STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1026

In the Matter of the Civil Commitment of:
Alan Joseph Schiller.

Filed January 14, 2019
Affirmed
Bratvold, Judge

Sibley County District Court
File No. 72-PR-17-9

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Considered and decided by Halbrooks, Presiding Judge; Rodenberg, Judge; and Bratvold, Judge.

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

BRATVOLD, Judge

On appeal from his civil commitment, appellant raises two challenges. First, he contends that his indeterminate commitment as a sexually dangerous person and sexual psychopathic personality must be reversed because the evidence is insufficient. Second, he argues that the district court erred in denying his motion for a new trial based on ineffective

assistance of counsel. Because we view the evidence in the light most favorable to the district court's decision, and expert testimony in the record established that appellant is highly likely to engage in harmful sexual conduct in the future and lacks the ability to control his sexual impulses, we conclude that the district court did not err when it found, by clear and convincing evidence, that appellant is sexually psychopathic and dangerous to other persons as defined by the applicable statutes. We also conclude that the district court did not err in denying appellant's request for a new trial because appellant established neither that (a) his trial counsel's representation fell below the objective standard of reasonableness, nor (b) a reasonable probability that, but for counsel's unprofessional errors, the outcome would have been different. Thus, we affirm appellant's civil commitment and its order denying appellant a new trial.

FACTS

In June 2008, J.O. spoke to a sheriff's deputy at the Cozy Corners Campground in Eden Lake Township, Minnesota, and reported that appellant Alan Joseph Schiller had sexually assaulted her 13-year-old son, D.L. J.O. stated that they had met Schiller the previous summer and Schiller was "very friendly" to J.O. and D.L. When D.L. did not return after he left to watch a movie at Schiller's camper, J.O. walked to the camper and saw D.L.'s underwear and pants on the floor. J.O. "pounded on the door" and Schiller came to the door. J.O. screamed, pushed passed Schiller, and saw D.L. come out of the bedroom wearing a shirt and holding clothing over his crotch. Schiller said he was sorry. J.O. left with D.L. and called police.

D.L. told police that he and Schiller took a boat ride and then went inside the camper to watch a movie. D.L. told Schiller that he had a stomach ache and Schiller rubbed D.L.'s stomach for about five minutes. Schiller then began rubbing D.L.'s "crotch" and took off D.L.'s pants and underwear; Schiller took D.L. to his bedroom and made him lay down on the bed, and Schiller started to "suck on [D.L.'s] penis." D.L. told Schiller he felt uncomfortable and asked him to stop, but Schiller told him that "it was okay." This lasted for about 30 seconds when D.L.'s mother arrived. When the police arrived, Schiller initially denied touching D.L. inappropriately and told officers that he had been drinking most of the day and did not remember details of the incident.

Schiller was 56 years old at the time of his arrest; he grew up on a farm, graduated from high school, and attended vocational school. He married in 1976, had two daughters, and was divorced in 1986. Schiller had both anger and alcohol problems after his divorce. At the time of his arrest, Schiller was active in the community, both at church and in other organizations.

Schiller was charged with one count of third-degree criminal sexual conduct. Schiller pleaded guilty to the charge and testified that he touched and put his mouth on D.L.'s penis. In August 2009, the district court convicted Schiller, stayed imposition of the guidelines sentence, and placed Schiller on probation for 15 years, with conditions that included completing outpatient sex-offender treatment and having no unsupervised contact with minors.

Schiller entered an outpatient sex-offender treatment program in May 2010. While in treatment, Schiller disclosed that he had sexually abused at least 15 victims beginning

in 1969, when Schiller, at age 17, sexually abused a ten-year-old male. Schiller's admitted offenses occurred throughout the 39 year period examined during his commitment trial. Schiller was not previously charged; his other victims were males ranging in age from 10 to 34, but most of his victims were 12 to 14 years old. Schiller knew all but one victim through friends, family, or neighbors. Schiller committed many offenses either at his family farm or in his residence and committed one offense in a public bathroom. His offenses included fondling, oral sex, and anal sex.

Schiller's outpatient sex offender treatment program terminated him in August 2010 for failure to make adequate progress. From 2013 to 2015, Schiller violated probation conditions several times: he had unsupervised contact with minors, failed to re-enroll in treatment, enrolled in and was terminated from treatment, and refused to return to sex offender treatment due to a medical condition. Because of his probation violations, the district court executed Schiller's 36-month sentence in November 2015 and he was committed to the Minnesota Correctional Facility (MCF) in Lino Lakes.

On August 2, 2017, respondent Sibley County filed a petition to civilly commit Schiller as a sexually dangerous person (SDP) and sexual psychopathic personality (SPP). The district court appointed an attorney to represent Schiller in the commitment proceedings. The district court also appointed Dr. Linda Marshall, as the court's expert examiner. At Schiller's request, the court appointed Dr. Anne Pascucci as a second court examiner. The court-appointed psychologists interviewed Schiller and conducted independent assessments, their testimony and written recommendations were entered into evidence during the commitment trial.

Dr. Marshall's report, filed with the district court in November 2017, summarized Schiller's sexual history and sexual offenses. Dr. Marshall stated that, although Schiller is "a level two offender" and needs to continue with treatment, "there is insufficient criteria to commit [Schiller] as a Sexually Dangerous Person and Sexual Psychopathic Personality." Dr. Pascucci also filed a report, which stated that "Schiller does not meet the statutory requirements as a Sexually Dangerous Person and as a Sexual Psychopathic Personality. While he presents with a significant history of harmful sexual behavior and a sexual disorder, the results of the risk assessment . . . are indicative of an individual who is appropriate for treatment in the community."

The county retained a third psychologist, Dr. Rosemary Linderman, to review the record. Previously, Dr. Linderman had provided a pre-petition opinion that Schiller met the criteria for commitment. Dr. Linderman also interviewed Schiller. Her report supported Schiller's commitment as a SDP and SPP and was also received into evidence at trial.

The district court held a three-day trial on the commitment petition, starting on January 4, 2018. First, the state called Schiller to testify regarding his history of sexual behavior. Even after years of treatment, Schiller testified that D.L. became aroused when Schiller rubbed his stomach and that led him to abuse D.L. He also testified that D.L. seemed attracted to him and that Schiller believed, if he had not been drinking, he does not think he would have offended against D.L. When asked at trial about his community involvement and whether he was leading a double life, Schiller replied, "To a certain extent I think so."

Dr. Linderman acknowledged that she had been retained by the county to testify as an expert and testified that she "found evidence to support [Schiller] meeting the criteria" to be committed as a SDP and SPP. Dr. Linderman described Schiller's grooming pattern with victims, history of chemical dependency, lack of adequate control over his sexual impulses, and history of not complying with probation supervision. She opined that he was highly likely to sexually re-offend because he has a "lifelong proclivity to seek out minor males to engage in sexual behavior" with them. She also testified that Schiller cannot be safely released into the community.

Dr. Pascucci and Dr. Marshall testified consistent with their reports that Schiller did not meet the statutory criteria for commitment as either a SDP or SPP. Dr. Pascucci testified that she did not read any records before she interviewed Schiller and admitted that some of this information may have affected her assessment of his overall risk to reoffend. Dr. Marshall testified that five out of six factors increased Schiller's risk to re-offend, but she did not think that Schiller met the highly-likely-to-reoffend standard. All three examiners opined that Schiller had engaged in a habitual course of sexual misconduct and has one or more conditions that render him irresponsible for personal conduct with respect to sexual matters.

Sara Robinson, a social worker at the MCF-Lino Lakes, testified regarding Schiller's two-year participation in the sex-offender program, which she described as in the "primary phase." Robinson testified that Schiller was evasive regarding his uncharged victims. Robinson also explained that because Schiller's outpatient program did not share information with MCF, Schiller was able to "either deny or minimize his sex offenses" and

had a "persistent behavioral trait" of doing so "until confronted with documentation (or evidence) that contradicts his position." Robinson testified that Schiller's denial may not indicate "by itself" the "propensity to re-offend," but it "negatively impact[s] his ability to be successful in treatment."

On March 12, 2018, the district court issued its findings of fact, conclusions of law and order, and memorandum, in 91 pages with over 350 detailed factual findings. The district court reviewed the evidence regarding each of the 15 victims and found that Schiller engaged in conduct "likely to cause substantial physical or emotional harm" to each victim. The district court reviewed Schiller's treatment history and found that he had made "some progress" but has "39 years of ingrained deviant sexual behavior, and he resisted and twice failed in outpatient sex offender treatment." Despite two years of intensive inpatient treatment in prison, Schiller had not progressed past the primary phase; thus the district court concluded that outpatient treatment and its related level of supervision "are not sufficient to meet Schiller's treatment needs or the needs of public safety." After making additional findings, the district court concluded that clear and convincing evidence supported indeterminately committing Schiller to the Minnesota Sex Offender Program (MSOP) as both a SDP and SPP.

Schiller retained a new attorney and filed a motion for a new trial, arguing that he had received ineffective assistance of counsel at trial. Specifically, Schiller alleged that his trial attorney used controlled substances during the trial. In May 2018, the district court denied Schiller's request for a new trial. Schiller appeals.

D E C I S I O N

I. The district court did not err in determining that clear and convincing evidence established that Schiller should be committed as a sexually dangerous person and sexual psychopathic personality.

A person may be civilly committed as a SDP or SPP if the county proves the statutory criteria by clear and convincing evidence. Minn. Stat. § 253D.07, subd. 3 (2018). If the district court finds that the statutory criteria has been met, the court "shall commit the person . . . unless the person establishes by clear and convincing evidence that a less restrictive treatment program is available, is willing to accept the respondent under commitment, and is consistent with the person's treatment needs and the requirements of public safety." *Id.*

This court reviews a district court's factual findings on the elements of the civil commitment statutes for clear error. *In re Civil Commitment of Stone*, 711 N.W.2d 831, 836 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). We view the record in the light most favorable to the district court's decision. *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995). An appellate court will not reweigh the evidence. *In re Salkin*, 430 N.W.2d 13, 16 (Minn. App. 1988), *review denied* (Minn. Nov. 23, 1988). "Where the findings of fact rest almost entirely on expert testimony, the [district] court's evaluation of credibility is of particular significance." *Knops*, 536 N.W.2d at 620. But whether the evidence is sufficient to meet the statutory requirements for commitment is a question of law, which this court reviews de novo. *In re Civil Commitment of Martin*, 661 N.W.2d 632, 638 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003).

On appeal, Schiller argues that the district court erred in determining that the state proved the statutory criteria for SDP and SPP commitment by clear and convincing evidence. Specifically, Schiller argues that the district court erred because the expert testimony conflicts regarding whether he is highly likely to engage in harmful sexual conduct in the future, and whether he lacks the ability to control his sexual impulses. Schiller also argues that evidence does not show that he is dangerous to other persons, as is required by the SPP statute.

A. The district court properly determined that Schiller is a sexually dangerous person under Minnesota law.

A 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. § 253D.02, subd. 16(a) (2018). Schiller limits his challenge to the district court's findings and conclusions regarding the third statutory requirement. Precedent has clarified that the third element is satisfied if a person is "highly likely" to reoffend by engaging in acts of harmful sexual conduct in the future. *In re Civil Commitment of Ince*, 847 N.W.2d 13, 23 (Minn. 2014).

To determine whether a person is highly likely to reoffend, a district court must engage in a "multi-factor analysis." *Id.* The multi-factor analysis includes consideration of the following six factors, known as the *Linehan* factors:

> (a) the person's relevant demographic characteristics (*e.g.*, age, education, etc.); (b) the person's history of violent behavior (paying particular attention to recency, severity, and frequency of violent acts); (c) the base rate statistics for violent behavior

> among individuals of this person's background (*e.g.*, data showing the rate at which rapists recidivate, the correlation between age and criminal sexual activity, etc.); (d) the sources of stress in the environment (cognitive and affective factors which indicate that the person may be predisposed to cope with stress in a violent or nonviolent manner); (e) the similarity of the present or future context to those contexts in which the person has used violence in the past; and (f) the person's record with respect to sex therapy programs.

Id. at 22 (quoting *In re Linehan*, 518 N.W.2d 609, 614 (Minn. 1994)). The *Linehan* factors also allow the court to consider other relevant evidence and information, including the actuarial assessment evidence used by the experts, even though this evidence is not directly mentioned in the *Linehan* factors. *See id*. at 24. No single factor is determinative. *In re Civil Commitment of Navratil*, 799 N.W.2d 643, 649 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011).

Schiller argues that, because Dr. Marshall and Dr. Pascucci, the court appointed examiners, both opined that Schiller was not likely to engage in acts of harmful sexual conduct in the future, the district court erred in finding otherwise. Schiller also contends that, because Dr. Linderman was a paid expert, and because she was a "member of the prepetition screening team," the district court erred in finding her opinion more credible. Schiller states that the opinions of "examiners who did not have a stake in the outcome of the case, must be weighed more heavily than the examiner who was retained."

First, we reject Schiller's argument that Dr. Linderman's opinion should be given less weight because she was retained and paid by the state. As stated, this court gives due deference to the district court as the best judge of the credibility of witnesses. *See Knops*, 536 N.W.2d at 620. And where, as here, the findings of fact "rest almost entirely on expert

testimony, the [district] court's evaluation of credibility is of particular significance." *Id.* This is true even when an expert is paid by a party. *See In re Civil Commitment of Crosby*, 824 N.W.2d 351, 356, 360-61 (Minn. App. 2013) (affirming appellant's civil commitment despite appellant's objection to the district court's decision to credit the forensic psychologist retained by the state, in the face of "competing experts"), *review denied* (Minn. Mar. 27, 2013).

Second, the district court thoroughly explained why it rejected Dr. Marshall and Dr. Pascucci's analysis and conclusions on the *Linehan* factors. Specifically, the district court stated that Dr. Pascucci's "lack of review of any records prior to interviewing Schiller weakens her persuasiveness on this element" because she was unable to ask "any follow-up questions" related to Schiller's offenses and likelihood to reoffend. The court explained that it rejected Dr. Marshall's opinion, in part, because she "testified that most of the *Linehan* factors apply, but she still did not support commitment, which weakens her persuasiveness on this element." Accordingly, the district court was within its discretion to determine which expert's opinion it found most persuasive. *See id.*; *see also Knops*, 536 N.W.2d 620 (stating that due regard is given to district court credibility determinations, and that the court's evaluation of the credibility of expert witness is particularly significant when the findings of fact rest almost exclusively on expert testimony).

Third, the district court's decision includes a detailed written analysis of each of the *Linehan* factors. In doing that analysis, the district court considered each expert's report and reached its own conclusion regarding Schiller's risk of reoffending. The district court did not find certain parts of Dr. Marshall and Dr. Pascucci's opinions persuasive. But the

court determined that a majority of the *Linehan* factors supported its determination that Schiller was "highly likely to commit acts of harmful sexual conduct in his remaining lifetime and is dangerous." We consider the district court's assessment of each of the six *Linehan* factors.

Factor a: Demographic characteristics. Schiller was 66 years old at the time of trial and had a history of alcohol dependence. Dr. Marshall and Dr. Pascucci opined that Schiller was an older male, who had demonstrated a pattern of lifestyle stability, and accordingly, was less likely to reoffend. The district court found that while Schiller's age normally might mitigate risk, Schiller had committed at least one sexual offense in his "mid-50s," and therefore, his age did not alleviate the risk of reoffending. Also, the 2008 assault of D.L. took place while Schiller was experiencing lifestyle stability. The court determined that this factor "somewhat increases Schiller's likelihood of re-offense." We conclude that the district court's determination of this factor is supported by record evidence.

Factor b: History of violent behavior. The district court found that this factor had "moderate application." Dr. Marshall opined that Schiller had a history of committing violent acts because "any sex offense against an underage child can be considered to be a violent offense." Dr. Pascucci opined that Schiller had a history of "sexual misbehavior." The district court agreed with Dr. Marshall and Dr. Pascucci and also found that Schiller had threatened violence towards his ex-wife, "usually while drinking." Dr. Lindeman reported, and the district court found, that Schiller had "not used physical violence in any of his sex offenses." We conclude that the district court's determination on this factor is supported by the record.

Factor c: Base-rate statistics. The district court found that the base-rate statistics for violent behavior among individuals with Schiller's background indicated that Schiller has "an average to below-average group risk" of reoffending. The district court added that, while these "actuarial tools are helpful, they are not . . . determinative" on whether Schiller is highly likely to reoffend because base-rate statistics measure group risk, not Schiller's individual likelihood of reoffending. We conclude that the district court's determination on this factor is supported by the record. *See Ince*, 847 N.W.2d at 24 (determining that, while the actuarial assessment evidence "is relevant to the determination of whether a person is highly likely to engage in future harmful sexual conduct," it is just one factor in a "multi-factor analysis for dangerousness prediction").

Factor d: Sources of stress. The experts testified that Schiller had some support in the community, including the Knights of Columbus and the Lions Club. But Dr. Pascucci opined that Schiller had "triggers to sexual misbehavior" which included "feelings related to social inadequacy." Dr. Pascucci specifically recognized Schiller's history of alcohol abuse as a "continued concern." The district court found that Schiller "essentially lived a double-life in the community—the image he projects to the community, and his private life, where he committed sex offenses against at least 15 victims." Relying in part on Dr. Pascucci's testimony, the district court found that Schiller would struggle with "reconciling those two worlds while in outpatient treatment." We conclude that the district court's finding on this factor and that it "significantly increases" Schiller's risk to re-offend is supported by the record.

Factor e: Similarity of the present context to past context of offenses. The district court found that Schiller had offended in his family home, on his family's farm, and in his home as an adult. Schiller asserted that his family "will keep him from re-offending," but the district court rejected this claim. At trial, Schiller testified that, years ago, a family member confronted him about his sexual offenses, and he denied any offense. Schiller also testified that the family member did not intervene. The district court concluded that Schiller would be released to the same environment in which he abused minors in the past, and this factor increased his likelihood of reoffending. We conclude that the district court's finding on this factor is supported by the record.

Factor f: Record in treatment programs. The district court found that Schiller had participated in prison-based sex-offender treatment, but was "still in the primary phase of treatment after two years." The record shows that Schiller was twice terminated for failing to make progress in outpatient treatment while on probation. Schiller's probation agent reported, in 2014, that Schiller claimed he "was finished with treatment" and going back to treatment would "cause unnecessary 'stress' in his life." Schiller's probation agent also stated that Schiller "threaten[ed] civil action against" the treatment program if he was required to return. The district court found that Schiller minimizes his behavior and is evasive about his sexual offenses while in treatment. The district court concluded that this factor may be the "most significant factor increasing Schiller's likelihood of re-offense." We conclude that the record supports the district court's findings on this factor.

In sum, the district court concluded that the *Linehan* factors establish Schiller is highly likely to reoffend and, therefore, support commitment as a SDP. In completing its

multi-factor assessment, the district court found that factors (d), (e), and (f) significantly increase Schiller's risk to reoffend, factor (b) moderately increases his risk, factor (a) slightly increases his risk, and factor (c) was "largely neutral." Because the district court's findings are supported by the record, we conclude that the district court did not err in determining Schiller to be a SDP.

B. The district court properly determined that Schiller has a sexual psychopathic personality under Minnesota law.

A sexual psychopathic personality is

> 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. § 253D.02, subd. 15 (2018) (emphasis added). Schiller challenges the district court's SPP decision in two ways. First, he claims that the evidence does not establish an utter lack of power to control. Second, he argues that the state did not prove that he is dangerous to other persons. We address each challenge in turn.

1. Utter lack of power to control sexual impulses

Generally, when considering whether a person has an utter lack of power to control his sexual impulses, the district court considers "the 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 may also consider the person's need for security, chemical-dependency issues, history of flight, and need for sex-offender treatment. *See In re Pirkl*, 531 N.W.2d 902, 907 (Minn. App. 1995), *review denied* (Minn. Aug. 30, 1995); *In re Irwin*, 529 N.W.2d 366, 375-76 (Minn. App. 1995), *review denied* (Minn. May 16, 1995); *In re Bieganowski*, 520 N.W.2d 525, 529-30 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994).

Schiller argues that Dr. Marshall and Dr. Pascucci considered these factors and concluded that he did not "meet all of the *Blodgett*, *Pirkl*, *Bieganowski*, and *Irwin* factors," and the factors that he did meet did not support "meeting criteria under the" SPP statute. Schiller also contends that Dr. Linderman concluded that he met "every single" factor, even though the evidence did not support her conclusion.

We are not persuaded by Schiller's argument because the district court conducted its own analysis of these factors and concluded that Schiller met the criteria for commitment as a SPP. Applying the *Blodgett* factors, the district court found that: Schiller had sexually assaulted 15 victims over a period of approximately 39 years; while Schiller did not use physical violence, he used his age and size to offend, and he offended against an adult victim while that victim was unconscious; Schiller assaulted strangers and acquaintances which "indicates a broad victim pool"; and Schiller did not complete sex-offender treatment, did not understand his offending cycle, and minimized his behaviors to avoid accountability. The district court concluded that the *Blodgett* factors supported a

finding that Schiller had an utter lack of power to control his sexual impulses. The court also analyzed the *Pirkl*, *Bieganowski*, and *Irwin* factors, and concluded that each of these tests supported a finding that Schiller has an utter lack of control over his sexual impulses.

The district court also stated that it did not find persuasive Dr. Marshall and Dr. Pascucci's reports on Schiller's self-control "because the applicable case law factors support an utter lack of power to control finding." The court stated that it completed its own analysis of the factors, and concluded that Schiller did not "have the ability to control his deviant sexual impulses when there is a victim available, and the means and opportunity to sexually offend." Based on our review, the district court's findings are supported by the record, and clear and convincing evidence supports the district court's determination that Schiller has evidenced an utter lack of power to control his sexual impulses.

2. Dangerous to other persons

Schiller argues that the state did not prove by clear and convincing evidence that he is dangerous to other persons. Schiller contends that his sexual offenses did not involve violence, and therefore, he is not dangerous to other persons. Schiller argues that his case is analogous to *In re Robb*, because Robb sexually assaulted several young boys, but did not use physical violence in his assaults. 622 N.W.2d 564, 566-67 (Minn. App. 2001), *review denied* (Minn. Apr. 17, 2001). In *Robb*, this court concluded that "Robb's behavior is not the kind of behavior contemplated by the [SPP] statute. . . . Robb did not physically injure any of his victims." *Id.* at 572. Schiller claims that he also did not "physically injure" any victims, therefore, he argues that the district court erred in finding him dangerous to other persons.

But our caselaw has evolved since *Robb*, and this court has determined that a person is "'dangerous to others' and subject to commitment as a [SPP] when the person's pattern of sexual misconduct . . . creates a substantial likelihood of serious physical or emotional harm to others." *In re Kindschy*, 634 N.W.2d 723, 732 (Minn. App. 2001), *review denied* (Minn. Dec. 19, 2001); *see also In re Preston*, 629 N.W.2d 104, 113 (Minn. App. 2001) (finding that, although appellant did not cause "physical injury collateral to their assaults themselves, this does not mean that [appellant's] assaults were non-violent within the meaning of the sexual psychopathic personality statute").

Even though Schiller's assaults were not physically violent, the emotional harm that he caused his victims supports a finding that Schiller is dangerous to others. In fact, the record shows that D.L. was "frighten[ed]" and upset by the assault. Although Schiller was not prosecuted for his 14 other offenses, against mostly 12 to 14 year olds, he committed several instances of "what may have been charged as either First or Second-Degree Criminal Sexual Conduct." Certain offenses, including criminal sexual conduct in the first and second degree, give rise to a rebuttable presumption of dangerousness to others because those offenses "create[] a substantial likelihood that a victim will suffer serious physical or emotional harm." *See* Minn. Stat. § 253D.02, subd. 8(b). The district court found that Schiller did not rebut the presumption that his victims suffered "serious physical or emotional harm." *Id.* All three examiners found that Schiller's history of deviance created a substantial likelihood of serious emotional harm to Schiller's victims.

We conclude that the record supports the district court's conclusion that Schiller is dangerous to other persons by clear and convincing evidence. Because the record also

supports the district court's determination that Schiller has an utter lack of power to control his sexual impulses, we affirm the district court's determination that Schiller must be civilly committed as a SPP.

II. The district court did not err in concluding that Schiller failed to demonstrate ineffective assistance of counsel.

A committed person has the statutory right to assistance of counsel in commitment proceedings. *See* Minn. Stat. § 253D.20 (2018). The district court shall appoint counsel to represent the committed person if the person does not provide counsel for himself. *Id.* During the commitment proceedings, the attorney shall: (1) consult with the person before any hearings; (2) "be given adequate time and access to records to prepare for all hearings; (3) continue to represent the person throughout any proceedings under this chapter unless released as counsel by the court; and (4) be a vigorous advocate on behalf of the person." *Id.* The district court determined that Schiller's trial attorney satisfied the statutory requirements and denied his request for a new trial.

This court applies the criminal standard for analyzing the effectiveness of counsel in civil-commitment cases. *In re Dibley*, 400 N.W.2d 186, 190 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987). Accordingly, Schiller must show "that counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Reed v. State*, 793 N.W.2d 725, 733 (Minn. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). "A strong presumption exists that counsel's performance fell within a wide range

of reasonable assistance." *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998). Claims of ineffective assistance of counsel that raise mixed questions of fact and law are reviewed de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

Schiller argues that the district court erred in denying his motion for a new trial because he received ineffective assistance of counsel. Specifically, Schiller claims that his trial attorney's performance fell below an objective standard of reasonableness because his attorney was arrested for a "serious felony-level drug charge" during his representation of Schiller. The district court has the discretion to grant a new trial, and this court will not disturb that decision "absent a clear abuse of that discretion." *Willis v. Indiana Harbor S.S. Co.*, 790 N.W.2d 177, 184 (Minn. App. 2010), *review denied* (Minn. Dec. 22, 2010).

A. Facts relevant to Schiller's ineffective-assistance-of-counsel claim

On January 2, 2018, the parties convened for what was supposed to be the first day of trial. Schiller's attorney did not appear and, when the district court called him at home, the attorney stated that he was sick, but that he would be "able to proceed normally tomorrow." On January 3, Schiller's attorney again did not appear and told the court on a conference call that he was still sick. The district court received word that Schiller's daughter heard Schiller's attorney "slurring" his speech when she spoke to him on the phone. Schiller's attorney explained that he had been sleeping and was groggy. The district court gave Schiller the opportunity to speak to his attorney on the phone, and scheduled the trial to begin the next day. On January 4, the trial began with Schiller's attorney representing him.

After the district court issued its commitment order in March 2018, the state wrote a letter to the district court stating that they could not reach Schiller's trial attorney. The district court appointed a new attorney for Schiller. Schiller's new attorney filed a motion for a new trial, arguing that Schiller received ineffective assistance of counsel because his trial attorney used controlled substances during the trial.

On May 30, 2018, the district court denied Schiller's request for a new trial. The district court's order stated that, on January 31, 2018, a drug task force completed a search at Schiller's attorney's home and found "large quantities of controlled substances." During an interview with law enforcement after the search, Schiller's attorney admitted "being addicted to methamphetamine and estimated using somewhere between a quarter and a half gram per day." Schiller's attorney was charged with two counts of first-degree controlled substance crime, and those charges were pending at the time the district court issued its post-trial order in Schiller's case.

The district court concluded that Schiller's attorney's performance at trial did not fall "below an objective standard of reasonableness." The district court found that Schiller's attorney had been in contact with Schiller before trial, was a "vigorous advocate" at trial, and that there was "nothing in the record to suggest that [Schiller's attorney] was impaired while representing [Schiller]."

B. The district court did not abuse its discretion in denying Schiller a new trial.

Schiller asks that, "as a matter of first impression, this [c]ourt hold that an attorney's performance falls below an objective standard of reasonableness when his actions lead to

criminal charges and possible license sanctions." We decline to adopt this rule. First, this rule contradicts the established standard for ineffective-assistance claims, which requires this court to consider whether the specific trial counsel's performance in that case fell below an objective standard of reasonableness. *Reed*, 793 N.W.2d at 733. A per se ineffective-assistance rule would not permit reviewing courts the flexibility that the *Strickland* test demands. Second, this court has previously declined to adopt per se ineffective-assistance-of-counsel rules. *See, e.g.*, *Berkow v. State*, 573 N.W.2d 91, 97 (Minn. App. 1997) (affirming finding of no ineffective assistance of counsel based on circumstances of case), *aff'd*, 583 N.W.2d 562 (Minn. 1998). Third, Schiller's proposed rule also contradicts analogous caselaw on this issue. In *State v. Nissalke*, the supreme court denied an ineffective-assistance-of-counsel claim when appellant's trial attorney was arrested for a drug charge just a few months prior to appellant's trial. 801 N.W.2d 82, 111 (Minn. 2011). Applying the *Strickland* test, the supreme court determined that, despite his attorney's drug arrest, Nissalke had not "demonstrated that his counsel's performance was objectively unreasonable." *Id.* at 111-12.

Schiller's claim of ineffective assistance fails for the same reasons Nissalke's did. Some of Schiller's complaints of ineffectiveness—including his trial attorney's decision not to "rehabilitate [Schiller] after his incriminating responses" to the county's questions and his attorney's decision not to call Schiller during his case in chief—fall squarely within "tactical decisions properly left to the discretion of trial counsel." *See State v. Mems*, 708 N.W.2d 526, 534 (Minn. 2006) (noting such tactical decisions do not prove that counsel's performance fell below an objective standard of reasonableness). Generally, a reviewing

court does not review matters of trial strategy for competence. *See Voorhees v. State*, 627 N.W.2d 642, 651 (Minn. 2001).

Schiller also argues that his counsel was likely impaired during the trial. But after reviewing the record, the district court specifically determined that there was no evidence that Schiller's attorney was impaired while he represented Schiller during trial or other court proceedings. We conclude that these factual findings are supported by the record.

Finally, and importantly, Schiller has failed to show that, but for counsel's "unprofessional errors, the result of the proceeding would have been different." *Reed*, 793 N.W.2d at 733. As stated by the district court, Schiller has failed to point to any "references to the transcript, citing inappropriate questioning, or the absence of questioning on critical issues." Thus, Schiller failed to show that his trial attorney's performance prejudiced him, and that, without his attorney's errors, the result would have been different.

We conclude that the district court did not abuse its discretion in denying Schiller's motion for a new trial. In sum, because clear and convincing evidence supports the district court's civil-commitment findings and conclusions, we affirm Schiller's commitment.

Affirmed.