STATE OF MINNESOTA
IN COURT OF APPEALS
A12-527

In the Matter of the Civil Commitment of:
Arden Charles Reich.

Filed August 20, 2012
Affirmed
Bjorkman, Judge

Pope County District Court
File No. 61-PR-11-97

Bradley A. Kluver, Litchfield, Minnesota (for appellant)

Lori Swanson, Attorney General, John D. Gross, Assistant Attorney General, St. Paul, Minnesota; and

Neil T. Nelson, Pope County Attorney, Glenwood, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Halbrooks, Judge; and Worke, Judge.

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

BJORKMAN, Judge

Appellant challenges his indeterminate civil commitment as a sexually dangerous person (SDP), arguing that the district court erred by (1) concluding that he is an SDP and (2) ordering his commitment to the Minnesota Sex Offender Program (MSOP), rather than a less-restrictive treatment program. We affirm.

FACTS

Appellant Arden Reich is 51 years old. He has a long history of substance abuse and considers himself an alcoholic. Reich was in a relationship with J.M. from the mid-1980s to the mid-1990s. Reich and J.M. have three daughters: A.M., born September 1987; T.M., born May 1989; and C.M., born June 1990.

In March 1999, Reich pleaded guilty to two counts of second-degree criminal sexual conduct for multiple incidents during the summer of 1997 in which Reich touched A.M.'s vagina, had A.M. rub his penis, and rubbed his penis against A.M.'s vagina. He received a stayed sentence and was placed on probation. As a condition of his probation, Reich was prohibited from having contact with minors. Reich also was required to complete sex-offender and chemical-dependency evaluations and to follow treatment recommendations. Reich completed both evaluations and entered treatment but continued to consume alcohol and marijuana and was terminated from multiple sex-offender treatment programs for having contact with under-age females, poor attendance, and failure to make adequate progress.

During sex-offender treatment, Reich disclosed several additional incidents of sexual abuse. In 2005 and 2006, he admitted that he also sexually abused his other two daughters during the 1990s, committing the same types of acts that he had against A.M. He also admitted to having sexually abused a female cousin and his sister when they were children. In addition to acknowledging past incidents of abuse, Reich admitted to committing several incidents of sexual abuse during his time in treatment. First, Reich admitted to sexually abusing his adult cousin, C.B., in 2000 or 2001. Reich went to

C.B.'s home for her birthday, they both became intoxicated, and they "played around." C.B. eventually passed out, and Reich continued to fondle her while she was unconscious, including digitally penetrating her vagina. Second, Reich admitted to sexually abusing C.B.'s teenage daughter, S.B., between 2001 and 2004, by touching her breasts and digitally penetrating her vagina. Third, Reich admitted to abusing L., an adult, by fondling her and digitally penetrating her vagina while she was intoxicated. This occurred during his "early 40's," around the same time as the incidents involving C.B. and S.B. Reich was not prosecuted for any of these incidents.

In April 2006, based on his terminations from treatment and other probation violations, the district court revoked Reich's probation and executed his sentence. He was placed on supervised release shortly thereafter. While on supervised release, Reich again enrolled in sex-offender treatment but continued the same patterns that resulted in his previous terminations from treatment—downplaying his abuse history and failing to complete treatment assignments. Reich was terminated from treatment in mid-2006. Reich also violated his supervised release by having contact with minors. Based on these violations, Reich's supervised release was revoked. While in prison, Reich again resisted and failed to progress in sex-offender treatment.

In March 2011, shortly before Reich's scheduled release date, Pope County petitioned for his civil commitment as an SDP. The district court appointed psychologists James Gilbertson, Ph.D., and Robert Riedel, Ph.D., to examine Reich. Both examiners recommended Reich's indeterminate commitment as an SDP. The district court also heard testimony from Reich, his daughter A.M., and his friend J.S.,

with whom he lived between September 2002 and April 2006, and received extensive treatment and criminal records. The district court concluded that Reich meets the criteria for commitment as an SDP and ordered Reich's commitment to MSOP as the only appropriate treatment program. The district court subsequently reviewed Reich's treatment progress and ordered his indeterminate commitment at MSOP. This appeal follows.

D E C I S I O N

I. The district court did not err by concluding that Reich is an SDP.

An SDP is one 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) "is likely to engage in acts of harmful sexual conduct." Minn. Stat. § 253B.02, subd. 18c(a) (2010). The facts necessary for commitment must be supported by clear and convincing evidence. Minn. Stat. §§ 253B.18, subd. 1(a), .185, subd. 1(a) (2010). We defer to the district court's findings of fact and will not reverse those findings unless they are clearly erroneous. *In re Civil Commitment of Ramey*, 648 N.W.2d 260, 269 (Minn. App. 2002), *review denied* (Minn. Sept. 17, 2002). But we review de novo "whether there is clear and convincing evidence in the record to support the district court's conclusion that appellant meets the standards for commitment." *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003).

A. Clear and convincing evidence supports the district court's finding that Reich has engaged in a course of harmful sexual conduct.

The SDP statute requires "a systematic or orderly succession" of harmful sexual conduct. *Ramey*, 648 N.W.2d at 268. "Harmful sexual conduct" is sexual conduct that "creates a substantial likelihood of serious physical or emotional harm to another." Minn. Stat. § 253B.02, subd. 7a(a) (2010). Conduct constituting most forms of criminal sexual conduct is rebuttably presumed to constitute harmful sexual conduct. *Id.*, subd. 7a(b) (2010).

The record indicates, and Reich does not dispute, that he sexually abused all three of his daughters, sexually abused his first cousin while she was intoxicated, and sexually abused his cousin's minor daughter.[1] Reich pleaded guilty to two counts of second-degree criminal sexual conduct for his abuse of A.M. and has admitted to conduct toward his other victims that amounts to second- or third-degree criminal sexual conduct. *See* Minn. Stat. §§ 609.343 (defining second-degree criminal sexual conduct to include sexual contact with a person under the age of 13 by an actor more than 36 months older), .344 (defining third-degree criminal sexual conduct to include sexual penetration with a person at least 16 but less than 18 years of age by an actor more than 48 months older and sexual penetration with one who the actor knows to be mentally incapacitated or physically helpless) (2010). This conduct is presumptively harmful sexual conduct. *See* Minn. Stat. § 253B.02, subd. 7a(b).

[1] The district court found insufficient evidence to consider Reich's sister, Reich's cousin, and adult L. to be victims.

Reich argues that the gap in time between when he abused his daughters (1997) and when he abused his cousins (2001 or 2004) precludes a finding that he engaged in a "course" of sexual conduct. We disagree. This court has previously held that the incidents necessary to establish a course of sexual conduct may occur "over a period of time," and "need not be recent," and "the existence of a period in which a person has not committed sex offenses does not preclude a determination that he engaged in a course of sexual misconduct." *In re Civil Commitment of Stone*, 711 N.W.2d 831, 837-38 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). The "gap" between Reich's incidents of sexual abuse is only a few years, and the record indicates that during that time, Reich continued to pursue contact with minors, consume alcohol, and otherwise place himself in situations in which he was likely to, and ultimately did, reoffend.

Reich also argues that his offenses against A.M. do not constitute harmful sexual conduct because she denies experiencing any harm. We are not persuaded. First, the SDP statute plainly requires only that the conduct "create[] a substantial likelihood of serious physical or emotional harm." Minn. Stat. § 253B.02, subd. 7a(a). It does not require that a victim suffer actual physical or emotional harm. *In re Civil Commitment of Martin*, 661 N.W.2d 632, 639 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003). We will not disturb the district court's finding that Reich's repeated sexual contact with his ten-year-old daughter was substantially likely to cause her serious emotional harm. Second, even if A.M.'s testimony effectively rebutted the presumption with respect to Reich's conduct toward her, it has no impact on the presumption that Reich's conduct

toward his other victims created a substantial likelihood of serious physical or emotional harm to them.

On this record, we conclude that clear and convincing evidence supports the district court's finding that Reich has engaged in a course of harmful sexual conduct.

B. Clear and convincing evidence supports the district court's finding that Reich has manifested a sexual, personality, or other mental disorder.

To sustain commitment as an SDP, there must be clear and convincing evidence that the person has "manifested a sexual, personality, or other mental disorder or dysfunction." Minn. Stat. § 253B.02, subd. 18c(a)(2).

Reich's treatment providers have consistently diagnosed him with pedophilia and either diagnosed him with or noted behaviors consistent with narcissistic and antisocial personality disorders. And the court-appointed examiners diagnosed Reich with sexual disorders. Dr. Gilbertson diagnosed Reich with pedophilia, female victims, nonexclusive type; and personality disorder, not otherwise specified (NOS), with antisocial and negativistic trait manifestation. Dr. Riedel diagnosed Reich with paraphilia, NOS. Both examiners also noted Reich's history of chemical abuse and borderline intellectual functioning, opining that both are risk factors and interfere with his ability to achieve success in treatment.

Reich argues that because the two court-appointed examiners do not agree as to whether he has a personality disorder, this statutory requirement is not met. We disagree. First, even if Reich does not have a personality disorder, his consistent, numerous, and apparently uncontested diagnoses of sexual disorders (paraphilia and pedophilia) amply

satisfy this statutory requirement. Second, Dr. Riedel's decision not to diagnose Reich with a personality disorder does not preclude a finding that Reich has exhibited a personality disorder based on Dr. Gilbertson's opinion and previous psychological assessments indicating that Reich has many disordered personality traits, including antisocial and negativistic traits.

On this record, we conclude that clear and convincing evidence supports the district court's finding that Reich has manifested personality and sexual disorders that satisfy the second element of the SDP statute.

C. Clear and convincing evidence supports the district court's finding that Reich is highly likely to engage in harmful sexual conduct.

The statute requires that the SDP's mental disorder make the person likely to engage in future harmful sexual conduct. Minn. Stat. § 253B.02, subd. 18c(a)(3). This requirement does not depend on a showing that the person has a complete inability to control his sexual impulses. Minn. Stat. § 253B.02, subd. 18c(b) (2010). Rather, the petitioner must show that the person's disorder "does not allow [him] to adequately control [his] sexual impulses," with the result that he is "highly likely" to engage in harmful sexual conduct. *In re Linehan*, 594 N.W.2d 867, 876 (Minn. 1999) (*Linehan IV*). When considering whether an offender is highly likely to reoffend, a court considers a number of factors, including:

> (1) the offender's demographic characteristics; (2) the offender's history of violent behavior; (3) the base-rate statistics for violent behavior among individuals with the offender's background; (4) the sources of stress in the offender's environment; (5) the similarity of the present or future context to those contexts in which the offender used

> violence in the past; and (6) the offender's record of participation in sex-therapy programs.

Stone, 711 N.W.2d at 840 (citing *In re Linehan*, 518 N.W.2d 609, 614 (Minn. 1994) (*Linehan I*)).

Reich argues that the evidence is insufficient to establish that he is highly likely to reoffend because his base-rate scores are low. We disagree. Neither low actuarial scores nor any other single factor is determinative of this issue. *In re Civil Commitment of Navratil*, 799 N.W.2d 643, 649 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011). Both court-appointed examiners emphasized that giving undue weight to actuarial scores would inaccurately represent an offender's risk of reoffense, particularly in Reich's case because he has a significantly higher percentage of unprosecuted conduct, has demonstrated less progress in treatment, and would be subject to less supervision than the offenders with whom he is compared for actuarial purposes. Both examiners emphasized that base-rate statistics and actuarial scores are the starting point for determining an offender's dangerousness and that all of an offender's circumstances must be considered.

Reich's circumstances amply establish that Reich is highly likely to reoffend. Most notably, Reich is an untreated sex-offender. Reich has participated in sex-offender treatment almost continuously for more than a decade, enrolling in ten different treatment programs. Not only has he failed to successfully complete any of these programs, but he also has continued a pattern of behavior contrary to that treatment: persistently denying his offenses, repeatedly failing to complete treatment assignments or attend treatment sessions, seeking out minors, and even committing multiple sexual offenses while in

treatment. At the time of trial, both examiners noted that Reich had retained virtually none of the content of the treatment provided to him over the years.

Not only has Reich failed to complete treatment, but several other *Linehan* factors also indicate he is highly likely to reoffend. Reich has a history of violent behavior including domestic assault and "inherently violent" sexual offenses against children and alcohol-inhibited adults. Reich would be released into an environment very similar to the one in which he previously offended. And he would be facing additional stress from having to register as a level-three sex offender, which both examiners opined would increase his likelihood of reoffending.

Reich argues that his age, "lengthy chemical free period," and employment prospects are mitigating factors that outweigh these indicators of future dangerousness. We are not persuaded. First, both examiners testified that for some offenders, typically those whose offenses are attributable to personality disorders, aging will diminish the urge to offend and therefore make reoffense less likely. But because Reich's offenses are attributable primarily to his sexual disorders, his advancing age is unlikely to diminish his likelihood of reoffending. Second, the record amply establishes that Reich's recent chemical abstinence is the result of his confinement, not treatment, and that Reich has a history of chemical use even after treatment and when prohibited from using. Third, Reich's employment prospects are not as certain as he asserts, since he acknowledged that his prospective employer was unaware of his status as a level-three sex offender. Moreover, even if employment were available, his past employment did not keep him from offending. Based on our review of the record, we conclude that clear and

convincing evidence supports the district court's finding that Reich's sexual and personality disorders make him highly likely to reoffend.

Because clear and convincing evidence establishes that Reich engaged in a course of harmful sexual conduct and has personality and sexual disorders that make him highly likely to engage in harmful sexual conduct in the future, the district court did not err by concluding that Reich is an SDP.

II. The district court did not clearly err by finding that there is not a less-restrictive treatment program that can safely meet Reich's needs.

When a person is determined to be an SDP, 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." Minn. Stat. § 253B.185, subd. 1(d) (2010). In considering treatment alternatives, a court may consider such factors as the need for security, whether the individual needs long-term treatment, and what type of treatment is required. *See In re Pirkl*, 531 N.W.2d 902, 910 (Minn. App. 1995), *review denied* (Minn. Aug. 30, 1995); *In re Bieganowski*, 520 N.W.2d 525, 531 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994). We will not reverse a district court's findings as to the propriety of a treatment program unless the findings are clearly erroneous. *In re Thulin*, 660 N.W.2d at 144.

Reich argues that the district court clearly erred in finding that MSOP is the least-restrictive appropriate treatment option because one of the outpatient treatment programs he previously attended, CORE Professional Services, can "more effectively" meet his

treatment needs than MSOP. We disagree. The only evidence Reich points to is Dr. Riedel's belief that CORE would accept Reich into its treatment program. Notably, Dr. Riedel did not recommend treatment at CORE. And whether CORE would accept Reich for treatment is immaterial in light of the examiners' consensus that Reich requires secure inpatient sex-offender treatment. *See In re Robb*, 622 N.W.2d 564, 574 (Minn. App. 2001) (noting that appellant's "reluctance to participate in treatment" supported finding that intensive supervision and outpatient treatment were not viable treatment alternatives), *review denied* (Minn. Apr. 17, 2001). On this record, we conclude that the district court did not clearly err by finding MSOP to be the least-restrictive treatment option.

Affirmed.