STATE OF MINNESOTA
IN COURT OF APPEALS
A10-489

In the Matter of the Civil Commitment of:
Kevin Scott Karsjens.

Filed August 3, 2010
Affirmed
Bjorkman, Judge

Morrison County District Court
File No. 49-PR-08-1461

Timothy M. Churchwell, Long Prairie, Minnesota (for appellant)

Lori Swanson, Attorney General, Noah A. Cashman, Assistant Attorney General, St. Paul, Minnesota; and

Brian Middendorf, Morrison County Attorney, Little Falls, Minnesota (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Wright, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant challenges his indeterminate commitment as a sexually dangerous person under Minn. Stat. § 253B.02, subd. 18c (2008), arguing that (1) the district court's findings relating to the first examiner's testimony are clearly erroneous and (2) the district court's determination that appellant is highly likely to reoffend sexually is not supported by clear and convincing evidence. We affirm.

FACTS

Appellant Kevin Scott Karsjens was born on October 23, 1963. He claims that he was sexually abused as a young child by two of his sisters. His own history of sexual and other offenses dates back to his teenage years. As a young teenager, appellant began sexually abusing his younger sister, T.J. The abuse continued through the early 1980s. What began as fondling, progressed to digital penetration, then to oral sex, and on a few occasions, to sexual intercourse.

All of appellant's sexual offenses have occurred in domestic situations. During his first marriage, from 1982 to 1986, appellant physically and sexually abused his wife, J.J.L. On one occasion, he forced her to engage in intercourse a few weeks after she gave birth to their child. When she learned she was pregnant again a few weeks later, appellant physically assaulted her. After their divorce, appellant required J.J.L. to engage in sexual intercourse in order to see their daughter, K.K. J.J.L. obtained an order for protection (OFP) against appellant in 1995.

While his divorce from J.J.L. was pending, appellant had a short-term relationship with C.M. The relationship ended abruptly when appellant became angry with C.M. one night, drove her out to the country, and assaulted her for several hours, including choking her and attempting to run her over with his car. C.M. persuaded appellant to take her home and later gave in to his request for intercourse in an attempt to keep him calm. C.M. did not press charges against appellant, but she did get an OFP based on his continued threats.

Appellant met L.D.O. in late 1990 and married her in March 1991. Appellant forced L.D.O. to engage in sexual intercourse throughout their marriage. He also threatened to kill her and her family if she ever left him, imprisoned her in the house against her will, and verbally and physically assaulted her. L.D.O. obtained an OFP when she left appellant during the summer of 1992.

In late 1994, appellant began dating L.G. and moved in with her three months later. He engaged in unusual behavior, including preaching to L.G. late into the night about how Satan was influencing her and how he could help her. On May 5, 1995, L.G. attempted to break up with appellant while the two were at a bar. On the way home, appellant punched the windshield of the car twice and broke it. Police officers stopped to assist, and told appellant to stay somewhere else that night. L.G. awoke the next morning to find appellant in her bedroom. He physically assaulted and raped her. Appellant was convicted of first-degree criminal sexual conduct, terroristic threats, and kidnapping for this incident, and was sentenced to 150 months' imprisonment, a double upward departure.

Appellant was released on October 20, 2003, and designated as a level 2 sex offender. He soon began dating D.B., and the two moved in together in September 2004. Shortly thereafter, appellant began to isolate D.B. from her friends and to restrict her travel. He became physically abusive and started forcing D.B. to engage in sexual intercourse against her will. D.B. escaped with the help of family and friends in January 2005. She reported the abuse to the Morrison County Sheriff's Department, who charged appellant with first- and third-degree criminal sexual conduct and terroristic threats.

During the course of the criminal proceedings, appellant contacted D.B. multiple times by phone, in violation of a criminal no-contact order, and convinced her to recant. He pleaded guilty to gross misdemeanor domestic assault and terroristic threats and was sentenced to 41 months' imprisonment.[1]

Upon his return to prison, appellant's risk level was reassessed and the Minnesota Department of Corrections' (DOC) psychologists began evaluating whether appellant was a candidate for commitment as a sexually dangerous person (SDP) or as a sexual psychopathic personality (SPP). In January 2006, appellant was referred to the on-site DOC Minnesota Sex Offender Program (MSOP). He refused to participate and was sentenced to 540 days of additional incarceration. In December 2006, DOC psychologist James Gilbertson opined that appellant meets the criteria for commitment as an SDP and SPP.

On June 27, 2008, respondent Morrison County filed a petition seeking to commit appellant as an SDP and SPP.[2] The petition includes information about seven potential victims: T.J., J.J.L., L.D.O., L.G., D.B., another unidentified sister, and appellant's daughter, K.K. C.M. was identified as an additional victim during the pendency of the commitment proceeding.

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[1] Appellant has numerous other criminal convictions including felony theft (1982), fleeing a police officer (1984), deer shining (1985), disorderly conduct (1986), and DWI (1987). His compliance with probation conditions has been poor, resulting in multiple periods of incarceration. Despite his numerous alcohol-related convictions, he has systematically refused alcohol treatment while incarcerated.

[2] The petition for commitment as an SPP was later dismissed.

The district court appointed Mary Kenning, Ph.D., as the first examiner. She opined that appellant meets all of the criteria for commitment as an SDP and presents a high risk to reoffend sexually. The district court appointed John V. Austin, Ph.D., as the second examiner. Dr. Austin's written report concludes that appellant is not highly likely to engage in harmful sexual behavior in the future, but Dr. Austin offers no recommendation as to commitment based on his belief that "[w]hether [appellant]'s risk of future sexual harm is sufficiently great to justify final involuntary civil commitment is a judgment that must be made by the court." Respondent retained a third expert, James M. Alsdurf, Ph.D., LP, who recommended that appellant be committed as an SDP.

Following a six-day trial, the district court determined that appellant meets the SDP criteria and ordered him committed to the MSOP at Moose Lake. During the six-month initial review period, appellant refused to participate in a mental-health assessment and begin treatment, and continued to deny that he had committed any sexual offenses. After a review hearing, the district court ordered appellant's indeterminate commitment as an SDP. This appeal follows.

D E C I S I O N

On appeal from an order committing a person as an SDP, "this court is limited to an examination of the [district] court's compliance with the statute, and the commitment must be justified by findings based upon evidence at the hearing." *In re Civil Commitment of Jackson*, 658 N.W.2d 219, 224 (Minn. App. 2003), *review denied* (Minn. May 20, 2003). The district court's findings of fact will not be set aside unless clearly erroneous, and the record is viewed in a light most favorable to the findings. *In re Civil*

Commitment of Ramey, 648 N.W.2d 260, 269 (Minn. App. 2002), *review denied* (Minn. Sept. 17, 2002). This court gives deference to the district court's opportunity to judge the credibility of witnesses. *Id.*

The petitioner must prove by clear and convincing evidence that the criteria for commitment as an SDP are met. Minn. Stat. § 253B.18, subd. 1(a) (2008). Whether the record contains clear and convincing evidence that the requirements of the SDP statute are met presents a question of law, which we review de novo. *In re Civil Commitment of Martin*, 661 N.W.2d 632, 638 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003).

An SDP is one who:

> (1) has engaged in a course of harmful sexual conduct as defined in [Minn. Stat. § 253B.02] subdivision 7a;
>
> (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 as defined in subdivision 7a.

Minn. Stat. § 253B.02, subd. 18c(a).

Appellant challenges only the district court's determination with respect to the third statutory element. To satisfy this element, respondent must establish that appellant is "*highly* likely [to] engage in harmful sexual acts in the future." *In re Civil Commitment of Stone*, 711 N.W.2d 831, 840 (Minn. App. 2006) (emphasis added) (alteration in original) (quoting *In re Linehan*, 594 N.W.2d. 867, 876 (Minn. 1999) *(Linehan IV)*), *review denied* (Minn. June 20, 2006).

I. The district court's findings related to the first examiner are not clearly erroneous.

Appellant argues that Dr. Kenning's opinion is based on a flawed application of one of the actuarial tests, the STATIC-99, and therefore the district court clearly erred in finding her testimony to be credible. Appellant also asserts that because the findings with respect to Dr. Kenning's opinion are clearly erroneous, the district court erred in concluding that appellant is highly likely to reoffend sexually. We disagree.

First, appellant presented the same arguments concerning the reliability of Dr. Kenning's opinions, including her scoring of the STATIC-99, to the district court. The district court rejected them, finding the opinions and testimony of Dr. Kenning "credible and persuasive regarding [appellant]'s need for treatment and the requirements of public safety." We defer to the district court on matters of witness credibility. *Ramey*, 648 N.W.2d at 270.

Second, appellant's specific challenges to Dr. Kenning's opinions do not withstand close scrutiny. Appellant first asserts that Dr. Kenning "changed her mind" as to appellant's score on the STATIC-99. We disagree with this characterization of Dr. Kenning's testimony. Dr. Kenning explained at trial that her initial analysis, including her preliminary scoring of the STATIC-99, did not seem to support commitment. But when she completed her evaluation, including finalizing the STATIC-99 scoring after reviewing the technical aspects of the instrument, she concluded that appellant meets the statutory criteria for commitment.

Appellant's argument that a changed score on one test is not sufficient to support Dr. Kenning's commitment recommendation fares no better. Although Dr. Kenning acknowledged that the revised STATIC-99 score may have "tip[ped] the balance," she testified that her recommendation is based on all the available information, including the various assessment tools and her subjective evaluation of appellant.

Appellant's assertion that Dr. Kenning relied on the wrong recidivism rates is also unavailing. It is undisputed that between the time of Dr. Kenning's evaluation of appellant and her testimony at trial, the creators of the STATIC-99 revised the instrument to include separate actuarial tables for sex offenders and violent offenders. Dr. Kenning scored appellant on both and used the predictive rate listed in the violent-offenders table. She explained that she considered appellant an adult rapist and that he better matched the characteristics of persons ranked on the violent-offender table, which is comprised of "offenders who resisted treatment and who have other psychological risk factors including elements of sexual deviance, antisocial/criminal and self management problems, or treatment responsivity problems, including maintaining distorted attitudes toward their offenses." The fact that Dr. Austin chose to use the sexual-offender table to score, which placed appellant at a lower predicted recidivism rate, is not determinative. The district court has discretion to give more weight to one expert's testimony over another. *See Stone*, 711 N.W.2d at 839.

The district court made thorough, careful findings on the evidence adduced at the hearing for each of the required statutory elements. On this record, we conclude that the

district court did not clearly err in crediting Dr. Kenning's testimony and that the district court's findings based on Dr. Kenning's opinion are not clearly erroneous.

II. Clear and convincing evidence supports the district court's determination that appellant is highly likely to reoffend sexually.

Appellant argues that even if the district court's findings regarding Dr. Kenning are sound, respondent has not established by clear and convincing evidence that appellant is highly likely to engage in future acts of harmful sexual conduct.

We first consider appellant's assertion that Dr. Kenning and Dr. Alsdurf considered different victims when evaluating appellant's past course of harmful sexual conduct. The lack of a common starting point, appellant argues, may impact the test scores and the experts' assessments of appellant's future likelihood of harmful sexual conduct. We disagree.

As Dr. Kenning explained, the actuarial tests take into account criminal charges and convictions but not informal reports of sexual offenses. All three examiners relied on the same incidents documented through formal charges and convictions in scoring the tests. Accordingly, the fact that Dr. Kenning considered an unidentified sister as a potential victim and that Dr. Alsdurf identified K.K. as a victim of appellant's harmful sexual conduct has no impact on his likelihood of reoffending as measured by the actuarial tests. Moreover, appellant does not dispute the district court's finding that appellant's past course of harmful sexual conduct involved six victims. The commitment petition identifies five of the victims and C.M. was identified between the filing of the petition and trial. The examiners reviewed the petition and information about C.M.

before forming their opinions. On this record, appellant's concerns about a common starting point are misplaced.

We next turn to the broader issue of whether the record evidence supports the district court's determination that appellant is highly likely to reoffend sexually. In making this determination, the court must evaluate:

> (1) the offender's demographic characteristics; (2) the offender's history of violent behavior; (3) the base-rate statistics for violent behavior among individuals with the offender's background; (4) the sources of stress in the offender's environment; (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 record of participation in sex-therapy programs.

Stone, 711 N.W.2d at 840.

The experts concluded that each of these commitment factors had been met. On the first factor, appellant's demographic characteristics, Drs. Kenning and Alsdurf concluded that appellant's age, gender, and aggressive behavior all increase his risk of reoffending. Dr. Austin found appellant's non-compliance with supervision and conditional release and his preoccupation with his intimate partners were significant.

On the second factor, a history of violent behavior, Dr. Kenning testified that appellant's behavior was escalating and Dr. Austin admitted that appellant is violent and sexually aggressive in the confines of intimate relationships. Drs. Kenning and Alsdurf pointed to appellant's use of aggression to cope with stress, his use of aggression while under review for civil commitment, and his refusal to complete sex-offender treatment as factors that heighten his risk of reoffending.

As to the third factor, base-rate statistics, Drs. Kenning and Alsdurf concluded that appellant is at a statistically heightened rate of reoffending when compared to other offenders. Drs. Kenning and Alsdurf both testified that appellant's score on the STATIC-99 placed him among the 10% of sex offenders most likely to reoffend. Appellant also scored significantly above the base rate on other tests, including the SORAG, the MnSOST-R, and the RRASOR.

All three experts concluded that as to the fourth factor, appellant will face stress in his environment including living in the community as a level 2 sex offender, living with another sex offender, alienation from his parents, whom he listed as his social support network, and his propensity to reoffend without close supervision.

On the fifth factor, Drs. Kenning and Alsdurf noted that appellant has repeatedly placed himself in the same domestic situations in which his violent sexual offenses have occurred. The similarity of the present or future context to those contexts in which appellant has used violence in the past indicates a high likelihood of reoffense. Finally, all three experts consider appellant an untreated sex offender. Accordingly, the sixth factor, appellant's record of participation in sex-therapy programs, indicates a high probability of reoffense.

The examiners did not limit themselves to the *Linehan* factors in reaching their conclusions that appellant is highly likely to reoffend. Drs. Kenning and Alsdurf noted appellant's untreated chemical dependency, his continued problems with authority, and his belief that his victims were united in a conspiracy against him as additional factors that adversely affect his ability to control his impulsive and aggressive behavior.

We conclude that clear and convincing evidence establishes that appellant is highly likely to engage in future harmful sexual conduct. The state therefore proved the statutory elements for commitment as an SDP.

Affirmed.