STATE OF MINNESOTA
IN COURT OF APPEALS
A11-792

In the Matter of the Civil Commitment of: Michael Duane Johnson.

Filed September 26, 2011
Affirmed
Schellhas, Judge

Koochiching County District Court
File No. 36-PR-10-165

Kimberly A. Wimmer, Wimmer Law Office P.A., Littlefork, Minnesota (for appellant Michael Duane Johnson)

Lori Swanson, Attorney General, John D. Gross, Assistant Attorney General, St. Paul, Minnesota; and

Jeffrey S. Naglosky, Koochiching County Attorney, International Falls, Minnesota (for respondent)

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

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

SCHELLHAS, Judge

Appellant challenges his civil commitment as a sexually dangerous person (SDP) and sexual psychopathic personality (SPP), arguing that (1) collateral estoppel bars the relitigation of identical issues from his previous civil-commitment trial, (2) the evidence is insufficient to civilly commit him as an SDP or SPP, and (3) he proved that a less-restrictive alternative to commitment exists that is consistent with his treatment needs and the requirements of public safety. We affirm.

FACTS

Between approximately March 1999 and October 2000, when appellant Michael Johnson was 17 to 19 years old, he had sexual intercourse approximately 150 times with A.A.S., who was 13 to 14 years old. Johnson knew that A.A.S. was 13 years old when they started having sexual intercourse. In June 2003, the State of Minnesota charged Johnson with third-degree criminal sexual conduct. Johnson pleaded guilty, and the district court imposed an 18-month sentence, stayed execution, and placed him on probation for 15 years. Among other conditions, Johnson's probation included one year at the Northeast Regional Correction Center.

In 1999 to 2000, at age 18 or 19, Johnson had sexual intercourse twice with M.S., once when she was 12 years old and once when she was 13 years old. According to Johnson's testimony, he thought that M.S. was 13 years old both times they had sexual intercourse. The state did not charge Johnson for his conduct with M.S.

In May 2002, at age 21, Johnson had sexual intercourse with 14-year-old H.M.H. Afterwards, Johnson told H.M.H. to "keep it quiet because he could get into a lot of trouble." The state charged Johnson with third-degree criminal sexual conduct but subsequently dismissed the charge pursuant to a plea agreement, when Johnson pleaded guilty to two counts of third-degree criminal sexual conduct for his conduct with A.A.S., discussed above, and C.L.M., discussed below.

In December 2002, at age 21, Johnson had sexual intercourse nine times with 13-year-old L.K.B. The state charged Johnson with third-degree criminal sexual conduct but also dismissed this charge pursuant to the plea agreement discussed above.

Also in December 2002, Johnson had sexual intercourse with 12-year-old C.L.M. After the state charged Johnson with first-degree criminal sexual conduct, he pleaded guilty to third-degree criminal sexual conduct, and the district court imposed an 18-month sentence consecutive to his previous stayed 18-month sentence related to his crime against A.A.S., stayed execution of his new sentence, and placed him on probation for 15 years to run concurrent to his 15-year probation related to A.A.S.

In February 2003, at age 21, Johnson had sexual intercourse with 14-year-old K.J.M. The state did not charge Johnson for this offense.

Also in February 2003, Johnson had sexual intercourse with 13-year-old H.N.M. The state charged Johnson with first-degree criminal sexual conduct, alleging that Johnson, as the weight-room supervisor at H.N.M.'s school, was in a position of authority over her. The state also charged Johnson with third-degree criminal sexual conduct. The district court concluded that, because Johnson's position monitoring the weight room at H.N.M.'s school was a voluntary, unpaid position, he was not in a position of authority and therefore dismissed the charge of first-degree criminal sexual conduct. The state dismissed the third-degree charge, stating that it was "not prepared to proceed with this matter at this time."

In July 2005, at age 24, Johnson had sexual intercourse with 14-year-old M.M.C. and sexual contact with 14-year-old C.A.P. The state charged Johnson with third-degree criminal sexual conduct in connection with M.M.C. and fourth-degree criminal sexual conduct in connection with C.A.P. The state also charged Johnson with first-degree witness tampering, after he contacted C.A.P. and requested that she lie and deny the sexual contact with him. Johnson pleaded guilty to third-degree criminal sexual conduct,

and the state dismissed the fourth-degree charge and the witness-tampering charge. The district court sentenced Johnson to 36 months' imprisonment consecutive to his two consecutive 18-month sentences for his crimes against A.A.S. and C.L.M. The court executed all three sentences.

In January 2008, after Johnson served his sentences, Koochiching County petitioned to civilly commit him as an SDP and SPP. After a three-day trial, the district court issued findings of fact, conclusions of law, order for judgment, and judgment. The court noted factual inaccuracies and other discrepancies in the two court-appointed examiners' reports and concluded that the county failed to meet its burden of proof to commit Johnson as an SDP or SPP. On October 23, 2008, the district court ordered Johnson's release in accordance with the terms of his supervised release plan. Johnson's release plan provided that he could not use a computer to access social networking sites or have direct or indirect contact with minors without prior approval.

On November 2, 2009, Johnson's supervising agent received information that Johnson had a Facebook account and had minor females listed as "friends." The agent logged onto Facebook, found Johnson's profile, and confirmed that the majority of Johnson's "friends" were young females. The officer noted the names of four female "friends" whom the officer believed were under age 18: A.B., age 15; H.N., age 17; H.J., age 17; and A.S., age 14. On November 4, parole agents arrested Johnson at his home. Johnson admitted that he had minor females as "friends" on his Facebook account and that he had sent messages to several of them. The Minnesota Department of Corrections found that Johnson violated the terms and conditions of his release, revoked his release, and imposed a sanction of 150 days in prison.

On March 16, 2010, Koochiching County again petitioned to civilly commit Johnson as an SDP and SPP. The district court appointed Dr. Mary Kenning as an examiner. Johnson did not request a second examiner, but he moved to dismiss the petition, arguing that the issues were identical to the 2008 civil commitment proceedings and that the county was collaterally estopped from proceeding with its petition. The district court denied Johnson's motion, concluding that collateral estoppel did not apply to the county's petition because it alleged new facts and, therefore, the issues were not identical to the 2008 commitment proceeding.

At a three-day trial, the district court heard testimony from seven witnesses and received 29 exhibits. The court concluded that clear and convincing evidence existed that Johnson met the requirements for commitment as an SDP and SPP and that no less-restrictive alternative existed. The court initially committed Johnson to the Minnesota Sex Offender Program (MSOP) as an SDP and SPP. After a 60-day review hearing, the district court indeterminately committed Johnson to MSOP as an SDP and SPP.

This appeal follows.

D E C I S I O N

Collateral Estoppel

Johnson argues that collateral estoppel bars the county from relitigating the issue of whether to civilly commit him. "Whether collateral estoppel precludes litigation of an issue is a mixed question of law and fact that we review de novo." *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004). Collateral estoppel applies when the following four prongs are met:

> (1) the issue must be identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or was in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Id. (quotation omitted).

"Collateral estoppel is meant to apply to an issue of ultimate fact." *In re McPherson*, 476 N.W.2d 520, 521 (Minn. App. 1991) (quotation omitted), *review denied* (Minn. Dec. 13, 1991). In *McPherson*, this court held that collateral estoppel does not apply to a petition for the civil commitment of a developmentally disabled individual because the individual's "condition or circumstances may change, making a new petition for commitment appropriate." *Id.* at 522. Therefore, the determination of whether a person is in need of commitment "does not involve the determination of an ultimate fact that can preclude relitigation of the issue." *Id.* Similarly, we conclude that the condition or circumstances of a potential SDP or SPP are subject to change.

Since Johnson's 2008 commitment proceeding, he used a computer to access an Internet social networking website, created a profile, and used the social networking website to contact minor females in violation of the terms and conditions of his supervised release. Upon discovery of Johnson's actions, the mental-health center, where he received sexual-offender treatment pursuant to the terms of his supervised release, terminated him from the program. Johnson's failure to abide by the terms and conditions of his supervised release, failure to complete mandatory sex-offender programming, and failure to refrain from high-risk behavior by contacting minor females through Facebook represent changed circumstances. The district court therefore did not err by denying Johnson's motion to dismiss the commitment petition based on collateral estoppel.

Sufficiency of the Evidence

The district court shall civilly commit a person under the Minnesota Commitment and Treatment Act if it finds by clear and convincing evidence the need for commitment. Minn. Stat. §§ 253B.18, subd. 1(a), .185, subd. 1(a), (c) (2010). Whether the record contains clear and convincing evidence that the statutory criteria are met presents a question of law, which this court reviews de novo. *In re Commitment of Martin*, 661 N.W.2d 632, 638 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003). We review the record in the light most favorable to the district court's decision, and we will not set aside the findings of fact unless they are clearly erroneous. *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995). We defer to the district court's role as the fact-finder and its opportunity to assess witness credibility. *In re 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 trial court's evaluation of credibility is of particular significance." *Knops*, 536 N.W.2d at 620.

SDP

Johnson argues that the petitioner failed to establish by clear and convincing evidence that Johnson is an SDP. An SDP is an individual 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) (2010). When committing an individual as an SDP, "it is not necessary to prove that the person has an inability to control the person's sexual

impulses." Minn. Stat. § 253B.02, subd. 18c(b) (2010). But an individual must have a "present disorder or dysfunction [that] does not allow [him] to adequately control [his] sexual impulses." *In re Linehan*, 594 N.W.2d 867, 876 (Minn. 1999) (*Linehan IV*).

The record contains clear and convincing evidence to support the district court's finding that Johnson engaged in a course of harmful sexual conduct. "Harmful sexual conduct" is "sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another." Minn. Stat. § 253B.02, subd. 7a(a) (2010). A rebuttable presumption exists that third-degree criminal sexual conduct "creates a substantial likelihood that a victim will suffer serious physical or emotional harm." *Id.*, subd. 7a(b) (2010).

Dr. Kenning testified that Johnson engaged in a course of harmful sexual conduct. Johnson victimized at least nine underage females and possibly as many as 18. Johnson's conduct created a substantial likelihood of serious physical or emotional harm in the form of depression, anxiety, or eating disorders. The district court found Dr. Kenning's testimony to be credible and persuasive.

Additionally, Johnson has multiple convictions for third-degree criminal sexual conduct, which creates a statutory presumption of harmful sexual conduct, and the record contains no evidence rebutting the presumption. Johnson argues that none of his crimes or incidents involved physical force or violence, and he argues that no evidence exists that the victims experienced any actual physical or emotional harm. Johnson's argument is unpersuasive.

First, the conduct does not need to 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). Second, the statute does not require that a victim suffer actual physical or emotional harm; the statute requires that the conduct create a substantial likelihood of such harm. *In re Commitment of Martin*, 661 N.W.2d at 639.

Based on Dr. Kenning's testimony and the statutory presumption, the record contains clear and convincing evidence that Johnson engaged in a course of harmful sexual conduct.

The record also contains clear and convincing evidence that Johnson has "manifested a sexual, personality, or other mental disorder or dysfunction" that does not allow him to adequately control his sexual impulses. *See* Minn. Stat. § 253B.02, subd. 18c(a)(2); *Linehan IV*, 594 N.W.2d at 876. Dr. Kenning opined that Johnson suffers from a personality disorder—not otherwise specified, with narcissistic and antisocial features—and paraphilia—not otherwise specified, whereby Johnson has "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with an adolescent girl." Paraphilia is considered a sexual deviance.

Johnson appears to argue that he does not suffer from paraphilia but, instead, suffers from hebophilia, which is a disorder not listed in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994) (DSM-IV). Johnson also argues that most sex offenders could be diagnosed with personality disorder with narcissistic and antisocial features.

Dr. Kenning acknowledged that hebophilia does not appear in the DSM-IV, but she specifically testified that Johnson suffers from paraphilia, not otherwise specified, and personality disorder, not otherwise specified, with narcissistic and antisocial features.

Dr. Kenning also opined that, as a result of these disorders, appellant lacks the ability to adequately control his harmful sexual behavior. The district court found Dr. Kenning's testimony to be credible. *See Ramey*, 648 N.W.2d at 269 (stating that appellate courts defer to the district court's evaluation of witness credibility). The record contains clear and convincing evidence that Johnson has manifested a sexual, personality, or other mental disorder or dysfunction that does not allow him to adequately control his sexual impulses.

The third prong is whether Johnson is highly likely to engage in acts of harmful sexual conduct. *See Linehan IV*, 594 N.W.2d at 876 (interpreting the SDP statute as requiring the future harmful conduct to be "highly likely" in order to commit a patient). A district court should consider six factors in determining whether an offender is highly likely to reoffend: (1) the offender's relevant demographic traits; (2) the offender's history of violent behavior; (3) the base-rate statistics for violent behavior among individuals with the offender's background; (4) sources of stress in the offender's environment; (5) the similarity of the present or future context to past contexts in which the offender has used violence; and (6) the offender's record with respect to sex-therapy programs. *In re Linehan*, 518 N.W.2d 609, 614 (Minn. 1994) (*Linehan I*) (discussing the guidelines for predicting dangerousness under the predecessor psychopathic-personality statute); *see also In re Linehan*, 557 N.W.2d 171, 189 (Minn. 1996) (*Linehan III*) ("We conclude that the guidelines for dangerousness prediction in *Linehan I* apply to the SDP Act . . . ."), *vacated on other grounds*, *Linehan v. Minnesota*, 522 U.S. 1011, 118 S. Ct. 596 (1997), *aff'd on remand*, *Linehan IV*, 594 N.W.2d 867. Johnson argues that he does not meet the *Linehan* criteria.

Relevant Demographic Traits

Dr. Kenning opined that Johnson's age and gender increase his risk to reoffend.

History of Violent Behavior

Dr. Kenning stated that "Johnson has a history of attraction to adolescent girls and at least 9 victims. He does not have a history of physically violent behavior in addition to his sex offenses."

Base-Rate Statistics for Violent Behavior Among Individuals with Johnson's Background

Dr. Kenning opined that "[y]oung adult offenders (who have offended during adulthood) are more likely to recidivate than older offenders." Dr. Kenning testified that Johnson's actuarial scores indicate that his "risk of reoffending is much higher than the base rate for the average sex offender." Johnson's actuarial scores in three different tests all indicate a high risk of recidivism.[1] In one test, Johnson scored in the 94.9 to 97.8 percentile range. In other words, only approximately five percent of sex offenders are more likely to reoffend than Johnson. Dr. Kenning opined that Johnson is highly likely to engage in harmful sexual conduct in the future. Dr. Kenning based her opinion on Johnson's record, her interview with Johnson, and the actuarial scores. Dr. Kenning noted that Johnson has "made some progress, but . . . not enough to be safe in the community" because "he ignores what he hears in treatment . . . he doesn't think he's like

[1] Johnson notes that he received a much lower score on an identical test administered by the Minnesota Department of Corrections (DOC). But Dr. Kenning testified that the DOC does not always have the same records and evaluators such as herself often have more information. Johnson also argues that Dr. Kenning incorrectly scored him as if he had a stranger victim. Dr. Kenning testified that a stranger victim is someone who knew the offender less than 24 hours prior to sexual contact. Dr. Kenning explained that C.A.P. was a stranger victim, which is why she scored him that way.

[other people in treatment, and] he's had difficulty admitting that the things he's done are actually wrong." Dr. Kenning also noted that Johnson reoffended while on probation and, most recently, was in contact with his "target population."

Sources of Stress in Johnson's Environment

Dr. Kenning observed that "[i]f [Johnson] returns to the community, he'll be . . . under the same conditions that he was under when he violated the terms of his probation, so . . . that increases his risk." The community would also be notified of his release, which "can be very stressful for people who are being released back into the community."

Similarity of Present or Future Context to Past Contexts in Which Johnson Used Violence

Dr. Kenning opined that this factor increases Johnson's risk of recidivism because Johnson would be returning to the same situation he was in when he violated his parole.

Offender's Record with Respect to Sex-Therapy Programs

Johnson completed sex-offender treatment in 2004 but reoffended in 2005. He has since failed to complete three programs, two of which he failed due to contact with minor females. Dr. Kenning testified that Johnson views "treatment as a series of assignments that he needs to get through rather than understanding that he needs to apply these things in his life. . . . [H]e just doesn't quite seem to be able to make these things work consistently in his life and to apply them."

The district court weighed the *Linehan* factors and found Dr. Kenning's opinions credible and persuasive in finding that Johnson is highly likely to engage in acts of harmful sexual conduct. Viewing the record in the light most favorable to the decision,

the record contains clear and convincing evidence that Johnson is highly likely to engage in acts of harmful sexual conduct. Because the record contains clear and convincing evidence with respect to each element of the SDP statute, the district court did not err by committing Johnson as an SDP.

SPP

Johnson argues that the county failed to establish by clear and convincing evidence that Johnson is an SPP. Under Minnesota law, sexual psychopathic personality is defined as follows:

> [T]he 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 (2010).

The first element is whether Johnson is irresponsible for personal conduct with respect to sexual matters based on one or a combination of the four conditions. Dr. Kenning opined that "Johnson's impulsivity is well documented in his history and his behavior in school" and "[h]is lack of customary standards of good judgment is evident in his repeated offenses." Johnson has also "failed to appreciate the consequences of his acts" because although "[h]e has acknowledged the far reaching effects of his actions[,] . . . he does not appear to have integrated them in a meaningful manner." In Dr. Kenning's opinion, "these conditions render him irresponsible for his conduct with regard to sexual matters." The district court found Dr. Kenning's opinions credible and

persuasive. Viewing the record in the light most favorable to the decision, clear and convincing evidence exists that Johnson meets three of the four conditions, which render him irresponsible for personal conduct with respect to sexual matters.

The next element is whether Johnson engaged in a habitual course of misconduct in sexual matters. Dr. Kenning noted that Johnson engaged in a habitual course of sexual misconduct. Johnson abused at least nine 12- to 14-year-old females by manipulating them into sexual contact. Johnson abused three of the victims multiple times, including one approximately 150 times. The district court found Dr. Kenning's opinion credible and persuasive. Viewing the record in the light most favorable to the decision, clear and convincing evidence exists that Johnson engaged in a habitual course of misconduct in sexual matters.

The next element is whether Johnson has an utter lack of power to control his sexual impulses. In considering this element, the district court must weigh several significant factors: (1) "the nature and frequency of the sexual assaults"; (2) "the degree of violence involved"; (3) "the relationship (or lack thereof) between the offender and the victims"; (4) "the offender's attitude and mood"; (5) "the offender's medical and family history"; (6) "the results of psychological and psychiatric testing and evaluation"; and (7) any "factors that bear on the predatory sex impulse and the lack of power to control it." *In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994).

Nature and Frequency of the Sexual Assaults

Johnson victimized numerous adolescent females with a high degree of frequency, indicating an utter lack of power to control his sexual impulses.

Degree of Violence Involved

The supreme court has analyzed whether sexual assaults are violent in the context of whether they create "a substantial likelihood of serious physical or mental harm." *In re Rickmyer*, 519 N.W.2d 188, 190 (Minn. 1994). While a perpetrator may not cause actual physical injury collateral to sexual assaults, that does not mean that the assaults are necessarily "non-violent within the meaning of the sexual psychopathic personality statute," as perpetrators will "only engage[] in the amount of force necessary to accomplish [their] will on very young victims." *In re Preston*, 629 N.W.2d 104, 113 (Minn. App. 2001) (holding that "collateral physical force" used to restrain victims, combined with coercion, is sufficient to support a finding that sexual misconduct is violent in nature). "It would be absurd to hold that because less force was needed to subdue an extremely young victim, the assault was non-violent." *Id.* Dr. Kenning noted that Johnson vaginally penetrated his victims and "used grooming and verbal coercion to gain victims' compliance." Dr. Kenning opined that "Johnson's conduct with [C.L.M.] and [A.A.S.], including penetration at such a young age, seems likely to produce a substantial likelihood of serious mental harm." This factor indicates an utter lack of power to control his sexual impulses.

Relationship between Johnson and the Victims

Dr. Kenning noted that "Johnson was a friend or acquaintance of his young victims" and "[h]e does not appear to have sought out victims other than those who were relatively available to him." This factor does not indicate an utter lack of power to control his sexual impulses.

Johnson's Attitude and Mood

Dr. Kenning wrote the following in her report:

> Johnson's attitude has often included a need to be recognized and seen as important to others. He indicated that his sexual conquests and ability to be a "player" gave him . . . recognition by others. His sexual behavior with others was most often callous, impersonal and without regard for the victim. He has been reluctant to accept therapy feedback that this was inappropriate or to admit that his behavior was wrong. Throughout his probation . . . he has had difficulty accepting restrictions on his ability to have contact with adolescent girls.

This factor indicates an utter lack of power to control his sexual impulses.

Johnson's Medical History and Family

Dr. Kenning opined that although "Johnson's medical history does not seem to contribute to his inability to control his offenses," "[h]is reported family history of victimization appears to have contributed to his sexual acting out and resulted in limited empathy for the feelings of others," indicating an utter lack of power to control his sexual impulses.

Results of Psychological and Psychiatric Testing and Evaluation

As discussed above, Johnson's actuarial tests indicate a high risk of recidivism and therefore an utter lack of power to control his sexual impulses.

Several other factors indicate an utter lack of power to control sexual impulses, including Johnson's lack of a relapse-prevention plan and belief that no problem exists. *See In re Pirkl*, 531 N.W.2d 902, 907 (Minn. App. 1995) (noting that refusal of treatment and lack of relapse-prevention plan indicate utter lack of control), *review denied* (Minn. Aug. 30, 1995); *see also In re Irwin*, 529 N.W.2d 366, 375 (Minn. App. 1995) (finding

that lack of treatment and belief that no problem exists can indicate utter lack of control), *review denied* (Minn. May 16, 1995). Johnson also reoffended while on probation and participating in sex-offender treatment. And he recently contacted his victim pool through Facebook while on probation and participating in sex-offender treatment.

Viewing the record in the light most favorable to the decision, clear and convincing evidence exists that Johnson has an utter lack of power to control his sexual impulses.

The final element is whether Johnson is dangerous to other persons. A person is dangerous to others when the person's pattern of sexual misconduct creates a substantial likelihood of serious physical or emotional harm to others. *Rickmyer*, 519 N.W.2d at 190; *see also Preston*, 629 N.W.2d at 113 (citing *Rickmyer*). Johnson vaginally penetrated at least nine underage females, several of whom were as young as 12. Johnson abused three of the victims multiple times, including one approximately 150 times. Dr. Kenning testified that Johnson's conduct created a substantial likelihood of serious physical or emotional harm in the form of depression, anxiety, or eating disorders. The district court found Dr. Kenning's testimony credible and persuasive. Viewing the record in the light most favorable to the decision, clear and convincing evidence exists that Johnson is dangerous to other persons.

Because clear and convincing evidence exists regarding each element of the SPP statute, the district court did not err by committing Johnson as an SPP.

Less-Restrictive Alternative

Under the Minnesota Commitment and Treatment Act, when the petitioner proves that an individual meets the requirements for civil commitment as an SDP or SPP, "the

court shall commit the patient to a secure treatment facility unless the patient establishes by clear and convincing evidence that a less-restrictive treatment program is available that is consistent with the patient's treatment needs and the requirements of public safety." Minn. Stat. § 253B.185, subd. 1(d). This court will not reverse a district court's findings on the propriety of a treatment program unless its findings are clearly erroneous. *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003).

Johnson argues that he established by clear and convincing evidence that a less-restrictive alternative is available that is consistent with his needs and public safety. Johnson argues that his probation officer would help him arrange for treatment at an appropriate facility and his intensive supervised release plan is sufficient to protect the public.

But Johnson did not present any evidence that he had applied for and formally been accepted to any specific program. Johnson also did not present evidence that the treatment programs would meet his needs. Johnson reoffended while participating in outpatient sex-offender treatment in 2005 and was discharged from outpatient sex-offender treatment in 2009 after contacting his victim pool through Facebook. And Dr. Kenning testified that a less-restrictive alternative does not exist. Dr. Kenning opined that Johnson needs sex-offender treatment and supervision in a secure setting. Dr. Kenning testified that only two programs are available currently to meet Johnson's needs and satisfy the requirements of public safety: MSOP and the sex-offender program at MCF-Lino Lakes.

Based on the record before us, we conclude that the district court's finding that Johnson failed to establish by clear and convincing evidence that a less-restrictive

alternative exists that is consistent with his needs and public safety is not clearly erroneous.

Affirmed.