STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0738

In the Matter of the Civil Commitment of: Jeffrey Joseph Lingl.

Filed October 22, 2012
Reversed
Stauber, Judge

Kandiyohi County District Court
File No. 34PR1157

Ryan B. Magnus, Jennifer Thon, Jones and Magnus, Mankato, Minnesota (for appellant)

Lori Swanson, Attorney General, John D. Gross, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Cleary, Judge; and Muehlberg, Judge.*

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

STAUBER, Judge

Appellant challenges his indeterminate commitment to the Minnesota Sex Offender Program as a sexually dangerous person, arguing that (1) the district court's conclusion that he met the criteria for commitment was not supported by clear and convincing evidence and (2) the district court erred by determining at the review hearing that he continues to meet the commitment criteria. Because the district court's

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

conclusion that appellant engaged in a course of harmful sexual conduct is not supported by clear and convincing evidence, we reverse.

FACTS

In May 2011, the State of Minnesota filed a petition to civilly commit appellant Jeffrey Joseph Lingl as a sexually dangerous person (SDP) and a sexual psychopathic personality (SPP). Appellant is 53 years old and has an IQ of between 65 and 80. The age equivalent of a person with his IQ score is approximately that of a nine year old. Appellant suffered brain damage at a young age and was diagnosed with borderline intellectual functioning. When appellant was between eight and nine years old, he was sexually abused by his great-uncle. When he was ten years old, appellant was sexually assaulted by his mother's female friend. From approximately ages 15 to 20, appellant lived in four different group homes. He attended special-education classes throughout school and graduated from high school when he was 20 years old. Appellant also has a long history of alcohol abuse. He first became drunk when he was 12 years old and, as an adult, he consumed approximately 12-24 beers and half a bottle of liquor every day. Appellant has not consumed alcohol since 2002 due to his imprisonment and later indefinite commitment to the Minnesota Sex Offender Program (MSOP).

In 1994, appellant entered an *Alford* plea to fourth-degree criminal sexual conduct stemming from an incident involving 13-year-old J.L.S. In September 1993, J.L.S. reported to police that, a few days earlier, she watched movies with appellant at his house. At the time, J.L.S. had known appellant for approximately two weeks. J.L.S. reported that, while she and appellant were sitting together on the couch, appellant placed

his hand on her leg, she placed her hand on appellant's leg, and they kissed five or six times. J.L.S. stated that she stayed overnight at appellant's house, but they did not have sexual intercourse. The next day, J.L.S. again watched movies with appellant, and he fondled her breasts over her clothing. In an interview shortly after the incident, appellant denied having sexual contact with J.L.S. while they were in bed together, but admitted kissing her and touching her breast. As a result of appellant's plea, the district court stayed imposition of a sentence, ordered him to serve 60 days in jail, and placed him on probation for three years. Appellant violated his probation by failing to report to jail on time and was ordered to serve an additional ten days. He was discharged from probation for this offense in 1996.

In March 1998, appellant entered an *Alford* plea to fifth-degree criminal sexual conduct stemming from an incident that occurred in 1997 involving an adult female, R.L.S. In November 1997, R.L.S. reported to police that, two weeks earlier, she and several people, including appellant, had a party at her home. She stated that she went to sleep on the floor of the living room at about 11:00 p.m. A short time later, she felt someone rub her buttocks and breasts. As R.L.S. woke up, she saw appellant rubbing her breasts over her clothes and another individual rubbing her buttocks. She yelled at appellant, but he did not stop until she had yelled at him several times and another person entered the room. R.L.S. reported that she believed she was going to be raped. During a December 1997 interview, appellant stated that he could not remember touching R.L.S. He also reported that they had a prior sexual relationship. The district court ordered appellant to serve 90 days in jail and pay a fine. At the commitment hearing, appellant

testified that he touched R.L.S.'s buttocks and asked her if she wanted to have sex, but he stopped touching her when she told him to stop.

In January 2000, appellant pleaded guilty to fourth-degree criminal sexual conduct based on an incident that occurred in the spring of 1998. In a May 1999 interview, 13-year-old K.M.S. told police that the previous year she had been watching television with appellant when he put his arm around her neck and over her shoulder and touched her breast over her clothing. At the plea hearing, appellant admitted that he touched K.M.S.'s breast. The district court sentenced him to 36 months in prison.

In May 1999, the state charged appellant with one count of fifth-degree criminal sexual conduct for an incident that occurred in the spring of 1998. K.M.S.'s nine-year-old brother, A.J.S., reported to police that appellant touched his buttocks when A.J.S. was getting ready to take a shower. He reported that he kicked appellant in the groin. A.J.S. was unable to remember where or when the incident occurred. The county agreed to dismiss this charge as part of appellant's plea agreement to fourth-degree criminal sexual conduct against K.M.S. At the commitment hearing, appellant admitted that he swatted A.J.S.'s buttocks but stated that his conduct was not sexually motivated.

In June 1999, the state charged appellant with first-, second-, and fifth-degree criminal sexual conduct stemming from incidents that occurred in 1994 or 1995. Seven-year-old A.R.T. reported to police that when she was two or three years old, appellant lived with her and her mother. She stated that appellant removed her clothes, digitally penetrated her vagina, rubbed his penis on her vagina, and forced her to touch his penis. She reported that appellant touched her several times and also touched her brother. In an

interview with police, A.R.T.'s mother stated that appellant had never met A.R.T.'s brother and that appellant had never been alone with A.R.T. A.R.T's mother further reported that approximately a month after appellant had moved into their home, A.R.T. came home from a visit with her father and reported that her grandfather had touched her. The state dismissed these charges as part of the plea agreement when appellant pleaded guilty to fourth-degree criminal sexual conduct against K.M.S. At the commitment hearing, appellant denied that he had any sexual contact with A.R.T. The district court did not rely on these allegations in making its commitment determination because it determined that they were not sufficiently reliable.

In May 2001, appellant was released from prison, where he had been serving a 36-month sentence for the fourth-degree criminal sexual conduct conviction, and was placed on supervised release. Shortly thereafter, appellant admitted violating his supervised release for failing to follow instructions, including having contact with minors. Appellant's release was revoked, and he was ordered to serve 120 days in prison. After a short extension, appellant was again placed on supervised release in March 2002. Less than two months later, he admitted a supervised release violation and was ordered to serve 90 days in prison. He was again placed on supervised release in July 2002. A short time later, he again violated his release by, among other things, having contact with the minor grandchildren of his live-in girlfriend. He was ordered to serve 365 days in prison, which was extended for another 365 days in September 2004, and again in May 2005. In November 2005, appellant was transferred to Minnesota Correctional Facility (MCF)-Moose Lake, where he remains.

Despite beginning sex-offender treatment several times, appellant has not successfully completed treatment. In April 2000, a department of corrections evaluator recommended appellant for civil commitment. However, the department of corrections referral committee disagreed with the recommendation and chose not to refer it to the county attorney's office. In 2001 and 2002, several evaluators administered actuarial tests to appellant to evaluate the likelihood that he would sexually reoffend; he was assigned a risk level of two, signifying a moderate re-offense risk. In February 2003, a psychologist at a treatment center where appellant resided noted that appellant would not be out of place in a sex-offender-treatment program, but that his cognitive difficulties could limit his progress in such a program. In September 2003, appellant was terminated from the program for having contact with minor children.[1] A short time later, appellant was admitted to MCF-Lino Lakes and placed on a waiting list for sex-offender treatment. In June 2004 he completed the assessment phase of the sex-offender-treatment program and entered the next phase. A psychologist diagnosed appellant with pedophilia, major-depressive disorder, alcohol dependence, antisocial-personality disorder, avoidant-personality disorder, and borderline intellectual function. The psychologist also questioned appellant's amenability to treatment. In September 2004, appellant was terminated from the treatment program. In September 2005, appellant again entered the sex-offender-treatment program at MCF-Lino Lakes; and was terminated from the program in October 2005. In addition, although appellant has a long history of alcohol abuse, he has never completed chemical-dependency treatment.

[1] Neither the 2001 or 2002 incidents involved inappropriate sexual conduct.

After the state filed the civil-commitment petition in May 2011, three experts evaluated appellant, prepared reports, and testified at the civil-commitment trial: Robert Riedel, Ph.D., as first examiner, Rosemary Linderman, Psy.D., as second examiner, and James Gilbertson, Ph.D., as an expert for the state. Drs. Riedel and Gilbertson opined that appellant satisfies the criteria for commitment as an SDP; Dr. Linderman opined that he does not satisfy the commitment criteria. Appellant and several of his family members also testified at trial. Based on this evidence, the district court ordered appellant to be initially committed as an SDP to the MSOP.

In February 2012, the district court held a review hearing following MSOP's submission of the statutorily required 60-day treatment report, which recommended that appellant remain in the program indefinitely because he continues to meet the SDP criteria. *See* Minn. Stat. § 253B.18, subd. 2 (2010). Mary Kenning, Ph.D., an examiner who was appointed at appellant's request, opined that appellant's course of harmful sexual conduct had not changed since he was committed and that he continued to meet criteria for several mental-health disorders. But Dr. Kenning noted that two of the actuarial measures that indicated at the time of his commitment that he was at moderate-high to high risk of sexual offense recidivism were, in fact, outdated. Instead, she opined that appellant has "a moderate to high moderate risk of recidivism."

The district court concluded that the state had established by clear and convincing evidence that appellant continues to meet criteria for commitment as an SDP and that there has not been a change in appellant's circumstances since the time of his initial

commitment. As a result, the district court indeterminately committed appellant to the MSOP as an SDP. This appeal follows.

D E C I S I O N

Civil commitment as an SDP is essentially a life sentence with little hope of release. As the state acknowledged at oral argument, only two of MSOP's over six hundred patients have been released since the current version of the statute was enacted in 2002, and one of those patients reentered the program shortly after his release.

In order to commit an individual as an SDP, the petitioner must establish the elements of commitment by clear-and-convincing evidence. Minn. Stat. § 253B.18, subd. 1(a) (2010). On review, we defer to the district court's findings of fact and will not reverse unless the findings are clearly erroneous. *In re Commitment of Ramey*, 648 N.W.2d 260, 269 (Minn. App. 2002), *review denied* (Minn. Sept. 17, 2002). But the question of "whether there is clear and convincing evidence in the record to support the district court's conclusion that appellant meets the standards for commitment" is reviewed de novo. *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003).

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). Appellant challenges the sufficiency of the evidence supporting the first and third factors. He does not dispute that he has a qualifying mental disorder or dysfunction.

"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 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) (2010). "The presumption is not that a victim actually suffers serious emotional harm, but that the conduct creates a substantial likelihood of such harm." *In re Commitment of Stone*, 711 N.W.2d 831, 837 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). In determining whether a person has engaged in a course of harmful sexual conduct, the district court may consider convictions as well as harmful sexual conduct that did not result in a conviction. *Ramey*, 648 N.W.2d at 268. The harmful sexual conduct that establishes the course does not need to be recent. *Stone*, 711 N.W.2d at 837. In addition, "the existence of a period in which a person has not committed sex offenses does not preclude a determination that he has engaged in a course of sexual misconduct." *Id.* at 838.

Appellant does not dispute that his two convictions for fourth-degree criminal sexual conduct and his conviction for fifth-degree criminal sexual conduct are part of a course of sexual conduct. And he acknowledges that his convictions for fourth-degree criminal sexual conduct create a presumption that the victims were substantially likely to suffer serious emotional harm. However, appellant argues that the allegations made by A.J.S. and A.R.T. are not sufficiently reliable to be considered in this matter and that Dr. Riedel's and Dr. Gilbertson's conclusions conflicted with their testimony.

The district court specifically found that A.R.T.'s allegations were not reliable but did not make a finding regarding the reliability of A.J.S.'s allegations. However, the district court found that "[e]ven without considering the allegations of abuse by AJS and ART . . . [the state] has established by clear and convincing evidence that [appellant] engaged in a course of harmful sexual conduct." The district court determined that the expert testimonies of Drs. Riedel and Gilbertson established that appellant's "successive incidents of sexual misconduct against J.L.S., R.L.S., and K.M.S. created a substantial likelihood of serious emotional harm to his victims, even without relying upon the statutory presumption."

Dr. Riedel and Dr. Gilbertson both relied on A.R.T. and A.J.S.'s allegations in analyzing appellant's course of conduct. During their testimony, both experts were asked whether excluding that information would alter their recommendation and both testified that it would not alter their recommendations.

Dr. Riedel testified that he based his conclusion that appellant engaged in a course of harmful sexual conduct on an analysis of appellant's conduct with five victims: J.L.S., R.L.S., A.J.S., A.R.T., and K.M.S. On cross examination, Dr. Riedel stated that he "did not give [A.J.S.'s testimony] a great deal of weight" in part because of inconsistencies in his statements. Dr. Riedel also acknowledged that he had concerns about A.R.T.'s credibility. Appellant's counsel asked Dr. Riedel, "From a forensic standpoint if you pull those two cases out and you don't consider them, how does that impact your opinion with regard to whether or not [appellant] has a course of harmful sexual conduct?" Dr. Riedel responded, "It doesn't alter it."

Dr. Gilbertson testified that he considered appellant to have nine formal charges for criminal sexual conduct offenses and considered A.R.T. and A.J.S.'s allegation in making his decision. On cross examination, Dr. Gilbertson testified that removing A.J.S. and A.R.T. from his analysis *would* affect appellant's actuarial risk scores. He testified that if A.J.S. and A.R.T. are included, then appellant's score would indicate a high risk to reoffend, but if they are removed, appellant's score would indicate a moderately high risk to reoffend.

We agree with appellant that it was error for Dr. Riedel and Dr. Gilbertson to include the allegations by A.R.T. and A.J.S. in their analysis as both incidents were unreliable and prejudicial. While Dr. Riedel testified that his opinion did not change when A.R.T. and A.J.S. were excluded from his analysis, Dr. Gilbertson testified that appellant's actuarial risk score would change if he did not consider those incidents.

Appellant argues that the district court erroneously relied on Dr. Riedel and Dr. Gilbertson's conclusion that appellant's conduct created a substantial likelihood of serious emotional harm because their ultimate conclusion conflicted with their testimony. Appellant contends that their testimony did not establish that the potential harm was "serious." In support of this argument, appellant references the following exchange between his counsel and Dr. Riedel on cross examination:

> [APPELLANT'S COUNSEL]: Okay. So then is it your testimony that every 13 year old or 14 year old or any person who's an adult who is touched one time over the clothing on her breast is likely to suffer serious emotional harm?
> [DR. RIEDEL]: Please, please repeat that. Did you have the word every in there?

> [APPELLANT'S COUNSEL]: Yes, or is it likely that—is it likely that a woman touched over the clothing on her breast one time by a person that she knows is likely to suffer serious emotional harm?
> [DR. RIEDEL]: I'm considering—yes—no. I say both yes and no. I can't answer that question with a direct yes or no because what I'm supposed to judge is likelihood and based on my review of the literature there is a likelihood and a significant number of people that there will be potential harm.
> [APPELLANT'S COUNSEL]: Serious emotional harm?
> [DR. RIEDEL]: In some cases serious emotional harm.
> [APPELLANT'S COUNSEL]: But is serious emotional harm under those circumstances really likely?
> [DR. RIEDEL]: I don't think so.

During this exchange, Dr. Riedel was asked about a general, hypothetical situation. As appellant acknowledges, all three experts testified that the likelihood of serious emotional harm resulting from unwanted sexual contact depends upon the circumstances and there was no testimony that J.L.S., R.L.S., or K.M.S. suffered serious emotional harm. At another point during his testimony, Dr. Riedel considered the specific facts of appellant's course of conduct and testified that appellant's conduct created a substantial likelihood of serious emotional harm.

Appellant next cites Dr. Gilbertson's testimony on direct examination, arguing that he does not use the words "substantial" or "serious":

> [STATE'S COUNSEL]: And looking specifically at [appellant's] victims, in your opinion would the course of sexual conduct engaged by him create a substantial likelihood of serious physical or emotional harm?
> [DR. GILBERTSON]: Yes. It's my opinion that the kind of behavior that he engaged in does have a likelihood of causing primarily emotional harm, probably not physical harm.

Appellant also references the following exchange between his counsel and Dr. Gilbertson on cross examination:

> [APPELLANT'S COUNSEL]: Then pulling back from there and taking a look at what [appellant] was actually convicted of we have three separate instances of one fondling over the clothing? And granted one was in 1993, one in 1998 and one in 1999 I believe. Do those three instances singular, non-stranger, are those seriously likely to cause serious emotional harm to a potential victim?
> [DR. GILBERTSON]: I think it can have harmful effects and I think on direct testimony I mentioned what conduct like that can. You've introduced the modifier serious effects. I don't know if that's part of the . . . definition but it may be. Any, any factor under study forensically comes in a spectrum. So if we look at harm, harm comes in a spectrum. If we look at [appellant's] offenses from a harmful standpoint they tend to be of lower harm than we often see in cases like this. That would be my best response. Would they be serious, *I don't think I would apply the word serious to them*.

(Emphasis added.) On re-direct examination, Dr. Gilbertson gave the following testimony:

> [STATE'S COUNSEL]: Okay. Now with regard to I guess the standard—now the statute says that there needs to be a substantial likelihood of serious physical or emotional harm. Do you believe that his acts, and, you know, we testified this on direct, but you do believe that his acts meet that standard of serious physical or emotional harm?
> [DR. GILBERTSON]: I don't think they meet serious physical harm certainly, but serious emotional harm—
> [STATE'S COUNSEL]: Okay.
> [DR. GILBERTSON]: —if I include all of the victims that I believe—that I'm basing my opinion upon.
> [STATE'S COUNSEL]: And individually when we broke them down I think your testimony was that, you know, eight—the offense against J.L.S. by itself would cause serious emotional harm, correct?
> [DR. GILBERTSON]: It could, yes.

> [STATE'S COUNSEL]: And that the offense against K.L.S. would cause serious emotional harm?
> [DR. GILBERTSON]: It could, yes.
> [STATE'S COUNSEL]: Okay and then the offense against K.M.S. caused serious emotional harm?
> [DR. GILBERTSON]: It could, yes.

While Dr. Gilbertson initially testified on direct examination that appellant's specific conduct created a substantial likelihood of serious emotional harm, on cross examination he changed his opinion after he excluded the unreliable allegations of A.J.S. and A.R.T. from his analysis. On re-direct examination he testified that appellant's course of conduct against K.M.S., R.L.S., and J.L.S. "could" cause serious emotional harm, but not that appellant's conduct "creates a substantial likelihood that a victim will suffer serious physical or emotional harm." *See* Minn. Stat. § 253B.02, subd. 7a(b). As a whole, Dr. Gilbertson's testimony does not support his ultimate conclusion that appellant engaged in a course of harmful sexual conduct.

Dr. Gilbertson's testimony, in combination with Dr. Linderman's testimony that appellant's conduct did not create a substantial likelihood of serious emotional harm to his victims, and Dr. Kenning's testimony concerning outdated actuarial standards, was sufficient to rebut the statutory presumption that appellant's victims in the incidents that led to his convictions of fourth-degree criminal sexual conduct against J.L.S. and K.M.S. were substantially likely to suffer serious emotional harm. Accordingly, we conclude that the district court's finding that appellant engaged in a course of harmful sexual conduct is clearly erroneous and, therefore, the record does not contain clear and convincing evidence to support the district court's conclusion that appellant met the

standard for commitment as an SDP. Because we reach this conclusion, we need not address appellant's argument that the district court clearly erred by finding that he is highly likely to engage in further harmful sexual conduct. *See* Minn. Stat. § 253B.02, subd. 18c(a)(3). We also do not consider whether the district court erred by determining after the review hearing that appellant continued to meet the statutory criteria for commitment.

Reversed.