STATE OF MINNESOTA

IN SUPREME COURT

A20-1007

Court of Appeals — Anderson, J.

In the Matter of the Civil Commitment of: Mitchell Lee Kenney.

Filed: August 18, 2021
Office of Appellate Courts

Jennifer L. Thon, Steven D. Winkler, Warren J. Maas, Jones Law Office, Mankato, Minnesota, for appellant Mitchell Kenney.

Keith Ellison, Attorney General, Brandon Boese, Assistant Attorney General, Saint Paul, Minnesota, for respondent Commissioner of the Department of Human Services.

S Y L L A B U S

1. The clear-error standard of review does not permit an appellate court to reweigh the evidence.

2. The Commitment Appeal Panel did not clearly err by granting appellant's petition for provisional discharge.

Reversed and remanded.

O P I N I O N

ANDERSON, Justice.

Appellant Mitchell Kenney was civilly committed as a sexually dangerous person in 2010. In 2018, he petitioned for a reduction in custody. After conducting a de novo review of the recommendation by the Special Review Board (SRB), the Commitment

Appeal Panel (CAP) granted his petition for provisional discharge. The court of appeals reversed, concluding that the CAP "substituted its judgment for that of the experts who testified" and that the "overwhelming weight of the evidence shows that provisional discharge is premature." *In re Civ. Commitment of Kenney*, No. A20-1077, 2020 WL 7488999, at *4 (Minn. App. Dec. 21, 2020). We granted Kenney's petition for review to address the court of appeals' application of the clear-error standard of review.

We conclude that a clear-error review does not permit an appellate court to reweigh the evidence. We also conclude that, as a whole, the evidence in the record reasonably supports the CAP's decision that the Commissioner for the Department of Human Services (Commissioner) failed to prove by clear and convincing evidence that provisional discharge is not appropriate for Kenney under Minn. Stat. § 253D.30 (2020). Accordingly, we reverse the decision of the court of appeals and remand to that court to address the remaining issue in this appeal.

FACTS

The central facts are not substantially disputed. From 1992 to 2004, Kenney was adjudicated delinquent of multiple sexual offenses against minors, and in 2004 he was convicted of first-degree criminal sexual conduct against a minor. He also has admitted to other sexual offenses against minors for which he was not charged.

In 2010, Kenney was indeterminately committed to the Minnesota Sex Offender Program (MSOP) as a sexually dangerous person. He later petitioned for, and was granted, a transfer to MSOP's Community Preparation Services (CPS), which is a nonsecure treatment setting in St. Peter.

MSOP is a three-phase program. Phase I focuses on a client's ability to control behavior and consistently follow the rules of the program. Phase II helps a client to understand and address the issues and motivations underlying the offense behavior that led to the civil commitment. Phase III is the transitional phase, which prepares a client to reintegrate into the community. Kenney has been in Phase II since 2011.

In 2018, Kenney petitioned for a reduction in custody, in the form of either a full or provisional discharge. The Commissioner and McLeod County opposed the petition.

After holding an evidentiary hearing, the SRB recommended that Kenney's request for full discharge be denied but that his request for provisional discharge be granted. *See* Minn. Stat. § 253D.27, subds. 3–4 (2020) (requiring the SRB to hold a hearing and issue a report and recommendation). The SRB found that Kenney complied with the CPS rules, made continuing gains in treatment, consistently took an active role in group therapy, demonstrated leadership abilities, exhibited high motivation, and had a number of "protective factors" that mitigate against the risk of recidivism. The SRB also found that Kenney's provisional discharge plan contained extensive conditions that would reasonably protect the public and enable Kenney to successfully adjust to the community. Accordingly, the SRB found that full discharge would be premature but that provisional discharge would be appropriate. *See* Minn. Stat. §§ 253D.30–.31 (2020) (providing criteria for provisional or full discharge).

The Commissioner requested reconsideration and rehearing of the SRB's recommendation to grant provisional discharge.[1] *See* Minn. Stat. § 253D.28, subd. 1(a) (2020). The CAP held a 2-day hearing at which it received exhibits and heard testimony from Scott Halvorson, Kelly Meyer, Michelle Ensz, Christopher Schiffer, Jessica Scharf, Andrea Lovett, and Kenny.

Scott Halvorson, the MSOP Reintegration Director, described the structure that MSOP uses to supervise clients who reside in the community on provisional discharge. Clients graduate to less restrictive tiers of supervision based on good behavior and, conversely, can lose privileges or even have provisional discharge revoked for improper behavior. Halvorson testified that the program has a process in place to find suitable housing and treatment providers and to ensure a continuity of care for clients who are provisionally discharged.

Kelly Meyer, one of Kenney's primary clinical therapists at MSOP, testified that Kenney successfully completed a 9-month program designed to reduce deviant sexuality and increase healthy arousal. She described Kenney as one of the most "motivated," "mature," and "independently dedicated" clients that she has worked with at MSOP. Meyer testified that Kenney has "very strong" social supports, and while he is responsible for carrying out his own aftercare plan, he also serves as a guide in a support group for other MSOP clients. Meyer acknowledged that Kenney experiences anxiety related to

[1] Kenney initially requested reconsideration of the SRB's recommendation to deny his petition for full discharge, but he later withdrew that portion of his discharge petition. McLeod County did not petition for reconsideration but participated in the proceedings before the CAP. The County has not participated in this appeal.

managing his sexual interests and that he has had few opportunities to practice his management techniques outside of the CPS.

Michelle Ensz, another of Kenney's primary therapists at MSOP, testified that Kenney has perfect treatment attendance and is a "motivated client" who is "extremely active" in group therapy sessions and is appropriately vulnerable with others. She described ways in which Kenney takes ownership of his treatment and has grown in identified areas of weakness. But she also agreed that his healthy sexuality is "rigid" and "limited," he struggles with anxiety from standards he sets for himself, and he has had very little opportunity to face situations outside of the CPS context.

Christopher Schiffer, the Clinical Court Services Director, is a member of MSOP's clinical leadership. He helps design and set in motion a client's treatment at MSOP, serving as a bridge between clinical services, the courts, the SRB, and clients. The parties stipulated that Schiffer is an expert concerning MSOP's treatment program. Schiffer opined that provisional discharge would be premature for Kenney. He acknowledged that Kenney has been doing "very well" in the program and "may be ready to begin a process of reintegration" into the community but nevertheless concluded that Kenney needs the support of the CPS program because of his longtime struggle with pedophilic interests and a fear of rejection from peers and caregivers. He explained that the CPS is a better location to begin reintegration because it offers a therapeutic community and access to clinical staff and security counselors that cannot be matched by provisional discharge. He testified that MSOP clients build confidence with "progressive successes" in treatment, rather than a "dive into the deep end."

Jessica Scharf, Psy.D., L.P., conducted a sexual violence risk assessment of Kenney, which considers historical factors, current treatment status, and the statutory criteria for a reduction in custody. Dr. Scharf diagnosed Kenney with various disorders, including a pedophilic disorder and unspecified anxiety disorder. Based on actuarial assessments, she rated Kenney's static (unchangeable) risk of recidivism as above to well above average, which would be mediated as Kenney works to manage dynamic (changeable) risk factors and increase the presence of protective factors that mitigate the risk of recidivism. She also identified which dynamic risk factors and dynamic protective factors were present and determined that he had a moderate need level.

Dr. Scharf testified that Kenney has worked to address the reasons for his commitment, including in the areas of sexuality, feelings of low self-worth, self-doubt and social rejection, and interpersonal skills and relationships. She noted that Kenney's progress is exemplified by the ratings on his 2019 annual progress report. Although she acknowledged that one of Kenney's "most salient remaining needs" is reintegration, she opined that the reintegration should begin while he has the "support and supervision offered in his present therapeutic treatment community." Accordingly, she also concluded that provisional discharge is not appropriate at this time, in light of Kenney's needs and in the interests of public safety.

Andrea Lovett, Ph.D., L.P., the court-appointed independent examiner, diagnosed Kenney with various disorders, including a pedophilic disorder and personality disorder. She rated his overall risk of recidivism as "at least" or "about" average, based on a combination of actuarial scores, dynamic risk factors, and protective factors. Dr. Lovett

noted that, although early on Kenney had fluctuated in his motivation and attendance in treatment at the CPS, he seemed to "hit his stride" in late 2017 or early 2018. She testified that Kenney "stands out both in terms of the rate of his progression in treatment as well as his dedication and level of effort," "has done everything that we could ask of him," and thus is "more than ready" to start transitioning to the community. She ultimately concluded, however, that the reintegration process should begin in the CPS setting. She explained that Kenney has "entrenched pedophilic interests" that require a significant amount of time and energy to manage, even in the "reasonably controlled environment" of the CPS. She opined that, as he begins reintegration, Kenney will require "a slow, gradual, and supervised progression of exposure to the community while residing within his current setting."

Dr. Lovett also emphasized the importance of the CPS community, where Kenney has constant support from peers and staff, because his feelings of anxiety, inferiority, and fear of rejection from peers have historically been "triggers" for offending. Dr. Lovett expressed concern that granting provisional discharge now could be "sabotaging his possibility for success." Consequently, she opined, provisional discharge is premature in light of Kenney's ongoing treatment needs and in the interests of public safety.

Kenney testified that he believes provisional discharge is the right step for him, as it provides "some reintegration" with "some support work." He acknowledged that his deviant sexual interest is always a part of him and must be managed, but, he testified, he does so by following the plans he has in place. He testified that he has an arousal management plan, a mental health plan, and a relapse prevention plan, all of which he

created and continually updates to keep himself on track. He explained that he has done everything asked of him in treatment. Kenney testified that his trips to Moose Lake and an additional trip to obtain a state-issued identification card went well. He identified his support network, inside of MSOP and outside of the program.

In support of his petition, Kenney offered MSOP's provisional discharge plan, which, he testified, he would follow.[2] That plan contains 37 conditions, which include, among others, GPS monitoring, face-to-face appointments with a supervisor, scheduled and nonscheduled substance testing, residing at an MSOP-approved residence with adequate security and monitoring measures, preapproval to leave the residence, ongoing participation in outpatient treatment programs, attendance at support groups, preapproval to access the internet, and avoiding direct or indirect contact with minors, known victims, or vulnerable adults without preapproval.

Applying a de novo standard of review to the SRB's recommendation to grant provisional discharge, the CAP found that the Commissioner and McLeod County had failed to prove by clear and convincing evidence that Kenney's petition for provisional discharge should be denied. The CAP also found that Kenney's course of treatment and present mental status show that he no longer needs treatment and supervision in the CPS setting. *See* Minn. Stat. § 253D.30, subd. 1(b)(1). It observed that Kenney has made great

[2] Because a provisional discharge does not automatically terminate, Kenney would be required to follow this plan unless he requests and is granted a change in the conditions of the plan or unless he petitions for and is granted a full discharge. *See* Minn. Stat. § 253D.30, subd. 3.

progress in his treatment and found "no credible evidence that he would be unable to make continued clinical progress in an outpatient setting."

The CAP also found that the conditions of Kenney's provisional discharge plan will provide a reasonable degree of protection to the public and enable him to make an acceptable adjustment to the community. *See id.*, subd. 1(b)(2). The panel disagreed with the notion that granting provisional discharge would be akin to throwing Kenney into the deep end of a pool, stating that it "undervalues the progress [that Kenney] has made in treatment at MSOP and the good work [Kenney] and his clinical staff have done on managing his sexual deviance and anxiety." Accordingly, the CAP granted Kenney's petition for provisional discharge.

The Commissioner appealed. In an unpublished opinion, the court of appeals reversed. *In re Civ. Commitment of Kenney*, No. A20-1007, 2020 WL 7488999 (Minn. App. filed Dec. 21, 2020). The court first explained that it reviews the CAP's decision for clear error and does not "reweigh the evidence as if trying the matter de novo." *Id.* at *2. But the court next stated that the clear-error standard "still appears to lend itself to some inherent reweighing of the evidence." *Id.* (citing *In re Civ. Commitment of Edwards*, 933 N.W.2d 796, 805 (Minn. App. 2019), *rev. denied* (Minn. Oct. 15, 2019)). The court then determined that the record as a whole does not reasonably support the CAP's conclusion that provisional discharge is the appropriate next step for Kenney, stating that the panel may reject expert testimony but cannot "disregard the evidence as a whole." *Id.* at *3–4. Further, the court concluded that the record "includes substantial uncontradicted evidence that the conditions of Kenney's provisional discharge plan" would neither provide

a reasonable degree of public safety nor enable him to successfully adjust to the community. *Id*. at *4. Accordingly, the court reversed the decision of the CAP. *Id.*

We granted Kenney's petition for review.

ANALYSIS

Kenney makes two arguments in this appeal. He first contends that the court of appeals misstated and misapplied the clear-error standard of review by allowing for "inherent reweighing" of the evidence. Under a proper clear-error standard of review, he argues that the evidence as a whole reasonably supports the CAP's decision to grant his provisional discharge petition.[3]

I.

We begin by addressing the contours of clear-error review, specifically, whether that standard, as the court of appealsstated, permits an appellate court to engage in some "inherent reweighing" of the evidence. *Kenney*, 2020 WL 7488999, at *2.

Kenney argues that current and historic formulations of the clear-error standard do not permit an appellate court to engage in any reweighing of the evidence and that the court of appeals' suggestion otherwise blurs the distinction between clear error and de novo review. The Commissioner responds that the court of appeals made a "single passing statement" that was not critical to its decision. Further, the Commissioner contends that,

[3] The Commissioner contends that Kenney forfeited review of the second issue—the merits of the CAP's decision—because his petition for review asked us to determine only whether the court of appeals misstated and misapplied the clear-error standard. We reach both issues because the first question impliedly seeks, and in fact requires, our substantive review of the CAP decision and, as a whole, the record.

in any event, the court of appeals applied the clear-error standard of review correctly when reviewing the decision of the CAP in this appeal.

The clear-error standard of review is familiar because it applies across many contexts. *See* Minn. R. Civ. P. 52.01 (requiring deference to a district court's findings of fact in a civil case unless those findings are clearly erroneous). Although our language has varied slightly, we have consistently said that findings are clearly erroneous when they are "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 726 (Minn. 1985); *see Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) ("If there is reasonable evidence to support the trial court's findings of fact, a reviewing court should not disturb those findings."). In applying the clear-error standard, we view the evidence in a light favorable to the findings. *In re Pamela Andreas Stisser Grantor Tr.*, 818 N.W.2d 495, 507 (Minn. 2012). We will not conclude that a factfinder clearly erred unless, "on the entire evidence," we are "left with a definite and firm conviction that a mistake has been committed." *N. States Power Co. v. Lyon Food Prods., Inc.*, 229 N.W.2d 521, 524 (Minn. 1975).

Despite the variations in language, none of these formulations permits an appellate court to reweigh the evidence when reviewing for clear error. We have repeatedly stated that clear-error review does not permit an appellate court "to weigh the evidence as if trying the matter *de novo*." *Johnson v. Noot*, 323 N.W.2d 724, 728 (Minn. 1982), *superseded by statute on other grounds*, *Enebak v. Noot*, 353 N.W.2d 544, 547 (Minn. 1984). Neither does it "permit [an appellate court] to engage in fact-finding anew," even if the court would

find the facts to be different if it determined them in the first instance. *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013). Nor should an appellate court "reconcile conflicting evidence." *Fletcher*, 589 N.W.2d at 101; *see Tonka Tours, Inc.*, 372 N.W.2d at 727 (stating that an appellate court's duty "is not to substitute its own judgment for that of the trial court"). Consequently, an appellate court need not "go into an extended discussion of the evidence to prove or demonstrate the correctness of the findings of the trial court." *Meiners v. Kennedy*, 20 N.W.2d 539, 540 (Minn. 1945). Rather, because the factfinder has "the primary responsibility of determining the fact issues" and the "advantage" of observing the witnesses in "view of all the circumstances surrounding the entire proceeding," an appellate court's " 'duty is fully performed' " after it has fairly considered all the evidence and has determined that the evidence reasonably supports the decision. *State ex rel. Peterson v. Bentley*, 71 N.W.2d 780, 786 (Minn. 1955) (citation omitted); *see LaPoint v. Family Orthodontics, P.A.*, 892 N.W.2d 506, 515 (Minn. 2017) (explaining the deference due to a factfinder who " 'has the advantage' " of hearing the testimony, assessing credibility, and acquiring a thorough understanding of the circumstances at issue (citation omitted)).

Thus, the clear-error standard does not contemplate a reweighing of the evidence, inherent or otherwise; it is a review of the record to confirm that evidence exists to support the decision. This is not to say that an appellate court must ignore the nature of the evidence in its review, or that a factfinder may base findings entirely on unreliable evidence. For example, in *Johnson*, we determined that the "reliable evidence" from those "most familiar with the case" required the conclusion that one of the petitioners was not mentally ill within

the meaning of the statute. 323 N.W.2d at 728. Accordingly, we reversed the CAP's finding that the petitioner was mentally ill. *Id.* at 729.

Here, the court of appeals correctly recognized that it must "examin[e] the record to determine whether the evidence as a whole sustains [the CAP's] findings" and not "reweigh the evidence as if trying the matter de novo." *Kenney*, 2020 WL 7488999, at *2. But in the next sentence, the court stated that this standard "still appears to lend itself to some inherent reweighing of the evidence." *Id.* Engaging in "some inherent reweighing" is inconsistent with the clear-error standard in our decisions and the clear-error standard the court of appeals has applied in similar cases. *See, e.g.*, *In re Civ. Commitment of Duvall*, 916 N.W.2d 887, 894, 897 (Minn. App. 2018) (stating that the appellate court "will not reweigh the evidence," even if the record provides a reasonable basis for a different decision, and rejecting arguments asserting "that the evidence should have been weighed differently"), *rev. denied* (Minn. Sept. 18, 2018); *In re Civ. Commitment of Fugelseth*, 907 N.W.2d 248, 256 (Minn. App. 2018) (stating that the "question is *not* whether the record could support a finding" of dangerousness, "the question is whether the [CAP] clearly erred by finding" otherwise), *rev. denied* (Minn. Apr. 17, 2018); *In re Civ. Commitment of Kropp*, 895 N.W.2d 647, 650 (Minn. App. 2017) (stating that the appellate court does not "reweigh the evidence as if trying the matter de novo" because "it is

immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary"), *rev. denied* (Minn. June 20, 2017).[4]

In sum, the role of an appellate court is not to weigh, reweigh, or inherently reweigh the evidence when applying a clear-error review; that task is best suited to, and therefore is reserved for, the factfinder. *See In re Civ. Commitment of Ince*, 847 N.W.2d 13, 24 (Minn. 2014) (stating that a factfinder is in the best position to "weigh the evidence and assess credibility"); *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995) (affording "due regard" to the factfinder's opportunity to "judge the credibility of the witnesses"). Instead, it is the duty of an appellate court to "fully and fairly consider [the] evidence, but so far only as is necessary to determine beyond question that it reasonably tends to support the findings" of the factfinder. *Carver v. Bagley*, 81 N.W. 757, 757–58 (Minn. 1900). When the record reasonably supports the findings at issue on appeal, "it is immaterial that the

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[4] The decision in *In re Civil Commitment of Edwards*, which the court of appeals cited as support for inherent reweighing, *Kenney*, 2020 WL 7488999, at *2, is consistent with these earlier decisions. 933 N.W.2d 796 (Minn. App. 2019), *rev. denied* (Minn. Oct. 15, 2019). In *Edwards*, the court sought to clarify the standard of review when considering the CAP's "decision on the merits of a petition for a reduction in custody." *Id*. at 799. In doing so, the *Edwards* court said *repeatedly* that it does not weigh or reweigh the evidence as if trying the matter de novo. *Id*. at 800–03. The court reversed the CAP's decision to grant Edwards's petition for a reduction in custody, in part because it could not "ignore" evidence from one expert "that speaks against transfer." *Id*. at 804–05. Despite the expert's support for a transfer, the "evidence as a whole," including from that expert, demonstrated that Edwards's participation in treatment was inconsistent, his treatment needs continued, he was unable to comply with program rules and expectations, and he was physically and verbally aggressive. *Id*. at 806–07. Given the court's repeated rejection of any weighing or reweighing in reaching this conclusion, we understand *Edwards* as simply a decision that the evidence as a whole did not reasonably support the CAP's decision.

record might also provide a reasonable basis for inferences and findings to the contrary." *Don Kral Inc. v. Lindstrom*, 173 N.W.2d 921, 924 (Minn. 1970).

II.

We now turn to the decision of the CAP, reviewing its findings for clear error. *See Ince*, 847 N.W.2d at 22 (reviewing for clear error the district court's determination in a civil commitment matter that the offender was "highly likely to engage in acts of harmful sexual conduct"); *Johnson*, 323 N.W.2d at 728 (reviewing for clear error the factfinder's determination of whether two petitioners who were seeking full discharge were mentally ill).

Kenney's civil commitment is governed by the Minnesota Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities, Minn. Stat. §§ 253D.01–.36 (2020). A committed person may petition for a reduction in custody, including a provisional discharge from the commitment. Minn. Stat. § 253D.27, subds. 1(b), 2. When the CAP reviews a recommendation made on the petition by the SRB, the petitioner seeking a reduction in custody "bears the burden of going forward with the evidence, which means presenting a prima facie case with competent evidence to show that the person is entitled to the requested relief." Minn. Stat. § 253D.28, subd. 2(d). When the petitioner meets this burden of production, the party opposing the petition for a reduction in custody bears the burden to prove by clear and convincing evidence that the petition should be denied. *Id.*

A person who is committed as a sexually dangerous person can be provisionally discharged when "the committed person is capable of making an acceptable adjustment to

open society." Minn. Stat. § 253D.30, subd. 1(a). When determining whether provisional discharge should be granted, the CAP must consider two factors:

> (1) whether the committed person's course of treatment and present mental status indicate there is no longer a need for treatment and supervision in the committed person's current treatment setting; and
>
> (2) whether the conditions of the provisional discharge plan will provide a reasonable degree of protection to the public and will enable the committed person to adjust successfully to the community.

Id., subd. 1(b). Here, it is undisputed that Kenney presented a prima facie case that he is entitled to relief, and thus, the Commissioner bore the burden to prove by clear and convincing evidence that provisional discharge was not appropriate under the above factors. Therefore, we must determine whether the CAP clearly erred by finding that the Commissioner did not meet her burden.

Our focus becomes whether the CAP erred by granting provisional discharge to Kenney against the unanimous recommendation of three experts. Kenney insists that, although experts provide help to the CAP, the CAP is not bound by those recommendations when determining whether provisional discharge is appropriate under the statutory factors. He also argues that the decision of the CAP is supported by substantial evidence in the record as a whole, including treatment records, lay and clinical witness testimony, and various parts of the experts' own testimony and reports.

The Commissioner contends that the CAP clearly erred by declining to follow the recommendation of experts Schiffer, Dr. Scharf, and Dr. Lovett. The Commissioner does not claim that the CAP must *always* follow unanimous expert opinions, but she posits that, in a case like this in which the expert opinions are not based on incorrect facts or data, the

record does not reasonably support the CAP's decision to grant the petition for provisional discharge.

We have previously acknowledged the importance of expert testimony in civil commitment cases. *See Ince*, 847 N.W.2d at 23–24 ("As the trier of fact, the district court will be in the best position to determine the weight to be attributed to each factor, as well as to evaluate the credibility of witnesses—a critical function in these cases *that rely so heavily on the opinions of experts*." (emphasis added)). Indeed, determining a person's mental state often requires the use of experts. *See* Minn. Stat. § 253D.28, subd. 2(c) (allowing the CAP to appoint an examiner and "hear and receive all relevant evidence" on a petition for a reduction in custody); *Addington v. Texas*, 441 U.S. 418, 429 (1979) ("Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists.").

But a factfinder is not bound by witness testimony, even if uncontradicted, when there is reason to doubt the testimony. A factfinder "is not required to accept even uncontradicted testimony if improbable or if surrounding facts and circumstances afford reasonable grounds for doubting its credibility." *Waite v. Am. Fam. Mut. Ins. Co.*, 352 N.W.2d 19, 22 (Minn. 1984); *see Caballero v. Litchfield Wood-Working Co.*, 74 N.W.2d 404, 408 (Minn. 1956) ("Clear, positive, direct, and undisputed testimony by an unimpeached witness, which is not in itself contradictory or improbable, cannot be rejected or disregarded by either court or jury, *unless the evidence discloses facts and circumstances which furnish a reasonable ground for so doing.*" (emphasis added)). The

same is true of uncontradicted testimony from experts. *See Krueger v. Knutson*, 111 N.W.2d 526, 536 (Minn. 1961) (explaining that the opinions of medical experts on a contested issue "are not conclusive unless so positive as to exclude all doubt as to the matter on which they are given and unless based on testimony which is positive, consistent, unimpeached, and uncontradicted").

These principles apply to decisions on petitions for a reduction in custody from civil commitment, which are subject to the CAP's de novo review. *See* Minn. Stat. § 253D.28, subd. 3 (requiring a "majority of the judicial appeal panel" to "rule upon the petition" de novo). Accordingly, when making determinations about the statutory factors for provisional discharge, the CAP is not bound by the recommendations of the experts, unless the experts' testimony is "so positive as to exclude all doubt as to the matter on which they are given and unless based on testimony which is positive, consistent, unimpeached, and uncontradicted." *Krueger*, 111 N.W.2d at 536. When other evidence in the record as a whole—such as treatment records, lay or clinical testimony, or parts of an expert's report or testimony—reasonably supports a finding contrary to the unanimous recommendation of the experts, the CAP is not required to adopt the experts' opinions. *See Duvall*, 916 N.W.2d at 894–95 (stating that the CAP did not err by discounting the opinions of two experts who opined against provisional discharge, in light of the "plethora of records" reflecting the petitioner's behavioral compliance and treatment gains).

Here, the record before the CAP was extensive: there were 29 exhibits and testimony from 7 witnesses. Although three experts opined that Kenney is not ready for provisional discharge, they each acknowledged Kenney's successes at MSOP. For

example, Dr. Lovett testified that Kenney is "behaviorally compliant," his "attendance and participation in treatment has been excellent," he has "made significant progress in treatment," and is "invested in making changes in himself." Taking all the relevant static and dynamic factors into account, Dr. Lovett considered Kenney at average risk for recidivism. Having reviewed his mental health, relapse prevention, and arousal management plans, Dr. Lovett agreed that these plans would help minimize situations that could increase Kenney's risk of recidivism while in the community. Schiffer and Dr. Scharf also acknowledged Kenney's successful progress in treatment. Given his undisputed progress in treatment, the experts acknowledged that Kenney is ready—and should have already begun—transitioning to the community.

As the Commissioner notes, however, each of the three experts "unequivocally testified" that Kenney's needs could be met only at the CPS. For example, Dr. Scharf stated that Kenney needed the "support and supervision offered in his present therapeutic treatment community." Dr. Lovett similarly opined that Kenney "requires a slow, gradual, and supervised progression of exposure to the community while residing within his current setting." And Schiffer opined that provisional discharge at this time could be likened to dropping Kenney into the deep end, rather than allowing for a gradual entry.

The CAP rejected these opinions based on its own assessment of the evidence as a whole, and substantial evidence in the record supports the CAP's decision to do so. For example, according to Kenney's treatment records, the testimony of his therapists, and the reports and testimony of the experts, he has shown great motivation and made remarkable progress in learning to manage his sexual interests and anxiety. Dr. Lovett and Dr. Scharf

testified that Kenney is "more than ready" to begin transitioning to the community, although they ultimately recommended that this process begin at the CPS so that he could continue to have the community support of the CPS.

Further, the record demonstrates that provisional discharge bears many similarities to transitioning while at the CPS. Dr. Lovett testified that there are comparable treatment programs to address Kenney's mental health needs on an outpatient basis. Witnesses testified that both the CPS and provisional discharge would gradually reintroduce Kenney to society while maintaining a high level of supervision. And although Kenney has been on only three community outings, the CAP found that he credibly testified about his experiences and found that there were no behavioral or other incidents. Thus, although conflicting evidence exists, the CAP could reasonably find that Kenney's course of treatment and present mental status show that he does not need to be in the CPS setting. As one expert testified, this case presents a "close call." Ultimately, we conclude that the CAP did not clearly err by finding that Kenney's current treatment and mental state no longer require treatment and supervision in a secure setting. *See* Minn. Stat. § 253D.30, subd. 1(b)(1).

As to the second statutory factor, the CAP found that the conditions of Kenney's provisional discharge plan will provide a reasonable degree of protection to the public and enable him to adjust successfully to the community. *See id.*, subd. 1(b)(2). The Commissioner asserts that the CAP's finding on this factor is clearly erroneous because "the only two witnesses qualified to opine on risk, and who actually reviewed Mr. Kenney's provisional discharge plan," testified that the statutory factor was not met.

Although there is conflicting evidence, the CAP's finding is supported by the record as a whole. Evidence in the record includes the detailed conditions of Kenney's provisional discharge plan, the graduated supervision tiers that MSOP has in place for provisional discharge, Kenney's cooperative attitude and openness with clinical staff, and the availability of outpatient support groups and treatment providers. The panel's finding is also supported by Dr. Lovett's assessment that Kenney's overall recidivism risk is close to average after protective factors are accounted for. It is further supported by Kenney's consistent treatment gains and positive attitude. Kenney also testified about the plans he has prepared to manage his risks and his commitment to adhering to those plans.

Notably, section 253D.30 does not authorize provisional discharge only on a showing that a petitioner *will not* recidivate; it allows provisional discharge when the petitioner's plan provides a "reasonable" degree of protection to the public with conditions that "enable" the petitioner to adjust successfully. Kenney's progress and the level of supervision that his plan will involve, his demonstrated motivation and treatment progress, and the services and support that will be available to him on provisional discharge is evidence that reasonably supports the CAP's findings on this factor. Accordingly, the CAP did not clearly err by finding that the conditions of Kenney's discharge plan will allow him to adjust to the community while providing a reasonable degree of public safety. *See id.*

In sum, because the record as a whole reasonably supports the CAP's findings, the CAP did not clearly err by granting Kenney's petition for provisional discharge.[5]

CONCLUSION

For the foregoing reasons, the decision of the court of appeals is reversed, and we remand to the court of appeals for consideration of the remaining issue raised in this appeal.

Reversed and remanded.

[5] Because it held that the Appeal Panel clearly erred, the court of appeals did not reach the Commissioner's additional argument that the Appeal Panel exceeded its authority by effectively directing Kenney's course of treatment. *Kenney*, 2020 WL 7488999, at *4. We therefore remand to that court to allow it to address this argument.