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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0456**

In the Matter of the Civil Commitment of: Don Edward Neff

**Filed July 22, 2008
Affirmed
Muehlberg, Judge***

Mower County District Court
File No. 50-PR-07-1443

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Considered and decided by Toussaint, Chief Judge; Kalitowski, Judge; and
Muehlberg, Judge.

UNPUBLISHED OPINION

MUEHLBERG, Judge

Appellant challenges the district court's order civilly committing him as a sexually dangerous person, arguing that the court erred in deferring to the opinions of the examiners and that his actions did not constitute a course of harmful sexual conduct. We affirm.

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

FACTS

In October 1978 and January 1979, appellant sexually abused a six-year-old girl. In a post-*Miranda* police interview, he admitted to the allegations and described in detail the sexual nature of his conduct. He pleaded guilty to aggravated indecent solicitation.

On February 19, 1999, appellant sexually assaulted two teenage girls. While one of the girls was lying naked on the bed, appellant touched, kissed, sucked on, and fondled her breasts. She had been drinking, appeared unconscious, and did not respond to him. Appellant also went into the bathroom with a second underage girl, removed her pants, fondled her breasts, and told her that everything from her waist up belonged to him and that he owned her breasts. He was charged with two counts of fourth-degree criminal sexual conduct and three counts of furnishing alcohol to a minor. He pleaded guilty to one count of each, and admitted to touching the breasts of the girl in the bathroom for the purpose of sexual gratification, knowing she was underage. At sentencing, he said it would not happen again, and that if it did he “probably should be shot.” At the commitment trial, the victim testified that she has experienced severe anxiety, problems sleeping, fear, and is uncomfortable around older men and afraid of appellant.

On August 18, 2006, appellant sexually assaulted a vulnerable adult woman. He picked her up for a date, told her he was an “undercover cop,” and asked if she wanted to help with a stakeout. After about an hour of conducting “surveillance,” appellant and the woman returned to her apartment, and appellant began kissing her. The victim pushed appellant away, but he said he loved her, and they had sexual intercourse. The next

evening, appellant returned to her home and they had sexual intercourse again. Appellant told police he had gone out with the victim as a favor to a friend, but she was not his type and he thought she had a mental disability. He denied having any sexual contact with her until reminded that his DNA was on file, and then admitted to kissing and “fingering” her and touching her breasts. He pleaded guilty to one count of fifth-degree criminal sexual conduct, and he admitted to touching the victim’s breasts when she did not have the ability to consent to sexual contact. At the commitment hearing, the victim’s mother testified that the victim was unable to live alone for a month or two after the assault, had terrible nightmares, woke up screaming and moaning, was prescribed sleeping pills, and received therapy.

Appellant has a history of mental health diagnoses and treatment going back to 1967. He attended outpatient sex offender treatment for five months in 2005, but denied and minimized his offenses. He was ultimately suspended, took no steps to reenter treatment, and refused to go back to the treatment facility.

On May 3, 2007, Mower County petitioned for civil commitment of appellant as a sexually dangerous person (SDP) and/or sexual psychopathic personality (SPP). Both court-appointed examiners concluded that appellant meets the criteria for SDP commitment. One examiner also concluded appellant meets the criteria for SPP commitment, but the other concluded that he does not. Appellant testified that he is not a danger to the community and has a zero percent chance of sexually reoffending. He testified that his triggers are beautiful women, but did not provide a plan for how to avoid them and did not articulate a relapse prevention plan. The district court concluded that he

met the criteria for SDP commitment, but not SPP commitment, and ordered him committed. Following a 60-day review hearing, the district court ordered appellant indeterminately committed as a SDP. This appeal followed.

D E C I S I O N

To commit a person under the SDP statute, the petitioner must prove that the person (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. § 253B.02, subd. 18c(a) (2006). It must also be shown that the person’s present disorder or dysfunction prevents the person from adequately controlling his or her sexual impulses, making it highly likely he or she will engage in harmful sexual acts in the future. *In re Linehan*, 594 N.W.2d 867, 876 (Minn. 1999) (*Linehan IV*).

An appellate court’s review of a judicial commitment is limited to determining whether the district court complied with the Minnesota Commitment and Treatment Act and whether the commitment is justified by findings based upon evidence submitted at the hearing. *In re Schaefer*, 498 N.W.2d 298, 300 (Minn. App. 1993). The petitioner must prove the need for commitment by clear and convincing evidence. Minn. Stat. § 253B.18, subd. 1(a) (2006); *see* Minn. Stat. § 253B.185, subd. 1 (2006) (stating that provisions of chapter 253B pertaining to persons who are mentally ill and dangerous to the public apply to SPP and SDP commitments); Minn. Spec. R. Commitment & Treatment Act 23(e) (burden of proof for indeterminate commitment). On review, findings of fact justifying commitment “shall not be set aside unless clearly erroneous,

and due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses.” Minn. R. Civ. P. 52.01; *see Schaefer*, 498 N.W.2d at 300 (applying Minn. R. Civ. P. 52.01 in commitment case). But whether the evidence is sufficient to satisfy the statutory elements for civil commitment is a question of law subject to de novo review. *In re Linehan*, 518 N.W.2d 609, 613 (Minn. 1994) (*Linehan D*).

I.

Appellant argues that the district court should not merely defer to the opinions of the court-appointed examiners. He correctly notes that the district court as finder of fact need not accept the opinion of an expert, even when it is uncontradicted. *See Costello v. Johnson*, 265 Minn. 204, 211, 121 N.W.2d 70, 76 (1963) (holding district court was not required to believe the uncontradicted testimony of an expert witness); *In re Civil Commitment of Stone*, 711 N.W.2d 831, 839 (Minn. App. 2006) (deferring to district court’s rejection of opinion of experts), *review denied* (Minn. June 20, 2006). Appellant also argues the district court erred in accepting the opinions of the experts in light of his testimony that he wanted to live a normal life with his girlfriend and he believes there is zero chance he will reoffend.

The district court here made 261 findings of fact. Those findings describe in detail the examiners’ testimony regarding the requirements for SDP and SPP commitment. The court also made specific findings that most of the opinions expressed by the examiners were credible and persuasive, though it rejected the opinion of one examiner that appellant has an utter lack of power to control his sexual impulses and meets the criteria

for SPP commitment. In contrast, the district court found appellant's testimony not credible. The 56-page commitment order in this case is not the work of a district court which merely deferred to the opinions of the examiners, but rather of a district court which carefully considered all the evidence and testimony, weighed the evidence and testimony in light of its credibility determinations, and reached a considered and independent conclusion.

II.

“Harmful sexual conduct” is defined as “sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another.” Minn. Stat. § 253B.02, subd. 7a(a) (2006). A course of harmful sexual conduct is a sequence of harmful sexual conduct occurring over a period of time. *Stone*, 711 N.W.2d at 837. Although “each act must constitute harmful sexual conduct,” it is not necessary “that the harmful sexual conduct be precisely the same type or demonstrate a degree of similarity other than what is necessary to establish that it is harmful sexual conduct.” *Id.* at 839. The incidents establishing a course of conduct may extend over a long period, and the court is not limited to considering only conduct that resulted in a criminal conviction. *See In re Civil Commitment of Ramey*, 648 N.W.2d 260, 268 (Minn. App. 2002) (stating that court may consider conduct not resulting in conviction), *review denied* (Minn. Sept. 17, 2002); *In re Irwin*, 529 N.W.2d 366, 374 (Minn. App. 1995) (stating that conduct need not be recent to support commitment as mentally ill and dangerous), *review denied* (Minn. May 16, 1995). This standard does not require that the conduct actually creates physical or emotional harm but rather that there is a substantial likelihood of causing physical or

emotional harm. *Ramey*, 648 N.W.2d at 269. There is a rebuttable presumption that conduct that constitutes criminal sexual conduct in the first through fourth degrees creates a substantial likelihood that a victim will suffer serious physical or emotional harm. Minn. Stat. § 253B.02, subd. 7a(b).

The district court found appellant committed five instances of sexual conduct against four vulnerable victims. Both court-appointed examiners concluded that all five of these instances carried a substantial likelihood of serious physical and/or emotional harm, and the district court found their expert opinions credible. In both their testimony and their reports, the examiners identified the factors which led them to this conclusion, as well as the types of harm the victims likely experienced. One instance resulted in a conviction for fourth-degree criminal sexual conduct, and appellant points to nothing on the record which would rebut the presumption that conduct created a substantial likelihood of serious physical or emotional harm. At the commitment trial, two of appellant's victims and the mother of one of the victims testified as to the actual harm appellant's victims have suffered. Thus, the record supports the district court's finding that appellant engaged in five instances of harmful sexual conduct, which is sufficient to constitute a course of harmful sexual conduct for purposes of SDP commitment.

Affirmed.