STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1171

In the Matter of the Civil Commitment of
Mauro Flores, a/k/a Mauro Raul Flores; Raul Flores.

Filed December 7, 2010
Affirmed
Stauber, Judge

Watonwan County District Court
File No. 83PR09619

Mark E. Betters, Mark Betters and Associates, Ltd., Mankato, Minnesota (for appellant Flores)

Lori Swanson, Attorney General, Scott E. Haldeman, Assistant Attorney General, St. Paul, Minnesota (for respondent State of Minnesota)

Considered and decided by Wright, Presiding Judge; Larkin, Judge; and Stauber, Judge.

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

STAUBER, Judge

In this appeal from the district court's orders initially and indeterminately committing appellant Mauro Flores as a sexually dangerous person (SDP) and a sexual psychopathic personality (SPP), appellant argues that the district court committed clear error by finding that appellant's conduct towards his three victims constituted a course of harmful sexual conduct or a habitual course of misconduct in sexual matters. Because the district court's findings are supported by clear and convincing evidence, we affirm.

FACTS

Appellant, who was 27 years old at the time this petition was filed, has a lengthy criminal record. This record includes three instances of criminal sexual conduct. His first offense occurred on May 1, 1996, when, at the age of 13, he sexually abused a 15-year-old girl, T.M.A. Appellant was charged with fifth-degree criminal sexual conduct and adjudicated delinquent. The record shows that appellant and another male were with T.M.A. after school and reportedly grabbed her around the waist and asked her to bend over. The girl told them to stop and they did not. When she tried to leave the area, appellant and the other male followed her around the block and continued the same behavior. T.M.A. continued to try to leave and the two males threw her down to the ground. The two attempted to unzip her pants at least three different times, and they grabbed her breasts on the outside of her clothing. T.M.A. reported that appellant was the primary aggressor. Appellant was placed on intensive juvenile supervision for 18 months, with one of the conditions being that he complete out-patient sex-offender treatment.

The record shows that appellant violated his probation extensively. One of these violations caused appellant to be suspended from school for 10 days after several students reported that appellant had touched them in private areas and performed "humping" gestures towards them. One student reported that she feared appellant would retaliate by using increased sexual force if he found out that she reported him. Appellant's probation agent recommended inpatient sex-offender treatment at the Hoffman Center in St. Peter, and the district court ordered the placement.

In December 1999, when appellant was 17-years-old, he sexually abused a 13-year-old girl, S.A.H. Appellant admitted to engaging in sexual intercourse with the victim at the apartment where she was staying. Appellant testified at the civil commitment trial that he was under the influence of alcohol and marijuana at the time. S.A.H. stated that appellant did not coerce or threaten her. She told investigators that this was the first time she had engaged in sexual intercourse.

On December 25, 1999, when appellant was still 17 years old, he sexually abused another 13-year-old girl, S.K.D. The incident was reported to police in May of 2000 by S.K.D.'s mother when she discovered that S.K.D. was pregnant. The incident took place at the home of appellant's older brother. Appellant testified that he was having a sexual relationship with S.K.D.'s mother at the time and that he met S.K.D. during his frequent visits to her mother's home. S.K.D. reported that appellant had been drinking alcohol and digitally penetrated her vagina while they watched television on a couch and then engaged in sexual intercourse with her. S.K.D. stated that she did not know what to think, but that she did not stop appellant. This was the first time S.K.D. engaged in sexual intercourse, and she stated that she did not have any further sexual contact with appellant or anyone else before learning of her pregnancy. Appellant admitted that he knew S.K.D. was 13 years old.

When S.K.D. was being interviewed by investigators, she disclosed that her friend, S.A.H., had also been the victim of sexual abuse by appellant. The police investigated both offenses, and the county attorney then filed a juvenile delinquency petition alleging two counts of criminal sexual conduct in the third degree. The court then certified

appellant as an adult, and appellant pleaded guilty to criminal sexual conduct in the third degree for his offense against S.K.D. in exchange for the count against S.A.H. being dropped. In the pre-sentence investigation (PSI) report, appellant's agent wrote that both "victims were extremely naïve, as well as emotionally and socially immature. S.K.D. in particular was unaware of what she was consenting to when she had sexual intercourse with [appellant] and did not realize she was pregnant until she watched a program detailing pregnancy symptoms on television." The court stayed imposition of the sentence for 15 years. As part of the conditions of the stay, appellant was to serve one year in jail with credit for time served, submit to a sex-offender evaluation and follow recommendations, and register as a predatory offender.

The record shows that appellant has been convicted of three subsequent crimes involving violence against women. While these offenses did not specifically involve sexual misconduct, the district court and the two court-appointed examiners discussed the offenses in making their SDP/SPP determination. In August 1999, appellant was cited for domestic assault/disorderly conduct and possession of drug paraphernalia. He pleaded guilty to disorderly conduct. The victim called police and reported that appellant was preventing her from leaving his home. She reported that appellant pulled her hair, pushed her, and was lying on her so she could not breathe. After the victim called the police, appellant choked her. The victim also told police that on a prior occasion appellant hit her in the face and tried to choke her while they were driving in a car, and also pushed her to the ground and kicked her multiple times. At the commitment trial, appellant testified that the victim's description of the events was accurate.

In September 2000, appellant was charged with kidnapping, assault in the third degree, and theft of a motor vehicle. He pleaded guilty to the assault and theft charges. A witness reported that appellant assaulted a Subway employee in Burnsville. Appellant was dating the victim, J.L.O., and living with her and her mother. He was taking care of J.L.O.'s child on the day of the incident, and took the child with him to Subway while J.L.O. was working. Appellant believed he saw J.L.O. flirting with male customers and confronted her inside the Subway. Security cameras showed that appellant punched, knocked down, and kicked J.L.O. Appellant then dragged J.L.O. out of the restaurant by her hair to her mother's van. Inside the van, Appellant hit J.L.O. in front of her child, causing her to bleed from her nose. Appellant forced J.L.O to drive and threatened to make the car crash if she did not drive where he told her. J.L.O. suffered a broken nose, a malocclusion of her jaw, and three chipped teeth as a result of the assault. Appellant testified at the commitment trial that he was drinking alcohol prior to the assault.

In January 2002, appellant was charged with two counts of kidnapping, one count of assault in the first degree, and one count of assault in the third degree. The victim called police and reported that appellant assaulted and kidnapped her. The victim had been staying with a friend in the same trailer park where appellant's brother lived. She told police that she had dated appellant for about a week and they had kissed. In the early morning of December 30, 2001, appellant came to the victim's trailer asking where she was. Appellant testified at the commitment trial that he believed his cousin was trying to date the victim and he went to the trailer in order to confront her. He also said that he had been drinking alcohol and inhaling glue prior to the incident.

The victim reported that appellant was upset because she would not have sex with him. When she agreed to step outside the trailer to speak with him, appellant grabbed her by the neck and slammed her face into a snow bank. The victim reported that appellant did this over and over until she could not breathe and nearly blacked out. She remembered next being inside a trailer with appellant choking her until she lost consciousness. The victim told police that she believed she was going to die. Appellant then forced the victim into a van and drove to the town of Sleepy Eye, eventually taking her to his mother's home. The victim told police that she was unconscious for most of two days. Appellant pleaded guilty to the kidnapping charge and was sentenced to 134 months.

The district court and the examiners also cited several instances of sexual misconduct committed by appellant while he was incarcerated. In 2006, appellant was charged with disorderly conduct and sexual behavior for touching a female guard's buttocks. He pleaded guilty to the offense. In 2007, he was again charged and pleaded guilty to disorderly conduct and sexual behavior for exposing his erect penis to a female guard. In 2009, prison staff found several pornographic pictures in his possession. He was also found masturbating in his cell on two occasions. In addition to this sexual misconduct, appellant continued his pattern of drug and alcohol use in prison. He was disciplined six times for possession of liquor, intoxicants, or drugs.

On September 17, 2009, Watonwan County filed a petition for civil commitment of appellant as an SDP and an SPP. The district court appointed Dr. Linda Marshall as first examiner, and Dr. Mary Kenning as second examiner, requested by appellant. At the

trial, both examiners opined in their testimony and reports that appellant meets the elements for commitment as an SDP. However, the examiners differed in their opinions as to whether appellant meets the elements for commitment as an SPP. Dr. Marshall believed that appellant met the criteria for SPP, but Dr. Kenning believed that appellant did not satisfy the elements of "habitual course of misconduct" and "utter lack of power to control."

The district court concluded that clear and convincing evidence established that appellant met the criteria for initial commitment as SDP and SPP. The court further concluded that appellant is in need of treatment and that the Minnesota Sex Offender Program (MSOP) in St. Peter and Moose Lake is the least restrictive treatment program available to meet appellant's needs and the requirements of public safety. Following appellant's initial commitment, MSOP submitted a 60-day treatment report as required by Minn. Stat. § 253B.18, subd. 2 (2008). The report, authored by Dr. Gary Hertog, supported appellant's continued commitment. Following the review hearing, the district court ordered indeterminate commitment. This appeal followed.

D E C I S I O N

This court reviews the district court's commitment decision to determine whether the court erred as a matter of law in applying the statutory criteria. *In re Commitment of Stone*, 711 N.W.2d 831, 836 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). We review de novo whether the record contains clear and convincing evidence to support the district court's conclusion that appellant meets the standards for commitment. *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003). We defer to the district court's

findings of fact and will reverse those findings only if they are clearly erroneous. *Stone*, 711 N.W.2d at 836. Further, "[w]here the findings of fact rest almost entirely on expert testimony, the [district] court's evaluation of credibility is of particular significance." *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995).

I.

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). 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).

Appellant challenges only the district court's determination with respect to the first statutory element. "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). While the Act does not define what constitutes a "course" of harmful sexual conduct, this court has defined "course" to mean "a systematic or orderly succession; a sequence." *In re Commitment of Ramey*, 648 N.W.2d 260, 268 (Minn. App. 2002), *review denied* (Minn. Sept. 17, 2002) (quotation omitted). Conduct need not be recent to be considered part of a course of harmful sexual conduct. *Stone*, 711 N.W.2d at 837. The Act does not require that a victim suffer actual physical or emotional harm; rather, the Act focuses on whether the conduct creates a substantial likelihood of such harm. *In re Commitment of Martin*, 661 N.W.2d 632, 639 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003). Additionally, the conduct need not be

violent to be considered harmful sexual conduct within the statutory definition of a sexually dangerous person. *In re Robb*, 622 N.W.2d 564, 573 (Minn. App. 2001), *review denied* (Minn. Apr. 17, 2001).

The statute also contains a rebuttable presumption that certain conduct, including criminal sexual conduct in the first through fourth degrees, "creates a substantial likelihood that a victim will suffer serious physical or emotional harm." Minn. Stat. § 253B.02 subd. 7a(b) (2008). The district court found that appellant's conviction for third-degree criminal sexual conduct was presumptively harmful under the statute, and additionally found that appellant's conduct was actually harmful.

Appellant's offenses against both S.K.D. and S.A.H. fall under the statutory presumption of harmful conduct. Appellant pleaded guilty to third-degree criminal sexual conduct for his offense against S.K.D. While a second charge of third-degree criminal sexual conduct for his offense against S.A.H. was dismissed pursuant to a plea agreement, incidents establishing a course of harmful sexual conduct "are not limited to those that resulted in a criminal conviction." *In re Commitment of Williams*, 735 N.W.2d 727, 731 (Minn. App. 2007), *review denied* (Minn. Sept. 26, 2007).

Appellant argues that sufficient evidence was presented to the district court in order to rebut this presumption of harm. We disagree. Appellant tries to rebut the presumption by arguing that no force or violence was used during the offenses against S.A.H. or S.K.D. However, conduct need not be violent in order to be considered harmful. *See Robb*, 622 N.W.2d at 573. Even if no force or violence was used against these victims, this does not rebut the presumption of harm. Appellant also argues that

S.A.H. and S.K.D. gave actual consent to engage in sexual intercourse, though he acknowledges that they were incapable of legal consent. We find this argument unpersuasive. In *Robb*, this court held that the appellant had not rebutted the presumption of harm where he failed to show that his conduct was "less serious than conduct that typically occurs in the commission of the offenses," or "that his victims suffered less emotional harm than other victims of the same offense would likely suffer." *Id.* Appellant's conduct constituted third-degree criminal sexual conduct. Consent is not a defense to that crime. *See* Minn. Stat. § 609.344, subd. 1(b) (2008) (amended 2010). The victims' consent, therefore, does not rebut the presumption of harm.

Appellant's argument that he was only three-and-a-half years older than the victims fails to rebut the presumption of harm for the same reason. The age difference between appellant and the two victims fits directly within the statutory definition of third-degree criminal sexual conduct. *See id.* (providing that third-degree criminal sexual conduct occurs when "the complainant is at least 13 but less than 16 years of age and the actor is more than 24 months older than the complainant"). Appellant has not shown that his conduct was less serious than the conduct that typically occurs for this offense.

Appellant finally argues that the presumption of harm is rebutted by several facts regarding the offense against S.K.D., including that S.K.D. maintained contact with appellant after the offense and continues to voluntarily offer appellant pictures and updates regarding their child. This evidence, by itself, does not show that the victim suffered less harm than other victims of the same offense, nor does it show that appellant's conduct was less serious than the conduct typical of other perpetrators of the

same offense. Accordingly, we conclude that the presumption of harm was not rebutted.[1] Looking at the record as a whole, clear and convincing evidence supports the district court's finding that appellant engaged in a course of harmful sexual conduct.

II.

A petitioner must prove by clear and convincing evidence that the standards for commitment as an SPP are met. Minn. Stat. §§ 253B.18, subd. 1(a), .185, subd. 1 (2008). The Minnesota Commitment and Treatment Act (the Act) defines an SPP 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). In order to commit an individual as an SPP, 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. *In re Linehan*, 518 N.W.2d 609, 613 (Minn. 1994). Appellant challenges only the district court's finding on the first factor.

[1] At oral argument, counsel for appellant urged this court to provide guidance as to how the presumption of harm can be rebutted. However, "[t]he function of the court of appeals is limited to identifying errors and then correcting them." *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). This court does not issue advisory opinions, and we do not decide cases merely to establish precedent. *In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989). On this record, we hold only that appellant did not present sufficient evidence to rebut the presumption of harm.

The requirement of "a habitual course of misconduct in sexual matters" under the SPP statute differs only slightly from the "course of harmful sexual conduct" element used in the SDP statute. Under the SPP statute, there is the additional requirement that the conduct must be "habitual." *Stone*, 711 N.W.2d at 837. This has been defined to require evidence of a pattern of similar conduct. *Id.* Courts look at both frequency and similarity of conduct. *In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994); *In re Bieganowski*, 520 N.W.2d 525, 529–30 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994).

Appellant does not specifically dispute the district court's finding that the misconduct was habitual. Appellant merely makes the same arguments with regards to this element as he does for the "course of harmful sexual conduct" element under the SDP analysis. Clear and convincing evidence, therefore, supports the district court's finding on this element as well.

Appellant argues that the district court erred by considering S.K.D.'s pregnancy as evidence of harm or misconduct. Appellant relies on *In re Stilinovich*, 479 N.W.2d 731 (Minn. App. 1992), for the proposition that medical results of sexual conduct, such as S.K.D.'s pregnancy, cannot constitute evidence of misconduct or harm. In doing so, appellant misreads the holding of that case. *Stilinovich* involved an appellant who was HIV positive and threatened to engage in sexual intercourse without informing potential partners of his HIV status. *Id.* at 732. The appellant did not actually engage in the conduct and had no victims of sexual abuse, but the district court still committed him as an SPP. *Id.* at 732–33. In reversing the commitment, this court stated that "[i]t is

apparent from the [district] court's findings that, ultimately, it was appellant's HIV-positive status that caused the [district] court to conclude he was dangerous to others." *Id.* at 735. The court therefore concluded that the appellant had not evidenced a habitual course of misconduct in sexual matters. *Id.* In deciding that civil commitment was not the appropriate remedy, the court stated that the Act "was passed to deal with *conduct*, not health conditions." *Id.* at 736. The district court, therefore, did not err in considering S.K.D.'s pregnancy as evidence of harmful sexual conduct or a habitual course of misconduct.

Affirmed.