

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

CLARENCE EDSON,

Defendant and Appellant.

C074047

(Super. Ct. No. 17232C)

Fifty-three-year-old Clarence Edson (appellant) attributed his violent exploitation of two young boys to drug and alcohol abuse, denied that he was currently a pedophile, and maintained that the progress he had made during six years of treatment for sexually violent predators had prepared him to reenter the community without risk of reoffending. Based on the testimony of two state evaluators, the jury rejected appellant's assurances he no longer posed a danger to society and found that, after 30 years of confinement in either prison or the state hospital, he continued to meet the legal criteria for a sexually violent predator. On appeal, he raises instructional and evidentiary error and challenges the sufficiency of the evidence to support the jury's finding. We affirm.

FACTS

Appellant readily admits that by the age of 23 he was abusing a variety of drugs and alcohol. In January 1984 appellant met a woman at a bar, and after leaving with her in her car, he grabbed her breasts and attempted to force her to orally copulate him. She crashed the car she was driving into a tree to stop the attack. He was convicted of misdemeanor assault and sentenced to 180 days in county jail.

Less than six months later, appellant broke into an apartment to steal methamphetamine. He found 11-year-old Paul sound asleep on a couch. Appellant grabbed the young boy, slammed his head into the fireplace, kissed him, and then ordered him to touch appellant's penis. He then turned Paul around and sodomized him. Nauseous, Paul tried to get to the bathroom. There appellant forced the boy to orally copulate him. He sodomized Paul a second time and took him to a bedroom, where he forced Paul to orally copulate him again until appellant ejaculated. Moving him to the living room, appellant sodomized Paul a third time and ejaculated. He was convicted of committing a lewd and lascivious act on a child under the age of 14 (Pen. Code, § 288, subd. (b)) and sentenced to state prison.

Appellant was released nine years later in May of 1992. By at least September he was violating his parole by spending unsupervised time with young boys. He did not molest the teenagers but turned his sexual aggression on a homeless drug addict's son, 12-year-old Jesse, who reminded him of his former cellmate, with whom he had had a sexual relationship. Appellant believed Jesse's father had been prostituting him and therefore he could have sex with him with impunity. He admitted that he had been sexually attracted to Jesse and children in Jesse's age group. Appellant offered Jesse work, helping appellant paint houses. In the empty houses, he forced Jesse to engage in sexual acts including oral copulation, masturbation, and sodomy. Despite the force, appellant believed he had established a romantic relationship with Jesse and felt an emotional connection with him. He was convicted of two counts of forcible oral

copulation on a child under the age of 14 in violation of Penal Code section 288a and returned to state prison until 2000.

In 2000 a jury found appellant met the criteria for a sexually violent predator who remained a current danger, and he was transferred to Atascadero State Hospital. At the hospital, as in prison, he continued to use marijuana, cocaine, methamphetamine, heroin, and alcohol. Complaining of back pain, he was prescribed Norco as well. He was recommitted in 2002. Petitions to retain him were filed in 2004 and again in 2006, and eventually he was committed to an indeterminate term following a change in the law. (Welf. & Inst. Code, § 6604, as amended by Prop. 83, § 27, as approved by voters, Gen. Elec. (Nov. 7, 2006, eff. Nov. 8, 2006).) He refused to participate in any treatment program until he transferred to Coalinga State Hospital. A woman named Chrystle brought her children to visit appellant at Atascadero while he was on parole status. Appellant's defense to the blatant parole violation was that he believed the visit had been approved since hospital personnel allowed it. The jury in this case was not informed about any of his prior commitments. It found appellant met the criteria for commitment as a sexually violent predator in May 2013.

DISCUSSION

I

“The Sexually Violent Predators Act (SVPA or Act) (Welf. & Inst. Code, § 6600 et seq.) [fn. omitted] provides a court process by which certain convicted violent sex offenders, whose current mental disorders make them likely to reoffend if free, may be committed, at the end of their prison terms, for successive two-year periods of state hospital confinement and treatment as long as the disorder-related danger persists. Before an SVPA commitment or recommitment proceeding may even be initiated, at least two mental health professionals designated by the Director of the State Department of Mental Health (Director) must evaluate the candidate under a standardized assessment protocol to determine whether, as the result of a diagnosed mental disorder, the person is

likely to commit new acts of criminal sexual violence unless confined and treated.”
(*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 893.)

In this case, two mental health professionals, Dr. Bruce Yanofsky and Dr. Lisa Jeko, evaluated appellant and concluded that he currently suffers from ongoing mental disorders and continues to pose a risk of reoffending. They both testified at length at trial. Appellant contends their testimony is insufficient to support his commitment under the SVPA.

The standard of review of a jury commitment under the SVPA is the same as in criminal proceedings. We must view the evidence in the light most favorable to the jury finding without reweighing the credibility of the experts or the relative strengths of their conclusions. (*People v. Sumahit* (2005) 128 Cal.App.4th 347, 352 (*Sumahit*)). We must affirm the judgment if there is substantial evidence, that is, evidence that is reasonable, credible, and of solid value. (*People v. Mercer* (1999) 70 Cal.App.4th 463, 465-466.)

A sexually violent predator under the SVPA is defined 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.” (Welf. & Inst. Code, § 6600, subd. (a)(1).) There was no dispute that appellant committed two qualifying offenses. Thus, the issues at trial were whether appellant suffered a current diagnosed mental disorder and whether he posed a danger to the health and safety of others. Drs. Yanofsky and Jeko provided an abundance of evidence to support both necessary prongs. But in a classic battle of the experts, the mental health professionals retained by the defense testified that he was not a pedophile and he did not present a serious and well-founded risk that he would engage in sexually violent predatory criminal behavior if released into the community. Because we are not at liberty to reweigh the evidence or make our own assessment of the credibility of the experts, we will highlight the prosecution’s evidence in support of the judgment.

Both doctors testified that appellant suffers from pedophilia, sexually attracted to males, nonexclusive; polysubstance dependence; and antisocial personality disorder. According to Dr. Yanofsky, a diagnosis of pedophilia is based upon six months of recurrent, intense, sexually arousing fantasies, urges, or behaviors, and the focus of arousal is children who are prepubescent and “generally 13 years or younger.” He relied, in part, on appellant’s statement, “It seems now that I wanted to -- that I would have been thinking is that I was having sex with the objects of my fantasies, two young boys, young and vulnerable.” Both Paul and Jesse were under the age of 13. Dr. Jeko’s diagnosis was based, in part, on appellant’s conduct after being paroled in May of 1992, when he began associating with 14- and 15-year-old boys. Appellant admitted that he would often smoke rock cocaine and methamphetamine with the two boys, but he denied molesting them. Alice Purdy, however, reported seeing appellant lying on a couch with his pants down next to a 15 year old, Steven. Appellant was not prosecuted for the incident.

Both doctors scored appellant on a series of actuarial instruments to assess whether his diagnosed mental disorders made it likely he would commit future criminal acts of a sexually violent and predatory nature. Although some of the tests they administered were different and they scored him differently on some of the same tests, both doctors opined that appellant was a high-risk offender. For example, Dr. Yanofsky testified that appellant scored a 25 on the Hare Psychopathy Checklist Revised, whereas Dr. Jeko testified that appellant scored a 31 on the same test, which indicated to her that he was a psychopath. Dr. Yanofsky agreed that appellant manifested significant psychopathic traits. The doctors described psychopaths as people who are typically callous, potentially violent, and manipulative, and who do not fear consequences or feel remorse. As a consequence, they have an increased risk of reoffending and often repeat past behaviors.

Those behaviors reflected impulsivity and a propensity for emotional outbursts. While at Atascadero State Hospital, appellant was verbally combative with staff

members. He often got upset during interviews, threatened to leave, and later wanted to retract what he had said.

Of grave concern to both doctors, as well as to Dr. Steven Arkowitz, the clinical director for the Liberty Health Care Conditional Release Program (Liberty Program), was appellant's failure to complete the final phase of the inpatient program for sexually violent predators. Dr. Yanofsky expressed concern about how long it had taken appellant to start treatment and that, even after he began the program, he dropped out for a while before restarting. Although appellant thereafter participated in the program for six years, he still had not completed it by the time of trial. Dr. Yanofsky reviewed some of appellant's work during the program and found it to be "very poor in . . . quality" and to not exhibit "insight or exploratory type understanding." He opined that defendant could not be safely released into the community before completing the inpatient treatment program within the hospital. He explained: "It's good that he's advanced to where he's at now, but I think there's a lot more to gain. And I don't feel that clinically he's ready to go and leave and do this on his own. I don't see the incentive to do it necessarily in him. I don't see the motivation to maintain treatment. I see the dangers, as I discussed before, trying to complete treatment in an outpatient setting. He is, as we've discussed, someone who presents the diagnosis where he's in the high risk category and has had a host of behavioral problems, problems with management supervision. And I would be very, very remiss if I thought that he could successfully transition at this point in time to the community."

Dr. Jeko echoed the same concerns. She testified that she respected appellant for the efforts he had made in treatment, but he had not "fully engaged [in] relapse prevention in a really deep way" that would prepare him for outpatient treatment. Describing appellant as a "work in progress," she further explained that he was "not ready for discharge" and "needed to go through the rest of the program before he would be a viable candidate for release to the community." She was particularly worried about

his potential for relapse into substance abuse given his “profound history of impulsivity” and his inability to stay clean when he was released from prison in 1992. Additionally, she expressed concern about his plan to continue painting houses and the access he would have to young boys.

The prosecution called Dr. Arkowitz to testify in rebuttal. As clinical director of the Liberty Program, he explained the importance of completing an entire inpatient treatment plan before release. His staff had evaluated appellant five times and had never recommended him for release because he had not completed the program. The final phase was imperative in his view because the patient had to finalize his release plan, discuss the plan with other patients in his treatment group, and receive feedback from his group. In the final phase, appellant would also be subjected to a sexual history polygraph to determine whether there had been additional unreported victims. Simply put, according to Dr. Arkowitz, appellant was not ready for the type of outpatient treatment program the defense had proposed. He testified:

“I will put it this way: That I think that by going through the treatment program, people, patients, are able to really avail themselves and lower their risk as much as possible before they get out into the community. Prior to that time, I don’t think that everything has necessarily -- necessarily been addressed. And that -- that potentially creates problems for them in the community. Not always, but it certainly could.

“And our feeling is that before someone comes into the community, we hope -- we want them to take part in all the treatment available to them so that they’re as ready as they can be. It’s not going to be perfect. But we want them to really thoroughly address all those factors prior to coming to the community.”

Appellant’s experts challenged Dr. Yanofsky’s and Dr. Jeko’s diagnoses as well as their conclusions that appellant currently posed a risk of harm to the community. In the words of the prosecutor, they raised the “hairy victim defense,” asserting that appellant was not a pedophile because 12-year-old Jesse had pubic hair at the time appellant

sexually assaulted him. The defense emphasized that the emergency room doctor who examined Jesse had described him as reaching stage four on the Tanner scale of male sexual development, a scale of one to five, based on the presence of some pubic hair above his penis. The defense argued that a Tanner stage four 12 year old with pubic hair did not qualify as prepubescent, and since appellant's attack on 11-year-old Paul was during a crime spree and not the result of his recurring, intense, sexually arousing urges or fantasies toward a prepubescent male, he did not satisfy the criteria for a pedophile.

Nor did Dr. Brian Abbott or Dr. Mary Jane Adams believe appellant suffered from a mental disorder rendering him currently dangerous. They attributed his violent sexual outbursts not to pedophilia, but to his chronic and severe drug and alcohol dependence. Because he had overcome those addictions and was no longer using Norco, they opined he was ready to participate in outpatient treatment. Dr. Charles Flinton, who operated a community outpatient program, testified that he would accept appellant into his program because of the progress he had made and his motivation to succeed.

Appellant's sister testified that she was willing to help finance the treatment program and to allow appellant to live with her. Based in part on the familial support and the availability of the outpatient program, the defense doctors opined that appellant's release plan was adequate to protect the community and prevent relapse.

Appellant testified on his own behalf. He explained he had been under the influence of methamphetamine when he abused the girl from the bar and Paul. He denied he had been sexually attracted to Jesse, a boy who looked older than 12. He admitted he continued to use methamphetamine, cocaine, marijuana, heroin, and alcohol, both in prison and at Atascadero, but he insisted he stopped using drugs and alcohol in June 2005. He weaned himself off Norco and transitioned to a nonnarcotic pain reliever. He justified his possession of a cell phone and a cigarette in his hospital room because his mother was ill and then died. He had nearly completed a college degree by the time of trial.

In challenging the sufficiency of the evidence to support the verdict, appellant reiterates the arguments he made to the jury at trial. He insists he is not a pedophile, but a rehabilitated drug addict. Only one of his two young victims, Paul, was prepubescent, since Jesse, though 12, had pubic hair, and even Paul was a victim of opportunity, not of his sexual desire. Because he has shown such tremendous progress in treatment controlling his impulsivity, he offers a sound release plan, and he does not suffer from pedophilia, he urges us to reverse the judgment.

Had the jury accepted appellant's arguments, there would have been substantial evidence to support a judgment in his favor. But it is a well-worn principle of appellate review of a substantiality claim that it is the jury's prerogative, and not ours, to weigh the credibility of the witnesses. Based on the testimony of the medical evaluators, as well as the director of the program with the exclusive contract with the state to provide outpatient treatment and supervision, the jury made the eminently reasonable and well-supported determination that appellant was not ready for release into the community. After all, the jury heard testimony that he had not completed the inpatient program designed to reduce the probability of reoffense. While Dr. Flinton testified that he would accept appellant into his privately financed outpatient program, he candidly explained that the program did not provide the type of intense supervision and support offered by the state-financed program. Of course, the jury also learned that appellant had been rejected five times for admission to the Liberty Program because he failed to complete his inpatient program. Thus, there was substantial evidence to support the jury's conclusion that because he had not completed the program, he continued to pose a risk of harm to the community if released into a voluntary and expensive program.

Appellant lodges a number of complaints about the competency and opinions of both medical evaluators in the same vein in which they were cross-examined. Their shortcomings, if any, therefore were thoroughly aired at trial. We need not dissect their credentials or the validity of their methodologies. That was a job for the jury, one in

which we must presume they honored their oaths and scrupulously followed the instructions they were given.

The jury was also free to accept or reject the diagnosis that appellant continued to suffer from pedophilia. It is true, as appellant emphasizes, that one of his young victims might have exhibited signs of sexual maturity. But the jury also heard the testimony of Drs. Yanofsky and Jeko, who discounted the importance of the Tanner scale of development in favor of the DSM-IV description of pedophilia. Both emphasized Jesse's tender age of 12 and explained that age under the DSM-IV criteria was more significant than the appearance of some pubic hairs.

Moreover, the jury might not have been satisfied with appellant's plans for release in light of Drs. Yanofsky's and Jeko's testimony that he had not adequately considered how he would deal with the stigma in the community, and the rejection and isolation that would follow. In the same vein, the jurors were also free to accept the prosecutor's argument that appellant's younger sister was ill equipped and unprepared to deal with the emotional and financial pressures of housing a former sexually violent predator and that appellant still would be in need of the rigorous supervision and intensive treatment that the Liberty Program could provide. In short, the jury might have agreed with Dr. Jeko's assessment that appellant remained a "work in progress," better suited for potential release once his inpatient treatment program was complete.

Nevertheless, appellant insists there is insufficient evidence to support any finding that he remains currently dangerous. He points to a lack of evidence that he possessed child pornography, had been disciplined for any sexually inappropriate behavior with children, or had used drugs or alcohol since 2005. Thus, in his view, he has demonstrated he is now capable of controlling his sexual behavior.

Again, we do not doubt that appellant has made progress in controlling his sexual appetite and removing the drug and alcohol triggers from his life. But whatever progress he may have achieved has been while he is confined. Dr. Jeko, in particular, expressed

her ongoing concern that appellant will be unable to control his impulsivity once free. “The fact that [appellant] has not misbehaved in a strictly controlled hospital environment does not prove he no longer suffers from a mental disorder that poses a danger to others.” (*Sumahit, supra*, 128 Cal.App.4th at p. 353.) While his progress certainly was relevant and might have persuaded the jury he no longer posed a danger to society, it did not. And given that there is ample evidence in this record to support the jury’s decision to commit appellant, a pedophile, for ongoing treatment, we reject appellant’s argument the judgment must be reversed for insufficient evidence.

II

Appellant argues, however, there was no evidence he failed to either start or complete treatment. In the absence of an evidentiary showing, he contends the trial court erred by instructing the jury that his failure to participate in or complete a sex offender treatment program could be considered as evidence that his condition had not changed. (CALJIC No. 4.19.) It is hard to tell if appellant is misreading the record or is attempting an appellate rescue from his failure of proof at trial. Either way, he loses.

Contrary to appellant’s suggestion in his reply brief, no one disputed that appellant entered treatment and had participated in the inpatient treatment program for several years. Nor was there really any dispute that he had not completed the program. Drs. Yanofsky, Jeko, and Arkowitz all testified appellant did not finish the final phase of the program, a phase they considered extremely important. The lingering, unanswered question on this record is why he had not completed the program.

Appellant suggests on appeal that he has been unable to complete the program because the program itself has changed and there are no longer five phases to complete. While it is true the hospital was implementing changes to its treatment program, treatment was ongoing, and at the time of trial, 10 to 15 patients were in the prerelease stage of treatment. If, as he implies on appeal, there is a structural impediment to his ability to complete the program, appellant should have presented proof at trial. That issue

is not before us and is one we cannot resolve. Rather, the simple issue presented on appeal is whether there was sufficient evidence he did not complete the program to support the instruction the trial court gave the jury.

As we have already indicated, there was more than enough evidence to support the instruction. In fact, everyone agreed appellant had not completed the program. Thus the court properly instructed the jury as follows: “You may consider evidence, if any, that [appellant] failed to participate in or complete the State Department of Mental Health Sex Offender Commitment Program as an indication that [appellant’s] condition has not changed. The meaning and importance of any such evidence is for you to decide.” As instructed, the jurors were free to attach any meaning or significance to the fact appellant failed to complete the program as they believed appropriate. If the jurors believed the change in the program compromised appellant’s ability to complete it, they presumably attached very little importance to the evidence. Again, we must not superimpose our judgment on the jury. The only question before us is whether there was sufficient evidence to justify the instruction and the only answer is a resounding yes. There was no instructional error.

III

Appellant alleges prejudicial evidentiary error as well. He contends the trial court erred by allowing the prosecutor to call the clinical director of the Liberty Program, Dr. Arkowitz, in rebuttal because his testimony was irrelevant to the issue of dangerousness and exceedingly prejudicial. The admission of Dr. Arkowitz’s testimony, he continues, violates his federal right to due process. We disagree. “The scope of rebuttal evidence is within the trial court’s discretion, and on appeal its ruling will not be disturbed absent ‘palpable abuse.’” [Citation.]” (*People v. Wallace* (2008) 44 Cal.4th 1032, 1088.) On this record, we can find no abuse of discretion and no violation of appellant’s right to due process.

The prosecution called Dr. Arkowitz to rebut Dr. Flinton's testimony that appellant was an appropriate candidate for an outpatient program before completing the comprehensive inpatient program, a determination probative of the crucial question whether appellant would be a danger to the community if released. Dr. Flinton had testified that appellant was sufficiently motivated, had achieved sufficient insight, had presented an adequate relapse prevention plan, and had the financial resources to participate in his program. We agree with the Attorney General that Dr. Arkowitz's testimony was relevant to rebut Dr. Flinton's opinion that appellant was ready for the less-intensive program he provided rather than the tightly structured and closely monitored Liberty Program. We disagree with appellant's fundamental premise that the rebuttal testimony was irrelevant.

Nor do we find it substantially more prejudicial than probative. Although Dr. Arkowitz testified that he had known appellant for many years, he had not interviewed him personally to determine his suitability for release. His testimony focused on a description of the Liberty Program and the services it provided. It was within the province of the jury to compare the differences between the two programs and to make the ultimate determination whether appellant would pose a risk to the community if allowed into Dr. Flinton's program without the benefit of completing the inpatient treatment. The fact that they might have inferred the Liberty Program would be more suitable for appellant and therefore prejudicial to his chances of obtaining immediate release into Dr. Flinton's program does not mean the prejudice was undue or that the trial court abused its discretion by admitting it. Rather, it was appropriate rebuttal evidence to the rosy picture painted by only one provider who was willing to accept appellant into an outpatient setting.

Appellant mischaracterizes Dr. Arkowitz's testimony in several respects. He contends that Dr. Arkowitz suggested completion of the inpatient treatment program "[was] the legal criteria for whether an individual can be confined as [a sexually violent

predator].” Not so. While Dr. Arkowitz did testify that he preferred to admit those who had completed the inpatient program, there were instances where his program had “taken clients that the court has ordered out where the hospital was opposed to it.” He explained why completion of the inpatient program was important, but he never said it constituted a legal requirement or that the jurors must defer to the hospital’s evaluators instead of independently judging the evidence. To the contrary, the jurors were specifically instructed that they alone must decide the facts, including whether appellant’s disorder made it likely he would engage in sexually violent criminal conduct if he were released into the community. (CALCRIM No. 200; see CALJIC No. 4.19.)

Appellant misunderstands the purpose of the rebuttal testimony. It was not, as he argues, to provide an analysis or critique of Dr. Flinton’s outpatient program directly. Rather, it was to provide the jurors with information about a different model, which provided more intensive supervision and testing, allowed the staff to take the former offenders into custody if necessary, and required, where possible, the completion of the inpatient program before release. His testimony helped rebut Dr. Flinton’s assessment that his program was suitable and gave the jury additional information upon which it could determine whether appellant would be likely to reoffend. Appellant’s emphasis on his willingness to save the taxpayers the expense of his ongoing treatment is irrelevant to the admissibility of Dr. Arkowitz’s testimony or whether he was likely to reoffend if freed.

We therefore reject appellant’s contentions that the rebuttal testimony was irrelevant, unduly prejudicial, and a violation of due process. Because we find the evidence probative of the key question whether it was likely appellant would engage in sexually violent criminal conduct if released into Dr. Flinton’s program and not unduly prejudicial, we conclude the trial court did not abuse its discretion or violate appellant’s right to due process. There was no evidentiary error.

DISPOSITION

The judgment is affirmed.

_____ RAYE _____, P. J.

We concur:

_____ BLEASE _____, J.

_____ DUARTE _____, J.