STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1441

In the Matter of the Civil Commitment of:
Richard Thomas Martinez.

Filed December 31, 2012
Affirmed
Rodenberg, Judge

Ramsey County District Court
File No. 62MHPR08277

Kathleen K. Rauenhorst, Rauenhorst & Associate, P.A., Roseville, Minnesota (for appellant Richard Thomas Martinez)

Stephen P. McLaughlin, Assistant Ramsey County Attorney, St. Paul, Minnesota (for respondent Ramsey County)

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

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

RODENBERG, Judge

In this civil commitment appeal, appellant argues that the district court should have accorded greater weight to the opinions of two of the five doctors who examined him during the course of the proceedings below. Because case law clearly mandates deference to the district court's assessment of the credibility of the witnesses, we affirm. Appellant also raises two other issues on appeal. However, appellant raises these issues

without adequate argument or citation to authority, and has therefore waived consideration of those issues on appeal.

FACTS

This case arises from respondent Ramsey County's petition to civilly commit appellant Richard Thomas Martinez as a sexually dangerous person (SDP) and as a person with a sexual psychopathic personality (SPP). *See generally* Minn. Stat. §§ 253B.02, subds. 18b (SPP defined), 18c (SDP defined) (2010).

Appellant was convicted of raping a woman in California in 1977, of criminal sexual conduct committed in Minnesota in 1983, of attempted second-degree assault against a female victim committed in 1987, and of first-degree assault against a female victim committed in 2003. In addition to these convictions, appellant has been convicted of felony theft and numerous gross misdemeanors and misdemeanors. Among these lesser convictions are five misdemeanor and gross misdemeanor convictions for indecent conduct.

Appellant had a traumatic and dysfunctional childhood. Appellant and his siblings were physically and sexually abused by their father, and appellant sexually abused his siblings. As an adult, appellant has been unable to maintain stable housing and employment. Appellant is chemically dependent, frequently and excessively using both alcohol and illegal drugs.

Prior to the evidentiary hearing on the petition, the district court appointed counsel for appellant, and appellant was examined by two court-appointed examiners: Dr. Paul Reitman, Ph.D., and Dr. Thomas Alberg, Ph.D. At the evidentiary hearing, the court-

appointed examiners both opined that appellant met all of the criteria established by statute and case law to be committed as an SDP/SPP. Both doctors also believed that appellant was mentally ill and thought it possible that bipolar disorder might play a role in appellant's mental illness. Both doctors opined that appellant was highly likely to offend sexually in the future.

Following the evidentiary hearing, the district court determined that respondent had demonstrated by clear and convincing evidence that appellant was an SDP/SPP, and issued an initial commitment order. The district court later received the 60-day report that was at that time required under the SDP/SPP statute. *See generally* Minn. Stat. §§ 253B.18, subd 2, .185, subd. 1 (2010) (requiring that a 60-day report be issued following initial commitment as an SDP/SPP); 2011 Minn. Laws ch. 102, art. 3, § 1, at 434 (eliminating the requirement for future commitments). Based on the report, appellant agreed to waive his right to a prompt final determination hearing, and agreed to have the matter continued to permit him to be further evaluated, including an evaluation to consider whether appellant was a candidate for commitment as mentally ill and dangerous (MI&D). *See generally* Minn. Stat. §§ 253B.18, subd. 2, .185, subd. 1 (2010) (establishing the right to a final determination hearing following issuance of the 60-day report, which hearing may be continued for up to one year); 2011 Minn. Laws ch. 102, art. 3, § 1, at 434 (eliminating the requirement for future SDP/SPP commitments).

After further examinations, a separate petition was filed alleging that appellant was MI&D. Appellant waived an initial hearing on that petition and agreed to be committed for a 60-day evaluation at the Minnesota Security Hospital in St. Peter. The

doctor at St. Peter concluded that appellant did not meet the statutory criteria for commitment as MI&D. Following this evaluation, the district court held a final commitment hearing on the SDP/SPP petition. In its findings of fact, conclusions of law, and order for final commitment, the district court determined that, although he displayed improvement because of medication changes, appellant continued to meet the statutory requirements to be committed as an SDP/SPP because of his dangerousness to others and because the likelihood of his reoffending had not changed following the initial commitment. The district court committed appellant as an SDP/SPP for an indeterminate period of time.

The district court found that, following his initial commitment, appellant responded positively to medication prescribed for bipolar disorder. Despite this evidence of some improvement, all five of the doctors whose opinions were considered by the court following the final commitment hearing believed that appellant continues to be dangerous to others.

Of these five doctors, Dr. Alberg opined that appellant no longer meets the requirements of the SDP/SPP statutes. Dr. Alberg recommended that appellant be committed as MI&D. Dr. Peter Meyers, Psy.D., L.P., opined that appellant's mental illness and dangerousness to others could be better understood as arising from appellant's bipolar disorder than from appellant's sexual deviancy. Dr. Meyers' report did not specify whether the author was of the opinion that appellant continues to meet the requirements to be committed as an SDP/SPP.

Dr. Gary Hertog, Psy.D., L.P., opined that appellant continues to meet the criteria to be committed as an SDP/SPP. Dr. Reitman opined that appellant continues to meet the criteria for commitment as an SDP. Dr. Michael Harlow, M.D., J.D., concluded that appellant's "violence is generated by his high level of sexual dysfunction, most notably chaotic sexual psychopathy, personality disorders, and chemical dependency issues." Dr. Harlow, who had evaluated appellant during his initial commitment as MI&D, believed that appellant does not meet the statutory criteria to be committed as MI&D.

The district court concluded that, despite the disagreement among the examiners, respondent met its burden of establishing by clear and convincing evidence that appellant continued to meet the statutory requirements for commitment as an SDP/SPP.

D E C I S I O N

This court reviews de novo the legal conclusion that a person meets the statutory requirements to be civilly committed under the SDP/SPP statutes. *In re Commitment of Martin*, 661 N.W.2d 632, 638 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003). The review "is limited to an examination of the [district] court's compliance with the statute," and whether the commitment is justified by the district court's factual findings. *In re Commitment of Jackson*, 658 N.W.2d 219, 224 (Minn. App. 2003), *review denied* (Minn. May 20, 2003).

However, this court reviews the district court's findings of fact in the light most favorable to those findings. *In re Commitment of Ramey*, 648 N.W.2d 260, 269 (Minn. App. 2002), *review denied* (Minn. Sept. 17, 2001). The district court's factual findings will not be reversed unless clearly erroneous. *Id.* This court's deference on factual issues

recognizes that the district court is in the best position to assess and weigh the credibility of the witnesses. *See In re Commitment of Navratil*, 799 N.W.2d 643, 647 (Minn. App. 2011) (stating that this court defers to "the district court's opportunity to judge witness credibility"), *review denied* (Minn. Aug. 24, 2011).

Appellant's primary argument on appeal is that the district court did not accord sufficient weight to the opinions of Drs. Alberg and Meyers, two of the five experts who provided supplemental reports at the review hearing.

In its findings of fact, conclusions of law, and order for final commitment, the district court noted that both Drs. Alberg and Meyers testified at the review hearing that appellant still presents a danger to others. The district court also noted that Drs. Hertog and Reitman both believe that appellant continues to meet the criteria for indeterminate commitment as an SDP and/or SPP. The district court quoted Dr. Harlow's conclusion that appellant's "violence is generated by his high level of sexual dysfunction."

The district court found that "[appellant] has improved in his behavior, demeanor and ability to be treated effectively, in large part based on his current medications. This improvement significantly enhances the likelihood of future success in [appellant's] treatment." However, the district court found that, despite the improvements, respondent "met its burden of proving that the statutory requirements for commitment continue to be met."

The district court considered the opinions of five doctors who had examined appellant, the opinions of whom were in accord on some points but who also disagreed on significant points. The record reflects that the district court thoughtfully weighed and

considered the testimony of the experts. Appellant disagrees with the weight accorded the testimony of some of the experts. As the district court's conclusion as to the weight to be accorded to the testimony of the experts is not clearly erroneous, it is entitled to our deference, and we will not disturb it. *See id.*

Appellant also argues on appeal that he should have been committed as MI&D rather than as an SDP/SPP. Appellant argues that commitment as MI&D is a less restrictive alternative. He does not explain why commitment as MI&D is "less restrictive" and cites to no authority that would support such an argument. Appellant's brief merely asserts that he could also have been committed as MI&D and that such a commitment would be "less restrictive."

An assignment of error based upon "mere assertion" and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997). Appellant's argument is based upon mere assertion and is not supported by argument or authority. Mere inspection does not reveal prejudicial error.[1] Consideration of this issue has been waived by failure to adequately brief it. *Id.*

[1] We note that the statutory focus of the less-restrictive-alternative analysis is the restrictiveness of the setting to which the patient is committed, not the statute under which the patient is committed. When a patient is committed as mentally ill, developmentally disabled, or chemically dependent, the committing court is directed to "commit the patient to the *least restrictive treatment program* or alternative programs which can meet the patient's treatment needs." Minn. Stat. § 253B.09, subd. 1(a) (2010) (emphasis added). In evaluating the restrictiveness of the alternatives, the district court must "consider a range of treatment alternatives including, but not limited to, community-based nonresidential treatment, community residential treatment, partial hospitalization, acute care hospital, and regional treatment center services." *Id.*, subd. 1(b) (2010). In

Appellant's brief also notes that his criminal sexual conduct convictions are remote in time. It is unclear to us whether appellant is attempting to argue that the convictions are too remote to support a commitment as an SDP/SPP. The brief does not directly make such an argument, nor does it cite to any authority that would support such an argument. Accordingly, this argument has also been waived.[2] *See id.*

Affirmed.

1998, the supreme court held that commitments as MI&D or as an SDP/SPP did not require the treatment to be in the least restrictive setting pursuant to Minn. Stat. § 253B.09, subd. 1. *In re Commitment of Senty-Haugen*, 583 N.W.2d 266, 268–69 (Minn. 1998), *superseded by statute*, 1999 Minn. Laws ch. 118, §§ 3, at 482; 6. The following year, in apparent response to *Senty-Haugen*, the legislature amended the provisions of both the MI&D and the SDP/SPP statutes to provide that the district 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." 1999 Minn. Laws ch. 118, §§ 3, at 482; 6. (emphasis added). The 1999 amendment remains in the present versions of the commitment statutes. *See* Minn. Stat. §§ 253B.18, subd. 1(a) (containing the language of the 1999 amendment), .185, subd. 1(d) (same) (2010). Given the holding in *Senty-Haugen*, the legislative response to it, the plain language of Minn. Stat. §§ 253B.18, subd. 1(d), .185, subd. 1(d), and the fact that the record here contains no evidence of the availability or appropriateness of any nonsecure alternative placement for appellant under either MI&D or an SDP/SPP commitment, such commitment under either designation on these facts would appear to be equally restrictive.

[2] Nor does mere inspection reveal prejudicial error. The remoteness of conduct does not prevent it from being included as a part of the course-of-conduct elements of the SDP and SPP statutes. *See In re Linehan* (*Linehan I*), 518 N.W.2d 609, 614 (Minn. 1994), *vacated on other grounds*, 522 U.S. 1011, 118 S. Ct. 596 (1997). Likewise, the remoteness of the conduct is only one of the many factors that the district court must take into consideration when estimating the likelihood that the patient will offend sexually in the future. *See, e.g.*, *In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1995) (laying out seven factors for the district court to consider); *In re Pirkl*, 531 N.W.2d 902, 907 (Minn. App. 1995), *review denied* (Minn. Aug. 30, 1995); *In re Commitment of Irwin*, 529 N.W.2d 366, 375 (Minn. App. 1995), *review denied* (Minn. May 16, 1995); *In re Commitment of Bieganowski*, 520 N.W.2d 525, 529–30 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994).