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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD HORN,

Defendant and Appellant.

F067008

(Super. Ct. No. 03CRSP676754)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Donald S. Black, Judge.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, and Julie A. Hokans, Deputy Attorney General, for Plaintiff and Respondent.

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*Before Cornell, Acting P.J., Gomes, J. and Franson, J.

INTRODUCTION

Appellant Richard Horn was found to be a sexually violent predator (SVP) in 1997 and subsequently released from Atascadero State Hospital in August 2007 to a conditional release program (CONREP). On February 7, 2013, Horn filed a petition in superior court for unconditional release pursuant to Welfare and Institutions Code section 6605.¹ The trial court denied Horn's petition.

Horn contends the trial court erred in denying the petition and the opportunity of a hearing on the issue of whether he should be unconditionally released into the community. We conclude Horn met the probable cause standard set forth in section 6605, former subdivision (c) (former § 6605(c)),² and the trial court erred in denying Horn's petition. We reverse the trial court's order denying Horn's petition and remand for further proceedings.

FACTS AND PROCEEDINGS

On November 13, 2012, the community program director of Horn's CONREP, Alan Stillman, LCSW, submitted a quarterly progress report pursuant to section 6605, former subdivision (d), recommending that Horn be unconditionally released from CONREP supervision into the community. Horn was born in February 1954 and was 58 years old when Stillman's report was prepared.³

SVP Offenses and Status

In 1979, while residing in Arizona, Horn knocked on the door of a residence. A female, 13 years old, answered the door. Horn said he needed to use the telephone. The

¹Unless otherwise designated, all statutory references are to the Welfare and Institution Code.

²The Legislature amended section 6605 effective January 1, 2014. (Stats. 2013, ch. 182, § 2.) Former subdivision (c) of section 6605 was redesignated as subdivision (a)(2) without any other change to its provisions. For consistency, we will refer to the subdivision designations in effect at the time of the pertinent proceedings.

³By the time of the hearing on Horn's petition on February 22, 2013, Horn had turned 59 years old.

girl allowed Horn in the home. Horn removed the girl's clothing and pulled her to the living room floor. He felt the girl's breast, asked her if she had had sex before, and then attempted to rape her. The girl's brother, who was three years old, was present and crying hysterically during Horn's attack. After five minutes, Horn left. Horn was convicted of one count of attempted sexual assault and sentenced to probation on condition that he serve a year in jail.

In 1980, Horn picked up a hitchhiking female in Arizona who was 18 years old. Horn was driving his employer's truck. Horn drove the victim to a field and performed cunnilingus on her before raping her. Horn forced the victim to masturbate herself while performing fellatio on him. Afterward, Horn picked up a hammer and said he did not know what to do with the victim, who fled to a nearby highway. In July 1984, Horn was convicted of one count of sexual assault and sentenced to 12 years in prison.

In September 1983, Horn stopped his vehicle and asked a 17-year-old girl who was walking by herself if she wanted a ride. The girl accepted the offer and asked to be dropped off when she was close to her destination. Instead, Horn grabbed the girl by the hair, pulled her toward the floorboard, and threatened to kill her if she did not shut up. Horn also told the girl he had a knife and would use it. Horn pulled over to a vacant field and commanded the girl to remove her blouse. Horn kissed the girl, attempted to pull her skirt up, and when he failed to do so, ordered the girl to remove her skirt and underpants.

The girl was crying. Horn rubbed her vaginal area and ordered the girl to masturbate him. When the girl replied she did not know how to comply, Horn masturbated. Horn then raped the girl, ejaculating inside her. After raping the girl, Horn told her she looked nice and let her dress herself. The girl was picked up later by an elderly couple and she contacted the police.

In October 1983, the girl was with her boyfriend when they saw Horn riding a bicycle. The boyfriend knocked Horn off the bicycle and the two fought. Horn

attempted to flee on foot but was found hiding under a palm tree and apprehended by police.⁴ Horn entered into a plea agreement and was convicted of rape by force. He was sentenced to prison for eight years. In 1984, Horn was convicted of sexual assault in Maricopa County, Arizona, for the 1980 incident in Arizona. He was sentenced to a prison term of 12 years in Arizona to be served concurrently with his California conviction.

In 1995, Horn was caught exiting from Sears in Fresno with a pair of jeans without paying for them. Horn was convicted in June 1995 of petty theft with prior convictions and sentenced to state prison for two years eight months. The Fresno County District Attorney's Office successfully petitioned that Horn was an SVP pursuant to section 6600. Horn was committed to a state hospital until he was conditionally released on August 16, 2007. On August 5, 2010, Horn was detained by deputies of the San Diego Sheriff's Office and subsequently transported to Coalinga State Hospital at the request of the community program director who sought revocation of Horn's outpatient status.⁵ On August 23, 2010, the trial court denied the request to revoke Horn's outpatient status.

Current Circumstances

Horn currently lives outside the city limits of Brawley, California in an unincorporated area of Imperial County. He has permission to leave the county for appointments and is monitored by a GPS device. Horn is subject to a curfew between

⁴The report stated the victim and her boyfriend saw Horn riding his bicycle in October 1993. The designation of the year appears to be a typographical error. The year designation is also inconsistent with the logical sequence of events, including Horn's 1984 conviction and sentence in Arizona.

⁵Horn had 23 violations of the terms of his release in 2010. The most serious of these occurred on August 4, 2010, when Horn was shopping in Wal-Mart and was approached by two female minors selling raffle tickets. Instead of immediately disengaging from any interaction, Horn asked the minors help him scratch the tickets, did so himself, and then owed them \$2. Horn then walked away. A term of Horn's release was to not initiate, establish, or maintain contact with any minor without the prior written permission of his community program director.

9:00 p.m. and 6:00 a.m. Horn owns his residence and is supported by public assistance, including disability benefits.

Horn had a prior substance abuse problem but is currently in attendance at Alcoholics Anonymous (AA) recovery groups and began chairing a weekly meeting in September 2012. Horn intended to attend a biweekly meeting with his sponsor, but this activity had waned along with contact with his sponsor. The CONREP staff described Horn's contact with his AA sponsor as inconsistent, but further noted urinalysis samples are collected on a random basis monthly and all tests submitted have been negative. Horn was discontinued on Antabuse in October 2010, and a waiver of urinalysis testing was approved in January 2012.

Horn's closest relative is an aunt with whom he maintains contact. Horn had contact with a sister and her husband but they have relocated to Wyoming. Horn does not maintain contact with his brothers and his mother. Horn also has a girlfriend, Elizabeth Ibarra, who is five years younger than Horn.

Ibarra is a former accountant now employed as a reference librarian. At the time of the hearing, Horn and Ibarra had been dating a little longer than a year. Ibarra is aware of Horn's criminal past, including his sexual crimes, and wrote a letter in support of his unconditional release. Ibarra stated she trusted Horn, planned to marry him, and described his sexual attitudes as those "of a healthy male ... without any deviant penchants."

Horn was given a polygraph assessment in July 2012. His disclosures indicated no deception. Horn admitted he took photographs of consensual sexual activity with his girlfriend, changed his clothing down to his underwear during a volunteer job at a cemetery, watched sexually stimulating movies, and violated the law by walking his dogs unleashed. Horn explained he took off his clothes down to his underwear at the cemetery on more than one occasion because he was working on landscaping and needed to change clothes. The cemetery is level with a few trees and next to a highway. An attempt to

have Horn volunteer instead at the Humane Society did not succeed because he only volunteered once and did not work.

In the quarter prior to November 2012, Horn had 15 rule violations. Stillman described this as troubling. The rules Horn violated were not being fully clothed in public at all times, failing to obey all laws by walking his dogs unleashed after repeatedly being told by CONREP staff and sheriff's deputies not to do so, watching sexually stimulating material, twice making stops in the community without CONREP staff approval, and failing to secure dangerous tools on three occasions.

Despite a prohibition on contacting or communicating with any victim or a victim's family, Horn visited the family members of a victim in October 2012. Horn was to bring to the director's attention any accidental contact with any minor but in late October 2012 he went to his brother and sister-in-law's residence to bring them a coffee table and their grandchild was present. Horn did not report this contact. Although Horn was not permitted to knowingly associate with criminals or sex offenders, he contacted a brother with such a past.

The CONREP team was concerned that Horn did not consider himself at risk for reoffending, that he chose to renew an unhealthy relationship with his brother and sister-in-law, that he had 15 rule violations, and he had an intimate relationship with an adult female that could add stress and divert him from his recovery.

The CONREP staff noted as positive developments that Horn had not reoffended or returned to substance abuse, he had developed an intimate adult relationship, and his contact with family members and the family of a victim were "merely a misunderstanding between [Horn] and staff." The staff further noted Horn was not using thought distortions to justify sexual deviance, did not suffer from urges or fantasies associated with coercive sexual behavior, did not have urges or fantasies associated with children, and did not struggle with controls on his sexual behavior or his anger. The structure of Horn's personality had improved through a prolonged course of intensive

cognitive behavioral therapy and psychodynamic therapy. Horn was not duplicitous and had performed well in the community.

Stillman concluded that although his recommendation was not made easily, he believed on balance that Horn had improved and was a productive member of the community. Horn had made excellent gains in therapy and presented a lower risk for sexual reoffending. Although Horn had several rule violations, they were not seen as indicating a higher risk for sexual offense because they were not sexual offense violations. Stillman recommended that Horn be released from CONREP supervision.

Psychological Evaluation

Steve Arkowitz, Psy.D., and Clinical Director of the Liberty Healthcare Corporation CA CONREP, prepared a psychological evaluation of Horn. Horn was diagnosed with paraphilia, NOS, social phobia, major depressive disorder, polysubstance abuse in sustained full remission, and an antisocial personality disorder.

Dr. Arkowitz summarized the areas of Horn's treatment. Regarding his history of sexual assault of females, there was an ongoing focus of individual and group treatment. Horn took responsibility for his past conduct. Dr. Arkowitz noted that although Horn has had rape fantasies and fantasies about the degradation of women in the past, a recent phallometric assessment was negative regarding sexual interest in violence. Dr. Arkowitz noted, however, that Horn may have used countermeasures during the assessment.

An ongoing focus of Horn's treatment in individual and group therapy involved his social anxiety, which had decreased as his self-esteem improved. Dr. Arkowitz was concerned about the lack of a positive social network outside of his girlfriend. Also, Horn was passive and masochistic in meeting his needs, which led to feelings of self-pity. This was another topic being addressed in therapy.

Although Horn had a significant history of methamphetamine, marijuana, and alcohol abuse, he continued to attend weekly AA meetings, had a 12-step sponsor, and consistently tested negative for the presence of drugs or alcohol. Dr. Arkowitz was

concerned that Horn had poor job skills and was unemployed. Horn's therapist encouraged him to find meaningful work. Horn exhibited signs of depression and had unexplored and unresolved issues involving his mother.

Dr. Arkowitz noted Horn's therapist reported that Horn "has met and exceeded the expectations of both treatment and supervision." The therapist did not believe Horn's recent violations of the terms of release represented an increased risk for sexual recidivism. Horn attended all of his therapy sessions and continued to function at the highest level since being in the conditional release program. The therapist further reported Horn was reflective regarding the events in his life and was continuing to "go deep" in treatment therapy in exploring the adversity of his past and its impact on his history of sexual deviance.

The therapist also believed Horn had developed much higher self-esteem. Horn's psychiatrist had discontinued psychotropic medications without a corresponding reduction in positive affect or mood.⁶ Although Horn's therapist reported Horn masturbated, it was infrequent and was to nondeviant themes involving adults. The therapist did not believe Horn was currently aroused by sadistic, violent, or coercive sexual themes. Horn attended all of his scheduled group therapy sessions, and his therapist reported Horn continued to participate well in the group.

Horn's psychiatrist recommended Horn for discharge from the conditional release program, "noting his overall marked progress." Although Horn had some difficulty following all of the program rules and conditions, the psychiatrist did not believe this presented evidence of increased risk. Horn passed a polygraph test indicating that since July 2012, he had not consumed any illegal drugs or alcohol, had not had contact with minors since the prior polygraph, had not masturbated while viewing nude images, had not committed sexual crimes, and had not engaged in any deviant sexual activity.

⁶Horn was prescribed Seroquel as needed to address sleep difficulties.

Horn had Static-99R and Structured Risk Assessment—Forensic Version Light (SRA-FVL) tests. Based on his scores, it was estimated that offenders with Horn's scores reoffend at a rate of between 8.7 and 12.3 percent over five years. Horn had a Static-99R score of 4, which placed him in the moderate-high risk to reoffend. Horn was 58 years old during the assessments and his Static-99R score will drop two points when he reaches age 60. This will place Horn in the low-moderate risk category, further lowering his risk for sexual recidivism. Horn's current assessment placed him in the 80th percentile, defined as the midpoint average. About 11 percent of sex offenders share Horn's score. Roughly 74 percent of offenders scored lower than Horn and 15 percent of offenders scored higher.

The SRA-FVL is designed to provide a systematic framework for reviewing which male adult sex offenders have long-term vulnerabilities that are known to contribute to sexual recidivism. With possible scores ranging from 0 to 5, Horn scored 2.3 on the SRA-FVL. It is estimated that the group of offenders with Horn's score have a recidivism rate above that indicated by the Static-99R routine norms, and below the Static-99R preselected treatment need norms. Offenders with Horn's score have been found to sexually reoffend at a rate of 12.3 percent in five years.

Dr. Arkowitz noted that Horn's psychiatrist and therapist agreed Horn had made significant gains in treatment in the last year. While Horn continued to have some difficulty following all programmatic rules and terms, his clinicians did not feel these violations represented a direct and increased risk for reoffense. Although Horn has areas of his life that still need to be addressed, his current risk to reoffend is relatively low and will continue to diminish as he ages. Dr. Arkowitz recommended that Horn be discharged from supervision and unconditionally released.

Show Cause Hearing on Horn's Petition

The hearing on Horn's petition was conducted on February 22, 2013. Dr. Arkowitz testified he was the Clinical Director of Horn's CONREP, a clinical psychologist, and a member of Horn's community safety team. Dr. Arkowitz and Alan

Stillman prepared Horn's report for the hearing. Dr. Arkowitz explained that Horn's diagnosis of paraphilia NOS was a clinical diagnosis and did not imply one way or the other whether Horn was currently experiencing symptoms.

Dr. Arkowitz stated Horn had been seeing his therapist for over five years, the entire time Horn had been in the community. Horn saw his therapist a minimum of once a week and, at times, twice a week. Horn participated in group therapy once a week. Horn had also been seeing his psychiatrist the entire time he had been in the community. Horn saw his psychiatrist at least once a month.

Dr. Arkowitz was asked on cross-examination to explain the results of a phallometric assessment, also known as a penile plethysmograph (PPG). The PPG measures blood flow to the penis when the subject is exposed to audio and visual stimuli. The blood flow is charted and, while not perfect, gives an indication of sexual interest. Dr. Arkowitz was asked to explain the possible countermeasures Horn may have taken during the PPG. Dr. Arkowitz explained there was an unclear finding during the polygraph that raised the possibility Horn used countermeasures during the PPG. According to Dr. Arkowitz, paraphilias such as Horn's are lifelong, and the goal of treatment is to help the person effectively manage it. Dr. Arkowitz believed this was possible.

Horn testified he disrobed behind a building on one occasion while volunteering at the cemetery because he was hot and sweaty from his work and wanted to put on clean clothes before going into town. On another occasion, Horn changed his clothes behind the open door of his truck and thought the truck was shielding him from view. Horn worked at the cemetery once a week for a few months.

The trial court issued a written ruling that reviewed Horn's criminal past, his SVP offenses, and his SVP treatment. The court stated Horn's age was 55, although at the time of the hearing Horn was 59 years old. The court directly quoted from former section 6605(c), which sets forth the standard for the trial court to determine whether there was probable cause to believe the committed person's diagnosed mental disorder had so

changed that he or she was no longer a danger to the health and safety of others and was not likely to engage in sexually violent criminal behavior if discharged. If this is so, the court sets a hearing on the issue. Citing *People v. Hardacre* (2001) 90 Cal.App.4th 1392, 1402 (*Hardacre*), the trial court noted Horn had the burden, similar to the prosecution's burden in a preliminary hearing, to establish probable cause to believe the existence of the requisite facts showing the SVP's mental condition had so changed that he or she was no longer a danger to others.

The court noted the therapist, psychiatrist, and Dr. Arkowitz all agreed Horn had made significant gains in his treatment, and Horn's difficulty following all programmatic rules and terms did not directly increase Horn's risk to reoffend. After reviewing Horn's Static-99R score, however, the court noted Horn was at a moderate-to-high level to sexually reoffend. The court found this data inconsistent with Dr. Arkowitz's conclusion that Horn was ready for unconditional release into the community. The court reviewed the positive assessment of Horn's therapist, as well as Elizabeth Ibarra's positive view of Horn.

In its ruling, the trial court referred to the request of the CONREP contractor to revoke Horn's conditional outpatient release in August 2010. The court noted there was concern in 2010 that Horn had not made substantial progress in his plan and had numerous rule violations. The court found nothing in the record before it to adequately explain how, two and a half years earlier, Horn's frequent rule violations coupled with his SVP offenses supported his current request for complete release from supervision. The court denied Horn's petition.

PROBABLE CAUSE DETERMINATION

Horn contends the trial court erred in denying his petition for a trial pursuant to former section 6605(c).⁷ As we explain, there was conflicting evidence, but there was

⁷Former section 6605(c) provided: "If the court at the show cause hearing determines that probable cause exists to believe that the committed person's diagnosed mental disorder has so changed that he or she is not a danger to the health and safety of others and is not likely to

still sufficient evidence to meet the statutory probable cause standard.

The SVP at a show cause hearing has an evidentiary burden similar to the burden of the prosecution in a felony preliminary hearing. The SVP and the prosecutor “must establish probable cause to believe in the existence of the requisite facts. At the preliminary hearing, the prosecutor must establish probable cause that an offense has been committed and the accused is guilty of it.” (*Hardacre, supra*, 90 Cal.App.4th at p. 1402; see former § 6605(c).) “At the show cause hearing, the SVP must establish probable cause to believe that his mental condition has changed so that he is no longer a danger to others.” (*Ibid.*)

When a magistrate dismisses criminal charges at the preliminary hearing, the appellate court independently reviews that order to determine whether the evidentiary record shows a rational basis for believing the defendant is guilty of the charged offense. If the magistrate makes findings of fact in the process of determining whether probable cause exists, those findings are conclusive if supported by substantial evidence. The same standard of review is applied in SVP cases.⁸ The question before us is whether the evidentiary record of the show cause hearing disclosed a rational basis for believing the SVP was no longer a danger to others, accepting any factual findings made by the trial

engage in sexually violent criminal behavior if discharged, then the court shall set a hearing on the issue.”

⁸In a criminal case, the magistrate presiding over a preliminary hearing is called upon only to determine whether the factual showing is sufficient to establish probable cause to believe the defendant committed a felony. The magistrate’s role is significantly different from that of the jury at trial. An information is not set aside if there is some rational ground for assuming the possibility that an offense has been committed and the defendant is guilty of it. The test is limited to whether there are such facts as would lead a person of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused. If the test is met, the magistrate must hold the accused to answer. Evidence that supports a prosecution need not be sufficient to support a conviction. The magistrate is not the trier of fact. The ultimate determination of the credibility of witnesses rests with the jury. (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 14-15; also see *Thompson v. Superior Court* (2001) 91 Cal.App.4th 144, 149, fn. 4.)

court to the extent they are supported by substantial evidence. (*Hardacre, supra*, 90 Cal.App.4th at p. 1402.)

Horn contends the court acted as a trier of fact at trial rather than as a magistrate making a probable cause determination. Horn argues he “introduced a mountain of undisputed evidence firmly establishing probable cause to believe that he was fit for unconditional release” and the trial court should have permitted him to proceed to trial. According to Horn, there was more than sufficient evidence to justify a trial on the issue of his unconditional release.

Horn had 15 rule violations. Many of these, such as leaving his toolbox unlocked, were obviously inconsequential in the trial court’s probable cause determination or the CONREP team’s assessment. Some, however, were more serious, including: the two occasions Horn disrobed to his underwear while working at the cemetery, his visit of a former victim’s family, watching inappropriate movies with sexual themes, and taking photographs of consensual sex acts with his girlfriend. The CONREP team was concerned that Horn did not consider himself at risk to reoffend and did not have a strong social support network outside of his relationship with Ibarra. The possibility that Horn used countermeasures to pass the PPG examination was inconclusive. Stillman, Horn’s psychiatrist, therapist, and Dr. Arkowitz nevertheless concluded the rule violations and other negative indicators did not increase Horn’s risk of sexually violent recidivism.

In denying Horn’s petition, the court questioned Stillman’s recommendation that Horn was ready for unconditional release by referring to Stillman’s prior assessment in 2010 that Horn’s CONREP should be revoked. Stillman’s prior assessment of Horn, however, was not based on Horn’s current circumstances and was based on facts two and a half to three years old at the time of the hearing. Absent a more serious violation of rules, the relevancy of events in 2010 was doubtful in a probable cause hearing.

In denying Horn’s petition, the trial court also relied on the Static-99R assessment showing Horn was at a moderate-to-high risk to commit a new sexually violent crime. The trial court stated Horn’s age was 55 when, in fact, Horn was already 59 years old at

the time of the hearing and is now 60 years old. Dr. Arkowitz noted Horn's Static-99R assessment would drop two points when Horn turned 60, and he would then be at a moderate-to-low risk for sexually violent recidivism. As with the rule violations, Stillman, Horn's psychiatrist, therapist, and Dr. Arkowitz all concluded he was not at risk of sexually violent recidivism even with his moderate-to-high Static-99R and SRA-FVL assessments.

Among the many positive facts in this case were: Horn's truthful polygraph examination, his therapist's and psychiatrist's observations that he no longer suffered from thought distortions or deviant urges or fantasies, his openness and lack of duplicity, the absence of a mood disorder, the absence of any new criminal activity, his sobriety and involvement with AA, his commitment to personal and group therapy, his therapist's observation that Horn could "go deep" in therapy, and his romantic relationship with a woman close to his own age. Ibarra corroborated the therapist's evaluation that Horn did not have any deviant sexual pendants. The therapist believed Horn was making important insights into the emotional reasons for his past SVP crimes. Horn's therapist, psychiatrist, and Stillman, Horn's CONREP supervisor, all recommended Horn's unconditional release into the community and they all believed Horn's rule violations did not increase his risk of violent sexual recidivism.

We believe the question of whether Horn established probable cause to be granted a hearing to determine whether he should be unconditionally released into the community rests on the trial court's finding that Horn's Static-99R assessment was a "disturbingly high score." Balanced against Horn's moderate-to-high Static-99R assessment were the evaluations of Horn's psychiatrist, therapist, Stillman, and Dr. Arkowitz that he was *not* at risk to commit a new sexually violent crime. As Horn points out in his opening and reply briefs, these assessments and conclusions were unrefuted in the record.

On appeal, we have to accept any factual findings made by the trial court to the extent they are supported by substantial evidence. (*Hardacre, supra*, 90 Cal.App.4th at p. 1402.) We conclude the trial court's finding that Horn failed to show probable cause

because of his Static-99R score does not constitute substantial evidence when the unrefuted opinions of four professional evaluators relied on the identical evidence and concluded Horn no longer posed a risk to public safety. Our conclusion would be different if the trial court had been acting as the trier of fact in the actual hearing to determine whether Horn was eligible for community release. The instant action, however, was a probable cause hearing.

Horn had the burden of showing in the probable cause hearing that his “diagnosed mental disorder has so changed that he ... is not a danger to the health and safety of others and is not likely to engage in sexually violent criminal behavior if discharged.” (Former § 6605(c).) Horn’s petition, the evidence attached to it, and the testimony of Dr. Arkowitz at the probable cause hearing passed the legal threshold of establishing probable cause.

Horn overcame the evidentiary threshold to establish probable cause that he was no longer a danger to the community even though there was contrary evidence in the record. In criminal cases there can be exculpatory evidence in a preliminary hearing, but such evidence does not preclude a finding of probable cause if there is evidence showing the defendant committed the elements of the crime and was the perpetrator. The trial court here erred in denying the petition and should have set the matter for a hearing on whether Horn was entitled to unconditional release. (Former § 6605, subd. (d), now § 6605, subd. (a)(3).)

We note that, just as with a probable cause determination in a preliminary hearing on a felony allegation, the probable cause determination in a section 6605 hearing is not a conclusive determination of whether the SVP should be released into the community. The evidentiary bar in a probable cause hearing, whether on criminal felony charges or on an SVP’s section 6605 petition, is lower than it would be in a jury trial, or in this case, a hearing before the jury. It is for the jury to determine in a subsequent hearing, where it will consider all the evidence and accord the evidence the weight the jury believes it

deserves, that Horn will either be granted or denied unconditional release back into the community.

DISPOSITION

The trial court's order denying Horn's petition pursuant to former section 6605(c) of the Welfare and Institutions Code is reversed. The case is remanded for the trial court to grant Horn's petition pursuant to section 6605 and set the matter for a hearing on the issue of whether Horn is entitled to unconditional release into the community.