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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-0288**

In the Matter of the Civil Commitment of: Jose (NMN) Garza

**Filed July 29, 2008  
Affirmed  
Hudson, Judge**

Steele County District Court  
File No. 74-PR-07-223

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Considered and decided by Hudson, Presiding Judge; Shumaker, Judge; and Schellhas, Judge.

**UNPUBLISHED OPINION**

**HUDSON, Judge**

On appeal from an order committing him as a sexually dangerous person (SDP), appellant argues that the state failed to prove by clear and convincing evidence that he is highly likely to reoffend because the actuarial data indicates that he is unlikely to reoffend.

Because there is clear and convincing evidence that appellant is highly likely to reoffend, we affirm.

## **FACTS**

This appeal stems from an order of the district court committing appellant Jose Garza as a sexually dangerous person (SDP) under Minn. Stat. § 253B.02, subd. 18c (2006). Appellant was born in Plainview, Texas, on April 8, 1955. Because appellant's father was a seasonal farm laborer, appellant's family frequently moved. As a result, appellant's education was limited, and he had few reading and writing skills.

In 1984, appellant's family moved to Minnesota. Three years later, appellant's niece S.M. met with law enforcement to report that appellant was sexually abusing her twin six-year-old stepsisters, S.F. and A.F. At a subsequent interview, S.F. reported that appellant had been sexually abusing her for several months and that he fondled and penetrated her vagina with both his finger and penis. S.F. told him to stop, but appellant continued to sexually abuse her. According to S.F., appellant hit her and threatened to keep hitting her if she told anyone about the abuse. A.F. was also interviewed about the allegations of sexual abuse. Although A.F. stated that appellant never molested her, she admitted seeing appellant touch S.F. several times.

While reporting allegations of sexual abuse involving her two stepsisters, S.M. admitted to police that appellant had also sexually abused her as a child. Further investigation revealed that when appellant was approximately 31 years old, he sexually assaulted his then 17-year-old niece O.G. six times. Appellant was not charged for the

alleged offenses against S.M. and O.G., but in July 1987, appellant was charged with criminal sexual conduct in the first degree for his offenses against S.F.

In September 1987, appellant pleaded guilty to second-degree criminal sexual conduct. The district court subsequently ordered that appellant be evaluated for sex-offender treatment. Appellant was evaluated for inpatient sex-offender treatment at the Minnesota Security Hospital's Intensive Treatment Program for Sexual Aggressives (ITPSA). During his social-history assessment, appellant admitted touching the genital area of his six-year-old niece, S.F., and putting his penis into her mouth. Appellant also admitted abusing S.F. without consequence in the past, but claimed that if he had not been drinking, he would not have abused S.F. Because appellant was not willing to accept responsibility for his sexual behavior and blamed the abuse on alcohol, the ITPSA refused to accept him in the program.

In December 1987, the district court sentenced appellant to a stayed sentence of 21 months. Four years later, appellant met and began dating S.W. Although never married, the couple had a daughter, J.E.G., born June 27, 1995. After a reported break-up in 1998, appellant was charged with fifth-degree domestic assault for assaulting S.W. The couple reconciled, but finally ended their relationship in March 2000. Shortly thereafter, appellant was charged and convicted of driving under the influence.

In August 2000, appellant was charged with two counts of criminal sexual conduct in the second degree for his offenses against F.J.S. The complaint alleged that nine-year-old F.J.S. was sexually assaulted by appellant in the summer of 1997 or 1998. According to F.J.S., appellant was present at her family's home when her mother was suddenly

called to an emergency for a friend. During the mother's absence, appellant fondled F.J.S.'s breasts and vagina while she was in her bed.

F.J.S. also reported that appellant sexually abused her a second time at his home during the summer of 1999. F.J.S. stated that she was at appellant's house playing with his daughter J.E.G. According to F.J.S., she was upstairs in appellant's house when appellant came into the bedroom and threw her onto the bed. Appellant then pulled down his pants and touched F.J.S. on the breast and vaginal area. F.J.S. also reported that appellant got on top of her and "bounced around," and that she could feel appellant's penis on her leg. Although there was no "skin on skin contact," appellant threatened F.J.S. by stating: "if you tell anybody I'm gonna do the same thing."

At about the time appellant was charged with sexually abusing F.J.S., law enforcement began investigating allegations that when appellant was 45 years old, he sexually abused his five-year-old daughter. S.W., appellant's ex-girlfriend, contacted social services in July 2000, to report that J.E.G. had told J.E.G.'s grandmother and a family friend that appellant was "making her do things down there" as she pointed to her vagina. J.E.G. explained that appellant would make her lick her own finger and insert it into her vagina. J.E.G. also stated that appellant would lick his own finger and insert it into her vagina. S.W. told social services that J.E.G. was asked about the possibility of sexual abuse after J.E.G. started touching herself frequently and refusing to be around appellant and other men. A subsequent interview with J.E.G. by law enforcement corroborated S.W.'s allegations.

On February 15, 2001, appellant pleaded guilty to one count of second-degree criminal sexual conduct for his offenses against F.J.S. As part of the plea agreement, the other count was dismissed, and appellant was not charged with sexually molesting his daughter. Prior to sentencing, a Department of Corrections (DOC) agent completed a presentence investigation (PSI). During his interview with the agent, appellant admitted to the allegations made by F.J.S, but recalled being drunk during the second incident. Appellant also admitted to fantasizing and masturbating to thoughts of having sex with F.J.S. and other “little girls,” whom he defined as females between the ages of seven and twelve years of age. Based on his review of the file, the agent recommended that the district court depart from the presumptive sentence of 36 months and sentence appellant to 72 months in prison.

Appellant also underwent a sex offender evaluation at the South Central Human Relations Center before he was sentenced. Appellant admitted to sexually abusing F.J.S., acknowledged masturbating as much as a couple times a day to the fantasy of sexually touching F.J.S., and admitted a “long-standing history of having sexually fantasized and masturbated to thoughts of prepubescent females.” In his report, the psychologist diagnosed appellant with alcohol dependence in partial remission, “[p]edophilia, sexually attracted to females, nonexclusive type,” and mild mental retardation. The psychologist opined that appellant did not appear to be appropriate for most forms of sex-offender treatment because of his intellectual limitations, but he recommended treatment if appellant’s probation agent was able to find a program that would address his deficits. The psychologist also noted that appellant was an “ongoing risk to prepubescent

females,” including his daughter, and recommended no unsupervised contact with females “under the age of majority.”

On February 11, 2002, the district court sentenced appellant to 36 months in prison, followed by 120 months of conditional release. The court also ordered that the Commissioner of Corrections consider the possibility of commitment as an SDP or a sexual psychopathic personality (SPP) upon the expiration of appellant’s sentence. Appellant was subsequently committed to the Commissioner of Corrections and, shortly thereafter, he was recommended for the sex-offender treatment program (SOTP) at the Minnesota Correctional Facility — Lino Lakes. While in SOTP, psychological testing revealed that appellant had a full-scale I.Q. of 59 (extremely low range). Appellant also admitted during treatment that he committed prior sex offenses with three different victims for which he was never caught. Appellant further admitted to being attracted to young girls and reinforcing this attraction through masturbatory fantasies.

On January 5, 2004, appellant was released from prison and was discharged from sex-offender treatment. Prior to his discharge, the End-of-Confinement Review Committee (ECRC) reviewed appellant’s file. The ECRC assigned appellant a “Risk Level” of one. On the “Assessment Scale” a Risk Level 1 is “[a]ny sex offender who scores 3 or lower on the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R) and causes no special concerns.” The ECRC noted, however, that appellant would be reviewed if he engaged in high-risk behaviors.

After his release from prison, appellant was placed on Intensive Supervised Release (ISR). As part of his release, appellant was not to have direct or indirect contact

with minors without written permission of his agent and was to complete sex-offender treatment, along with aftercare. During treatment, appellant admitted that he began sexually abusing young girls at the age of 15, and he estimated abusing 40 to 50 children. Appellant admitted that most of his victims were females, but that he also abused some of his nephews as well. Appellant further admitted that he sexually assaulted eight to nine female children after completing probation on his first offense.

Throughout his treatment period, appellant continued to have contact with minor children. Appellant reported that the children next door and children he saw at Walmart were “triggers” that induced his masturbatory fantasies about his victims and other young girls. He also frequently exhibited frustration over not being able to visit his daughter and admitted going to locations to be with his daughter on three occasions. As treatment progressed, appellant admitted that when he was 14 or 15 years old, he had his brother’s dog lick his penis. Appellant also admitted that he drilled a hole in the wall of the bathroom so that he could watch his young nieces, ages 9 through 12, while they showered and used the bathroom. Appellant further revealed that when he was 45 years of age, he tried to sexually abuse a vulnerable adult niece. Finally, appellant noted that he expressed thoughts of raping S.W. and admitted to similar thoughts regarding his victims.

On February 8, 2006, while appellant was still on supervised release in the community, a DOC psychologist performed a second Sex-Offender Risk Assessment Recommendation on appellant. The psychologist gave appellant a MnSOST-R score of plus two, reflecting a low risk of sexual reoffense. The psychologist ultimately

recommended a Risk Level of two, reflecting a moderate risk of sexual reoffense, but cited numerous special concerns. The psychologist indicated that appellant's admission that he sexually abused up to 50 child victims and his continued reinforcement of deviant sexual fantasies required the increased designation to level two to allow law enforcement to notify appellant's potential victim pool.

On January 17, 2007, the state filed a petition to commit appellant as an SDP and an SPP. At trial, appellant testified that his first victim was his 9-year-old niece, M.F., whom he sexually assaulted when he was approximately 18 years of age. Appellant also testified that when he was 18 or 19, he sexually assaulted his 12-year-old niece, R.R., on three occasions because "she was there and I was there, so I just decided to do it." Appellant further admitted to sexually abusing other young female relatives, but he denied allegations that he abused his daughter.

Appellant testified that during his supervised release period, he did not want to live near a school because he had "triggers" to the little school girls every time he went outside. Appellant stated that he sometimes had an erection and masturbated after seeing the school children because they reminded him of his victims. Appellant also testified that when he lived in the apartment building on School Street, "a few" children lived in apartments in the same building, and one of the little girls sometimes came to his apartment with her mother. Although appellant admitted that he needs sex-offender treatment, he claimed that he should not be committed because he had three years of outpatient sex-offender treatment and knows his "stoppers and all that stuff" that he learned in treatment.

Also testifying at trial were appellant's probation agent, Jeff Oney, and one of appellant's victims, F.J.S. Oney testified that he was concerned that appellant had children in his apartment and was in an apartment complex where children lived. Oney also testified that he became very concerned about appellant's risk after he learned the full extent of appellant's victim pool and after appellant repeatedly violated his release by having unauthorized contact with his daughter and contact with nieces who had been victims. F.J.S., who was 19 at the time of trial, testified that when she was nine, appellant sexually abused her about four times. F.J.S. further testified extensively about the emotional and psychological problems she dealt with as a result of the abuse.

Three court-appointed examiners testified at trial. The first examiner, Dr. Linda Marshall, diagnosed appellant as follows: Axis I: Pedophilia, attracted to females, non-exclusive, alcohol dependence (in remission in a controlled environment); Axis II: Mild mental retardation; Axis III: Back problems, high blood pressure, hearing loss; Axis IV: Problems related to social environment – Problems related to interaction with legal system – pending court hearing for possible commitment as an SDP and SPP. Dr. Marshall opined that, based on her review of appellant's records, appellant met the criteria for commitment as an SDP but fell "short of the threshold" for commitment as an SPP. Dr. Marshall testified that appellant is in need of a secure intensive treatment program that offers a structured setting with special services due to his intellectual limitation.

Dr. John Austin was the second court-appointed examiner and was chosen by appellant. Dr. Austin diagnosed appellant with "Pedophilia, Sexually Attracted to

Females, Nonexclusive Type . . . , Alcohol Dependence, Sustained Full Remission, In a Controlled Environment . . . and Mild Mental Retardation . . . .” Dr. Austin opined that appellant “possesses the power to control his sexual impulses,” and he believed that appellant could remain in the community to complete outpatient sex offender treatment because he is not “highly likely” to reoffend. Dr. Austin testified that although appellant will likely always respond sexually to children, he can learn to control how he acts to this response as does an alcoholic in recovery.

Dr. Peter Marston, who was retained by the state, performed a pre-petition review of appellant’s records. Dr. Marston testified that he did not meet with appellant prior to testifying due to appellant’s refusal, but that he was present during appellant’s trial testimony and during the testimony of F.J.S. Dr. Marston stated that he also reviewed appellant’s records and the transcripts of Drs. Marshall’s and Austin’s interviews with appellant, reviewed scores of various instruments, and reviewed Drs. Marshall’s and Austin’s reports to the court. Dr. Marston concluded that appellant met the criteria for commitment as an SDP and an SPP based on appellant’s pedophile sexual interests, his high level of sexual drive, and his limited intellectual ability. Marston gave this opinion based on his structured clinical judgment, actuarial tools, and appellant’s other individual risk factors. Dr. Marston further testified that appellant requires “long term intensive inpatient treatment in a secured setting” specialized for individuals with limited intellectual ability.

On October 3, 2007, the district court issued its order concluding that appellant “satisfies the requirements for commitment as a ‘sexually dangerous person’ under Minn.

Stat. § 253B.02, subd. 18c (2006). [Appellant] does not satisfy the requirements for commitment as a ‘sexually psychopathic personality’ under Minn. Stat. § 253B.02, subd. 18b (2006).” Following appellant’s commitment as an SDP, a 60-day review hearing was held as required by Minn. Stat. § 253B.18, subd. 2 (2006). The district court concluded that the “statutory requirements for commitment of [appellant] as a SDP, as defined in Minn. Stat. § 253B.02, subd. 18b and 18c . . . continue to be met,” and the Minnesota Sex Offender Program “is the appropriate and least restrictive alternative available to provide confinement, care, and treatment to [appellant].” This appeal follows.

## D E C I S I O N

This court “review[s] 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 Civil Commitment of 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 (quotation omitted).

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) “is

likely to engage in acts of harmful sexual conduct.” Minn. Stat. § 253B.02, subd. 18c(a) (2006). The statute requires a showing that the person’s disorder does not allow him to adequately control his sexual impulses. *In re Linehan*, 594 N.W.2d 867, 876 (Minn. 1999) (*Linehan IV*).

Appellant argues that the state “did not prove by clear and convincing evidence that as a result of engaging in a course of harmful sexual conduct and manifesting a sexual personality, or other mental disorder or dysfunction, that [appellant] is likely to engage in acts of harmful sexual conduct.”<sup>1</sup> 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*), *vacated on other grounds*, 522 U.S. 1011, 118 S. Ct. 596 (1997), *aff’d on remand*, 594 N.W.2d 867 (Minn. 1999). Specifically, appellant claims that the district court erred in concluding that he is highly likely to reoffend because the actuarial data indicate that he is unlikely to reoffend. Appellant further points to Dr. Austin’s opinion that in light of appellant’s record during the last three years of his treatment, appellant is unlikely to reoffend.

We agree that there is some evidence in the record supporting appellant’s position that he is not highly likely to reoffend. But the overwhelming majority of the evidence and testimony in the record indicates otherwise. The record is replete with assessments

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<sup>1</sup> Appellant concedes that the first two factors of section 253B.02, subdivision 18c(a), are satisfied, and he acknowledges that he is not challenging the district court’s findings on those factors in this appeal.

of appellant over the course of his sexual-offender treatment that demonstrate that appellant still has strong sexual urges toward young females and puts himself in situations in which he is around children. In fact, appellant admitted at trial that while he was on supervised release and living near a school, he had “triggers” to little girls when he went outside. Appellant further admitted that he fantasized about the children living nearby and continues to have masturbatory fantasies about his victims.

In addition, the Minnesota Supreme Court has set forth six factors to be considered in examining the likelihood of reoffense: (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*). Our review of the *Linehan I* factors supports the district court’s conclusion that appellant is highly likely to reoffend.

The first factor is relevant demographic characteristics. Appellant is male, which increases the risk. In addition, Dr. Marston testified that appellant still has a high level of sexual drive directed toward female children that still exists despite appellant’s age (52). Thus, this factor supports the conclusion that appellant is highly likely to reoffend.

The second factor contemplates appellant’s history of violent behavior. A review of the record reveals that appellant repeatedly sexually assaulted several victims over decades. In fact, appellant admitted abusing up to 50 different victims. The record also

reveals that appellant was physically rough with some victims and has verbally threatened other victims. Consequently, the second factor indicates that appellant is highly likely to reoffend.

The third factor is the base-rate statistics for violent behavior among individuals with appellant's background. Again, we acknowledge that some of appellant's test results categorize appellant as a moderate or even low risk to reoffend, but many of the test results are based on the interpretation of the assessing psychologist. For example, Dr. Austin concluded that based on his review of the tests he administered to appellant, the likelihood of appellant reoffending is "not highly likely." In contrast, both Drs. Marshall and Marston opined that the base-rate statistics indicate that appellant is at risk for further sexual reoffense. Their opinions were based not only on appellant's test scores, but also on the doctors' review of appellant's file and their observations of appellant during interviews and his trial testimony. The district court specifically found Drs. Marshall's and Marston's testimony on the issue to be credible and found Dr. Austin's testimony not to be persuasive. 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). Accordingly, the third factor supports the conclusion that appellant is highly likely to reoffend.

The fourth factor, the sources of stress in appellant's environment, indicates a high risk of reoffense in light of Drs. Marshall's and Marston's concerns that appellant's stress would increase as a result of being designated a sex offender, and that appellant might

begin drinking again, which, in turn, would reduce his ability to control his sexual impulses. Moreover, because of his status as a sex offender, appellant was prohibited from having contact with certain family members and thus unable to establish a supportive environment. Drs. Marshall and Marston both indicated that this was an additional source of stress in appellant's environment that increased the likelihood of reoffense.

The fifth factor is the similarity of the present or future context to those contexts in which appellant used violence in the past. The record indicates that but for appellant's commitment as an SDP, appellant would return to a situation similar to that in which he lived in the community in the past, providing appellant with the same opportunities to commit additional acts of violence. This reasoning is supported by Oney, appellant's former probation and supervised release agent. Oney testified that he became concerned about appellant's designated risk level when he learned the full extent of appellant's victim pool and after appellant repeatedly violated his release by contacting his daughter and nieces who had been previous victims. Oney also testified that appellant told him that he would have reoffended had he not moved out of the School Street apartment building. According to Oney, appellant claimed that he had selected his next victim, a girl who had visited his apartment with her mother. Oney further testified that he believed the move from the School Street apartment interrupted appellant's reoffense cycle. Accordingly, this factor indicates a high likelihood of reoffense.

Finally, the sixth factor, appellant's record of participation in sex-therapy programs, also indicates a high risk of reoffense. Although appellant has made progress

in treatment, appellant has yet to successfully complete a sex-offender treatment program, and according to Dr. Marshall, appellant's knowledge of treatment principles is "pretty elementary or practically nil." Moreover, Dr. Marston testified that appellant's prevention plan is problematic because appellant continued to put himself in risk situations. Therefore, in light of the *Linehan I* factors and the totality of the evidence presented, we conclude that the district court did not err in finding that there is clear and convincing evidence that appellant is highly likely to reoffend.

Appellant also contends that the state did not prove by clear and convincing evidence that he is unable to adequately control his harmful sexual conduct. To support his claim, appellant asserts that although he still has sexual urges involving young girls, he demonstrated his ability to control his urges by living in the community without reoffending from January 2004 to February 2007. Moreover, appellant again relies on Dr. Austin's opinion that appellant "possesses the power to control his sexual impulses."

Appellant's argument is directly intertwined with his claim that there is not clear and convincing evidence that he is highly likely to reoffend. In other words, if there is clear and convincing evidence that appellant is highly likely to reoffend, then there is clear and convincing evidence that he is unable to control his sexual impulses. As noted above, there is more than sufficient evidence in the record to conclude that appellant is unable to control his sexual impulses. Although Dr. Austin opined that appellant can control his sexual impulses, the district court specifically found this testimony to be incredible. *See Knops*, 536 N.W.2d at 620 (this court defers to the district court's credibility determinations). Although appellant did not reoffend while on supervised

release, appellant has a long history of sexually deviant behavior, as well as continued sexual fantasies. Moreover, Oney testified that he believed appellant was preparing to reoffend, and would have reoffended had appellant not moved from the School Street apartment. We conclude that the record supports the district court's conclusion that appellant cannot control his sexual impulses and is highly likely to engage in harmful sexual conduct. Accordingly, the district court did not err in committing appellant as an SDP.

**Affirmed.**