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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY GOLDBERG,

Defendant and Appellant.

A134863

(San Mateo County  
Super. Ct. No. CIV 497921)

Jeffrey Goldberg was committed to the Department of Mental Health for an indefinite term after a jury found him to be a sexually violent predator (SVP) within the meaning of the Sexually Violent Predators Act (SVPA).<sup>1</sup> On appeal, he contends that his commitment cannot be sustained because the jury’s determination was supported by insufficient evidence, he was entitled to a jury instruction clarifying the definition of “diagnosed mental disorder,” and the SVPA is unconstitutional. We disagree and affirm.

I.  
FACTUAL AND PROCEDURAL  
BACKGROUND

Over the course of six years in the 1980s, Goldberg raped, sodomized, or otherwise sexually attacked at least nine women. The attacks began in 1983, when he used a razor to threaten a 15-year-old prostitute (V.M.), and then raped and sodomized her and forced her to orally copulate him. Goldberg was sentenced to prison, but the

<sup>1</sup> Welfare and Institutions Code, section 6600 et sequitur. Unless otherwise noted, all further statutory references are to the Welfare and Institutions Code.

sentence was suspended, and he received probation. In June 1984, approximately five months after being placed on probation, he sexually assaulted a former girlfriend (S.S.). Criminal charges were brought, but they were dismissed when Goldberg admitted that he had violated his probation. He was sentenced to prison for the probation violation, spent about six months in custody, and was released on parole in March 1985.

In 1986, while still on parole, Goldberg used a knife to threaten another prostitute (T.D.), whom he raped and forced to orally copulate him. On a separate occasion, he used a sharp object to assault and attempt to rape another prostitute (P.M.). Although the charges related to T.D. were eventually dismissed, Goldberg admitted that the incident occurred. Goldberg was convicted of the charges related to P.M. and sentenced to a six-year prison term. He served about three years in prison and, in June 1989, was released on parole again.

About a month after his release, Goldberg used a knife to threaten another prostitute (D.M.), whom he sodomized and forced to orally copulate him. Two weeks after he attacked D.M., Goldberg used a knife while raping yet another prostitute (V.M.). Goldberg was arrested, charged, and convicted of the offenses against D.M. and V.M., and sentenced to 39 years in prison.

Thus, the record shows that Goldberg sexually assaulted six women whose identities are known, all but the first when he was on probation or parole. With one exception—the sexual assault on S.S., Goldberg’s former girlfriend—all of these assaults involved Goldberg using a knife or other sharp object to force himself upon a prostitute. In addition, Goldberg admits to sexually assaulting at least three more prostitutes whose identities we do not know, bringing the total number of his sexual assaults to at least nine. All nine of these sexual assaults occurred during the approximately four and a half years between 1983 and 1989 when Goldberg was not incarcerated.

Goldberg has remained in custody since 1989. In August 2010, a few weeks before he was scheduled to be released from prison, the People filed a petition seeking his indefinite commitment to a state hospital as an SVP. The trial court found probable cause, and a jury trial was held in January 2012. Four clinical psychologists testified as

experts: Drs. Jesus Padilla and Marianne Davis for the People, and Drs. Brian Abbott and Christopher Heard for Goldberg. Drs. Padilla and Davis diagnosed Goldberg with paraphilic coercive disorder—a disorder in which a person’s sexuality is directed at nonconsensual sex—and concluded that he was likely to rape again if released. Drs. Abbott and Heard testified that paraphilic coercive disorder could not be reliably diagnosed. They also testified that even if Goldberg had a mental disorder predisposing him to sexually violent behavior, he was not sufficiently likely to reoffend to be considered an SVP. The jury found that Goldberg was an SVP, and the court ordered him committed to state hospital for an indefinite term. Goldberg timely appealed.

## II. DISCUSSION

For a person to be committed under the SVPA, the People must prove beyond a reasonable doubt that he or she is an SVP. (§ 6604.) This requires a jury or court to find that the person (1) has been convicted of a sexually violent offense against at least one victim and (2) has a “diagnosed mental disorder that makes [him or her] a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.” (§ 6600, subd. (a)(1).) In addition, this behavior must be predatory. (*People v. Hurtado* (2002) 28 Cal.4th 1179, 1182, 1187.) A “[d]iagnosed mental disorder” includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.” (§ 6600, subd. (c).)

Goldberg argues that his commitment as an SVP cannot be sustained because the jury’s determination was supported by insufficient evidence, he was entitled to a jury instruction clarifying the definition of “diagnosed mental disorder,” and the SVPA is unconstitutional. We reject all of his claims.

### A. *Sufficiency of the Evidence.*

Goldberg contends that there was insufficient evidence to establish that (1) paraphilic coercive disorder exists; (2) he has paraphilic coercive disorder; or (3) he is “likely” to reoffend if released. When reviewing challenges based on the sufficiency of

the evidence, we apply the substantial evidence standard of review. (*People v. Mercer* (1999) 70 Cal.App.4th 463, 466-467.) This standard requires us to “review the entire record in the light most favorable to the judgment to determine whether substantial evidence supports the determination below.” (*Id.* at p. 466; see also *People v. Cuevas* (1995) 12 Cal.4th 252, 260.) To be substantial, evidence must be “reasonable, credible, and of solid value.” (*Cuevas* at p. 260.) In reviewing whether the evidence meets this standard, we defer to the trier of fact’s credibility determinations, including determinations of “[t]he credibility of the experts and their conclusions.” (*Mercer* at pp. 466-467; see also *People v. Jones* (1990) 51 Cal.3d 294, 314 [“it is the exclusive province of the trial judge or jury to determine the credibility of a witness”].) “The testimony of one witness, if believed, may be sufficient to prove any fact. (Evid. Code, § 411.)” (*People v. Rasmuson* (2006) 145 Cal.App.4th 1487, 1508.) But expert medical opinion based on a “ ‘guess, surmise or conjecture, rather than relevant, probative facts, cannot constitute substantial evidence.’ ” (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1110.)

With this standard of review in mind, we turn to whether there was sufficient evidence upon which the jury could have concluded that paraphilic coercive disorder is a legitimate “diagnosed mental disorder,” that Goldberg suffered from the disorder, and that he was likely to reoffend if released.

1. Sufficient evidence was presented that paraphilic coercive disorder is a “diagnosed mental disorder.”

Goldberg argues that the evidence failed to establish that paraphilic coercive disorder is a valid mental disorder that can justify commitment as an SVP. Although we recognize that the experts’ contrasting opinions in this case echo a larger debate among mental-health professionals about the disorder, we conclude that sufficient evidence was presented for the jury to find that paraphilic coercive disorder is a legitimate mental disorder.

We begin by summarizing the evidence presented at the trial about paraphilic coercive disorder. A paraphilia is a mental disorder in which the person’s sexuality is

directed at an abnormal focus, such as children or nonhuman items. The version of the American Psychiatric Association's diagnostic manual of mental disorders current at the time of Goldberg's trial was the DSM-IV-TR (Diagnostic and Statistical Manual of Mental Disorders (Text rev. 4th ed.)). This version lists eight specific paraphilias. It also lists paraphilia not otherwise specified (NOS), a catchall category that encompasses dozens of other recognized paraphilias.

Paraphilic coercive disorder is also known as "paraphilia NOS nonconsenting persons" or "rape paraphilia." It is a paraphilia in which a person's sexual arousal is stimulated by nonconsensual sex. Paraphilic coercive disorder does not appear in the DSM-IV-TR, and the manual does not contain any diagnostic criteria for it other than those for paraphilia NOS.

Goldberg argues the evidence showed that paraphilic coercive disorder is insufficiently "accepted by the mental health community" to satisfy the SVPA's "diagnosed mental disorder" requirement. We are not persuaded. It is true that the testifying experts all agreed that the disorder, to the extent it exists, is rare, and the vast majority of rapists do not have it. But Drs. Padilla and Davis testified that paraphilic coercive disorder is well-recognized in the mental-health field. Even one of Goldberg's experts, Dr. Abbott, agreed with Drs. Padilla and Davis that paraphilic coercive disorder exists. Only Dr. Heard expressed doubt about the disorder's existence, based on the difficulty of diagnosing it. Thus, substantial evidence was presented upon which the jury could have relied in concluding that paraphilic coercive disorder is a valid mental disorder.

We also find it significant that our Supreme Court and other courts of appeal have upheld SVPA commitments on the basis of a diagnosis of paraphilia NOS directed at nonconsenting persons. (See, e.g., *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1150 ["Paraphilia Not Otherwise Specified, Bondage, Rape and Sodomy of Adult Women, Severe,"] and ["Paraphilia, not otherwise specified with rape, sodomy and klismaphilia toward adult women, severe"]; *People v. Williams* (2003) 31 Cal.4th 757, 762 ["paraphilia NOS" involving "sex with nonconsenting persons"]; *People v. Felix*

(2008) 169 Cal.App.4th 607, 610-611, 616-617 [paraphilia not otherwise specified where defendant committed a series of rapes and other forcible sexual acts]; *People v. Burris* (2002) 102 Cal.App.4th 1096, 1102, 1110 [“paraphilia involving rape”].) Goldberg has not pointed to any case, and we are aware of none, that has categorically concluded that paraphilic coercive disorder cannot constitute the “diagnosed mental disorder” required for commitment under the SVPA.

Simply because paraphilic coercive disorder is not specifically identified in the DSM-IV-TR does not mean it cannot be a “diagnosed mental disorder.” (See *Hubbart, supra*, 19 Cal.4th at pp. 1158-1161 [the range of disorders that may support an SVPA commitment is not limited to those the psychiatric community defines as mental illnesses]; *McGee v. Bartow* (7th Cir. 2010) 593 F.3d 556, 576, 580 [“[C]ivil commitment upon a finding of a ‘mental disorder’ does not violate due process even though the predicate diagnosis [of rape paraphilia] is not found within the four corners of the DSM”].)

The question of whether paraphilic coercive disorder can constitute a mental disorder justifying an involuntary commitment was thoughtfully considered by the Court of Appeals for the Seventh Circuit in *McGee*, and we find the opinion’s discussion and analysis persuasive. After acknowledging the lack of expert agreement on the reliability of a diagnosis of paraphilic coercive disorder, the court concluded that questions about the disorder’s legitimacy are properly left to the jury. The court wrote that “[g]iven these admittedly conflicting professional views, we must conclude, on the basis of present Supreme Court precedent, that the diagnosis of a paraphilic disorder related to rape is not so unsupported by science that it should be excluded absolutely from consideration by the trier of fact.” (*McGee v. Bartow, supra*, 593 F.3d at p. 580.) The professional debate about the disorder, the court found, “is a relevant issue in commitment proceedings and a proper consideration for the factfinder in weighing the evidence that the defendant has the ‘mental disorder’ required by statute.” (*Id.* at p. 581.)

We likewise conclude that a jury may properly find that paraphilic coercive disorder is a valid mental disorder justifying a commitment under the SVPA when

substantial evidence is presented as to its validity, as happened in this case. Accordingly, we now turn to whether substantial evidence was presented that Goldberg has the disorder.

2. Sufficient evidence was presented that Goldberg suffers from paraphilic coercive disorder.

Drs. Padilla and Davis independently diagnosed Goldberg with paraphilic coercive disorder. In explaining his diagnosis, Dr. Padilla cited the DSM-IV-TR's diagnostic criteria for paraphilia NOS and studies on the factors supporting a diagnosis of paraphilic coercive disorder. He and another researcher surveyed mental-health professionals who assess, treat, and research sex offenders, and he compiled a list of factors most closely related to the diagnosis. Dr. Padilla concluded that Goldberg satisfied several of these factors: he had five or more victims over a period of at least six months; he was convicted of a sexual offense at least twice; he reoffended within a year of another offense and while on probation or parole; he had a pattern of coercive sexual behavior over at least six months; his offenses were premeditated and involved planning; he had a consistent method; and he sought out victims despite the availability of a consenting sexual partner. In addition, Dr. Padilla pointed out that Goldberg did not stop raping or stop being aroused when his victims resisted, which would have contraindicated the disorder's diagnosis.

Dr. Davis also referred to the paraphilia NOS diagnostic criteria, although she did not identify the source of the factors specific to paraphilic coercive disorder that she considered. She cited many of the same factors that Dr. Padilla had used to support his opinion, including that Goldberg continued to rape over a long period of time; planned his offenses; was able to ejaculate despite his victims' resistance; used the same modus operandi; and raped despite the availability of a consenting sexual partner. She also concluded that Goldberg's offenses were compulsive because he offended while on probation or parole; "had a very high sex drive"; and expressed remorse for his actions, which suggested he could not control them.

Goldberg's experts testified that Goldberg did not have paraphilic coercive disorder. Dr. Abbott concluded that Goldberg sexually assaulted women not because of sexual deviancy but because of his antisocial attitudes and poor self-control and judgment. Dr. Abbott believed that Goldberg's pattern of offending was not sufficient to diagnose a paraphilia, and there were contraindications of paraphilic coercive disorder, such as Goldberg's telling a victim to enjoy herself or continuing an assault despite a lack of resistance.

Dr. Heard saw no "indices of any paraphilia whatsoever" in Goldberg. He testified that Goldberg's crimes did not follow a sufficient "script" to suggest a paraphilia, and there was no evidence that he looked at pornography involving rape. According to Dr. Heard, Goldberg did not have paraphilic coercive disorder but was instead a "a power anger rapist," meaning that he sexually assaulted women out of feelings of inadequacy and anger.

Goldberg implies there was an insufficient basis for his diagnosis by the People's experts because there are no accepted criteria for diagnosing paraphilic coercive disorder. "[A]ny material that forms the basis of an expert's opinion testimony must be reliable," although it need not be admissible. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618; see also Evid. Code, § 801, subd. (b).) But "[n]o precise legal rules dictate the proper basis for an expert's journey into a patient's mind to make judgments about his behavior." (*People v. Stoll* (1989) 49 Cal.3d 1136, 1154.) In particular, expert testimony about the diagnosis of mental conditions, even mental conditions not listed in the DSM, is not subject to the *Kelly*<sup>2</sup> standard, which raises the admissibility threshold for evidence produced by a "new scientific method." (*People v. McDonald* (1984) 37 Cal.3d 351, 373; *People v. Ward* (1999) 71 Cal.App.4th 368, 373; see also *People v. Cegers* (1992) 7 Cal.App.4th 988, 1000.)

We cannot say from our review of the record that Dr. Padilla's and Dr. Davis's diagnoses were based on " 'guess, surmise or conjecture.' " (*Lockheed Martin Corp. v.*

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<sup>2</sup> (*People v. Kelly* (1976) 17 Cal.3d 24, 30.)

*Superior Court, supra*, 29 Cal.4th at p. 1110.) Dr. Padilla cited the DSM-IV-TR’s diagnostic criteria for paraphilia NOS, and he discussed studies and research on the factors supporting a diagnosis of paraphilic coercive disorder. He testified that Goldberg satisfied several of these factors and did not satisfy other factors contraindicating the disorder’s diagnosis. Goldberg does not point us to any authority suggesting that the materials Dr. Padilla used were unreliable. Dr. Davis also mentioned the DSM-IV-TR’s diagnostic criteria for paraphilia NOS and referred to the extensive literature analyzing paraphilic coercive disorder. The factors she applied in diagnosing Goldberg overlapped with those that Dr. Padilla considered. We find it significant that Drs. Padilla and Davis diagnosed Goldberg with the same disorder independently and without being aware of the other’s conclusions. In short, we conclude that sufficient indicia of reliability were presented regarding these experts’ opinions to support the jury’s conclusion that Goldberg had a “diagnosed mental disorder.”

3. Sufficient evidence was presented showing that Goldberg was likely to reoffend if released.

Goldberg argues that insufficient evidence was presented that he was likely to reoffend upon release, especially given that he was 57 years old at the time of trial, and the risk of reoffending declines with age. Again, we disagree.

Section 6600, subdivision (a) requires proof that the respondent poses “a substantial danger, that is, a serious and well-founded risk, of committing” sexually violent crimes if released. (*People v. Roberge* (2003) 29 Cal.4th 979, 988, italics omitted.) The trier of fact must find “much more than the mere possibility that the person will reoffend,” but the chance of reoffending need not be greater than 50 percent. (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 916, 922, italics omitted.)

All four expert witnesses testified that they used the Static-99R tool in predicting the likelihood that Goldberg would reoffend. The Static-99R is an actuarial tool used to assess a sexual offender’s risk of reoffending. (See *People v. Paniagua* (2012) 209 Cal.App.4th 499, 504, fn. 5.) The evaluator gives the subject a base score depending on various factors, including the subject’s age and crime characteristics. Because

Goldberg was between 40 and 59 years old at the time of assessment, a point was deducted from his base score to recognize the lower risk of reoffending due to his age. If he had been 60 or older when assessed, the Static-99R would have required that three points be deducted from his base score.<sup>3</sup> Dr. Davis testified that the Static-99R “sufficiently accounts for age according to all the research that has been coming out about the instrument,” and that there was no justification for further decreasing Goldberg’s likelihood of reoffending based on his age. Goldberg’s experts disagreed with this testimony.

After assigning a base score under the Static-99R, an evaluator then determines which of four sample groups the subject best fits, depending on factors such as the number of sex offenses. The subject’s risk of reoffending within five years and within 10 years is the same as that established for the offenders in the selected sample group with the same base score. Dr. Davis testified that the Static-99R is of moderate accuracy, but it may underestimate the likelihood of reoffending because many sex offenses go unreported.

The experts all agreed that Goldberg’s base score was five, which put him in the moderate-high risk category, but disagreed on which sample group was most appropriate. As a result, they projected different levels of risk. Dr. Padilla projected Goldberg’s risk of reoffending within five years at 25.2 percent, and within 10 years at 35.5 percent. Dr. Davis projected the risk of reoffending within five years at 19.6 percent, and within 10 years at 27.7 percent. Because Goldberg’s experts did not think the Static-99R

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<sup>3</sup> Goldberg suggests that if he had been a few years older when assessed, the deduction of an additional two points from his base score might have made a difference to the jury in deciding whether he was likely to reoffend. But the fact is that he was 57, not 60, at the time of the trial. He will have new opportunities to prove that he should no longer be committed as he ages. His mental condition will be examined at least annually, and the director of State Department of State Hospitals may recommend his conditional release or discharge if and when his commitment is no longer appropriate. (§ 6605; see also § 6607.) He may also petition the court on his own initiative for conditional release or discharge, a process in which he has the right to assistance of counsel. (§ 6608, subd. (a).)

sufficiently took age into account, they did not use it to do five- and 10-year projections. Dr. Abbott decided that Goldberg's risk of reoffending within five years was six percent, and Dr. Heard projected a risk of no more than eight percent. Based primarily on their Static-99R projections, Drs. Padilla and Davis determined that Goldberg was likely enough to reoffend to justify his commitment as an SVP.<sup>4</sup> Drs. Abbott and Heard did not think Goldberg was likely to reoffend.

Goldberg urges us to disregard the Static-99R testimony of the People's experts because, according to him, it was internally inconsistent. He argues that despite evidence that the risk of reoffending declines with age, "both Dr. Padilla and Dr. Davis told the jury that [Goldberg]'s risk to reoffend would continue to rise over time" by testifying that Goldberg's "risk of reoffending would be greater in 10 years . . . than it was at the time of trial." Goldberg misunderstands their testimony. They meant that as of trial, the risk that Goldberg would reoffend over a period of five years was 25.2 percent or 19.6 percent, and the risk that he would reoffend over a period of 10 years was 35.5 percent or 27.7 percent, not that his risk of reoffending 10 years later was greater than his risk of reoffending five years later. A comparison of the 10-year estimates with the five-year estimates show that both experts presumed that Goldberg's risk of reoffending would *decrease* in the second five-year period. Still, the overall chance of Goldberg reoffending in 10 years was estimated by the experts to be higher than the chance of reoffending in five years because five additional years were being considered.

Goldberg also argues that his experts' testimony that his risk of reoffending was no more than 10 percent should be credited over the People's witnesses' testimony that his risk was higher. We decline his invitation to reweigh the evidence. Dr. Padilla concluded that Goldberg had at least a 35.5 percent chance reoffending at some point.

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<sup>4</sup> Dr. Davis used two other statistical tools to measure Goldberg's likelihood of reoffending. She and Dr. Padilla also considered "dynamic" factors, including Goldberg's history of unsuccessful intimate relationships, his social isolation, his failure to comply with conditions of parole, and his prison infractions. This evidence bolsters our conclusion that sufficient evidence was presented to support the jury's conclusion that Goldberg was likely to reoffend.

Goldberg does not claim, and we do not find, that this level of likelihood is insufficient as a matter of law. We conclude that substantial evidence was presented to the jury that Goldberg was likely to reoffend if released.

*B. The Jury Instruction Defining “Diagnosed Mental Disorder.”*

Goldberg contends that the portion of CALCRIM No. 3454 defining “diagnosed mental disorder” is ambiguous, and the trial court should have given a clarifying instruction. Even though Goldberg failed to request a clarifying instruction at trial, which normally would have resulted in a forfeiture of the issue on appeal (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1236), we will consider his argument on the merits because he claims the instruction affected his substantial rights (Pen. Code, § 1259). In doing so, we conclude that his claim is foreclosed by *People v. Williams, supra*, 31 Cal.4th 757.

The word “includes” is the only part of the instruction that Goldberg challenges. The relevant part of the instruction states, “The term diagnosed mental disorder includes conditions either existing at birth or acquired after birth that affect a person’s ability to control emotions and behavior and predispose that person to commit criminal sexual acts to an extent that makes him or her a menace to the health and safety of others.” This definition closely tracks the SVPA’s definition of “ ‘[d]iagnosed mental disorder,’ ” which uses “includes” in the same way. (See § 6600, subd. (c) [“ ‘Diagnosed mental disorder’ includes . . . .”].) Goldberg recognizes that the instruction conveyed the statutory requirements. (*People v. Estrada* (1995) 11 Cal.4th 568, 574 [statutory language is normally “ ‘an appropriate and desirable basis for an instruction’ ”].) But he argues that the instruction embraces mental disorders other than those described, and the jury therefore could have found the petition true without finding that paraphilic coercive disorder fit the specific description given. He suggests that the danger the jury did so was real, given its request during deliberations to reexamine the testimony about the definition of paraphilia NOS and the diagnosis of paraphilic coercive disorder.

At the outset, we recognize that a definition beginning with the word “includes” is often not limited to the description that follows. For example, in *Pirkig v. Dennis* (1989)

215 Cal.App.3d 1560, 1565, we analyzed a statute that uses “ ‘includes’ ” to define the “ “prevailing party” ’ ” for the purpose of determining costs in a civil case. We determined that “[t]he word ‘includes’ is an open-ended term which is expansive in scope,” and its use in the statutory definition allowed for “prevailing parties” other than those described. (*Ibid.*; see also Garner, *Dict. of Modern Legal Usage* (3d ed. 2011) p. 439, col. 2 [“including . . . should not be used to introduce an exhaustive list, for it implies that the list is only partial,” boldface omitted].)

While most decisions have not considered the effect of the SVPA’s use of the word “includes” to define “diagnosed mental disorder,” the Fourth District Court of Appeal has recognized that the SVPA does not “fully define[]” the term. (*In re Parker* (1998) 60 Cal.App.4th 1453, 1457.) The challenged instruction conveys essential elements of “diagnosed mental disorder” by requiring the jury to find, beyond a reasonable doubt, that “[a]s a result of [the] diagnosed mental disorder, [Goldberg was] a danger to the health and safety of others because it [was] likely that he [would] engage in sexually violent predatory criminal behavior.” Thus, by finding Goldberg to be an SVP, the jury necessarily found that his mental condition “predispose[d him] to commit criminal sexual acts to an extent that [made] him . . . a menace to the health and safety of others.”

On the other hand, we recognize that the challenged instruction does not convey the requirement that a diagnosed mental disorder “affect a person’s ability to control emotions and behavior.” This could matter because *Kansas v. Crane* (2002) 534 U.S. 407, 413, held that civil-commitment schemes for SVPs must require “proof of serious difficulty in controlling behavior” in order to comport with due process. An offender’s future dangerousness, standing alone, is insufficient because then the civil-commitment scheme would become a “ ‘mechanism for retribution or general deterrence,’ ” which are concepts the criminal law should address. (*Id.* at p. 412; see also *Kansas v. Hendricks* (1997) 521 U.S. 346, 360.)

*People v. Williams, supra*, 31 Cal.4th 757, however, forecloses any claim that the instruction’s use of the word “includes” violated Goldberg’s due process rights. In

*Williams*, our Supreme Court analyzed the SVPA’s definition of “diagnosed mental condition” and held that the statute “inherently embraces and conveys the need for a dangerous mental condition characterized by impairment of behavioral control,” and thus comports with *Kansas v. Crane, supra*, 534 U.S. at p. 413. (*Williams*, at p. 774, italics omitted.) The court refused to hold that “further lack-of-control instructions or findings” beyond those conveyed in jury instructions tracking the SVPA’s language “are necessary to support a commitment under the SVPA.” (*Id.* at pp. 774-775.) The instruction given here was sufficient under *Williams* as it is undisputed that it reflected the SVPA’s statutory requirements.

Finally, even if there were instructional error by failing to require proof of difficulty in controlling behavior, we conclude that it was harmless beyond a reasonable doubt. (See *People v. Hurtado, supra*, 28 Cal.4th at pp. 1194-1195.) Dr. Davis testified that before she could conclude an offender was an SVP, the SVPA required her to diagnose a mental disorder that “impair[s the individual] either volitionally, and by that [the statute] mean[s] it impairs his behavior, his control of his behavior, or it impairs him emotionally.” Both she and Dr. Padilla identified several factors suggesting Goldberg’s compulsion to rape, including his offending repeatedly and rapidly, offending despite being on probation, offending while having an available, consenting partner, and expressing remorse. Accordingly, there was plenty of evidence showing that Goldberg had an impaired ability to control himself.

### C. *Equal Protection.*

Goldberg argues that his indeterminate commitment denies him equal protection of the law, relying on *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee I*). We disagree and concur with our colleagues in Division Three that the recent case of *People v. McKee* (2012) 207 Cal.App.4th 1325 (*McKee II*) is dispositive. (*People v. McKnight* (2012) 212 Cal.App.4th 860, 862.)

In *McKee I*, the California Supreme Court concluded that, for purposes of the equal protection clause, SVPs are similarly situated to two other classes of people subject to civil commitments: mentally disordered offenders and persons found not guilty by

reason of insanity. (*McKee I, supra*, 47 Cal.4th at pp. 1203-1204.) After ruling that the classes are similarly situated, the court remanded the case for an evidentiary hearing to determine whether there were legitimate reasons to subject SVPs, but not the other classes, to indefinite commitments. (*Id.* at pp. 1208-1210.) On remand, and following a 21-day evidentiary hearing, the trial court concluded that the People had met their burden of justifying the disparate treatment. (*McKee II, supra*, 207 Cal.App.4th at pp. 1330, 1332.) The Fourth District Court of Appeal affirmed (*id.* at pp. 1348, 1350), and our Supreme Court denied McKee’s petition for review on October 10, 2012 (S204503).

Goldberg urges us not to follow *McKee II, supra*, 207 Cal.App.4th 1325. But as the court explained in *People v. McKnight, supra*, 212 Cal.App.4th at pages 863-864, the Supreme Court transferred multiple “ ‘grant and hold’ ” cases under *McKee I, supra*, 47 Cal.4th 1172 “to the Courts of Appeal with directions to vacate their prior opinions and suspend further proceedings until the *McKee I* remand proceedings were final, ‘*in order to avoid an unnecessary multiplicity of proceedings.*’ [Citations.] On remand, *McKee [II]* concluded that differences between *SVP’s as a class* and other offenders justify their different treatment under the Act. It is plain that *McKee II* is not to be restricted to Mr. McKee alone . . . , but rather its holding applies to the class of SVP’s as a whole.” (Original italics.) The Supreme Court denied review in *McKnight* on March 13, 2013 (S208182), and it has since denied review in other cases that also found *McKee II* to be dispositive on the equal protection issue. (*People v. Landau* (2013) 214 Cal.App.4th 1, 48 [agreeing with *McKee II*’s reasoning and conclusion and noting that respondent made no showing he was able to introduce “any new or different evidence that would require a different result”], petn. review den. May 22, 2013, S209450; *People v. McCloud* (2013) 213 Cal.App.4th 1076, 1079 [same], petn. review den. May 22, 2013, S208845; *People v. McDonald* (2013) 214 Cal.App.4th 1367, 1371 [agreeing with *McKnight*], petn. review den. July 10, 2013, S210418.)

Like the *McKnight* court, we agree with the Fourth District’s equal protection analysis in *McKee II supra*, 207 Cal.App.4th 1325. We thus conclude that Goldberg’s

commitment under the SVPA does not violate his equal protection rights. (*People v. McKnight, supra*, 212 Cal.App.4th at p. 864.)

*D. Other Constitutional Challenges.*

As Goldberg concedes, *McKee I, supra*, 47 Cal.4th 1172 forecloses his remaining constitutional challenges to the SVPA. Under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, we are bound by the Supreme Court's determinations in *McKee I* and must reject Goldberg's claims.

III.  
DISPOSITION

The judgment is affirmed.

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Humes, J.

We concur:

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Ruvolo, P.J.

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Reardon, J.