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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0648**

In the Matter of the Civil Commitment of: Thomas Scott Wagner.

**Filed December 2, 2013
Affirmed
Kalitowski, Judge**

Dakota County District Court
File No. 19HA-PR-10-387

Thomas Scott Wagner, Moose Lake, Minnesota (pro se appellant)

James C. Backstrom, Dakota County Attorney, Debra E. Schmidt, Assistant County Attorney, Hastings, Minnesota (for respondent Dakota County)

Considered and decided by Cleary, Chief Judge; Kalitowski, Judge; and Kirk,
Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

In this appeal from his indeterminate commitment as a sexual psychopathic personality (SPP) and a sexually dangerous person (SDP), appellant Thomas Scott Wagner argues that (1) newly discovered evidence warrants reversal of his commitment order and (2) the evidence is insufficient to demonstrate that he meets the statutory criteria for commitment. We affirm.

DECISION

The district court shall civilly commit a person under the Minnesota Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities if it finds by clear and convincing evidence the need for commitment. Minn. Stat. §§ 253D.01, .07, subd. 3 (Supp. 2013).¹ Whether there is clear and convincing evidence in the record to support commitment is a question of law, which this court reviews de novo. *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003). Findings of fact will not be set aside unless clearly erroneous. *In re McGaughey*, 536 N.W.2d 621, 623 (Minn. 1995). The record is viewed in the light most favorable to the district court's decision. *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995). This court defers to the district court's role as fact-finder and its opportunity to assess witness credibility. *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 [district] court's evaluation of credibility is of particular significance." *Thulin*, 660 N.W.2d at 144 (quotation omitted). The district court "shall make its determination upon the entire record." Minn. Stat. § 253B.08, subd. 7 (2012).

¹ The legislature amended parts of Minn. Stat. § 253B in 2013 by creating a chapter to specifically address the civil commitment of SDPs and SPPs. Minn. Laws ch. 49, §§ 9-19, 22, at 226-28, 229-31 (codified at Minn. Stat. §§ 253D.01-.36 (Supp. 2013)). Although the 2010 version of the statute was in effect when appellant was civilly committed as an SDP and SPP, if the preexisting law is clarified, rather than substantively changed, the most current version of the statute should be applied. *Braylock v. Jesson*, 819 N.W.2d 585, 588 (Minn. 2012) ("When the Legislature merely clarifies preexisting law, the amended statute applies to all future or pending litigation.").

I.

Appellant argues that the release of the fifth edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) (DSM-5) constitutes newly discovered evidence and warrants a reversal of his civil commitment order. He contends that under the DSM-5 he no longer has the sexual, personality, or mental disorder that is required for commitment under the SDP and SPP statutes. We disagree.

Because this is appellant's direct appeal of his civil commitment as an SPP and an SDP, this court's review is limited to the arguments and matters presented and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating an appellate court will consider only those matters and theories presented to and considered by the district court). Because appellant did not argue his newly discovered evidence at the district court, his argument is not properly before this court, and we will not consider this argument for the first time on appeal. *See Carter v. Anderson*, 554 N.W.2d 110, 113 (Minn. App. 1996) (refusing to consider a Minn. R. Civ. P. 60.02 argument for the first time on appeal), *review denied* (Minn. Dec. 23, 1996).

Moreover, even if we were to consider appellant's argument that the DSM-5 constitutes newly discovered evidence, it is without merit. Appellant claims that the personality and sexual disorders he was previously diagnosed with by expert examiners have been removed, revised, or are no longer applicable under the DSM-5.

Three experts, Dr. Linderman, Psy.D., L.P., Dr. Kenning, Ph.D., L.P., and Dr. Gilbertson, Ph.D., L.P., all diagnosed appellant with axis II antisocial personality disorder

and with axis I paraphilia. Furthermore, Dr. Linderman and Dr. Kenning diagnosed appellant with axis I voyeurism, and Dr. Gilbertson stated that appellant has a paraphilia with a voyeuristic focus. Thus, although the DSM-5 now distinguishes between a paraphilia and a paraphilic disorder, the criteria for personality disorders and voyeurism diagnoses did not substantially change. Therefore, appellant's newly discovered evidence argument fails because even if his paraphilia is not classified as a disorder under the DSM-5, his commitment was based on the diagnoses of two other sexual and personality disorders.

Appellant further contends that he was erroneously diagnosed with an antisocial personality disorder because he has no juvenile record. But a juvenile conviction is not necessary to support an antisocial personality disorder diagnosis. Rather, the fourth² and fifth editions of the DSM only require that there is either a pervasive pattern of conduct (DSM-IV) or the impairments are relatively stable across time (DSM-5). Moreover, the DSM-5 eliminates the requirement that the specified conduct must have started at age 15.

Here, all three experts opined that appellant's pervasive behavior has been consistent over the past decades, and the district court found that appellant was involved in criminal conduct as a juvenile. Consequently, appellant's argument that under the DSM-5 he no longer has a sexual, personality, or mental disorder fails, as he still meets the diagnostic criteria of one or more of the disorders he was diagnosed with under the previous edition of the DSM.

² American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994) (DSM-IV).

II.

Appellant claims that the record does not contain clear and convincing evidence to support the district court's finding that (1) he has an utter lack of control over his sexual impulses under the SPP statute and (2) he is highly likely to engage in harmful sexual conduct under the SDP statute. We disagree.

Utterly Unable to Control Sexual Impulses

An SPP is defined as a person who “has evidenced, by a habitual course of misconduct in sexual matters, an utter lack of power to control [his] sexual impulses and, as a result, is dangerous to other persons.” Minn. Stat. § 253B.02,, subd. 15 (Supp. 2013). “[I]t is likely [an SPP] will attack or otherwise inflict injury, loss, pain, or other evil on the objects of [his] uncontrolled and uncontrollable desire.” *In re Preston*, 629 N.W.2d 104, 110 (Minn. App. 2001) (quotation omitted).

The district court found that clear and convincing evidence existed to commit appellant as an SPP. Appellant only challenges the district court's conclusion that he has an utter lack of power to control his sexual impulses. As the other SPP requirements are supported by the record, our review is therefore limited to this conclusion.

To determine whether a person is utterly unable to control sexual impulses, the district court considers the following factors:

the nature and frequency of the sexual assaults, the degree of violence involved, the relationship (or lack thereof) between the offender and the victims, the offender's attitude and mood, the offender's medical and family history, the results of psychological and psychiatric testing and evaluation, and such other factors that bear on the predatory sex impulse and the lack of power to control it.

In re Blodgett, 510 N.W.2d 910, 915 (Minn. 1994).

Appellant does not challenge a specific factor; rather he broadly alleges that the evidence does not prove that he has an utter lack of control over his sexual impulses. But the district court found that, over the past thirty-plus years, appellant has been a suspect, pleaded guilty, or been convicted of numerous sexual-assault, trespassing, and burglary crimes. Of these crimes, ten were violent, patterned sexual assaults in which appellant broke into a female's home at night. Many of the assaults involved tying the victim up and threatening her with a knife while raping her. All of the victims were strangers, and appellant continuously denies committing these crimes even when confronted with DNA evidence linking him to the rapes. The district court further relied on the three experts' opinions that considered all of the *Blodgett* factors and concluded that appellant is utterly unable to control his sexual impulses.

Based on the combination of expert testimony and evidence of past crimes and misconduct of appellant, clear and convincing evidence supports the district court's conclusion that appellant has an utter lack of power to control his sexual impulses. The district court did not err in finding that appellant meets the statutory criteria for commitment as an SPP.

Highly Likely to Engage in Harmful Sexual Conduct

An SDP is a person 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. § 253D.02, subd. 16 (Supp. 2013).

The district court concluded that appellant satisfies each element of the SDP statutory criteria. Appellant does not challenge the district court’s conclusions on the first two elements, and the record supports these determinations. We therefore limit our analysis to the third statutory element.

The Minnesota Supreme Court has interpreted this third element to mean that, along with demonstrating that the person engaged in a course of harmful sexual conduct, the state must show that the person’s “present disorder or dysfunction does not allow them to adequately control [his] sexual impulses, making it highly likely that [he] will engage in harmful sexual acts in the future.” *In re Linehan*, 594 N.W.2d 867, 876 (Minn. 1999).

In determining whether someone is highly likely to engage in future dangerous behavior, the district court must consider the following factors: (1) demographic characteristics; (2) history of violent behavior; (3) statistical analysis; (4) sources of stress; (5) similarity of present or future context to former context; and (6) history of treatment. *In re Civil Commitment of Navratil*, 799 N.W.2d 643, 649 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011). “No single factor is determinative of this complex issue.” *Id.* These factors are particularly important when “there is a large gap of time between the petition for commitment and the [offender’s] last sexual misconduct.” *In re Linehan*, 518 N.W.2d 609, 614 (Minn. 1994). Appellant does not provide any arguments

or legal support challenging the factors; instead he only alleges that the evidence does not prove that he is likely to engage in acts of harmful sexual activity.

The district court found, based on testimony and reports by all three experts, that appellant is highly likely to engage in further acts of harmful sexual conduct and is dangerous to others. The court's conclusion was based on appellant's high actuarial risk assessment scores, his antisocial personality disorder combined with his sexual deviance, his long history of sexually harmful behavior, his lack of remorse, his dynamic risk factors, and his continuous denial of any of the sexual assaults. We conclude that the district court's finding that appellant is highly likely to sexually reoffend and is dangerous is supported by clear and convincing evidence. Thus, the district court did not err by concluding that appellant satisfies the criteria for commitment as an SDP.

Affirmed.