STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1403

In the Matter of the Civil Commitment of:
Austin Raymond Black Elk.

Filed February 3, 2014
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 27-MH-PR-12-657

Marilyn B. Knudsen, St. Paul, Minnesota (for appellant)

Michael O. Freeman, Hennepin County Attorney, John L. Kirwin, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Peterson, Judge; and Halbrooks, Judge.

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

HALBROOKS, Judge

Following his civil commitment as a sexually dangerous person, appellant argues that the district court erred by (1) denying his request to appoint a second judge to review evidentiary objections, (2) making findings based on evidence that was outside the record, (3) denying his attempt to challenge his 1992 conviction, (4) concluding that the evidence is sufficient to demonstrate that he meets the statutory criteria for commitment, (5) improperly applying the *Linehan* factors, (6) denying appellant's challenge to the

Minnesota Sex Offender Program as a treatment program, and (7) denying his constitutional challenge to the Minnesota Commitment and Treatment Act. We affirm.

FACTS

In 1992, approximately five months after his release from a South Dakota prison following a robbery and burglary conviction, appellant Austin Raymond Black Elk and two accomplices violently assaulted a woman at a social gathering in Minnesota. A jury found Black Elk guilty of first-degree criminal sexual conduct, and he was convicted and sentenced to 244 months in prison—twice the presumptive sentence. We affirmed Black Elk's conviction and sentence, noting that "[t]he evidence of Black Elk's guilt was strong" and that "Black Elk . . . treated the victim with particular cruelty." Black Elk refused sex-offender treatment while in prison.

In 2006, Black Elk violated both his South Dakota parole and his supervised release in Minnesota by repeatedly contacting a young woman against her wishes, being terminated from sex-offender treatment, and getting arrested for a new sexual assault. Charges in this alleged sexual assault were pending at the time of Black Elk's commitment hearing. The district court reviewed various records relating to Black Elk's release violations and found, for purposes of the civil-commitment proceeding, that the alleged sexual assault and the repeated, unwanted contact were proved by clear and convincing evidence.

In 2010, Black Elk was charged with first- and third-degree criminal sexual conduct in connection with the violent sexual assault of an acquaintance. Black Elk

agreed to a stipulated-facts trial on an amended charge of fourth-degree criminal sexual conduct and was convicted. He was sentenced to 45 months in prison.[1]

As Black Elk's sentence for the 2010 sexual assault was nearing its end, Hennepin County petitioned the district court to involuntarily civilly commit Black Elk as a sexually dangerous person (SDP) and sexual psychopathic personality (SPP). The district court held a four-day trial on the county's petition, at which four witnesses testified, including Black Elk and the court-appointed examiner, Michael Thompson, M.S.W., Psy.D., whose report was also admitted into evidence. The district court also considered the analysis and conclusions in a report by Amanda B. Powers-Sawyer, Psy.D, L.P., who evaluated Black Elk as a repeat sex offender in 2011,[2] and other corrections and treatment records.

Dr. Powers-Sawyer diagnosed Black Elk with paraphilia not otherwise specified (non-consent) and antisocial personality disorder. Dr. Thompson diagnosed Black Elk with antisocial personality disorder, sexual abuse of an adult, and alcohol dependence. Dr. Thompson opined that Black Elk has a sexual, personality, or mental disorder; has engaged in a course of harmful sexual conduct; and has a high likelihood of engaging in harmful sexual conduct in the future. Dr. Thompson specifically opined that Black Elk

[1] Also in 2010, Black Elk was charged with second-degree criminal sexual conduct based on a separate incident. These charges were dismissed, and neither the court-appointed examiner nor the district court considered these allegations in reaching their conclusions.

[2] Although Dr. Powers-Sawyer was not acting in the capacity of a court-appointed examiner in this case, the record demonstrates that she is an experienced examiner in SDP commitment cases and her assessment of Black Elk was recent and relevant. We conclude that the district court's reliance on her professional assessment is appropriate.

meets the statutory criteria for an SDP and recommended that Black Elk be civilly committed to a secure treatment facility.

The district court concluded that,

> as a result of his past course of harmful sexual conduct, his mental disorders, and the resulting impairment of his ability to control his sexual impulses, it is highly likely that Mr. Black Elk will engage in further harmful sexual conduct if not civilly committed and that he is dangerous.

The district court committed Black Elk to the Minnesota Sex Offender Program (MSOP) as an SDP and dismissed the SPP allegation. This appeal follows.

D E C I S I O N

I.

We first address Black Elk's evidentiary challenges. Black Elk challenges the denial of his pretrial motion requesting the appointment of a second judge to review evidentiary challenges, argues that the court-appointed examiner and the district court inappropriately considered evidence that was not admitted, and challenges the exclusion of exculpatory evidence relating to his 1992 conviction. Absent erroneous interpretation of the law, the question of whether to admit or exclude evidence is within the district court's discretion. *Kroning v. State Farm Auto. Ins. Co*., 567 N.W.2d 42, 45-46 (Minn. 1997). Having reviewed the record and the district court's findings, we conclude that the district court acted within its discretion in its evidentiary rulings and consideration of evidence.

Appointment of Second Judge

In a pretrial motion, Black Elk asked the district court to appoint a second judge to review the admissibility of evidence so that the district court, as ultimate fact-finder, was not exposed to any evidence that was ultimately excluded. The district court denied this motion, noting that judicial resources do not allow for the assignment of two judicial officers to a single matter. Black Elk cites no legal authority in support of his argument that this ruling was in error. In the absence of adequate briefing, we decline to reach this issue. *See Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994).

Findings Based on Evidence Outside the Record

Black Elk also argues that the district court relied on evidence outside the record, including police reports and other evidence relating to his 1992 and 2010 sexual-assault convictions. Our review of the record reveals no support for this argument.

1992 Conviction

Black Elk asserts that no evidence was admitted on the specific facts underlying his 1992 conviction, but that the district court nevertheless made findings beyond the basic elements of the crime. He infers, therefore, that the district court relied on excluded evidence or the criminal complaint itself as the basis for its findings. This assertion is meritless.

The transcript of the 1992 jury trial was admitted into evidence in the civil-commitment proceeding, and the district court's findings are supported by the testimony of the victim, the sex-crimes investigator, and Black Elk, himself. The commitment order also references allegations from the 1992 criminal complaint, which was admitted

into evidence, about the context of the assault and the victim's significant injuries. These allegations are substantiated by the 1992 trial transcript. The district court acted within its discretion in considering the 1992 transcript because the content is relevant and Black Elk had the opportunity to cross-examine the witnesses in 1992. *See* Minn. R. Evid. 401, 804(b)(1). We therefore conclude that the district court's findings relating to Black Elk's 1992 conviction are amply supported by evidence in the record.

2010 Conviction

Black Elk also asserts that the district court made findings beyond the facts in evidence regarding his 2010 conviction of fourth-degree criminal sexual conduct. The record belies this assertion. Black Elk agreed to a stipulated-facts trial under Minn. R. Crim. P. 26.01, subd. 3, and the district court's findings of fact, conclusions of law, and order from this conviction were admitted into evidence in the civil-commitment proceeding. The findings in the commitment order are consistent with the findings made in support of the 2010 conviction. We therefore conclude that the district court's findings are amply supported by evidence in the record.

Records Relied Upon by Examiner

Black Elk contends that the court-appointed examiner inappropriately relied on "documents and allegations" that the parties stipulated were not part of the record, but points to no specific documents or allegations in support of this contention. A review of the record shows that counsel for both parties provided documents to Dr. Thompson for his review, with the understanding that they would not necessarily be admitted into evidence. The district court noted that Dr. Thompson would apply his professional

judgment in determining the weight to give the documents and acknowledged that the admissibility of the documents was a separate issue. We note that an expert may rely on facts or data not in evidence to provide a basis for his or her opinions. Minn. R. Evid. 703(a). We decline to address this claim of error in greater depth because it is inadequately briefed. *See Ganguli*, 512 N.W.2d at 919 n.1.

Attempt to Challenge 1992 Conviction

Black Elk argues that the district court erred by denying his request to present evidence that he did not commit the 1992 offense. The district court "determined well before trial that it would not entertain a collateral attack upon a conviction that has been appealed and previously challenged for postconviction relief." The district court noted that it was not its place "to take evidence on a 20 year old offense which has run its course through the justice system." Black Elk cites no legal authority supporting his claim of error. We note that collateral estoppel bars a person convicted of a crime from attacking the conviction in a subsequent civil proceeding. *Noske v. Friedberg*, 670 N.W.2d 740, 744 (Minn. 2003) (citing *Travelers Ins. Co. v. Thompson*, 281 Minn. 547, 555, 163 N.W.2d 289, 294 (1968)). And because Black Elk's legal argument on this issue is meager, we decline to address it further. *See Ganguli*, 512 N.W.2d at 919 n.1.

II.

Black Elk argues that the evidence is insufficient to demonstrate that he meets the statutory criteria for commitment as an SDP. The district court shall civilly commit a person under the Minnesota Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities (the SDP Act) if it finds clear and

convincing evidence that the person is an SDP, unless that person establishes the existence of a less-restrictive treatment program. Minn. Stat. §§ 253D.01, .07, subd. 3 (Supp. 2013).[3] The district court "shall make its determination upon the entire record." Minn. Stat. § 253B.08, subd. 7 (2012). Whether there is clear and convincing evidence in the record to support commitment is a question of law, which we review de novo. *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003). Findings of fact will not be set aside unless clearly erroneous. *In re McGaughey*, 536 N.W.2d 621, 623 (Minn. 1995). We view the record in the light most favorable to the district court's decision. *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995). We defer to the district court's role as fact-finder and its opportunity to assess witness credibility. *In re Civil Commitment of Ramey*, 648 N.W.2d 260, 269 (Minn. App. 2002), *review denied* (Minn. Sept. 17, 2002). "Where the findings of fact rest almost entirely on expert testimony, the [district] court's evaluation of credibility is of particular significance." *Thulin*, 660 N.W.2d at 144 (quotation omitted).

Evidentiary Support for Statutory Elements

A person may be committed as an SDP if the person: (1) has engaged in a course of harmful sexual conduct; (2) has manifested a sexual, personality, or other mental

[3] The legislature amended parts of Minn. Stat. ch. 253B in 2013 by creating a chapter to specifically address the civil commitment of SDPs and SPPs. Minn. Laws ch. 49, §§ 9-19, 22, at 226-28, 229-31 (codified at Minn. Stat. §§ 253D.01-.36 (Supp. 2013)). Although the 2012 version of the statute was in effect when appellant was civilly committed as an SDP, if the preexisting law is clarified, rather than substantively changed, the most current version of the statute should be applied. *Braylock v. Jesson*, 819 N.W.2d 585, 588 (Minn. 2012) ("When the Legislature merely clarifies preexisting law, the amended statute applies to all future or pending litigation.").

disorder or dysfunction; and (3) as a result, is likely to engage in acts of harmful sexual conduct. Minn. Stat. § 253D.02, subd. 16 (Supp. 2013). Black Elk argues that the evidence does not support the district court's findings regarding the third element of the commitment statute.

Causality

Black Elk asserts that there is no causal evidence supporting the district court's finding that "as a result of his past course of harmful sexual conduct, his mental disorders, and the resulting impairment of his ability to control his sexual impulses, it is highly likely that Mr. Black Elk will engage in further harmful sexual conduct if not civilly committed." We disagree.

Dr. Thompson diagnosed Black Elk with antisocial personality disorder, sexual abuse of an adult, and alcohol dependence. Dr. Powers-Sawyer diagnosed Black Elk with paraphilia not otherwise specified (non-consent) and antisocial personality disorder.[4] Dr. Thompson concluded that Black Elk is a rapist due to a variety of reasons, many of which related to his diagnoses. Both psychologists considered statistical data in concluding that Black Elk presents a recidivism risk. Dr. Thompson specifically opined that Black Elk is likely to pose a danger in the community. Viewed in the light most favorable to the findings, this evidence amply demonstrates a causal connection.

[4] Minnesota courts have recognized both antisocial personality disorder and paraphilia as disorders for purposes of the SDP Act. *See In re Linehan*, 594 N.W.2d 867, 878 (Minn. 1999) (*Linehan IV*); *In re Civil Commitment of Navratil*, 799 N.W.2d 643, 648 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011).

"Highly Likely" and Linehan Factors

Black Elk argues that the evidence did not satisfy the "highly likely" standard and that the district court did not properly consider the *Linehan* factors. Under Minnesota law, an SDP is subject to civil commitment only if the person's disorder or dysfunction does not allow adequate control over sexual impulses and makes it "highly likely" that the person will reoffend. *Linehan IV*, 594 N.W.2d at 876; *see also* Minn. Stat. § 253D.02, subd. 16. In determining whether an SDP is "highly likely" to reoffend, the district court must consider the *Linehan* factors. *Navratil*, 799 N.W.2d at 649. "No single factor is determinative of this complex issue." *Id.*

Dr. Thompson addressed the *Linehan* factors in his report and his testimony. He concluded that Black Elk has a high likelihood of reoffending sexually. The district court referenced the *Linehan*-factors section of Dr. Thompson's report. Black Elk argues that the district court did not go far enough, and must discuss each *Linehan* factor explicitly and independently of the court-appointed examiner's analysis. He cites no legal authority for this proposition.

Demographic characteristics

Dr. Thompson opined that risk "tends to be elevated in individuals who offend against unrelated and stranger victims." Dr. Thompson noted that Black Elk's victims include strangers and unrelated victims.

History of violent behavior

Dr. Thompson stated in his report that Black Elk has a history of violent behavior in both sexual and non-sexual contexts. This statement is amply supported by the evidence in the record of Black Elk's criminal history.

Base-rate statistics

Dr. Thompson utilized the Static-99R and MnSOST-R instruments. The Static-99R is an actuarial measure of relative risk for sexual-offense recidivism. Dr. Thompson noted that Black Elk's Static-99R score of 5 "is similar to a group of offenders at [h]igh risk for sexual re-offense." Dr. Powers-Sawyer also administered the Static-99R instrument and also determined that Black Elk's score is 5. She noted that Black Elk's score fell in the 81-89th percentile range, meaning that only about 10-20% of sex offenders scored higher.

The MnSOST-R is an actuarial, empirically based measure that scores 16 items to identify a sex offender's risk to reoffend. Dr. Thompson scored Black Elk as +10 with this instrument, which places him in a category of sex offenders with a re-arrest rate between 52 and 61% over a six-year period. For community-notification purposes, this score is equal to a Presumptive Risk Level 3.

Sources of stress

Dr. Thompson opined that post-incarceration adjustment is a source of significant stress because of the need to conform to court mandates and a hostile social climate without the structure of regimented daily living. He also noted that Black Elk would be

subject to considerable stress and severe economic hardship due to difficulties securing employment.

Similarity of future context to offending context

Dr. Powers-Sawyer noted that Black Elk's sexual offenses occurred "after being free in the community for a short period of time." Dr. Thompson observed that Black Elk's sexual offenses are similar in that they were forcible assaults against adult females while he was living in the community. He noted in particular that Black Elk "has displayed the ability to sexually offend even after being sanctioned by the legal system." The district court highlighted this portion of Dr. Thompson's report, noting that the fact that Black Elk's offenses occurred "regardless of the legal consequences or supervision" was "particularly relevant" when considering his likelihood of reoffending.

Participation in sex-offender treatment

Dr. Thompson noted that Black Elk has not successfully completed sex-offender treatment and, in fact, has been terminated from treatment at least twice and has been deemed unamenable to treatment due to his denial of offending and lack of motivation. He noted that Black Elk rejected treatment and has lied about his sexual behaviors in treatment. Dr. Powers-Sawyer also noted Black Elk's lack of success with sex-offender treatment. Both Dr. Thompson and Dr. Powers-Sawyer concluded that Black Elk requires residential sex-offender treatment in a secure environment.

We conclude that the district court properly considered the *Linehan* factors. The district court also made credibility determinations well within its discretion. The district court therefore did not clearly err in determining that Black Elk is highly likely to engage

in harmful sexual conduct in the future. Black Elk is asking this court to assume the responsibility of the district court in order to determine the credibility of the witnesses and reweigh the evidence. It would be improper for us to do so. *See In re Salkin*, 430 N.W.2d 13, 16 (Minn. App. 1988) (stating that appellate courts will "not weigh the evidence" but rather "determine if the evidence as a whole sustains the [district] court's findings"), *review denied* (Minn. Nov. 23, 1988). Accordingly, we will not disturb the district court's findings.

III.

Black Elk argues that the district court erred by denying his challenge of MSOP as a treatment program and then making a finding that it is the least-restrictive treatment program available to meet his needs. Black Elk argued in a pretrial motion that the treatment available in MSOP is inadequate and asserted that this inadequacy necessitated dismissal of the commitment petition. The district court denied his motion, determining that the claim was premature. Because Black Elk's argument about the inadequacy of treatment was made before he was committed, the district court did not err in denying Black Elk's motion as premature. *See In re Civil Commitment of Travis*, 767 N.W.2d 52, 58 (Minn. App. 2009) (offender's right-to-treatment arguments are not ripe before commitment).

After a four-day trial, the district court found, by clear and convincing evidence, that Black Elk is subject to commitment as an SDP. The burden was on Black Elk to establish that a less-restrictive treatment program is available to meet his needs. *See* Minn. Stat. § 253D.07, subd. 3 ("[T]he court shall commit the person to a secure

treatment facility unless the person establishes by clear and convincing evidence that a less restrictive treatment program is available . . . ."). Black Elk points to no less-restrictive treatment program. Dr. Thompson and Dr. Powers-Sawyer both opined that an unsecured inpatient treatment program would not be adequate. Accordingly, the district court did not err in finding that MSOP is the least-restrictive treatment program that can meet Black Elk's needs.

IV.

Black Elk argues that the SDP Act is unconstitutional because its discharge procedures violate due process and separation of powers. Black Elk raised this issue with the district court when he had not yet been committed and certainly had not yet petitioned for a reduction in custody. The district court rejected as premature Black Elk's arguments relating to discharge procedures. The district court noted that before it even made a commitment determination, "motions relating to his release or relief from commitment would be purely speculative," and that it did not have jurisdiction generally over issues of release from commitment. We agree.

As noted above, we have concluded that a right-to-treatment argument is not ripe when it is raised in advance of civil commitment. *Travis*, 767 N.W.2d at 58. For the same reasons, we conclude that arguments relating to discharge procedures are not ripe when raised in advance of a commitment order. Accordingly, the district court did not err when it rejected as premature Black Elk's constitutional argument relating to discharge procedures.

Affirmed.