This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).

STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1289

In the Matter of the Civil Commitment of: Andrew James Busskohl

Filed December 5, 2011
Affirmed
Larkin, Judge

Washington County District Court
File No. 82-PR-10-7449

Timothy T. Ryan, Chisago City, Minnesota (for appellant)

Peter Orput, Washington County Attorney, James Zuleger, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Considered and decided by Klaphake, Presiding Judge; Larkin, Judge; and Stauber, Judge.

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

LARKIN, Judge

Appellant challenges his indeterminate commitment to the Minnesota Security Hospital (MSH) as a person who is mentally ill and dangerous (MID), arguing that he does not meet the statutory criteria for civil commitment as MID and that commitment to the MSH is inappropriate. We affirm.

FACTS

During the months prior to August 2008, appellant Andrew James Busskohl devised a plan to murder an individual in his Woodbury neighborhood. He thought he would "enjoy" committing a murder and that "there might be a thrill from it." He was also interested in the thrill of "getting away with it." Busskohl wanted to murder someone who had committed bad acts, but he had difficulty finding a victim fitting that description. Busskohl instead targeted someone that he randomly selected from a telephone book—a single man who lived near his home. Busskohl planned to break a window at the victim's home a day or two prior to the murder to gain easier access on the night of the murder. He also planned to stab the victim or cut the victim's throat. He wanted to establish a modus operandi by either cutting off the victim's eyelids or cutting out his heart. Busskohl assembled a "murder kit" consisting of a swim cap, black gloves, latex gloves, hospital scrubs, gauze, an address card with the victim's address written on it, shoe covers, a pry bar, a black mask, plastic bags, knives, two flashlights, scissors, a scalpel, tweezers, and a GPS device with the victim's address stored in its memory. He assembled these materials so he "wouldn't leave any sort of fingerprints or DNA behind."

On August 6, 2008, Busskohl drove to the victim's house at approximately 1:00 a.m., parking his car a block away to avoid detection. Busskohl stood outside of the house for about 45 minutes, "[d]ebating" what to do. When the "dark aspect" of his internal debate "won out," Busskohl used a large rock to break the victim's patio door window, and he cut his hand in the process. Busskohl fled the scene and later told his friend, E.E., what he had done. Busskohl had previously informed E.E. of his plan to

murder his neighbor, describing the plan in detail. Because E.E. believed that Busskohl intended to follow through with his murderous plot, he contacted the police. Busskohl was arrested later that night. Police searched Busskohl's vehicle and found the murder kit. A search of Busskohl's home revealed a calendar with the dates of August 5 and August 7 marked and August 7 labeled, "night."

Busskohl was charged with attempted burglary and attempted first-degree premeditated murder, but the district court dismissed the attempted-murder charge for lack of probable cause, reasoning that Busskohl's actions did not amount to a "substantial step" toward commission of murder under the criminal law. *See* Minn. Stat. § 609.17, subd. 1 (2010) (defining "attempts" as requiring "an act which is a substantial step toward, and more than preparation for, the commission of the crime"). On April 17, 2009, Busskohl pleaded guilty to reduced gross-misdemeanor charges of criminal damage to property and harassment for stalking with intent to injure. The district court sentenced Busskohl to 90 days in jail and four years of probation.

Because Busskohl was considered a high-risk probationer, he received "intensive supervision." Despite this level of supervision, Busskohl had difficulty complying with the probationary requirements, and he violated the terms of probation on multiple occasions. In April 2009, while attending classes at a local college, Busskohl had thoughts about causing harm to another student and was found to be in possession of several knives. Busskohl was also arrested for shoplifting after attempting to steal a knife, a spring clamp, and a butane lighter. In April 2010, Busskohl accepted a job as

salesperson with a knife company against the advice of his probation officer, and lied to his therapist about the fact that this employment violated his probationary conditions.

In May 2010, Busskohl admitted to his mother that he was having homicidal thoughts and was taken to a hospital. In a pre-petition screening interview, Busskohl admitted that he thought about murdering a couple that he had selected from a phonebook. Busskohl admitted that he chose the couple because they had no children and lived nearby in a secluded area. Busskohl had procured a knife, acetone, and paint-resistant clothing, and he stated that he planned to slit the couple's throats.

In June 2010, Busskohl's mother called police after Busskohl had been in an argument with his stepfather. Busskohl was again found to be in possession of knives, in violation of probation. In September 2010, Busskohl's probation officer searched Busskohl's vehicle and discovered an "airsoft" gun, a knife with an eight-inch blade, gloves, a scope for a gun, and razor blades. In November 2010, Busskohl's probation officer discovered another knife in a locked desk drawer that Busskohl used at school. At Busskohl's home, the officer also found a night scope, a Swiss army knife, and a notebook with a list of items in Busskohl's handwriting that included a "vice for head."

On November 19, 2010, Washington County petitioned the district court to commit Busskohl as an MID person. In January and February 2011, the district court held a three-day contested evidentiary hearing, which included the testimony of Busskohl, his mother, his caseworker, his probation officer, and five expert witnesses. On March 3, 2011, the district court found Busskohl to be mentally ill and dangerous and civilly committed him to the MSH. After a review hearing under Minn. Stat. § 253B.18,

subd. 1(b) (2010), on June 3, 2011, the district court indeterminately committed Busskohl to the MSH. This appeal follows.

D E C I S I O N

Standard of Review

We review a district court's civil-commitment decision to determine whether the district court complied with statutory requirements and whether the evidence in the record supports the findings of fact. *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995). In doing so, we view the record in the light most favorable to the district court's decision. *Id.* We will not set aside a finding of fact unless it is clearly erroneous. Minn. R. Civ. P. 52.01. But we review de novo whether there is clear and convincing evidence to support the district court's legal conclusion as to whether a person meets the standard for civil commitment as mentally ill and dangerous. *Knops*, 536 N.W.2d at 620; *see also In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003).

Statutory Criteria for Commitment

A district court may order the commitment of a person as mentally ill and dangerous if it finds by clear and convincing evidence that the person satisfies the relevant statutory criteria. Minn. Stat. § 253B.18, subd. 1(a) (2010). A person is "mentally ill and dangerous to the public" if the person is "mentally ill"[1] and

[1] A person is "mentally ill" if the person "has an organic disorder of the brain or a substantial psychiatric disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality, or to reason or understand, which is manifested by instances of grossly disturbed behavior or faulty perceptions and poses a substantial likelihood of physical harm to self or others." Minn. Stat. § 253B.02, subd. 13(a) (2010). Whether a person poses "a substantial likelihood of

> as a result of that mental illness presents a clear danger to the safety of others as demonstrated by the facts that (i) the person has engaged in an overt act causing or attempting to cause serious physical harm to another and (ii) there is a substantial likelihood that the person will engage in acts capable of inflicting serious physical harm on another.

Minn. Stat. § 253B.02, subd. 17(a)(2) (2010).

Busskohl does not dispute the district court's determination that he is mentally ill. Rather, he challenges the determinations that he presents a danger to public safety and that he engaged in an overt act within the meaning of the statute. Specifically, Busskohl challenges the district court's determination that "the incident occurring on or around August 6, 2008, constitutes an overt act attempting to cause serious physical harm to another." "Whether evidence is sufficient to prove an overt act is a legal question and is subject to de novo review." *Knops*, 536 N.W.2d at 620. It is not necessary that "mayhem or murder" occur, and less violent conduct may meet the statutory requirement. *In re Kottke*, 433 N.W.2d 881, 884 (Minn. 1988). A "person's intent or the outcome of the action is not relevant to the determination of whether the conduct meets the overt-act requirement" for dangerousness. *In re Civil Commitment of Carroll*, 706 N.W.2d 527, 530 (Minn. App. 2005). The focus is "on the seriousness of the act and whether it did occur." *Knops*, 536 N.W.2d at 620.

The district court determined that "[a]n attempt to murder someone evidences an intent to inflict 'serious physical harm' on that person." Recognizing that Busskohl's

---

physical harm to self or others" may be demonstrated by, among other things, "a recent attempt or threat to physically harm self or others," or "recent and volitional conduct involving significant damage to substantial property." *Id.*

charge of first-degree attempted murder was dismissed for lack of probable cause, the district court stated that it analyzed Busskohl's actions giving the word "attempt" "its usual meaning and not the one used in criminal law." *See In re Jasmer*, 447 N.W.2d 192, 195 (Minn. 1989) (stating that the commitment statute "does not require" that an overt act attempting to cause serious physical harm to another equate with an "attempt" within the meaning of the criminal statutes).

In arguing that his 2008 conduct is not an overt act within the meaning of the statute, Busskohl reviews caselaw regarding MID commitment appeals and argues that "previous findings of the 'overt act' requirement involved actual injuries or direct threats to injure." *See, e.g.*, *Carroll*, 706 N.W.2d at 528-29 (patient had record of physical assaults and threatening behavior); *Jasmer*, 447 N.W.2d at 194 (patient had committed several assaults and fired a gun at a neighbor); *In re Hofmaster*, 434 N.W.2d 279, 281 (Minn. App. 1989) (patient had history of violence including stabbing his wife and other threatening behavior). Busskohl contends that while he "thought about injuring someone, and took remote steps toward injuring someone . . . [he] was never in a position to immediately do serious physical harm to another." Busskohl also emphasizes that his first-degree attempted-murder charge was dismissed for lack of probable cause because he did not take a "substantial step" toward committing the murder under the criminal statute. Busskohl suggests a similar result should follow in his commitment proceeding, arguing that he only took "a small step toward the commission" of the overt act.

We are not persuaded. First, Busskohl's reliance on the dismissal of his criminal attempted-murder charge is not dispositive. "Conviction of a crime is not a prerequisite

to commitment as mentally ill and dangerous to the public," and the commitment statute "does not require" that an overt act attempting to cause serious physical harm to another equate with an "attempt" within the meaning of the criminal statutes. *Jasmer*, 447 N.W.2d at 195. Second, Busskohl's argument that "[n]o one was hurt" by his actions does not bar a determination that he committed an overt act for purposes of the commitment statutes. Under the plain language of the statute, actual serious physical harm is not required. *See* Minn. Stat. § 253B.02, subd. 17(a)(2) (requiring an "overt act causing *or attempting to cause* serious physical harm") (emphasis added).

It is undisputed that Busskohl devised a detailed plan to kill a stranger and took several steps to carry out the plan. He identified a victim. He selected the date for the murder. He assembled a "murder kit." And he broke the victim's window—as planned—in order to access the victim's home on the night of the anticipated murder. After Busskohl told his friend, E.E., that he had broken the window and that his plan had been set in motion, E.E. notified police, and Busskohl was arrested later that evening. After his arrest, Busskohl told police that he was thankful that they intervened before "anything else could have happened." The fact that the police arrested Busskohl and no physical harm resulted from Busskohl's plan appears to be a matter of luck. The evidence clearly and convincingly shows that Busskohl engaged in an overt act attempting to cause serious physical harm to another.

Busskohl also argues that the evidence does not support the district court's determination that he "poses a substantial likelihood of physical harm to self or others." A person is not MID unless "there is a substantial likelihood that the person will engage

in acts capable of inflicting serious physical harm on another." Minn. Stat. § 253B.02, subd. 17(a). "The question of dangerousness is a factual determination for the trial court, which should not be disturbed on appeal unless it is clearly erroneous." *Hofmaster*, 434 N.W.2d at 282. The district court may consider the person's "entire history, including his actions both prior and subsequent to" the act in question when determining whether "he remains a clear danger to others." *Id.* at 281. Appellate courts give "due regard" to the district court's opportunity to judge witness credibility. Minn. R. Civ. P. 52.01. And "[w]here 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.

Busskohl argues that the experts "did not agree on" his level of dangerousness, and contends that the district court "failed to consider the progress" he made since August 2008, emphasizing that he has not "engaged in direct hostile or violent behavior." The county argues that the district court's undisputed findings regarding Busskohl's ongoing behavior clearly supports the district court's determinations. We agree.

The district court emphasized Busskohl's responses during the civil commitment pre-petition screening process in May 2010, in which Busskohl admitted having "homicidal ideations." It is undisputed that Busskohl admitted thinking about murdering another couple that he had chosen through a random search in the phonebook, and that he gathered items in preparation for the act, including paint-resistant clothing, a knife, and acetone. The district court found these actions to be "too similar" to his 2008 planned murder to be coincidental. And it is also undisputed that, while under intensive probation supervision for his 2008 criminal conduct, Busskohl repeatedly possessed knives and

viewed violent images using his computer. He also acquired an airsoft gun, and took a job with a knife company, in violation of his probationary terms.

The expert testimony also supports the district court's determinations. The district court emphasized that it "was most persuaded" by the testimony of Dr. Katheryn Cranbrook and Dr. Lawrence Panciera, two board-certified forensic psychologists. Dr. Cranbrook's report states that Busskohl presents a "complex diagnostic picture," and that reaching an accurate diagnosis has been complicated by Busskohl's "tendency toward secrecy, deception and the provision of inconsistent and conflicting information about a variety of topics over time and across situations." She placed him in a "[h]igh risk category relative to future risk of violent recidivism." Dr. Panciera testified that Busskohl posed a "significant risk," and that in the time since the August 2008 events, Busskohl has engaged in "secretive," "troubling behaviors" indicating that Busskohl "is not changing."

While the opinions of other experts varied to some extent, the differences do not render the district court's findings clearly erroneous. Dr. James Alsdurf, an expert retained by Busskohl, placed Busskohl in the "moderate range of risk to re-offend," with 42% to 56% likelihood of violent offending within ten years. But Dr. Alsdurf also agreed that Busskohl "poses a clear danger to the safety of others . . . without treatment." Dr. James Gilbertson also opined that Busskohl had a "moderate degree of risk to re-offend," and that the "actuarial results would not . . . support a finding of *substantial probability* of a future violent offense." But actuarial results are only one factor in the analysis. *See In re Linehan*, 557 N.W.2d 171, 189 (Minn. 1996) (stating that statistical

evidence of recidivism "is only one" factor, and that district courts may consider other evidence in addressing the "complex and contested" matter of predicting dangerousness), *vacated on other grounds*, 522 U.S. 1011, 118 S. Ct. 596 (1997), *aff'd on remand*, 594 N.W.2d 867 (Minn. 1999). Moreover, Dr. Gilbertson noted that Busskohl "continues to have a fixation upon knives and gore," and has "at times, some degree of homicidal ideation." Dr. Gilbertson stated that Busskohl does have "an increased degree of risk for violent re-offense" if he is not treated and taking psychoactive medication, and is "not under some form of accountability supervision." The variations in the expert opinions are not so stark as to render the district court's determinations regarding dangerousness clearly erroneous. And the district court's evaluation of the expert testimony is of "particular significance." *Knops*, 536 N.W.2d at 620. On this record, the district court's determination that Busskohl remains a danger to the safety of others is not clearly erroneous.

Placement for Treatment

Busskohl contends that the district court erred in committing him to the MSH, arguing that (1) he should have been placed in a less restrictive setting, and (2) that the facility will not properly treat his mental health needs. Under the commitment act,

> If the court finds by clear and convincing evidence that the proposed patient is a person who is mentally ill and dangerous to the public, it *shall* commit the person to a secure treatment facility or to a treatment facility willing to accept the patient under 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.18, subd. 1(a) (emphasis added). "Secure treatment facility" is defined as "the Minnesota Security Hospital . . . but does not include services or programs administered by the secure treatment facility outside a secure environment." Minn. Stat. § 253B.02, subd. 18a (2010). This court will not reverse a district court's findings on the propriety of a treatment program unless its findings are clearly erroneous. *Thulin*, 660 N.W.2d at 144.

The district court committed Busskohl to the MSH, finding that "there are no available less restrictive treatment programs" consistent with Busskohl's needs and "the requirements of public safety." The district court determined that Busskohl "needs to be placed in a facility where his serious mental illnesses can be properly treated," emphasizing that the facility "must be highly supervised to insure that he does not have access to any of his 'triggers.'" The court also found that the alternative programs Busskohl suggested "do not feature enough monitoring or structure" for his needs.

Busskohl asserts that he should have been placed in a less restrictive setting. He argues that the mental health professionals "did not unequivocally testify that the state security hospital was the only possible placement option," and that some proposed a community treatment program. Busskohl correctly points out that some mental health professionals noted the availability of community-based treatment programs for mentally-ill patients. For example, Dr. Michael Thompson, a psychologist retained by the county, opined in a report that Busskohl needed treatment "in a structured setting that

can adequately address his medical issues and that offers some modicum of community safety." He suggested that a "community treatment program may be a least restrictive alternative provided funding sources are stable and of duration sufficient to permit an extended placement and that requisite security considerations are met to insure community safety." Dr. Alsdurf also testified as to availability of community-based options, but he also noted the need for security and monitoring.

Busskohl indicated he is "willing to go" to a community-based treatment program, and that he searched for a program, but he was unable to identify a treatment program that was willing to accept him. Indeed, Busskohl's county case manager testified that he inquired with nine different facilities, and none would accept Busskohl as a person committed as MID. Ultimately, "patients have the opportunity to prove that a less-restrictive treatment program is available, but they do not have the right to be assigned to it." *In re Kindschy*, 634 N.W.2d 723, 731 (Minn. App. 2001), *review denied* (Minn. Dec. 19, 2001). Because Busskohl failed to demonstrate "by clear and convincing evidence that a less restrictive treatment program is available that is consistent with his treatment needs and the requirements of public safety," the district court did not err by committing Busskohl to the MSH. *See* Minn. Stat. § 253B.18, subd. 1(a).

Busskohl also asserts that the district court "disregarded the official position" of the security hospital's staff, arguing that the hospital does not believe that Busskohl is mentally ill and dangerous and that the hospital is "not designed" to meet his needs. He emphasizes a report authored by Dr. Andrei Nemoianu and Dr. Tracy Thomas and

submitted by the MSH at the review hearing,[2] which notes that the security hospital "is primarily a psychiatric hospital designed to treat and manage severe and persistent mental illness" and that "it is unlikely that Mr. Busskohl's primary diagnosis . . . is likely to resolve through treatment" at the facility. The county argues that this particular argument amounts to a challenge to the adequacy of Busskohl's treatment, and as such, is "outside the scope of the commitment process." We agree.

"[T]he commitment process is not the proper avenue for asserting a right-to-treatment argument" because "the availability or adequacy of treatment afforded to committed individuals is outside the scope of the commitment process." *In re Navratil*, 799 N.W.2d 643, 651 (Minn. App. 2011). We nonetheless observe that the MSH report states that treatment options for Busskohl's personality disorder "are available" and that the MSH "would certainly treat [Busskohl] if he were committed." Moreover, to the extent Busskohl challenges the weight given to the testimony of various expert witnesses, appellate courts give "due regard" to the district court's opportunity to judge witness credibility. Minn. R. Civ. P. 52.01; *See also Knops*, 536 N.W.2d at 620 ("Where the findings of fact rest almost entirely on expert testimony, the [district] court's evaluation

[2] After a district court determines that a person is MID and initially commits the person to a treatment facility, the district court must conduct a second hearing to review the written treatment report of the treatment facility. Minn. Stat. § 253B.18, subd. 2(a) (2010). If the district court finds that the patient "continues to be . . . mentally ill and dangerous," it must order commitment for an indeterminate period of time. *Id.*, subd. 3 (2010).

of credibility is of particular significance."). In sum, Busskohl's argument that the MSH will not properly treat him is unavailing.

Affirmed.

Dated:

Judge Michelle A. Larkin