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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Glenn)

THE PEOPLE,

Plaintiff and Respondent,

v.

EUGENE CLARENCE WOOD,

Defendant and Appellant.

C068123

(Super. Ct. No. 17551)

In 2008, the People filed a petition (2008 petition) to commit defendant Eugene Clarence Wood for an indeterminate term as a sexually violent predator (SVP) and the trial court found probable cause. Subsequent case law determined that the assessment protocol used to evaluate Wood was an invalid underground regulation. Two new evaluations (first pair) were ordered, but they resulted in a split of opinion as to whether Wood met the criteria of an SVP. Two additional evaluations (second pair) were ordered, but they also resulted in split opinions.

On March 4, 2010, the People filed a new petition for commitment (2010 petition), attaching two evaluations, one from the first pair and one from the second. Contemporaneously, after the People provided more information about Wood's physical condition to the psychologist in the first pair who had found Wood was *not* an SVP, she changed her mind and found Wood was an SVP. On March 19, 2010, the People filed a supplemental petition (supplemental 2010 petition), attaching both evaluations from this psychologist.

After a bench trial, the trial court found Wood was an SVP, and committed him for an indeterminate term to the custody of the Department of Mental Health (DMH).

Wood timely appeals. He contends his due process rights were violated because neither the 2010 petition nor the supplemental 2010 petition complied with the statutory requirements of Welfare and Institutions Code,¹ section 6601, subdivisions (d), (e), and (f). He further contends there is no statutory authority for the People to participate in the evaluation process. Finally, he argues there is insufficient evidence that he is likely to commit another sexual offense, and that his indeterminate commitment violates equal protection.

For reasons we will explain, we hold that neither differences of opinion among the various evaluators, nor the People's reliance on evaluations from both the first and second

¹ Further undesignated statutory references are to the Welfare and Institutions Code.

pair, required dismissal of the 2010 petitions. Further, any error concerning reliance on evaluations from both pairs to support the 2010 petitions was harmless, as Wood has failed to show prejudice. Sufficient evidence supports the finding that Wood is likely to reoffend; however, we shall remand for an equal protection determination pursuant to *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee*).

FACTUAL AND PROCEDURAL BACKGROUND

I

Wood's Criminal Background

Wood, born in 1953, has a considerable criminal history, beginning when he was a juvenile and ending in 1980 with his incarceration for murder and other crimes. In 1978, Wood pled guilty to kidnapping in Connecticut and was sentenced to two to five years in prison. Around the same time, he was charged in Rhode Island with assault with intent to commit rape and pled nolo contendere. His five-year sentence was suspended and he was sentenced to five years of probation to begin after his release from his term in Connecticut.

In 1979, Wood allegedly committed a rape in Portland, Maine. The case was not pursued because Wood was facing murder charges in Oregon. Wood allegedly committed another rape against a 16-year-old victim in Oregon, but the district attorney declined to file formal charges.

Wood's crime spree continued. In 1980, Wood pled guilty in California to two counts of kidnapping and robbery and was

sentenced to 11 years in prison. He was also convicted in Oregon of murder and sentenced to life in prison.

In 1997, Wood was transferred from prison in Oregon, where he was serving his life sentence for murder, to prison in California to serve his sentence on his California crimes. In 1999, Wood was discharged from his Oregon sentence. While in prison in California, Wood had one major rule violation and several minor rule violations.

II

SVP Evaluations and Petitions

An SVP is defined by statute as "a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person 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).)

The 2008 petition was supported by the evaluations of two psychologists, Mark Patterson and Dawn Starr, who found Wood met the criteria of an SVP under section 6600, subdivision (a). The trial court found probable cause to believe Wood was an SVP.

While Wood's case was pending trial, Division 3 of the Fourth District decided *In re Ronje* (2009) 179 Cal.App.4th 509 (*Ronje*). In *Ronje*, the court found the standardized assessment protocol used to evaluate sex offenders was an invalid underground regulation. (*Ronje, supra*, 179 Cal.App.4th at pp. 516-517.) The remedy per the *Ronje* court was not to dismiss the petition, but to remand to the trial court for new evaluations

using a valid assessment protocol and to conduct another probable cause hearing. (*Ronje, supra*, at pp. 519, 521.)

Confronted with *Ronje*, here the trial court and the parties agreed the case had to go back to "square one," and that two new evaluations (first pair) would be ordered.² Per the "agreement" between the parties and trial court, if the two new evaluations did not *both* find that Wood qualified as an SVP, the People would not file a new petition and there would be no probable cause hearing. If the evaluators did agree and find Wood an SVP, the case would go forward with a probable cause hearing.

Patterson and Starr performed new evaluations (first pair). In her January 2010 evaluation, Starr changed her opinion from 2008 as to whether Wood qualified as an SVP. Finding his deteriorating health was a significant mitigating factor, Starr opined that Wood did not meet the criteria of an SVP.

The trial court held a hearing on February 5, 2010, at which time the People represented that DMH was in the process of assigning two new doctors to perform additional evaluations (second pair). The defense argued Wood should be immediately released. The trial court indicated it would continue the case and allow a new petition to be filed; it apparently believed that without a *new* petition, it did not have jurisdiction to proceed.

² As we explain *post*, it appears to us that this agreement was based on a misunderstanding of the law.

On March 4, 2010, the People filed a second petition to extend Wood's commitment. The 2010 petition was accompanied by two evaluations, one by Patterson (from the first pair) and the second by Deirdre D'Orazio (from the second pair), both finding Wood an SVP.

Wood moved to dismiss the petition, strike the pleadings, demurrer, and for summary judgment. He claimed the petition was invalid under the following rationale: DMH had secured the first pair of evaluations (Patterson and Starr) under subdivision (d) of section 6601³; when Starr did *not* find Wood an SVP, DMH secured a second pair of evaluations (D'Orazio and Mary Ann Davis) under subdivision (e) of section 6601.⁴ But only one of those evaluators (D'Orazio) found Wood an SVP. Thus there was never any agreement *within* either of the two pairs that Wood was an SVP. Wood contended that the petition was valid only if there were *two concurring* evaluations under *either* subdivision (d) or subdivision (e) but not from a *combination* of both pairs.⁵

³ Subsection (d) provides in pertinent part that "if both evaluators concur that the person [is an SVP], the Director of Mental Health shall forward a request for commitment under Section 6602"

⁴ Subsection (e) provides in pertinent part that "if one of the professionals performing the evaluation pursuant to subsection (d) does not concur that the person [is an SVP], but the other professional concludes that the person [is an SVP], the Director of Mental Health shall arrange for further examination of that person by two independent professionals"

⁵ Subsection (f) provides in pertinent part that "if an examination by independent professionals pursuant to subdivision

The trial court opined that the issue of whether the petition was defective was premature as it now had "a petition in front of me," and set a probable cause hearing.

In the meantime, the People provided Starr with additional current information about Wood's physical condition, including recent reports of Wood running, jogging, and playing handball for up to an hour, as well as a CD ROM showing Wood engaging in aerobic exercise. As a result of this information, Starr changed her opinion, finding Wood *did* meet the criteria of an SVP because his health issues were not a protective factor. Starr issued an addendum to her January 2010 evaluation. The addendum was dated March 1, 2010, but was not received by DMH until March 9, 2010.

The People filed a supplemental petition on March 19, 2010. Both Starr's March 2010 addendum, finding Wood was an SVP, and her January 2010 evaluation, finding Wood was not an SVP, were attached to the supplemental 2010 petition.

III

Probable Cause Hearing

A. Prosecution Case

Patterson was a licensed psychologist with a private practice who performed evaluations for DMH. He first evaluated Wood in 2007 and had performed several updates. He found Wood met the criteria of an SVP. Wood had a qualifying offense, a

(e) is conducted, a petition [] shall only be filed if both independent professionals who evaluate the person pursuant to subdivision (e) concur that the person [is an SVP]. . . ."

predisposing diagnosis of paraphilia NOS (not otherwise specified), as well as an antisocial personality disorder, and he was likely to reoffend in a sexually violent predatory manner. Patterson found that Wood's tendencies had remained consistent from 2007 to 2010.

In his 2010 evaluation, Patterson noted that Wood reported he had suffered a stroke. Wood took medication for low testosterone, a thyroid problem, keeping food down, arthritis, and pain. Wood reported he had hepatitis C and spots on his lung. A nurse confirmed Wood's medical status and stated Wood had undergone a "perceptible decline" in the last year.

To assess Wood's risk of sexual reoffending, Patterson scored Wood on four actuarial instruments, Static-99R, Static 2002R, Minnesota Sex Offender Screening Tool Revised, and the Sex Offender Risk Appraisal Guide. Wood's scores placed him at the high, moderate, highest, and relatively high risk level, respectively. Dynamic risk factors, such as intimacy deficits, lack of self-regulation, and lack of cooperation with supervision were consistent with a higher recidivism risk. Patterson found no protective factors that mitigated the risk of reoffending. In conclusion, Patterson found Wood's risk to reoffend was substantial.

D'Orazio was an independent evaluator for the DMH sex offender commitment program. She diagnosed Wood with paraphilia NOS, antisocial personality, and poly substance dependence. In her evaluation, she scored Wood on three actuarial risk assessment instruments and assessed him on a dynamic risk

assessment instrument. She concluded his risk of sexual reoffense rose to the level of substantial danger.

Starr was a licensed psychologist who focused on forensic psychology. She had performed over 1300 SVP evaluations. She had met with Wood four times from 2007 to 2010. She evaluated Wood after *Ronje* in January 2010 and filed an addendum in March. She found his Rhode Island conviction was a qualifying offense and Wood had two qualifying mental diagnoses, paraphilia NOS and antisocial personality disorder. These findings remained the same for her January and March 2010 reports.

In January, Starr found Wood did not meet the third criteria of likelihood to reoffend due to his health condition, the level of deterioration, and the likelihood he would recover from his illness. At that time, she attempted to get official medical records about his medical issues, but was unable to do so. Her information was limited to what Wood and a nurse at the jail told her. They portrayed Wood as having only a 50 percent chance of recovery, being in great pain, and very limited as to physical activity.

Subsequently, she received information from the People, including behavioral write-ups in jail and observations of his physical abilities. This information was contrary to what Wood and the nurse had told her. She watched a video showing Wood working out in the courtyard for an hour, both jogging and playing handball. There were other current reports that Wood was seen routinely jogging or running around in the "recent past." Given his physical ability, she found him to meet the

threshold of likely to reoffend as he was physically capable of reoffending.

B. Defense Case

Maryjane Alumbaugh had a Ph.D. in psychology and had training specific to SVP evaluations. She did not believe Wood had paraphilia. She testified that less than three percent of rapists were paraphiliacs. She also did not believe Wood met the third criteria for an SVP, likelihood of reoffending. She testified that rape is a young man's crime and tapers off when the offender is over 40. She scored Wood as a low to moderate risk on the Static-2002R.

James Park was a licensed psychologist with a private practice who worked half-time for the Department of Corrections and Rehabilitation with the Chico Parole Unit. He found Wood did not have a qualifying diagnosed mental disorder that predisposed him to criminal sex acts. For a diagnosis of paraphilia NOS, there must be causal connection between the behavior and a paraphiliac arousal pattern. Park found that causal connection was missing in Wood's case.

Melvin Macomber, a forensic psychologist, also evaluated Wood.⁶ He found no diagnosed mental disorder and no evidence of any psychosexual problems. He found Wood was "a very sick man"

⁶ D'Orazio, who had been Macomber's superior at Coalinga State Hospital, sharply criticized Macomber. She indicated he had been terminated from Coalinga State Hospital due, in part, to an incident where he submitted a declaration and signed it in his role at the hospital, but the declaration was outside his role.

who might live only a few months. Macomber opined that although Wood was only 56, he looked 80.

The parties stipulated the jail nurse would testify that between Starr's January and March 2010 reports Wood's condition significantly deteriorated and that by March, Wood was experiencing severe pain. Medical records from the jail were also submitted.

The trial court found probable cause to believe that Wood was likely to engage in sexually violent predatory criminal behavior if released from custody.

IV

Trial

Wood waived trial by jury. The case was submitted to the court on the evaluation reports of the psychologists and the transcript of the probable cause hearing.

The court found beyond a reasonable doubt that Wood was an SVP. The parties agreed that Wood had a qualifying conviction for a sexually violent offense. The court found beyond a reasonable doubt that Wood suffered from a diagnosed mental disorder under section 6600, subdivision (c). As to Wood's likelihood to reoffend, the court found Starr's testimony compelling. Starr had the opportunity to watch Wood in the exercise yard after January 2010 and she opined that he was more than physically able to reoffend if released. The court found reports of Wood's poor physical condition part of his manipulation.

The court committed Wood to the custody of DMH for an indeterminate term for appropriate treatment and confinement.

DISCUSSION

I

SVP Evaluations

The SVP commitment process begins with a screening of inmates by prison officials; the officials review the social, criminal, and institutional history of inmates convicted of sexually violent predatory sexual offenses. (§ 6601, subd. (b).) If an inmate is determined likely to be an SVP, he is referred to DMH for a "full evaluation." (*Ibid.*) The evaluation is done in accordance with a standardized assessment protocol which "shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders." (*Id.*, subd. (c).)

Evaluations are conducted by two mental health professionals, either practicing psychiatrists or practicing psychologists, designated by the Director of DMH. (§ 6601, subd. (d).) If "both evaluators concur" that the person meets the SVP criteria, the director forwards a request for a commitment petition to the appropriate county and makes available the evaluation reports and any other supporting documents. (*Ibid.*) If the evaluators disagree, the director must arrange for further examination by two "independent professionals" who are not state employees. (*Id.*, subs. (e) & (g).) After the examination by independent professionals, a

petition may be filed only if the independent professionals concur the person meets the criteria for commitment. (*Id.*, subd. (f).)

Petitions for SVP commitment are filed by the county's designated attorney (the district attorney or county counsel) if the attorney concurs with recommendation of DMH. (§ 6601, subd. (i).) The alleged SVP is entitled to a probable cause hearing to determine whether there is sufficient evidence to believe he or she is likely to engage in sexually violent predatory behavior upon release. (§ 6602, subd. (a).)

The objective of the evaluation process is to screen out individuals who plainly do not meet the SVP criteria. "The Legislature has imposed procedural safeguards to prevent meritless petitions from reaching trial." (*People v. Scott* (2002) 100 Cal.App.4th 1060, 1063.) "[T]he requirement for evaluations is not one affecting disposition of the merits; rather, it is a collateral procedural condition plainly designed to ensure that SVP proceedings are initiated only when there is a substantial factual basis for doing so." (*People v. Superior Court (Preciado)* (2001) 87 Cal.App.4th 1122, 1130 (*Preciado*).) "The legal determination that a particular person is an SVP is made during the subsequent judicial proceedings, rather than during the screening process. [Citation.]" (*People v. Medina* (2009) 171 Cal.App.4th 805, 814 (*Medina*).)

II

Validity of Petition

A. Jurisdiction

Wood contends his due process rights were violated because the petition to extend his commitment was not filed in compliance with section 6601. He contends a petition could be filed only if the two evaluators appointed under section 6601, subdivision (d) (first pair), or the two professionals appointed under section 6601, subdivision (e) (second pair), concurred that he met the criteria of an SVP. He contends section 6601 does not permit the People to rely on one evaluation performed pursuant to subdivision (d) (Patterson) and one performed pursuant to subdivision (e) (D'Orazio). Wood asserts that since the petition was filed without DMH having received two concurring evaluations from the same pair, it was invalid and should be dismissed. (See *People v. Butler* (2000) 78 Cal.App.4th 1171, 1182 [petition for recommitment as SVP dismissed where petition supported by only one evaluation].)

We see a strikingly similar fact pattern in the recent case of *Davenport v. Superior Court* (2012) 202 Cal.App.4th 665 (*Davenport*) (review denied Mar. 28, 2012, S0200079). There, as here, the original petition (here the 2008 petition) was supported by two evaluations prepared using an invalid protocol. After *Ronje*, new evaluations and a new probable cause hearing were ordered. The first two evaluators then disagreed on whether the inmate met the criteria of an SVP. Pursuant to section 6601, subdivision (e), two additional evaluators were

appointed and they also disagreed. The inmate moved to dismiss the proceeding; when his motion was denied, he petitioned for a writ of mandate or prohibition to compel the trial court to dismiss the SVP proceedings. (*Davenport, supra*, 202 Cal.App.4th at pp. 667-668.) The appellate court found the split opinions did not require dismissal of the petition. (*Davenport, supra*, at p. 673.)

The *Davenport* court rejected the view that *Ronje* required beginning the SVP determination process anew as if the commitment petition had never been filed because *Ronje* did not order the trial court to dismiss the petition. (*Davenport, supra*, 202 Cal.App.4th at p. 671.) The *Ronje* court found the flaw in the protocol had no effect on the fundamental jurisdiction of the trial court and dismissal was not required. "Use of the evaluations based on the invalid assessment protocol, though erroneous, does not deprive the trial court of fundamental jurisdiction over the SVPA commitment petition. The trial court has the power to hear the petition notwithstanding the error in using the invalid assessment protocol. Dismissal therefore is not the appropriate remedy." (*Ronje, supra*, 179 Cal.App.4th at p. 518.)

The *Davenport* court found the post-*Ronje* evaluations were comparable to updated or replacement evaluations authorized by section 6603, subdivision (c).⁷ (*Davenport, supra*, 202

⁷ Both Patterson and Starr labeled their 2010 evaluations as updates.

Cal.App.4th at p. 671.) To determine the effect of split opinions in updated evaluations, the court looked to *People v. Gray* (2002) 95 Cal.App.4th 322 (*Gray*). In *Gray*, the court found a split of opinion in updated evaluations does not undermine the validity of the original petition. "Once a petition under the Act has been filed, and the trial court (as here) has found probable cause to exist, the matter should proceed to trial. In other words, once a petition has been properly filed and the court has obtained jurisdiction, the question of whether a person is a sexually violent predator should be left to the trier of fact unless the prosecuting attorney is satisfied that proceedings should be abandoned." (*Gray, supra*, 95 Cal.App.4th at p. 329.)

The *Davenport* court concluded the pre-*Ronje* petition (in this case analogous to the 2008 petition) was properly filed and gave the trial court jurisdiction. The effect of ordering new evaluations pursuant to *Ronje* did *not* begin the proceedings anew. Given the substantial risk of serious harm if a potential SVP is released and the procedural safeguards--a probable cause hearing and a trial requiring a unanimous verdict--there was no reason to dismiss the petition and start the SVP evaluation process from the beginning. (*Davenport, supra*, 202 Cal.App.4th at p. 673.)

Here, the trial court erroneously believed that ordering new evaluations pursuant to *Ronje* started the case anew and divested the court of jurisdiction until a new petition was filed, stating an "amended petition must be filed according to

the statute." The parties agreed with the trial court. Citing this agreement, Woods argues that the post-*Ronje* evaluations cannot be considered updated or supplemental evaluations under section 6603, subdivision (c), and the reasoning of *Gray* does not apply. Also citing this agreement to go back to "square one," the People refuse to argue that the 2010 evaluations are updated evaluations under section 6603, subdivision (c).⁸

We decline to accept the agreement of the parties and the trial court that the order for new, post-*Ronje* evaluations divested the court of jurisdiction; it is based on a misunderstanding of the law--a view persuasively rejected by the court in *Davenport*. In *Ronje*, the court denied the request for dismissal of the petition; instead, it limited the remedy to ordering new evaluations using a valid assessment protocol and conducting a new probable cause hearing. (*Ronje, supra*, 179 Cal.App.4th at p. 519.) Nothing in *Ronje* supports treating the order for new evaluations under a valid protocol as divesting the trial court of fundamental jurisdiction over the proceedings. The use of the invalid assessment protocol in conducting SVP evaluations does not deprive the trial court of fundamental jurisdiction over the subsequently filed commitment petition. (*Medina, supra*, 171 Cal.App.4th at p. 816.) Even a

⁸ The record does not support complete agreement on the necessity of a post-*Ronje* petition. The People argued to the trial court that the 2008 petition was still valid and additional evaluations were needed merely because of a change in risk assessment after *Ronje* and because the People were "at the one-year mark" per DMH policy.

petition that was supported by only one, not two, evaluations has been found not to deprive the court of jurisdiction where the petition was facially valid and the lack of a second evaluation was subsequently cured. (*Preciado, supra*, 87 Cal.App.4th at p. 1130.)

Nor is this a case where the SVP proceeding should not go forward because "the prosecuting attorney is satisfied that proceedings should be abandoned." (*Gray, supra*, 95 Cal.App.4th at p. 329.) The People indicated no intent to abandon the proceedings; they did not dismiss the 2008 petition, but instead continued to work to prove Wood an SVP. When faced with the conflicting evaluations of Patterson and Starr, the People obtained additional evaluations from D'Orazio and Davis, and also (successfully) sought to convince Starr to change her opinion by providing her with additional information about Wood's physical condition.⁹

Since the trial court retained fundamental jurisdiction over the proceedings due to the 2008 petition, the split of opinion in subsequent evaluations did not divest the court of jurisdiction and require dismissal of the petition.¹⁰ (*Davenport, supra*, 202 Cal.App.4th at pp. 672-673.)

⁹ Wood challenges the propriety of the People's actions in contacting Starr and providing her with additional information. As we discuss *post*, we find no impropriety.

¹⁰ We recognize our Supreme Court recently granted review in a case that disagrees with *Davenport*. (*Boysel v. Superior Court* (2012) 204 Cal.App.4th 854 (*Boysel*), review granted June 13, 2012, S202324.) In *Boysel*, the court held a petition to declare

B. *The People's Contact With Starr*

Wood objects to Starr's March addendum because it was the result of the People's effort to change Starr's opinion by providing her with additional information about Wood's physical condition. He contends there is no statutory authority for ex parte submissions to a DMH evaluator appointed under section 6601, subdivision (d), and no statutory authority for a prosecutor to participate in the evaluation process. He further argues the People's ex parte communication with Starr threatened to produce an "out-of-court mini-trial" as Starr requested jail records from the defense but did not receive them. We are not persuaded.

While nothing in the statute expressly *authorizes* contact between the People and an evaluator, including providing the evaluator with further information, we see no authority

an inmate an SVP can be filed *only* if both the initial evaluators or both the independent evaluators concur that the inmate meets the criteria of an SVP. (*Boysel, supra*, 204 Cal.App.4th at pp. 871-872.) Even if we were to follow *Boysel* instead of *Davenport*, we would still affirm for two reasons. First, we note that by the time the 2010 petition was filed, the two psychologists (Patterson and Starr) who performed the first pair of evaluations (pursuant to subdivision (d) of section 6601) *did* concur that Wood met the criteria of an SVP. Starr's March addendum was dated March 1, 2010; the 2010 petition was filed on March 4. Thus, the purpose of requiring concurring evaluations, to ensure that SVP proceedings are initiated only when there is a substantial factual basis for doing so (*Preciado, supra*, 87 Cal.App.4th at p. 1130), was fulfilled. Second, as discussed in Part C, *post*, unlike in both *Davenport* and *Boysel*, Wood did not challenge the validity of the petition immediately by writ. Instead, he waited until after trial to appeal and has failed to show the necessary prejudice.

precluding contact. The section 6601 evaluations serve only as a screening process to ensure SVP proceedings are not initiated unless there is a substantial factual basis; the evaluations do not affect disposition of the merits. (*Preciado, supra*, 87 Cal.App.4th at p. 130.) We find the People's actions here analogous to consultation with an expert before bringing charges in a criminal action. There was no impropriety.

C. Harmless Error

Even if we were to honor the flawed agreement between the trial court and the parties that the proceedings began anew from the filing of the 2010 petition, we would find any error in failing to meet the requirements of section 6601, subdivisions (d), (e), and (f) harmless.

We are mindful that subdivision (f) of section 6601 provides: "If an examination by independent professionals pursuant to subdivision (e) is conducted, a petition to request commitment under this article shall only be filed if both independent professionals who evaluate the person pursuant to subdivision (e) concur that the person meets the criteria for commitment specified in subdivision (d)." As we noted *ante*, the evaluations under subdivision (e) were ultimately unnecessary because the evaluators under subdivision (d) eventually concurred that Wood met the criteria of an SVP. Nevertheless, the subdivision (e) evaluations were conducted and those evaluators did *not* concur. Accordingly, we consider the effect of any error in proceeding contrary to section 6601, subdivision (f).

The effect of conducting SVP proceedings without proper evaluations was before the court in *In re Wright* (2005) 128 Cal.App.4th 663 (*Wright*). In *Wright*, after the jury found Wright to be an SVP, he petitioned for a writ of habeas corpus raising a question as to whether one of the evaluators had the proper credentials. The court assumed the evaluator lacked the degree required by section 6601, subdivision (g), but concluded the defect was harmless. (*Wright, supra*, 128 Cal.App.4th at p. 673.)

"[I]rregularities in the preliminary examination procedures which are not jurisdictional in the fundamental sense shall be reviewed under the appropriate standard of prejudicial error and shall require reversal only if defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination. The right to relief without any showing of prejudice will be limited to pretrial challenges of irregularities. At that time, by application for extraordinary writ, the matter can be expeditiously returned to the magistrate for proceedings free of the charged defects." (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529.)

This same rule applies in SVP proceedings. "Irregularities in the preliminary hearing under the Act are not jurisdictional in the fundamental sense and are similarly subject to harmless error review. [Citation.] Thus, reversal is not necessary unless the individual can show that he or she was denied a fair trial or had otherwise suffered prejudice. [Citation.] Here,

counsel represented Wright at trial and Wright presented his own expert witness and cross-examined the People's witnesses. These facts show that Wright received a fair trial and he does not argue to the contrary. The only possible prejudice Wright could have suffered was in the fact that the petition actually proceeded to trial; however, our high court concluded that the erroneous denial of a motion to dismiss an information under Penal Code section 995 will not be reversed on appeal in the absence of a showing that the defendant was deprived of a fair trial, or otherwise prejudiced in the ability to mount a defense. [Citation.] . . . Thus, the fact that Wright was compelled to 'participate in an otherwise fair trial' does not demonstrate prejudice. [Citation.]" (*Wright, supra*, 128 Cal.App.4th at p. 673.)

Here, Wood did not challenge the denial of his motion to dismiss immediately by writ; he appealed only after the trial. Thus, to prevail he must establish prejudice. As in *Wright*, he received a fair trial; he presented defense witnesses and cross-examined the prosecution's witness. Although he claims he "can show a world of prejudice from being committed on invalid petitions under the state and federal due process clauses" and argues that probable cause hearings cannot be held on invalid petitions, his argument is refuted by *Pompa-Ortiz* and *Wright*. That Wood "was compelled to 'participate in an otherwise fair trial' does not demonstrate prejudice. [Citation.]" (*Wright, supra*, 128 Cal.App.4th at p. 673.) Any error due to the failure

to comply with requirements for pre-petition evaluations under section 6601, subdivisions (d), (e), and (f) is harmless.

III

Substantial Evidence

Wood contends there was insufficient evidence that he was likely to reoffend--the third SVP criteria.¹¹ He points to his documented low testosterone as evidence that he lacked a sex drive, and emphasizes his deteriorating health. Wood's contention fails.

The standard for considering the sufficiency of the evidence to support a commitment under section 6600 is the same test as for reviewing the sufficiency of the evidence to support a criminal conviction. (*People v. Mercer* (1999) 70 Cal.App.4th 463, 466.) "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence that is, evidence which is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a

¹¹ At the probable cause hearing, the main dispute among the experts was the second of the SVP criteria, whether Wood had a qualifying diagnosed mental disorder. Defense experts Alumbaugh and Park testified Wood did not have a diagnosis of paraphilia NOS (not otherwise specified) and that such a diagnosis was rare and had to be based on more than behavior. "Paraphilia NOS is a common diagnosis in SVP proceedings. [Citation.] It has also been the subject of controversy. [Citation.]" (*People v. O'Shell* (2009) 172 Cal.App.4th 1296, 1302, fn. 5.) On appeal, Wood does not challenge the diagnosis.

reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

Wood contends his lack of testosterone was "not in dispute" and argues that "most people would agree" that the absence of testosterone means the absence of a sex drive and "the relationship between the urge to commit a sex crime and testosterone seems pretty clear." Wood relies on Macomber's evaluation, in which he wrote that Wood was "so sick that his body is unable to produce testosterone."¹² He claimed a person deficient in testosterone "has absolutely no sexual drive" and is considered incapable of aggressive sexual acts.

Other evidence, however, did not establish that Wood had no testosterone, only that his testosterone level was low. Further, it was undisputed that Wood received testosterone shots. D'Orazio testified that the relationship between testosterone and sexual offenders is not clear and that some individuals sexually offend for reasons unrelated to elevated

¹² Macomber also wrote that "Wood is a very sick man and may not live more than a few months." This statement was contradicted by subsequent evidence of Wood's robust physical activity. It was the task of the trial judge, as trier of fact, to resolve conflicts in the evidence. "Where there is conflicting expert evidence, the determination of the trier of fact as to its weight and value and the resolution of such conflict are not subject to review on appeal. [Citations.] Such determination is had when the trier of fact accepts the proof presented by an expert on one side of the case and rejects that presented by an expert on the other side." (*Francis v. Saue* (1963) 222 Cal.App.2d 102, 119-120.)

testosterone. Although acknowledging Wood's low testosterone level, the People's experts, D'Orazio, Starr and Patterson, found Wood was likely to reoffend.

The evidence did not establish that Wood's lack of testosterone made him incapable of meeting the criteria of an SVP. He essentially argues that we should take judicial notice that low testosterone disqualifies him from being classified as an SVP. We decline to do so. Judicial notice is appropriate for "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subd. (h).) That is not the case here. We note that in *People v. Fields* (2009) 175 Cal.App.4th 1001 (*Fields*), an inmate who had undergone a bilateral orchiectomy, or the surgical removal of his testes, was found to be an SVP and that determination was upheld on appeal. There was expert testimony that sexual offenses were due to psychological factors as well as physical ones and that the effect of the castration could be reversed by taking testosterone. (*Fields, supra*, 175 Cal.App.4th at pp. 1021-1023.)

Wood contends his physical problems, including hepatitis C, fibrosis of the liver, arthritis, after effects of a stroke, and hormone dysfunction "is just not a real world picture of a man with uncontrollable sexual urges." He argues the evidence of his occasional vigorous physical activity "did not establish that he felt like normal vigorous activity every day the way a healthy man would." However, on the issue of Wood's physical

condition, Starr testified he was physically capable of reoffending and the trial court found her testimony "compelling." The evidence was sufficient.

IV

Equal Protection

Wood contends the indeterminate term of commitment now prescribed for an SVP violates the equal protection clause of the United States Constitution. He contends the matter must be remanded to the trial court for a determination of whether his indeterminate commitment violates equal protection in light of *McKee, supra*, 47 Cal.4th 1172.

In *McKee*, our Supreme Court found mentally disordered offenders and SVP's are similarly situated. (*McKee, supra*, 47 Cal.4th at p. 1203.) As to the equal protection challenge, the court ruled that the state "has not yet carried its burden of demonstrating why SVP's, but not any other ex-felons subject to civil commitment, such as mentally disordered offenders, are subject to indefinite commitment." (*McKee, supra*, at p. 1184.) The court remanded the case to the trial court to determine whether the state could demonstrate constitutional justification for its disparate treatment of SVPs. (*Id.* at pp. 1184, 1208-1210.) We follow the same remand procedure here.

The People concur generally in the view that Wood's claim is governed by the Supreme Court's decision in *McKee, supra*, 47 Cal.4th 1172. The People argue, however, that Wood forfeited his constitutional objection by failing to raise it in the trial court. Although we agree that Wood did not raise this objection

in the trial court, we decline to treat his constitutional claim as forfeited. (See *People v. Vera* (1997) 15 Cal.4th 269, 276 [defendant not precluded from raising deprivation of "certain fundamental, constitutional rights" for first time on appeal]; *People v. Calderon* (2004) 124 Cal.App.4th 80, 94 [failure to object in trial court did not waive claim that SVPA violates ex post facto clause].)

DISPOSITION

The case is remanded to the trial court for consideration of Wood's equal protection claim in light of *McKee*. The trial court is also directed to suspend further proceedings pending finality of proceedings in *McKee* (see *McKee, supra*, 47 Cal.4th at pp. 1208-1210). "Finality of proceedings" shall include the finality of the appeal in the Court of Appeal, Fourth District, Division 1, and any proceedings in the California Supreme Court. In all other respects, the judgment is affirmed.

DUARTE, J.

We concur:

RAYE, P. J.

BUTZ, J.