STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2029

In the Matter of the Civil Commitment of:
Clifford David Ostby.

Filed April 2, 2012
Affirmed
Klaphake, Judge

Roseau County District Court
File No. 68-PR-09-217

Richard N. Sather, II, Sather Law Office, Thief River Falls, Minnesota (for appellant Ostby)

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

Considered and decided by Stoneburner, Presiding Judge; Klaphake, Judge; and Cleary, Judge.

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

KLAPHAKE, Judge

Appellant Clifford David Ostby was civilly committed to the Minnesota Sex Offender Program (MSOP) as a sexually dangerous person (SDP). Appellant challenges the district court's order, arguing that there is insufficient evidence to sustain the indeterminate commitment. Because there is clear and convincing record evidence that appellant meets the standards for commitment as an SDP, we affirm.

D E C I S I O N

Standard of Review

A petition for civil commitment as an SDP must be proved by clear and convincing evidence. *In re Civil Commitment of Stone*, 711 N.W.2d 831, 836 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). We review the district court's factual findings for clear error and the district court's determination of whether the statutory standard for commitment has been satisfied as a question of law subject to de novo review. *Id.* Evidence is viewed in the light most favorable to the district court's conclusion. *Id.* at 840.

Sufficiency of the Evidence

Appellant challenges the sufficiency of the evidence to support his commitment as an SDP. A "sexually dangerous person" is defined as a person 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) "as a result, is likely to engage in acts of harmful sexual conduct." Minn. Stat. § 253B.02, subd. 18c(a) (2010). The state need not show that the person has a complete inability to control sexual impulses. *Id.*, subd. 18c(b) (2010). Appellant asserts that the evidence is insufficient to show (1) that his conduct constitutes a course of harmful sexual conduct; and (2) that his personality disorder makes it highly likely that he will reoffend.

"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) (2010). There is a rebuttable presumption that fourth-degree criminal sexual

conduct creates a substantial likelihood that a victim will suffer serious physical or emotional harm. *Id.*, subd. 7a(b) (2010). Appellant was convicted of fourth-degree criminal sexual conduct for incidents involving 15-year-old K.G.L. and 12-year-old A.M.D. The state is not obligated to prove that a victim suffered actual physical or emotional harm, but must merely demonstrate that there was a substantial likelihood of such harm. *In re Civil Commitment of Martin*, 661 N.W.2d 632, 639 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003). Experts at the commitment hearing opined that sexual abuse victims, particularly child victims, tend to suffer emotional harm. Although neither victim testified at the commitment hearing, A.M.D told police that she was scared and worried when appellant, who was a stranger to her, had sexual contact with her.

The state must also show that there has been a "course of harmful sexual conduct." While not defined in the statute, this court has defined a "course" as "a systematic or orderly succession" or "a sequence." *In re Civil Commitment of Ramey*, 648 N.W.2d 260, 268 (Minn. App. 2002), *review denied* (Minn. Sept. 17, 2002). For purposes of the commitment statute, a succession of events can include both charged and uncharged offenses. *Stone*, 711 N.W.2d at 837. Appellant admitted to a series of sexual encounters with females under the age of 18 and under the age of 16, some involving sexual penetration under circumstances that amounted to third- or fourth-degree criminal sexual conduct.

Two of the three experts, Dr. Marshall and Dr. Linderman, concluded that appellant engaged in a course of harmful sexual conduct, citing convictions against K.G.L. and A.M.D., as well as a self-reported offense against a third victim, 15-year-old

J.G. Marshall and Linderman also considered a probation violation which involved appellant initiating sexual intercourse with 17-year-old E.W. while appellant was at a Department of Corrections (DOC) house. Linderman noted that appellant self-reported up to 10 additional contacts with girls as young as 15 years old. Dr. Austin, the third expert, opined that appellant engaged in far more sexual conduct against minor females than his record of convictions shows. Marshall concluded that appellant's probation violations, which consisted of having contact with or engaging in sexually laced correspondence with minors several times, even after receiving sex offender treatment and while living in a DOC house, demonstrated a continuing pattern of behavior. All three experts agreed that appellant did not take responsibility for his actions and was not honest about them. All three experts agreed that the sexual conduct against appellant's known victims would cause them emotional or physical harm.

Appellant argues that he was not involved in a course of harmful sexual conduct because he was convicted of only two sex offenses and the type of the sexual contact for each offense was different. However, although appellant asks this court to assume that "people are sexual in nature" and to discount his other behavior, a course of harmful sexual conduct need not be based merely on behavior for which appellant was convicted. *Stone*, 711 N.W.2d at 837. Many of the other sexual incidents occurred while appellant was on probation and operating under strict scrutiny and narrow behavioral guidelines. All of this conduct provides clear and convincing evidence that appellant has engaged in a course of harmful sexual conduct.

The second prong of the SDP definition requires proof of a sexual or personality disorder or dysfunction; this has been interpreted to mean that the proposed patient's disorder "'makes it difficult, if not impossible, for the person to control his dangerous behavior.'" *In re Linehan*, 594 N.W.2d 867, 876 (Minn. 1999) (*Linehan IV*) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 358, 117 S. Ct. 2072, 2080 (1997)). Appellant acknowledges that he has a sexual or personality disorder, but argues that the evidence does not show that his disorder causes him to lack adequate control over his sexual impulses.

The three experts agreed that appellant has an anti-social personality disorder and alcohol or marijuana dependency. All three agreed that appellant is chemically dependent, cannot control his use of alcohol, and committed crimes while using alcohol or other drugs. According to the experts, an antisocial personality disorder leads a person to "not conform to social norms with respect to lawful behaviors"; such a person "acts without regard to the safety of others and [does not learn] from mistakes." Here, Austin stated that appellant's "sex offenses appear to be related to a sense of entitlement and manipulative and deceptive behaviors." The three experts described appellant as "reckless," "impulsive," "[showing] little remorse," and "not affected by the loss or pain of others." The experts considered appellant to exhibit characteristics of psychopathy, an extreme form of an antisocial personality disorder that manifests itself in impulsivity; the experts stated that sanctions are of little use in controlling this behavior. Although Austin opined that appellant's diagnosis does not cause him to lack adequate control, he nevertheless was of the opinion that if appellant re-offended, it would be due to his

personality disorder and "[u]nder the right conditions, such as significant personal stress combined with the use of mood-altering substances and the desire for sexual release," appellant would be unable to adequately control his sexual impulses. All three experts noted the numerous violations that occurred when appellant was on intensive supervised release (ISR).

We conclude that there is clear and convincing evidence showing that appellant's antisocial personality disorder makes it difficult, if not impossible, to control his sexual impulses. *See Martin*, 661 N.W.2d at 639 (concluding that evidence supported commitment as SDP when proposed patient suffered from antisocial personality disorder that affected his ability to control his harmful sexual behavior).

Finally, as to the last factor, whether an offender is highly likely to re-offend, the district court must consider a number of factors, including:

> (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 (citing *In re Linehan*, 518 N.W.2d 609, 614 (Minn. 1994) (*Linehan I*)). Although these factors were originally set forth in *Linehan I*, a sexual psychopathic personality case, the supreme court applied them specifically to an analysis of SDP commitment in *In re Linehan*, 557 N.W.2d 171, 189 (Minn. 1996) (*Linehan III*),

cert. granted, judgment vacated, and case remanded, 522 U.S. 1011, 118 S. Ct. 596 (1997), *aff'd on remand*, 594 N.W.2d 867 (Minn. 1999).

As to the first factor, Marshall and Linderman agreed that appellant's relatively young age was a risk factor, as was the fact that his antisocial behavior began early in life and persisted, and that he had very sporadic employment. Austin testified that appellant presented several demographic characteristics that collectively would increase his risk of re-offending.

As to the second factor, the history of violent behavior, Marshall noted two violations of orders for protection, and testified that sexual assaults against minor females are inherently violent. Linderman added that appellant had a juvenile adjudication for assault with a baseball bat. Some of the prison records indicate that appellant engaged in disorderly or assaultive conduct.

As to the third factor, base rate statistics, Marshall and Linderman testified that all of the actuarial and diagnostic tools indicate that appellant is more likely to re-offend, although they cautioned that they would not recommend commitment based solely on these tools. Linderman thought that the test results understated the probabilities of appellant reoffending.

As to the fourth factor, sources of stress in appellant's environment, Marshall testified that appellant would have difficulty because of his chemical dependency issues and noted his numerous probation violations, some of which occurred when appellant used alcohol to deal with stress. She added that as a level three offender, he would be subject to stress. She noted that he had no employment during his most recent release

and violated probation while in a DOC house. Linderman testified that appellant was a greater risk because he had no network of friends, and because of his chemical dependency, impulsivity, and irresponsibility. Austin stated that appellant would find it stressful to readjust to society and added that he was not successful during his previous releases. Austin also expressed reservations about appellant's release, because he would no longer be under DOC supervision. Austin also recognized appellant's marginal job skills and poor attitude toward work, as well as a "thin" support system.

As to the fifth factor, the similarity of the future or present contexts to the past, all three experts agreed that appellant would most likely return to the same environment, making re-offense more likely. Marshall and Linderman both noted that appellant had quickly reverted to rule-breaking behavior during each release, even while under ISR, and that appellant would no longer be under supervision, so there would be less incentive to obey rules.

As to the last factor, the history of sex offender treatment, all three experts stated that appellant had been discharged multiple times from treatment programs, finally completing a program at the Minnesota Correctional Facility at Rush City; but even the discharge report from that program reflects aggression and lack of control. Marshall noted that appellant violated his ISR within a short time of completing this program by having sexual intercourse with E.W. All three experts agreed that appellant did not internalize or absorb treatment concepts. The district court found the experts, particularly Marshall and Linderman, to be credible and concluded that it was highly likely that

appellant would re-offend. There is clear and convincing evidence in the record to support this conclusion.

Having thoroughly reviewed the record, we conclude that the evidence is clear and convincing and that the district court properly applied the standards for appellant's indeterminate civil commitment.

Affirmed.