STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1426

In the Matter of the Civil Commitment of:
Michael James Brouillette.

Filed March 10, 2014
Affirmed
Smith, Judge

Hennepin County District Court
File No. 27-MH-PR-13-537

Michael James Brouillette, St. Peter, Minnesota (pro se appellant)

Michael O. Freeman, Hennepin County Attorney, John L. Kirwin, Assistant County Attorney, Minneapolis, Minnesota (for respondent county)

Considered and decided by Smith, Presiding Judge; Johnson, Judge; and Kirk, Judge.

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

SMITH, Judge

We affirm the district court's order of commitment as a mentally ill person because 1) the district court's findings of fact are substantially supported by the record, 2) there is no constitutional right to a jury trial in commitment proceedings, 3) appellant's claims of ineffective assistance of counsel are without merit, and 4) appellant did not preserve his objections to alleged procedural errors.

FACTS

Appellant Michael James Brouillette was born in 1956. Brouillette has a long history of criminal charges stretching back to his early 20s, including accusations of criminal sexual conduct, drug possession, terroristic threats, driving while intoxicated, receiving stolen property, reckless driving, fleeing the police, car theft, possession of child pornography, and most recently, domestic abuse, violation of a harassment restraining order, and stalking. These accusations resulted in convictions for third-degree criminal sexual conduct, fourth-degree criminal sexual conduct, terroristic threats, receiving stolen property, third-degree possession of controlled substance, and careless driving.

On March 3, 2003, Brouillette was riding his motorcycle in Florida when he was struck by a drunk driver. Among other injuries, Brouillette suffered a traumatic brain injury (TBI). He has been diagnosed with Psychotic Disorder due to TBI with delusions. In August 2003, following Brouillette's return to Minnesota with his then-fiancée, J.L., Brouillette was admitted to the Brain Injury Program at Fairview Ridges Hospital due to his unmanageable behavior.

In 2004, Brouillette was arrested for behavior related to J.L. following their break-up. J.L. obtained an order for protection against Brouillette because he left letters outside her house and made multiple calls to her house and work. Brouillette has continued to experience issues with his mental health since that time.

The incidents that led the county to petition for Brouillette's commitment stem from Brouillette's interactions with K.L. Brouillette met K.L. 15 years ago through

mutual friends. Twelve years ago, K.L. and Brouillette were intimate. Brouillette and K.L. had kissed a few times since, but have not had an intimate relationship for the past five to eight years. In the winter of 2011-2012, one of K.L.'s friends voiced concern about Brouillette's behavior toward K.L., and K.L. distanced herself from Brouillette. Because of this, Brouillette began posting rants about K.L. on his Facebook page, making threatening phone calls to her and sending her threatening texts. On January 26, 2012, K.L. asked Brouillette not to contact her again because his threats scared her. Brouillette did not honor K.L.'s request and instead began posting derogatory misinformation about K.L. and her business on his Facebook page. He warned K.L. that he would post her private medical records on Facebook, which he claimed to have obtained from a fellow Navy SEAL, if she did not continue their relationship.

Brouillette stopped contacting K.L. until February 2013, when he saw K.L. at a local bar. She had not seen him in over three years, and gave him a quick, cordial hug. K.L. immediately regretted making contact, but Brouillette took it as an indication that she wanted to rekindle their relationship. He again began incessantly calling and texting K.L. The text messages included both threats and professions of love for K.L. He also began sending her packages in the mail.

In April 2013, K.L. attended a birthday party for her friend at a bar. While she was sitting outside on a picnic table bench, Brouillette approached her from behind and grabbed her hair. Brouillette did not let go of K.L.'s hair until she jumped up and ran inside the bar. Because of this incident and because Brouillette refused to honor her request to stop contacting her, K.L. filed for a Harassment Restraining Order (HRO).

On May 1, 2013, Brouillette attended an individual therapy session at Allina Hospital where he told a therapist that "people end up in body bags for f--king with people." The therapist interrupted Brouillette to ask if he was serious; he responded that he was, and that he has "friends who have killed their women for f--king with them." The therapist notified police of Brouillette's threat, who, in turn, notified K.L.

In the early morning on May 8, 2013, Brouillette texted K.L., stating that he was outside her home. K.L. called the police, but because the HRO had not yet been served on him, they could not arrest him. Brouillette was served with the HRO later that day. On May 9, 2013, K.L.'s son heard someone in the backyard of their home. K.L. again called 911 and officers responded. Officers arrested Brouillette in the alley behind K.L.'s house. He stated that he was trying to get the license plate number from a car in K.L.'s garage in order to get a restraining order on her. K.L. told police that Brouillette had left two baskets of flowers on her doorstep. She also reported the physical assault, as well as the stalking behavior that had occurred over the past three years. The next day, Brouillette was charged with fleeing a police officer and violation of the HRO.

While in jail, Brouillette called a friend and made statements about killing K.L. He told the friend, "I might as well just get the hell outta here and shoot the b-tch, because that's what it's gonna amount to. If I'm gonna spend the next f--king month in here I might as well just kill her."

On May 13, 2013, the district court ordered a rule 20.01 competency evaluation of Brouillette. Tricia Lynn Aiken, a licensed psychologist, completed the rule 20.01 competency evaluation of Brouillette. She reported that Brouillette fixated on K.L., that

he believed K.L. was mistreating him, and that she would not leave him alone. She stated that Brouillette's thoughts about K.L. were "clearly delusional and obsessive." Dr. Aiken also stated that Brouillette had other "grandiose delusional beliefs," which included statements that Brouillette was affiliated with "Special Ops Team, Army Rangers and Seal Team Six," as well statements about his wilderness adventures. Brouillette told Dr. Aiken that, because of his TBI, "people trip my trigger quickly" and he "can sit up and cry all night." During the evaluation, Brouillette stated, "I might end up killing the stupid broad because she keeps doing this to me. She won't stay away from me. I won't kill her, but why won't [K.L.] stay away from me?" Because of this comment and her concern for K.L.'s safety, Dr. Aiken contacted the district court and counsel. Dr. Aiken visited Brouillette's Facebook page and documented the continued threats to K.L., which Brouillette had posted for public viewing. The Facebook posts included lengthy rants about how he was improperly arrested because of K.L., including the comment that he "can't wait to see [K.L.] Burn in Hell for what she Did to Me."

Dr. Aiken diagnosed Brouillette with "Psychotic Disorder, due to Traumatic Brain Injury, with Delusions (Primary)." She concluded that Brouillette was not competent to stand trial. On May 29, 2013, the county filed a petition for judicial commitment. A preliminary hearing was held on June 6, 2013, and the district court ordered another examination and ordered Brouillette to remain in Hennepin County Jail until trial. Dr. Carlson, a licensed psychologist and court-appointed examiner, assessed Brouillette on June 6, 2013, and recommended that Brouillette be committed as mentally ill.

On June 13, 2013, a commitment hearing was commenced before a referee. At the hearing, Brouillette testified to his March 2003 accident and his resulting personality change. He stated that since the accident, he cannot be confined in small spaces, has a very short temper, and is easily irritated. He testified to becoming more fixated: "I also stick with things, I don't give up easily. Since my accident, I refuse to walk away when I should."

Brouillette called two friends as witnesses. Both testified to his personality change since his TBI but claimed that he was, and still is, a nonviolent person.

Dr. Carlson testified regarding her diagnosis of Brouillette as mentally ill, stating that nothing presented at the hearing altered her diagnosis or her recommendation for commitment. K.L. testified about her contact with Brouillette over the last 15 years. She stated that she was afraid that Brouillette would harm her and her son, and that she viewed the hair-pulling incident as "one more step towards . . . victimization."

The referee recommended that the district court commit Brouillette to the commissioner of the department of human services as mentally ill. The district court accepted the recommendation, issuing the order on June 20, 2013. On November 20, 2013, the district court ordered continued commitment for six additional months.

D E C I S I O N

I.

Brouillette argues that some of the district court's findings of fact are clearly erroneous and that the district court erred by determining that he is mentally ill. In reviewing a district court's commitment of a person as mentally ill, our review is limited

to a determination of whether the district court complied with the commitment act. *In re Commitment of Janckila*, 657 N.W.2d 899, 902 (Minn. App. 2003). The district court's findings of fact, which must be made on clear and convincing evidence, are accorded deference and will not be overturned unless they are clearly erroneous; but we review whether the evidence is sufficient to satisfy the requirements of the statute de novo. *Id.* The record is considered in the light most favorable to the district court's findings. *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995). When the findings rest largely on expert testimony, the district court's credibility determinations, to which we defer, are particularly important. *Id.* "The findings of a referee, to the extent adopted by the court, shall be considered as the findings of the court." Minn. R. Civ. P. 52.01.

The relevant definition for a mentally ill person is:

> [A]ny person who has . . . a substantial psychiatric disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality, or to reason or understand, which is manifested by instances of grossly disturbed behavior or faulty perceptions and poses a substantial likelihood of physical harm to self or others as demonstrated by: . . .
>
> (3) a recent attempt or threat to physically harm self or others.

Minn. Stat. § 253B.02, subd. 13(a) (2012). The statutory definition requires, in relevant part, that the person (1) has "a substantial psychiatric disorder" and (2) "poses a substantial likelihood of physical harm to self or others." *Id.*

Substantial psychiatric disorder

Brouillette challenges the accuracy of the findings of the district court, which he claims does not support a finding that he has a substantial psychiatric disorder.

Recovery from TBI

Brouillette argues that he no longer suffers from a substantial psychiatric disorder and contends that this finding is erroneous because a TBI is not a permanent injury. He maintains that he has recovered from the TBI he suffered in March 2003. The district court found that Brouillette "is ill with personality change due to traumatic brain injury (TBI), which is a substantial psychiatric disorder of his thought, mood, and perception, which grossly impairs his judgment, behavior, capacity to recognize reality and ability to reason or understand."

Dr. Carlson noted personality defects consistent with TBI. She testified to her diagnosis of Brouillette: personality change from TBI. Dr. Carlson ruled out diagnosis of psychotic disorder, but she stated that Brouillette showed signs of "psychotic ideation, particularly when his mood is agitated." She testified to his labile personality and his fixation on K.L., which are consistent with her diagnosis. Brouillette did not present evidence to rebut Dr. Carlson's testimony. The evidence substantially supports the district court's conclusion that Brouillette has not fully recovered from his injury.

Dr. Carlson's testimony

Brouillette also contends that Dr. Carlson made false statements about his symptoms and that Dr. Carlson's report includes misinformation. The district court credited Dr. Carlson's reports regarding the fact that Brouillette continues to exhibit symptoms of brain injury. The district court found Dr. Carlson's testimony and report to be credible, and there is no evidence to rebut this credibility finding. Expert testimony in this case provided the primary basis for Brouillette's commitment, and our deference to

the district court's findings in such a case is of particular importance. *See Knops*, 536 N.W.2d at 620. The district court did not clearly err by relying on Dr. Carlson's testimony and report.

Employment history

Brouillette alleges that the district court's finding regarding his employment history was false. The district court found that Brouillette has not been steadily employed for the past 10 years. Brouillette alleges that he was employed by the federal government and trucking companies on a "need to know" basis. Brouillette's own testimony supports this statement. Dr. Aiken and Dr. Carlson both concluded that Brouillette's recollection of his employment history is delusional. According to Brouillette, he entered the Air Force in 1973 for a brief period and was trained as an Army Ranger. He also claimed to have worked on government contracts around the world, including assignments with the Canadian government, the Department of Homeland Security, and the Caymen Islands government. He stated that he has previously worked as a flight mechanic for the Navy SEALs, specifically for SEAL team 6. Even if Brouillette had been employed in these positions, he did not testify to any employment after his TBI in 2003. The district court did not clearly err by finding that Brouillette's employment had not been steady.

Substantial likelihood of physical harm

Brouillette does not directly challenge whether the record was sufficient to support that he "poses a substantial likelihood of physical harm to self or others as demonstrated by . . . a recent attempt or threat to physically harm self or others." *See* Minn. Stat.

§ 253B.02, subd. 13(a). Instead, Brouillette challenges the validity of a number of the district court's findings of fact that support its ultimate finding that there is a substantial likelihood of harm.

The commitment statute "requires that the substantial likelihood of physical harm must be *demonstrated* by an overt failure to obtain necessary food, clothing, shelter, or medical care or by a recent attempt or threat to harm self or others." *In re McGaughey*, 536 N.W.2d 621, 623 (Minn. 1995). This requirement is not met by "speculation as to whether the person may, in the future, fail to obtain necessary food, clothing, shelter, or medical care or may attempt or threaten to harm self or others." *Id.* However, it does not require "that the person must either come to harm or harm others before commitment as a mentally ill person is justified." *Id.*

Reliance on criminal history

Brouillette argues that the district court's reliance on his criminal history was erroneous. He argues that some of the charges relied upon by the district court were dropped and presumably that they should not have affected his commitment. A district court can consider a history of violence, even if the violence did not result in a criminal conviction or charges. *See, e.g.*, *In re Jasmer*, 447 N.W.2d 192, 196 (Minn. 1989) (considering patient's use of "loaded guns to scare people," which did not result in a criminal conviction). Thus, it was not clearly erroneous for the district court to consider Brouillette's entire criminal history as support for its finding that there is a substantial likelihood that Brouillette would cause harm to others.

Prospect of independent rehabilitation

Brouillette next argues that it was erroneous for the district court to determine that he would not seek necessary therapy if not committed. The district court determined that there was nothing in the record to indicate that Brouillette would seek out therapeutic assistance on his own initiative. Brouillette states that he made an appointment to see another doctor on May 8, 2013. Although Brouillette provided documentation of this appointment on appeal, it was not before the district court. Thus, we do not consider it in reviewing his claims. *Plowman v. Copeland, Buhl & Co., Ltd.*, 261 N.W.2d 581, 583 (Minn. 1977) ("[We] may not base [our] decision on matters outside the record on appeal, and [] matters not produced and received in evidence below may not be considered."). Brouillette had the opportunity to mention his efforts at recovery when he testified at the hearing. Instead, Brouillette testified that it was his intention after the proceedings to enter the wilderness and get "as far away from people and [K.L.] as possible." His testimony directly contradicts his later contention that he is trying to seek treatment.

In sum, the record clearly and convincingly supports the district court's determination that there is a substantial likelihood that Brouillette may harm himself or others. The record documents numerous statements made by Brouillette about killing himself and K.L. At the hearing, Brouillette admitted to telling a therapist that he wanted to kill K.L. Brouillette also admitted telling one of his friends while in jail that if he has to stay locked up he "might as well just kill her." Brouillette physically assaulted K.L. Although she was not injured, such an attack qualifies as an "attempt" to physically harm her. *See Jasmer*, 447 N.W.2d at 195-96 (concluding in a mentally ill and dangerous

commitment, a patient shooting a gun at a child intentionally constituted an attempt to cause serious physical harm to another).

The district court did not clearly err by finding that there is a substantial likelihood that Brouillette will harm himself or others in the future. Therefore, the statutory requirements for committing Brouillette as mentally ill have been met.

II.

Next, Brouillette argues that because he is facing criminal charges, he has a right to a trial by jury. He argues that K.L.'s allegations are fact questions for a jury to determine. The Minnesota Constitution guarantees that a defendant in both civil and criminal cases has a right to a trial by jury. Minn. Const. art. I, § 4. But there is no statutory or constitutional right to a jury trial in commitment proceedings. *State ex rel. Anderson v. U.S. Veterans Hosp.*, 268 Minn. 213, 221, 128 N.W.2d 710, 716 (1964). Thus, the district court did not err by denying Brouillette a jury trial relative to his civil commitment.

III.

Next, Brouillette argues that he received ineffective assistance of counsel during his commitment proceeding. The commitment statute provides a right to appointed counsel to "vigorous[ly] advocate" for individuals facing civil commitment. Minn. Stat. § 253B.07, subd. 2c (2012). We analyze the adequacy of appointed counsel by following the criminal standard for effective counsel. *In re Dibley*, 400 N.W.2d 186, 190 (Minn. App.1987), *review denied* (Minn. Mar. 25, 1987).

The claimant "must demonstrate that counsel's representation fell below an objective standard of reasonableness, and that a reasonable probability exists that the outcome would have been different but for counsel's errors." *State v. Miller*, 666 N.W.2d 703, 716 (Minn. 2003). There is a strong presumption that counsel's performance was reasonable. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). "Even if counsel's representation is less than perfect, the result of a hearing or trial will be set aside only if counsel's actions so undermine the hearing process that the result is prejudiced." *In re Cordie*, 372 N.W.2d 24, 29 (Minn. App. 1985), *review denied* (Minn. Sept. 26, 1985).

Brouillette alleges that his counsel failed to request a settlement conference. Although a settlement conference was scheduled for June 6, 2013 at 2:00 p.m. with the examination to be done at 1:00 p.m., the settlement conference did not take place. However, there is no statutory right that a claimant be given the opportunity for a settlement conference. Thus, Brouillette's claim of ineffective assistance because of counsel's failure to schedule a settlement conference is without merit.

Brouillette next argues that his counsel was ineffective because he requested a transfer to Hennepin County Medical Center or University of Minnesota Fairview Hospital for evaluation, but his request was denied. There is not a sufficient record to support Brouillette's argument that the failure on the part of Brouillette's counsel, if any, to request a transfer to another hospital prejudiced Brouillette or constituted ineffective assistance of counsel. Brouillette also argues that he requested for a transfer so that he could access non-pay phones because his family and friends would not or could not

accept collect calls. This did not affect his commitment hearing because he gave phone numbers to his attorney, who did notify witnesses (two of whom were present and testified at the hearing). Records also indicate that Brouillette completed 60 phone calls while in the county jail. Thus, Brouillette was able to contact witnesses on his own behalf and he was not prejudiced by not being transferred.

Brouillette argues that his counsel failed to contact witnesses, specifically employees or the owner of the bar where the assault of K.L. occurred. Counsel's choice of witnesses is beyond appellate review because it is a trial tactic "within the proper discretion of trial counsel." *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999); *Dibley*, 400 N.W.2d at 191 ("[T]he selection of witnesses and the conduct of trial are specifically for counsel to determine."). Brouillette did not provide evidence that other witnesses would have testified that the assault did not occur. And K.L. still would have testified that the assault occurred and any rebuttal testimony likely would not have rebutted K.L.'s recollection of the assault.

Brouillette contends that he communicated to his attorney that he wanted a second examiner to testify at his hearing and that his attorney failed to pursue his request. Claims of ineffective assistance of counsel, which require additional evidence to determine their validity, including testimony about attorney-client communications, require an evidentiary hearing. *Robinson v. State*, 567 N.W.2d 491, 495 (Minn. 1997). Thus, this claim is not proper for direct appeal. *Cf. Beaulieu v. Minn. Dep't of Human Servs.*, 798 N.W.2d 542, 550 (Minn. App. 2011), *review granted* (July 19, 2011), *aff'd*, 825 N.W.2d 716 (Minn. 2013) (suggesting that a rule 60.02 motion may be the proper

avenue to raise an ineffective assistance claim). Because we do not have an adequate record on which to review Brouillette's claim involving his request for a second examiner, we do not decide its merits.

IV.

Finally, Brouillette argues that several errors were made during the commitment proceedings. Brouillette specifically alleges that he was prejudiced by being precluded from reviewing Dr. Carlson's notes until just before the commitment hearing; that the district court erred by allowing the county to call witnesses after it rested; and that it erred by allowing Dr. Carlson to observe the proceedings. However, because Brouillette failed to raise these arguments before the district court, they are waived on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (noting that matters not raised to the district court will not be considered on appeal); *see also In re Civil Commitment of Travis*, 767 N.W.2d 52, 67 (Minn. App. 2009) (applying *Thiele* in commitment proceedings).

Affirmed.