pattern of abuse of this victim, the prior sexual offense, and his position as a parental figure. The court concluded there was clear and convincing evidence demonstrating Appellant was a sexual predator. This decision was supported by the evidence.

{¶21} Appellant was charged with three counts of rape of a child under 13 occurring over the course of more than two years with allegations of force or threat of force and life specifications. He was in a position of authority over the child for many years. He lived with the victim's mother long-term, and the victim's mother bore four of his children. He instructed the victim to answer in the negative if she was asked if anyone touched her. The victim reported the sexual conduct inflicted upon her was a regular occurrence. She alleged Appellant digitally penetrated her and performed oral sex on her, and she believed she thwarted his attempts at penetration with his penis by moving around. Appellant negotiated a plea to one count of raping this victim (born 2/4/1998) in 2006 (when Appellant was approximately 40 years old). The young age of the victim is an extremely pertinent fact on sexual recidivism as is a recurring pattern of abuse. *See, e.g., State v. Chapmyn*, 10th Dist. No. 07AP-300, 2007-Ohio-6538, ¶ 19 (stating the "age of the victim is probative because it serves a

telling indicator of the depths of the offender's inability to refrain from such illegal conduct" and a repeated pattern is highly probative as it may evince a "compulsion which will drive" the offender in the future). Appellant had a 1999 conviction for sexual battery. He was also convicted of domestic violence prior to his plea in the case at bar. We conclude the trial court's decision, finding Appellant was likely to engage in a sexually oriented offense in the future, was supported by clear and convincing evidence.

{¶22} Lastly, Appellant's brief suggests defense counsel lacked sufficient advance notice of the hearing to investigate the issues, call witnesses, or obtain reports to fully argue against a sexual predator classification, noting his right to call witnesses and present evidence under R.C. 2950.09(B)(1). This contention is not connected with the two assignments of error or other parts of the brief as required by App.R. 16(A)(3)-(8). We recognize written notice was provided by the court on Thursday, February 9, 2017 for a hearing on Monday, February 13, 2017 at 11:30 a.m. The court's notice seems to have been prompted by communications from the Ohio Department of Rehabilitation and Correction seeking a classification hearing due to Appellant's upcoming release date.

{¶23} Appellant was represented by the same attorney who negotiated the plea for him in 2009. A continuance was not requested prior to the hearing. At the hearing, counsel noted he obtained a competency and insanity defense evaluation which was ordered in 2009 prior to the plea. He did not seek to admit the evaluation, request expert assistance for the sexual predator hearing, or seek a continuance in order to obtain an expert or to call some other witness. Instead, he argued the lack of an expert or other witness with first-hand knowledge diminished the case presented by the prosecutor (who had a detective review the file the morning of the hearing); he also suggested Appellant presumably was a model prisoner for eight years or the state would have presented evidence of his behavior in prison. In sum, the defense did not object to the proceedings taking place upon the notice provided; instead, a strategical decision was employed (possibly to avoid the possibility of the

state using the additional time to collect more damaging evidence).

{¶24} Appellant's assignments of error are overruled, and the trial court's judgment is affirmed.

Donofrio, J.,concurs.

Waite, J., concurs.