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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1772**

In the Matter of the Civil Commitment of:
Tyler Paul Gephart.

**Filed April 10, 2017
Affirmed
Kirk, Judge**

Ramsey County District Court
File No. 62-MH-PR-15-145

Kathleen K. Rauenhorst, Rauenhorst & Associate, P.A., Roseville, Minnesota (for
appellant Tyler Paul Gephart)

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Considered and decided by Kirk, Presiding Judge; Peterson, Judge; and Kalitowski,
Judge.*

UNPUBLISHED OPINION

KIRK, Judge

Appellant Tyler Paul Gephart challenges his commitment to the Minnesota Sex
Offender Program (MSOP) as a sexually dangerous person (SDP) and sexual psychopathic

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

personality (SPP) on the grounds that the district court erred in determining that: (1) he was highly likely to reoffend with harmful sexual conduct; (2) he demonstrated a habitual course of criminal conduct; and (3) a less-restrictive treatment program was unavailable. We affirm.

D E C I S I O N

On appeal from a civil commitment order, this court is limited to examining whether the district court complied with the Minnesota Commitment and Treatment Act, and whether the commitment is justified by findings based on evidence at the hearing. *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995). “We review the district court’s factual findings under a clear-error standard to determine whether they are supported by the record as a whole.” *In re Civil Commitment of Ince*, 847 N.W.2d 13, 22 (Minn. 2014). When findings of fact rest on expert testimony, “the district court’s evaluation of credibility is particularly significant.” *In re Civil Commitment of Crosby*, 824 N.W.2d 351, 356 (Minn. App. 2013), *review denied* (Minn. Mar. 27, 2013). We review de novo the question of whether the evidence is sufficient to meet the statutory requirements for commitment. *In re Civil Commitment of Martin*, 661 N.W.2d 632, 638 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003).

A. Highly likely to reoffend with harmful sexual conduct

Gephart argues that the district court erred in ordering his indeterminate commitment as an SDP because the state failed to prove that he is highly likely to reoffend with harmful sexual conduct. Gephart points to the testimony of Dr. Peter Marston, Ph.D., L.P., a forensic psychologist who examined Gephart, who concluded that Gephart was

unlikely to reoffend because much of his sex-offending behavior occurred when he was a juvenile. Gephart also asserts that the district court did not consider the link between Gephart's attention-deficit-hyperactivity-disorder (ADHD) diagnosis and his delayed brain development when he committed his offenses.

A person may be committed as an SDP if the person: (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, .07, subd. 3 (2016). “‘Harmful sexual conduct’ means sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another.” Minn. Stat. § 253D.02, subd. 8(a). There is a rebuttable presumption that certain offenses, including criminal sexual conduct in the first, second, third, or fourth degree, “creates a substantial likelihood that a victim will suffer serious physical or emotional harm.” *Id.*, subd. 8(b).

When determining whether an offender engaged in a course of harmful sexual conduct, the district court may take into account conduct for which the offender was convicted and conduct that did not result in conviction. *In re Civil Commitment of Stone*, 711 N.W.2d 831, 837-38 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). In determining whether a person is “highly likely” to reoffend, a district court must consider:

(a) the person's relevant demographic characteristics (*e.g.*, age, education, etc.); (b) the person's history of violent behavior . . . ; (c) the base rate statistics for violent behavior among individuals [with the offender's] background . . . ; (d) the sources of stress in the environment . . . ; (e) the similarity of the present or future context to those contexts in which the

person has used violence in the past; and (f) the person's record with respect to sex therapy programs.

Ince, 847 N.W.2d at 22 (citing *In re Linehan*, 518 N.W.2d 609, 614 (Minn. 1994) (*Linehan I*)). The district court may consider all relevant, reliable evidence without requiring foundation witnesses. *In re Linehan*, 557 N.W.2d 171, 178, 189 (Minn. 1996) (*Linehan III*) (affirming a district court's commitment order when the court examined case specific facts in relation to statistical data), *vacated on other grounds sub nom. Linehan v. Minnesota*, 522 U.S. 1011, 118 S. Ct. 596 (1997), *aff'd on remand*, 594 N.W.2d 867, 876 (Minn. 1999).

In a detailed and thorough 67-page order, the district court made findings on each *Linehan* factor based on the opinions and testimony of the examiners and witnesses. The district court found that Gephart's record "clearly establish[ed] that [Gephart] has a history of violence that has brought great harm to others through his sex offending behaviors." Both examiners found that Gephart had engaged in a course of harmful sexual conduct, including first-degree criminal sexual conduct. Dr. Peter Meyers, Psy.D., L.P., opined that Gephart was a psychopath, a diagnosis that carries a three to four times higher re-offense rate. The district court found Dr. Meyers's opinion to be credible. The district court also credited the independent calculation of Gephart's Static-99R score by Dr. Meyers and Jeff Olson, M.S., L.P., a psychologist employed at the Minnesota Department of Corrections, which predicted a high rate of sexual offense re-conviction in ten years.

The district court acted within its discretion when it discredited much of Dr. Marston's report and testimony. *See Crosby*, 824 N.W.2d at 356, 361 (affirming a district

court's commitment order when the court credited the testimony of two experts over another). The district court criticized Dr. Marston's approach of sanitizing Gephart's juvenile sex-offending behaviors, finding that they were "among the most predatory in a line of offense behaviors" and that the behaviors constituted "many forms of rape." Additionally, the district court rejected Dr. Marston's MnSOST score because it failed to take into account the number of victims, the broad range of offenses, and Gephart's psychopathy diagnosis. The district court also criticized Dr. Marston's attempts to privately contact Dr. Meyers to try to harmonize the results of their examinations of Gephart before trial to find an agreed upon risk level. We discern no error in the district court's findings.

Gephart does not provide any legal support for his argument that the district court could not base his SDP commitment on his conduct as a juvenile, and there does not appear to be any caselaw in support of Gephart's position. *Cf. In re Civil Commitment of Navratil*, 799 N.W.2d 643, 648 (Minn. App. 2011) (citing Navratil's sex-offending behavior as a juvenile in its affirmance of his indeterminate commitment as an SDP), *review denied* (Minn. Aug. 24, 2011). Moreover, the district court can consider all relevant evidence, which includes an individual's juvenile history. *See Linehan I*, 518 N.W.2d at 614 (declining to adopt specific scientific standards for the prediction of dangerousness). Because Gephart has been in prison for almost his entire adult life, the relevant evidence necessarily includes his sexual-offending behavior as a juvenile. Neither examiner testified with certainty that Gephart's ADHD diagnosis was a mitigating factor in his offense history. And even if there was such record evidence, the district court is free to make

findings so long as they are supported by the record as a whole. *Ince*, 847 N.W.2d at 22. On this record, we conclude that the district court did not clearly err.

B. Habitual course of misconduct in sexual matters

To commit someone as a person with an SPP, the district court must find: (1) a habitual course of misconduct involving sexual matters; (2) an utter lack of power to control sexual impulses; and (3) dangerousness to others. Minn. Stat. § 253D.02, subd. 15 (2016); *Linehan I*, 518 N.W.2d at 613. A pattern of habitual sexual offenses can be established by showing similar incidents of misconduct or incidents that form a pattern. See *In re Bieganowski*, 520 N.W.2d 525, 530 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994).

Gephart argues that he does not demonstrate a habitual course of criminal conduct as an adult. He also contends that his self-reported sex-offending behaviors as a juvenile were varied and do not create a course of conduct. Gephart classifies his offending behavior as juvenile sexual curiosity that was fueled by his ADHD diagnosis and developmental delay.

The record supports the district court's finding that Gephart engaged in a habitual course of harmful sexual conduct. The district court separately identified offenses committed by Gephart as both a juvenile and as an adult, to both known and unknown victims, and found that they constituted a pattern of habitual sexual misconduct. Gephart habitually used force, deceit, and coercion during his sexual assaults.

The 2007 first-degree criminal-sexual-conduct conviction as an adult is similar to his 2013 sexual misconduct incident against the chemical-dependency counselor at the

Minnesota Department of Corrections in that both incidents were sexual in nature and were designed to intimidate the victim. Gephart's first-degree criminal-sexual-conduct conviction constituted harmful sexual conduct, and he used force to accomplish the rape. In 2013, Gephart rubbed and fondled his crotch in front of his chemical-dependency counselor during group sessions and attempted to groom her over a period of several weeks. Dr. Meyers testified that Gephart "could have been charged" for his behavior and convicted. Dr. Marston opined in his report that Gephart's 2013 actions against the counselor "created a substantial likelihood of substantial emotional harm. His behavior went on for a period of months and he engaged in intimidating behaviors that would have created significant fear and distress in the victim."

Likewise, Gephart's 2004 juvenile adjudication for fifth-degree criminal sexual conduct is similar to his 2007 first-degree criminal-sexual-conduct conviction in that both incidents were sexual in nature and Gephart exploited situations where he could manipulate the victims into performing sexual acts for him that he knew they did not want to do. These incidents establish a cycle of sexual abuse that is habitual and chronic. The district court did not clearly err in its findings.

C. Less-restrictive treatment program

Under Minnesota law, a district court "shall commit the person to a secure treatment facility unless the person establishes by clear and convincing evidence that a less restrictive treatment program is available, is willing to accept the [person] under commitment, and is consistent with the person's treatment needs and the requirements of public safety." Minn. Stat. § 253D.07, subd. 3 (2016). "Under the current statute, patients have the opportunity

to prove that a less-restrictive treatment program is available, but they do not have the right to be assigned to it.” *In re Kindschy*, 634 N.W.2d 723, 731 (Minn. App. 2001) (emphasis omitted), *review denied* (Minn. Dec. 19, 2001). “[T]he burden of proving that a less-restrictive program is available is on the patient.” *In re Robb*, 622 N.W.2d 564, 574 (Minn. App. 2001), *review denied* (Minn. Apr. 17, 2001). We will not reverse a district court’s findings on the propriety of a treatment program unless its findings are clearly erroneous. *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003).

Gephart argues that he presented a less-restrictive alternative plan that met the requirements of public safety. The district court found that while Gephart reported that he was open to participating in outpatient sex-offender therapy, he did not produce any evidence that he had been accepted into any treatment program. It found Gephart’s need for structure, continued treatment, and tight accountability is “far greater than what is available to him in the community.”

The district court’s findings are supported by the record. Based on the examiners’ respective assessments, the district court found that Gephart suffers from pedophilia, psychopathy, polysubstance-use disorder, and a number of paraphilias. Dr. Marston testified Gephart needs structure and a rules-based environment in order to be successful because he suffers from a lack of impulse control. Dr. Meyers opined that Gephart’s sexual-assaulting behaviors occurred while in the confines of a highly structured and secure setting, which illustrated his inability to control his sexual urges in the community. Gephart’s probation agent testified that Ramsey County would not be able to provide intense supervision of Gephart and that the agent would likely see Gephart in person once

a week. Accordingly, the district court did not err in finding that there is no less-restrictive setting available for Gephart and that public safety requires that Gephart be indeterminately committed.

Affirmed.