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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0962**

In the Matter of the Civil Commitment of:
Michael James Crow.

**Filed November 4, 2008
Affirmed
Hudson, Judge**

Redwood County District Court
File No. 64-PR-07-485

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Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and
Crippen, Judge.*

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

UNPUBLISHED OPINION

HUDSON, Judge

On appeal from an order committing him as a sexually dangerous person (SDP), appellant argues that the record does not support, by clear and convincing evidence, the district court's conclusion that he is highly likely to engage in future acts of harmful sexual conduct. Because there is clear and convincing evidence that appellant is highly likely to engage in future acts of harmful sexual conduct, we affirm.

FACTS

This is a direct appeal from an order of the district court committing appellant Michael James Crow as a sexually dangerous person (SDP) under Minn. Stat. § 253B.02, subd. 18c (2006). Appellant was born in St. Paul on October 11, 1980. His childhood was considerably unstable. Appellant's biological father was in prison for murder from the time appellant was eight or nine years old, and prior to that was not significantly involved in appellant's life. Appellant observed acts of violence in the home and was himself physically and emotionally abused. Appellant was also sexually abused twice as a child. Several of appellant's immediate family members had chemical dependency problems while appellant was growing up, and appellant began using drugs as early as the age of six or seven. Appellant is chemically dependent on alcohol and marijuana.

Appellant has several juvenile delinquency adjudications, including adjudications for second-degree assault, fifth-degree assault, aiding and abetting motor vehicle theft, disorderly conduct, theft, first-degree criminal damage to property, and reckless discharge of a firearm. Additionally, appellant has adult criminal convictions for second-

degree assault, third-degree assault, fifth-degree assault, felon in possession of a firearm, fifth-degree possession of a controlled substance, aiding and abetting kidnapping, aiding and abetting false imprisonment, and aiding and abetting coercion.

In August of 2007, appellant was nearing the end of his prison term for the convictions of aiding and abetting kidnapping, aiding and abetting false imprisonment, aiding and abetting coercion, and third-degree criminal sexual conduct. On August 10, respondent petitioned to civilly commit appellant as an SDP and a sexual psychopathic personality (SPP). The district court appointed two examiners for appellant's commitment trial, Dr. Linda Marshall and Dr. Thomas Alberg.

Trial began on November 10, 2007. Neither doctor supported the commitment of appellant as an SPP, so that portion of the petition was dismissed. Appellant testified at the trial and admitted to committing five acts of harmful sexual conduct. Specifically, in 1996, when appellant was 15 years old, appellant had a sexual encounter with an unknown female victim, who was also 15 years old. The victim performed oral sex on appellant in the backseat of a van. According to appellant, the encounter was initially consensual, but when the victim attempted to stop, appellant held her head down and "forced" her to continue.

In July of 1997, appellant was swimming with some friends when he pushed a young female, M.E., into the water and pulled off her bikini top, exposing M.E.'s breasts. M.E. also reported that appellant groped her breasts, but appellant denied groping M.E.

In January of 1999, when appellant was 18 years old, he sexually assaulted T.A.C., a 16-year-old female. Appellant and T.A.C. were at a party together where they

drank alcohol and smoked marijuana. After the party, T.A.C. asked appellant to give her a ride home. After stopping for cigarettes, appellant pulled his truck off to the side of the road. He asked T.A.C. to get into the back seat, and when she refused, he pulled T.A.C. into the back seat, removed her clothing, and “forced sex on her.” T.A.C. repeatedly told appellant to stop, but he continued. Appellant was charged with third- and fifth-degree criminal sexual conduct. As part of a plea agreement, appellant pleaded guilty to a controlled substance offense, and the criminal sexual conduct charges were dropped.

In February of 1999, appellant sexually assaulted S.M.G., a 15-year-old female, in S.M.G.’s home. Appellant and S.M.G. were kissing in S.M.G.’s bedroom. The kissing was consensual, but when appellant tried to take S.M.G.’s pants off, she said “no.” Despite S.M.G.’s refusal, appellant continued his advances and “forced” her to have sex with him. Appellant was charged with third- and fifth-degree criminal sexual conduct. He pleaded guilty to third-degree criminal sexual conduct.

In September of 2002, appellant, then 21 years old, had consensual sex with C.M.C., a 15-year-old female. Appellant and his friends approached C.M.C. in a parking lot where she was standing with friends. Appellant invited the girls to “hang out” and “party,” and C.M.C. agreed to join them. They purchased alcohol and then parked at Beaver Falls. Appellant knew C.M.C. was underage, but he encouraged her to drink because he wanted to have sex with her. The group left Beaver Falls and went back to appellant’s apartment, where appellant took C.M.C. into his bedroom and had sex with her. Appellant was charged with and convicted of third-degree criminal sexual conduct.

In addition to appellant's testimony, Dr. Marshall and Dr. Alberg both submitted reports and testified at appellant's commitment trial. Dr. Marshall concluded that appellant satisfies the criteria for commitment as an SDP. She diagnosed appellant with several personality disorders, including sexual disorder – not otherwise specified (NOS) and antisocial personality disorder. Dr. Marshall's sexual disorder diagnosis was based upon appellant's use of others to meet his sexual needs without regard to the other person, and upon appellant's deviant sexual interest in teenage girls. Dr. Marshall also testified that appellant has engaged in harmful sexual conduct, and that appellant is highly likely to reoffend both violently and sexually. Her opinion was based on the results of several actuarial tests, as well as her consideration of the *Linehan I* factors.

Dr. Alberg disagreed that appellant satisfied the criteria for commitment as an SDP. He admitted that appellant has engaged in harmful sexual conduct but noted that other evaluators have questioned whether appellant's conduct rises to the level required to commit someone as an SDP. Further, while Dr. Alberg diagnosed appellant with several personality disorders, he stated that a sexual disorder diagnosis was not appropriate because appellant lacks a disordered arousal system. Dr. Alberg also considered the likelihood that appellant would reoffend sexually. While Dr. Alberg agreed that the actuarial measures and *Linehan I* factors indicate a high likelihood of violent reoffense, he was unsure whether such an offense would be sexual in nature.

The district court found clear and convincing evidence that appellant met the statutory requirements for commitment as an SDP. The court issued an interim order

committing appellant to the Minnesota Sex Offender Program (MSOP), subject to a mandatory MSOP treatment report and review hearing by the court.

The review hearing occurred on April 18, 2008. Dr. Katie Connell authored the MSOP report. Dr. Connell diagnosed appellant with several personality disorders but questioned whether appellant has a sexual disorder. She stated that appellant presents a risk for future dangerous behavior, but that his risk for sexual reoffense was not clear. Ultimately, she concluded that appellant remains untreated, that nothing about appellant's behavior disputes the district court's commitment findings, and that it is reasonable to assume the initial factors substantiating appellant's commitment have not changed.

Dr. John Austin was appointed by the district court and also evaluated appellant for the review hearing. Dr. Austin's actuarial tests produced results consistent with those reached by Dr. Alberg and Dr. Marshall. Dr. Austin believed, however, that some of the actuarial measures only assess the risk of violent reoffense, not sexual reoffense. As a result, Dr. Austin found that it is much less likely that appellant will commit a sexual offense in the future. Dr. Austin also disagreed with Dr. Marshall's sexual disorder diagnosis. But when asked specifically about any change in appellant's condition, Dr. Austin merely indicated his disagreement with the district court's findings in the first instance.

The district court found by clear and convincing evidence that the commitment requirements continued to be satisfied and ordered appellant indeterminately committed as an SDP. This appeal follows.

DECISION

This court reviews 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). The reviewing court defers to the district court's role as factfinder and its ability to judge the credibility of witnesses. *In re Ramey*, 648 N.W.2d 260, 269 (Minn. App. 2002), *review denied* (Minn. Sept. 17, 2002). "Where the findings of fact rest almost entirely on expert testimony, the trial court's evaluation of credibility is of particular significance." *Thulin*, 660 N.W.2d at 144.

A district court will commit a person as an SDP if the person meets the criteria for commitment by clear and convincing evidence. Minn. Stat. § 253B.18, subd. 1(a) (2006). 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) "as a result, is likely to engage in acts of harmful sexual conduct" Minn. Stat. § 253B.02, subd. 18c(a) (2006). The statutory phrase "likely to engage in acts of harmful sexual conduct" means that the person is "highly likely" to engage in harmful sexual conduct in the future. *In re Linehan*, 557 N.W.2d 171, 180 (Minn. 1996) (*Linehan III*, No. C1-95-2022, substantive analysis), *vacated on other grounds*, 522 U.S. 1011, 118 S. Ct. 596 (1997), *aff'd on remand*, 594 N.W.2d 867 (Minn. 1999).

The supreme court has set forth six factors to be considered in examining the likelihood that an offender will engage in future harmful sexual conduct: (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. *In re Linehan*, 518 N.W.2d 609, 614 (Minn. 1994) (*Linehan I*).

Initially, appellant argues that it was clear error for the district court to find that he was properly diagnosed with a sexual disorder – NOS. Specifically, appellant asserts that the record does not support the district court's finding because three of the four experts questioned whether appellant's behavioral history meets the diagnostic criteria for a sexual disorder diagnosis. To the extent that appellant's argument challenges whether he has a sufficient sexual, personality, or other mental disorder or dysfunction under Minn. Stat. § 253B.02, subd. 18c(a)(2), appellant explicitly waived that challenge.¹ If, on the other hand, this argument relates to whether appellant is likely to engage in future acts of harmful sexual conduct, we address that issue in our analysis below.

Next, appellant asserts that the district court erred in finding that he is highly likely to engage in future acts of harmful sexual conduct because the court incorrectly concluded that appellant has a deviant arousal system. Appellant also contends that the district court failed to distinguish between the likelihood that appellant will commit *any* offense in the future versus the likelihood that appellant will commit a *sexual* offense in

¹ In his brief, appellant states that he “challenges only the District Court's findings and conclusions regarding the third prong of the statutory analysis,” which requires clear and convincing evidence that the person “. . . is likely to engage in acts of harmful sexual conduct.” Minn. Stat. § 253B.02, subd. 18c(a) (2006).

the future. In support of both claims, appellant relies on the testimony and reports of Dr. Alberg, Dr. Austin, and Dr. Connell, who all question whether appellant has a deviant arousal system and whether any future offense by appellant will be sexual in nature.

While there is some support in the record for appellant's claims, we cannot say that the district court abused its discretion. At the initial commitment hearing, the district court considered the testimony and reports of Dr. Marshall and Dr. Alberg. In regard to appellant's arousal system, Dr. Marshall diagnosed appellant with sexual disorder – NOS, based upon appellant's use of others to meet his sexual needs without regard to the other person and upon appellant's deviant sexual interest in teenage girls. Concerning the likelihood that appellant will engage in future acts of harmful sexual conduct, Dr. Marshall testified that actuarial tests and the *Linehan I* factors indicate appellant presents a high risk for both violent and sexual reoffense.

Dr. Alberg conducted many of the same actuarial tests and also considered the *Linehan I* factors. Dr. Alberg concluded that appellant clearly presents a high risk of violent reoffense, but he was unsure whether any future offense would be sexual in nature. Dr. Alberg also disagreed with Dr. Marshall's sexual disorder diagnosis, stating that appellant lacks a disordered arousal system.

Ultimately, the district court's decision was based heavily upon the credibility of the witnesses. After making extensive findings of fact, the district court specifically determined that Dr. Marshall's opinion was credible, while Dr. Alberg's opinion was not credible. The district court is in the best position to evaluate the credibility of evidence

and testimony, and we defer to the district court's credibility determinations. *See In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995).

Similarly, at appellant's commitment review hearing, the district court considered the testimony and report of Dr. Austin, and the statutorily required treatment report of Dr. Connell. Appellant correctly asserts that Dr. Austin was critical of Dr. Marshall's sexual disorder diagnosis and questioned whether appellant will sexually reoffend. But the district court specifically found that much of Dr. Austin's opinion was not credible, and we defer to that determination.

Further, evidence considered at a commitment review hearing is properly limited to: "(1) the statutorily required treatment report; (2) evidence of changes in the patient's condition since the initial commitment hearing; and (3) such other evidence as in the district court's discretion enhances its assessment of whether the patient continues to meet statutory criteria for commitment." *In re Linehan*, 557 N.W.2d 167, 171 (Minn. 1996) (*Linehan III*, No. C3-96-511, procedural analysis), *vacated on other grounds*, 522 U.S. 1011, 118 S. Ct. 596 (1997), *aff'd on remand*, 594 N.W.2d 867, 878 (Minn. 1999). Although Dr. Connell raised some of the same concerns as Dr. Austin, Dr. Connell's report specifically stated that appellant remains untreated, nothing about appellant's behavior disputes the district court's commitment findings, and that it is reasonable to assume the initial factors substantiating appellant's commitment have not changed. Moreover, to the extent that Dr. Austin's testimony was credible, the district court found that it supported appellant's commitment as an SDP and indicated no change in appellant's condition since the commitment trial.

The district court made extensive findings on each of the *Linehan I* factors, and our review of the *Linehan I* factors supports the district court's conclusions. The first factor is relevant demographic characteristics. Dr. Alberg stated that appellant's demographic characteristics increase his likelihood of sexual reoffense, while Dr. Marshall suggested that appellant's age and dysfunctional childhood do not lower appellant's risk for reoffense. Dr. Austin noted that many characteristics associated with sexual recidivism apply to appellant. Thus, this factor supports the conclusion that appellant is highly likely to engage in future acts of harmful sexual conduct.

The second factor contemplates appellant's history of violent behavior. All four evaluating doctors acknowledged that appellant has engaged in violent behavior, and appellant admitted at his commitment trial to several acts of violent behavior. Consequently, the second factor indicates that appellant is highly likely to engage in future acts of harmful sexual conduct.

The third factor is the base-rate statistics for violent behavior among individuals with appellant's background. Dr. Marshall testified that appellant's base-rate statistics indicate a high likelihood of reoffense, and that actuarial tests suggest a high risk of both violent and sexual reoffense. Dr. Alberg stated that appellant's actuarial tests indicate that appellant presents a higher risk of re-offending than his base-rate statistics suggest. Dr. Austin suggested that no one base-rate statistic is applicable to appellant, but admitted that appellant is likely to engage in "future sexual misbehavior." Accordingly, the third factor supports the conclusion that appellant is highly likely to engage in future acts of harmful sexual conduct.

The fourth factor, the sources of stress in appellant's environment, indicates a high risk of sexual reoffense in light of Dr. Marshall's and Dr. Alberg's concern that appellant's stress would increase as a result of being designated a Level III sex offender. Dr. Marshall also noted that appellant has already failed in the community as a Level II sex offender. Additionally, while Dr. Austin was more optimistic about appellant's ability to manage within a stressful environment, he stated that appellant's "level of psychopathy suggests that he will be more likely than most to resort to anger and be disrespectful when frustrated and stressed."

The fifth factor is the similarity of appellant's present or future context to those contexts in which appellant used violence in the past. Dr. Marshall stated that appellant will be returning to a similar situation because he has yet to complete sex-offender treatment. She also noted that appellant has spent time developing a support network, but recalled that appellant has relapsed several times in the past. Dr. Alberg assumed that if appellant could maintain sobriety and find new friends, his context would change. Dr. Austin believed that appellant would in fact maintain sobriety and thus change his environment. In light of the district court's credibility determination, Dr. Marshall's opinion supports the conclusion that appellant is highly likely to engage in future acts of harmful sexual conduct.

Finally, the sixth factor, appellant's record of participation in sex-therapy programs, also indicates high risk of sexual reoffense. Appellant has made progress in treatment, but has yet to successfully complete a sex-offender treatment program. Dr. Marshall testified that appellant is only beginning to learn about the dynamics of his

sex offending. Dr. Alberg and Dr. Austin both acknowledged that appellant has not yet completed sex-offender treatment, but stated that appellant appears to have benefited from the treatment he has received. Again, in light of the district court's credibility determination, Dr. Marshall's opinion supports the district court's conclusion.

Accordingly, clear and convincing evidence supports the district court's conclusion that appellant is highly likely to engage in future acts of harmful sexual conduct.

Affirmed.