STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: January 28, 2013)

STATE OF RHODE ISLAND	:	
	:	**C.A. No. PM-08-2850**
v.	:	
	:	
JOHN SWIFT	:	

DECISION

GIBNEY, P.J. Before this Court is John Swift's ("Swift") appeal of an October 2, 2012 decision (the "Decision") of Drug Court Magistrate Flynn (the "Magistrate"), affirming the sex offender classification order issued by the Rhode Island Sex Offender Board of Review (the "Board"). The Board found that Swift should be classified as a Level III sex offender for purposes of the Rhode Island Sexual Offender Registration and Community Notification Act (the "Act"), G.L. 1956 § 11-37.1-1 et seq. On appeal, Swift argues that he should be classified as a Level I sex offender instead. Jurisdiction is pursuant to G.L. 1956 § 8-2-39.2(j).

I

Facts and Travel

Swift was convicted of one count of second degree child molestation on April 25, 2007 and was sentenced by this Court, Darigan J., to a twenty-year prison term, with one year to serve and nineteen years probation. The facts underlying Swift's conviction are summarized below.[1] Due to the nature of his crime, Swift was required by § 11-37.1-3 to

[1] Between August 1, 2004 and October 15, 2004 Swift engaged in numerous sexual acts with his then eight-year-old step-granddaughter ("V1"). Swift also coerced V1 and his then twelve-year-old step-grandson ("V2") to engage in sexual acts with each other

register as a sex offender with local authorities upon his release from prison.[2] Pursuant to § 11-37.1-12 and the Rhode Island Parole Board Sexual Offender Community Notification Guidelines (the "Guidelines"), Swift was also referred to the Board for sex offender classification. The Board is required by § 11-37.1-6(b) to "determine the level of risk an offender poses to the community . . ." when the offender is due for release from prison. The Guidelines provide for three classification levels based upon the "level of danger to the community" that the offender represents upon release. Guidelines § 1.13 at 7. Level I offenders pose a "low" risk of re-offense; Level II offenders pose a "moderate" risk; and Level III offenders pose a "high" risk of re-offense. See id. at §§ 1.13.1-1.13.3.

The Board completed Swift's Risk Assessment Report (the "Board Report") on February 25, 2008 and classified him as a Level III offender for community notification

---

several times during the same two-month span. This conduct occurred in Swift's apartment and in the back of Swift's van. Both V1 and V2 testified that Swift coerced them into so acting by using loud, threatening commands, telling them that such conduct was "OK" and would "improve their relationship" and testified that he had guns in his apartment.

Based on these facts, Swift was arrested and charged with five counts of second degree child molestation. While out on bail, Swift and his wife fled Rhode Island and settled with Swift's son in Kansas. Police units from Rhode Island and Kansas located Swift nearly five months later and returned him to this state on a Governor's warrant signed by a Superior Court justice. Swift agreed to plead nolo contendere to one charge of second degree child molestation in return for the State's dismissal of the other four charges. Swift was released on probation in early 2008 after serving his one-year prison term at the Adult Correctional Institutions (the "ACI").

[2] Section 11-37.1-3 provides for sex offender registration. Among other requirements, it mandates that "[a]ny person who, in this or any other jurisdiction . . . has been convicted of a criminal offense against a victim who is a minor" is required to register his or her current home address with local law enforcement authorities. Sec. 11-37.1-3(a). Such persons include those convicted of second degree child molestation. Sec. 11-37.1-2(e)(3). These offenders are "required to register annually for ten years after the date of conviction and to verify their addresses quarterly for the first two years after the date of conviction." Germane, 971 A.2d at 563; see § 11-37.1-4(a).

purposes.[3] Pursuant to § 11-37.1-14, Swift timely appealed the Board's classification order and requested a hearing before a justice of the Superior Court on March 13, 2008. In response, the State moved on April 14, 2008 to affirm the Board's classification of Swift.

The Magistrate held a hearing on October 2, 2012 and affirmed the Board's classification order. Swift then timely appealed the Magistrate's Decision to this Court on October 15, 2012, pursuant to Administrative Order 94-12(b). Swift also filed a Motion to Stay the Magistrate's Decision on October 15, 2012, which the Magistrate denied on October 23, 2012.

II

Standard of Review

Superior Court review of Drug Court Magistrate decisions is governed by § 8-2-39.2(j):

> "A party aggrieved by an order entered by the Drug Court Magistrate shall be entitled to a review of the order by a justice of the superior court. Unless otherwise provided in the rules of procedure of the court, the review shall be on the record and appellate in nature. The court shall, by rules of procedure, establish procedures for review of orders entered by the Drug Court Magistrate, and for enforcement of contempt adjudications of the Drug Court Magistrate."

[3] Level I sex offenders are subject to the fewest notification requirements: victim, witness, and local law enforcement agency notification. See Guidelines § 5; § 11-37.1-12(b)(1). Level II sex offenders are subject to Level I sex offender notification standards along with additional requirements: notification to public and private education institutions, daycare facilities, and any establishments and organizations catering to children. See Guidelines at § 7; § 11-37.1-12(b)(2). Notification standards for Level III sex offenders include the Level I and Level II sex offender notification standards and also empower local law enforcement agencies to provide additional disclosure to myriad other community groups which may come into contact with the sex offender. See Guidelines at § 9; § 11-37.1-12(b)(3).

(Emphasis added.) In Administrative Order 94-12, the Presiding Justice of the Superior Court promulgated procedures by which a Superior Court justice may review a magistrate's decision:

> "The Superior Court justice shall make a de novo determination of those portions to which the appeal is directed and may accept, reject or modify, in whole or in part, the judgment, order or decree of the Master. The justice, however, need not formally conduct a new hearing and may consider the record developed before the Master, making his or her own determination based upon that record whether there is competent evidence upon which the Master's judgment, order or decree rests. The justice may also receive further evidence, recall witnesses or recommit the matter to the Master with instructions."[4]

Administrative Order 94-12(h). Thus, the Superior Court justice conducts a de novo review of the portions of the record appealed. See Paradis v. Heritage Loan & Investment Co., 678 A.2d 440, 445 (R.I. 1996) (recognizing that Administrative Order 94-12 gives a Superior Court justice "broad discretion in his or her review of the master's decision" and finding that "the trial justice's de novo review of the master's decision, based solely on the record, was proper"); see also 66 Am. Jur. 2d References § 44. The record on appeal includes "[t]he original papers and exhibits filed with the clerk of the Superior Court, the transcript of the proceedings, and the docket entries." Administrative Order 94-12(f).

III

Discussion

On appeal, the State carries the burden of presenting "a prima facie case that justifies the proposed level of and manner of notification." Sec. 11-37.1-16(a). To carry this burden, the State must show that "[a] validated risk assessment tool has been used to

[4] The term "Master" was amended to "Magistrate" by P.L. 1998, ch. 442 § 1.

determine the risk of re-offense" and "[r]easonable means have been used to collect the information used in the validated assessment tool." Sec. 11-37.1-16(b)(1)-(2). The Magistrate must affirm the Board's findings when the State presents a prima facie case unless he or she "is persuaded by a preponderance of the evidence that the determination on either the level of notification or the manner in which it is proposed to be accomplished is not in compliance with this chapter or the guidelines adopted pursuant to this chapter." Sec. 11-37.1-16(c). As such, the appellant is afforded an opportunity to present evidence and testimony challenging the State's prima facie case. See Germane, 971 A.2d at 580-81.

A

The Hearing Before the Magistrate

The Magistrate determined at the October 2, 2012 hearing that the State successfully presented a prima facie case justifying Swift's Level III classification. First, he found that the State demonstrated that the Board utilized two valid actuarial risk assessment tools—the STATIC-99[5] and the STABLE 2000[6] tests—to calculate Swift's

[5] Our Supreme Court has noted that the STATIC-99 is a nationally-recognized validated actuarial risk assessment test. See Dennis, 29 A.3d at 447, 451; Germane, 971 A.2d at 567. The Board provided a detailed description of the STATIC-99 test in the Board Report:

> "The STATIC-99 is an instrument designed to assist in the prediction of sexual and violent recidivism for sexual offenders. The risk assessment instrument was developed by Hanson and Thornton (1999) based on follow-up studies from Canada and the United Kingdom with a total sample size of 1,301 sexual offenders. The STATIC-99 consists of 10 items and produces estimates of future risk based upon the number of risk factors present in any one individual . . . The recidivism estimates provided by the STATIC-99 are group estimates based upon reconvictions and were derived

classification level. (Hr'g. Tr. at 5.) The Magistrate noted that both tests are "nationally recognized and well-established" tools for determining the recidivism risk that a convicted sex offender presents to the community upon release from prison. Id.

The Magistrate further found that the State established that the Board utilized "reasonable means" to gather and analyze the information used to calculate Swift's classification level. Id. at 5-6. The Magistrate noted that such means included review of Swift's criminal, institutional, and probation/parole records, Swift's treatment and supervision information, and the underlying police reports. Id. at 3-4.

The Magistrate provided Swift with an opportunity to present evidence and testimony supporting his challenge to the Board's classification level determination. Id. at 2, 6. Swift proffered a seven-page brief with seven exhibits, and his attorney orally presented several other arguments. Id. Essentially, Swift argued that the Board erred in classifying him as a Level III sex offender because he has not been a danger to the community since his release from prison in 2008; he has attended regular counseling

---

> from groups of individuals with these characteristics. As such, these estimates do not directly correspond to the recidivism risk of an individual offender. The offender's risk may be higher or lower than the probabilities estimated in the STATIC-99 depending on other risk factors not measured by this instrument."

(Board Report at 1-2.)

[6] Our Supreme Court has also recognized that the STABLE 2000 test is a nationally-used validated actuarial risk assessment test. See Dennis, 29 A.3d at 447. In the Board Report, the Board explained that the STABLE 2000 test utilizes six "dynamic risk factors" to calculate a sex offender's risk level: Significant Social Influences, Intimacy Defects, Sexual Self-Regulation, Attitudes Supportive of Sexual Assault, Co-Operation with Supervision, and General Self-Regulation. See Board Report at 2, 5-6.

sessions since April 2008; and he is too old and sickly to warrant such a high risk to the community. Id. at 6.

While noting that Swift need only prove "by a preponderance of the evidence" that the Board erred in classifying him as a Level III sex offender, the Magistrate determined that Swift failed to carry this burden. Id. at 6. The Magistrate found that Swift's clean record since his release from prison was one factor in his favor. Id. However, the Magistrate noted that Swift was ordered by Justice Darigan to attend counseling sessions as a component of his sentencing but proffered only a few counseling receipts from April and May 2008 as evidence of his attendance. Id. at 7. The Magistrate determined that such evidence "falls far short" of satisfying Swift's burden of demonstrating the scope or goals of his counseling sessions or the significance of his progress, if any. Id.

Finally, the Magistrate found that Swift's advanced age and failing health did not justify overturning the Board's classification determination. He reasoned that because Swift was already in his late 60s and displayed signs of sickness when he committed his crimes, such factors did not mitigate his present risk to the community. Id. at 7-8. Accordingly, the Magistrate affirmed the Board's classification of Swift as a Level III sex offender. Id. at 8.

B

The Appeal of the Magistrate's Decision

On appeal, Swift argues that the Magistrate erred in affirming the Board's Level III classification. Swift contends that the Board conducted an inaccurate and improper assessment of the risk he poses to the community. He challenges both the scoring

methods of the Board's actuarial risk assessment tests and the Board's consideration of additional factors in determining his classification level. Swift argues that the Board miscalculated both test scores, contending that the Board should have calculated scores of "0" points on both tests. Swift further asserts that the Board erred in considering additional factors to increase his classification level beyond the level that his actuarial test scores indicated and that five of the outside factors considered by the Board were factually inaccurate and impermissibly subjective.

Swift maintains that had the Board conducted the proper inquiry, it would have classified him as a Level I sex offender, the lowest risk category. He asks this Court to reject the Magistrate's Decision and reduce his classification level to Level I.

IV

Analysis

A

The Risk Assessment Test Scores

Concerning his STATIC-99 score, Swift asserts that the Board erred in calculating a "1" point total score based on the "targets male victims" factor because he was convicted only of molesting a female child. Therefore, Swift contends, the Board should have given him a score of "0" total points on this test.

The Magistrate did not directly address this argument, instead finding generally that the Board properly utilized a variety of information to calculate Swift's STATIC-99 test score at "1" total point. (Hr'g. Tr. at 3-4.) The Magistrate affirmed the Board's calculations because he found that Swift failed to proffer any evidence to support his challenges. Id. at 8.

This Court finds that the Magistrate's decision to affirm Swift's STATIC-99 score is supported in the record by competent evidence. See State v. Dennis, 29 A.3d 445, 450 (R.I. 2011) (holding that a reviewing court will not disturb the findings of a justice sitting without a jury when "the record indicates that competent evidence supports the [justice's] findings"); School Committee of City of Cranston v. Bergin-Andrews, 984 A.2d 629, 648-49 (R.I. 2009) (finding same).[7] The record reflects that Swift was convicted of molesting only V1, his step-granddaughter. (Criminal Docket Sheet at 1-2); (Judgment at 1.) The record indicates, however, that Swift targeted two victims, V1 and V2, his step-grandson. (Criminal Information at 1-2); (Arrest Report at 1-2); (Incident Report at 1.) Swift forced V2 to engage in sexual acts with V1 on more than one occasion. (V2 Statement, Nov. 13, 2004 at 1-4); (Grant Narrative, June 14, 2005 at 1-2); (Grant Supp. Narrative A, June 14, 2005 at 2-3.) Swift also watched pornographic films with V2. (V2 Statement, Nov. 13, 2004 at 3); (Grant Narrative, June 14, 2005 at 1.) Swift has presented no evidence to the contrary. See § 11-37.1-16(c) (requiring that the appellant support his or her challenge to the Board's findings by at least a "preponderance of the evidence"). This Court finds that there is competent evidence in the record supporting the Magistrate's affirmation of Swift's STATIC-99 score. See Dennis, 29 A.3d at 450; Bergin-Andrews, 984 A.2d at 648-49. This Court therefore "accepts" this part of the Magistrate's Decision. Administrative Order 94-12(h).

Swift also objects to his score of "7" total points on the STABLE 2000 test. He challenges all five of the factual determinations that the Board made in calculating his

[7] Our Supreme Court has noted that "legally competent evidence is marked 'by the presence of 'some' or 'any' evidence supporting the [judge's] findings.'" State, Office of the Secretary of State v. R.I. State Labor Relations Bd., 694 A.2d 24, 28 (R.I. 1997) (citing Environmental Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I.1993)).

total STABLE 2000 score. Swift's initial three challenges concern the characteristics of his sexual behavior during the commission of his crime. Swift first argues that the Board erred in calculating a score of "2" out of "7" points in the "emotional identification with children" category because there was no evidence in the record to show that he "obviously feels more comfortable with children than adults [and] has children as friends." Swift next asserts that the Board erred in giving him a score of "2" out of "7" points in the "deviant sexual interests" category because there is no evidence in the record showing that he "repeatedly" engaged in deviant sexual behavior. Third, Swift contends that the Board erred in calculating a score of "1" out of "7" points in the "sexual entitlement" category because there is no evidence in the record demonstrating that Swift exhibited any sense of entitlement during or after the commission of his crime.

Swift's final two arguments challenge the Board's findings regarding his parole and personal conduct. In particular, Swift maintains that the Board erred in scoring him at "1" out of "7" points in the "cooperation with supervision" category because he always cooperated with his supervisors while incarcerated, contrary to the Board's findings. Swift further argues that the Board erred in giving him a score of "1" out of "7" in the "poor cognitive problem solving skills" and "negative emotions/hostility" categories because there is no evidence in the record demonstrating that he suffers from any emotional problems. Based on these arguments, Swift contends that the Board should have given him a score of "0" total points on this test.

The Magistrate determined that the Board properly reviewed the entire record to calculate Swift's STABLE 2000 score at "7" total points. (Hr'g. Tr. at 3-4.) Because the

Magistrate found that Swift did not present any contradictory evidence, he affirmed the Board's calculations. Id. at 8.

This Court finds that the Magistrate's affirmation of the Board's STABLE 2000 calculations is supported by competent evidence in the record. See Dennis, 29 A.3d at 450; Bergin-Andrews, 984 A.2d at 648-49. Concerning Swift's first three challenges, the record shows that Swift engaged in multiple sexual acts with V1, his then eight-year-old step-granddaughter, on more than one occasion. (V1 Statement, Jan. 10, 2007 at 1-2); (Grant Narrative, June 14, 2005 at 1); (Grant Supp. Narrative A, June 14, 2005 at 2-3.) On other occasions, Swift coerced V1 and V2, his then twelve-year-old step-grandson, to engage in sexual acts with each other while Swift watched. (V2 Statement, Nov. 13, 2004 at 2-4); (Grant Narrative, June 14, 2005 at 1-2); (Grant Supp. Narrative A, June 14, 2005 at 2-3); (Grant Supp. Narrative, undated at 1-2.) Further, Swift viewed pornographic films with both victims and also showed them his sex toys. (V2 Statement, Nov. 13, 2004 at 3); (Grant Narrative, June 14, 2005 at 1); (Grant Supp. Narrative A, June 14, 2005 at 2-3); (Grant Supp. Narrative, undated at 2.) Such conduct occurred in Swift's apartment and in the back of Swift's van. (V2 Statement, Nov. 13, 2004 at 1-3); (Grant Narrative, June 14, 2005 at 1-2); (Grant Supp. Narrative A, June 14, 2005 at 2-3.) When Swift's wife chastised him for conducting such activities, he scolded her into silence. (V2 Statement, Nov. 13, 2004 at 2); (Grant Narrative, June 14, 2005 at 1); (Grant Supp. Narrative A, June 14, 2005 at 1-2.) Swift has not proffered any contrary evidence. See § 11-37.1-16(c). Thus, this Court finds that there is competent evidence in the record supporting the Magistrate's affirmation of these determinations by the Board. See

Dennis, 29 A.3d at 450; Bergin-Andrews, 984 A.2d at 648-49. This Court therefore "accepts" this portion of the Magistrate's Decision. Administrative Order 94-12(h).

Swift's final two challenges—that there is no evidence showing that Swift failed to cooperate with his supervisors while in prison or that he suffers from emotional problems—are also without merit. The record demonstrates that Swift was generally cooperative during his parole, psychological evaluation, and Board interviews while incarcerated; the record also reflects, however, that Swift consistently became "emotional," gave conflicting testimony, denied responsibility for his crimes, and did not display any guilt during these interviews. (Parole Report at 2, 10); (Psychological Report at 1-2); (Interview Form at 3.) His evaluators all noted that Swift instead sought to lay blame for his actions on his victims and on the victims' mother. (Parole Report at 2); (Psychological Report at 2); (Interview Form at 3.) In this vein, the evaluators remarked that Swift claimed that the victims had engaged in sexual acts with each other of their own volition beginning two years before his arrest. Id. They further noted that Swift alleged that the victims' mother was a poor caregiver, had various undefined "mental problems," attended "sex parties" with her live-in boyfriend, and threatened Swift's and his wife's lives. Id. Swift's denials and allegations were such that Swift was barred from attending sexual offender treatment classes while incarcerated. (Parole Report at 3.) Swift has not presented any evidence contradicting these facts. See § 11-37.1-16(c). This Court therefore finds that there is competent evidence in the record supporting the Magistrate's affirmation of these findings by the Board, see Dennis, 29 A.3d at 450; Bergin-Andrews, 984 A.2d at 648-49, and this Court "accepts" this part of the Magistrate's Decision. Administrative Order 94-12(h).

B

The Additional Factors

The Board considered a number of additional factors beyond Swift's STATIC-99 and STABLE 2000 test scores to determine Swift's classification level.[8] Swift argues in the first instance that the Board should not have examined any additional information in calculating his classification level, contending instead that the Board should have utilized only his STATIC-99 and STABLE 2000 test scores.

The Magistrate rejected this argument, finding that the Board properly considered additional outside factors along with Swift's actuarial test scores in determining Swift's classification level. (Hr'g. Tr. at 4-5.) The Magistrate pointed to the fact that § 11-1-37.1-6(b) expressly allows the Board to consider "other materials" beyond the risk assessment tools to determine a sex offender's classification level. Id. The Magistrate noted specifically that in this case, the Board calculated Swift's classification level after

---

[8] In particular, the Board noted the presence of the following characteristics in this case:

> "(1) The nature of the current sex offense:
> (a) Use of threats
> (b) Adult offender targeting a child victim
> (c) Multiple acts against a single victim during single criminal episode
> (d) Particularly egregious and planned offense
> (e) Offenses against particularly vulnerable victims such as a significantly younger victim
> (2) A pattern of repetitive and compulsive sexually aggressive behavior, involving separate incidents with either the same victim
> (3) Offender's denial of the crimes
> (4) Currently supervised by Probation with a poor adjustment and a bail violation for leaving the state
> (5) Avoidance of current sex offender specific treatment."

(Board Report at 2.)

considering Swift's criminal, institutional, and probation/parole records, treatment and supervision information, and the underlying police reports in conjunction with his STATIC-99 and STABLE 2000 test scores. Id. at 3-4.

This Court finds that there is competent evidence in the record supporting the Magistrate's findings. See Dennis, 29 A.3d at 450; Bergin-Andrews, 984 A.2d at 648-49. Our Supreme Court has consistently noted that "[r]isk assessment is not an exact science, and a certain amount of judgment and even intuition must be exercised by the [Board] and the reviewing magistrate." Dennis, 29 A.3d at 450-51 (quoting Germane, 971 A.2d at 589).[9] The fundamentally opaque nature of such assessments obligates reviewing bodies to exercise their professional discretion in assessing the risk that a sex offender poses to the public upon release from prison. See Dennis, 29 A.3d at 451 (recognizing that "[t]he classification of an individual's future risk of sexual recidivism is not a one-size-fits-all application"). Therefore, the Board's mandate necessarily requires it to consider a wide range of information to properly assess a sex offender's risk of recidivism in a given case. See Germane, 971 A.2d at 585 (quoting Kaveny v. Town of Cumberland Zoning Bd. of Review, 875 A.2d 1, 10 (R.I. 2005) and holding that "the board of review's ability to consider dynamic factors beyond the static factors analyzed by the STATIC-99 . . . has a 'substantial relation to the public health, safety, morals, [and] general welfare'").

Both the Act and the Guidelines contain affirmative, mandatory language requiring the Board to consider both the actuarial test scores and outside factors in

[9] The difficulty and uncertainty posed by the task of sex offender risk assessment perhaps explains why the Legislature mandated in § 11-37.1-6(1)(a) that the Board shall be composed of "eight (8) persons including experts in the field of behavior and treatment of sex offenders . . . ." Section 11-1-37.1-6(1)(a) further provides that "[a]t least one member of the [Board] shall be a qualified child/adolescent sex offender treatment specialist."

determining the appropriate classification level for a given sex offender. See Dennis, 29 A.3d at 451 (finding that the "statutory language, paired with the guidelines, suggests that a sexual offender assessment should not . . . solely rest on the results of the risk assessment tools"). For example, § 11-1-37.1-6(b) requires that "the [Board] will utilize a validated risk assessment instrument and other material approved by the parole board to determine the level of risk an offender poses to the community . . . ." (Emphasis added.) Section 11-37.1-6(2)(i) mandates that "[t]he [Board] shall within thirty (30) days of a referral of a person conduct the validated risk assessment, review other material provided by the agency having supervisory responsibility and assign a risk of re-offense level to the offender." (Emphasis added.) Section 11-37.1-6(4) further requires that "the [Board] shall have access to all relevant records and information in the possession of any state official or agency . . . relating to the juvenile and adult offenders under review by the [Board]." Sec. 11-37.1-6(4). (Emphasis added.)

Additionally, "Addendum 1" in the Guidelines' "Appendix" provides that "each risk of re-offense assessment decision shall be made on the basis of the facts of each individual case, after review of appropriate documentation." Guidelines, Addendum 1 at 27. (Emphasis added.) "Addendum 1" also contains a list of fifteen enumerated fact categories that the Board must consider in determining a sex offender's classification level.[10] Id. at 27-28. Of the fifteen enumerated fact categories, the use of validated

[10] Specifically, "Addendum 1" contains the following fifteen factual categories: Actuarial Risk Score; Degree of Violence; Other Significant Crime Considerations; Degree of Sexual Intrusion; Victim Selection Characteristics; Known Nature and History of Sexual Aggressions; Other Criminal History; Substance Abuse; Presence of Psychosis, Mental Retardation or Behavioral Disorder; Degree of Family Support of Offender Accountability and Safety; Personal, Employment and Educational Stability; Incarceration Community Supervision Record; External Controls; Participation in Sex

actuarial risk assessment tools like the STATIC-99 and STABLE 2000 tests is listed only in the first category. Id. at 27. Therefore, fourteen of the fifteen factual categories considered by the Board entail outside factors in addition to the sex offender's actuarial test scores. See Germane, 971 A.2d at 585 (recognizing that "the board of review is required, pursuant to its own guidelines, to review a number of case-specific facts in addition to an individual offender's score on the STATIC-99").

The creators of the risk assessment tools also acknowledge that their tests should not be used as the only risk assessment devices when classifying sex offenders. In the STATIC-99 Coding Rules, for example, the test's creators note that

> "The STATIC-99 utilizes only static (unchangeable) factors that have been seen in the literature to correlate with sexual reconviction in adult males. The estimates of sexual and violent recidivism produced by the STATIC-99 can be thought of as a baseline of risk for violent and sexual reconviction . . . The strengths of the STATIC-99 are that it uses risk factors that have been empirically shown to be associated with sexual recidivism and the STATIC-99 gives explicit rules for combining these factors into a total risk score . . . The weaknesses of the STATIC-99 are that it demonstrates only moderate predictive accuracy . . . and that it does not include all the factors that might be included in a wide-ranging risk assessment . . . [A] prudent evaluator will always consider other external factors that may influence risk in either direction."

Germane, 971 A.2d at 585. (Emphasis added.) Accordingly, our Supreme Court has found that it is "not only reasonable, but . . . also in accordance with the express recommendation of the STATIC-99's creators," for the Board to consider both the actuarial test scores and additional outside factors when calculating a sex offender's

---

Offender Specific Treatment Program; and Response to Sex Offender Specific Treatment/Admission of Guilt, Acceptance of Responsibility for Crimes, Commitment to Ongoing Safety, Recovery and Sex Offender Treatment. See Guidelines, Addendum 1 at 27-28.

classification level. Id. Swift has not presented any evidence showing that the Board must confine its analysis to the actuarial risk assessment tests when determining an offender's risk level. See § 11-37.1-16(c). This Court finds that the record contains competent evidence corroborating the Magistrate's determination that the Board correctly considered "other materials" beyond the risk assessment tests when calculating Swift's Level III classification. See Dennis, 29 A.3d at 450; Bergin-Andrews, 984 A.2d at 648-49. This Court therefore "accepts" this part of the Magistrate's Decision. Administrative Order 94-12(h).

Swift also challenges the validity of five of the Guidelines factors specifically noted by the Board. Swift argues that there is no evidence in the record substantiating the Board's determination that Swift engaged in either "[m]ultiple acts against a single victim during a single criminal episode" or "a pattern of repetitive and compulsive sexually aggressive behavior involving separate incidents with either the same victim." Swift next contends that the Board considered the single factor, "adult offender targeting a child victim" and "offense against a particularly vulnerable victim, such as a significantly younger victim," as two separate factors, thereby impermissibly enhancing Swift's classification level. Swift further asserts that the Board incorrectly applied the factor, "[c]urrently supervised by probation with a poor adjustment and a bail violation for leaving the state," to the facts of this case in two ways.[11] Swift also argues that there is no evidence in the record supporting the Board's finding that he "used threats" to coerce

[11] On one hand, Swift argues that the Board considered his probation status as a negative factor, when, in fact, it should have been viewed as a positive factor because individuals on probation are less likely to re-offend. Swift also contends that there is no evidence in the record to justify the Board's finding that he demonstrated "poor adjustment" to probation.

his victims. Finally, Swift posits that the Board erred in concluding that he intentionally avoided entering sex offender treatment classes while in prison, contending instead that his sentence was too short to allow him to enter any such programs. In fact, Swift avers, he is currently enrolled in sex offender treatment classes while on probation.

Swift contends that, on the whole, these five factors are factually inaccurate and impermissibly subjective as applied to his case. Swift maintains that had the Board not improperly considered these five factors, it would have classified him as a Level I sex offender.

The Magistrate did not find these arguments compelling. He found that the Board properly noted the existence of various specific characteristics that influenced its classification of Swift as a Level III sex offender, including the five factors that Swift specifically challenges. (Hr'g. Tr. at 4.) In so finding, the Magistrate determined that the record as a whole supported the Board's determinations, and Swift failed to proffer any opposing evidence. Id. at 8. Therefore, the Magistrate affirmed the Board's findings. Id.

This Court finds that the record contains competent evidence supporting the Magistrate's affirmation of the Board's findings regarding these factors. See Dennis, 29 A.3d at 450; Bergin-Andrews, 984 A.2d at 648-49. Concerning Swift's first challenge, the record is replete with evidence demonstrating that Swift engaged in multiple sexual acts with both V1 and V2, separately and together. (V2 Statement, Nov. 13, 2004 at 2-4); (V1 Statement, Jan. 10, 2007 at 1-2); (Grant Narrative, June 14, 2005 at 1-2); (Grant Supp. Narrative A, June 14, 2005 at 2-3); (Grant Supp. Narrative, undated at 1-2.) In some of these instances, Swift performed sexual acts on V1 or coerced her into performing sexual acts on him. Id. In other instances, Swift coerced his victims to

perform sexual acts on each other while he watched. Id. Swift has not presented any contrary evidence. See § 11-37.1-16(c). Thus, this Court finds that there is competent evidence in the record supporting the Magistrate's affirmation of this finding by the Board, see Dennis, 29 A.3d at 450; Bergin-Andrews, 984 A.2d at 648-49, and this Court "accepts" this part of the Magistrate's Decision. Administrative Order 94-12(h).

Swift's second challenge is similarly unavailing. The Guidelines plainly state that the Board must examine "Victim Selection Characteristics" as one of the fifteen factors enumerated in "Addendum 1." Guidelines, Addendum 1 at 27. This factor encompasses a bevy of considerations, "including, but not limited to, the number of victims, age of the victim, specificity of victim characteristics, developmental level, [and] vulnerability factors i.e. handicap, establishment of relationships for the primary purpose of victimization." Id. (Emphasis added.) Even though factors concerning the "age of the victim" and the victim's level of vulnerability fall within a single factual category, it is clear that the Board may properly consider both factors in assessing Swift's risk of recidivism. Swift has not presented any evidence contradicting these determinations. See § 11-37.1-16(c). Thus, this Court finds that there is competent evidence in the record supporting the Magistrate's determination that the Board properly considered both of these factors in calculating Swift's risk classification level. See Dennis, 29 A.3d at 450; Bergin-Andrews, 984 A.2d at 648-49. This Court therefore "accepts" this part of the Magistrate's Decision. Administrative Order 94-12(h).

Swift's third challenge is also without merit. The record indisputably demonstrates that Swift and his wife fled this state while Swift was free on bail following Swift's arrest. (Grant Supp. Narrative B, June 14, 2005 at 1-2); (Parole Report at 3);

(Interview Form at 2.) The couple settled in Kansas with their adult son and lived there for nearly five months until apprehended. (Grant Supp. Narrative B, June 14, 2005 at 1-2.) Swift stated that he fled Rhode Island to escape the charges brought against him because he thought that the charges were groundless. (Grant Supp. Narrative B, June 14, 2005 at 1); (Psychological Report at 1.) Swift further intimated that he and his wife had not intended to return to Rhode Island but he was relieved to be caught because their flight "[didn't] look good." (Interview Form at 2.) Upon his release from prison, Swift represented to the Board's interviewer that he wished to pursue a television and book deal to inform the public of his time as a fugitive. Id. at 10.

Furthermore, the record evinces that Swift's psychological evaluator found that Swift's refusal to accept responsibility for his crime, failure to display any guilt, and insistence that the victims' mother was the true criminal demonstrated that Swift was not "a good candidate for parole." (Psychological Report at 2 ¶ 14.) The psychological evaluator further found that Swift showed no desire or inclination to change his lifestyle upon his release from prison. Id. As such, the evaluator concluded that Swift would "benefit from spending time in . . . a highly monitored/structured program . . . when released." Id. Swift has presented no evidence to the contrary. See § 11-37.1-16(c). This evidence supports the Magistrate's affirmation of the Board's finding that Swift demonstrated "poor adjustment" to probation and fled Rhode Island while on bail. Therefore, this Court finds that there is competent evidence in the record supporting the Magistrate's findings, see Dennis, 29 A.3d at 450; Bergin-Andrews, 984 A.2d at 648-49, and this Court "accepts" this part of the Magistrate's Decision. Administrative Order 94-12(h).

Concerning Swift's challenge to the "use of threats" factor, the record shows that Swift used a number of threats and other coercive tactics to induce his victims to engage in various sexual acts. Both V1 and V2 consistently testified that Swift coerced them into so acting through the use of loud, authoritative commands and telling them that engaging in such conduct was "OK" and would "improve their relationship." There was further testimony that Swift had guns in his apartment. (V2 Statement, Nov. 13, 2004 at 1-4); (V1 Statement, Jan. 10, 2007 at 1-2); (Wolbridge Statement, Jan. 16, 2007 at 2); (Grant Narrative, June 14, 2005 at 1-2); (Grant Supp. Narrative, undated at 1.) Swift has produced no contrary evidence. See § 11-37.1-16(c). Therefore, this Court finds that the Magistrate's affirmation of the Board's finding that Swift used threats during the commission of his crimes is supported in the record by competent evidence, see Dennis, 29 A.3d at 450; Bergin-Andrews, 984 A.2d at 648-49, and this Court "accepts" this part of the Magistrate's Decision. Administrative Order 94-12(h).

Swift's final challenge—that the Board erred in finding that he purposefully avoided sex offender treatment classes while in prison—is also without merit. The record shows that the parole board determined that Swift was not enrolled in any sex offender treatment classes while incarcerated because "he [was] not willing to admit his guilt." (Parole Report at 3); (Psychological Report at 2 ¶ 14.) Other evidence in the record corroborates the parole board's conclusion that Swift did not display any guilt or accept his crime while in prison. See Interview Form at 2, 10; Psychological Report at 2 ¶ 13. Swift, in fact, informed his evaluators that he would only attend sex offender treatment classes if doing so "would give [him] an edge up on parole." (Psychological Report at 2 ¶ 13.) The Magistrate found that Swift failed to show that he was progressing through

goal-oriented counseling sessions following his release from prison. (Hr'g. Tr. at 6-7.) Swift has not presented any contrary evidence. See § 11-37.1-16(c). This Court finds that there is competent evidence in the record supporting the Magistrate's affirmation of this factor. See Dennis, 29 A.3d at 450; Bergin-Andrews, 984 A.2d at 648-49. This Court therefore "accepts" this part of the Magistrate's Decision. Administrative Order 94-12(h).

V

Conclusion

Based on a de novo review of the entire record on appeal, this Court finds that there is competent evidence in the record supporting all of the Magistrate's findings concerning Swift's claims of error. This Court "accepts" all parts of the Magistrate's Decision affirming the Board's classification of Swift as a Level III sex offender.

Counsel shall prepare an appropriate Order for entry.