STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1562

In the Matter of the Civil Commitment of:
Jose Garcia Arellano

Filed March 27, 2017
Affirmed
Ross, Judge

Ramsey County District Court
File No. 62-MH-PR-16-59

Steven R. Kufus, Steven R. Kufus, P.A., St. Paul, Minnesota (for appellant)

John J. Choi, Ramsey County Attorney, Lawrence M. Schultz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Halbrooks, Judge; and Schellhas, Judge.

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

ROSS, Judge

Appellant Jose Arellano sodomized, masturbated, or forced oral sex on his two adolescent stepsons and other neighborhood boys for about three years beginning in 1991. The district court convicted Arellano of three counts of criminal sexual conduct and imprisoned him until 2016, when the state successfully petitioned the district court to civilly commit him as a sexually dangerous person and a sexual psychopathic personality. Because we cannot conclude that the district court abused its discretion by excluding

testimony and because clear and convincing evidence supports the district court's civil-commitment findings and conclusion, we affirm the commitment order.

FACTS

Jose Arellano sexually assaulted his two stepsons, C.A. and J.A., many times between 1991 and 1994. He began by making them watch pornographic films and imitate the acts on each another. He eventually involved himself, forcing the boys to submit to his oral and anal penetration. Arellano video recorded some of his abuse. He also abused neighborhood boys, including M.E., who reported that Arellano penetrated him anally many times and would also fondle his genitals. M.E.'s younger brother, M.F., recounted that Arellano had rubbed his penis against M.F.'s buttocks and fondled M.F.'s penis and buttocks.

C.A. ran away from home and reported Arellano's abuse to child protection workers in 1994. But C.A. soon recanted after Arellano threatened him. In 1996, however, the boys and their mother reported the abuse and showed police Arellano's video recordings. The recording showed Arellano involved in masturbation and oral-penetration incidents in 1992 and 1993.

After the state charged Arellano with multiple counts of criminal sexual conduct, Arellano pleaded guilty to one count of first-degree criminal sexual conduct against M.E. and faced a court trial on two counts of first-degree criminal sexual conduct against his stepsons. The district court found Arellano guilty and imposed consecutive sentences of 182 months, 86 months, and 86 months.

The state petitioned for Arellano's civil commitment in January 2016, alleging that Arellano is a sexually dangerous person and a sexual psychopathic personality. *See* Minn. Stat. § 253D.02, subds. 15, 16 (2016). The district court held a trial on the petition and received evidence detailing the facts we have just summarized.

The district court also received evidence about Arellano's education, treatment, and conduct during his incarceration. It learned that a 1997 sex-offender intake assessment indicated Arellano's only partial admissions to his crimes and recommended long-term intensive treatment and psychoeducational programming. It learned that Arellano had been terminated from half of his educational courses. It learned that Arellano was ineligible to enter the sex-offender treatment program because it requires English proficiency and Arellano missed the opportunities the prison afforded him to improve his English. And it learned that Arellano had been institutionally disciplined twice for sexual misconduct.

The district court learned from two experts about Arellano's suitability for release rather than civil commitment. The experts did not agree. The district court learned from Dr. Peter Meyers, the expert who favored commitment, that Arellano's performance on the Minnesota Sex Offender Screening Tool-3.1.2 (MnSOST) placed him in the 91.40 percentile and at a high risk for re-offense. Only months earlier, another doctor conducted a MnSOST, which predicted Arellano's recidivism at 14.11%, and a correctional-department committee subsequently assigned Arellano a "high" risk level of 3. The district court learned that the Hare Psychopathy Checklist (Revised-II) indicated a score of 26, which fell below the categorical cutoff for psychopathy. The Sexual Violence Risk-20 assessment put Arellano in the high-risk category for further sexual violence. And although

the court learned that the Static-99R assessment returned a "0" score, suggesting that Arellano is in the "no risk" category, it also received clarifying testimony that this assessment tool depended on charges and convictions, missing the full range of Arellano's multiple victims and multiple offenses. Dr. Meyers provided a thorough *Blodgett*-factor analysis, based on *In re Blodgett*, 510 N.W.2d 910 (Minn. 1994), and a *Linehan*-factor analysis, based on *Matter of Linehan*, 518 N.W.2d 609 (Minn. 1994). Dr. Meyers concluded that Arellano met the statutory elements of a sexual psychopathic personality and a sexually dangerous person.

Another expert, Dr. Thomas Alberg, reached different results using some of the same evaluative tools and factors, concluding after his thorough review,

> I do not believe that [Arellano] meets the criteria to be someone who demonstrates an utter lack of control of his sexual behavior and is dangerous to the public. Consequently, I do not recommend that he be committed as a sexual psychopathic personality.

He also concluded that Arellano did not meet the criteria to be committed as a sexually dangerous person.

Arellano's counsel also examined Dr. Alberg as follows:

> Q: [D]id you note whether or not the Department of Corrections recommended that this matter proceed as a -- on petitions for a sexually dangerous person or a sexual psychopathic personality?
> A: They did not.
>
> [State]: Objection, Your Honor. I don't think that's relevant.
>
> [The Court]: I'll sustain the objection.

The record also contains a document entitled, "Recommendation to Commissioner of Corrections from Independent Legal Counsel." In it, independent counsel recommended against a petition seeking to commit Arellano as a sexually dangerous person or sexual psychopathic personality.

The district court considered the competing expert opinions along with the other evidence, and we briefly summarize its thorough findings: Arellano never sincerely sought sex-offender treatment despite having the opportunity to obtain it; he has inadequate control over his sexual impulses; he is highly likely to engage in future harmful sexual conduct; he essentially refused treatment by denying his offenses occurred and being unwilling to become proficient in English—a known prerequisite to treatment; he regularly denied engaging in his offending behavior "until his self-serving statement" to the expert who testified in his favor; and the expert who believed commitment is fitting offered opinions that were "strongly supported by the facts in the record and are weighed much heavier than those of" the expert who opposed commitment.

The district court found that Arellano is a sexually dangerous person and a sexual psychopathic personality, and it ordered him committed indeterminately.

Arellano appeals.

D E C I S I O N

Arellano argues that the district court inappropriately precluded Dr. Alberg from testifying about a Minnesota Department of Corrections (DOC) recommendation concerning his civil commitment. He also argues that the district court erred by determining

that he is a sexually dangerous person and that he is a sexual psychopathic personality. The arguments do not lead us to reverse the civil-commitment order.

I

During the trial, Arellano's counsel attempted to ask Dr. Alberg whether the DOC recommended a petition to commit Arellano, but the district court sustained the state's relevance objection. Arellano argues that the district court abused its discretion. The decision to admit or exclude evidence rests within the district court's broad discretion, and we will reverse only if the district court clearly abused that discretion. *In re Civil Commitment of Ramey*, 648 N.W.2d 260, 270 (Minn. App. 2002), *review denied* (Minn. Sept. 17, 2002). And we will not reverse for a new trial unless the appellant demonstrates that the error was prejudicial. *See In re Robb*, 622 N.W.2d 564, 574 (Minn. App. 2001), *review denied* (Minn. Apr. 17, 2001).

Before a convicted sex offender is released from prison, the commissioner of corrections must preliminarily determine whether a petition for commitment is appropriate. Minn. Stat. § 244.05, subd. 7(a) (2016). The determination "must be based on a recommendation of a [DOC] screening committee and a legal review and recommendation from independent counsel knowledgeable in the legal requirements of the civil commitment process." *Id.* The record contains a DOC risk assessment and a recommendation from independent legal counsel. But the state correctly asserts that, contrary to Arellano's suggestion, the record does *not* contain any finding *by the DOC* that there was no sufficient basis for commitment. Arellano directs us only to the purported

recommendation of independent legal counsel. The recommendation of legal counsel is not the same as a recommendation of the DOC itself. *See id.*

Arellano argues that the district court's evidentiary decision deprived him of his fundamental right to be heard. The first problem with the argument is that the district court prohibited only Dr. Alberg's testimony *about* the DOC's recommendation; it was never asked to admit the actual recommendation. And second, even if we were to assume an abuse of discretion, the district court received Dr. Alberg's ultimate recommendation not to commit, and Arellano fails to demonstrate that the admission of any excluded testimony would have affected the district court's decision. We decline to reverse on this issue.

II

Arellano challenges the factual bases for the district court's determination that he is a sexually dangerous person suitable for indeterminate civil commitment. We generally defer to the district court's findings of fact, and we will not reverse those findings unless they are clearly erroneous. *Ramey*, 648 N.W.2d at 269. This case hangs largely on the testimony of one expert witness in contrast to the testimony of a different expert witness. We defer to the district court's credibility determinations, recognizing that its evaluation is particularly significant when the findings rest "almost entirely on expert testimony." *In re Civil Commitment of Crosby*, 824 N.W.2d 351, 356 (Minn. App. 2013), *review denied* (Minn. Mar. 27, 2013). But whether the record contains clear and convincing evidence supporting civil commitment is reviewed de novo. *Id.*

We are satisfied that the district court received sufficient evidence that supports its fact finding that Arellano is a sexually dangerous person. A "sexually dangerous person" is one who:

> (1) has engaged in a course of harmful sexual conduct as defined in [Minnesota Statutes section 253D.02, subdivision 8];
> (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 8.

Minn. Stat. § 253D.02, subd. 16(a). The Minnesota Supreme Court clarified that the statute "allows civil commitment of sexually dangerous persons who have engaged in a prior course of sexually harmful behavior and whose present disorder or dysfunction *does not allow them to adequately control their sexual impulses*, making it *highly likely* that they will engage in harmful sexual acts in the future." *In re Linehan*, 594 N.W.2d 867, 876 (Minn. 1999) (emphasis added). Arellano's arguments focus specifically on whether the evidence supports the finding of his inability to control his sexual impulses and the likelihood of his future harmful sexual conduct.

Ability to Control Sexual Impulses

Arellano argues that the district court erroneously concluded that Dr. Alberg failed to offer any opinion about Arellano's ability to control his sexual impulses. His argument rests largely on a misunderstanding of the district court's statements. Arellano highlights this part of Dr. Alberg's direct examination:

> Q: Now, Dr. Alberg, I'll cut to the chase. . . . [D]o you have an opinion . . . as to whether or not Mr. Arellano meets the criteria

> to be a sexual psychopathic personality or a sexually dangerous person?
> A: I do.
>
> Q: And what is that opinion?
> A: My opinion is he does not meet the criteria to be committed as either one of those classifications.
>
> Q: And, just briefly, what has brought you to that conclusion?
> A: Well, with the case of the sexually dangerous person, I think really the key thing is that I can't say he's highly likely to reoffend. And I think with the sexual psychopathic personality, I think, again, there's -- whether he's highly likely to reoffend or not feeds very much into whether he has an utter lack of power to control his sexual impulses, so -- I can't say that he has an utter lack of control.
>
> [State]: I'm sorry? The last part?
> A: He does not have an utter lack of control.

Arellano's argument misses the context of the district court's finding that "Dr. Alberg did not opine on *this* issue." (Emphasis added.) The district court clarified that it was addressing sexually dangerous persons, and it presented the applicable *Linehan* holding. It correctly noted that "it is unnecessary to establish that [Arellano] is *completely unable* to control his sexual impulses," (emphasis added), *see* Minn. Stat. § 253D.02, subd. 16(b), and it addressed Arellano's failure to accept even his need to change. The findings immediately following this discussion were that Dr. Alberg did not opine on the issue and that clear and convincing evidence established that Arellano has inadequate control over his sexual impulses.

The transcript demonstrates that Dr. Alberg's summary statement addressed his assessment of *both* the sexually-dangerous-person *and* sexual-psychopathic-personality standards. He also used the phrase "utter lack of power to control," a statutory phrase

included in the definition of "sexual psychopathic personality," *not* "sexually dangerous person." *See* Minn. Stat. § 253D.02, subd. 15. *Linehan* addressed an "adequate" control, rather than an "utter lack" of control. 594 N.W.2d at 876. And the district court later addressed the "utter lack of power to control" issue in determining that Arellano is a sexual psychopathic personality. We are not persuaded that the district court's challenged finding is clearly erroneous.

Likelihood of Re-offense

Arellano contends that clear and convincing evidence did not prove that he is highly likely to engage in future harmful sexual conduct. The supreme court requires the district court to consider the individual's demographic characteristics, his history of violent behavior, the base rate statistics for violent behavior among individuals with a similar background, the sources of stress in his environment, the similarity of present or future contexts to those in which he used violence previously, and his record in sex-therapy programs. *In re Civil Commitment of Ince*, 847 N.W.2d 13, 22 (Minn. 2014) (citing *Linehan*, 518 N.W.2d at 614). The district court carefully addressed each factor, covering the evidence thoroughly.

Arellano focuses on the inconsistent expert assessments analyzing the likelihood of his re-offense. Each expert gave reasoned assessments tied to his different approach to the assessment tools. The district court could not equally credit both experts, of course, and the record informs us that it chose the expert whose explanations were most persuasive on the interpretation of the data and on the weight of the different components of each assessment tool. Arellano's argument boils down mostly to his concern that the district

court's findings are based on its crediting of the wrong expert's opinion. But sitting on review, we defer to the district court's determinations of credibility, especially when its findings rest "almost entirely on expert testimony." *Crosby*, 824 N.W.2d at 356. Our careful review of the record, including the expert testimony, informs us that ample evidence supports the district court's finding of clear and convincing evidence that it is highly likely that Arellano would engage in future harmful sexual conduct if he were not civilly committed. We therefore affirm the district court's determination that Arellano is a sexually dangerous person.

III

Arellano also challenges the district court's determination that he is a sexual psychopathic personality and that commitment is therefore appropriate. His argument on this issue faces the same difficulty as the last, as it depends on factual findings and credibility assessments that generally call for our deference to the district court judge who received the testimony firsthand. When the evidence about the existence of a psychopathic personality is conflicting, it raises a question of fact. *In re Pirkl*, 531 N.W.2d 902, 907 (Minn. App. 1995), *review denied* (Minn. Aug. 30, 1995). But we ask only whether clear and convincing evidence supports civil commitment. *Crosby*, 824 N.W.2d at 356.

A sexual psychopathic personality is someone who has:

> 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. § 253D.02, subd. 15. Arellano's challenges address the "habitual course of misconduct" and "utter lack of power to control . . . sexual impulses" requirements.

Habitual Course of Misconduct in Sexual Matters

Arellano argues that "[t]here is no [f]inding of [f]act that [he] committed any acts of sexual abuse prior to 1991 nor after 1994." He claims that the district court improperly relied on his sexual disciplinary violations. The relevant portion of the district court's findings provides as follows:

> [Arellano's] history and behavior while incarcerated by the [DOC] demonstrate a habitual course of sexual misconduct. This is shown by his three convictions for the most serious sex offenses, his sexually assaulting [M.F.] and his institutional rule violations, including violations of a sexual nature that resulted in institutional punishment. [Arellano's] targeted deviancy is children and he had no opportunity to sexually assault minors while in prison surrounded by adult men.

Arellano argues that the two incidents in prison do not relate back to his sexual abuse of children. His point is valid. A showing of similar incidents of misconduct or of incidents that form a pattern can establish a habitual course of misconduct in sexual matters. *See, e.g.*, *Crosby*, 824 N.W.2d at 359. But Arellano's disciplinary violations are dissimilar to his crimes and would not themselves constitute habitual sexual misconduct.

The state correctly contextualizes the finding, observing that the district court's primary basis for its finding was the repeated sexual abuse over a period of years. It is true that Dr. Alberg characterized the child abuse as "episodic" rather than "habitual," but the district court recognized that the abuse spanned years and allegedly included *hundreds* of

sexual encounters with the victimized children. And while Arellano thinks it is "important to note the victims reported [that] the last sexual abuse occurred in June 1994, more than two years before [his] arrest," the district court was mindful that Arellano curbed his abuse only after years of continuous assaults and only after his stepson reported the abuse. Arellano does not explain why the district court was bound to find that hundreds of sex-abuse episodes involving multiple victim boys over a period of years does not constitute "habitual" conduct, and no explanation is apparent to us.

Utter Lack of Power to Control Sexual Impulses

Arellano argues that the district court erred by finding that he has an utter lack of power to control his sexual impulses. To determine whether a person has an utter lack of power to control his sexual impulses, the district court should consider multiple factors:

> [T]he nature and frequency of the sexual assaults, the degree of violence involved, the relationship (or lack thereof) between the offender and the victims, the offender's attitude and mood, the offender's medical and family history, the results of psychological and psychiatric testing and evaluation, and such other 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). The district court's *Blodgett* analysis covered those factors based on the competing testimony, and it concluded that Arellano has an utter lack of power to control his impulses. It based this conclusion on its finding that Arellano demonstrated a lengthy pattern of frequent sexual conduct that included family members and other children, reasoning, "[Arellano] clearly preys on the weak and vulnerable." It also accurately observed that Arellano "takes a victim stance and has historically denied sexual misconduct until his release from prison."

Arellano challenges the district court's finding that he refused treatment. The finding rests on Arellano's "denial of his offenses and his unwillingness to satisfy the English-proficiency requirement" for treatment. We are unconvinced by Arellano's contention that it is "unfair" to characterize his behavior as a refusal of treatment on account of his being waitlisted for continuing education. Although the record does show that Arellano was waitlisted rather than enrolled in the English-proficiency course, it also shows that he was waitlisted because of his own misconduct, which caused his placement in segregation. The district court had ample reason to surmise that Arellano's placement on the waitlist resulted from his own behavior. Arellano does not persuasively challenge the district court's alternative basis for concluding that he essentially refused treatment—his continually denying key aspects of his sex abuse. He also fails to refute the remainder of the district court's *Blodgett*-factor analysis.

Arellano does challenge the district court's related *Irwin* analysis, which applies to individuals with a large gap of time between a petition for commitment and their last act of sexual misconduct. *See In re Irwin*, 529 N.W.2d 366, 375 (Minn. App. 1995), *review denied* (Minn. May 16, 1995). The district court considered this gap and found that Arellano never began or completed sex-offender treatment, that he denied that a problem existed, and that it was at best debatable whether he began to control his sexual behavior independently. We are satisfied that the district court adequately addressed the gap and find that Arellano's related arguments do not merit further discussion.

The district court's ultimate determination is supported by the record and proper analysis. We therefore affirm the district court's determination that Arellano is a sexual psychopathic personality.

Affirmed.