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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1790**

In the Matter of the Civil Commitment of:
Chester Lee Grauberger.

**Filed April 22, 2019
Affirmed
Halbrooks, Judge**

Lincoln County District Court
File No. 41-PR-17-117

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Glen A. Petersen, Lincoln County Attorney, Tyler, Minnesota (for respondent Lincoln County)

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges his conviction as a sexually dangerous person (SDP) on the grounds that the district court erred in determining that he meets the criteria for commitment and that he received ineffective assistance of counsel. We affirm.

FACTS

On March 18, 1985, appellant Chester Lee Grauberger was adjudicated delinquent of first-degree criminal sexual conduct after he admitted to sexually abusing two family members. He has since been accused of sexual assault on multiple occasions. In 1991, S.P.L. reported that Grauberger approached her at a party, grabbed her left breast, and later pushed her down a flight of stairs. The police interviewed Grauberger. He confirmed that he confronted S.P.L. at the party, but denied groping her and indicated that he had accidentally knocked her down the stairs. No charges were brought as a result of the incident. On December 30, 1995, G.K.H. reported that Grauberger had sexually assaulted her. She told the police that earlier in the night she and Grauberger had engaged in consensual sexual activity. But when she attempted to leave, he grabbed her from behind, choked her, punched her in the back, and forced her to have sexual intercourse. G.K.H. later refused to give a taped statement. As a result, no charges were brought.

On July 8, 1996, P.L.N. reported that she had been sexually assaulted by an intruder. She reported that an intruder entered her home, walked over to the couch where she was sleeping, and began sexually assaulting her. The intruder told P.L.N. not to make any noise because her daughter was sleeping on the couch beside her. After the intruder sexually assaulted her, he asked P.L.N. for money and then left. P.L.N. ran to her neighbor's house and was later transported to the hospital for a sexual-assault examination. P.L.N. was unable to identify the assailant, and the DNA sample recovered during the examination did not initially result in a match.

On April 18, 1997, a witness reported that a woman, J.S.W., was being sexually assaulted in an alley. When law enforcement arrived on the scene, J.S.W. was disheveled and naked below her waist, and her face was covered in blood. She pointed at Grauberger, who was standing nearby, and identified him as the assailant. Grauberger was arrested, and J.S.W. was taken to the hospital. She suffered a fractured nose, a closed head injury, and a skull fracture. Grauberger was charged with two counts of first-degree criminal sexual conduct, two counts of second-degree criminal sexual conduct, third-degree criminal sexual conduct, fourth-degree criminal sexual conduct, and third-degree assault. A jury found him guilty of all counts. The district court sentenced him to 258 months in prison, a triple upward departure. Grauberger appealed, and this court affirmed his convictions and sentence. *State v. Grauberger*, No. C5-98-1034 (Minn. App. Mar. 23, 1999), *review denied* (Minn. May 18, 1999).

As a result of the convictions, Grauberger was required to provide a DNA sample for the convicted sex-offender database. His DNA matched the sample obtained in 1996 during P.L.N.'s sexual-assault examination. Grauberger was subsequently charged and convicted of third-degree criminal sexual conduct related to the assault of P.L.N. and sentenced to 116 months in prison. He received an upward departure based on the vulnerability of the victim and the fact that it occurred in the victim's home.

On February 18, 2018, respondent Lincoln County petitioned to civilly commit Grauberger as an SDP. On May 7-9, the district court held a commitment hearing. The district court heard testimony from three experts: Linda Marshall, Ph.D., L.P.; Robert Riedell, Ph.D., L.P.; and Peter Marston, Ph.D., L.P. The district court also heard testimony

from G.K.H., S.M.N., J.S.W., support persons and people who had worked with Grauberger while he was incarcerated, and Grauberger. Following the commitment hearing, the district court determined that Grauberger meets the criteria for civil commitment as an SDP because he has engaged in a course of harmful sexual conduct, manifests a sexual, personality, or other mental disorder, and as a result, is likely to engage in acts of harmful sexual conduct. The district court ordered that Grauberger be indeterminately committed as an SDP to the Minnesota Sex Offender Program (MSOP).

Grauberger filed a posttrial motion, alleging that he received ineffective assistance of counsel, requesting a new trial based on “irregularities,” and requesting that new counsel be appointed on appeal because of the ineffective-assistance-of-counsel claim. The district court denied Grauberger’s motion for a new trial and claim of ineffective assistance of counsel but granted his request that new counsel be appointed for appeal. This appeal follows.

D E C I S I O N

I.

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(a) (2018). The state is not required to prove that the person has an inability to control his sexual impulses. *Id.*, subd. 16(b) (2018). In order to commit a person as an SDP, there must be clear and convincing evidence that the

person is highly likely to engage in future acts of harmful sexual conduct. *In re Civil Commitment of Ince*, 847 N.W.2d 13, 20 (Minn. 2014).

We review for clear error a district court’s factual findings on the elements of the civil-commitment statute. *In re Civil Commitment of Stone*, 711 N.W.2d 831, 836 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). When the findings of fact are based 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 whether the evidence is sufficient to meet the statutory requirements for commitment is a question of law, which we review de novo. *In re Civil Commitment of Crosby*, 824 N.W.2d 351, 356 (Minn. App. 2013), *review denied* (Minn. Mar. 27, 2013).

The first element that the district court must find is that Grauberger engaged in a course of harmful sexual conduct. Minn. Stat. § 253D.02, subd. 16(a)(1). Harmful sexual conduct is defined as “sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another.” Minn. Stat. § 253D.02, subd. 8(a) (2018). A “course of conduct” is defined by its ordinary meaning, which is a “systemic or orderly succession; a sequence.” *In re Civil Commitment of Ramey*, 648 N.W.2d 260, 268 (Minn. App. 2002) (quotation omitted), *review denied* (Minn. Sept. 17, 2002).

The civil-commitment statute provides that certain convictions create a rebuttable presumption that the conduct that led to the conviction constitutes harmful sexual conduct. Minn. Stat. § 253D.02, subd. 8(b) (2018). Grauberger was adjudicated delinquent of first-degree criminal sexual conduct for sexually assaulting two members of his family, convicted of first-degree criminal sexual conduct for sexually assaulting J.S.W., and

convicted of third-degree criminal sexual conduct for sexually assaulting P.L.N. All three convictions create a rebuttable presumption that Grauberger engaged in harmful sexual conduct. *Id.* And all three experts opined that Grauberger had engaged in a course of harmful sexual conduct and that his convictions alone are sufficient to establish the element.

Grauberger argues that the record does not support the determination that he engaged in a course of harmful sexual conduct. In determining that the element had been established, the district court found that all three experts consistently testified that Grauberger has engaged in a course of harmful sexual conduct. But Grauberger argues that because the experts disagreed in other aspects of their testimony, the district court's finding that their testimony was consistent is clearly erroneous. He contends that the determination is not based on sufficiently particularized findings because the district court's findings merely recite testimony. An order must be based on "sufficiently particular findings of fact on the key issues." *In re Civil Commitment of Spicer*, 853 N.W.2d 803, 810 (Minn. App. 2014). It is insufficient for a district court to merely summarize or recite testimony without commenting on the relative credibility of the witnesses or tying the findings to the conclusions of law. *Id.* at 810-11.

Grauberger contends that, because the district court merely recited the experts' testimony and failed to resolve the conflicting testimony, the finding that he engaged in a course of harmful sexual conduct is clearly erroneous. We disagree. The district court was sufficiently particular in explaining what testimony it was relying on to determine whether

Grauberger had engaged in a course of harmful sexual conduct. In making its findings on this element, the district court first found:

The Court finds that this element is virtually uncontested as all three psychologists rendered an opinion that based on Grauberger's convictions alone he possesses a course of harmful sexual conduct under the SDP statute. The Court finds by clear and convincing evidence that Grauberger possesses a course of harmful sexual conduct in sexual matters.

The district court next noted that all three experts “agreed that Grauberger’s conduct created a substantial likelihood of serious physical or emotional harm” and that all three had “training, education, and experience that provide a basis” to provide an opinion on the subject. The district court later found that all three testified that, using only Grauberger’s convicted offenses, “he still meets the criteria of a course of harmful sexual conduct for purposes of the SDP statute.” Finally, the district court found that the opinions of the three experts were “credible and persuasive with respect to Grauberger’s course of harmful sexual conduct within the meaning of the SDP statute.” Accordingly, the district court’s order explains the testimony that it found persuasive and the basis for finding it persuasive—the experts’ training and experience and consistent overall opinions. On this record, the district court’s order sufficiently explains the basis for its ultimate conclusion that Grauberger engaged in a course of harmful sexual conduct.

Grauberger next argues that the evidence is insufficient to establish that he is highly likely to reoffend in the future. To determine whether a person is highly likely to reoffend, a district court must engage in a “multi-factor analysis.” *Ince*, 847 N.W.2d at 23. The

multi-factor analysis includes consideration of the following six factors, known as the *Linehan* factors:

(a) the person's relevant demographic characteristics (*e.g.*, age, education, etc.); (b) the person's history of violent behavior (paying particular attention to recency, severity, and frequency of violent acts); (c) the base rate statistics for violent behavior among individuals of this person's background (*e.g.*, data showing the rate at which rapists recidivate, the correlation between age and criminal sexual activity, etc.); (d) the sources of stress in the environment (cognitive and affective factors which indicate that the person may be predisposed to cope with stress in a violent or nonviolent manner); (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.

Id. at 22 (quoting *In re Linehan*, 518 N.W.2d 609, 614 (Minn. 1994)).

The analysis may include other relevant evidence and information, including the actuarial-assessment evidence used by the experts. *Id.* at 24. The supreme court has determined that an individual is “highly likely” to reoffend if it would be “difficult, if not impossible, for the person to control his dangerous behavior.” *Id.* at 20 (quotation omitted). The term “highly likely” cannot be defined by a specific numeric value. *Id.* No single factor is determinative of this issue. *In re Civil Commitment of Navratil*, 799 N.W.2d 643, 649 (Minn. App. 2011).

The district court made findings related to each of the six *Linehan* factors. The district court found that both Dr. Marshall and Dr. Marston “credibly and persuasively opined and testified that Grauberger meets the final criterion for commitment under the SDP statute, by concluding that Grauberger is highly likely to engage in acts of harmful sexual conduct in the future and is dangerous to other persons.” Grauberger argues that

this finding, and the findings related to the *Linehan* factors, are insufficiently particular because the district court found Dr. Marshall and Dr. Marston to be credible without reconciling their inconsistent testimony and did not make “true findings” relating to several of the *Linehan* factors.

Grauberger asserts that the findings do not address the actuarial assessments utilized or what evidence the district court relied on in determining that Grauberger is highly likely to reoffend. But the district court found that all three experts utilized the Static-99R actuarial tool and that all three scored Grauberger as a +6, placing him in the well-above-average risk group. The district court explicitly found that Dr. Riedel’s testimony on his scoring of the Static-99R was not credible or persuasive “based on his failure to follow scoring guidelines by not including any of the risk estimates or indicating what normative sample group he is using.” The district court found Dr. Marshall and Dr. Marston credible based in part on their application of “actuarial risk tools.”

Grauberger argues that the record does not support the district court’s reliance on the testimony of Dr. Marshall and Dr. Marston because the district court failed to reconcile the fact that they had different results on various assessments. He points out that Dr. Marshall and Dr. Marston placed him in different assessment groups when conducting the Static-99R but reached the same conclusion. But the district court found that Dr. Marston explained that “he used the routine sample group because the risk percentage difference is negligible when you reach such a high score.” Thus, the district court did reconcile the difference in scoring. And while Grauberger asserts that the results of his PCL-R are inconsistent, the district court explained that “when a standard error of

measurement is applied . . . [D]octors Marshall and Marston have similar scores within the confidence interval of the instrument.” Accordingly, the scores are not in conflict. Grauberger also argues that, if the district court had factored in an actuarial assessment, then it would have to give “less weight or no weight to some of the *Linehan* factors due to overlap.” The district court found that Dr. Marshall and Dr. Marston “took steps to ensure that they were not engaged in factor repetition” and included this fact in determining that they were credible.

Grauberger relies on *Spicer* to support his assertion that the district court failed to make sufficiently particular findings of fact. 853 N.W.2d at 809. In *Spicer*, the district court generally found that the opinions of two of the experts were “more credible and persuasive” than the opinion of a third. *Id.* at 810. This court determined that the “district court cannot satisfy its obligation to find facts with particularity by simply adopting *in toto* the opinions of a particular expert.” *Id.* We then noted that the two experts who were deemed credible disagreed in important aspects of their testimony. *Id.* at 810-11. We observed that, based on the “conclusory nature” of the district court’s findings of fact on the expert evidence, we could not ascertain which portions of the conflicting expert testimony the district court relied on. *Id.* at 811.

Here, the district court reconciled the seemingly inconsistent testimony of Dr. Marshall and Dr. Marston. As discussed above, the district court made findings explaining why Grauberger was placed in different assessment groups during the Static-99R and why that fact did not impact the assessment. And the district court noted that the doctors’ scoring on another assessment fell within the same overall range.

Importantly, both Dr. Marshall and Dr. Marston ultimately opined that Grauberger meets the statutory criteria for commitment. On this record, the district court made sufficiently particular findings that explain what evidence it was relying on in making its ultimate determination.

Finally, Grauberger argues that he cannot be considered “highly likely” to reoffend because both Dr. Marshall and Dr. Marston opined that his estimated likelihood of re-offense is approximately 41%. But the supreme court has held the determination “cannot be defined by a numeric value.” *Ince*, 847 N.W.2d at 21. Both Dr. Marshall and Dr. Marston opined that Grauberger is highly likely to reoffend. Accordingly, the numeric value assigned by Dr. Marshall and Dr. Marston is insufficient to render the finding clearly erroneous. We conclude that the record supports the district court’s determination that Grauberger meets the statutory criteria for commitment as an SDP under Minn. Stat. § 253D.02, subd. 16.

II.

Grauberger contends that he received ineffective assistance of counsel. A committed person has the statutory right to assistance of counsel in commitment proceedings. *See* Minn. Stat. § 253D.20 (2018). During the commitment proceedings, the attorney shall: (1) consult with the person before any hearings; (2) “be given adequate time and access to records to prepare for all hearings; (3) continue to represent the person throughout any proceedings under this chapter unless released as counsel by the court; and (4) be a vigorous advocate on behalf of the person.” *Id.*

We apply the criminal standard for analyzing the effectiveness of counsel in civil-commitment cases. *In re Dibley*, 400 N.W.2d 186, 190 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987). Grauberger must therefore show “that counsel’s representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Reed v. State*, 793 N.W.2d 725, 733 (Minn. 2010) (quotation omitted). There is a strong presumption that counsel’s “performance fell within a wide range of reasonable assistance.” *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998). Claims of ineffective assistance of counsel that raise mixed questions of fact and law are reviewed de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

Grauberger asserts that he received ineffective assistance of counsel because, prior to this case, his trial counsel had never represented a client in a civil-commitment hearing. Grauberger acknowledges that an attorney may provide adequate representation in a novel field through study, but argues that, because of the complex nature and expedited timeline of a civil-commitment proceeding, his trial counsel did not have enough time to become sufficiently proficient in the area of the law. Inexperience alone cannot be a basis to establish ineffective assistance of counsel. *Swaney v. State*, 882 N.W.2d 207, 218 n.7 (Minn. 2016).

Grauberger also argues that his trial counsel failed to adequately communicate with him and that the attorney’s trial strategy should not be given deference. Generally, we defer to trial counsel’s trial strategy. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). Grauberger asserts that this court should not defer to the choice of trial strategy because it

was without reason. Grauberger contends that trial counsel made a significant error in not recalling him to further explain his testimony about the incident with G.K.H. During direct examination, Grauberger explained that, during the incident, he “wasn’t thinking of it as sexual assault. I didn’t think of it as forcing her. I certainly can see where she felt that way now.” He also stated that “looking at the position that she must have felt like she was in I believe that she probably felt like she had no choice.” He argues that it was a critical mistake that he was not recalled to clarify that he did not view G.K.H. as a victim. But despite his current contention that he could have clarified that he does not consider G.K.H. to be a victim, Grauberger plainly stated that he understood why she felt like she had no choice but to engage in sexual intercourse with him. And while the district court considered his conduct against G.K.H., the main focus when addressing his course of harmful sexual conduct was on the incidents that resulted in convictions. Thus, the decision likely had very little, if any, impact on the outcome of the proceeding.

Grauberger also challenges trial counsel’s decision not to call certain witnesses. He asserts that trial counsel should have called his prior therapist to testify. He argues that doing so would have provided important information about his progress in treatment, his past, and how his past affected his thinking. Which witnesses to call falls within the scope of trial strategy that is generally not reviewed. *State v. Nicks*, 831 N.W.2d 493, 516 (Minn. 2013). And as the county notes, the therapist that trial counsel called was actually Grauberger’s present therapist, who was familiar with his case and had completed two progress reviews for him. Moreover, the notes of Grauberger’s prior therapist were received into evidence. Because trial counsel called a therapist with knowledge of

Grauberger's case and present needs and submitted the information from the previous therapist, the trial strategy was reasonable. *Id.* On this record, Grauberger has failed to establish that he received ineffective assistance of counsel.

Affirmed.