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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1086**

In the Matter of the Civil Commitment of:
James Irvin Rigenhagen.

**Filed December 31, 2012
Affirmed
Crippen, Judge***

Crow Wing County District Court
File No. 18-PR-10-5132

John P. Chitwood, Chitwood & Davey, PLLC, Saint Paul, Minnesota (for appellant James Irvin Rigenhagen)

Lori Swanson, Attorney General, Angela Helseth Kiese, Assistant Attorney General, St. Paul, Minnesota; and

Donald F. Ryan, Crow Wing County Attorney, Brainerd, Minnesota (for respondent Crow Wing County)

Considered and decided by Connolly, Presiding Judge; Ross, Judge; and Crippen, Judge.

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

UNPUBLISHED OPINION

CRIPPEN, Judge

Appellant challenges his indeterminate commitment as a sexually dangerous person and sexual psychopathic personality, largely asserting errors in the district court's findings of fact. Because the record contains adequate evidence to support the district court's findings of fact and there is no merit to appellant's additional arguments, we affirm.

FACTS

In 2006, appellant James Rigenhagen pleaded guilty to four counts of second-degree criminal sexual conduct stemming from his conduct on two occasions during which he sexually abused four girls between the ages of seven and twelve. Two offenses occurred in Hennepin County and two offenses occurred in Crow Wing County. Appellant pleaded guilty to the Hennepin County offenses and received a stayed sentence of 21 months with 25 years of probation and was ordered to serve one year in jail and complete inpatient treatment at Alpha House. Appellant also pleaded guilty to the Crow Wing County offenses and received a stayed sentence of 54 months with 25 years of probation, one year in jail to be served consecutively, and treatment at Alpha House.

Appellant was terminated from treatment at Alpha House before completing the program after violating the program rules and his probation terms. The district courts in Hennepin and Crow Wing counties executed appellant's sentences. When appellant entered prison in 2009, he was determined appropriate for treatment at the Minnesota Sex Offender Program (MSOP), but he did not have sufficient incarceration time remaining to

complete the program. Upon appellant's release from prison, Crow Wing County petitioned for his civil commitment.

Evidence at trial included testimony from two court-appointed psychologists, Dr. Mary Kenning and Dr. Robert Riedel. The district court also heard testimony regarding appellant's sexual history, including deviant behavior such as his use of child pornography, bondage, dominance, sadomasochism (BDSM), and bestiality. The district court found that clear and convincing evidence established that appellant was a sexually dangerous person (SDP) and a sexual psychopathic personality (SPP) under Minnesota law and that MSOP was capable of meeting appellant's treatment needs and public safety requirements. The district court also found that appellant failed to show by clear and convincing evidence that a less restrictive treatment program consistent with appellant's needs and public safety requirements was available. Thus, the district court ordered that appellant be committed as an SDP and SPP. After a 60-day review hearing, the court concluded that appellant continued to meet the statutory requirements for the commitment as an SDP and SPP and ordered that appellant be indeterminately committed.

Appellant argues that (1) his commitment as an SDP and SPP was not supported by clear and convincing evidence; (2) MSOP was not the least restrictive treatment alternative; and (3) MSOP has failed to accomplish its goal of providing effective treatment for rehabilitating the civilly committed.

DECISION

1.

Minnesota law 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 (2010).

Appellant disputes four findings of fact made by the district court: (1) that appellant engaged in a habitual course of sexual misconduct; (2) that he displayed emotional instability, impulsiveness, a lack of customary standards of good judgment, or a failure to appreciate the consequences of his personal acts; (3) that he lacks the ability to control his sexual impulses; and (4) that he is dangerous to other persons.

On a petition for civil commitment, the petitioner must prove the need for commitment by clear and convincing evidence. Minn. Stat. § 253B.18, subd. 1(a) (2010); *In re 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. *Id.*

a. Habitual course of sexual misconduct.

To commit an individual as an SPP, clear and convincing evidence must establish that the individual committed a habitual course of misconduct in sexual matters and is

utterly unable to control his sexual impulses, making him dangerous to other persons. *In re Preston*, 629 N.W.2d 104, 110 (Minn. App. 2001). Appellant argues that the state did not prove a habitual course of sexual misconduct because there were only four known victims and because his self-reporting of events cannot be considered.

The district court found that clear and convincing evidence at trial revealed additional victims besides those involved in the conviction offenses. Appellant testified that he had downloaded pornography of infants and children up to 17 years old, that he has traded thousands of pictures and videos of child pornography on the internet, and that at times he viewed pornography for two and eight hours a day. Additionally, while employed as a teacher, appellant fondled an 11- or 12-year-old student in his classroom and at his home, and he spontaneously took pictures of three or four girls' breasts in his classroom without their knowledge. Appellant also had sexual contact with two sleeping victims: he once touched his wife's friend's breasts while the friend was sleeping and he once touched his wife's 12- or 13-year-old niece on her crotch over and under her clothing while she was sleeping. Finally, appellant testified that he paid more money than usual to prostitutes on ten to twelve occasions so that he could be highly abusive. Additionally, clear and convincing evidence established that appellant engaged in bestiality on multiple occasions, with dogs, a goat, and a sheep.

Dr. Kenning testified that appellant's behavior constituted a habitual course of sexual misconduct because of its pervasiveness over a long period of time and its extensive nature, including his wide range of victims and practice of bestiality. Dr. Riedel also concluded that appellant's sexual misconduct was habitual because it

involved “multiple victims over many years including animals, adults, [and] children,” and it was repetitive, even including acts while appellant was in and nearing the end of treatment.

Because clear and convincing evidence supports the district court’s finding that appellant had committed a habitual course of sexual misconduct, the district court’s findings were not clearly erroneous.

b. Emotional instability, impulsiveness, lack of customary standards of good judgment, or failure to appreciate the consequences of personal acts.

The district court found that appellant lacks customary standards of good judgment and fails to appreciate the consequences of his actions. Appellant argues that this finding is not established by clear and convincing evidence because Dr. Riedel’s report concluded that, outside of appellant’s sexual actions, appellant does not display impulsiveness and does not lack customary standards of good judgment.

Minn. Stat. § 253B.02, subd. 18b, requires a showing 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.” Dr. Riedel concluded that appellant “has shown to a high degree” that he fails to appreciate the consequences of his personal acts. Dr. Riedel testified that, regarding appellant’s ability to appreciate the consequences of his personal acts, “[h]e can probably recite the literature, but has not incorporated it as a real component of his belief system or has any emotional reactions to it.” And Dr. Kenning testified that appellant not only fails to appreciate the consequences of his acts, but also lacks adequate

control over his sexually harmful behavior and lacks customary standards of good judgment. Similarly, Dr. Riedel testified that appellant displays impulsive behavior, as evidenced by appellant's failure to adhere to treatment requirements when he was nearing the end of treatment at Alpha House, and that appellant's impulsiveness seems to be directly related to his need to act out sexually.

Clear and convincing evidence supports the district court's conclusion that appellant displays impulsiveness, lacks customary standards of good judgment, and fails to appreciate the consequences of his personal acts.

c. Ability to control sexual impulses.

The district court found that clear and convincing evidence established that appellant "exhibits an utter lack of control over his sexual urges." The court credited Dr. Kenning and Dr. Riedel's testimonies and noted the record as a whole, "including [appellant's] propensity to violate probation and the rules and regulations of Alpha [H]ouse while in treatment."

Appellant argues that the evidence did not support the district court's finding because his neurological testing scores show his executive functioning is not impaired. But other factors, such as degree of psychopathy and personality disorders, are considered when determining whether a person lacks adequate control of his sexual impulses. Both Dr. Riedel and Dr. Kenning diagnosed appellant with a variety of personality and other mental-health disorders and testified that these disorders cause appellant to lack adequate control over his sexually harmful behavior. Although appellant argues that Dr. Riedel's diagnosis of appellant as having narcissistic personality

disorder is tainted by Dr. Riedel's personal revulsion at appellant's sexual history, no evidence supports appellant's position.

Clear and convincing evidence supports the district court's finding that appellant lacks the ability to control his sexual impulses.

d. Dangerousness to others.

Appellant argues that clear and convincing evidence does not establish that he is dangerous to other persons because his actuarial scores do not show that he is unable to control his sexual impulses and his conduct with prostitutes should not be considered because there is no evidence that he knowingly engaged in sex with sex workers below the age of consent.

The district court found that appellant was dangerous to others for several reasons, not just because of his conduct with prostitutes. The district court found that appellant was dangerous to others based on its observations that he had stalked victims in stores, touched sleeping or unconscious victims, and engaged in sexual activity with animals. Additionally, the court noted that appellant's violent conduct with prostitutes indicates dangerousness because, regardless of the prostitutes' ages, the evidence does not indicate that the conduct was consensual. Furthermore, both psychologists concluded that appellant is dangerous to others, requires treatment at a secure facility, and cannot be safely released into the community. Finally, appellant's actuarial scores are not conclusive evidence that he is not dangerous to others.

Clear and convincing evidence established that appellant is dangerous to others, and therefore, the district court's conclusion is not clearly erroneous.

2.

An SDP is 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). “[L]ikely to engage in acts of harmful sexual conduct” means “highly likely.” *In re Linehan*, 557 N.W.2d 171, 180 (Minn. 1996) (*Linehan II*), *vacated and remanded*, 522 U.S. 1011 (1997), *aff’d* 594 N.W.2d 867 (Minn. 1999). It is not necessary to prove that the person is unable to control his sexual impulses. Minn. Stat. § 253B.02, subd. 18c(b) (2010). But the person must lack adequate control of his sexual impulses. *In re Linehan*, 594 N.W.2d 867, 876 (Minn. 1999) (*Linehan III*).

Appellant disputes three findings of fact made by the district court: (1) that appellant lacks adequate control of his sexual impulses; (2) that he is highly likely to engage in harmful sexual conduct in the future; and (3) that MSOP is the least restrictive treatment alternative available to appellant.

On a petition for civil commitment, the state must prove the need for commitment by clear and convincing evidence. Minn. Stat. § 253B.18, subd. 1(a); *Stone*, 711 N.W.2d at 836. This court reviews the district court’s factual findings for clear error. *Id.*

a. Lack of adequate control of sexual impulses.

Appellant argues that because he has “no neurological inability regarding impulse control,” the evidence does not prove that he lacks adequate control of his sexual impulses. The district court found that clear and convincing evidence established that

appellant's ability to control his sexual impulses was sufficiently impaired to meet the statutory requirements for commitment and specifically noted Dr. Kenning's and Dr. Riedel's testimonies. Both doctors testified that factors besides neurological testing are considered when determining whether a person lacks adequate control of his sexual impulses, such as degree of psychopathy and personality disorders.

The court accepted the expert diagnoses that appellant suffered from frotteurism, pedophilia, paraphilia (bondage and domination, pornography), zoophilia, urophilia, hypersexuality, and personality disorder with schizoid, narcissistic, and antisocial features; appellant does not dispute the district court's finding that he has manifested a personality disorder. Dr. Kenning testified that these disorders cause appellant to lack adequate control over his sexually harmful behavior and that his paraphilias and narcissism in particular have reinforced his interest in children and supported his lack of concern for others, leading him "to continue to engage in abusive behavior with children and imped[ing] his control of his sexual impulses." Dr. Riedel recognized that appellant's neuropsychological function test scores were "quite good," and that the functioning of his executive process is not a source of his impulsivity, but that the difficulties appellant has in impulse control are related to his personality disorder. Furthermore, Dr. Riedel testified that appellant's victim pool contains a wide range of ages, which "gives more opportunity for future incidents to be probable."

Because appellant has not shown that neurological testing is determinative as to whether a person lacks adequate control of his sexual impulses and both doctors testified

to other factors that indicate appellant lacks adequate control of his sexual impulses, the district court did not err by finding that this criteria was met.

b. Highly likely to engage in harmful sexual conduct in the future.

In determining whether an individual is highly likely to reoffend, courts consider a number of factors: (1) demographic characteristics, (2) history of violent behavior, (3) base rate statistics, (4) sources of stress, (5) similarity of present or future context to contexts in which the person has used violence in the past, and (6) sex therapy history. *In re Linehan*, 518 N.W.2d 609, 614 (Minn. 1994) (*Linehan I*). No single factor is determinative in making this determination. *In re Commitment of Navratil*, 799 N.W.2d 643, 649 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011). And courts may consider evidence beyond these factors to determine likelihood to recidivate. *Linehan II*, 557 N.W.2d at 189.

Appellant argues that the state's proof was inadequate because his demographic factors and base rate statistics weigh against his commitment. But he has not shown that either of these factors is determinative in deciding appellant's likelihood to reoffend, and other factors support the district court's conclusion that appellant is highly likely to reoffend.

Dr. Kenning stated that "psychopathy and deviant arousal are considered the strongest predictors of sexual offense recidivism," and that having both psychopathy and deviant arousal dramatically increases the risk of recidivism. Dr. Kenning views appellant as moderately psychopathic with "a very strong and well established history of deviant arousal." Dr. Riedel also testified that appellant has at least moderate-strong

psychopathic tendencies and that there is no doubt in literature that persons with high psychopathy have more of a tendency to reoffend, as well as persons with high deviancy.

Furthermore, dynamic, or criminogenic, factors are reliably and empirically associated with risk of recidivism, and appellant's dynamic risk factors indicate he is at high risk to reoffend. Dr. Kenning testified that actuarial tools primarily consider historical data but do not account for sexual deviance. But dynamic risk factors do account for sexual deviance by examining things such as a person's relationship with sexual partners, women, and others; sexual deviance; and the ability to manage and control impulsivity. Dr. Kenning testified that appellant displays numerous characteristics of sexual deviance and that he especially has engaged in sexual deviance "in a very late period in his life." Dr. Riedel agrees with Dr. Kenning regarding dynamic factors such as appellant's difficulties in relationships and with intimacy, and "the oddity of the development of his deviant behavior which didn't seem to occur until much later in life."

Dr. Riedel further highlighted that appellant's past behavior shows that he is highly likely to reoffend. When in treatment at Alpha House and "even in the almost immediate presence of supervision and threat of negative consequences, [appellant] still acted out sexually and still made very dangerous choices in relationship to participation in deviant activities." Additional facts contribute to Dr. Riedel's conclusion that appellant is highly likely to reoffend: appellant continues to refuse to accept that his activity is deviant; appellant's large number of victims; appellant's large victim pool,

including animals, children, teenagers, and adults; and appellant's lack of an adequate support group.

In conclusion, the district court found that “[g]iven the history of [appellant] and the inundating character of the allegations and conduct contained within the file, actuarial tables are not enough for the Court to rely on; and when the Court takes into consideration the general tenor of the file, including [appellant's] failure on probation and in treatment, it indicates that [appellant] is at high risk for recidivism.” Based on several factors beyond the actuarial rates and appellant's demographic information, the district court did not err in finding that clear and convincing evidence established that appellant was highly likely to reoffend.

3.

Appellant challenges his commitment to MSOP and asserts that Alpha House is a less restrictive treatment alternative.

If a district court finds the factual basis for an SPP or SDP commitment, “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) (2010). Thus, the burden to show a less restrictive alternative is upon the person to be committed. *In re Kindschy*, 634 N.W.2d 723, 731 (Minn. App. 2001), *review denied* (Minn. Dec. 19, 2001).

The district court disagreed with appellant's suggestion that he return to Alpha House or some other outpatient facility. The court concluded that because of appellant's

prior failure in treatment and probation violation, a secure facility was necessary to prevent appellant from reoffending. Furthermore, appellant had already failed treatment at Alpha House, and Alpha House previously “was not effective in preventing [appellant] from being placed in situations where he might be tempted to offend” because they had placed him for employment in a location where he had previously offended. The district court did not err in finding that appellant failed to establish by clear and convincing evidence that there was a less restrictive appropriate treatment program available for him.

4.

Appellant argues that the evidence did not establish that his conduct caused sufficient injury to meet the “dangerous to others” criteria for commitment as an SPP. Whether the evidence was sufficient to demonstrate the statutory requirements for civil commitment is a question of law subject to de novo review. *Linehan I*, 518 N.W.2d at 613.

We have previously stated that, “[t]he supreme court has not suggested that the question is whether the violence was greater than that involved in other sexual assaults that involve some physical force, but whether it was violent to the point of creating a substantial likelihood of serious physical or mental harm.” *Preston*, 629 N.W.2d at 113 (quotations omitted). In *Preston*, the court received expert testimony that the defendant’s acts likely caused psychological harm to his victims and therefore there was “no question that [defendant’s] pattern of behavior is so egregious so as to create the substantial likelihood of physical or mental harm.” *Id.* (quotations omitted).

Additionally, we stated in *Kindschy* that to determine whether a person is dangerous to others, courts consider (1) the nature and frequency of the sexual abuse, (2) the degree of violence used, (3) the relationship between the offender and his victims, (4) the offender's attitude, (5) the offender's medical and family history, (6) psychological and psychiatric testing results and evaluations, and (7) "other factors that bear on the predatory sex impulse and the lack of power to control it." *Kindschy*, 634 N.W.2d at 732.

Here, as in *Preston*, the district court received extensive expert testimony of likely harm done: Both Dr. Kenning and Dr. Riedel testified that appellant's conduct undoubtedly created a substantial likelihood of serious physical or mental harm and was likely to cause serious physical or mental harm in the future. And the district court considered the factors outlined in *Kindschy* and found that the nature and frequency of appellant's sexual abuse, the degree of violence he displayed during some incidents, the fact that his victims were strangers, his psychological testing results, and other factors that bear on his predatory sex impulse and his lack of power to control it all support that appellant is substantially likely to cause physical or mental harm to his victims, and therefore is dangerous to others.

Appellant's legal argument that his behavior was insufficiently violent to meet the criteria for commitment under the SPP statute fails.

5.

Finally, appellant argues that MSOP has failed to accomplish its goal of providing effective treatment for rehabilitating the civilly committed. But appellant did not make

this argument to the district court, and an appellate court “must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.” *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted). Because appellant did not argue MSOP’s ineffectiveness to the district court, we do not consider the issue on appeal.

Affirmed.