STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1368

In the Matter of the Civil Commitment of:
Joseph William Schulz

Filed January 8, 2008
Affirmed
Minge, Judge

Blue Earth County District Court
File No. 07-PR-06-2055

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Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and Minge, Judge.

U N P U B L I S H E D O P I N I O N

MINGE, Judge

The district court ordered the indeterminate commitment of appellant as both a sexual psychopathic personality (SPP) and a sexually dangerous person (SDP). Appellant challenges only his commitment as a SPP. Appellant argues that his history does not demonstrate that he is "dangerous" or that he suffers from an "utter lack of

control" as required by the SPP commitment statute. He also asserts that because of conflicting expert testimony, the district court erred in finding that there was clear and compelling evidence establishing that he qualifies as a SPP. Because we find that the district court did not err in committing the appellant as a SPP, we affirm.

FACTS

Appellant Joseph William Schulz is 50 years old. Schultz has been diagnosed with pedophilia. He sexually abused seven known victims from 1991 through 2003, when he was incarcerated. The victims ranged in age from 5 to 11. A petition to commit Schulz as a sexual psychopathic personality and a sexually dangerous person was filed on July 14, 2006.

The police report introduced at the hearing indicates that the first known abusive conduct took place in January 1991, with eight-year-old female victim S.G.R., Schulz's niece. S.G.R. testified at the hearing that she and her brother stayed with Schulz and their grandparents for several hours each day while their parents were at work. Schulz would initiate "tickling" and "wrestling" with S.G.R. and her brother, during which he would touch S.G.R. on her vagina and chest. On one occasion, he kept his hand on her vagina for two to three minutes. On another, he pinned S.G.R. and her brother into a corner so that they could not get away. S.G.R. asked him to let her go, but he refused to do so. As a result of his sexual contact with S.G.R., he was charged with five counts of criminal sexual conduct in the second degree and pleaded guilty to one count.

S.G.R testified that the abuse continued for several months before she told her parents. She stated that since the abuse, she has attempted suicide and suffered from

anxiety and insomnia. She further testified that because she complained of Schulz's conduct, she was disowned by her grandmother, who blamed her for the abuse. Her mother stated that after she was abused, S.G.R. experienced difficulties in school, had frequent school absences, and became socially withdrawn.

During this time, Schulz also sexually abused S.G.R.'s brother, S.R., who was then five years old. S.R. testified at the hearing that on one occasion, Schulz lifted him up, unbuttoned his pants, and fondled his penis. No criminal charges were brought against Schulz as a result of this activity. S.R. testified that as a result of the abuse, he lost his relationship with his grandfather, experienced problems with anger, does not trust others easily, and uses drugs to help deal with his emotions.

In the summer of 1991, Schulz sexually abused 11-year-old female victim S.L.G., another niece, by fondling her vagina. Although she did not testify at the commitment hearing, Schulz admitted his conduct.

In the fall of 1994, Schulz also had sexual contact with 11-year-old female victim, A.C., and her five-year-old sister, M.H. A.C. testified at the hearing that Schulz groomed her family by buying them groceries and offering to babysit, then began staying with them intermittently. When he babysat them, he would touch their genital and breast area over their clothing, often while "wrestling." On one occasion, Schulz found victim A.C. coming out of the shower and put her panties down his pants. He told her to get them. His penis was erect but A.C. could not recall whether she touched it. In the case of the five-year-old M.H., he performed oral sex on her on four to five occasions. As a result of

these activities, Schulz pleaded guilty to two counts of criminal sexual conduct in the second degree and was incarcerated.

A.C. testified that since the abuse, she has had problems with depression, sleeping, and self-mutilation, and that she has attempted suicide. A.C. also testified that she has nightmares that someone is touching her and has seen a counselor because of the emotional issues that she struggles with as a result of the abuse. Victim M.H. testified that as a result of her abuse, she began cutting her wrists when she was 11 years old. She also testified that she is scared to be around "guys," never wants to be alone, and has nightmares.

On or about August 8, 2003, while on supervised release, Schulz had sexual contact with victim S.S.O. while she was staying at his fiancé's house. S.S.O. was then seven years old. She told investigators in 2003 that Schulz touched her feet, touched her vaginal area underneath her underwear, and kissed her mouth and nose while she pretended to sleep. As a result of this activity, Schulz pleaded guilty to one count of criminal sexual conduct in the second degree. Before Schulz was sentenced on that offense, S.S.O.'s mother said in a victim impact statement that S.S.O. was sent to counseling after the incident, that S.S.O. was forced to grow up quicker, and that she had been having nightmares and waking up screaming and crying.

Three experts testified at the hearing. Two court-appointed examiners testified that Schulz' profile does not fit the criteria for a SPP. One of those examiners concluded that he is a SDP, while the other disagreed. An examiner appointed by the petitioner found that Schulz qualified for commitment as both a SPP and a SDP.

The district court concluded that Schulz fit the definition of a SPP and a SDP, and that he should be civilly committed. This appeal follows.

D E C I S I O N

The primary issue is whether the evidence was sufficient to commit Schulz as a SPP. Where the evidence is in conflict as to the existence of a psychopathic personality, the question is one of fact to be determined by the district court upon all the evidence. *In re Pirkl*, 531 N.W.2d 902, 907 (Minn. App. 1995), *review denied* (Minn. Aug. 30, 1995). An appellate court will uphold the district court's findings of fact if they are not clearly erroneous. *See, e.g.*, *In re Joelson*, 385 N.W.2d 810, 811 (Minn. 1986); *In re Preston*, 629 N.W.2d 104, 110 (Minn. App. 2001). The appellate court will review de novo whether the record shows that the statutory requirements for civil commitment are met. *In re Linehan*, 518 N.W.2d 609, 613 (Minn. 1994).

I.

A petitioner must prove that the standards for commitment as a SPP are met by clear and convincing evidence. Minn. Stat. §§ 253B.18, subd. 1(a), .185, subd. 1 (2006). A SPP is statutorily defined as

> the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of personal acts, or a combination of any of these conditions, which render the person irresponsible for personal conduct with respect to sexual matters, if the person has evidenced, by a habitual course of misconduct in sexual matters, an utter lack of power to control the person's sexual impulses and, as a result, is dangerous to other persons.

Minn. Stat. § 253B.02, subd. 18b (2006). The statute requires that the district court find (1) a habitual course of misconduct; (2) an utter lack of power to control sexual impulses; and (3) dangerousness. *Id.*; *see also Linehan*, 518 N.W.2d at 613. "While excluding 'mere sexual promiscuity,' and 'other forms of sexual delinquency,' a psychopathic personality 'is an identifiable and documentable violent sexually deviant condition or disorder.'" *Preston*, 629 N.W.2d at 110 (quoting *In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994)). Schulz did not argue in his brief or at oral argument that the district court erred in finding that he exhibited a "habitual course of misconduct." Therefore, that first element for commitment under the SPP statute is not further considered.

A. Utter Lack of Control

Schulz argues that the district court erred in finding that he meets the second part of the definition of SPP – an utter lack of power to control his behavior. "If a person has the ability to control the sexual impulse, the standard for commitment is not met." *Pirkl*, 531 N.W.2d at 907. In determining whether the individual exhibits an utter lack of control over his sexual behavior, our supreme court has identified several significant factors:

> [1] the nature and frequency of the sexual assaults, [2] the degree of violence involved, [3] the relationship (or lack thereof) between the offender and the victims, [4] the offender's attitude and mood, [5] the offender's medical and family history, [6] the results of psychological and psychiatric testing and evaluation, and such other factors that bear on the predatory sex impulse and the lack of power to control it.

Blodgett, 510 N.W.2d at 915. Schulz argues that his relationship with the victims and the nature of his sexual assaults do not show that he suffers from an "utter lack of control" as

demanded by the statute. Because he does not challenge the findings of the district court with regard to the other four *Blodgett* factors, we will focus on these two.

The record shows that Schulz regularly offended from the time he was 33 until he went to prison, then resumed this behavior upon his release. One doctor testified that Schulz' pattern of sexual assault escalated over time. Schulz also used limited physical force and yelling to achieve his sexual assaults. His behavior involved fondling young children, as well as engaging in oral sex with at least one victim. Schulz used the level of physical force necessary to achieve victim compliance. Schulz' offenses involved grooming and manipulation, and were committed against young children, which can be indicia of a lack of control over his sexual impulses. *See Preston*, 629 N.W.2d at 111-13. The nature and chronictiy of his assaults demonstrate that the district court did not abuse its discretion in determining that this exhibited Schulz' utter lack of control over his actions.

The district court also properly considered the relationship Schulz had with his victims. Because Schulz primarily held a position of authority and trust over his victims, his relationship with them is indicative of an utter lack of control over his sexual impulses. *Id.* There was expert testimony that his most recent conduct of victimizing a stranger indicated a willingness to undertake a higher degree of risk in order to achieve his sexual objectives and that this evinced a greater lack of control over his impulses. The district court did not abuse its discretion in relying upon this testimony.

The district court also made a number of other specific findings that are supported by the record. The record shows that Schulz had failed to develop an adequate re-offense

prevention plan, that he re-offended after sex offender treatment, that he offended while on supervision, that he displayed a lack of empathy or remorse, and that he had never removed himself from a situation in which he might risk re-offending. These considerations support a conclusion that Schulz suffers from an utter lack of control over his behavior.

Based on this record, we conclude that the district court had an adequate factual basis for finding that there is clear and convincing evidence that Schulz exhibited an utter lack of power to control his sexual impulses.

B. Dangerousness

Schulz characterizes his behavior as particularly nonviolent, and argues that it is therefore similar to conduct that this court and the Minnesota Supreme Court have found to be outside of the ambit of the SPP statute. *See, e.g.*, *In re Rickmyer*, 519 N.W.2d 188, 190 (Minn. 1994); *In re Robb*, 622 N.W.2d 564, 572 (Minn. App. 2001), *review denied* (Minn. Apr. 17, 2001); *In re Schweninger*, 520 N.W.2d 446, 450 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994). Schulz argues that there is no clear and convincing evidence that his particular pattern of sexual misconduct is so egregious that there is a sufficient likelihood of serious physical or mental harm being inflicted on his victims, and that he is therefore not "dangerous to other persons" as required for commitment as a SPP. *See* Minn. Stat. § 253B.02, subd. 18b (2006); *Rickmyer*, 519 N.W.2d at 190. In determining dangerousness, Minnesota courts consider: (1) the offender's relevant demographic characteristics; (2) offender's history of violence, including the "recency, severity, and frequency" of violent acts; (3) "the base rate statistics for violent behavior

among individuals of this person's background"; (4) the offender's predisposition to cope with stress in a violent or nonviolent manner; (5) the similarity of the present or future context to those contexts in which the offender used violence in the past; and (6) the offender's sex-therapy-program record. *Linehan*, 518 N.W.2d at 614.

Here, the district court properly considered and made detailed findings regarding the six *Linehan* factors. The district court found that Schulz is highly likely to re-offend based on his history of violent behavior, base rate statistics, inability to handle stress, and lack of an adequate support system. The district court noted that his re-offense after completing sex offender treatment is of particular concern, and relied on testimony that Schulz has a limited understanding of treatment principles despite his experience with treatment programs. These findings are not directly contested by Schulz on appeal.

Courts have stated that evidence of the likelihood of future offenses is sufficient even if in the past the offenders only used limited physical restraint in performing oral sex on or vaginally penetrating young girls. *Preston*, 629 N.W.2d at 113 (finding that where the defendant had performed oral sex and digital penetration on girls as young as four years old, committed numerous offenses, engaged in the level of force required to reach his objectives, and both experts testified that the defendant was a pedophile, there was adequate violence on the record to support the commitment). The *Rickmyer* court found that mental harm, even without physical harm, could be egregious enough to merit commitment under the statute. 519 N.W.2d at 190; *accord Preston*, 629 N.W.2d at 112 n.4 ("[P]hysical harm, or even the risk of physical harm, is not a requirement for commitment under the sexual psychopathic personality statute.").

As in *Preston*, Schulz engaged in sexual activities with very young children. His youngest victim was five years old, and, as in *Preston*, he engaged in oral sex with that victim on more than one occasion. The *Preston* court considered this type of activity to be inherently violent. 629 N.W.2d at 113; *see also* Minn. Stat. § 609.1095, subd. 1(d) (2006) (listing first-, third-, and fourth-degree criminal sexual conduct as "violent crimes" for sentencing purposes). Schulz abused his victims over extended periods of time through repetitive offenses; he held himself in a position of power over them as an adult babysitter; he engaged in the limited level of force required to reach his objectives, including the pinning of arms and bodies; and experts testified that he was a pedophile. Schulz' victims have endured intense mental and emotional harm as a result of his actions. The strain caused by his abuse has resulted in suicide attempts, self-mutilation, and emotional trauma expressed through nightmares and anger problems. Victims have also testified that they have a decreased capacity to trust others and form emotional relationships, and that some of their existing family relationships were significantly affected as a result of Schulz' conduct.

Because Schulz' abuse has been shown to likely reoccur and because his past behavior was of an egregious nature likely to harm his victims, the district court did not err in concluding that he is sufficiently "dangerous" to merit commitment under the SPP statute. All of the district court's findings are supported by the record.

II.

Schulz argues that the evidence is insufficient to support his commitment because expert testimony conflicted regarding certain elements required under the SPP statute.

"When evidence as to the existence of a psychopathic personality is in conflict, the question is one of fact to be determined by the trial court upon all the evidence." *In re Martenies*, 350 N.W.2d 470, 472 (Minn. App. 1984), *review denied* (Minn. Sept. 12, 1984). If findings of fact rest almost entirely on expert testimony, the trial court's evaluation of credibility is of particular significance. *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003); *see also In re Joelson*, 385 N.W.2d 810, 811 (Minn. 1986); *compare Piotter v. Steffan*, 490 N.W.2d 915, 920 (Minn. App. 1992), *review denied* (Minn. Nov. 17, 1992) (overturning a court's credibility determination regarding expert testimony where the testimony of personal physicians was considered to be more credible than the testimony of a consulting psychologist who was not given time to adequately evaluate the patient). An appellate court will uphold the district court's findings if they are not clearly erroneous. *Joelson*, 385 N.W.2d at 811.

Schulz points out that *Robb*, *Rickmeyer*, and *Linehan* are cases in which experts disagreed about the extent of the appellants' illness and the evidence was determined to be insufficient to support commitment, and argues that because of divergent expert testimony in his commitment hearing, evidence in his case was likewise insufficient. In *Rickmyer*, two psychologists testified that the defendant was a pedophile and dangerous to children, while another psychologist testified that Rickmyer was relatively non-dangerous. 519 N.W.2d at 190. The district court concluded that the evidence was insufficient to support his commitment because his conduct was not likely to inflict serious mental or physical harm on his victims. *Id.*

In *Robb*, one expert testified that Robb met the statutory requirements for commitment as a SPP and another testified that he fell just short of those requirements. 622 N.W.2d at 567. Again, the district court concluded that the evidence was insufficient to support commitment because Robb used minimal force and did not cause physical injury to his victims. *Id.* at 572.

Linehan is another case in which expert opinions differed regarding the individual's status as a SPP. 518 N.W.2d at 612. There, the district court determined that because no experts had testified regarding Linehan's lack of control over his actions, his commitment was based on insufficient evidence and reversed. *Id.* at 613-14. None of these cases, however, reversed because of conflicting expert testimony. Rather, reversal was based on a failure of the district court to adequately support a finding of "dangerousness."

Here, three experts testified. The district court relied on the conclusions of Dr. Marston, who was retained by the Blue Earth County Attorney's Office. He was properly qualified as an expert. Dr. Marston testified that in his opinion, Schulz met the criteria for both a SPP and a SDP. Dr. Marston did not interview Schulz, because Schulz refused to meet with him. In developing this opinion, Dr. Marston relied on the record, the examinations and interviews with Schulz conducted by the other two experts, and psychological tests. He testified that, like the other experts, he believed that based on his test responses, Schulz had a personality disorder, was a pedophile, and that he also exhibited distrustfulness and emotional dependency. He also found that Schulz's victims suffered from post-traumatic stress disorder as a result of their experiences with him.

Dr. Marston testified that in his opinion, Schulz's offenses constituted a course of conduct under the statute. He further asserted that because Schulz was beginning to attack strangers, as exhibited by his assault of S.S.O., his behavior was deteriorating rather than improving. Marston testified that because Schulz committed this offense while on supervised release and because he did not know what S.S.O.'s reaction to his advances might be, it was a riskier activity indicating his lack of control. Marston said this opinion was reinforced by Schulz's engagement in prohibited sexual contact while in treatment, where he had consensual sexual exchanges with another inmate in violation of facility rules. Dr. Marston also testified that Schulz had not responded well to treatment and that there were no treatment facilities in Minnesota that could provide alternative treatment for him. He also opined that Schulz had not formulated any effective plan to avoid re-offending, and that he could not be safely released into the community.

We recognize that two other court-appointed examiners reached differing results after separately evaluating Schulz and that they had conducted more extensive evaluations and had direct contact with him. However, the district court has the task of sorting through the testimony of conflicting witnesses, including experts. The testimony of the other experts did not indicate flaws in Marston's methodology or analysis; they simply reached different conclusions. There is no requirement that experts agree for there to be a clear and convincing basis for a SPP determination. In this setting the district court found one expert's testimony more persuasive than that of other experts. Because we defer to the weight-of-the-evidence and credibility determinations made by the district court and because there is adequate evidence on this record to support a SPP

determination, we conclude that the "clear and convincing" standard is met, and we affirm the district court.

Affirmed.

Dated: