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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0183

In the Matter of the Civil Commitment of: Randy Ray Schmiedeberg

Filed July 2, 2012
Affirmed
Larkin, Judge

Kittson County District Court
File No. 35-PR-10-115

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Roger C. Malm, Kittson County Attorney, Hallock, Minnesota (for respondent)

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

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

Appellant challenges his commitment as a sexual psychopathic personality (SPP) and sexually dangerous person (SDP), arguing that the evidence does not support the district court's conclusion that he meets the statutory criteria for commitment. Because

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

appellant's commitment as an SPP and SDP is supported by clear and convincing evidence, we affirm.

FACTS

In 2010, respondent State of Minnesota filed a petition to civilly commit appellant Randy Ray Schmiedeberg as an SPP and an SDP. The district court held a three-day hearing on the petition, at which it received 22 exhibits and heard testimony from nine witnesses. After the hearing, the district court issued an order preliminarily committing appellant to the custody of the commissioner of human services at the Minnesota Sex Offender Program (MSOP) as an SPP and an SDP. Later, the district court held a 60-day review hearing[1] and ordered appellant's indeterminate commitment as an SPP and SDP. The district court made the following findings in support of its order.

Appellant has a long history of sexually inappropriate conduct involving multiple victims. In approximately 1988, appellant sexually abused 11-year-old KLN. In April 1995, KLN told police that she and her family delivered a Christmas wreath to appellant. Appellant asked KLN to go outside with him to find a place to hang the wreath. Once they were outside alone, appellant kissed KLN. He also reached inside her underwear and touched her genital area. KLN could smell that appellant had been drinking. KLN told appellant not to touch her, and appellant stopped. Appellant told KLN not to tell anyone about the incident. KLN reported that appellant tried to hug and kiss her one

[1] *See* Minn. Stat. § 253B.18, subd. 2 (2010) ("A written treatment report shall be filed by the treatment facility with the committing court within 60 days after commitment. . . . The court shall hold a hearing to make a final determination as to whether the person should remain committed . . . .").

other time after the first incident. She said that he put his arms around her and kissed her arms. She told him to stop, and he did not go any further.

In approximately 1989, appellant sexually abused 7-year-old LAN. LAN is KLN's younger sister. In April 1995, LAN told police that she and her family often brought their vehicle to appellant's mechanic shop for service. On several occasions, appellant told LAN that he wanted to show her something in the basement. He brought her to the basement, kissed her on the lips, and tried to feel her "private area." He put his hands inside of her shorts, but not inside of her underwear. Appellant also removed his pants on one occasion and asked LAN to touch his private parts. LAN told appellant that she did not want to engage in this conduct, but he made her do so. After he touched her, appellant told LAN that she could never tell anyone what he had done or he would "do something" to her. LAN said that appellant had been drinking at the time of the incidents, but did not appear drunk.

In 1994, appellant sexually abused 16-year-old LRN. In April 1995, LRN told police that she was waiting for appellant to finish some work on her vehicle when he asked her if she "would ever have an affair with an older married man" and if she would "mind if he did stuff." Appellant also indicated that he was interested in sexual contact with her breasts. He told LRN that she was pretty and that he wished his wife looked more like her and had a body like hers. LRN told appellant that she did not want to have sexual contact with him. He then tried to touch her breast and crotch areas. She resisted, but he succeeded in touching her breasts. Appellant touched her breast only one time, but

he tried several other times. LRN believed that appellant had been drinking at the time of the offense.

LRN told police that appellant had made sexual advances toward two other girls. Officers spoke with PP who reported that, when she was 14 years old, appellant grabbed her around the waist and kissed her. She said that she told her parents and avoided appellant. Officers also spoke with TS who told them that appellant made sexual advances toward her, but had not touched her. Authorities did not prosecute appellant for either of these incidents.

In 1995, appellant propositioned 13-year-old LRG. LRG was riding her horse past appellant's residence, and he convinced her to enter his yard. Appellant placed his hand on her saddle, very close to LRG's crotch, but did not touch her or her clothing. Appellant asked LRG if she ever thought about sex and told her that she could come to him if she had questions. Appellant said that his wife never talked to him when he needed to talk with someone. Appellant told LRG that they could develop a secret code that would allow them to meet in private and that nobody would know. He told her to call him if she wanted to be with him and to use a password. LRG did not feel that she could leave during this conversation. Appellant told LRG not to tell anyone about the incident.

In 1995, appellant propositioned 15-year-old RCO. RCO told police that she accompanied her grandmother to appellant's home so that he could change the oil in her grandmother's car. When appellant finished servicing the car, RCO was sitting in the front passenger seat of the vehicle. Appellant got into the driver's seat, put his arm

around RCO, and said, "Let's go out and park baby." Appellant rubbed RCO's right shoulder and said, "[Your grandmother] always interrupts us."

In April 1995, ERO told police that during the summer of 1994, when she was 15 years old, appellant came into her parents' store and asked her about something in the back of the store. She said that he put his arm around her and asked her to kiss him, and she told him that she was not interested. Appellant told her to let him know if she changed her mind.

In April 1995, RRL told authorities that when she was in the third grade, appellant came into a camper where she was reading, put his hand on her shoulder, and asked for a kiss. She said no, but appellant repeatedly asked her for a kiss. KLS told authorities that when she was in the third grade, she stayed with RRL while her parents were on vacation. Appellant approached KLS and RRL and asked them if they wanted to go parking and have a great time. Appellant told them that they should go for a ride with him because it would be really fun and that if they did not, they would be missing out on a lot of "stuff." They said no, but appellant tried to convince them to go with him.

Appellant's sexual misconduct resulted in multiple criminal convictions. In May 1995, the state charged appellant with one count of second-degree criminal sexual conduct regarding KLN, six counts of second-degree criminal sexual conduct regarding LAN, one count of fifth-degree criminal sexual conduct regarding LRN, one count of harassment regarding LRG, and one count of harassment regarding RCO. On June 27, appellant pleaded guilty to one count of second-degree criminal sexual conduct regarding KLN, one count of fourth-degree criminal sexual conduct regarding LAN, and one count

of fifth-degree criminal sexual conduct regarding LRN. Appellant entered *Alford* pleas, stating that he could not remember the details of his offenses because he was intoxicated during the offenses. In exchange for the guilty pleas, the state dismissed the remaining counts.

The district court stayed imposition of appellant's sentence and placed him on probation for 25 years. The probationary conditions included no use of alcohol and drugs, 120 days in jail, completion of sex-offender treatment and aftercare, and no contact with females 16 years of age or younger.

Appellant entered outpatient sex-offender treatment in October 1996. The assessor found appellant to have below-average intelligence. Appellant's insight into his situation and judgment appeared fair to poor. He was unable or unwilling to take full responsibility for his actions or to share all of his transgressions with his therapist. Appellant reported that his last use of alcohol was in October 1993.

Appellant told the assessor that he perpetrated offenses against five victims. Appellant said that his victims lied and that at least one would recant her statement. He was resistant to treatment and viewed treatment as unfair and unnecessary. The assessor believed treatment would advance slowly due to appellant's denial, lack of remorse, and feelings of self-righteousness. The assessor diagnosed appellant with Adjustment Disorder, with depressed mood; Sexual Abuse of a Child; and Antisocial Personality Disorder.

According to treatment notes, appellant took responsibility for his offenses for the first time in late January 1997. But treatment notes from September 1997 indicate that

appellant read a "denial statement," in which he blamed his victims for making up the abuse. And in October 1998, members of appellant's treatment group noted that appellant still felt that his victims were to blame for his presence in sex-offender treatment. Appellant was described as having a "poor me" and "it is always someone else's fault" attitude.

In January 1999, appellant graduated from treatment and in August, he was discharged from the program. He completed the program with generally satisfactory performance, and his diagnosis was fair. In September 2004, the district court discharged appellant from probation on the recommendation of appellant's probation agent. Less than one year later, appellant sexually offended against another child.

On July 25, 2005, appellant sexually assaulted 15-year-old LRK. LRK told police that she had accompanied appellant to turn in some aluminum cans. On the way, appellant asked her if she had any questions that she wanted to ask about sex. Appellant kissed her and told her to touch his private area. LRK said that she did not want to touch him. He then grabbed her hand and placed it on his unclothed penis. Appellant drove onto a side road and told LRK to lie down. She complied because she was scared. Appellant removed her shorts, got on top of her with his pants down, and tried to have sex with her. According to LRK, appellant "somewhat" had an erection. Appellant rubbed his penis on her vagina, and LRK was unsure if his penis entered her vagina. Appellant penetrated her vagina with his finger. LRK said no and pushed appellant off. LRK stated that she was scared and told appellant to stop.

Appellant got off of LRK and masturbated until he ejaculated. Appellant made LRK get napkins out of the glove box, wiped himself off, and threw the napkins out the window. Appellant told LRK not to tell anyone about what had happened because he had been in trouble before. LRK was afraid of what appellant might do to her if she reported the incident. Appellant tried to talk to LRK twice after the incident. LRK said that appellant was afraid that she might be pregnant.

LRK also informed police that appellant had sexually abused her before July 25. She said that the first incident occurred when appellant wanted her to help him fix a lawn mower in her grandmother's garage. Appellant asked if he could kiss her. She stated that she did not know, and he kissed her. Later, appellant kissed her again and wanted her to touch his penis. She said no, and he put her hand on his penis. She pulled away, told him to stop, and he zipped up his pants and did not do anything else. He told her not to tell anybody.

Another incident occurred when appellant came over to pump water out of LRK's basement. LRK went to the basement with appellant, and he asked if he could kiss her again. She said no, he persisted, and she "just gave in, hopefully letting, or making him stop." He kissed her and touched her breast on top of her shirt and her vaginal area on top of her pants. LRK said that she did not mention the prior incidents at the time of her initial statement because she was embarrassed and did not want to remember anything.

In August 2005, the state charged appellant with first-degree criminal sexual conduct based on his behavior towards LRK on July 25, 2005. After LRK disclosed the additional incidents, the state amended the complaint to add two counts of second-degree

criminal sexual conduct. Appellant pleaded guilty to second-degree criminal sexual conduct. The district court sentenced appellant to 90 months in prison.

In July and August 2006, a repeat-offender mandatory assessment of appellant was completed. Appellant portrayed himself as inhibited and lacking in sexual self-confidence, with a general fear of potential sexual partners ridiculing or laughing at him. He did not believe his sex drive was very strong and noted that various medications seemed to lessen his sex drive. He did not believe he had a sexual problem of any sort.

Appellant suggested that he felt more comfortable with children, but was adamant that he did not have sexual fantasies or urges toward children or teenagers. The assessor diagnosed appellant with pedophilia, sexually attracted to females, non-exclusive type; learning disorder, NOS; and alcohol dependence, in sustained full remission by patient report. The pedophilia diagnosis was based on appellant's sexual perpetration against five different victims ranging in age from six to 16 and performing acts ranging from intimidation to kissing to digital-genital contact. The assessor also noted that the persistence of appellant's sexual arousal to underage females was demonstrated by his 2005 offense.

The assessor noted that during the evaluation, appellant superficially acknowledged molesting two of his victims but denied molesting the others. "In general, he seemed content to continue to blame others or the situation for his actions and he certainly did not acknowledge that he has any kind of problem with urges toward children." The assessor opined that appellant tended to use his intellectual deficits as an excuse to avoid taking responsibility for his deviant behaviors. Appellant demonstrated

"self-pity [and a] sense of entitlement." The assessor concluded that appellant's failure to benefit much from his previous sex-offender treatment program raised concerns about his future risk of re-offense.

In 2007, appellant was incarcerated at the Lino Lakes Sex Offender Treatment Program. Staff found appellant to be a low priority for sex-offender treatment due to his low score on the Minnesota Sex Offender Screening Tool (MnSOST-R), with no evidence of risk-related exceptions. In May 2007, staff placed appellant in segregation after he placed his hands on the back of a female volunteer's head and lower back in violation of prison rules. Appellant denied touching or kissing the volunteer, but a hearing officer found him guilty of the violation.

In December 2007, appellant completed the Thinking for a Change Program. In December 2008, appellant completed the Offender Re-Entry Program. In March 2009, a department of corrections psychologist gave appellant a score of four on the MnSOST-R, reflecting a moderate risk of re-offense. He also gave appellant a score of four on the Static-99, an actuarial instrument designed to estimate the probability of sexual and violent recidivism among adult males who have already been convicted of at least one sexual offense against a child or non-consenting adult; the score of four indicates a moderate-high risk of re-offense.

In April 2009, the SPP/SDP review team at the Minnesota Department of Corrections voted unanimously to forward appellant's case to a psychologist for review. The psychologist gave appellant a score of four on the Rapid Risk Assessment for Sex Offender Recidivism (RRASOR), reflecting a high risk of re-offense. She gave him a

score of five on the MnSOST-R, reflecting a moderate risk of re-offense. On April 8, the psychologist completed an SPP/SDP review report regarding appellant. She noted that his eye contact was minimal and that appellant spent most of the interview "staring fixedly at [her] breasts." Appellant stated that he "never" masturbates and has no sexual fantasies or any interest in sexual contact with anyone. Appellant denied the existence of any uncharged sexual offenses. He asserted he was at "zero" risk for reoffending sexually. He explained that he was not going to be around children anymore, and added, "I'm gonna stay home all the time and not go anywhere unless someone is with me." Appellant stated that since he had been incarcerated, he had begun watching court reality television shows and had learned that minors are not old enough to consent to sexual activity. He professed ignorance of that fact prior to his current incarceration, despite having previously completed sex-offender treatment.

Appellant was also assessed by two court-appointed examiners during the civil-commitment proceeding. Dr. Penny Zwecker served as the first court-appointed examiner. Dr. Zwecker has been a licensed psychologist in Minnesota since 1978 and is qualified to serve as an expert in SPP/SDP cases. Dr. Zwecker interviewed appellant in August 2010 and reviewed the records in this case, including appellant's prior psychological reports and testing. She testified that appellant meets the statutory requirements for commitment as an SPP and SDP.

Dr. John Austin served as the second court-appointed examiner. He was selected by appellant. Dr. Austin has been a licensed psychologist in Minnesota since 1982 and is qualified to serve as an expert in SPP/SDP cases. Dr. Austin interviewed appellant in

March 2011. He also reviewed the records in this case, including prior psychological reports and testing of appellant. Dr. Austin testified that appellant does not meet the statutory requirements for commitment as an SPP or SDP.

The state retained Dr. Peter Marston as its expert witness. Dr. Marston has been a licensed psychologist in Minnesota since 1981 and is qualified to serve as an expert in SPP/SDP cases. Although Dr. Marston reviewed appellant's records, transcripts of Drs. Zwecker's and Austin's examinations of appellant, and the examiners' reports, he did not interview appellant. Dr. Marston testified that appellant meets the statutory requirements for commitment as an SPP and SDP.

At the civil-commitment hearing, appellant testified that he still did not believe that he has a sexual problem, that he is a sex offender, or that he needs additional sex-offender treatment. He further testified that he still believed that he has been blamed for a lot of things that he did not do. But he admitted that although he felt that he was at zero risk of reoffending after he completed sex-offender treatment, he reoffended within one year.

D E C I S I O N

Appellant argues that the evidence does not establish that he meets the standards for commitment as an SPP and SDP. A petitioner must prove the elements of commitment by clear and convincing evidence. Minn. Stat. §§ 253B.18, subd. 1(a), .185, subd. 1 (2010). On review, we defer 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). "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). But 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).

I.

The Minnesota Commitment and Treatment Act defines an SPP as

> the existence in any 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 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).

A. Emotional Instability, Impulsiveness of Behavior, Lack of Customary Standards of Good Judgment, or Failure to Appreciate the Consequences of Personal Acts

Under Minn. Stat. § 253B.02, subd. 18b, the district court must first consider whether appellant exhibits emotional instability, impulsiveness of behavior, lack of customary standards of good judgment, or fails to appreciate the consequences of personal acts. The district court concluded that appellant exhibits all four conditions.

Appellant first argues that the evidence in the record does not support the district court's conclusion that he exhibits emotional instability. Drs. Marston and Zwecker opined and testified that appellant exhibits emotional instability, impulsiveness of

behavior, lacks customary standards of good judgment, and fails to appreciate the consequences of personal acts. They noted that appellant has had periods of depression and anxiety that led to hospitalizations related to suicidal and homicidal threats. These periods of emotional instability have occurred both while appellant lived in the community and while he was incarcerated. Appellant does not dispute that he was hospitalized but rather argues that he was "hospitalized for only a few days, never overtly acted on threats of self-harm, and the behavior was identified as attention seeking and related to legal problems." But appellant's failure to overtly act on his threats does not preclude a finding that he is emotionally unstable. Appellant was hospitalized for making suicidal and homicidal threats. Two psychologists opined that this demonstrated emotional instability. This evidence clearly and convincingly supports the district court's conclusion that appellant is emotionally unstable.

As to impulsivity, appellant argues that the district court improperly relied on testimony that appellant touched a female volunteer while he was incarcerated. He contends: "To identify one isolated incident of touching a person on the back in prison as the impulsivity being considered under the commitment statute is [a] stretch by any sense of the imagination. The court failed to consider the evidence that appellant has been rather stable his whole life." Nonetheless, appellant concedes that "[h]is criminal sexual behavior has been somewhat impulsive, but that behavior is an exception to his norm." Dr. Zwecker testified that appellant's sexual assaults themselves were impulsive. Appellant's alleged "stability" in other areas of his life does not change the fact that his sexual transgressions were impulsive.

Appellant also argues that the district court incorrectly concluded that he lacks good judgment because "[i]t is only in the area of his sexual behavior that he has demonstrated significant lack of good judgment." But sexual conduct is the focus of the inquiry under the statute. Appellant insists that "the commitment statute contemplates consideration of the entire person when addressing the statutory elements. Obviously the offenses in themselves would always meet the 'four elements,' but if that is all one looks at, by definition a sex offender becomes SDP and SPP." This argument ignores the plain language of the statute. An individual's emotional instability, impulsivity, lack of good judgment, or failure to appreciate the consequences of personal acts must "render the person irresponsible for personal conduct with *respect to sexual matters*." *Id.*, subd. 18b (emphasis added). Appellant's contention that the court must find evidence of the four conditions that render a person irresponsible for personal conduct *unrelated* to sexual matters is inconsistent with the plain language of the statute.

In sum, appellant's argument that the district court erred in concluding that he exhibits emotional instability and impulsiveness of behavior, lacks customary standards of good judgment, and fails to appreciate the consequences of personal acts which render the person irresponsible for personal conduct with respect to sexual matters, is unavailing. But to commit an individual as an SPP, the district court must also 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. *In re Linehan*, 518 N.W.2d 609, 613 (Minn. 1994) (*Linehan I*).

B. Habitual Course of Misconduct Involving Sexual Matters

A habitual course of misconduct "has been defined to require evidence of a pattern of similar conduct." *In re Commitment of Stone*, 711 N.W.2d 831, 837 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). Drs. Zwecker, Austin, and Marston all opined that appellant has engaged in a habitual course of misconduct in sexual matters. Appellant does not challenge the district court's conclusion on this factor, acknowledging that "the experts agree that [he] engaged in such conduct."

C. Utter Lack of Power to Control Sexual Impulses

When determining whether an individual has an utter lack of power to control his or her sexual impulses, the district court must weigh what are known as the *Blodgett* 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 sexual impulse and the lack of power to control that impulse. *In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994).

The district court considered the *Blodgett* factors and concluded that appellant demonstrated an utter lack of power to control his sexual impulses. Appellant argues that "the whole issue [regarding his utter lack of power to control his sexual impulses] is resolved by the fact that he has lived in the community for years without acting on sexual impulses." This assertion conveniently ignores the fact that appellant abused at least four

children over a period of 17 years. Moreover, the record evidence clearly and convincingly supports the district court's conclusion on the *Blodgett* factors.

Appellant sexually assaulted multiple victims, in a similar manner, over a period of several years. Dr. Marston noted that appellant's earlier sexual assaults were fairly frequent, involved a number of victims, and occurred on several occasions with several of the victims. Appellant sexually assaulted LRK three times, after a lapse in offenses of several years. Appellant's last offense against LRK occurred shortly after appellant was released from probation and after he had completed sex-offender treatment.

The district court determined that appellant threatened victims after offending and used force with his most recent victim. *See In re Preston*, 629 N.W.2d 104, 113 (Minn. App. 2001) (holding that "collateral physical force" used to restrain victims is sufficient to support a finding that sexual misconduct is violent in nature). The district court further concluded that less force was necessary with the younger and more vulnerable victims and stated that appellant's offenses against the younger victims were "violent by nature." *See id.* ("It would be absurd to hold that because less force was needed to subdue an extremely young victim, the assault was non-violent."). Dr. Marston noted that appellant's use of force with the last victim indicates an escalation in his willingness to use force to achieve his objective. Prior to that, he used his relationships, age, size, and occupation to gain access to victims, and he often manipulated situations to perpetrate his offenses.

The district court concluded that the relationship between appellant and his victims is indicative of his utter lack of power to control his sexual impulses. We agree.

Appellant was not related to his victims, but he knew their families and used his business and friends to gain access to victims who trusted him. Appellant has stated that he would like to reclaim his home and mechanic shop, but he also says that he is going to stay home all the time and not have contact with children. It is difficult to imagine that he will be able to avoid contact with children if he continues to operate a mechanic's shop, which is problematic because he gained access to many of his victims through his shop.

Appellant's attitude toward his sexual offenses has been superficial at times. He routinely minimized, justified, and denied his sex offenses. Although he sometimes admitted that the offenses occurred, he often blamed the victims. Appellant does not believe he needs additional sex-offender treatment, and he appears to have very limited insight into the impact of his behavior on the victims.

The district court correctly concluded that appellant's medical and family history does not appear to affect his risk of re-offense.

The psychological testing and evaluation results support the conclusion that appellant lacks the ability to control his sexual impulses. Dr. Zwecker testified that appellant's clinical profile is characteristic of a person with acutely disturbed behavior and poor impulse control. And test results indicate that appellant recently experienced problems related to loneliness and family issues. Dr. Zwecker concluded that appellant's psychological testing indicates dependent, avoidant, narcissistic, and paranoid personality traits. She further testified that the test results support appellant's personality-disorder diagnosis. Dr. Marston noted that appellant's personality-disorder diagnosis demonstrates his inclination to behave in a dysfunctional manner toward others. And

appellant's limited intellectual functioning minimizes his ability to think through and anticipate the consequences of his actions. The risk assessment therefore indicates a high risk for re-offense.

Other facts similarly demonstrate that appellant has an utter lack of control over his sexual urges. Appellant reoffended after treatment and does not have a current re-offense prevention plan. He does not have a clear understanding of his offense cycle and does not believe that he is a risk to the public. He has recently stated that sex-offender treatment is a waste of time. Appellant minimizes his offenses and does not believe he has sexual-deviancy problems. These factors all contribute to appellant's utter lack of control regarding his sexual impulses.

Drs. Zwecker and Marston opined that appellant demonstrated an utter lack of power to control his sexual impulses. Dr. Austin found that this element was not established. Appellant contends that he does not meet the *Blodgett* factors and cites the analysis in Dr. Austin's report as support for this contention. But the district court found Drs. Zwecker and Marston credible, and 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). In sum, the record evidence clearly and convincingly supports the district court's conclusion that appellant utterly lacks the power to control his sexual impulses.

D. Dangerousness to Others

Six factors are considered when determining whether an offender presents a serious danger to the public, which are known as the *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. *Linehan I*, 518 N.W.2d at 614.

The district court considered each of the *Linehan* factors and concluded that appellant is a danger to others. Appellant argues that he "possesses few of the characteristics of the prototypical psychopath and in no way resembles their clinical presentation" and challenges the district court's conclusions regarding the third through sixth *Linehan* factors.

As to the third factor, Dr. Zwecker testified that base-rate statistics suggest a moderate to high likelihood of re-offense. She noted that given appellant's pedophilia diagnosis, the base-rate statistics would predict a higher likelihood of reoffending. Dr. Marston reported that the three actuarial instruments that he used showed a high, moderate, and low-moderate risk of sexual re-offense. He opined that the two instruments showing less than a high risk appear to be underestimates when special or dynamic factors are reviewed and added to the analysis. Dr. Marston noted that

appellant's sexually deviant orientation and behavior increase his risk of re-offense and that his risk is clearly higher than the average sex offender.

Appellant argues that the actuarial tests reflected, at most, a moderate risk of re-offense. He further argues that the various test results are inconsistent and that one of the tests, the Static-99, is outdated. But Dr. Zwecker testified that actuarial tools underestimate an individual's likelihood of sexual reoffending because the statistics associated with those tools are based on arrests and convictions and many sex offenses go unreported or are reported later. And appellant's argument fails to recognize that statistical information is only one of the factors relevant to predicting likelihood of re-offense. *In re Linehan*, 557 N.W.2d 171, 189 (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) (noting that the appellant in that case had offered "no statutory or precedential support for the argument that actuarial methods or base rates are the sole permissible basis for prediction"). Thus, although several of the tests indicate only a moderate risk of re-offense, the test results are not dispositive.

With regard to factors four through six, appellant generally argues that "he did so well on parole before, that any opinion to the contrary now would be extremely speculative and unsupported by his past behavior." The record belies appellant's argument. Dr. Zwecker testified that, if released, appellant will be released as a level-III sex offender and will have limited support in the community. She acknowledged that although the people who testified on his behalf are a credit to appellant and the

community, they will not be able to stop appellant from reoffending.[2] Dr. Zwecker also noted that appellant was previously dependent on his wife, but because they are now divorced, he would no longer have her for support. Dr. Austin opined that without his usual support systems, it will be difficult for appellant to adjust and to cope effectively with stress. He noted that appellant will be even more isolated now than he was before his last crime and concluded that "the greatest concern will be that he will once again misperceive the kindness of others to be an indication that they are willing to be sexual with him and another victim will ensue." Dr. Marston testified that "the increased scrutiny, his social isolation and personal emotional vulnerability and distrustfulness and his difficulty with more independent functioning and reading would make his future situation more challenging for him."

Moreover, appellant's proposed release circumstances are similar to those in which he offended in the past. Appellant has articulated a desire to return to his house and to operate his mechanic's shop upon release. Appellant obtained access to his victims through his shop in the past.

Although appellant completed sex-offender treatment in 1999 and was released from probation in September 2004, he reoffended in July 2005. During treatment, he focused on his own victimization and did not develop empathy for his victims. Appellant has not accepted responsibility for his offenses. Instead, he has expressed his belief that

[2] A church pastor testified that he runs a support group at the local church and could provide appellant with emotional support. Appellant's friend testified that he works with a sex offender who attends the aforementioned church and that he could support appellant in the same manner. Another friend testified that he would "help" appellant. Appellant's sister-in-law testified that she would drive appellant to treatment.

"if only things would have been better at home," he would not have reoffended in 2005. Appellant argues that his activities were "impulsive, isolated incidents, occurring when the appellant was intoxicated." But Dr. Marston noted that appellant was sober when he reoffended in 2005. Thus, appellant's attempt to blame his sexual proclivity on alcohol is unavailing. Dr. Marston also opined that appellant "appears to have experienced very limited benefit from his sex offender treatment, if any. Practically speaking, he should be regarded as an untreated sex offender." In sum, the record clearly and convincingly supports the district court's conclusion that appellant is a danger to others and that appellant meets the statutory criteria for commitment as an SPP.

II.

A person is considered an SDP if that person: (1) has engaged in a course of harmful sexual conduct as defined in section 253B.02, subdivision 7a; (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 as defined in section 253B.02, subdivision 7a. Minn. Stat. § 253B.02, subd. 18c (2010). "Harmful sexual conduct" is defined as "sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another." *Id.*, subd. 7a(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). But 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*). The supreme court has construed the statutory phrase "likely to engage in

acts of harmful sexual conduct" to require a showing that the offender is "highly likely" to engage in harmful sexual conduct. *Linehan III*, 557 N.W.2d at 190.

Appellant does not challenge the district court's conclusion that he has engaged in a course of harmful sexual conduct. And clear and convincing evidence supports the district court's conclusion that appellant has manifested a mental disorder or dysfunction. Dr. Zwecker diagnosed appellant with pedophilia, sexually attracted to females, nonexclusive type; learning disorder, NOS; alcohol dependence, currently in sustained full remission; and personality disorder, NOS, with dependent, avoidant, narcissistic, and paranoid features. Dr. Austin diagnosed appellant with alcohol dependence, sustained full remission, and learning disorder, NOS. Dr. Marston diagnosed appellant with pedophilia, sexually attracted to females, nonexclusive type; learning disorder, NOS; alcohol dependence, in sustained full remission; and personality disorder, NOS, with dependent, avoidant, narcissistic, and paranoid features.

Appellant challenges his diagnosis as a pedophile. The relevant diagnostic criteria require recurrent, intense, sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child, generally 13 years or younger, over a period of at least six months. A pedophilia diagnosis is appropriate if the person has acted on those urges. Appellant contends that there is insufficient data to substantiate his pedophilia diagnosis, arguing that

> [t]here is no evidence in the record that appellant ever experienced reoccurring, intense sexual arousal to deviant stimuli. [He] never talked about having an erection during his sexual behavior or fantasizing about prepubescent girls to any of the examiners. There is no testimony from the victims that

> this was the case. There are no instances of pedophilic pornography being possessed by the appellant. [There is] [n]o indication of recurring thoughts in treatment or otherwise.

Appellant's attempt to ignore his documented history of sexual misconduct with children while focusing on the absence of behavior that might normally accompany the misconduct is unavailing. Appellant engaged in sexual misconduct with children age 13 or younger from 1988 to 2005. Dr. Zwecker testified that she based her pedophilia diagnosis on appellant's sexual attraction to children and his sexual behavior towards children over a time period of at least six months. And Dr. Marston noted that even though appellant does not report fantasies or desires about female children, his actual sexual behavior toward female prepubescent children over the course of several years establishes the pattern for this diagnosis. The district court found Drs. Zwecker and Marston's pedophilia diagnoses credible and persuasive. Clear and convincing evidence in the record supports this diagnosis.

Appellant also challenges the district court's conclusion that he is highly likely to engage in acts of harmful sexual conduct. When examining whether an offender is highly likely to engage in acts of harmful sexual conduct, the district court considers the same six factors that are used to determine dangerousness under the SPP statute. *Id.* at 189 ("We conclude that the guidelines for dangerousness prediction in *Linehan I* apply to the SDP Act . . . ."). As discussed above, the six *Linehan I* factors indicate that there is clear and convincing evidence that appellant is a danger to others. Under this same analysis, there is clear and convincing evidence that appellant is highly likely to engage

in acts of harmful sexual conduct and that appellant meets the statutory criteria for commitment as an SDP.

In conclusion, we determine that there is clear and convincing evidence to support the district court's conclusion that appellant meets the standards for commitment as an SPP and SDP. We therefore affirm.

Affirmed.