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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-527**

In the Matter of the Civil Commitment of:
Donald Jay Conard.

**Filed September 6, 2011
Affirmed
Worke, Judge**

Roseau County District Court
File No. 68-PR-09-424

Richard N. Sather, II, Thief River Falls, Minnesota (for appellant Donald Jay Conard)

Lori Swanson, Attorney General, Eric P. Schieferdecker, Assistant Attorney General, St. Paul, Minnesota (for respondent state)

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Willis, Judge.*

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges his indeterminate commitment, arguing that the evidence is insufficient to commit him as a sexually dangerous person (SDP) and as a sexual psychopathic personality (SPP) because he has not committed a recent sexual offense, he

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

has never refused sex-offender treatment, and a recent assessment determined that he did not meet the commitment criteria. We affirm.

D E C I S I O N

Appellant Donald Jay Conard argues that the evidence is insufficient to support the district court's conclusion that he satisfies the requirements for commitment as a sexually dangerous person (SDP) and as a sexual psychopathic personality (SPP). The state must prove the facts necessary for commitment by clear-and-convincing evidence. Minn. Stat. §§ 253B.18, subd. 1(a), .185, subd. 1 (2010). This court defers to the district court's findings of fact and will not reverse those findings unless they are clearly erroneous. *In re Commitment of Ramey*, 648 N.W.2d 260, 269 (Minn. App. 2002), review denied (Minn. Sept. 17, 2002). But 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).

SDP Commitment

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) (2010). It is not necessary to prove that the person to be committed has an inability to control his sexual impulses. *Id.*, subd. 18c(b) (2010). The statute requires a showing that the person's disorder "does not allow [him] to adequately control [his] sexual impulses." *In re Linehan (Linehan IV)*, 594 N.W.2d 867, 876 (Minn. 1999).

Course of harmful sexual conduct

The district court must first find that appellant “has engaged in a course of harmful sexual conduct.” Minn. Stat. § 253B.02, subd. 18c(a)(1). A “course” of conduct is defined by its ordinary meaning, which is “a systematic or orderly succession; a sequence.” *Ramey*, 648 N.W.2d at 268 (quotation omitted). “Harmful sexual conduct” is “sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another.” Minn. Stat. § 253B.02, subd. 7a(a) (2010). Convictions are not required; rather, the statute has been consistently interpreted as allowing consideration of all harmful sexual conduct or behavior. *See Ramey*, 648 N.W.2d at 268 (stating “that the course of conduct need not consist solely of convictions, but may also include conduct amounting to harmful sexual conduct [for] which the offender was not convicted”).

There is clear-and-convincing evidence supporting the district court’s finding that appellant engaged in a course of harmful sexual conduct. Appellant concedes that he is a sex offender based on his criminal-sexual-conduct convictions. In addition, appellant self-reported: touching a six-year-old girl’s “private” underneath her underwear while she was sleeping when appellant was 17 years old; setting a two-year-old girl on his lap while he had an erection when he was 15 or 16 years old; kissing and hugging a girl between seven and 12 years old when he was 13 years old; and touching the “butt” of a six-year-old girl when he was 13 years old. Appellant also admitted to sexually and physically abusing dogs, peeping, exposing himself to females, experiencing sexual arousal attributed to bicycle seats, masturbating with stuffed animals, asking a female child to kiss his penis, attempting to have a dog lick his penis, masturbating with his younger

brother, kissing his three-year-old female cousin when he was 13 years old, and hugging a female child's back and buttocks after she bathed while he was babysitting her. The record supports the district court's finding that appellant engaged in a course of harmful sexual conduct.

Adequate control

The district court must next find that appellant suffers from a mental abnormality or personality disorder that does not allow him to adequately control his sexual impulses. *Linehan IV*, 594 N.W.2d at 876. Appellant argues that although he may suffer from a mental abnormality or personality disorder, the record fails to show that any such disorder does not allow him to adequately control his sexual impulses.

The district court found that appellant is diagnosed with sexual abuse of a child; sexual disorder; alcohol abuse, in remission in a controlled environment; cannabis abuse, in remission in a controlled environment; history of depression, not otherwise specified; fetal-alcohol-effect syndrome; and antisocial personality disorder. The district court based these findings on the testimony of Drs. Linda Marshall and James Alsdurf.

Dr. Marshall served as the first court-appointed examiner. Dr. Marshall diagnosed appellant with sexual disorder NOS, a classification for an individual who uses other people to meet his sexual needs without regard for the other person. She did not have enough information to make a diagnosis of paraphilia, although appellant had issues with pornography and sexual behavior with dogs. She also diagnosed appellant as having an antisocial personality disorder, composed of maladaptive personality traits that cause impairment in his ability to function in interpersonal relationships. Dr. Marshall stated

that appellant's disorders cause him to have serious difficulty controlling his sexually harmful behavior and render him unable to control his behavior.

Dr. Alsdurf was retained as an expert on behalf of the state. Dr. Alsdurf diagnosed appellant as "paraphilia rule-out," meaning that there is reason to believe that there is a problem, specifically appellant having a persistent deviant pattern of sexual arousal and sexually offending against young girls, but the problem is not known for certain. Dr. Alsdurf diagnosed appellant as a hebephilia, which is a deviant pattern of sexual arousal toward post-pubescent females. Dr. Alsdurf opined that appellant's diagnosis of sexual disorder means that appellant has acted out in a sexually distorted manner, and that the diagnosis of antisocial personality disorder can drive appellant's sexual offending.

The district court found Drs. Marshall and Alsdurf to be credible and persuasive and found that as a result of appellant's disorders, he lacks the ability to control his sexually harmful behavior; thus, the statute's second prong is supported by clear-and-convincing evidence. See *Ramey*, 648 N.W.2d at 269 (stating that appellate courts defer to the district court's evaluation of witness credibility).

Likelihood of reoffense

Finally, the district court must determine whether, as a result of appellant's course of misconduct and mental disorders or dysfunctions, he "is likely to engage in acts of harmful sexual conduct." Minn. Stat. § 253B.02, subd. 18c(a)(3). The phrase "likely to engage in acts of harmful sexual conduct" has been construed to require a showing that the offender is "highly likely" to engage in future harmful sexual conduct. *In re Linehan*

(*Linehan III*), 557 N.W.2d 171, 180 (Minn. 1996), *vacated on other grounds sub nom. Linehan v. Minn.*, 522 U.S. 1011, 118 S. Ct. 596 (1997), *aff'd on remand sub nom. Linehan IV*, 594 N.W.2d 867. Six factors must 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 (Linehan I)*, 518 N.W.2d 609, 614 (Minn. 1994). The record demonstrates that the six factors were considered and support the district court's conclusion that appellant is highly likely to reoffend.

1. *Demographic characteristics*

Appellant is 25 years old, which correlates with a high likelihood of reoffense. He also has been diagnosed with fetal-alcohol-effect syndrome, which creates impulse-control issues.

2. *History of violent behavior*

Appellant's history of violence dates back to his adolescence. There is evidence that he harmed several young girls. There was also testimony that a history of violence is one of the best predictors of future violent behavior.

3. *Base-rate statistics*

Dr. Alsdurf testified that appellant is a child molester and is sexually deviant. The record shows that child molesters exhibit a high level of reoffense. The record shows that

appellant's scores place him in a pool of offenders who tend to be rearrested at a rate of 70% within six years.

4. *Sources of stress in offender's environment*

Dr. Marshall stated that appellant does not have a reasonable relapse-prevention plan and that he does not have the ability to control his sexual impulses when there is an available victim and the circumstances are conducive to taking sexual advantage or committing a sexual assault. She stated that appellant does not have a system in place to help him cope with stress. Dr. John Austin, the second court-appointed examiner, testified that appellant does not have a good support group or friends, he does not have a plan for his future, and he is a "loser."

5. *Context*

The fifth *Linehan* factor is the similarity of the present or future context to those contexts in which the offender used violence in the past. *Id.* Drs. Marshall and Alsdurf opined that this factor indicates a high likelihood of reoffense. This is based on appellant's history of reoffending even when supervised, which demonstrates an impulsive nature to his offending.

6. *Participation in sex-therapy programs*

Appellant has participated in treatment, but he has never completed treatment. When appellant reached 21 years of age and was released from a custodial program, he reoffended.

Each factor indicates that appellant's risk of reoffending is high. The district court did not err by concluding that appellant satisfies the requirements for commitment as an SDP.

SPP Commitment

Appellant also argues that he does not meet the requirements for commitment as an SPP because there is no evidence that he cannot control his sexual impulses. 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). 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 “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.*

Habitual course of misconduct

Appellant argues that there is insufficient evidence to support his commitment as an SPP because he has committed no recent offenses. The record supports the district court's finding that appellant engaged in a habitual course of misconduct as analyzed

above. Thus, the district court did not err in concluding that appellant engaged in a habitual course of sexual misconduct.

Utter control

Appellant next argues that there is no evidence that he cannot control his sexual impulses because his conduct did not involve violence, he did not engage in grooming, and he does not have a diagnosed mental illness. First, Dr. Marshall testified that appellant did engage in violent conduct because young children were assaulted. Second, there is testimony in the record that appellant does not have the intellectual capacity to engage in grooming behavior. Finally, appellant has been diagnosed with a mental disorder.

In considering the second element of an SPP analysis, the district court must weigh several significant 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.” *Id.*

1. Nature and frequency of the sexual assaults

Appellant’s victims varied in age, ranging from two to 15 years of age. This range indicates that appellant has a large victim pool. And the contexts of the assaults varied from babysitting situations to public-school hallways. Thus, appellant took advantage of any opportunity available to him to assault his victims.

2. *Degree of violence involved*

Appellant argues that because children were the “recipients” of his conduct, they may not even consider his conduct as being sexual or violent. The standard for harmfulness requires merely that the conduct create “a substantial likelihood of serious physical or mental harm.” *In re Preston*, 629 N.W.2d 104, 113 (Minn. App. 2001) (quotation omitted) (stating that this threshold is particularly relevant when assaults involve extremely young victims; noting that it would be “absurd to hold that because less force was needed to subdue an extremely young victim, the assault was non-violent”). Dr. Marshall testified that appellant’s conduct creates a substantial likelihood of emotional, psychological, and physical harm to his victims. Dr. Marshall further testified that appellant is violent because he has been convicted of sex crimes. She also stated that appellant’s offenses were violent because of the ages of his victims, stating that child molestation—an act against a child—is always considered a form of violence. Further, Dr. Austin stated that appellant has a moderate level of psychopathy, making him more impulsive than the average person, which causes him to use violence. The record shows that appellant’s offenses were violent.

3. *Relationship (or lack thereof) between the offender and the victim*

This factor also shows that appellant has an utter lack of control because he was familiar with all of his victims.

4. *Offender’s attitude and mood*

The record shows that appellant blames others, including his victims, for his behavior and has not accepted responsibility. Dr. Marshall stated that during her

interview with appellant, he admitted to having ten victims but accepted responsibility for only one. Appellant testified that he most likely dreamed some of the behavior he reported. But during this appeal, he argues that his self-reporting was exaggerated. Thus, he is still unable to accept responsibility for his conduct.

Appellant believes that his risk of reoffending is “zero.” But Dr. Marshall stated that appellant does not have a system to help him cope with stress, does not have a reasonable relapse-prevention plan, and does not have the ability to control his sexual impulses when there is an available victim and the circumstances are conducive to taking sexual advantage or committing a sexual assault. Dr. Austin testified that appellant is emotionally unstable, impulsive, demonstrates a lack of good judgment, and fails to appreciate the consequences of his actions. Dr. Marshall testified that appellant has not benefitted from treatment, has problems with authority, problems with conflict, and is determined to do what he wants, whenever he wants, and without concern for anyone else. She noted that he continues to act out, has not learned from his mistakes, and has a deviant sexual-arousal disorder, a combination which leads to problems with inappropriate sexual conduct.

5. *Offender’s medical and family history*

Appellant has several issues with his family. His parents divorced when he was one year old. He claims to have been physically abused by his mother, father, and step-mother. He claims to have been sexually assaulted by his sister. His mother had chemical-dependency issues during pregnancy, and appellant was diagnosed with fetal-alcohol-effect syndrome. Appellant has learning and reading disabilities and attention-

hyperactivity disorder. There is a concern that his fetal-alcohol-effect syndrome results in his exercising poor judgment. But the record shows that there is nothing affecting appellant medically that would diminish his sexually offending behavior.

6. *Results of psychological and psychiatric testing and evaluation*

Testing indicates that appellant cannot control his sexual impulses and that he is against perceived authority. He exhibits sexual deviance. He blames his victims and others and maintains that he is responsible for only one assault.

7. *Factors that bear on the predatory sex impulse and the lack of power to control it*

Dr. Marshall stated that appellant is dangerous when he gets mad because he gets physical and cannot deal with his anger. The district court found that appellant does not have a prevention plan and has no plans for his future. The court further found that appellant reoffended when released previously, failed to remove himself from similar situations, and failed to complete sex-offender treatment. The district court did not err in determining that appellant has an utter lack of power to control his sexual impulses.

Dangerousness to others

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. *Linehan I*, 518 N.W.2d at 614. As discussed in the SDP analysis, appellant is dangerous to others and highly likely to reoffend. The district court did not err in determining that

appellant meets the requirements for commitment as an SPP. The district court, therefore, did not err in ordering appellant's indeterminate commitment.

Affirmed.