**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A08-2216**

In the Matter of the Civil Commitment of: Clarence Antonia Washington.

**Filed May 19, 2009**
**Affirmed**
**Stoneburner, Judge**

Otter Tail County District Court
File No. 56F306002020

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Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and Crippen, Judge.*

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

**STONEBURNER**, Judge

On appeal from indeterminate commitment as a sexually dangerous person, appellant argues that there is insufficient clear and convincing evidence that he engaged

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

in a "course of harmful sexual conduct" to support the commitment. We disagree and affirm.

**D E C I S I O N**

On appeal from commitment as a sexually dangerous person (SDP), we review the district court's factual findings for clear error. *In re Civil Commitment of Stone*, 711 N.W.2d 831, 836 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). Findings supporting commitment as a SDP must be based on clear and convincing evidence. Minn. Stat. §§ 253B.18, subd. 1, .185, subd. 1 (2008). One of the elements of commitment as a SDP under Minn. Stat. § 253B.02, subd. 18(c) (2008), is a finding that the person has engaged in a course of harmful sexual conduct as defined in Minn. Stat. § 253B.02, subd. 7a (2008). "Harmful sexual conduct" means sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another. Minn. Stat. § 253B.02 subd. 7a(a). "Course" as used in the statute is defined using its ordinary meaning, as "a systematic or orderly succession; a sequence." *In re Stone*, 711 N.W.2d at 837.

In this case, the district court found, based on appellant Clarence Antonia Washington's "1990 [juvenile adjudication] . . . , along with his assaults on S.J.T, L.R.W., and A.H., that [Washington] has engaged in a course of harmful sexual conduct within the meaning of the SDP statute." Washington argues that the evidence is insufficient to support this finding because it is based on clearly erroneous findings with regard to his conduct toward the victim of the 1990 juvenile adjudication and toward S.J.T., L.R.W., and A.H.

## I. Conduct toward victim of juvenile adjudication

Washington first argues that the district court erred by finding that Washington's juvenile adjudication of fifth-degree criminal sexual conduct, that occurred in the early 1990's in Hennepin County when Washington was 12 years old, was part of a course of harmful sexual conduct. We agree.

The conduct described in the offense of fifth-degree criminal sexual conduct does not give rise to a presumption that a victim will suffer serious physical or emotional harm. *See* Minn. Stat. § 253B.02, subd. 7a(b) (list of criminal provisions for which conduct described creates presumption of substantial likelihood that victim will suffer serious physical or emotional harm). The records of this juvenile offense have been destroyed, and the victim did not testify at Washington's commitment hearing. Dr. Kenning, the only examiner involved in this commitment, testified based on a review of vague secondary-source descriptions[1] that Washington's conduct in this juvenile incident, described in the district court's findings as reaching up the blouse of the victim without her consent on a school bus, creates "the possibility of serious emotional harm" and "could be traumatic later in life even if the victim did not realize it at the time." The district court, stating that "this conduct tends to create a substantial likelihood of serious emotional harm" found the conduct to be harmful sexual conduct within the meaning of the SDP statute.

[1] In a 1995 court-ordered certification study, Washington stated to a Hennepin County Court Psychologist that his offense involved putting his hand up the blouse and down the pants of a 12-year-old female but he denied the conduct. While in prison, Washington later stated that that he was "fooling around" with a girl his age on a school bus and was charged with touching her breasts against her will.

We conclude that evidence of a "tend[ency] to create a substantial likelihood of serious emotional harm" is not the equivalent of clear and convincing evidence that the conduct actually created a substantial likelihood of serious physical or emotional harm required under Minn. Stat. § 253B.02, subd. 7a(a). Because the evidence does not support the district court's finding that Washington's juvenile conduct was part of a course of harmful conduct, the finding is clearly erroneous.

**II. Conduct toward S.J.T.**

Washington does not dispute that the sexual assault on S.J.T., resulting in his conviction of fourth-degree criminal sexual conduct constituted harmful sexual conduct.

**III. Conduct toward L.R.W.**

Washington argues that the district court erred in finding that L.R.W. was a victim of harmful sexual conduct because L.R.W. testified that Washington stopped any sexual conduct when L.R.W. communicated that she did not want to engage in sexual activity with him. Washington ignores the commitment-trial testimony of L.R.W. that as Washington attempted to digitally penetrate her vagina, she kept fighting him off and kept telling him no, but he continued to assault her for two to three minutes and that she was traumatized by the sexual assault. Washington ignores the district court's explicit rejection of his most recent version of his contact with L.R.W. and crediting of L.R.W.'s testimony. Washington ignores Dr. Kenning's finding that L.R.W. was a victim of harmful sexual conduct. The district court did not err in including Washington's conduct toward L.R.W. as part of his course of harmful sexual conduct.

## IV. Conduct toward A.H.

Washington asserts that the state failed to prove that 17-year-old A.H. was a victim of harmful sexual conduct because A.H. testified that she did not tell Washington "no" when he touched her. Once again Washington ignores the fact that the district court credited A.H's statements to the police at the time of the assaults and her commitment-hearing testimony, and discredited Washington's version of his encounter with A.H. A.H. testified that, due to her history of sexual abuse, she was not able to say "no" when Washington digitally penetrated her but that she attempted to move out of his reach and engaged in other behavior that manifested her unwillingness. A.H. testified that she was very clear with Washington that she did not want sexual contact but he forced it on her. A.H. testified that Washington's conduct caused her to go backwards in treatment and had a long-term effect.

Dr. Kenning opined that digital penetration of A.H. would cause substantial likelihood of harm. The district court did not err in finding that A.H. is a victim of harmful sexual conduct that is part of Washington's course of harmful sexual conduct.

## V. Course of harmful sexual conduct

Washington argues that because only S.J.T. was a victim of harmful sexual conduct, there is insufficient evidence of a "course" of such conduct. But we have concluded that clear and convincing evidence supports a finding that there have been at least three victims of Washington's harmful sexual conduct. Dr. Kenning opined that Washington's sexual misconduct demonstrates a series of acts or "path" of sexual offending.

The statute does not specify the number of incidents necessary to qualify as a "course" of harmful sexual conduct. *In re Stone*, 711 N.W.2d at 837. (noting that the word "habitual" used in the SPP statue does not appear in the SDP statute). And an examination of whether an offender engaged in a course of harmful sexual conduct takes into account both conduct for which an offender was convicted and conduct that did not result in a conviction. *Id.* We conclude that the clear and convincing evidence of Washington's harmful sexual conduct with three vulnerable minors is sufficient to support the district court's finding that Washington has engaged in a course of harmful sexual conduct. Because this is the only basis of Washington's challenge to his commitment as a SDP, we affirm the commitment.

**Affirmed.**