STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0623

In the Matter of the Civil Commitment of:
Lance Andrew Moore.

Filed September 1, 2009
Affirmed
Bjorkman, Judge

St. Louis County District Court
File No. 69DU-PR-08-324

John S. Lind, 306 West Superior Street, Suite 920, Duluth, MN 55802 (for appellant Lance Andrew Moore)

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Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

On appeal from his indeterminate commitment as a sexually dangerous person (SDP), appellant argues that (1) the district court erred in using a clear-and-convincing-evidence standard rather than requiring proof beyond a reasonable doubt when appellant was charged with several instances of criminal sexual conduct but not convicted based on his lack of competency to stand trial; (2) the evidence is insufficient to establish that he

engaged in a course of criminal sexual conduct; and (3) the district court erred in failing to commit appellant as a mentally ill and dangerous person. Because the district court did not err in its application of the law and the evidence is sufficient to support appellant's commitment as an SDP, we affirm.

FACTS

Appellant Lance Moore is a 28-year-old male with a history of criminal sexual conduct and a low range of intellectual functioning resulting from heterotopia, a structural abnormality of the brain. In July 1994, at the age of 13, appellant committed his first reported sexual assaults by inappropriately touching three different girls between the ages of 12 and 13 while at a playground. In an interview with police, appellant denied engaging in this conduct and said he thought they were just playing. No charges were brought against appellant as a result of these incidents.

In August 1995, L.M., a 13-year-old girl, reported that she was sexually abused by appellant. She alleged that appellant held a knife to her throat and raped her within view of her eight-year-old niece. Police discontinued the investigation of this incident after they were unable to contact L.M.

Approximately one year later, appellant sexually assaulted his 26-year-old social worker, S.D.A., who visited appellant's home to address his truancy issues. While S.D.A. was speaking to appellant, he began rubbing his groin in a sexual manner. As S.D.A. tried to leave, appellant placed his hands tightly on her shoulders, forced S.D.A.'s body up against the door and rubbed the front of his body up and down against the back of her body. Appellant denied this conduct to the police. But he later left a message for

S.D.A. stating that he was sorry and that if he was going to rape her she would be in the hospital. Appellant was charged with fifth-degree criminal sexual conduct but was found incompetent to stand trial and the charges were dismissed.

As a result of the incident involving S.D.A., the St. Louis County Social Services Department filed a petition alleging that appellant was a child in need of protection or services (CHIPS). The petition detailed appellant's history of out-of-home placements, disruptive and aggressive behavior, truancy, and delinquency. Appellant was adjudicated CHIPS and placed at the Leo Hoffman Center, a residential treatment center for adolescent males with problematic sexual behavior.

While at the Leo Hoffman Center, appellant continued to engage in sexually inappropriate behavior, including possessing pornographic magazines, verbalizing sexual fantasies about female staff, having oral and anal sex with a peer, and participating in mutual masturbation with a peer. Appellant ran away from the Leo Hoffman Center in April 1998 and failed to complete the program.

In 2000, J.L.H., a 17-year-old girl, reported to police that she was raped by appellant, but no charges were filed. And in December 2006, A.E.R.M., a 75-year-old woman, reported that she was approached by a man on a bicycle while she was smoking on the back porch of her group home. The man got off of the bicycle and raped her. A.E.R.M. identified appellant in a photo lineup. The police referred the matter for charges, but none were filed.

In July 2007, appellant was charged with 18 separate counts of criminal sexual conduct for sexual assaults or attempted sexual assaults against four different women that

occurred between September 2006 and June 2007. In September 2006, M.A.S., a 30-year-old woman, awoke to a man penetrating her vagina with his hand as she slept on her couch. In May 2007, M.D.L., a 35-year-old woman, awoke to a man penetrating her vaginally from behind and holding her face down against the mattress. In June 2007, K.A.S., a 49-year-old visually impaired woman, awoke to find a male in her bedroom. The man pushed her down and tried to penetrate her vaginally and anally, and at one point he held his hands over her mouth and neck making it hard for K.A.S. to breathe. Later that month, J.M.B., a 56-year-old woman, woke up and saw a man in her bedroom. She jumped out of her bed, put on a robe, and ran screaming out to her backyard. Appellant was found incompetent to stand trial and the charges related to all of these incidents were dismissed.[1]

Subsequently, the state filed a petition to civilly commit appellant as an SDP. Because he had never been convicted of criminal sexual conduct, appellant argued that the district court should bifurcate the commitment-trial proceedings and determine first whether, based on proof beyond a reasonable doubt, appellant committed the alleged instances of criminal sexual conduct and whether the conduct constituted a course of harmful sexual conduct. The district court declined to do so.

At trial, two court-appointed psychologists, Dr. Linda Marshall and Dr. Paul Reitman, testified that appellant meets the criteria for commitment as an SDP. M.A.S.,

[1] In pre-*Miranda* interviews with police regarding these incidents, appellant in some instances acknowledged the alleged acts. These statements appear to have been guided by the officers, and although they tend to corroborate that appellant knew the victims, are not resounding admissions of guilt.

M.D.L., K.A.S., and J.M.B. testified regarding the circumstances and impact of the sexual assaults or attempted sexual assaults appellant committed against them. The state also presented the testimony of a Minnesota Bureau of Criminal Apprehension (BCA) forensic scientist regarding DNA evidence linking appellant to the sexual assault against K.A.S. Following the four-day trial, the district court issued extensive findings of fact and conclusions of law and ordered appellant committed on an interim basis. After a 60-day review hearing, the district court issued an order for appellant's indeterminate commitment as an SDP. This appeal follows.

D E C I S I O N

I. The clear-and-convincing-evidence standard contained in the SDP law does not violate due process.

Whether a statute is constitutional is a question of law subject to de novo review. *In re Blilie*, 494 N.W.2d 877, 881 (Minn. 1993). When considering the constitutionality of a statute, we are mindful that laws come to this court with a presumption of validity and may be declared unconstitutional only with great caution and if absolutely necessary. *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989). A person challenging the constitutionality of a statute has the burden of establishing beyond a reasonable doubt that the statute violates a claimed right. *In re Conservatorship of Foster*, 547 N.W.2d 81, 85 (Minn. 1996).

To support commitment, the SDP statute requires the state to show by clear and convincing evidence that the person: (1) has engaged in a course of harmful sexual conduct; (2) has manifested a sexual, personality, or other mental disorder or dysfunction;

and (3) as a result, is likely to engage in acts of harmful sexual conduct. Minn. Stat. §§ 253B.02, subd. 18c(a), 253B.18, subd. 1, 253.185, subd. 1 (2008). "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. 7(a) (2008).

Appellant argues that the district court erred in applying the clear-and-convincing-evidence standard set forth in the SDP statute. He contends that because his alleged course of harmful sexual conduct did not result in criminal convictions, the heightened standard of proof beyond a reasonable doubt must apply in order to satisfy due process. Appellant cites no controlling precedent for this assertion. Rather, citing *United States v. Comstock*, 507 F. Supp. 2d 522 (E.D.N.C. 2007), he argues that the determination whether he committed a course of harmful sexual conduct requires a factual finding of criminal conduct, as in a criminal case, and thus proof beyond a reasonable doubt is the constitutionally required standard.[2]

Appellant's reliance on *Comstock* is unpersuasive. Not only does *Comstock* lack precedential weight and base its holding on a federal statute, but the decision departs from controlling authority. In *Addington v. Texas*, 441 U.S. 418, 432-33, 99 S. Ct. 1804,

[2] In *Comstock*, the United States District Court for the Eastern District of North Carolina analyzed the constitutionality of the clear-and-convincing-evidence standard included in the civil commitment provision of the Adam Walsh Child Protection and Safety Act of 2006 (the Walsh Act), Pub. L. No. 109-248, 120 Stat. 587 (2006), codified at 18 U.S.C. § 4248, and determined that it violates due process. 507 F. Supp. 2d 522, 527-28, 559 (E.D.N.C. 2007), *aff'd on other grounds*, 551 F.3d 274 (4th Cir. 2009), *cert. granted*, 129 S. Ct. 2028 (2009). The Walsh Act required that the government "must provide 'clear and convincing evidence' that the person 'has engaged or attempted to engage in sexually violent conduct or child molestation *and* . . . is sexually dangerous to others.'" *Id.* at 527 (quoting 18 U.S.C. § 4247 (a)(5)).

1812-13 (1979), the Supreme Court held that the constitutionally minimum burden of proof for civil commitment proceedings is clear and convincing evidence. The *Addington* court explained:

> There are significant reasons why different standards of proof are called for in civil commitment proceedings as opposed to criminal prosecutions. In a civil commitment state power is not exercised in a punitive sense. Unlike [in] delinquency proceeding[s] . . . a civil commitment proceeding can in no sense be equated to a criminal prosecution.
>
> In addition, the beyond a reasonable doubt standard historically has been reserved for criminal cases. This unique standard of proof, not prescribed or defined in the Constitution, is regarded as a critical part of the moral force of the criminal law, and we should hesitate to apply it too broadly or casually in noncriminal cases.

441 U.S. at 428, 99 S. Ct. at 1810 (citations, quotations, and footnote omitted).

The *Comstock* court distinguished *Addington* on the basis that, unlike SDP statutes that require findings that the individual engaged in "sexually dangerous conduct" or "a course of harmful sexual conduct," the commitment statute involved in *Addington* "was not premised upon a finding of criminal conduct of any kind," and merely required findings that "the individual sought to be involuntarily committed was mentally ill and required hospitalization for his own welfare and for the protection of others." 507 F. Supp. 2d at 553-54. Based on this distinction, the *Comstock* court reasoned that "where factual findings of criminal acts must precede the taking of an individual's liberty, those findings must be made beyond a reasonable doubt." *Id.* at 552, 555-56.

While we recognize the significant liberty interest at stake in civil-commitment proceedings, we do not agree that determining whether an individual engaged in "a

course of harmful sexual conduct" equates to a finding of guilt in a criminal proceeding. Indeed, such an analysis would be inconsistent with our jurisprudence in which we have held that a course of harmful sexual conduct is a succession or sequence of actions over a period of years, including both charged and uncharged conduct. *In re Civil Commitment of Stone*, 711 N.W.2d 831, 837 (Minn. App. 2006), *review denied* (Minn. June 20, 2006); *see also In re Civil Commitment of Williams*, 735 N.W.2d 727, 731 (Minn. App. 2007) ("Incidents establishing a course of harmful sexual conduct need not be recent and are not limited to those that resulted in a criminal conviction."), *review denied* (Minn. Sept. 26, 2007); *In re Civil Commitment of Ramey*, 648 N.W.2d 260, 268 (Minn. App. 2002) (stating that court may consider conduct not resulting in conviction), *review denied* (Minn. Sept. 17, 2002). Moreover, proving that a person has engaged in a course of harmful sexual conduct requires more than just a factual showing as to whether the person did or did not commit a particular act. As articulated in *Addington*, this determination "turns on the *meaning* of the facts" and necessitates expert analysis regarding whether a succession of acts constitutes a course of conduct. 441 U.S. at 429, 99 S. Ct. at 1811.

We also note that the Minnesota Supreme Court has upheld the constitutionality of the SDP statute and declined to extend constitutional protections that apply in criminal proceedings to civil commitment proceedings under this statute. *See In re Linehan*, 594 N.W.2d 867, 871-76 (Minn. 1999) (*Linehan IV*) (rejecting double-jeopardy challenge and holding that SDP statute satisfies substantive due process); *In re Linehan*, 557 N.W.2d 171, 186-87 (Minn. 1996) (*Linehan III*) (holding that SDP provision does not violate

equal-protection rights), *vacated on other grounds*, 522 U.S. 1011, 118 S. Ct. 596 (1997), *aff'd on remand*, 594 N.W.2d 867 (Minn. 1999) (*Linehan IV*); *see also Joelson v. O'Keefe*, 594 N.W.2d 905, 910 (Minn. App. 1999) (rejecting right-to-a-jury-trial claim), *review denied* (Minn. July 28, 1999). Consistent with these cases, we decline to extend the law to require that the state offer proof beyond a reasonable doubt in SDP commitment proceedings which are not preceded by criminal convictions. *See Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) (stating that the task of extending the law falls to the supreme court or the legislature, but not to this court), *review denied* (Minn. Dec. 18, 1987).

II. Sufficient evidence supports appellant's commitment as an SDP.

Whether the evidence is sufficient to meet the statutory requirements for civil commitment is a question of law subject to de novo review. *In re Linehan*, 518 N.W.2d 609, 613 (Minn. 1994) (*Linehan I*); *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003). This court defers to the district court's role as fact-finder and its ability to judge the credibility of witnesses. *Ramey*, 648 N.W.2d at 269.

Appellant argues that even under the clear-and-convincing-evidence standard, the state failed to establish that he engaged in a course of harmful sexual conduct because he has no criminal convictions and his statements of guilt are inadmissible. Appellant also contends that other evidence in the record, including the testimony of the victims and expert psychologists, is unreliable and lacks credibility.

A. Victims' testimony

With respect to the charged criminal-sexual-conduct offenses committed between September 2006 and June 2007, appellant argues that "[t]here is significant doubt that [he] was the assailant of all four victims absent the DNA match of one . . . victim." Appellant contends that "[t]he victims' testimony was primarily about general characteristics of a young black male," and that they were not able to reliably identify him when asked to do so at trial. Appellant's argument largely disregards the victims' actual testimony and is unpersuasive.

As the state notes, only M.A.S. and J.M.B. were asked at the commitment trial to identify appellant as their assailant. M.A.S. testified that she "[got] a look at the man" that assaulted her and identified that man as appellant. She testified that he had been at her house prior to the assault, that after the assault she pushed him out of her house and he left on a bicycle, and that later "he kept coming back" and was riding his bicycle around the neighborhood.

J.M.B. also identified appellant as the man who broke into her house on the morning of June 19, 2007, and testified that she had seen him in or near her yard two times prior to that date. J.M.B. testified that after that date she saw the same man walking in her neighborhood. J.M.B.'s neighbor later informed her that the man J.M.B. had seen in her home and walking around the neighborhood was appellant.

The district court found the victims' testimony credible, noting that "fear, anxiety and emotions were evident in their testimony about how these incidents affected their lives." In addition to this testimony, the record is replete with other evidence establishing

that appellant engaged in a habitual pattern of harmful sexual behavior over an extended period of time. The DNA evidence linking appellant to the assault of K.A.S. is compelling. The crimes against each of these four women were strikingly similar and reflect a common modus operandi. And the record includes numerous exhibits documenting appellant's long history of inappropriate sexual behavior with women and girls other than those whose testimony he challenges, including records from social services agencies, treatment programs, and law enforcement. The totality of this evidence supports the district court's findings and conclusions.

B. Expert testimony

Appellant asserts that the testimony of Dr. Marshall and Dr. Reitman was not credible because they were inexperienced in assessing, for purposes of civil commitment as an SDP, individuals who have not been convicted of criminal sexual conduct. This argument is unavailing.

Both Dr. Reitman and Dr. Marshall have extensive experience evaluating individuals under the SDP criteria. Dr. Reitman acknowledged that appellant has never been convicted of criminal sexual conduct, but stated that this fact did not affect his opinion that appellant engaged in a course of harmful sexual conduct. And Dr. Marshall testified that although she has never evaluated an individual for commitment who "had not been convicted of any criminal offense by a criminal court, jury or judge," in appellant's case "the pattern is there." Dr. Marshall also noted that appellant has a history of sexual offending, including numerous victims and a common modus operandi. Dr. Marshall stated that in her interview with appellant, he "blatantly denied" any

allegation of offending behavior, including the assault against K.A.S. which is confirmed by DNA evidence. Dr. Marshall testified that because appellant had been deemed incompetent to stand trial for these charges, "it makes him feel like he can do whatever he wants, and he can get away with it because he's not been . . . convicted of these offenses."

We have previously held that the sheer number of convictions that an individual has is not dispositive of whether he meets the criteria for commitment as an SDP. *In re Monson*, 478 N.W.2d 785, 789 (Minn. App. 1991). Likewise, the lack of prior criminal convictions is not determinative. Based on the extensive record of appellant's long history of inappropriate sexual behavior, we conclude that sufficient clear and convincing evidence supports the district court's determination that appellant engaged in a course of harmful sexual conduct. The district court was in the best position to judge the credibility of the victims' testimony and the experts' findings in light of the entire record.

III. The district court did not err in failing to consider alternative commitment of appellant as mentally ill and dangerous to the public.

Appellant argues that the district court erred in determining that he is an SDP rather than mentally ill and dangerous to the public.[3] Specifically, appellant contends that the district court erred in concluding that he "has a sexual, personality disorder rather than an organic brain disorder" and asserts that this court should vacate the district court's findings regarding appellant's "cognitive propensity for harmful sexual conduct"

[3] A person is mentally ill and dangerous to the public when the person is (1) mentally ill; and (2) as a result of this mental illness, presents a clear danger to the safety of others. Minn. Stat. § 253B.02, subd. 17 (2008).

and reverse and remand for consideration as to whether he should be committed as mentally ill and dangerous. We disagree.

First, as the state notes, the applicable criterion under the SDP statute is whether an individual manifests a "sexual, personality, or mental disorder or dysfunction," rather than just a "sexual, personality disorder" as appellant suggests. Minn. Stat. § 253B.02, subd. 18(c). Heterotopia is not appellant's only diagnosis; he was also diagnosed with paraphilia,[4] not otherwise specified (NOS); cognitive disorder, NOS; atypical bipolar disorder; antisocial personality disorder; mild mental retardation; and alcohol abuse. These diagnoses include sexual disorders, personality disorders, and mental disorders, any one of which meets the requirements of the SDP statute.

Second, although the record includes testimony regarding the possibility of committing appellant as mentally ill and dangerous, neither the state nor appellant asked the court to consider commitment on that basis. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that this court will generally not consider matters not argued to and considered by the district court). Dr. Reitman acknowledged early in his testimony that he "entertain[ed] the possibility of [recommending that appellant be committed as] mentally ill and dangerous" because appellant is "clearly so compromised cognitively." But Dr. Reitman went on to testify that he rejected such a recommendation based on "a lot of deliberation," his understanding of the law, appellant's history of sexual conduct, and the fact that many of appellant's acts occurred when he would not have met the mentally ill and dangerous definition.

[4] Dr. Marshall and Dr. Reitman testified that paraphilia is deviant sexual arousal.

Additionally, appellant failed to produce any affirmative evidence that he should be committed as a mentally ill and dangerous person rather than as an SDP. *See Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003) ("[A] party cannot complain about a district court's failure to rule in [the party's] favor when one of the reasons it did not do so is because that party failed to provide the district court with the evidence that would allow the district court to fully address the question."), *review denied* (Minn. Nov. 25, 2003). Both of the court-appointed psychologists rejected appellant's argument. Dr. Reitman testified that appellant's offenses included "purposeful behavior," such as cutting phone lines and window screens, which would not be typical of a person who is mentally ill and dangerous. And Dr. Marshall testified that while she has recommended that an individual be committed as mentally ill and dangerous rather than as an SDP in other cases, she did not find that a mentally ill and dangerous recommendation was appropriate in this case. Dr. Marshall stated that "[t]o be committed as a mentally ill and dangerous person . . . usually what we see is somebody that has a substantial psychiatric diagnosis; in other words, a psychotic disorder." And she noted that appellant does not have "any psychotic symptoms at all, any delusions, hallucinations, that type of thing."

On this record, the district court did not err in failing to consider whether appellant should be committed as mentally ill and dangerous rather than as an SDP.

Affirmed.