STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0366

In the Matter of the Civil Commitment of:
Gary Peter Scott.

Filed August 18, 2009
Affirmed
Toussaint, Chief Judge

Lake of the Woods County District Court
File No. 39-PR-08-7

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Considered and decided by Halbrooks, Presiding Judge; Toussaint, Chief Judge; and Willis, Judge.*

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

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

TOUSSAINT, Chief Judge

Appellant Gary Peter Scott challenges the district court's orders initially and indeterminately committing him to treatment in the Minnesota Sex Offender Program (MSOP) as a sexually dangerous person (SDP) and as a sexual psychopathic personality (SPP), as well as the district court's decision to allow an expert to testify at the commitment trial and the court's adoption of respondent State of Minnesota's proposed findings. Because clear and convincing evidence supports the district court's determination that appellant meets the commitment criteria, because the district court did not abuse its discretion by allowing respondent's expert to testify, and because the record supports the proposed findings, we affirm.

D E C I S I O N

On appeal from a civil-commitment order, this court's review is limited to determining whether the district court abided by the civil-commitment act and whether the commitment is warranted by the findings based on the evidence presented at the hearing. *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995). This court will not reverse a district court's factual findings unless they are clearly erroneous and defers to the district court's opportunity to evaluate witness credibility. *Id.* When factual findings "rest almost entirely on expert testimony, the [district] court's evaluation of credibility is of particular significance." *Id.* Determining whether the evidence sufficiently supports the statutory requirements for commitment involves a question of law, which receives de novo review. *In re Commitment of Stone*, 711 N.W.2d 831, 836 (Minn. App. 2006),

review denied (Minn. June 20, 2006).

I.

Appellant argues that the district court abused its discretion by allowing respondent's expert to testify because of the late disclosure and prejudice to appellant. This court will not disturb a district court's decision to admit expert testimony unless an abuse of discretion has occurred. *Dunshee v. Douglas*, 255 N.W.2d 42, 47 (Minn. 1977). If an expert's specialized knowledge will aid the fact-finder to understand the evidence or to determine a factual issue, the expert's testimony is admissible. Minn. R. Evid. 702; *see also Jones v. Fleischhacker*, 325 N.W.2d 633, 640 (Minn. 1982) (stating that district court has discretion to admit expert testimony on issues outside fact-finder's common knowledge and experience). Generally, the district court should reject expert testimony when counsel fails to timely disclose respondent's expert's identity only if the late disclosure prejudices the other party. *Dennie v. Metro. Med. Ctr.*, 387 N.W.2d 401, 405 (Minn. 1986).

The district court did not abuse its discretion by admitting respondent's expert's testimony. Respondent disclosed its expert's identity to appellant one week before trial. Respondent's expert provided relevant information to aid the district court in determining whether appellant met the commitment criteria, especially considering that two court-appointed examiners disagreed on several points. *See* Minn. Stat. § 253B.08, subd. 5a (giving district court discretion during the commitment hearing to "receive the testimony of any other person"), subd. 7 (stating that district court "shall admit all relevant evidence" during commitment hearing) (2008).

Appellant suffered no prejudice, although he contends that he was unable to retain a rebuttal expert due to lack of time and resources. Respondent's expert reviewed appellant's records and attended the hearing. Appellant's counsel received the report before respondent's expert testified with sufficient time to prepare for cross-examination, obtained a list of court-approved examiners, and declined the opportunity to retain his own expert at respondent's expense. Because appellant had sufficient notice, respondent's expert's testimony was relevant, and appellant suffered no prejudice, the district court did not abuse its discretion by allowing respondent's expert's testimony.

II.

A district court may commit a person as an SDP under the Minnesota Commitment and Treatment Act if the petitioner proves that the person meets the criteria for commitment by clear and convincing evidence. Minn. Stat. §§ 253B.18, subd. 1(a), subd. 1 (2008). An SDP is one who: (1) "has engaged in a course of harmful sexual conduct"; (2) "has manifested a sexual, personality, or other mental disorder or dysfunction"; and (3) "is likely to engage in acts of harmful sexual conduct." Minn. Stat. § 253B.02, subd. 18c(a) (2008). It is not necessary for the petitioner to prove that the person to be committed has an inability to control his sexual impulses. *Id.*, subd. 18c(b) (2008). But the statute requires a showing that the person's disorder "does not allow [him] to adequately control [his] sexual impulses." *In re Linehan*, 594 N.W.2d 867, 876 (Minn. 1999) (*Linehan IV*).

A. Course of Harmful Sexual Conduct

"Harmful sexual conduct" is defined as "sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another." Minn. Stat. § 253B.02, subd. 7a(a) (2008). Appellant acknowledges that his three second-degree criminal-sexual-conduct convictions give rise to the rebuttable presumption that his conduct "creates a substantial likelihood that a victim will suffer serious physical or emotional harm." *Id.*, subd. 7a(b) (2008). But he argues that his three convictions do not constitute a course of harmful sexual conduct. A course of harmful sexual conduct is a sequence of incidents that occur over a period of time, need not be recent, and may include conduct that did not result in conviction. *Stone*, 711 N.W.2d at 837.

Both court-appointed examiners and respondent's expert agreed that appellant has engaged in a course of harmful sexual conduct. The district court found their opinions credible and supported by the evidence, which established that appellant engaged in numerous incidents of criminal sexual conduct causing harm to his juvenile victims. The second examiner emphasized that, because appellant's victims were children, they could suffer harm lasting a lifetime. Additionally, appellant has failed to rebut the presumption that his conduct created a substantial likelihood of physical or emotional harm. The record contains clear and convincing evidence to support the district court's determination that appellant's offenses constituted to a course of harmful sexual conduct.

B. Disorder or Dysfunction

Appellant next argues that respondent failed to prove that he manifested a disorder or dysfunction by clear and convincing evidence because the court-appointed examiners

and respondent's expert did not agree in all aspects of appellant's diagnosis. Although appellant acknowledges that the examiners and respondent's expert diagnosed him with pedophilia, he contends that this diagnosis is irrelevant because it does not establish a failure to control his impulses and because not all people with pedophilia should be civilly committed.

The record establishes that appellant's disorders relate to his pattern of offending. The examiners and respondent's expert testified that one can never lose a pedophilia diagnosis, and appellant's offenses have all involved children. Although the examiners and respondent's expert had other differing diagnoses, each agreed that appellant's disorders caused him serious difficulty in controlling his harmful sexual conduct. The district court found their testimony credible, and this court defers to the district court's credibility findings on expert testimony. *Knops*, 536 N.W.2d at 620. The record supports the district court's finding that appellant suffers from a sexual disorder or dysfunction.

C. Highly Likely to Reoffend

Appellant finally argues that respondent failed to prove by clear and convincing evidence that he is highly likely to reoffend. *See In re Linehan*, 557 N.W.2d 171, 180 (Minn. 1996) (*Linehan III*) (holding that statutory phrase "likely to engage in acts of harmful sexual conduct" means that offender is "highly likely" to do so), *vacated on other grounds*, 522 U.S. 1011, 118 S. Ct. 596 (1997), *aff'd on remand*, 594 N.W.2d 867 (Minn. 1999). In determining the likelihood of future harmful conduct in an SDP commitment, the district court must consider the following six factors: (1) the offender's

demographic characteristics, (2) the offender's history of violent behavior, (3) the base-rate statistics regarding violent behavior among people with the offender's background, (4) stress sources in the offender's environment, (5) similarities of the present or future context to past contexts in which the offender has used violence, and (6) the offender's record of participation in sex-therapy programs. *In re Linehan*, 518 N.W.2d 609, 614 (Minn. 1994) (*Linehan I*) (addressing SPP commitment); *see Linehan III*, 557 N.W.2d at 189 (applying same factors to determination of future harm for SDP commitment)

These factors indicate that appellant is highly likely to engage in harmful sexual conduct. His demographic characteristics and use of violence indicate a high chance for reoffending. The second examiner found that appellant's gender, his interest in children, his lack of social support, and his offending against non-familial members increases his risk of reoffending. The first examiner believed that appellant's age reduced his risk of reoffense but admitted that other factors increased his risk. Additionally, respondent's expert testified that age is not a mitigating factor and that the research regarding this issue is ongoing. Although appellant claims that he has no history of violence, the record establishes otherwise – that appellant has used force to perpetrate sexual assault and that his offenses could be considered emotionally violent.

Based on actuarial-testing results, the second examiner and respondent's expert opined that appellant is highly likely to reoffend. The first examiner's scores did not mirror the scores of the second examiner or the respondent's expert, but the first examiner testified that he may have incorrectly scored a test. The district court found the second examiner and respondent's expert more credible than the first examiner, and this

court defers to the district court's credibility findings on expert testimony. *Knops*, 536 N.W.2d at 620.

Nothing in the record suggests that appellant is capable of handling the stressors that he would face if released or that his circumstances upon release would be different from his past circumstances. Although appellant's main stressors of family and marriage are absent, he still has no job, no place to live, and a history of depression and gambling. Appellant testified that he offended when angry or after drinking and gambling. He also lacks a support network and would be restricted in his movement based on his background, which would cause him significant stress. Appellant testified that he wants to become involved in the community and that he wants to be a father to his children and a grandfather if he is released. His past offenses, however, have involved gaining access to children through volunteering and positions of authority.

Appellant has never completed a sex-offender treatment program despite his voluntary participation in several sex-offender treatment programs. Respondent's expert opined that appellant's failure in sex-offender treatment increases his risk of reoffense. Nothing in the record indicates that appellant will follow through or benefit from treatment if released. He offended against his daughter after treatment, refused to return to treatment, and denied his pedophilia diagnosis. The record establishes that appellant's lack of insight and treatment increases his risk of reoffense.

The record supports the district court's finding that appellant is highly likely to engage in harmful sexual conduct, and clear and convincing evidence supports the district court's orders for initial and indeterminate commitment of appellant as an SDP.

III.

A petitioner must prove by clear and convincing evidence that the standards for commitment as an SPP are met. Minn. Stat. §§ 253.18, subd. 1(a), .185, subd. 1. An SPP is 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 (2008). The district court must find: (1) a habitual course of misconduct involving sexual matters; (2) an utter lack of power to control sexual impulses; and (3) dangerousness to others. *Id.*; *Linehan I*, 518 N.W.2d at 613. The psychopathic personality "excludes mere sexual promiscuity" and "other forms of social delinquency." *In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994). The personality, however, "is an identifiable and documentable violent sexually deviant condition or disorder." *Id.*

A. Habitual Course of Misconduct in Sexual Matters

Appellant first contends that respondent failed to prove by clear and convincing evidence that his three criminal-sexual-misconduct convictions constitute a habitual course of sexual misconduct. A habitual course of misconduct, however, can be proved with similar incidents of misconduct or incidents that create a pattern. *See In re Bieganowski*, 520 N.W.2d 525, 530 (Minn. App. 1994) (finding that offender exhibited

habitual pattern of grooming victims before abusing them), *review denied* (Minn. Oct. 27, 1994).

The examiners and respondent's expert agree that appellant has at least one of the conditions that render him irresponsible in sexual matters and that he has engaged in a habitual course of misconduct. Appellant argues that the examiners and respondent's expert disagree on the level of appellant's emotional instability, but the SPP statute does not require a person to have all of the conditions to be irresponsible in sexual matters. *See* Minn. Stat. § 253B.02, subd. 18b (defining SPP as person having emotional instability, impulsive behavior, "lack of customary standards of good judgment," failure to appreciate consequences *or* combination of these conditions that makes person irresponsible in sexual matters) (emphasis added).

The record supports the examiners' and respondent's expert's opinions that appellant engaged in a habitual course of sexual misconduct. Appellant sexually assaulted children from 1970 until 1997 and used a position of authority and grooming behaviors to gain his victims' trust. The district court did not err when it concluded that appellant has engaged in a habitual course of sexual misconduct.

B. Utter Lack of Power to Control Sexual Impulses

Appellant next argues that respondent failed to prove by clear and convincing evidence that he utterly lacks power to control sexual impulses. Regarding this element, the district court must consider 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 history and family"; (6) "the results of psychological and psychiatric testing and evaluation"; and (7) any factors "that bear on the predatory sex impulse and the lack of power to control it." *Blodgett*, 510 N.W.2d at 915.

The nature and frequency of appellant's offenses and the degree of violence he used establish an utter lack of control. The examiners and respondent's expert agreed that appellant's offending has escalated from approaching and grooming male juveniles to soliciting a male juvenile to assaulting juveniles of both genders to assaulting a familial victim while using violent force. Appellant argues that he has not offended since 1997, but he has been in prison since then and only had 15 months of supervised release, which was revoked. Good behavior in an artificial environment is not conclusive on the issue of dangerousness. *In re Beard*, 391 N.W.2d 29, 31 (Minn. App. 1986), *review denied* (Minn. Sept. 24, 1986).

Appellant's relationship with his victims and his attitude and mood indicate an utter lack of control. The examiners and respondent's expert agreed that appellant knew his victims and groomed them to gain their trust before he offended and opined that he lacked insight, which demonstrates a lack of control. *In re Irwin*, 529 N.W.2d 366, 375 (Minn. App. 1995), *review denied* (Minn. May 16, 1995).

The record indicates that, although appellant has no medical issues, he comes from a dysfunctional family, has a history of depression, and was sexually and physically abused as a child. His history increases his utter lack of ability to control his sexual impulses. The results of appellant's testing and evaluations, as noted above, indicate that he lacks control over his impulses.

Finally, several other factors indicate an utter lack of control, such as treatment refusal, lack of a relapse-prevention plan, belief that no problem exists, and failure to remove oneself from situations providing opportunities for re-offending. *See In re Pirkl*, 531 N.W.2d 902, 907 (Minn. App. 1995) (finding that refusal of treatment and lack of relapse-prevention plan indicate utter lack of control), *review denied* (Minn. Aug. 30, 1995); *Irwin*, 529 N.W.2d at 375 (finding that lack of treatment and belief that no problem exists can indicate utter lack of control); *Bieganowski*, 520 N.W.2d at 529-30 (finding that offender's inability to remove himself from situations leading to reoffense indicates utter lack of control).

The record indicates that appellant has not completed any sex-offender treatment program and that he has refused treatment. He has never controlled his behavior as shown by his attempts to groom an MSOP patient before trial. The record supports the district court's finding that appellant has an utter lack of control over his sexual impulses.

C. Dangerousness to Others

Appellant finally contends that he is not dangerous, that he has not acted violently, and that the examiners and respondent's expert disagreed on this criterion. To determine whether an offender is dangerous to others, the district court must consider the factors enumerated in *Linehan I*, as noted above. *Linehan I*, 518 N.W.2d at 614. Based on this record, as discussed above in the SDP section, appellant is dangerous and highly likely to reoffend if released. The record's clear and convincing evidence supports the district court's orders for initial and final indeterminate commitment of appellant as an SPP.

IV.

Lastly, appellant argues that the district court erred in adopting respondent's proposed findings of fact, conclusions of law, and order for initial commitment because the record does not support the proposed findings. The district court did not adopt respondent's proposed findings verbatim. Even verbatim adoption does not amount to reversible error per se. *Bliss v. Bliss*, 493 N.W.2d 583, 590 (Minn. App. 1992), *review denied* (Minn. Feb. 12, 1993). This court reviews the district court's decision to determine "if the record supports the findings and shows the [district] court conscientiously considered all the issues." *Bersie v. Zycad Corp.*, 417 N.W.2d 288, 292 (Minn. App. 1987), *review denied* (Minn. May 5, 1988).

Here, the record supports the findings that appellant meets the commitment criteria as an SDP and SPP. The district court stated that it "carefully reviewed the proposed findings of fact submitted by [respondent]" and that the "findings accurately, completely, and properly describe the evidence presented at the trial in this matter." After a three-day hearing, the district court had four months to review the entire record. Because the district court had ample time to review the record and because the record supports the findings, the district court did not err by adopting respondent's proposed findings.

Affirmed.