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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1030**

In the Matter of the Civil Commitment of: David Wayne Hamilton.

**Filed February 19, 2013
Affirmed
Kalitowski, Judge**

Washington County District Court
File No. 82-PR-09-3473

David Wayne Hamilton, Moose Lake, Minnesota (pro se appellant)

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

Considered and decided by Larkin, Presiding Judge; Kalitowski, Judge; and Klaphake, Judge.*

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant David Wayne Hamilton challenges his commitment as a sexually dangerous person (SDP) and sexual psychopathic personality (SPP). We affirm.

DECISION

“We review the district court’s factual findings under a clear-error standard.” *In re Commitment of Stone*, 711 N.W.2d 831, 836 (Minn. App. 2006), *review denied* (Minn.

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

June 20, 2006). We will not reweigh evidence when reviewing findings of fact. *In re Salkin*, 430 N.W.2d 13, 16 (Minn. App. 1988), *review denied* (Minn. Nov. 23, 1988). “Where the findings of fact rest almost entirely on expert testimony, the [district] court’s evaluation of credibility is of particular significance.” *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995). “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).

Minnesota Commitment and Treatment Act

The Minnesota Commitment and Treatment Act provides for the civil commitment of SDPs and SPPs. Minn. Stat. § 253B.185 (2012).¹ The act requires the state to prove the need for commitment by clear and convincing evidence. Minn. Stat. § 253B.18, subd. 1(a) (2012). In order to commit an individual as an SDP, the district court must find that the individual “(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 (2012). And in order to commit a person as an SPP, the district court must find

the existence in [the] person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of personal acts, or a combination of any of these conditions, which render the person irresponsible for personal conduct with respect to sexual matters, if the person has evidenced, by a habitual course of misconduct in sexual

¹ The district court applied the statutes in effect at the time of Hamilton’s commitment hearing. The applicable statutes have not changed. For ease of reference, we refer to the current version of the statutes in this opinion.

matters, an utter lack of power to control the person's sexual impulses and, as a result, is dangerous to other persons.

Id., subd. 18b (2012).

Reliance on Court-Appointed Examiners

Minn. R. Evid. 702 provides that “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” In addition, Minn. R. Evid. 704 provides that “[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” And in commitment hearings, psychologists may assist the trier of fact:

Each of the criteria used to determine whether a person is a sexually dangerous person involves an assessment of the psychological state of either the person whose conduct is being assessed or a person who was harmed by the conduct, and the specialized knowledge of a psychologist may assist the trier of fact in determining a person's psychological state.

In re Commitment of Jackson, 658 N.W.2d 219, 227 (Minn. App. 2003), *review denied* (Minn. May 20, 2003).

Here, Hamilton argues that court-appointed examiners answered questions regarding whether he met the statutory criteria for commitment and thus improperly assumed the district court's responsibility of determining the facts and applying the law. We disagree.

We previously addressed and rejected an argument identical to Hamilton's in *Jackson*. 658 N.W.2d at 226-27. In *Jackson*, appellant argued that “allowing the

examiners to testify whether he met the statutory criteria for commitment was beyond the court's discretion because answering the question did not require the expertise of a psychologist." *Id.* at 226. We disagreed and stated that the specialized knowledge of a psychologist could assist the trier of fact to determine whether the criteria are met. *Id.* We further reasoned that chapter 253B requires the district court to appoint an examiner whose duty is to address whether the person for whom commitment is sought is an SDP or SPP. *Id.* at 227. In light of these requirements, we held that the district court did not err by permitting the court-appointed examiner to testify whether appellant met the statutory criteria for commitment. *Id.*

The district court did not err by permitting the examiners to testify whether Hamilton met the statutory criteria for commitment. Both statutes and caselaw provide that the examiners may opine whether the person is an SDP or SPP. Minn. Stat. § 253B.08, subd. 5a (2012) (stating that the opinions of the examiners may be admitted into evidence if they are present to testify); *Jackson*, 658 N.W.2d at 227 (stating that it is the duty of the examiners to address whether the person is an SDP or SPP). Moreover, by testifying whether they believed Hamilton met the statutory criteria, the examiners did not ultimately decide questions of fact and law. Rather, they assisted the district court in determining facts that required specialized knowledge. This assistance is allowed in commitment proceedings and under the rules of evidence. Minn. R. Evid. 702, 704; *Jackson*, 658 N.W.2d at 227.

In addition, the district court's detailed findings of fact show that the court independently evaluated whether Hamilton met the statutory requirements for

commitment. The district court examined extensive records compiled by persons other than the court-appointed examiners, including numerous psychological assessments, psychological evaluations and interviews, and psychosexual evaluation reports. The district court's appropriate recognition of the expert's role was shown when court-appointed examiner Dr. Powers-Sawyer was asked at trial whether she believed Hamilton had engaged in harmful sexual conduct. Hamilton's counsel objected, stating that "[t]he expert is opining on the ultimate issue which is for the court to decide." The district court overruled the objection, reasoning that the examiner "can offer her opinion, and then I will decide how much weight to give the opinion." Thus, the district court reached its own conclusion as to whether Hamilton met the statutory criteria.

Finally, Hamilton cites several cases where expert testimony was inadmissible. But none of these cases categorically exclude expert testimony, even where "the opinion relates to the ultimate fact that must be found." *Teslow v. Minneapolis-Honeywell Regulator Co.*, 273 Minn. 309, 312, 141 N.W.2d 507, 509 (1966).

Sufficiency of Expert Testimony

Hamilton argues that the expert testimony was insufficient to meet the clear and convincing standard because the court-appointed examiners did not interview him. But Hamilton fails to cite any authority for this argument. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (stating that assignments of error based on mere assertions and not supported are waived).

We also reject Hamilton's argument that the expert witness testimony was insufficient because the examiners disagreed on their mental health diagnoses. Court-

appointed psychologist Dr. Thompson testified that he would not diagnose Hamilton with a sexual, personality, or other mental disorder without meeting or interviewing him. And since Hamilton refused to be interviewed, Dr. Thompson was unable to make a diagnosis. But Dr. Thompson did testify that he believed Hamilton meets the criteria for antisocial personality disorder, sexual paraphilia, and pedophilia. Dr. Powers-Sawyer testified that she had diagnosed Hamilton with paraphilia, pedophilia, cannabis dependence, and antisocial personality disorder. Hamilton contends that the inconsistencies in these diagnoses render the expert testimony on this issue insufficient. We disagree.

Dr. Thompson testified that even though he had not met Hamilton, he believed that it was probable that Hamilton met the criteria for several disorders. In addition, the district court considered the inconsistencies, and concluded that Dr. Thompson's refusal to make any diagnoses did not undermine Dr. Powers-Sawyer's diagnoses. The district court found that Dr. Powers-Sawyer's testimony with regard to the diagnoses was "thoughtful, unflappable, and entirely credible." And we defer to the district court's ability to weigh the credibility of witnesses, especially when the findings rest on expert opinion testimony. *Knops*, 536 N.W.2d at 620.

On appeal Hamilton attached an affidavit of a psychologist to support his argument "that psychological testimony cannot establish, by clear and convincing evidence, that an individual is a sexually dangerous person within a statute." But this affidavit was not presented to the district court. Thus, it is outside the record and we will not consider it on appeal. *See* Minn. R. Civ. App. P. 110.01 ("The papers filed in the trial

court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases.”).

Actuarial Tests

Hamilton argues that actuarial test results measuring the likelihood of recidivism are insufficient to meet the clear and convincing standard and that because the court-appointed examiners erred during the testing, the results were unreliable. We disagree.

Hamilton’s argument that actuarial test results generally are “not sufficiently reliable to meet the current evidentiary standards” is unsupported. *See, e.g., Stone*, 711 N.W.2d at 840-41 (discussing the results of psychological tests, in addition to the *Linehan* factors, as a way to analyze appellant’s likelihood of recidivism).

Hamilton also attacks specific numbers in some of the individual actuarial tests that he contends inflated his risk of recidivism. But this argument ignores the fact that both experts opined that Hamilton met the statutory criteria for recidivism, even after they acknowledged inconsistencies in the data. Despite the limitations, the experts stood by their ultimate conclusions. In addition, the district court considered possible data inconsistencies:

During cross-examination of the court-appointed examiners, [Hamilton’s] counsel called into question some of the statistical modeling and data used in their analyses. Dr. Powers-Sawyer’s and Dr. Thompson’s responses to this inquiry were forthright and well-reasoned. . . . In the end, both doctors concluded that after combining all of [Hamilton’s] scores he met the threshold for establishing that [he] was highly likely to reoffend. . . . Accordingly, this court is satisfied that the statistical analyses, data used in [the] analyses, and the protocols followed by [the examiners] were sound and reliable and finds that [the state] has established by

clear and convincing evidence that [Hamilton] is highly likely to reoffend.

Hamilton's argument also ignores our standard of review and our deference to the district court's findings when weighing the credibility of expert testimony. *See Knops*, 536 N.W.2d at 620 (stating that the district court's credibility evaluations of expert testimony are particularly significant).

Because the district court weighed the credibility of the examiners and found the analyses, data, and protocols they followed to be reliable, we defer to these findings. And we conclude that clear and convincing evidence supports the district court's determination that Hamilton meets the standards for commitment.

Affirmed.