

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0194
A19-0239**

In the Matter of the Civil Commitment of: Steven Loren Edwards.

**Filed July 22, 2019
Reversed
Larkin, Judge**

Commitment Appeal Panel
File No. AP18-9025

Keith Ellison, Attorney General, Brandon Boese, Assistant Attorney General, St. Paul, Minnesota (for appellant Minnesota Commissioner of Human Services)

James Backstrom, Dakota County Attorney, Heather Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for appellant Dakota County)

Jennifer L. Thon, Steven D. Winkler, Warren J. Maas, Jones Law Office, Mankato, Minnesota (for respondent Steven Edwards)

Considered and decided by Larkin, Presiding Judge; Ross, Judge; and Bratvold, Judge.

S Y L L A B U S

This court does not apply de novo review to a commitment appeal panel's decision on the merits of a petition for a reduction in custody under Minn. Stat. § 253D.27 (2018), unless the panel has ordered dismissal under Minn. R. Civ. P. 41.02(b). Instead, we review such a decision for clear error, examining the record to determine whether the evidence as a whole sustains the panel's findings.

OPINION

LARKIN, Judge

Appellants challenge an order of a commitment appeal panel (CAP)¹ granting, in part, respondent's petition for a reduction in custody under Minn. Stat. § 253D.27. Because the evidence as a whole provides insufficient support for the CAP's findings in support of respondent's transfer out of a secure treatment facility, we reverse.

FACTS

Respondent Steven Loren Edwards is a 47-year-old man with a history of alleged and proven criminal sexual conduct. In December 2000, a woman reported that respondent tried to rape her in a gas-station restroom. Respondent denied the allegation, and the state did not file charges. In July 2001, a woman reported that respondent masturbated in front of her and touched her breasts. Respondent admitted that conduct, but the state did not file charges. Also in July 2001, respondent physically and sexually assaulted a 15-year-old girl. He was later convicted of second-degree criminal sexual conduct for that offense. In September 2001, respondent held a pair of scissors to the neck of a 16-year-old girl, forced her to perform oral sex on him, and penetrated her vaginally and anally. He was convicted of kidnapping and first-degree criminal sexual conduct for that offense.

¹ We refer to the entity formerly known as the supreme court appeal panel or judicial appeal panel as the commitment appeal panel. See Minn. Stat. § 253D.28, subd. 1(a) (2018) (providing for review by "the judicial appeal panel established under section 253B.19, subdivision 1"); Minn. Stat. § 253B.19, subd. 1 (2018) (providing that the supreme court shall establish an appeal panel).

In October 2011, respondent was civilly committed as a sexually dangerous person (SDP) under the Minnesota Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities (MCTA: SDP/SPP), Minn. Stat. §§ 253D.01-.36 (2018).² In May 2012, his indeterminate commitment at the Minnesota Sex Offender Program (MSOP) was finalized. Since August 2013, respondent has been in Phase II of MSOP's three-phase treatment program. Since 2016, respondent's participation in treatment has been sporadic. In May 2017, respondent stopped participating in treatment, with the exception of a conflict-resolution program. Respondent started participating in treatment again in July 2018.

In June 2017, respondent petitioned the special review board (SRB) for transfer to community preparation services (CPS), provisional discharge, or full discharge. *See* Minn. Stat. § 253B.18, subd. 4c (2018) (establishing special review board); Minn. Stat. § 253D.27 (setting forth procedure by which persons civilly committed as sex offenders may petition the special review board for a "reduction in custody," which means transfer out of a secure treatment facility, a provisional discharge, or a discharge from commitment). Appellants Minnesota Commissioner of Human Services (the commissioner) and Dakota County (the county) opposed respondent's petition. The SRB recommended that respondent's request

² We note that when respondent was committed, SDP/SPP commitments were governed by the Minnesota Commitment and Treatment Act (MCTA). *See* Minn. Stat. §§ 253B.01-.24 (2010 & Supp. 2011). In 2013, the legislature amended the MCTA by removing provisions regarding SDP and SPP commitments from chapter 253B and moving them to a new chapter 253D, entitled the "Minnesota Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities." 2013 Minn. Laws ch. 49, §§ 1-22, at 210-31. Because there are no substantive differences between the two, we cite to the current statutory provisions.

for provisional and full discharge be denied, but recommended that respondent's request for transfer to CPS be granted. The commissioner petitioned the CAP for rehearing and reconsideration on the issue of transfer, and respondent petitioned the CAP for rehearing and reconsideration on the issues of provisional and full discharge. *See* Minn. Stat. § 253D.28, subd. 1 (authorizing petition to the CAP for rehearing and reconsideration of a recommendation of the SRB under section 253D.27).

In September 2018, the CAP heard the matter. At the beginning of the hearing, respondent withdrew his request for full discharge, leaving the transfer and provisional-discharge issues before the CAP. Respondent presented testimony from CPS Operations Manager Michelle Sexe and Forensic Evaluator Jennifer Tippet, Psy.D., in support of his request for a reduction in custody. *See* Minn. Stat. § 253D.28, subd. 2(d) (stating that a petitioner seeking provisional discharge bears the burden of going forward with the evidence). Sexe provided general information about CPS and did not opine regarding whether transfer was appropriate. Dr. Tippet opined that respondent meets the statutory criteria for transfer to CPS. Respondent withdrew his request for provisional discharge at the close of his evidence.

After respondent presented his case, the commissioner moved to dismiss respondent's petition under Minn. R. Civ. P. 41.02(b), and the CAP denied the motion. The commissioner then presented testimony from MSOP Clinical Director Peter Puffer, M.A., L.P., and court-appointed examiner Mary Kenning, Ph.D., L.P. Puffer testified that MSOP clinical leadership believes that a transfer to CPS would be premature. Dr. Kenning opined that respondent does not meet the statutory criteria for transfer to CPS.

The CAP granted respondent's request for transfer to CPS. The commissioner and the county appeal.³

ISSUES

- I. Does this court apply de novo review to a CAP's decision on the merits of a petition for a reduction in custody under Minn. Stat. § 253D.27?
- II. Did the CAP err by granting respondent's petition for transfer to CPS?

ANALYSIS

I.

Appellants argue that this court should reverse because the CAP erred in concluding that respondent met his burden to show that transfer to CPS should be granted. Appellants alternatively argue that this court should remand because the CAP did not provide sufficient factual findings to enable this court to effectively review the CAP's application of the relevant statutory criteria de novo.

We begin by addressing the standard that applies to our review of a CAP's decision on the merits of a petition for a reduction in custody under Minn. Stat. § 253D.27. Appellants contend that our review is de novo. An "appeal de novo" is one in which "the appellate court uses the [lower tribunal's] record but reviews the evidence and law without deference to the [lower tribunal's] rulings." *Black's Law Dictionary* 117 (10th ed. 2014).

³ The commissioner and the county filed separate appeals. The county did not file a brief, but joined in the commissioner's arguments. Respondent also filed an appeal. This court consolidated all three appeals. Later, respondent voluntarily withdrew his appeal.

Appellants argue that this court applies de novo review because a CAP's decision on the merits of a petition for a reduction in custody is based on the application of statutory criteria to facts found. Appellants rely on two unpublished decisions of this court as support.⁴ Unpublished opinions of this court are not precedential. Minn. Stat. § 480A.08, subd. 3 (2018); see *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800-01 (Minn. App. 1993) (noting that although persuasive, “[t]he legislature has unequivocally provided that unpublished opinions are not precedential”). However, respondent agrees that our standard of review is de novo, citing *In re Civil Commitment of Kropp* for the proposition that this court applies de novo review to a CAP's application of law to the facts of a particular case. 895 N.W.2d 647, 650 (Minn. App. 2017), *review denied* (Minn. June 20, 2017).

The parties' suggestion that this court should review the CAP's ultimate decision on the merits of respondent's petition de novo is inconsistent with language in this court's published opinions indicating that we do not apply de novo review. But we recognize that language in some of those opinions mentions de novo review. We therefore take this opportunity to clarify our standard of review.⁵

⁴ See *In re Civil Commitment of Kerkhoff*, No. A18-1191, 2019 WL 178875, at *2 (Minn. App. Jan. 14, 2019); *Rousseau v. Ludeman*, No. A07-1756, 2008 WL 570915, at *2 (Minn. App. Mar. 4, 2008).

⁵ At oral argument, appellants noted that the appropriate standard of review is not disputed by the parties and offered to provide supplemental briefing regarding that issue. Identification of the appropriate standard of review is an issue in every appeal. See Minn. R. Civ. App. P. 128.02, subd. 1(d) (providing that the formal brief of the appellant shall contain an argument that includes “the contentions of the party with respect to the issues presented” and “the applicable standard of appellate review for each issue”). After consideration by the panel, we decline to order supplemental briefing for two reasons. First, both parties included a discussion of the standard of review in the initial briefing. Second, we will not delay our decision in this expedited appeal for supplemental briefing.

We begin with a review of the relevant caselaw. In *Johnson v. Noot*, the Minnesota Supreme Court reviewed a CAP's decisions regarding requests for full discharge from two individuals committed as mentally ill and dangerous. 323 N.W.2d 724, 725 (Minn. 1982); see Minn. Stat. § 253B.18 (2018) (describing process for the civil commitment of persons as mentally ill and dangerous); Minn. Stat. § 253B.18, subd. 7 (providing for provisional discharge); Minn. Stat. § 253B.18, subd. 15 (providing for full discharge). The supreme court described the applicable standard of review as follows:

The final issue we address is whether the [CAP's] findings in either 81-460 or 81-696 were clearly erroneous. *The function of this court is not to weigh the evidence as if trying the matter de novo*, but to determine from an examination of the record if the evidence as a whole sustains the [CAPs'] findings. If it does so, it is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary.

Johnson, 323 N.W.2d at 728 (emphasis added).

Later, in *Jarvis v. Levine*, this court applied the standard of review from *Johnson* when reviewing a CAP's order denying a request for transfer from a person committed as mentally ill and dangerous. 364 N.W.2d 473, 473-74 (Minn. App. 1985); see Minn. Stat. § 253B.18, subd. 6 (providing for transfer). We explained the standard of review as follows:

The [CAP] will be reversed only if [its] decision was clearly erroneous. *This court will not weigh the evidence as if trying the matter de novo*, but must examine the record to determine

See Minn. Stat. § 253B.23, subd. 7 (2018) (stating that commitment appeals must be heard within 90 days after service of notice of appeal); see also Minn. Stat. § 253D.03 (stating that the provisions of Minn. Stat. § 253B.23 generally apply to commitments under MCTA: SDP/SPP).

whether “the evidence as a whole sustains the [CAPs’] findings.”

Jarvis, 364 N.W.2d at 474 (emphasis added) (quoting *Johnson*, 323 N.W.2d at 728).

Then, in *Larson v. Jesson*, this court indicated that the standard of review from *Jarvis* applies when this court reviews a CAP’s order denying a petition for full or provisional discharge by a person committed as an SDP. 847 N.W.2d 531, 534 (Minn. App. 2014). In *Larson*, the CAP dismissed the petition for discharge under Minn. R. Civ. P. 41.02(b). *Id.* at 533-34. This court explained our standard of review as follows:

Larson challenges the [CAP’s] dismissal of his request for a discharge or a provisional discharge from MSOP. As a threshold matter, we must determine the appropriate standard for our review. *Generally, this court reviews decisions by a [CAP] for clear error, “examining the record to determine whether the evidence as a whole sustains the [CAPs’] findings” and not “weighing the evidence as if trying the matter de novo.”* *Jarvis v. Levine*, 364 N.W.2d 473, 474 (Minn. App. 1985) (quotation omitted). But we hold that when a [CAP] dismisses a petition under Minn. R. Civ. P. 41.02(b), the appropriate standard of appellate review is de novo.

Id. at 534 (emphasis added) (citation omitted); see Minn. R. Civ. P. 41.02(b) (“After the plaintiff has completed the presentation of evidence, the defendant . . . may move for a dismissal on the ground that upon the facts and the law, the plaintiff has shown no right to relief.”); *Coker v. Jesson*, 831 N.W.2d 483, 489-91 (Minn. 2013) (explaining application of Minn. R. Civ. P. 41.02(b) in a proceeding before a CAP).

Although this court stated, in *Larson*, that it generally will not apply de novo review to a CAP’s decision on a petition for a reduction in custody, this court subsequently used language that might suggest otherwise in *Kropp*. In that case, we reviewed a CAP’s order

granting a request for provisional discharge from a person committed as an SDP and an SPP, and we described our standard of review in accordance with *Larson* as follows:

This court reviews a [CAP's] decision for clear error, examining the record to determine whether the evidence as a whole sustains the [CAP's] findings. *In this review, we do not reweigh the evidence as if trying the matter de novo.* If the evidence as a whole sustains the [CAP's] findings, it is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary.

Kropp, 895 N.W.2d at 649-50 (emphasis added) (citations omitted). But we also included the following language, which raises the possibility of de novo review: “However, this court reviews de novo questions of statutory construction and the application of statutory criteria to the facts found.” *Id.* This court’s reference to de novo review of questions of statutory construction is unremarkable. See *In re Welfare of Children of J.L.G.*, 924 N.W.2d 9, 14 (Minn. App. 2018) (“This court reviews questions of statutory interpretation de novo.”). But this court’s reference to de novo review of the application of statutory criteria to facts found could be read to suggest—for the first time—that we apply de novo review to a CAP’s decision on the merits of a petition for a reduction in custody. For the three reasons that follow, our statement in *Kropp* should not be read to endorse de novo review.

First, such a reading would be inconsistent with our statement in *Larson*, as well as the supreme court’s decision in *Johnson* on which it was based, that we generally do not weigh the evidence as if trying the matter de novo when reviewing a CAP’s decision on a petition for a reduction in custody. This court honored that principle when reviewing the CAP’s decision in *Kropp* by deferring to the CAP’s reliance on certain testimony in support

of provisional discharge. 895 N.W.2d at 654-55. Such deference is inconsistent with de novo review. *See Black's Law, supra*, at 117 (defining “appeal de novo” as an appeal in which the appellate court “reviews the evidence and law without deference to the [lower tribunal’s] rulings”).

Second, although this court has cited the standard of review set forth in *Kropp* when reviewing CAP decisions on the merits of petitions for a reduction in custody, its opinions do not reflect de novo review. For example, in *In re Civil Commitment of Fugelseth*, this court reviewed a CAP’s order for full discharge of a person committed as an SDP and an SPP. 907 N.W.2d 248, 250 (Minn. App. 2018), *review denied* (Minn. Apr. 17, 2018). This court cited *Kropp* for the standard of review, stating:

This court applies a clear-error standard of review to a [CAP’s] findings of fact by examining the record to determine whether the evidence as a whole sustains the [CAP’s] findings. In doing so, *we do not reweigh the evidence, and it is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary*. In addition, we apply a *de novo* standard of review to issues of statutory interpretation and to a [CAP’s] application of the law to the facts of a particular case.

Id. at 253 (emphasis added) (quotations omitted).

Consistent with that statement, this court applied de novo review to an issue of statutory construction. *Id.* at 253-55. But when reviewing the CAP’s decision on the merits of the petition for a reduction in custody, we deferred to the CAP’s assessment of the evidence, stating:

The commissioner further contends that, in light of the [CAP’s] erroneous understanding of the factual record, she did prove by clear and convincing evidence that Fugelseth still is

dangerous to the public. *This contention is contrary to the principles that we do not reweigh the evidence and that it is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary.* The question is *not* whether the record could support a finding that Fugelseth still is dangerous to the public; the question is whether the [CAP] clearly erred by finding that Fugelseth no longer is dangerous to the public. The [CAP] considered conflicting evidence and determined that Herbert’s testimony was entitled to more weight than Kunkel’s testimony. This court generally will defer to a district court’s evaluation of expert testimony.

Id. at 256 (first emphasis added) (quotations and citation omitted).

And in *In re Civil Commitment of Duvall*, another case involving review of a CAP’s decision on a petition for a reduction in custody in the SDP/SPP context, we stated, “On appeal, we review a [CAP’s] order granting provisional discharge for clear error.” 916 N.W.2d 887, 889-90 (Minn. App. 2018), *review denied* (Minn. Sept. 18, 2018). Although we cited *Kropp* for the principle that our review of the application of statutory criteria to facts found is *de novo*, we also said, “We review a [CAP’s] decision for clear error and examine the record to determine whether the evidence as a whole sustains the [CAP’s] findings. *We do not reweigh the evidence.*” *Id.* at 892-93 (emphasis added) (quotation omitted). We then rejected arguments that the CAP should have given more weight to certain testimony and less weight to other testimony, as well as arguments that it failed to consider certain evidence, reasoning, “In reviewing the [CAP’s] order, we will not reweigh the evidence, and it is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary.” *Id.* at 894 (quotation omitted).

This court’s refusal to reweigh the evidence before the CAPs in *Fugelseth* and *Duvall*, as well as its statements that it was immaterial that the records might have provided

a reasonable basis for inferences and findings contrary to the CAPs' decisions, is inconsistent with de novo review, which would not have given any deference to the CAPs' decisions. See *Black's Law, supra*, at 117.

Third, although an appellate court generally reviews the application of statutory criteria to facts found de novo, that principle is not applied to *every* application of statutory criteria. For example, we do not apply de novo review to a district court's child-custody determination, which is based on an application of statutory criteria. See Minn. Stat. § 518.17, subd. 3(a)(3) (2018) ("In determining custody, the court shall consider the best interests of each child"); *id.*, subd. 1(a) (2018) ("In evaluating the best interests of the child for purposes of determining issues of custody . . . , the court must consider and evaluate all relevant factors, including" 12 statutorily enumerated factors). Instead, "[t]he [district] court's determination of the ultimate best-interests issue will be affirmed unless it constitutes an abuse of the [district] court's discretion or the [district] court rationale suggests an erroneous application of law." *Vangsness v. Vangsness*, 607 N.W.2d 468, 475 (Minn. App. 2000).⁶

Moreover, in *Kropp*, this court relied on *State v. Bunde*, 556 N.W.2d 917, 918 (Minn. App. 1996), for the principle that the application of statutory criteria to facts found is reviewed de novo. 895 N.W.2d at 650. *Bunde* is a case in which this court relied on a statutory standard governing police conduct to determine whether an officer acted

⁶ At oral argument in this case, respondent suggested that the appropriate standard of review might be "more of an abuse of discretion." We leave open for another day the question of whether the abuse-of-discretion standard should apply to a CAP's evaluation of the factors that must be considered when ruling on a petition for a reduction in custody.

unlawfully by arresting a person outside of the officer's jurisdiction. 556 N.W.2d at 918-19. This court's decision in *Bunde* relied, in turn, on *State v. Favors*, 482 N.W.2d 226, 227 (Minn. App. 1992), *review denied* (Minn. Mar. 26, 1992). *Id.* at 918. In *Favors*, this court applied de novo review to determine whether an action was timely commenced under the applicable statute of limitations. 482 N.W.2d at 227. Neither *Bunde* nor *Favors* dealt with statutes that require the weighing of factors when determining whether statutory criteria are met, as is the case here. See Minn. Stat. § 253D.29, subd. 1(b) (requiring consideration of five factors when determining whether a transfer "is appropriate").

For all of these reasons, we do not read *Kropp* to mean that this court applies de novo review to a CAP's decision on the merits of a petition for a reduction in custody, unless the CAP has ordered dismissal under Minn. R. Civ. P. 41.02(b). See *Johnson*, 323 N.W.2d at 728 (stating that "[t]he function of this court is not to weigh the evidence as if trying the matter *de novo*"). Instead, we review such a decision for clear error, examining the record to determine whether the evidence as a whole sustains the CAP's findings. We do not reweigh the evidence as if trying the matter de novo. If the evidence as a whole sustains the CAP's findings in support of its decision, it is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary. In sum, we will not reverse a CAP's decision on a petition for a reduction in custody so long as the underlying findings are supported by the evidence as a whole.

II.

We now turn to appellants' argument that the CAP erred in concluding that respondent met his burden to show that transfer to CPS should be granted.

“A person who is committed as [an SDP] . . . shall not be transferred out of a secure treatment facility unless the transfer is appropriate. Transfer may be to other treatment programs under the commissioner’s control.” Minn. Stat. § 253D.29, subd. 1(a). The following factors must be considered when evaluating a transfer request:

- (1) the person’s clinical progress and present treatment needs;
- (2) the need for security to accomplish continuing treatment;
- (3) the need for continued institutionalization;
- (4) which facility can best meet the person’s needs; and
- (5) whether transfer can be accomplished with a reasonable degree of safety for the public.

Id., subd. 1(b). “A party seeking transfer under section 253D.29 must establish by a preponderance of the evidence that the transfer is appropriate.” Minn. Stat. § 253D.28, subd. 2(e).

In granting respondent’s request for transfer, the CAP explained,

The [CAP] has considered all the evidence presented in this case. Dr. Tippet’s opinion is well-supported and the [CAP] finds that CPS is the best facility to meet [respondent’s] treatment needs. The need for security to accomplish [respondent’s] continuing treatment is not needed at the same level of his current facility and CPS will provide adequate security. Although [respondent] requires continued institutionalization, he will progress in treatment with the deinstitutionalization opportunities offered at CPS. Additionally the [CAP] finds that a transfer can be made with a reasonable degree of safety for the public.⁷

⁷ We note that although more detailed findings would have provided greater insight into the CAP’s reasoning and are therefore preferred, the CAP’s findings are adequate to enable review in this case under the standard set forth above.

Dr. Tippet provided the majority of the evidence supporting those findings. As to that evidence, the record shows that Dr. Tippet interviewed respondent and used actuarial risk tools to assess his risk of reoffending. Dr. Tippet did not diagnose respondent with a sexual disorder.⁸ Dr. Tippet opined that “[respondent’s] sexual assault of two adolescent females . . . is best accounted for by his personality disorder and chronic substance abuse.” Dr. Tippet noted that respondent does not have “remaining treatment need in areas of sexuality,” that he completed a full disclosure polygraph, which indicated no deception, and that he reported 11 years of sobriety. Dr. Tippet was “struck with [respondent’s] insight and [his] ability to self reflect.”

According to Dr. Tippet,

[Respondent] made the decision to disengage from treatment and . . . remained heavily engaged in the therapeutic community and becoming a CREST guide, which is a conflict resolution program. He also worked on a large-scale craft project collaboratively with a number of other clients.

He was noted to speak up in community meetings to counsel others to practice emotional regulation and other . . . prosocial management tools.

However, Dr. Tippet also recognized that “[h]istorically [respondent] had great difficulty following rules and policies and maintaining what we call behavioral control. As he has progressed in treatment he has demonstrated an increased ability to follow those

⁸ Respondent has been diagnosed with: antisocial personality disorder, posttraumatic stress disorder (provisional), “[e]ncounter for mental-health services for perpetrator of nonparental child sexual abuse,” cocaine-use disorder, alcohol-use disorder, cannabis-use disorder, amphetamine-type substance-use disorder, and problems related to other legal circumstances.

rules and understand why the procedures are there.” She testified that “[g]iven his lack of time in the community in a constructive manner it will be very important for him to have a slow and controlled reintegration into the community” and that she was “not aware of any opportunities for reintegration work at” his current treatment facility. Dr. Tippet opined that respondent’s treatment needs can be met at CPS because “[i]t provides him with continued inpatient intensive treatment for the factors which we have discussed . . . , but it also adds in the more accountable and treatment savvy peers, prosocial group, as well as reintegration possibilities as he progresses and does well.” She also opined that a transfer to CPS can be accomplished with a reasonable degree of safety for the public.

The CAP obviously found Dr. Tippet’s opinion persuasive, and this court “generally [defers] to a district court’s evaluation of expert testimony.” *Fugelseth*, 907 N.W.2d at 256 (quotation omitted). But we also examine the record to determine whether the evidence as a whole sustains the CAP’s findings. We therefore cannot ignore evidence from Dr. Tippet that speaks against transfer. For example, Dr. Tippet gave respondent a score of six on the Static-2002R, which places him in the above-average risk category. Dr. Tippet gave respondent a score of five on the Static-99R, which indicates an above-average risk for sexual reoffense when compared to a typical offender. Dr. Tippet agreed that respondent’s treatment participation in the past few years has been “on and off.” Moreover, Dr. Tippet reported, “When looking at a transfer, of concern is [respondent’s] propensity to break rules. The degree to which he has engaged in rule breaking behavior has decreased over the years, although he is still given to difficulty in this area.” Dr. Tippet testified that “there continue to be difficulties with intimacy and other things which we’ve

talked about, emotional regulation, which would necessitate further treatment.” She also testified that “[respondent] tends to struggle with prosocial problem solving, both historically and he still has difficulty currently.”

Other witnesses echoed the concerns raised by Dr. Tippet. For example, MSOP Clinical Director Peter Puffer testified that the MSOP clinical leadership does not support respondent’s request for transfer because he has issues with “mistrust,” “sexuality,” and “developing healthy appropriate relationships with other people,” and because he does not demonstrate insight about “the dynamics that underlie the actual sexual abuse of other people.” According to Puffer, respondent “is a Phase II client who has not demonstrated actively that he has an understanding of why he committed the offenses that he committed.”

After interviewing respondent and reviewing his records, court-appointed examiner Dr. Kenning did not support the petition for transfer. Dr. Kenning was involved in respondent’s initial commitment proceeding and has “known him for a long time.” Dr. Kenning explained that respondent still needs the external controls, security, and structure provided at his current treatment facility. Like Dr. Tippet, Dr. Kenning gave respondent a score of six on the Static-2002R, which places him in the above-average risk category. Dr. Kenning testified that respondent’s risk for recidivism is “pretty high,” noting that he falls between “above average [and] well above average.”

As to Dr. Tippet’s acknowledgment that respondent’s participation in treatment has been “on and off,” the record indicates that he participated in treatment from 2011 to 2014, and then stopped attending. Dr. Kenning reported that respondent “returned to groups in April 2016 and by the second half of the year he was participating consistently. However,

he attended only individual therapy, refusing modules and core group meetings from January 2017 to April 2017.” Respondent again stopped participating in treatment from May 2017 until July 2018. Puffer testified, “[T]here’s a pattern of him attending groups again somewhat sporadically and with varying levels of participation.” Puffer explained, “For the period of time when [respondent] wasn’t attending, he wasn’t attending the six hours of core groups or the modules. More recently he requested to not be placed in a particular module that his treatment team had identified for him. He did not want to attend.”

As to Dr. Tippet’s concern regarding respondent’s history of violating program rules, Dr. Kenning testified that he “continues to exhibit antisocial behavior,” “has a very strong problem with rules and regulations,” and has a “history of dysfunctional coping.” Dr. Kenning also noted concerns with respondent’s “grievance based thinking.” She testified that he “has quite a collection of poor-me stories.” When asked to elaborate, she explained, “Well, I think they’re the things that cause his wrangles with staff. He tends to see himself as the person who’s poorly treated in those interactions and doesn’t seem to have much insight into his contributions to those things.”

The record documents respondent’s issues with staff and peers. In February 2016, respondent punched a peer for allegedly grabbing one of his compact discs. In October 2016, respondent reportedly swore at staff. In April 2017, respondent verbally assaulted one of his therapists. Respondent was upset because there was an error regarding one of his offenses in a mental-health report. After he experienced difficulty trying to change the report, respondent yelled homophobic slurs at the therapist who made the error.

Dr. Kenning testified, “[Respondent] has a long history of . . . reacting to things that he considers to be errors in his report, so this [incident with the therapist] is not an isolated incident; this has happened multiple times.”

When CPS Operations Manager Michelle Sexe was asked about the characteristics of a patient who is successful at CPS, she responded,

[D]efinitely being a voice of the therapeutic community meeting; having developed internal controls to follow the rules; being able to confront their peers when they are not following the rules, and if that does not work it would require that they let staff know that another client is struggling; working collaboratively with the—all treatment staff at CPS.

Sexe voiced concern regarding the transfer to CPS of any individual who has a history of verbal aggression toward staff.

In sum, although the record supports the CAP’s finding that, in theory, respondent will have deinstitutionalization opportunities at CPS,⁹ it also shows that respondent’s participation in treatment has been inconsistent, that he continues to have treatment needs related to the antisocial personality disorder that accounts for his sexual offenses, that he has had difficulty complying with the rules and expectations of his current treatment program, and that he has engaged in physically and verbally aggressive behavior. This record does not support the CAP’s findings that CPS is the best facility to meet respondent’s needs, that less security is necessary to accomplish respondent’s continuing treatment, that CPS will provide adequate security, that respondent will progress in

⁹ Sexe testified that a Phase II client such as respondent may not go into the community unless the CPS director were to depart from the program design.

treatment at CPS, or that a transfer can be made with a reasonable degree of safety for the public.

Again, this court generally defers to the CAP's evaluation of expert testimony such as Dr. Tippet's. *Fugelseth*, 907 N.W.2d at 256. But, as the supreme court noted in *Johnson*, a reviewing court must "determine from an examination of the record if the evidence as a whole sustains the [CAP's] findings." 323 N.W.2d at 728. And unlike other cases in which this court has affirmed the CAP's grant of a petition for a reduction in custody, in this case, the evidence as a whole does not support the CAP's findings. See *Duvall*, 916 N.W.2d at 894 (noting that petitioner "achieved the privileges of his current treatment plan, maintained a community-based support system, acted in a leadership role in the therapeutic community, and prepared for his transition into the community"); *Fugelseth*, 907 N.W.2d at 256 (noting that the petitioner "has a low risk of recidivism, has had privileges in the community on a regular basis without incident, has a strong support network, and has completed all recommended treatment programming").

D E C I S I O N

Because the evidence as a whole does not support the CAP's findings, the CAP erred by granting respondent's request for transfer. We therefore reverse.

Reversed.