STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1971

In the Matter of the Civil Commitment of:
Curtis Marcell Smallwood.

Filed March 19, 2012
Affirmed
Randall, Judge[*]

Dakota County District Court
File No. 19HA-PR-09-547

Joe Covert Dalager, Law Office of Joe C. Dalager, P.A., West St. Paul, Minnesota (for appellant Smallwood)

Debra E. Schmidt, Assistant County Attorney, Dakota County Attorney's Office, Hastings, Minnesota (for respondent Dakota County)

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Randall, Judge.

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

RANDALL, Judge

Appellant challenges his commitment to the Minnesota Sex Offender Treatment Program (MSOP) as a sexually dangerous person (SDP), arguing that (1) the district court abused its discretion by admitting into evidence records containing allegations of prior misconduct that did not result in a conviction and (2) the district court's findings and

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

conclusions that appellant met the commitment criteria are not supported by clear-and-convincing evidence. We affirm.

FACTS

In 1984, appellant Curtis Marcell Smallwood was arrested in Florida and charged with battery and a sex offense. According to court documents, the victim alleged that appellant entered her home without permission, grabbed her from behind, and fondled her breasts and genitals through her clothing. Appellant admitted to the actions, but claimed that the encounter was consensual. The victim failed to appear in court and, as a result, the case was dismissed.

In 1987, appellant was arrested in California and charged with burglary and assault to commit rape. According to court documents, a man entered the victim's house without her knowledge and put his arms around her from behind, squeezed her, and kissed the back of her neck. The man kissed her neck and fondled her breasts through her clothing, saying that he wanted to make love to her. The man eventually left, but the victim stated that he kept returning on successive days. The man was later identified as appellant, who again admitted the behavior but claimed that the encounter was consensual. According to appellant, the charges were later reduced to a misdemeanor trespass charge.

In July 1988, appellant entered the home of an adult female. The victim awoke to find appellant lying next to her in bed, without pants, and with his penis exposed. Upon investigation, it was learned that appellant gained entrance into the home by convincing the victim's children that he was there to surprise their mother. Appellant claimed that

the victim invited him into the home. He pleaded guilty to fourth-degree burglary and was sentenced to one year in prison.

That same month, appellant entered the home of an adult female through a living-room window. The victim awoke to find appellant standing at the foot of her bed with his penis exposed and holding a knife in his hand. Appellant told her to remain quiet and that he wanted to "make love" to her. The woman convinced appellant to not assault her and to dress himself. She then called 911, and appellant fled the residence. Appellant pleaded guilty to first-degree burglary and received a 65-month sentence.

In 1992, appellant entered a neighbor's apartment while she was asleep. The victim awoke to find appellant standing at her bedside. After appellant refused to leave, the victim threatened to call the police, at which time appellant exited through a bedroom window. The victim fell asleep, but again awoke to find appellant standing by her bed with his pants unzipped. She pushed appellant out of her bedroom and out of the apartment. Appellant pleaded guilty to second-degree burglary, and received a 52-month sentence.

In 1996, appellant entered a home in Dakota County and touched the buttocks of a sleeping woman. She awoke to find appellant standing next to her bed without a shirt. When the woman told appellant to leave the home, appellant said "shut up or I'll cut ya" and poked her hand with what she believed to be a knife. Appellant was found guilty of first-degree burglary and was sentenced to 240 months.[1] During the presentence

[1] Appellant was incarcerated on this charge at the time the petition in the present case was filed.

investigation, appellant admitted to rubbing the woman's buttocks and stated that he had a sexual fantasy that such a victim, upon awakening, would be amenable to his sexual advances and engage in sexual conduct with him.

In 2006, appellant was accused of sexually abusing his girlfriend's developmentally-disabled daughter and was charged with third-degree criminal sexual conduct. The victim stated that one night when she was between 10 and 13 years old, appellant entered her room, removed her pajama bottoms, and penetrated her vagina and anus with his penis. The charges were later dismissed by the district court due to inconsistencies in the victim's statements regarding the date of the offense, as respondent was in prison at the time of the alleged abuse. However, the record indicates that appellant, in phone conversations with the victim, has asked if she knew how to bring herself to orgasm and stated that, had he not been incarcerated, he would come to her room and show her how to bring herself to orgasm.

In addition, the record establishes that appellant was convicted of 12 non-sex-related or motivated offenses from 1979 until 1985, and over 50 rule infractions while institutionalized, including allegations of sexual harassment and sexual behavior.

On June 30, 2010, respondent Dakota County filed a petition to commit appellant as a sexually dangerous person (SDP) and as a sexual-psychopathic personality (SPP). At appellant's request, a second examiner was appointed to evaluate appellant and the hearing was continued to December 14 to allow for the evaluation and to give the parties a chance to review the evaluation. At the beginning of the hearing, the petition was

amended to seek commitment only as an SDP, and the SPP allegations were removed and are not a subject of this appeal.

At the hearing, the district court heard testimony from Dr. Catherine A. Carlson, who was the first court-appointed examiner; Dr. Thomas Alberg, who was the examiner appointed at appellant's request on September 20; and Dr. Michael D. Thompson, who was the pre-petition examiner. Appellant also testified at the hearing. The district court also received a number of exhibits, a majority of which were received without objection. Appellant did object to the receipt of documents related to the 1984, 1987, and 2006 allegations, and the district court overruled this objection.

Dr. Carlson testified that appellant met the criteria for commitment as an SDP. She testified that his conduct constituted a course of harmful sexual conduct based on his four burglary convictions, which she believed to be sexually motivated. She further testified that appellant suffered from paraphilia, not otherwise specified, and that this disorder caused him to lack adequate control over his sexual impulses. Based on a number of actuarial tools, she testified to a reasonable degree of psychological certainty that appellant had a high likelihood of reoffending with acts of harmful sexual conduct. She concluded that appellant was in need of both sex-offender and chemical-dependency treatment, that he needed to be treated at a secure facility that offers intensive therapy, and that the only such program that she was aware of is the Minnesota Sex Offender Treatment Program (MSOP).

Dr. Alberg also testified that appellant met the criteria for commitment as an SDP. He agreed that the burglary convictions, all of which he found to be sexually motivated,

constituted a course of harmful sexual conduct. According to the actuarial tools utilized by Dr. Alberg, appellant exhibited a high likelihood of reoffending, but Dr. Alberg acknowledged that the risk would be lowered if appellant remained chemical-free. Dr. Alberg concluded that appellant needed treatment in a secure setting and that MSOP is the only such program available.

Appellant disputed the examiners' reports, claiming that his crimes were monetarily motivated as opposed to sexually motivated. The district court found that appellant's testimony lacked the credibility of the experts "because of his interest in the outcome of the proceeding." The district court—finding the testimony of the screener and the two court-appointed examiners to be credible—concluded that the evidence was sufficient to commit appellant as an SDP. The district court signed an interim order committing appellant as an SDP on March 24, 2011.

The matter came before the district court for a review hearing on August 4. At that hearing, the district court received into evidence a treatment report and the report of Dr. James Gilbertson. The court also took judicial notice of the previously received evidence and the district court's interim order, and heard evidence from Dr. Gary Hertog, Dr. Gilbertson, one of appellant's therapists, and appellant himself. The district court found that the testimony of the three medical professionals supported appellant's indeterminate commitment. By order dated September 19, 2011, the district court indeterminately committed appellant as an SDP. This appeal follows.

D E C I S I O N

Appellant's arguments are best classified into two distinct sets. First, he challenges the district court's admission of old records containing allegations of misconduct in Florida in 1984, in California in 1987, and in Dakota County in 1996. Appellant also asserts that the evidence is insufficient to support his commitment as an SDP.

I.

Appellant challenges the district court's determination that records containing allegations of his prior misconduct from 1984-1996 were admissible and could be used by the court examiners in the formulation of their opinions. A district court is to make a civil-commitment determination based upon the entire record pursuant to the Minnesota Rules of Evidence. Minn. Stat. § 253B.08, subd. 7 (2010). In a civil-commitment proceeding, the district court "may admit all relevant, reliable evidence, including but not limited to the [subject's] medical records, without requiring foundation witnesses." Minn. Spec. R. Commit. & Treat. Act. 15.

"The decision of whether to admit or exclude evidence is within the district court's discretion and will be reversed only if the court has clearly abused its discretion." *In re Commitment of Ramey*, 648 N.W.2d 260, 270 (Minn. App. 2002), *review denied* (Minn. Sept. 17, 2002). Evidence in these proceedings enjoys a presumption of admissibility. *In re Commitment of Williams*, 735 N.W.2d 727, 731 (Minn. App. 2007), *review denied* (Minn. Sept. 26, 2007). "Evidence is relevant if it has any tendency to make the

existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* (quotation omitted).

Appellant's central argument regarding the admissibility of the records appears to be that the allegations are anywhere from 16-27 years old and none resulted in a conviction.[2] Appellant is right about the "staleness." But "[i]ncidents establishing a course of harmful sexual conduct need not be recent and are not limited to those that resulted in a criminal conviction." *Id.*; *see also In re Ramey*, 648 N.W.2d at 268 (stating that court may consider conduct that did not result in a conviction); *In re Irwin*, 529 N.W.2d 366, 374 (Minn. App. 1995) (stating that conduct need not be recent), *review denied* (Minn. May 16, 1995). Appellant's argument regarding the age of the allegations and the lack of resulting convictions is not without logic, but does not persuade us that the trial court erred.

Appellant also seems to argue that the district court abused its discretion by admitting the evidence because the allegations are "clearly prejudicial to [a]ppellant." *See* Minn. R. Evid. 403 (providing for the exclusion of relevant evidence when "its probative value is substantially outweighed by the danger of unfair prejudice"). Appellant's argument regarding prejudice centers on his assertion that admission of the evidence "allows the court examiners to take these allegations as true and use the allegations as a basis to form their opinions" and "in the application of actuarial

[2] The 1984 allegations were not prosecuted. The 1987 allegations were referred to the misdemeanor bureau after the prosecuting authority concluded that prosecution would be unsuccessful. The 1996 allegations were dismissed for lack of probable cause because "the State would not withstand a motion for a judgment of acquittal."

instruments." But "[u]nfair prejudice under rule 403 is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). Here, appellant offers no evidence that the records of allegations persuade by "illegitimate means," other than his argument—which we have rejected based on precedent—that the allegations are stale and did not result in convictions. The allegations were damaging to appellant. Their probative value is argumentative, but not outweighed by the risk of unfair prejudice. The district court did not abuse its discretion by admitting the records.

II.

Appellant argues that the evidence does not establish that he meets the standards for commitment as an SDP. The procedure for civil commitment of SDP is governed by Minn. Stat. § 253B.18, subd. 1 (2010). *See also* Minn. Stat. § 253B.02, subd. 17(b) (2010) (defining "person who is mentally ill and dangerous" to include "[a] person committed as . . . a sexually dangerous person"). A person is considered sexually dangerous if the person (1) has engaged in a course of harmful sexual conduct, as that term is used in Minn. Stat. § 253B.02, subd. 7a (2010); (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 by the statute. Minn. Stat. § 253B.02, subd. 18c (2010).

It is not necessary to prove that the person to be committed has an inability to control his sexual impulses. *Id*., subd. 18c(b). 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*). The supreme court has construed the statutory phrase "likely to engage in acts of harmful sexual conduct" to require a showing that the offender is "highly likely" to engage in harmful sexual conduct. *In re Linehan*, 557 N.W.2d 171, 190 (Minn. 1996) (*Linehan III*), *vacated on other grounds*, 522 U.S. 1011, 118 S. Ct. 596 (1997), *aff'd on remand*, 594 N.W.2d 867.

A petitioner must prove the elements of commitment by clear-and-convincing evidence. Minn. Stat. §§ 253B.18, subd. 1(a), .185, subd. 1 (2010). On review, we defer to the district court's findings of fact and will not reverse those findings unless they are clearly erroneous. *In re Ramey*, 648 N.W.2d at 269. But we review de novo "whether there is clear and convincing evidence in the record 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).

Appellant presents three arguments regarding the sufficiency of the evidence: (1) that the district court incorrectly used the preponderance-of-the-evidence standard, (2) that the district court erred by applying a rebuttable presumption of harmful sexual conduct to convictions not enumerated in the commitment statute, and (3) that the district court erred by concluding that appellant suffered from a paraphilia.

A. Burden of Proof

The petitioner in a civil-commitment case must prove the elements of commitment by clear-and-convincing evidence. Minn. Stat. §§ 253B.18, subd. 1(a), .185, subd. 1. Clear-and-convincing evidence is "more than a preponderance of the evidence but less

than proof beyond a reasonable doubt" and "will be shown where the truth of the facts asserted is 'highly probable.'" *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978).

Appellant's challenge is based on the fact that a number of the district court's findings begin with the phrase: "The preponderance of the evidence." However, each of the findings cited by appellant goes on to indicate that the district court made its findings under the more stringent clear-and-convincing-evidence standard. While the district court's inclusion of the phrase "the preponderance of the evidence" was unfortunate, appellant's argument that the wording necessitates the conclusion that the district court utilized the incorrect burden of proof is unavailing given the language of the order as a whole.

B. Rebuttable Presumption of Harmful Sexual Conduct

"'Harmful sexual conduct' means sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another." Minn. Stat. § 253B.02, subd. 7a(a). There is a rebuttable presumption that first-, second-, third-, and fourth-degree criminal sexual conduct "creates a substantial likelihood that a victim will suffer serious physical or emotional harm." *Id.*, subd. 7a(b). This rebuttable presumption also applies to certain other conduct, including first-degree burglary, "[i]f the conduct was motivated by the person's sexual impulses or was part of a pattern of behavior that had criminal sexual conduct as a goal." *Id.*

Here, the district court found that appellant's four burglary convictions—two in the first-degree, one in the second-degree, and one in the fourth-degree—were sexually motivated and therefore raised the rebuttable presumption that the victims suffered

serious physical or emotional harm. The district court went on to find that appellant had not rebutted the presumption, and that the conduct constituted "harmful sexual conduct" las that term is used in the commitment statute. Appellant challenges this finding, arguing that the rebuttable presumption does not apply to second- or fourth-degree burglary and the harm was "sufficiently limited to rebut the statutory presumption" as to the two first-degree burglary convictions.

Appellant is correct that the statute does not include second- or fourth-degree burglary as conduct that gives rise to the rebuttable presumption. *See* Minn. Stat. § 253B.02, subd. 7a(b) (listing 18 offenses that may give rise to the statutory presumption); *State v. Williams*, 771 N.W.2d 514, 523 (Minn. 2009) (stating that the statutory-construction canon of "expressio unius est exclusio alterius" provides that "the expression of one thing is the exclusion of another"). Because the statute does not provide for a presumption that second- and fourth-degree burglary, when motivated by a person's sexual impulses, constitutes harmful sexual conduct, the district court erred by applying such a presumption to appellant's convictions on second- and fourth-degree burglary.

But the presumption may apply to first-degree-burglary convictions. Appellant asserts that "[a]t worst we have court examiners inferring that [his] burglaries were sexually motivated," as the examiners "cannot definitively state that such is the case." But the examiners testified that the crimes were sexually motivated, and the district court credited this testimony. "The district court acts within its discretion in determining the credibility of expert testimony, and we defer to those assessments." *In re Commitment of*

Stone, 711 N.W.2d 831, 839 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). The experts testified that appellant's behavior that resulted in the first-degree convictions was sexually motivated. That finding is proper and nowhere near clearly erroneous.

Appellant relies on this court's opinion in *In re Robb*, 622 N.W.2d 564 (Minn. App. 2001), *review denied* (Minn. Apr. 17, 2001), in support of his argument that he has rebutted the statutory presumption. In *Robb*, we reversed the commitment as an SPP, commenting that the behavior was repellent, "but it did not inflict the kind of harm that is contemplated by the sexual-psychopathic-personality statute." 622 N.W.2d at 572. We went on to consider whether the harm was sufficiently limited to rebut the presumption for purposes of SDP commitment and concluded that it was not. *Id.* at 573. We affirmed the commitment as an SDP, but not an SPP. *Id.* at 576.

Here, appellant argues that because his first-degree burglary convictions "only involved the touching of one victim on the buttocks and exposing himself in the other burglary," the harm was sufficiently limited to rebut the statutory presumption. We disagree. This argument ignores the emotional-harm aspect of the burglaries. Appellant has offered no evidence, either to the district court or now on appeal, that his conduct rebuts the presumption.

Because appellant's first-degree burglary convictions give rise to the statutory presumption that his actions created a substantial likelihood that his victims suffered serious physical or emotional harm, the district court's erroneous application of the presumption to his second- and fourth-degree burglary convictions is error, but does not change the totality of the record. Appellant did not present evidence to rebut this

presumption for first-degree burglary convictions. The district court did not err by finding that appellant had engaged in harmful sexual conduct, as that term is used in Minn. Stat. § 253B.02, subd. 7a.

C. Paraphilia

Appellant also challenges the district court's conclusion that appellant suffered from paraphilia, as "[t]he only paraphilia offered by the psychologists in this case was paraphilia, not otherwise specified." Appellant notes that Dr. Alberg characterized non-specified paraphilia as a diagnosis to rule out. Dr. Alberg is an expert. But we rejected a substantially similar argument in *In re Commitment of Navratil*, 799 N.W.2d 643 (Minn. App. 2011). In that case, appellant argued "that his personality disorder does not rise to the level required under the SDP statute because it is 'not otherwise specified.'" 799 N.W.2d at 648. We rejected the argument then, noting that use of the "not otherwise specified" designation does not mean that it is "less of a disorder." *Id.*

Related to this issue, appellant argues that the district court's finding that he is unable to control his sexual impulses[3] was erroneous. As discussed above, the evidence supports the district court's finding that appellant suffers from paraphilia. And the experts testified that this paraphilia prevents him from adequately controlling his sexual impulses. This satisfies the standard that the supreme court articulated in *Linehan IV*.

[3] "Unable to control his sexual impulses" is a subjective phrase, and often completely useless as a reliable indicator, but it still remains on the books.

See 594 N.W.2d at 876 (requiring showing that sexual disorder "does not allow [patient] to adequately control [his] sexual impulses").

Affirmed.