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CONCLUSION

Accordingly, we reverse the decision of the trial court and remand the cause for an amended final award consistent with this opinion.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. CHAD NORMAN, APPELLANT.

824 N.W.2d 739

Filed January 18, 2013. No. S-12-339.

1. **Criminal Law: Convicted Sex Offender: Evidence.** A crime that is generally not a typical sex crime may still require registration under the Sex Offender Registration Act if the court finds that evidence of sexual penetration or sexual contact was present in the record.
2. **Convicted Sex Offender: Appeal and Error.** An appellate court will affirm a court's ruling that a defendant must register under the Sex Offender Registration Act if, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found with a firm conviction that the crime involved sexual contact.
3. **Evidence: Appeal and Error.** As with any sufficiency claim, regardless whether the evidence is direct, circumstantial, or a combination thereof, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Michael J. Synek for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CONNOLLY, J.

NATURE OF CASE

Chad Norman pled no contest to third degree assault. Based solely on the factual basis for the plea, the district court ordered

Norman to register under the Sex Offender Registration Act (SORA).[1] On Norman's first appeal, we reversed, and remanded for the court to consider all the evidence in the record (rather than just the factual basis) in making its determination.[2] On remand, the court found by clear and convincing evidence that Norman's crime involved sexual contact and again ordered Norman to register under SORA. Because there is evidence to support the court's finding, we affirm.

BACKGROUND

The underlying facts are set out in detail in our earlier opinion, so a summary of those facts is sufficient here. Norman pled no contest to the third degree assault of an 11-year-old boy, T.A.W. The State's factual basis for the plea alleged that Norman had touched T.A.W.'s penis and that Norman had threatened T.A.W.'s family if he told anyone about the touching. After recitation of the factual basis, the court clarified that the third degree assault charge was "'based upon the threat,'"[3] to which the State agreed. The court accepted Norman's plea and found him guilty of third degree assault.[4]

[1] A crime that is generally not a typical sex crime, such as third degree assault, may still require registration under SORA if the court finds that "evidence of sexual penetration or sexual contact . . . was present in the record."[5] In Norman's case, registration under SORA was a possibility, so the court conducted an expansive sentencing hearing. Both the State and Norman offered evidence at the hearing, which consisted primarily of police reports and deposition testimony. Norman also testified at the sentencing hearing. He denied ever sexually abusing T.A.W. and stated that there had "'never been any contact between me and him.'"[6]

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[1] Neb. Rev. Stat. §§ 29-4001 to 29-4014 (Reissue 2008 & Cum. Supp. 2012).

[2] *State v. Norman*, 282 Neb. 990, 808 N.W.2d 48 (2012).

[3] *Id.* at 993, 808 N.W.2d at 54.

[4] See *Norman, supra* note 2.

[5] § 29-4003(1)(b)(i)(B).

[6] *Norman, supra* note 2, 282 Neb. at 995, 808 N.W.2d at 54.

But the court ordered Norman to register under SORA, implicitly finding that Norman's crime involved either sexual penetration or sexual contact. The court seemingly ignored the evidence offered because the court explicitly noted that it based its ruling "'solely'" upon the factual basis for the plea.[7]

On appeal, we determined that Norman had not received due process. We noted that due process required both notice and a meaningful opportunity to be heard. Although Norman had received notice and the court had held an evidentiary hearing, we reasoned that Norman had not received a *meaningful* opportunity to be heard because the court's ruling was based solely on the factual basis for the plea.[8] We concluded that "a meaningful hearing requires consideration of evidence at the hearing as well as the factual basis and the presentence report."[9] We remanded the cause for the court to consider all the evidence in the record and determine whether Norman's crime involved sexual penetration or sexual contact. We also concluded that the State had the burden of proving sexual penetration or sexual contact by clear and convincing evidence.[10]

On remand, the court summarized our holding and then reviewed the evidence in the record. This included the factual basis, the presentence report, Norman's testimony, and the exhibits received at the evidentiary hearing. Those exhibits were the relevant police reports, the transcript of a juvenile proceeding involving T.A.W., a letter from Norman's employer to the court, and deposition testimony from both T.A.W. and his mother. The court ultimately found, by clear and convincing evidence, that Norman's crime involved sexual contact with T.A.W.

ASSIGNMENT OF ERROR

Norman alleges, consolidated and restated, that the district court erred in finding by clear and convincing evidence that

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[7] See *id.* at 996, 808 N.W.2d at 56.

[8] See *Norman, supra* note 2.

[9] *Id.* at 1009, 808 N.W.2d at 64.

[10] See *Norman, supra* note 2.

his crime involved sexual contact and ordering him to register under SORA.

STANDARD OF REVIEW

As both parties recognize, we have not previously stated our standard of review for reviewing a district court's finding of sexual contact in a SORA registration hearing. But although this is an issue of first impression, our existing case law provides some guidance.

State v. Hamilton[11] involved an analogous situation. There, the judge made the factual determination that the defendant's crime was an "'aggravated offense'" under SORA and ordered the defendant to submit to lifetime registration. We concluded, as we did in *Norman*,[12] that the judge's finding could be based on "information contained in the record, including the factual basis for a plea-based conviction and information contained in the presentence report."[13] And although we did not explicitly state our standard of review for evaluating that finding, we concluded that the record "support[ed]" the court's finding.[14] So we essentially reviewed the court's finding as a question of the sufficiency of the evidence.

In *State v. Kofoed*,[15] we reviewed a court's finding under Neb. Rev. Stat. § 27-404(3) (Reissue 2008) that the defendant had committed an uncharged, extrinsic crime. Just like here, the State had the burden of proving that fact by clear and convincing evidence. We reviewed the finding as an "insufficient evidence claim[],"[16] and analogized it to that of reviewing the sufficiency of the evidence to support a conviction. But we also recognized that the State's burden in a hearing pursuant to § 27-404(3) was proof by clear and convincing evidence rather than proof beyond a reasonable doubt. So we concluded that we would affirm the court's finding "if, viewing the evidence

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[11] *State v. Hamilton*, 277 Neb. 593, 594, 763 N.W.2d 731, 733 (2009).

[12] See *Norman, supra* note 2.

[13] *Hamilton, supra* note 11, 277 Neb. at 602, 763 N.W.2d at 738.

[14] *Id.*

[15] *State v. Kofoed*, 283 Neb. 767, 817 N.W.2d 225 (2012).

[16] *Id.* at 771, 817 N.W.2d at 231.

in the light most favorable to the prosecution, any rational trier of fact could have found with a firm conviction the essential elements of the uncharged crime."[17]

[2,3] These types of factual findings under SORA, as seen in *Hamilton*, are reviewed under a sufficiency-of-the-evidence type of standard of review. And like in *Kofoed*, here the State was required to prove the existence of a fact (sexual contact) by clear and convincing evidence. So we conclude that a similar standard of review should apply to a court's finding of sexual contact in a SORA registration hearing. We hold that we will affirm a court's ruling that a defendant must register under SORA if, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found with a firm conviction that the crime involved sexual contact. And, as with any sufficiency claim, regardless "whether the evidence is direct, circumstantial, or a combination thereof . . . we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact."[18]

ANALYSIS

Norman argues that the State failed to meet its burden to prove sexual contact by clear and convincing evidence and that the court's reasoning in support of its finding was unpersuasive. Although this is a close case, our standard of review is a deferential one, and there is evidence in the record to support the court's finding.

Neb. Rev. Stat. § 28-318 (Reissue 2008) defines the term "sexual contact" in part as follows:

> (5) Sexual contact means the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact shall also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts

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[17] *Id.*

[18] *Id.*

> when such touching is intentionally caused by the actor. Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party.

In the court's order following remand, it summarized the evidence, which included the factual basis, the presentence report, the police reports, deposition testimony, and Norman's testimony. The record showed that T.A.W. alleged that Norman had touched T.A.W.'s penis. Although T.A.W. never appeared in person before the court, the court concluded that T.A.W. had not been coached and noted that T.A.W. had "essentially testified consistently and without substantial or meaningful conflict" throughout his "prolonged deposition." And the court reasoned that the evidence of sexual encounters between T.A.W. and other children was "not inconsistent with a child being abused." The court concluded that the State had met its burden and ordered Norman to register under SORA.

Norman obviously takes issue with this finding. Norman argues that the evidence was contradictory and insufficient to find that Norman's crime involved sexual contact and that parts of T.A.W.'s story simply did not make sense. Norman also argues that the court's reasoning was flawed. Specifically, Norman argues that the court improperly emphasized T.A.W.'s sexual encounters with other children and Norman's showing lingerie catalogs to T.A.W. Norman also claims that the court gave insufficient weight to the police officer's initial suspicion that T.A.W. had been coached and that the court incorrectly determined that T.A.W.'s deposition testimony was consistent. Finally, Norman claims that the court incorrectly relied on the factual basis for the plea and parts of the presentence investigation, and argues that the court could not find T.A.W. credible because T.A.W. never appeared before the court in person.

Norman is asking us to reweigh the evidence and find in his favor. But under our standard of review, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Instead, the question is only whether a rational trier of fact, viewing the evidence in a light most

favorable to the State, could have found with a firm conviction that the crime involved sexual contact. It could.

We noted in *Norman* that on remand, the court should consider the factual basis, presentence report, and the evidence in the record in determining whether sexual contact occurred.[19] Here, the State's factual basis obviously supported the court's finding because the factual basis alleged that Norman had touched T.A.W.'s penis. The presentence report also supported the court's finding. As part of the presentence investigation, the court ordered Norman to participate in a psychological and sex offender evaluation. Although the court determined that the resulting report essentially "offer[ed] no significant information or diagnosis concerning any aberrant sexual behaviors of [Norman]," the report shows otherwise. Specifically, the report concluded that Norman's test "results raise a red flag regarding his sexual interest in children. [Norman] needs to have Sex Offender therapy to address these concerns." So both the factual basis and the presentence report supported the court's finding.

The evidentiary exhibits also provided support for the court's finding. Exhibit 2 contains numerous police reports related to T.A.W.'s allegations against Norman. Those reports document the police investigation, including the interviews of T.A.W., his mother, and T.A.W.'s counselor. They note that T.A.W. told several people, including police officers, that Norman had inappropriately touched him. It is true, as Norman notes, that an investigating police officer was initially concerned that T.A.W. had been coached. But we reiterate that our standard of review requires us to view the evidence in the light most favorable to the State. This was the only evidence that T.A.W. might have been coached. And this did not stop law enforcement from continuing the investigation and eventually arresting Norman, which would indicate that coaching was ruled out as a possibility. Furthermore, this same officer reported that T.A.W.'s counselor, among others, later explained that T.A.W. was uncomfortable speaking with men. This could explain T.A.W.'s looking toward his mother

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[19] See *Norman, supra* note 2.

at the initial interview, which is apparently what the district court concluded.

The record contains T.A.W.'s deposition testimony. After reading the deposition, we agree with the district court that T.A.W. "essentially testified consistently and without substantial or meaningful conflict" throughout the deposition. We recognize that the deposition contains some inconsistencies, but T.A.W. always maintained that Norman had inappropriately touched him, and T.A.W. never wavered on that point at any time during the investigation or prosecution. Furthermore, the inconsistencies in T.A.W.'s deposition are relatively minor and may be explained by the time that had elapsed since the alleged incidents, T.A.W.'s age and situation, and the length of the deposition. We conclude that this evidence, when taken together, could lead a rational trier of fact to have found with a firm conviction that Norman's crime involved sexual contact.

We express one final note on the issue of credibility. Both Norman and the State, at oral argument, characterized the dispute as one coming down to credibility—T.A.W.'s allegations against Norman's denials. This case was a bit unique, however, because T.A.W. never testified in person before the court, and so one could argue that the court could not make a credibility determination about T.A.W. Or, at least, we would not necessarily be required to defer to such a credibility determination because the court had the same evidence before it as we do—that being a cold record. But Norman did testify in person before the court, and he denied any inappropriate touching of T.A.W. The court's finding that sexual contact occurred demonstrated that the court did not find Norman to be credible, and that determination is entitled to deference under our standard of review.

CONCLUSION

The court weighed the evidence and found by clear and convincing evidence that Norman's crime involved sexual contact. We conclude that the evidence supported that finding and affirm the court's order requiring Norman to register under SORA.

AFFIRMED.