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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARVIN ADAMS,

Defendant and Appellant.

F070647

(Super. Ct. No. FP003841A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. John D. Oglesby, Judge.

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

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, John W. Powell and Julie A. Hokans, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In 2014, a jury found that appellant Marvin Adams was a sexually violent predator pursuant to the Sexually Violent Predators Act (SVPA) commencing at Welfare and Institutions Code section 6600.¹ He was committed to the custody of the California Department of State Hospitals for appropriate treatment and confinement at Coalinga State Hospital.

On appeal, appellant asserts the trial court prejudicially erred in rejecting the defense's proposed jury instruction that there must be proof he had "serious difficulty in controlling his behavior." He further contends his rights to due process and a fair trial were violated by using a "likely" standard of reoffense. We find these arguments unpersuasive. As appellant concedes, our Supreme Court in *People v. Williams* (2003) 31 Cal.4th 757 (*Williams*) and *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888 (*Ghilotti*), have decided these issues against him. We affirm.

FACTUAL BACKGROUND

I. The Prosecution's case.

Two psychologists testified against appellant, Eric Simon and Michael Musacco, who were both experienced in conducting sexually violent predator evaluations. Simon and Musacco separately interviewed appellant, who was 80 years old at the time. They both reviewed numerous documents and reports pertaining to appellant, including police and probation reports, jail records, and medical records.

At trial, the psychologists informed the jury about appellant's prior convictions for sexual offenses. At some point in the mid-1950's, appellant was convicted of indecent exposure. He was in his backyard and he observed a young girl dancing next door. He became curious about her sexuality and he exposed himself to her. He informed

¹ All future statutory references are to the Welfare and Institutions Code unless otherwise noted.

Musacco that he exposed himself to four or five different young girls and was sent to Atascadero State Hospital, where he was evaluated. He did not stay there long and he was released back to the community.

Appellant was convicted in 1957 and again in 1958 for indecent exposure. He was driving an ice cream truck at the time he committed these offenses. He exposed himself to children ranging from four to eight years of age. He would ask the children if they wanted to see his dog as a way to lure them inside the truck.

In 1992, appellant was convicted of 10 counts of lewd and lascivious acts with a child under the age of 14, and two counts of oral copulation of a child under the age of 14. The victim was a girl around five to six years of age, and appellant was a friend of the victim's family. He invited her to watch through a window as he engaged in sex with his wife. He fondled the victim, exposed his genitals to her, forced her to masturbate him, kissed her chest, forced her to orally copulate him, and he sodomized her. When arrested for these acts, appellant told police he had a strong sexual attraction to young girls, which he had struggled with for years. He said the temptation was too strong to resist. Appellant was sentenced to 16 years in prison.

Appellant was paroled in 2000. Six years later, he exposed his genitals to a 19-month-old child and said, "Come here," as he did it. The child's mother caught appellant in the act. He was convicted and sentenced to 32 months in prison. He was released on parole in 2008.

In 2009, appellant's wife was very ill and in a nursing home. He would go to the nursing facility to visit his wife, but while there he engaged in sex acts with at least one elderly demented resident. He was caught and convicted of sexual battery. He returned to prison, and has been either in prison or in Coalinga State Hospital since that time.

Simon believed appellant was likely to commit a new sexually violent offense without appropriate treatment and custody. He diagnosed appellant with three conditions: pedophilic disorder; exhibitionism disorder; and "other specified, personality

disorder with antisocial features.” He opined that appellant continues to have a sexual interest in prepubescent children, and his interest in a 19-month-old child showed a more severe condition. Appellant had an emotional impairment and an inability to control himself. Simon administered a test, the Static-99R, and appellant’s results indicated there was a moderate to high risk he would commit a new sex offense. If appellant’s advanced age was not factored, he would have been in the “high-risk” category. Appellant was currently in treatment at Coalinga State Hospital, but “he was not doing so well.” He was beginning to participate in earnest and was “maybe” making some progress but he had not completed his treatment.

Musacco also diagnosed appellant with three conditions: pedophilic disorder; exhibitionistic disorder; and a stimulant use disorder. He opined that appellant was likely to engage in sexually violent predator acts if he was released from custody and treatment. Musacco also administered the Static-99R test on appellant, which showed a moderate to high risk appellant would commit a new sexual offense. Musacco noted recidivism declines with age but appellant was unusual given his convictions for sexually related offenses while he was in his 70’s. Musacco believed appellant had an inability to show sexual self-regulation, and appellant continued to place blame on the victims. Musacco believed outpatient treatment would not be effective for appellant.

II. Defense evidence.

Christopher North is a psychologist who has experience conducting sexually violent predator evaluations. He met with appellant and evaluated him. In preparation, North reviewed police reports, probation reports, and appellant’s prison records.

North had previously evaluated appellant in 2008, opining then that appellant did not fit the criteria as a sexually violent predator. At that time, North had diagnosed appellant as having pedophilia disorder based on his long history of sexual interest in children. North, however, believed appellant’s crimes showed a gradual decline in the

degree of force and the “kind of sex” he initiated. Appellant had not told North he had continuing fantasies concerning prepubescent children.

North opined appellant was currently not likely to commit a new sexually violent offense. He felt appellant’s 2009 conviction caused concern, but it was for sexual battery which “fell short” of a sexually violent offense. North believed appellant was capable of committing sexually aggressive offenses, but he was past a threshold where he was likely to commit a sexually violent offense. North acknowledged appellant had committed atypical sex crimes in his 70’s, but he believed appellant’s sex drive would continue to decline as he aged. He administered the Static-99R test on appellant, noting the same score which Simon and Musacco had observed.

DISCUSSION

I. The Trial Court Did Not Err In Declining To Use Appellant’s Instruction.

Appellant argues the trial court prejudicially erred when it failed to instruct the jury with his requested instruction regarding his “serious difficulty” in controlling his sexual behavior.

A. Background.

Prior to trial, appellant’s counsel asked for the following special jury instruction:

“In order to find that [appellant] to be [*sic*] a sexually violent predator there must be proof that he has serious difficulty in controlling his behavior. This difficulty in controlling behavior, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.”

After the prosecution rested, the trial court heard argument regarding this instruction. The court indicated the proposed instruction did not make the standard instruction under CALCRIM No. 3454 clearer and it expressed reluctance to stray from the standard instruction. The court denied the request to give this special instruction, but

the defense was given a chance to redraft it for the following day. The following day, however, defense counsel said he was not going to offer a redrafted special instruction.

The trial court instructed the jury with CALCRIM No. 3454 as follows:

“The Petition alleges that [appellant] is a sexually violent predator. To prove the allegations, the People must prove beyond a reasonable doubt that;

“One, he has been convicted of committing sexually violent offenses against one or more victims;

“Two, he has a diagnosed mental disorder;

“Three, as a result of that diagnosed mental disorder, he’s [*sic*] is a danger to the health and safety of others because it is likely that he will engage in sexually violent predator criminal behavior;

“And, four, it is necessary to keep him in custody in a secure facility to ensure the health and safety of others.

“The term diagnosed mental disorder includes conditions either existing at birth or acquired after birth, affects a person’s ability to control emotions and behavior and predispose [*sic*] that person to commit criminal sexual acts to an extent that makes him a menace to the health and safety of others.

“A person is likely to engage in sexually violent predator behavior if there is a substantial danger, that is, a serious and well-founded risk that the person will engage in such conduct if released into the community. The likelihood [that] the person will engage in such conduct does not have to be greater than 50 percent. Sexually violent criminal behavior is predatory if it is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or a person with whom a relationship has been established or promoted for the primary purpose of victimization.

“Violations of Penal Code Section 288 (a) and/or 288 (a) (c) are sexually violent offenses.

“You may not conclude that [appellant] is a sexually violent predator based solely on his alleged prior convictions without additional evidence that he currently has such a diagnosed mental disorder.

“In order to prove [appellant] is a danger to the health and safety of others, the People do not need to prove a recent overt act committed while he’s in custody. A recent overt act is a criminal act that shows a likelihood that the actor may engage in a sexually violent predatory criminal behavior.”

B. Standard of review.

A defendant has a right to a pinpoint instruction which emphasizes a defense theory. (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) The trial court may, however, refuse an instruction if it is potentially confusing, misstates the law, is argumentative, or is not supported by substantial evidence. (*People v. Moon* (2005) 37 Cal.4th 1, 30.) We independently review a claim of instructional error. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.)

C. Analysis.

The SVPA permits a two-year involuntary civil commitment of persons found beyond a reasonable doubt to be “a sexually violent predator.” (§ 6604.) The SVPA defines a sexually violent predator as one “who has been convicted of a sexually violent offense against two 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).) 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.” (*Id.* at subd. (c).)

The United States Supreme Court has held that a civil commitment for an alleged sexually violent predator requires proof the defendant has “serious difficulty in controlling behavior.” (*Kansas v. Crane* (2002) 534 U.S. 407, 413.) Relying on *Kansas v. Crane*, appellant asserts the trial court’s refusal to give the requested instruction prejudiced him and “violated his rights to due process, a jury trial, a fair trial, and

fundamental fairness under the Fifth, Sixth and Fourteenth Amendments and their California counterparts.” He contends the requested instruction would have focused the jury’s attention on the facts showing he did not have serious difficulty controlling his behavior. We disagree. As appellant concedes, our Supreme Court has decided this issue against him.

In *Williams, supra*, 31 Cal.4th 757, our Supreme Court rejected a similar claim that a defendant’s SVPA commitment under California law was “invalid under *Kansas v. Crane, supra*, 534 U.S. 407, because the statute’s literal language fails to express the federal constitutional requirement of proof of a mental disorder that causes ‘serious difficulty in controlling behavior’ [citation], and the jury was not specifically instructed on the need to find such impairment of control.” (*Williams, supra*, 31 Cal.4th at p. 764.) After extensive analysis of the relevant law, the *Williams* court determined there was no need to provide a special instruction augmenting the SVPA’s language because a jury instructed in the language of the statute “must necessarily understand the need for serious difficulty in controlling behavior.” (*Id.* at p. 774, fn. omitted.) *Williams* held that a commitment imposed under the “plain language of the SVPA” was constitutionally valid, and no separate instructions or findings on that issue are required. (*Id.* at p. 777.)

Here, in light of *Williams, supra*, 31 Cal.4th 757, no error occurred from the trial court’s failure to give appellant’s requested instruction. (*Id.* at p. 777.) Appellant, however, contends the concurring opinion of Justice Kennard in *Williams* “casts considerable doubt” on whether the standard SVPA instruction is sufficient. In a concurring opinion, Justice Kennard stated it would be “prudent” for trial courts to instruct juries “that defendants cannot be found to be sexually violent predators unless they have serious difficulty in controlling their behavior.” (*Williams, supra*, 31 Cal.4th at p. 780 (conc. opn. of Kennard, J.)) Justice Kennard expressed concern that such an instruction would ensure the validity of future SVPA commitments because the United States Supreme Court could later hold such a jury instruction was required. (*Ibid.*)

We reject appellant's argument that Justice Kennard's concurring opinion required the jury to be instructed pursuant to *Kansas v. Crane, supra*, 534 U.S. 407. First, we do not read Justice Kennard's concurrence as demanding or imposing any special instruction for constitutional compliance. Second, under the doctrine of stare decisis, we are required to follow our Supreme Court's decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) The controlling opinion from *Williams* makes clear no additional instruction is constitutionally required beyond that which follows the statute's language. (*Williams, supra*, 31 Cal.4th at p. 777.) It is not our function to attempt to overrule the Supreme Court's decision. (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455.) Accordingly, appellant's claim fails.

II. The Standard For Conviction Under The SVPA Did Not Violate Due Process.

Appellant argues his rights to due process and a fair trial were prejudiced when the trial court denied his motion to dismiss the case against him on grounds that the standard of "likely" to reoffend was too broad and vague. He maintains reversal is required.

A. Background.

Prior to the presentation of evidence, appellant filed a motion in limine to dismiss the matter for an alleged violation of due process. The motion contended the SVPA violated federal due process because it did not provide clarity regarding the level of "likely" risk of recidivism" and a jury could arbitrarily resolve that issue. After hearing argument, the trial court denied the motion.

B. Standard of review.

Regarding a motion to dismiss, we review de novo the trial court's ruling when a pure question of law is presented. (*People v. Superior Court (Sokolich)* (2016) 248 Cal.App.4th 434, 441.)

C. Analysis.

Appellant contends the terms "likely" and "substantial danger" can easily result in inconsistent outcomes because one jury could equate "likely" with greater than 50

percent chance of reoffending, while other juries could apply a different numerical percentage. He asserts the California standard is vague and violates due process. We disagree.

Under the SVPA, a petition for commitment is forwarded to the appropriate county after two qualified evaluators concur that the defendant “has a diagnosed mental disorder so that he or she is *likely* to engage in acts of sexual violence without appropriate treatment and custody[.]” (§ 6601, subd. (d), italics added.) The SVPA defines a sexually violent predator as one “who has been convicted of a sexually violent offense against two 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), italics added.)

In *Ghilotti, supra*, 27 Cal.4th 888, our Supreme Court analyzed the definition of “likely” as it appears in section 6601, subdivision (d). (*Ghilotti, supra*, at pp. 915-917.) *Ghilotti* held “that the phrase ‘*likely* to engage in acts of sexual violence’ (italics added), as used in section 6601, subdivision (d), connotes much more than the mere *possibility* that the person will reoffend as a result of a predisposing mental disorder that seriously impairs volitional control. On the other hand, the statute does not require a precise determination that the chance of reoffense is *better than even*. Instead, an evaluator applying this standard must conclude that the person is ‘likely’ to reoffend if, because of a current mental disorder which makes it difficult or impossible to restrain violent sexual behavior, 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.” (*Id.* at p. 922, original italics.) *Ghilotti* held the language from the SVPA did not violate due process. (*Id.* at pp. 923-924.)

Here, the trial court instructed the jury with CALCRIM No. 3454. The jury was told that the People must prove beyond a reasonable doubt that appellant had been convicted of committing sexually violent offenses, he had a diagnosed mental disorder,

and, as a result of that disorder, he was a danger to others “because it is likely that he will engage in sexually violent predator criminal behavior[.]” The jury was told that “[a] person is likely to engage in sexually violent predator behavior if there is a substantial danger, that is, a serious and well-founded risk that the person will engage in such conduct if released into the community.”

As appellant concedes, *Ghilotti* held that the SVPA’s language does not support a constitutional challenge. Based on the jury instruction in this matter and *Ghilotti*’s holding, appellant’s due process rights were not violated. Accordingly, this claim fails.

DISPOSITION

The judgment is affirmed.

LEVY, Acting P.J.

WE CONCUR:

GOMES, J.

SMITH, J.