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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN DUNHAM,

Defendant and Appellant.

D064060

(Super. Ct. No. MH107359)

APPEAL from an order of the Superior Court of San Diego County, Howard H. Shore, Judge. Affirmed.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

Steven Dunham appeals from an order of commitment after a jury found him to be a sexually violent predator (SVP) under the Sexually Violent Predators Act (SVPA; Welf. & Inst. Code, § 6600 et seq.). Dunham contends that insufficient evidence supports the jury's finding that he meets the definition of an SVP. Also, for the purpose of preserving the argument, Dunham contends that the current version of the SVPA violates the state and federal Constitutions and that the trial court should hold a hearing on whether his right to equal protection has been violated. We conclude that Dunham's arguments are without merit, and we accordingly affirm the order of commitment.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

Dunham was born in 1969 and was 44 years old at the time of trial.

Dunham's history of criminal sexual conduct began at age 13 or 14 when he attempted to have sex with his five-year-old female cousin but was stopped by an adult after touching the victim's vagina. After that offense, Dunham was placed in a group home and later in a California Youth Authority facility. While institutionalized as a minor, Dunham sexually assaulted both a 14-year-old female peer and a female parole agent.

Dunham was released into the community in June 1992, and in September 1992, he sexually assaulted his 30-year-old aunt by grabbing her from behind and reaching between her legs. For that incident, Dunham was convicted of sexual battery and placed on formal probation.

In December 1993, Dunham was convicted of rape by a foreign object with force. (Pen. Code, § 289, subd. (a).) The victim was a 33-year-old female acquaintance who was confined to a wheelchair with cerebral palsy. While in the victim's apartment, Dunham closed the curtains and fondled the victim's breasts. After the victim told Dunham to stop, Dunham lifted her shirt and kissed her stomach and breasts and digitally penetrated her vagina. The victim refused to orally copulate Dunham, so he masturbated and then left. Dunham was arrested when he returned to the scene to apologize to the victim. Dunham was sentenced to eight years in prison.

After release from prison in 1998, Dunham reoffended in less than a month. Dunham wrote sexually explicit notes to a female acquaintance who was staying at the same motel. He then forced his way into the victim's room, punched her face, and told her if she screamed, he would kill her. Dunham opened the victim's robe, kissed her breasts, told her he wanted to perform oral sex on her, and tried to force her legs apart. The victim managed to get away and contacted the police. Dunham was convicted of attempted rape and burglary, and his current incarceration was for that conviction.

During his time in prison, Dunham incurred several serious rule violations, some of which involved sexual misconduct. Among other things, in 1996 Dunham gave a sexually explicit note to a classroom teacher; in 1998, Dunham was observed masturbating after asking to see a female staff member; in 2006, Dunham described sexual feelings toward a clinician, which the prison interpreted as a threat to commit sexual assault; and also in 2006, Dunham committed indecent exposure by stroking his penis while staring at a correctional officer.

In interviews with psychologists, Dunham made several relevant statements describing his state of mind. Dunham explained that when out in the community, he sometimes felt urges to sexually attack women. "If I seen a woman I'd want to feel up, sometimes I'd get it hard right there. . . . [I]f she wasn't (looking) at me I'd get mad and want to knock her down and feel her up." Dunham stated that he wanted to be prescribed drugs to decrease his sex drive because "I want to keep making sex with women — way out thoughts. Beat her up. Throw her down and eat her pussy. . . . Those thoughts come back — what can you do? Some women I just don't like. I want to hurt them." In 2006, when questioned about making sexual threats toward a clinician in prison, Dunham stated, "I want some help because sometimes my brain just wants what it wants."

In April 2012, the People filed a petition for involuntary commitment of Dunham for treatment as an SVP pursuant to the SVPA. The trial court held a jury trial during which four expert witnesses testified as to Dunham's mental disorders and his risk of committing sexually violent predatory criminal acts in the future.

Dr. George Grosso and Dr. Harry Goldberg both testified for the People, opining that Dunham qualified as an SVP under the statutory definition. The main difference between the two expert opinions was that they identified different mental disorders as the primary cause of Dunham's risk of committing another violent sex crime. Dr. Grosso and Dr. Goldberg both diagnosed (1) Anti-Social Personality Disorder (ASPD)<sup>1</sup> and

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<sup>1</sup> According to the testimony at trial, ASPD is "a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 as indicated by three or more of" certain enumerated criteria.

(2) Impulse Control Disorder, Not Otherwise Specified (ICD NOS).<sup>2</sup> Dr. Grosso believed that ASPD was the mental disorder more clearly predisposing Dunham to commit criminal sexual acts. In contrast, Dr. Goldberg believed that ICD NOS was the primary cause of Dunham's sexual violence.

Although disagreeing about which mental disorder was the primary cause of Dunham's sexual misconduct, both Dr. Grosso and Dr. Goldberg acknowledged that the two disorders interacted with each other to cause Dunham's behavior. Dr. Grosso explained that ICD could be a contributing factor in Dunham's criminal acts in that ICD NOS and ASPD "mesh" and "overlap," and impulsive behavior is a component of ASPD. Dr. Goldberg explained that the "symptomology" of ICD NOS and ASPD "overlap[]" in Dunham's case, and that "over and above [ICD NOS] you do have a criminal personality." Dr. Goldberg tended more toward the ICD NOS diagnosis as causing the sexual violence, focusing on Dunham's expression of remorse on several occasions, but he believed that both ICD NOS and ASPD caused Dunham's sex offenses to some extent.

Dunham's expert witnesses both acknowledged that part of what caused Dunham's sexual misconduct is an inability to control his impulses. Dunham's first expert witnesses — Dr. Gerry Blasingame — concluded that Dunham's history of violent sex crimes was better explained by Dunham's low cognitive functioning, rather than by a diagnosis of

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<sup>2</sup> According to the testimony at trial, impulse control disorder (ICD) is characterized by "the failure to resist an impulse, drive or temptation to perform an act that is harmful to the person or to others."

ASPD or ICD NOS. Dunham's second expert witness — Dr. Mary Jane "Jay" Adams — concluded that Dunham did not meet the criteria to be an SVP. Dr. Adams diagnosed Dunham with mild mental retardation or borderline intellectual functioning and described the traumatic childhood abuse that Dunham suffered. Due to Dunham's cognitive disabilities and his history of trauma while growing up, Dr. Adams was reluctant to diagnose ASPD as the cause of Dunham's sexual misconduct.

Each of the expert witnesses who performed an actuarial assessment to determine Dunham's risk of reoffending with a violent sex crime (Dr. Grosso, Dr. Goldberg and Dr. Adams) found a high risk of reoffending based on the actuarial tests,<sup>3</sup> although Dr. Adams questioned the accuracy of those tests for someone with cognitive disabilities.

The jury found that Dunham is an SVP, and the trial court ordered Dunham to be committed as an SVP for an indeterminate term. Dunham filed a notice of appeal.

## II

### DISCUSSION

#### A. *Dunham's Challenge to the Sufficiency of the Evidence Lacks Merit*

Dunham contends that insufficient evidence supports the jury's finding that he meets the requirements for commitment as an SVP.

Welfare and Institutions Code section 6600, subdivision (a)(1) defines an SVP as "a person who has been convicted of a sexually violent offense against one or more

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<sup>3</sup> Dr. Blasingame did not perform an actuarial assessment or offer an opinion on whether Dunham was an SVP.

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." Accordingly, to commit Dunham as an SVP in this case, the jury was instructed to make findings on three factual predicates: (1) that Dunham "has been convicted of committing sexually violent offense[s] against one or more victims"; (2) that Dunham "has a diagnosed mental disorder";<sup>4</sup> and (3) that "[a]s a result of that diagnosed mental disorder, [Dunham] is a danger to the health and safety of others because it is likely that [he] will engage in sexually violent predatory criminal behavior."<sup>5</sup> (CALCRIM No. 3454.)

The first factual requirement was not disputed here. The parties stipulated that Dunham's 1993 conviction for rape by a foreign object with force (Pen. Code, § 289, subd. (a)) constitutes a qualifying conviction. However, Dunham contends that insufficient evidence supports a finding on the second and third requirements, namely, that he has a qualifying mental disorder, making it likely he will reoffend by committing a sexually violent predatory crime.

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<sup>4</sup> 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." (Welf. & Inst. Code, § 6600, subd. (c).)

<sup>5</sup> " 'Likely,' in this context, does not mean more likely than not; instead, the standard of likelihood is met 'when "the person presents a *substantial danger*, that is, a *serious and well-founded risk*, that he or she will commit such crimes if free in the community." ' " (*People v. Shazier* (2014) 60 Cal.4th 109, 128.)

"We review sufficiency of the evidence challenges under the SVP[A] according to the same standard pertinent to criminal convictions." (*People v. Fulcher* (2006) 136 Cal.App.4th 41, 52.) "When a defendant challenges the sufficiency of the evidence to support a finding that he is an SVP, 'this court must review the entire record in the light most favorable to the judgment to determine whether substantial evidence supports the determination below. [Citation.] To be substantial, the evidence must be " 'of ponderable legal significance . . . reasonable in nature, credible and of solid value.' " [Citation.]' [Citation.] 'In reviewing the record to determine the sufficiency of the evidence this court may not redetermine the credibility of the witnesses, nor reweigh any of the evidence, and must draw all reasonable inferences, and resolve all conflicts, in favor of the judgment.' " (*People v. Sumahit* (2005) 128 Cal.App.4th 347, 352.)

1. *The Conflicts Between the Opinions of Dr. Grosso and Dr. Goldberg Do Not Undermine the Sufficiency of the Evidence*

According to Dunham, his main challenge to the sufficiency of the evidence "focuses upon the contradictions and deficiencies inherent in the prosecution's own expert testimony." Dunham argues that "[g]iven two opposing expert opinions for the [People], . . . a reasonable trier of fact could not have avoided doubt that either expert's testimony provided a sound or solid factual basis . . . for a lifelong SVP commitment." Dunham contends that because the experts do not agree, both opinions must be "speculative" and therefore lack sufficient evidentiary value to support a verdict.

We reject Dunham's argument for the fundamental reason that it is the role of the jury to resolve conflicts in the evidence and to decide which expert opinion to credit.

" 'The credibility of the experts and their conclusions [are] matters [to be] resolved . . . by the jury,' and '[w]e are not free to reweigh or reinterpret [that] evidence.' " (*People v. Poulson* (2013) 213 Cal.App.4th 501, 518.) Thus, for example, in rejecting the challenge to a finding made by the jury in a proceeding brought under the SVPA, the court explained that "[t]he conflict among the experts' opinions . . . did not render the evidence insufficient[.]" as "[t]he credibility and weight of the expert testimony was for the jury to determine, and it is not up to us to reevaluate it." (*People v. Flores* (2006) 144 Cal.App.4th 625, 632, 633.)

The fact that two experts do not agree does not mean that *neither* opinion lacks evidentiary value. (*People v. Poe* (1999) 74 Cal.App.4th 826, 831 [in an appeal under the SVPA, the fact finder appropriately resolved a conflict in the expert testimony by crediting one group of experts and not the other, and that evidence constituted substantial evidence for the disputed finding].) As the opinion of a single expert is sufficient to establish a fact (Evid. Code, § 411; *People v. Rasmuson* (2006) 145 Cal.App.4th 1487, 1508), the conflict in the expert opinions presented by the People does not undermine the sufficiency of those opinions to support the verdict.

Both Dr. Grosso and Dr. Goldberg testified that Dunham suffers from a mental disorder, and the mental disorder creates a likelihood that Dunham will reoffend with sexually predatory behavior. Thus, regardless of which expert the jury chose as the most credible, either expert opinion provides substantial evidence for a finding on the second and third requirements under the SVPA.

Dunham's argument is also flawed because it relies on a greatly exaggerated description of the extent to which the two expert opinions conflict. Significantly, both Dr. Grosso and Dr. Goldberg diagnosed Dunham with the *same* two conditions: ICD NOS and ASPD. Further, they both agreed that the two disorders *working together* likely influenced Dunham's sexually predatory behavior to some extent. Their disagreement was *only* with respect to which of the disorders was the *primary* cause of Dunham's sexual misconduct. Dr. Grosso and Dr. Goldberg both gave reasonable grounds for concluding that one of Dunham's disorders was primary over the other in causing Dunham's sexually predatory behavior.<sup>6</sup> In light of the fact that the two experts differed only as to *emphasis* rather than expressing opinions which undermined each other, there is no basis for Dunham's argument that Dr. Grosso's and Dr. Goldberg's opinions were so different from each other that no reasonable juror could credit either one.

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<sup>6</sup> Dunham simply misstates the record by contending that ". . . Dr. Grosso repeatedly and consistently dismissed his colleague's opinion (that ICD NOS explained [Dunham]'s sex offenses), as constituting . . . conjecture and guesswork . . . ." Indeed, the record citations in Dunham's appellate brief provide no support for the contention. As we have explained, Dr. Grosso testified that ICD NOS and ASPD "mesh" and "overlap," and that impulsive behavior is a component of ASPD. Dr. Grosso also answered "absolutely yes" to the question of whether ICD NOS could be one of the disorders that qualifies Dunham as an SVP, but he explained that he simply had chosen to focus on the ASPD diagnosis as the causative factor.

Dunham also contends that Dr. Grosso's and Dr. Goldberg's opinions are inconsistent because the evidence at trial purportedly established that a diagnosis of ICD NOS and ASPD "cannot be made 'side by side.'" The premise of Dunham's argument is not supported by the evidence. Counsel for Dunham *attempted* at trial to elicit testimony from the witnesses that it is improper to diagnose both ICD and ASPD, but the witnesses would not agree with counsel.

2. *Additional Attacks on the Expert Diagnoses*

In addition to focusing on the disagreement between Dr. Grosso and Dr. Goldberg, Dunham argues that the two experts' diagnoses were individually flawed for other reasons and therefore did not provide substantial evidence to support the verdict. As we will explain, we find no merit to Dunham's arguments.

a. *Dr. Goldberg's Diagnosis of ICD NOS as the Qualifying Mental Disorder*

Dunham presents two main criticisms of Dr. Goldberg's diagnosis of ICD NOS as the mental disorder predisposing Dunham to predatory sex offenses.

First, Dunham contends that Dr. Goldberg's diagnosis does not constitute substantial evidence because of Dr. Goldberg's reference to a study discussing sexual behaviors by people with ICD. Dr. Goldberg testified on direct examination that the study concluded that 5 or 6 percent of people in the community with ICD act out sexually. On cross-examination, Dr. Goldberg described the study as showing that "sexual behaviors are a common impulse control problem." Referring to a Web site at which the study can purportedly be accessed, Dunham argues that the study does not support Dr. Goldberg's conclusions.<sup>7</sup> The study was not entered into evidence and is not part of the record. Nor was Dr. Goldberg cross-examined with the aspects of the study

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<sup>7</sup> In any event, Dunham's argument depends on a mischaracterization of Dr. Goldberg's description of the article. Dunham incorrectly states that Dr. Goldberg interpreted the article as stating that "5% to 6% of persons with ICD also sexually offend." In fact, Dr. Goldberg described the article as stating that 5 to 6 percent of people with ICD *act out* sexually.

that Dunham now attempts to bring to our attention on appeal. As the evidence that Dunham relies on for his appellate argument is not part of the record, we will not consider it. (*People v. Castillo* (2010) 49 Cal.4th 145, 157 [" 'an appellate court generally is not the forum in which to develop an additional factual record' "].)

Second, Dunham contends that because the diagnosis is "not otherwise specified" (NOS), rather than a particular type of ICD, such as pyromania or kleptomania, "it is just a description of [Dunham] from the outside" rather than a valid diagnosis. We disagree. Although counsel for Dunham attempted at trial to undercut Dr. Goldberg's diagnosis of ICD NOS by suggesting that an NOS diagnosis was somehow less valid, Dr. Goldberg rejected that suggestion during his testimony, as did Dr. Grosso when asked about that part of his diagnosis. Because both experts testified that an NOS diagnosis was an accepted and proper approach in this context, the evidence provided an ample basis for a rational jury to accept Dr. Grosso's diagnosis of ICD NOS as the mental disorder qualifying Dunham as an SVP.<sup>8</sup>

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<sup>8</sup> Without further developing the argument, Dunham contends that Dr. Grosso's diagnosis of ICD NOS does not provide substantial evidence for the verdict because "[a]ppellate counsel has found no SVP commitment case based on ICD alone." Dunham's argument is misplaced because it is not necessary that an expert's diagnosis of a mental disorder be based on case law precedent. Instead, the inquiry is whether the expert testimony has identified a mental disorder meeting the statutory definition, which 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." (Welf. & Inst. Code, § 6600, subd. (c).) In accordance with this requirement, the jury was instructed that "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

b. *Dr. Grosso's Diagnosis of ASPD as the Qualifying Mental Disorder*

Dunham sets forth two main criticisms of Dr. Grosso's diagnosis of ASPD as the mental disorder that predisposes Dunham to commit sexually predatory crimes.

First, Dunham contends that the evidence at trial revealed a controversy among experts as to whether it is proper to use ASPD as a mental diagnosis sufficient to support a conclusion that an individual is an SVP. As Dr. Goldberg described during his testimony, some experts in the field question whether a diagnosis of ASPD should be used to support a conclusion that someone is an SVP. However, the evidence was also clear that Dr. Goldberg and other experts reject that criticism and believe that it is entirely appropriate to use ASPD as the qualifying diagnosis in an SVP proceeding. The jury was entitled to credit that testimony and accept Dr. Grosso's diagnosis of ASPD as a qualifying diagnosis for Dunham.

Second, Dunham contends that there is "no case in California that justifies finding that an ASPD diagnosis alone . . . can suffice to meet SVP law requirements." We reject Dunham's argument, as case law is to the contrary. In *People v. Williams* (2003) 31 Cal.4th 757, 778, our Supreme Court noted in affirming an SVP commitment that there was expert testimony that the appellant's control was impaired by a number of mental disorders, including severe ASPD, which enhanced his impulsivity and clouded his judgment. In *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, our Supreme Court rejected an argument that the SVPA was unconstitutional because it did not exclude from

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the health and safety of others." A reasonable jury could find, based on the expert testimony, that a diagnosis of ICD NOS meets those requirements.

its scope "[ASPD] or other conditions characterized by an inability to control violent antisocial behavior" (*id.* at p. 1158), concluding that United States Supreme Court precedent permitted the use of antisocial personality conditions and past criminal conduct as part of the basis for a commitment determination. (*Id.* at p. 1161.)

As Dunham acknowledges, *People v. Burris* (2002) 102 Cal.App.4th 1096, 1105, rejected the appellant's argument that "[ASPD] is not a 'mental disorder' within the meaning of the [SVPA]." (*Id.* at p. 1108). However, Dunham contends that *Burris* does not apply because in that case the respondent also was diagnosed with paraphilia involving rape. (*Id.* at p. 1110.) The factual distinction is not legally significant. Nothing in *Burris* suggests that an additional diagnosis of paraphilia is necessary to a finding that a person suffers from a qualifying mental disorder under the SVPA.

In sum, we conclude that Dunham's challenges to the sufficiency of the evidence lack merit. The testimony of either Dr. Grosso or Dr. Goldberg provided substantial evidence for the jury's finding on the final two elements required to commit Dunham as an SVP, namely that Dunham suffers from a diagnosed mental disorder and as a result it is likely that he will continue to engage in sexually violent predatory criminal behavior.

B. *Application of the SVPA Does Not Violate Dunham's Constitutional Rights*

Solely for the sake of preserving the issue, Dunham argues that the current version of the SVPA violates his right to due process, violates double jeopardy prohibitions, and constitutes a punitive ex post facto law. As Dunham acknowledges, each of those constitutional challenges was rejected by our Supreme Court in *People v. McKee* (2010)

47 Cal.4th 1172 (*McKee I*). Based on *McKee I*, we find Dunham's due process, double jeopardy and ex post facto challenges to the SVPA to be without merit.

C. *There Is No Basis for a Remand to the Trial Court to Determine Whether Dunham's Equal Protection Rights Were Violated by Application of the SVPA*

In *McKee I*, our Supreme Court remanded to the trial court for a ruling on whether McKee's equal protection rights were violated by disparate treatment between SVP's and others subject to civil commitments, namely, mentally disordered offenders (MDO's) and to persons found not guilty by reason of insanity (NGI's). (*McKee I, supra*, 47 Cal.4th at pp. 1208-1211.) On remand, *People v. McKee* (2012) 207 Cal.App.4th 1325 (*McKee II*) affirmed the trial court's ruling rejecting McKee's equal protection challenge, and that decision is now final.

Dunham contends that, as our Supreme Court did in *McKee I*, we should remand this action for the trial court to determine whether Dunham's equal protection rights were violated by applying the SVPA to him. However, it is clear from our Supreme Court's approach that it intended the decision in *McKee II* to be dispositive of the equal protection issue not just as to McKee but as to all other parties making the same challenge to the SVPA. (See *People v. Kisling* (2014) 223 Cal.App.4th 544, 548 ["we agree the Supreme Court intended for the remanded proceedings in *McKee I* to be, as a matter of law, dispositive in all cases on the issue of whether the disparate treatment between SVP's and MDO's/NGI's was justifiable, and because *McKee II* decided that issue adversely to the defendants, there was no basis in the present case for a hearing on the matter"].) As the equal protection issue decided in *McKee II* is the same as the equal

protection argument raised by Dunham in this case, *McKee II* is dispositive and there is no basis for a remand of this action.

DISPOSITION

The order of commitment of Dunham as an SVP is affirmed.

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.