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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-1485**

In the Matter of the Civil Commitment of:  
Antonio Robert Difronzo

**Filed January 7, 2013  
Affirmed  
Stoneburner, Judge**

Dakota County District Court  
File No. 19HA-PR-10-228

David A. Jaehne, West St. Paul, Minnesota (for appellant Antonio Robert Difronzo)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Debra E. Schmidt, Assistant County  
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Considered and decided by Stoneburner, Presiding Judge; Kalitowski, Judge; and  
Larkin, Judge.

**UNPUBLISHED OPINION**

**STONEBURNER**, Judge

Appellant challenges his indeterminate commitments as a sexually dangerous  
person (SDP) and a sexual psychopathic personality (SPP), arguing that the evidence is  
insufficient to support the commitments, that he will not receive the intensive treatment  
he needs if committed to the Minnesota Sex Offender Program (MSOP), and that he was  
denied effective assistance of counsel. We affirm.

## FACTS

Appellant Antonio Robert Difronzo was born in 1969. In 1984 he was convicted of his first criminal sexual offense for grabbing a female classmate's breast and making obscene phone calls to her, resulting in a conviction of fourth-degree criminal sexual conduct. In 1989, Difronzo was convicted of third-degree criminal sexual conduct for having sexual intercourse with a 13-year-old female. During this incident, he dragged the victim into a bedroom and laid her on the floor before forcibly removing her clothing and penetrating her. In 1996, Difronzo was convicted of third-degree criminal sexual conduct for having sexual intercourse with a 15-year-old female. He portrayed himself as a high school student to get close to the victim and then raped her when she refused to perform oral sex on him. The victim suffered bruising on her labia and clitoris and was unable to sit down for a period of time as a result.

Difronzo was sentenced to 76 months in prison for the 1996 crime. He was released into the community on December 31, 2001, but returned to prison on February 13, 2002, for possessing sexually explicit material, including material from dating services. Although ordered multiple times to complete sex-offender treatment after his return to prison, he never completed treatment. He remained in prison until his transfer to the MSOP in early June 2011.

The record reveals other noncharged sexual conduct with young females as follows: (1) 1983, digital and penile penetration of a young girl while they were at Camp Buckskin; (2) 1984, repeated molestation and unsuccessful intercourse of an eight-year-old cousin; (3) 1985, molestation of the same cousin; (4) 1986, kissing and fondling

of a 13-year-old girl; (5) 1990, fondling and digital penetration of a 16-year-old girl; and (6) 1990, fondling of a 13-year-old girl. The record indicates that Difronzo has had between 100 and 150 sexual partners, including 20 to 30 girls whom he considered to be victims of his sexual offenses. He particularly looked for young victims who were vulnerable, easy to manipulate, and unlikely to refuse his sexual advances.

On January 13, 2011, Dakota County petitioned to have Difronzo committed as an SDP and SPP. The petition relied on a report prepared by Dr. Michael Thompson, who reviewed available records but did not interview Difronzo or complete any psychological testing. After the petition was filed, two additional experts prepared reports in connection with this case, Drs. Andrea Lovett and Mary Kenning.

All three experts testified at the commitment hearing. They all agreed that Difronzo meets the criteria for commitment as an SDP, having concluded that Difronzo engaged in a course of harmful sexual conduct based on his three convictions for criminal sexual conduct and his noncharged sexual conduct. Dr. Kenning also noted that Difronzo himself reported 20 to 30 victims. With respect to SPP commitment, both Drs. Thompson and Lovett concluded that Difronzo's course of conduct was habitual due to the similarities between the charged and noncharged incidents and the characteristics of the victims involved, as well as the frequency of the conduct. Dr. Kenning, however, does not believe that the course of conduct was habitual because the offenses were more opportunistic in nature. All three experts concluded that Difronzo is dangerous, but Dr. Lovett is uncertain that the level of violence involved in Difronzo's past offenses meets the criteria for SPP commitment.

Five actuarial instruments admitted at the commitment hearing place Difronzo at a high risk of being charged with or convicted of another sexual offense, including the Static-99R, the Static-2002R, and the Minnesota Sex Offender Screening Tool-Revised (MN-SOST-R). On two other instruments, including the Sex Offender Risk Appraisal Guide (SORAG), the results indicate that Difronzo has a 100% chance to reoffend within seven years. Dr. Lovett noted that it is “uncommon” for five actuarial results to all show high risk for recidivism. Drs. Thompson, Lovett, and Kenning all testified that based on these results and Difronzo’s past conduct, it is highly likely that Difronzo will reoffend.

Drs. Thompson, Lovett, and Kenning all recommend that Difronzo receive lengthy, intensive sex-offender treatment in a secure setting. They testified that the MSOP is the least-restrictive treatment program available and that other programs, such as Alpha House, are not in a secure setting and would not consider Difronzo due to his commitment status.

Difronzo testified that he has made a lot of progress with his department-of-corrections therapist, Kathy Lockie. He testified that Lockie helped him to take responsibility for his actions. Difronzo testified that he does not believe that he is at a high risk of reoffending because he has support, he would see a therapist, he has jobs and housing lined up, and he now thinks before acting upon his impulses. He opposes commitment to the MSOP because he does not believe that the MSOP provides the kind of intensive treatment he needs.

After the trial, the district court issued a detailed, 48-page order of commitment. The district court made specific findings on each of the statutory criteria for both SDP

and SPP commitments and attached a memorandum of law to the commitment order expanding on the statutory commitment criteria as it relates to Difronzo. Based on its findings, the district court concluded that Difronzo meets the statutory criteria for commitment as an SDP and SPP. The court committed Difronzo to the MSOP, finding that Difronzo failed to present any evidence of an available, less-restrictive treatment program that is consistent with his needs and the requirements of public safety.

At the 60-day review hearing, the district court heard testimony from Drs. Gary Hertog and Thomas Alberg, who testified that Difronzo continues to meet the criteria for both an SDP and SPP because no substantial changes had been made by Difronzo since the initial commitment and Difronzo had not engaged in any type of programming since being committed. Drs. Hertog and Alberg testified that the MSOP is the only secure treatment program where Difronzo is able to participate in a secure, “long term sex offender specific program.”

On June 27, 2012, the district court issued an order finding that Difronzo continues to meet the statutory criteria for commitment as an SDP and SPP and committing him to an indeterminate period to the MSOP. This appeal followed.

## **D E C I S I O N**

### **I. Sufficiency of the Evidence**

Difronzo argues that the evidence is insufficient to support his commitment as an SDP and SPP.

In an appeal concerning civil commitment, this court examines only whether the district court complied with the requirements of the commitment statutes. *In re Knops*,

536 N.W.2d 616, 620 (Minn. 1995). The petitioner must prove the facts necessary for SDP and SPP commitment by clear and convincing evidence. Minn. Stat. §§ 253B.18, subd. 1(a), .185, subd. 1 (2010). This court applies a clearly erroneous standard of review to the district court’s factual findings, and the record is reviewed in the light most favorable to those findings. *Knops*, 536 N.W.2d at 620. But the issue of whether the facts satisfy the statutory criteria for commitment is reviewed de novo. *In re Linehan*, 518 N.W.2d 609, 613 (Minn. 1994) (*Linehan I*).

An SDP is defined as a person who “(1) has engaged in a course of harmful sexual conduct [as defined in the statute]; (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) (2010). “[I]t is not necessary to prove that the person has an inability to control the person’s sexual impulses,” *id.*, subd. 18c(b) (2010), but the state must prove by clear and convincing evidence 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*).

An SPP is one who exhibits

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

Minn. Stat. § 253B.02, subd. 18b (2010). To commit someone as an SPP, the district court must find (1) a habitual course of misconduct involving sexual matters; (2) an utter lack of power to control sexual impulses; and (3) dangerousness to others. *Linehan I*, 518 N.W.2d at 613. The psychopathic personality is limited to “sexual assaultive behavior” and “excludes mere sexual promiscuity” and “other forms of social delinquency.” *In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994). It “is an identifiable and documentable violent sexually deviant condition or disorder.” *Id.*

#### **A. SDP commitment**

Difronzo does not directly challenge any of the district court’s findings that he meets the statutory criteria of being committed as an SDP. Rather, he argues that the evidence is insufficient to support the commitment because he has been prosecuted for only three sex crimes, the last of which was in 1996. We construe this argument as a challenge to the sufficiency of the evidence with respect to the first element of the SDP statute—that Difronzo has engaged in a course of harmful sexual conduct. *See* Minn. Stat. § 253B.02, subd. 18c(a)(1).

#### **1. Course of harmful sexual conduct**

A “course of harmful sexual conduct” is defined by its ordinary meaning, which is “a systematic or orderly succession; a sequence.” *In re Commitment of Ramey*, 648 N.W.2d 260, 268 (Minn. App. 2002) (quotation omitted), *review denied* (Minn. Sept. 17, 2002). A course of conduct is not limited to “convictions, but may also include conduct amounting to harmful sexual conduct, of which the offender was not convicted.” *Id.*

When an individual engages in certain enumerated behaviors, including criminal sexual

conduct in the third and fourth degrees, a rebuttable presumption of physical or emotional harm to the victim of the offense attaches. Minn. Stat. § 253B.02, subd. 7a(b) (2010).

Although Difronzo has only three convictions of criminal sexual conduct, the number of convictions an individual has is not dispositive of whether the criteria are met for commitment as an SDP. *In re Monson*, 478 N.W.2d 785, 789 (Minn. App. 1991). In this case, the evidence demonstrates that Difronzo has had 100 to 150 sexual partners, at least 20 to 30 of whom were victims of sexual misconduct. The specific convictions carry a presumption of harm, Minn. Stat. § 253B.02, subd. 7a(b), and the district court's conclusion that Difronzo's other victims—all of whom were juveniles—likely experienced serious physical or emotional harm is supported by the record, which includes Difronzo's acknowledgment that his sexual offenses have involved force, coercion, and manipulation against vulnerable victims.

Difronzo also points out that his convictions occurred more than 15 years ago, but “the incidents that establish the course will have occurred 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 Commitment of Stone*, 711 N.W.2d 831, 837-38 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). In this particular case, Difronzo has engaged in a course of sexual misconduct starting at a very early age and continuing until his imprisonment in 1996. The fact that he has not offended since 1996 carries little weight, considering that Difronzo was in prison except for two months in 2001. And during the

two months when he was not in prison, he was found with dating-service materials—a service he has used in the past to find vulnerable victims.

Accordingly, the district court’s determination that Difronzo has engaged in a course of harmful sexual conduct is supported by the record and is not clearly erroneous.

Difronzo does not make any argument regarding the remaining elements of the SDP statute. Issues not argued on appeal are waived and need not be considered. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982). But we nevertheless briefly address the remaining commitment criteria and note that the third criterion bears directly on Difronzo’s argument against his SPP commitment.

## **2. Sexual, mental, or other disorder or dysfunction**

The SDP statute requires the petitioner to prove by clear and convincing evidence that Difronzo “has manifested a sexual, personality, or other mental disorder or dysfunction.” Minn. Stat. § 253B.02, subd. 18c(a)(2). All three experts testified that Difronzo has such mental disorder or dysfunction, and the record contains multiple other diagnoses. The evidence is sufficient to support the district court’s finding on this element.

## **3. High likelihood of reoffending**

The SDP statute requires the petitioner to prove by clear and convincing evidence that, as a result of Difronzo’s disorder or dysfunction, he “is likely to engage in acts of harmful sexual conduct.” *Id.*, subd. 18c(a)(3). To meet this element, the petitioner must show that the person is “highly likely” to engage in harmful sexual conduct. *Linehan IV*,

594 N.W.2d at 876. When considering whether an offender is highly likely to reoffend, a district court considers the following six “*Linehan*” factors:

- (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 *Linehan I*, 518 N.W.2d at 614).

The district court discussed the evidence relevant to these factors in great detail and concluded that Difronzo is highly likely to reoffend, in particular because of his high actuarial risk assessment scores, his high degree of psychopathy and sexual deviance, his dynamic risk factors, and his inadequate internal controls.

The district court’s conclusion is supported by the testimony of the experts and the exhibits. All three experts testified regarding the six *Linehan* factors and concluded that Difronzo is highly likely to reoffend. They noted that Difronzo received high results on five actuarial instruments, an “uncommon” result. Some of his scores correspond to a 100% chance of reoffending. The experts also noted Difronzo’s history of sexually violent behavior and testified to the similarity of Difronzo’s conduct, which involved force, coercion, and manipulation of vulnerable young victims. And, for the only amount of time Difronzo was not in confinement since 1996, he placed himself in a situation where he could find additional vulnerable victims by possessing materials from dating services. Lastly, it is significant that Difronzo has failed to complete sex-offender

treatment despite multiple attempts at treatment and, since his return to prison in 2002, he has been terminated from treatment programs on three occasions. He was terminated from the latest treatment program in September 2005 due to, among other reasons, a sexually threatening letter he wrote that referenced having sex with the program director.

Based on the foregoing, the district court's conclusion that Difronzo is highly likely to reoffend is supported by the testimony and the record, and is not clearly erroneous.

## **B. SPP commitment**

Difronzo argues that the evidence is insufficient to support his commitment as an SPP. He contends that his course of conduct was not sufficiently violent because there is more evidence of manipulation rather than physical violence. We disagree.

### **1. Habitual course of misconduct involving sexual matters**

The first element of the SPP commitment statute requires the petitioner to prove that Difronzo engaged in a habitual course of misconduct, which “has been defined to require evidence of a pattern of similar conduct.” *Stone*, 711 N.W.2d at 837.

Drs. Thompson and Lovett opined that Difronzo has engaged in a habitual course of misconduct in sexual matters, citing to the similarity of his offenses, the characteristics of the victims, the use of force and/or manipulation, and the frequency of the conduct.

Dr. Kenning did not agree. She reasoned that Difronzo is more opportunistic than habitual. The district court weighed the expert reports and concluded that Drs.

Thompson and Lovett were “more compelling.” This court defers to the district court's resolution of this conflicting expert opinion testimony. *See In re Martenies*, 350 N.W.2d

470, 472 (Minn. App. 1984) (stating that where expert testimony provides conflicting evidence as to the existence of a psychopathic personality, the district court must resolve the question of fact), *review denied* (Minn. Sept. 12, 1984). And the differing opinion of one expert does not render the district court's finding clearly erroneous.

## **2. Utter lack of power to control sexual impulses**

The second element of the SPP statute requires the petitioner to prove that Difronzo has an utter lack of power to control his sexual impulses. In making this determination, the district court must weigh several factors: (1) "the nature and frequency of the sexual assaults"; (2) "the degree of violence involved"; (3) "the relationship (or lack thereof) between the offender and the victims"; (4) "the offender's attitude and mood"; (5) "the offender's medical and family history"; (6) "the results of psychological and psychiatric testing and evaluation"; and (7) any factors "that bear on the predatory sex impulse and the lack of power to control it." *Blodgett*, 510 N.W.2d at 915.

Difronzo does not challenge the district court's finding on this element. All three experts reported in detail on these factors, and all agreed that Difronzo met this element. The evidence clearly supports the district court's determination in this regard.

## **3. Dangerousness**

To determine whether an offender is dangerous to others, the district court must consider the same factors analyzed in determining whether an offender is highly likely to reoffend; in other words, if a person is highly likely to reoffend, he is also dangerous. *See Linehan I*, 518 N.W.2d at 614; *In re Commitment of Navratil*, 799 N.W.2d 643, 649 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011). As analyzed above in

Section I.A.3., the record establishes by clear and convincing evidence that Difronzo is highly likely to reoffend; therefore, the record supports the district court's conclusion that Difronzo is also dangerous.

Difronzo appears to argue that the district court's conclusion is not supported by the record because Dr. Lovett was uncertain whether he meets the requirements of SPP commitment. Dr. Lovett, however, made clear that she believes Difronzo satisfies the criteria of an SPP if the district court concluded that his conduct was sufficiently violent. The district court acknowledged Dr. Lovett's concern and concluded that Difronzo's actions were both violent and egregious because

[h]e has used a combination of coercion, manipulation, persistence, and force to accomplish his crimes. He has used his physical size and strength to overcome any resistance to his sexual demands, pinning his victims down. One victim suffered substantial physical harm, i.e. significant bruising to her labia and clitoris while being raped by [Difronzo].

Based on the district court's conclusion in this regard, Dr. Lovett's testimony actually supports the SPP commitment.

Difronzo also argues that there is more evidence of manipulation than there is of physical violence. But this element of an SPP commitment does not turn on the degree of physical violence involved; rather, it turns on the offender's dangerousness to others, based on an analysis of the six *Linehan* factors. See *Linehan I*, 518 N.W.2d at 614. In any event, the evidence establishes that Difronzo engaged in "sexual assaultive behavior" rather than "mere promiscuity." See *Blodgett*, 510 N.W.2d at 915. For example, the evidence reveals that Difronzo dragged a victim to a bedroom before pinning her down and raping her, and that Difronzo raped another victim so hard that she sustained

significant bruising on her labia and clitoris such that she could not even sit down for a period of time following the assault. The record supports the district court's conclusion that Difronzo's conduct was violent, aggressive, involved coercion and manipulation, and utilized physical force to overcome any resistance, which is sufficient to satisfy this element of an SPP commitment. *See In re Preston*, 629 N.W.2d 104, 113 (Minn. App. 2001) (holding that the physical force used by a sexual offender in restraining his victims is, in and of itself, sufficient to support a finding that the offender engaged in violent sexual misconduct).

#### **4. Testimony of Dr. Thompson**

Difronzo challenges the district court's reliance on Dr. Thomson's testimony and report, arguing that because Dr. Thompson did not conduct an interview of him and merely commented on the findings of others, the district court should not have considered Dr. Thompson's opinions. But Difronzo cites to no authority for the proposition that a personal interview is required or that an expert cannot offer an opinion based on a review of relevant documents. Difronzo's argument goes more to the weight than to the admissibility of Dr. Thompson's testimony. The district court weighed and credited Dr. Thompson's testimony, and we defer to that credibility determination. *See Ramey*, 648 N.W.2d at 269; *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003) ("Where the findings of fact rest almost entirely on expert testimony, the [district] court's evaluation of credibility is of particular significance."). And Difronzo has not shown any prejudice due to the admission of Dr. Thompson's testimony because the evidence supports commitment even without that testimony.

## II. Commitment Facility

Difronzo argues that it was error for the district court to commit him to the MSOP given the prosecutor's insistence on intensive treatment. He contends that the type of intensive treatment contemplated by the prosecutor is not available at the MSOP but is available at in-treatment facilities such as Alpha House.

When a person is determined to be an SDP or SPP, 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, the district 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). This court will not reverse a district court's findings as to the propriety of a treatment program unless the findings are clearly erroneous. *Thulin*, 660 N.W.2d at 144.

Minn. Stat. § 253B.185, subd. 1(d), provides a rebuttable presumption that the patient will be committed to a secure treatment facility. The burden is on the patient to rebut the presumption and show that a less restrictive facility is available. Difronzo's argument focuses on the intensity of the treatment at the MSOP, but he fails to address the experts' insistence on a secure treatment facility; Difronzo's proposed alternative treatment programs do not offer a secure setting. The experts also insisted on "long

term” treatment, but Difronzo offered no evidence of whether other treatment programs would offer the lengthy treatment required to meet his needs. Lastly, the experts testified that other treatment programs, such as Alpha House, would not accept Difronzo due to his commitment status, and Difronzo failed to offer any evidence showing that any of the other proposed treatment programs are available to him. Accordingly, the district court’s conclusion that the MSOP is the least restrictive alternative available and that Difronzo failed to rebut the presumption in Minn. Stat. § 253B.185, subd. 1(d), is supported by the evidence, and is not clearly erroneous.

### **III. Ineffective Assistance of Counsel**

Difronzo argues that he was denied the effective assistance of counsel when his attorney failed to call witnesses who would have been favorable to him.

In civil commitment cases, this court analyzes a claim of ineffective assistance of counsel by applying the standards that are used in criminal cases. *In re Dibley*, 400 N.W.2d 186, 190 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987). To prevail on a claim of ineffective assistance of counsel, the appellant must affirmatively prove, first, that his counsel’s representation “fell below an objective standard of reasonableness” and, second, “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). This court may address these two prongs in any order and may dispose of a claim of ineffective assistance of counsel if one prong is determinative. *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006).

Difronzo contends that his attorney failed to call Kathy Lockie, his therapist, to the witness stand. He argues that Lockie is the person who turned his life around and that she would have testified that he needs more one-on-one therapy, which is not available at the MSOP. But “[d]ecisions about which witnesses to call at trial and what information to present to the jury are questions of trial strategy, which lie within the discretion of trial counsel,” and those decisions “will not be second-guessed by appellate courts.” *Leake v. State*, 737 N.W.2d 531, 536, 539 (Minn. 2007).

And Difronzo has failed to show prejudice stemming from counsel’s conduct. The record contains more than 40 pages of Lockie’s session reports, documenting Difronzo’s progress with one-on-one therapy, and the district court heard testimony about Difronzo’s progress with this type of therapy from both Dr. Kenning and Difronzo, but nevertheless concluded that Difronzo needs to be in a secure setting at the MSOP for lengthy, intensive treatment. Even if Lockie testified as Difronzo asserts she would have, the outcome of the commitment hearings would not have been different.

**Affirmed.**