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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT JOSEPH ADAMS,

Defendant and Appellant.

G044146

(Super. Ct. No. FVIVS012731)

O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County,
Brian S. McCarville, Judge. Affirmed.

Chris Truax, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and
Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant raises various evidentiary issues which we find lack merit. We find his equal protection argument also lacks merit. We affirm.

I

FACTS

The People filed a petition to commit Robert Joseph Adams (appellant) as a sexually violent predator (SVP) for an indeterminate term pursuant to Welfare and Institutions Code section 6600 et seq. At the time the petition was filed, appellant was a patient at Coalinga State Hospital.

A jury returned a true finding that appellant meets the criteria of being a sexually violent predator pursuant to Welfare and Institutions Code sections 6600-6604. Pursuant to the true finding, the superior court ordered appellant committed to the custody of the State Department of Mental Health for appropriate treatment and confinement in Coalinga State Hospital for an indeterminate term.

Appellant's Childhood History

Appellant never met his father and was housed at a boy's home when he was 10 years old because his mother said he was incorrigible. His interactions with the juvenile justice system were for "things like petty theft." His education stopped at the ninth grade. When he was 13 or 14 years old, he was sent to a forestry camp for six or seven months. By the age of 15 "he started having a number of arrests for being drunk in public, for fighting, and again for petty theft."

Appellant's Adult History

In appellant's "rap sheet," there is an entry for June 4, 1963, for a parole violation. It is not apparent from his record what this incident was about. Appellant told a psychologist he got a girl pregnant. Appellant remarked the girl's parents got upset and

he ended up “going back” on a parole violation. The girl was 16 years old. Appellant was 18 years old.

Mary

In April 1978, Mary, a woman who was “totally blind,” telephoned her mother to tell her that she need not pick her up to drive her home because appellant promised to take her “straight home.” During the drive with appellant, Mary realized appellant had made an inappropriate left turn. When she questioned him, appellant told her he wanted to show her his motorcycle. When the two arrived at appellant’s apartment, and she questioned why he was unlocking the door, he told her he parked his motorcycle in his dining room. Appellant kissed her and pulled down her zipper. Mary told him she liked to be treated as a lady. She told him she did not believe in premarital sex “because I do not believe God intended me to. It’s sacred, to be shared between a man and woman and not something to be played with.” She said that as she stood by the door waiting for appellant to lead her out, appellant “grabbed me and sat me down and pulled down my zipper. He says, well, now you’re going to have it, have sex whether you like it or not or whether you want to or not.” On December 4, 1978, appellant pled guilty to first degree rape in Maricopa County, Arizona.

Janet

On April 30, 1986, an officer with the Tustin Police Department responded to a school to speak with a 12-year-old girl named Janet. Janet said appellant was her mother’s boyfriend and that while she was asleep, appellant got into bed next to her and put his hand underneath her clothing and “was rubbing her vagina and inserting his finger.”

Debbie

Janet's 16-year-old sister, Debbie, was interviewed and revealed that she, too, had been molested. She said defendant had sexual intercourse with her.

Dawn

On November 16, 1995, while he was on parole, appellant was arrested in connection with sexual activity with his 20-year-old stepdaughter, Dawn, who has Down Syndrome. Dawn told a police investigator appellant was raping her. She said he tied her up and inserted a spoon in her vagina, called her a "slut, a whore" and threatened to kill her. Dawn described something else appellant did to her: "He put some kind of alcohol on some rag, and he put it over my mouth and nose so I couldn't breathe." Dawn told a social worker her stepfather was forcing her to have sex with him. When she was asked why she did not tell her mother what was going on, she responded: "I didn't want my mom to get mad at me or I might get in trouble." She added that she didn't want her mom to feel bad.

During Dawn's testimony, she was asked about a disclosure she made to a coworker. The following are questions asked by the prosecutor and Dawn's responses about that conversation:

"Q: Did you tell him if someone was hurting you? Did you answer him?"

"A: Yes.

"Q: What do you remember saying?"

"A: I told Steve that somebody was hurting me.

"Q: Was someone hurting you?"

"A: Can you repeat that?"

"Q: Yes. When you said someone was hurting you, what did you mean by hurting? What were they doing to you?"

“A: He was raping me.

“Q: Who was raping you?

“A: Mr. Adams.

“Q: Is that the same person you pointed to and said that’s Bob?

“A: Yes.

“Q: Do you remember how — okay. Let me strike that for a minute. Do you know what rape is?

“A: Yes.

“Q: What is it?

“A: Molested.

“Q: Okay. Does that mean he touched you someplace you didn’t want him to touch you?

“A: Yes.

“Q: Can you tell us the name of the places he touched you?

“A: My upper chest.

“Q: Okay.

“A: My groin area.

“Q: Okay.

“A: And right under my arms.

“Q: Okay. That part of the groin in your area, is there a special name for it?

“A: It’s a crotch.

“Q: Okay. Did he put something in your crotch?

“A: Yes.

“Q: What did he put in it?

“A: His penis.

“Q: You know what a penis is?

“A: Some part of a man.

“Q: Did he put his penis in — what is your body part called that he put it in?

“A: In the crotch.

“Q: Okay. Did he put his penis in your butt?

“A: Yes.

“Q: Did you try to stop him or say no?”

Appellant’s counsel raised an objection which was overruled.

“Q: Did you try to say no or try to stop him?

“A: I told him to stop and he wouldn’t stop.

“Q: Did he ever hit you or strike you? Do you know what I’m saying by hit? Do you know what I mean by hit?

“A: Yeah.

“Q: Okay. Did he hit you?

“A: He smacked me across my face.”

Expert Douglas Korpi

Dr. Douglas R. Korpi is a forensic psychologist. He began doing risk assessments in the mid-1980’s. From 1990 until 2000, Korpi was the director of the California Forensic Assessment Project. He described its work: “And the California Forensic Project was 30 psychologists who did risk assessments on violent offenders. Violent offenders, sexual offenders. [¶] . . . [¶] We did all the assessments for all the CONREP programs, all the conditional release programs in the whole state. So we — I would deploy the psychologists all over the state to do risk analysis and treatment

planning to help the programs sort of deal with psychotic and violent folks.” The project worked with and interacted with other psychologists who are national experts.

Korpi saw appellant on November 22, 2000, at the state facility in Corchran. Korpi gave appellant two diagnoses: “[P]araphilia not otherwise specified and antisocial personality disorder.” He explained that pedophilia, voyeurism, exhibitionism and frotteurism are subcategories of paraphilia. With regard to what paraphilia not otherwise specified, Korpi said: “A lot of the sexual disorders have nice names, like if you’re into kids we call it pedophilia. If you’re into flashing, we call it exhibitionism. There [are] no names for certain things. I wasn’t being glib when I said somebody is into police cars. There is also no names for rape. We don’t have a word like rapism or course of sexual disorder. There is no name for it. [¶] So when there is not a name for it, instead of you say paraphilia, the general term, not otherwise specified.”

In assessing appellant, Korpi looked for “sexually arousing fantasies, urges, or behaviors.” He discussed each of the sexual incidents and crimes in appellant’s known history.

With regard to the pregnant teenager, the doctor stated: “So what — I don’t consider that sexually deviant at all. But it really sets the stage for subsequent points.” As to why that incident was important to his assessment, Korpi said: “The reason that’s important is because it’s an arrest for sexual misbehavior. And when people get in trouble for sexual misbehavior, they tend never to get in trouble again for sexual misbehavior. The rule is you don’t get arrested twice. You only get arrested once for sex.” He added that “once you get arrested for the sex offense, that first thing getting in trouble for sex, you have . . . about an 87 percent chance of never getting arrested again. . . . [¶] The literature is resoundingly loud and clear as a bell on this. Recidivism rates are as low as three percent and as high as 30 percent. But that’s — but around 13, 14, 15, 10. All researchers in this field would agree with that number.”

Dr. Korpi noted that in April “1978 he rapes Mary . . . and ends up getting convicted and gets 5 to 15 years.” Korpi said he and his team “really didn’t expect this arrest for rape in 1978. And now I’m beginning to suspect that something is wrong because he’s beat the numbers — he hasn’t gone with the numbers. He’s done something exceptional.”

With regard to his analysis of the rape of Mary, Korpi said she was an adult and she was blind and she “keeps telling him that she’s scared. She has never had sex before. Doesn’t feel right if you’re not married. He takes her — throws her to the couch. Throws her onto the couch. She attempts to fight him off. He puts his hand over her mouth. She thinks she’s suffocating because her nose — she had some sort of accident. So she feels like she’s suffocating. [¶] Tells her to shut up or he’ll knock her out or give her a shot of something. As he’s doing this, he speaks in a vulgar fashion to her saying things like, ‘I want a piece of your ass.’ ‘Have you ever had it in your butt.’ Takes off her panties, girdle. Forces her to submit to sexual intercourse and then he brings her home.”

The significance of the incident to Korpi’s analysis was that “he’s able to maintain an erection quite despite her pleading, screaming, saying she’s scared, saying she’s a virgin. He’s even able to threaten to knock her out, throw her around, and maintain his — all of this sexually arousing. [¶] What’s also remarkable about her is that she’s blind and that he takes a blind woman, sequesters her, basically takes her away to his own private lair. Anytime you see somebody moving a victim, you are a little concerned.” Korpi said it was striking that “this is a man that has a robust sexual interpersonal life. He has lots and lots of sexual partners that he can go to. He doesn’t need to rape people. He told me he has had over 200 partners. He had at least three wives. So this is not a socially incompetent guy. This is a guy that knows how to be around women. [¶] And the fact that he would have to take a blind one sort of suggests

— again, I wouldn't make a diagnosis at this point. But all these things are suggestive of that something is sexually wrong here that he might be sexually attracted to deviant things. [¶] You know, I should preface 99 percent of rapes in America are done by just jerks. I'm always trying to figure out, well, is this just a jerk, or is this the guy that's got something really wrong with him. And so this could be just, well, just a jerky thing to do. You know, a really kind of jerky — because she was blind. That's kind of over the top. But I wouldn't make the diagnosis yet."

Dr. Korpi testified about the next item in appellant's history that was significant in April 1986: "he forces a 16-year-old girl, Deborah, into some sexual activity. He is ultimately convicted of two counts of . . . contributing to the delinquency of a minor. CDM. And he gets one-year sentences each." He explained: "This is a 16-year-old girl. It's not like she's an 11-year-old or — she's 16. She doesn't resist him. So, you know, it's not that funky. [¶] But there are some things that are kind of disturbing. First of all, this is an incredibly unexpected event. You don't get arrested three times for sexual offenses. That's unusual. Again, he's defied gravity by getting arrested. [¶] He's 41 years of age. Sex offending — age is a huge deal in sex offending. If we look at a graph of sex offenders, you know, they start around 12, 13. And then they really peak around 18, 19, 20. And then we see a nice — from 20, 22 years of age, a nice even graph all the way down to 70 with a huge drop-off at around 40. So you really get a big — the vast majority of sex offenders are doing it between the age of 18 and 39. [¶] So he's 41, so you really don't expect this. You didn't expect it for a lot of reasons. [¶] The other — the thing that — again, he knows the victim and he knows he has to tell her not to tell her mom. So you know he's risking getting in trouble again. This is a guy that's pretty willing to take big chances in life. So what's so important, you're willing to take all this chance?"

It's the next case two weeks later that "is more the nail in the coffin" for Korpi: "He is sexual with 12-year-old Janet, gets a conviction and an eight-year sentence. So, of course, there is lots of documentation, police reports, probation reports, abstracts of judgment, crime. This is a well-documented event. [¶] Now, this is the first time — up until now I've been thinking, gosh. Maybe this guy might be a rapist. But you know, he didn't seem to get all excited with Deborah. Because she was not fighting him back. So maybe he isn't a rapist. [¶] And now we have a 12-year-old. And he describes her to me as skinny and having no breasts. So this is clearly a 12-year-old. This isn't a 12-year-old that looks like [an] 18-year-old. This, whatever — no matter what the facts are, just molesting of a 12-year-old girl really is a highly unusual phenomenon and seen only in — typically in people who have something sexually amiss. [¶] It doesn't at all concord though — I mean it's not — it's not — it's not at all like the blind woman thing. You're trying to figure out what's turning this guy on. Is it that they are blind? Is it that they're kids? Is it that they're resisting? You don't know what the turn on is here. And that's what you're trying to always figure out. You know, what turns these guys on? What do they masturbate to at night? [¶] And these none of these things — they're not real similar. So I'm — at this point, I'm thinking, well, he's not a pedophile. Pedophile would be something — remember it has to be six months. He's only done this Janet once or twice or something. It's hardly at all. It's not six months. So he's not a pedophile. [¶] He's not a serial rapist. He's only had one real rape. You know, the blind woman. And then he's had the second woman who stayed really quiet, the teenager. So maybe, you know, maybe it wasn't her fighting that was the turn on. [¶] So you don't know what you've got here. However, we have three sexual arrests. That's way too many. That just doesn't happen in nature. It's too statistically rare. So we know — I suspect now we've got something. But I'm not sure what to call it."

Korpi described the next incident of significance: “On November 16, 1995, he’s picked up on parole in connection with sexual activity with his 20-year-old stepdaughter.” Korpi continued: “The San Bernardino Uniform Crime Report of 11-16-95 says — she’s Down Syndrome, by the way. And she’s — tells Officer Peters . . . that he has raped her on two occasions. The first was in March of 1995 at his residence. . . . By backhanding [her] across the left side of her face when she says no. And he threatens her don’t tell anybody. [¶] The second event was in November of 1995. And this, again, took place at his residence. And she says he tied the victim’s hands and legs with a white color string, forced her to put on red lingerie, gagged her, and had intercourse with her twice. He also orally copulated her, kissed her vagina and her anal opening and fondled her.”

After Detective Peters’s interview with Dawn, police searched appellant’s trailer and found white string, white rope, red lingerie and a dildo. Korpi wasn’t very impressed with what the police found: “I guess more striking to me is just him having sex with a stepdaughter who is Downs. The little — whether it was a red negligee or whether she got tied up or didn’t get tied up is of less import than whether or not he’s having sex with a Downs stepdaughter.”

Korpi explained: “So now this is the fourth sexual related arrest. I wasn’t so sure with the third arrest that we had a diagnosis. But now — incredibly important here is he’s 51 when this happens. 51 years of age. You know, he had like less than a percent chance of getting arrested. He had a very low — you just don’t expect it. So just that fact that he gets arrested at such an advance — we consider 51 years old — I’m 60, but — we consider 51-year-old sex offenders old.”

Continuing with his analysis of the fourth arrest, Korpi testified: “Well, keep in mind he has a wife. So he can have sex voluntarily — and by the way, he loves having sex with [B.] Him and [B.] get along sexually great. So he doesn’t need to go

elsewhere. So why? [¶] Dawn can — knows who he is and can identify him. Why is he, you know, risking so much? He's being watched by — I mean, you know. This — it's easy to establish this man has a lot of sexual drive. The question for me isn't does he have a high sex drive. The question is what's the nature of the sex drive. What is the paraphilia? [¶] And I think with Dawn we finally understand what is it. It's not pedophilia. It's not that he wants to be with kids, necessarily. It's not that he likes to beat up women and gets turned on by them bleeding. It's something different. And I think what it is in this case, it's the vulnerability in the victim. There is something that's magical to him when he sees somebody that doesn't quite have it all together. They are blind or they're Down Syndrome or they're little and he can take advantage somehow. That, you know, excites him. And I think that's — finally with Dawn, we finally understand what that is. And that's why I made the paraphilia.”

In addition to the paraphilia diagnosis, Korpi said defendant also has an antisocial personality disorder. The prosecutor asked Korpi if these two diagnoses “are the type of disorders that the Sexually Violent Predator Act calls diagnosed mental disorder?” Korpi said defendant's diagnoses qualify as a diagnosed mental disorder under the act, and stated: “And on top of that paraphilia, he has elements in his personality that render him a menace to the health and safety of others. He has the, . . . mental disorder predisposing to the commission of criminally sexual acts.”

Dr. Korpi said appellant's condition affects his ability to control his emotions and behaviors. He said that “[w]hat's striking about this case is that he gets in trouble. His life gets totally messed up. He gets out. Oh, I'm not going to do it again. He does it again. His life gets totally messed up. He loses his job. He loses his wife, goes back to prison. [¶] It's this inability to control it. This inability to keep free of harm, free of prison. That suggests that he has a hard time controlling his — I'm not so

concerned with controlling his emotions. I guess I'm really concerned with controlling his behavior. You know, he just can't help it, basically.”

In Korpi's opinion, appellant is likely to reoffend in the future. He noted appellant had parole violations on three separate occasions. Korpi said it was problematic that both in prison in 2000 and at Atascadero State Hospital between 2001 and 2006, appellant was written up for telling off and being disrespectful to staff. One time he threw a chair. But Korpi said a big risk factor is that when appellant was released from prison in 1993 and was in a sex treatment outpatient clinic, “he got violated for sexual misbehavior while in sex specific treatment.”

Dr. Korpi noted that since appellant has been 18 years old, he has only been free in the community for 16 years, and that appellant received the highest evaluation possible on the “psychopathic deviate” portion of the Minnesota Multiphasic Personality Inventory (MMPI), which “just means criminal — it means criminologic or antisocial.”

Expert Kathleen Longwell

Dr. Kathleen Longwell is a licensed psychologist. She worked in the California Forensic Assessment Project did her postdoctoral internship for the conditional release program (CONREP) where she did psychological evaluations on patients who had been designated not guilty by reason of insanity and mentally disordered offenders (MDO). After she completed her postdoctoral internship, she continued working as a panel member for the California Forensic Assessment Project. Since 1996, a majority of Longwell's time as been involved in the “assessment, report writing, and testifying on sexually violent predator cases.”

Longwell first evaluated appellant on November 21, 2000. At that first encounter, appellant did not admit to committing any sex offenses. She later evaluated

him in June 18, 2007 and July 1, 2008. Longwell stated: “I diagnosed him with paraphilia, not otherwise specified, [NOS] and antisocial personality disorder.”

Longwell commented: “All of the victims were vulnerable, particularly vulnerable. The two victims were very disabled. The blind woman and the developmentally disabled woman. Both women. And also, the two girls by the nature of their mother’s relationship with him. One would think that these people would — it would be very difficult for them to tell anyone about what happened and to be believed. [¶] In the case of the Down Syndrome woman, she told the police that prior to being sexually assaulted with him, he had choked her. He had hit her on the side of her head. He had threatened to kill her if she told anyone.”

According to Longwell, appellant’s “paraphilia would be considered permanent and entrenched” because of “the duration that we know of his committing — forcing himself on non-consenting persons.” Longwell went on to explain appellant is a very impulsive person who “doesn’t really give enough consideration to the consequences of his behavior. He just seems to do what he wants whenever he feels like it without regards to who he might hurt or what might happen to him.” Besides being impulsive, he is irritable in that “[e]verybody gets on his nerves” and he’s aggressive and reckless with a “disregard of the safety of himself and others.”

Dr. Longwell testified she “never saw any sincere indications of any guilt or remorse on [appellant’s] part for any of the people that he’s hurt or any of the crime’s he’s committed.” She said when she evaluated him in 2003, appellant said to her: “I’m sorry for my sex offenses. I feel bad about it. My lawyer said to tell you that.”

With regard to whether or not appellant’s diagnoses meet and satisfy the requirements for sexually violent predator commitment, Longwell stated: “My opinion is that both of the diagnoses, the paraphelia NOS and antisocial personality disorder, both meet the criteria as a diagnosed mental disorder in the sense that they both affect his

ability to control his emotional and volitional — I think there is a — emotional volitional capacity that predisposes him to the commission of future sex crimes.”

As to Longwell’s opinion about whether or not appellant might reoffend, she stated: “65 years old. And the last time that we have is he’s 51 when he was accused of sexually assaulting his stepdaughter. He is not as healthy now as he was at 51. However, he is not incapacitated where he couldn’t again sexually assault someone. He is not in a wheelchair. He is not lacking in physical strength. He probably has less muscle on him than he had at 51, but he is still able. He is still mobile. And he could — he still has the capacity to manipulate his way into someone’s life who is vulnerable. ¶¶ So even though I believe that his sex drive is probably less than it was at 51, it’s still — it still exists. And his is still a significant risk. ¶¶ In addition, 51 would be considered unusual, an unusual age to still be sexually offending. So we already know that he is an exception to the rule that sex offenses are committed mostly by younger men. So I — even though I do think his risk is slightly less now than it was when he was 51 years old when he last offended, I do not think his age or his health problems significantly lower his risk where he would be considered below the likely level, given all the other high risk indicators that he has.” Longwell summed up her opinion about the risk appellant presents: “It is my opinion that he is a substantial risk based on a serious and well-founded information.”

Expert Richard Wollert

Dr. Richard Wollert is a licensed psychologist in Oregon and a certified sex offender treatment provider in Washington. He has engaged in research and publications about risk assessment for sex offenders. One such publication was in the American Psychological Association journal. It “show[ed] that recidivism rates for older offenders decrease as age increases even for those who have very high scores on actuarial tests.”

Wollert discussed recidivism rates among various age groups. He stated: “And you can see that it is relatively high for the youngest group. Those who are 18 to 30 years old are the highest sexually recidivism rate group. As you go over to those who are 60 and over, the recidivism rate for sex offenders as a group gets close to zero. I believe it is about two percent.”

Expert Christopher Heard

Christopher Heard is both a psychologist and a lawyer. He was appointed by the superior court to do an evaluation of appellant for “fitness for probation after conviction of a sexual offense.”

Heard concluded appellant did not suffer from a qualifying mental disorder. He explained: “What you’re looking for is a mental disorder. There may be any one of the number of different [dis]orders, whether they are specified as sexual disorders or paraphilia or otherwise. He did not seem to suffer from any. [¶] What he appears to have is an anti — he’s got a mixed antisocial narcissistic personality disorder with strong elevations on components to both of those, basically.”

Witness Mary Nordahl

The prosecutor’s trial brief states: “While on state-supervised parole . . . in approximately November 1995 it was reported in [a] Victorville City Police Report . . . that on two occasions the [appellant] forcibly raped his 21-year-old mentally challenged (Downs Syndrome) stepdaughter in addition to other acts of sexual molestation.” The brief further says: “A neighbor also reported that she had observed the [appellant] and the victim kissing on the mouth and touching. The witness claimed that on November 13, 1995, the [appellant] and the victim were “acting like lovers.”

Pretrial the prosecutor filed a motion to allow the deposition of Mary Nordahl to be read at trial rather than having her testify in person. The prosecutor's written motion states Nordahl had been diagnosed with dementia "which has become increasingly worse during the past several months" and that Nordahl "has difficulty recalling recent events, recognizing familiar people and places and trouble finding the right words to express thoughts or name objects." At an August 3, 2009 hearing, the trial court said it would "read the depo then . . . make a determination as the so-called gatekeeper"

Meanwhile the court heard from Nordahl's doctor, Ricardo Eduardo Saco, who treats Nordahl for dementia. At an August 7, 2009 pretrial hearing, Saco testified: "Her diagnosis is Alzheimer's, which is the most common type of dementia. This is based on my mental status examination. The most common one that we physicians do is called mini mental, mental status." The doctor explained: "And I have seen a gradual decline in my patient. Lying in bed in a fetal position, answering very simple questions. [¶] At times the comprehension, which is part of the dementia, is that the aphasia, which is the ability to comprehend, or the use of language. I believe I've seen a decline." At a continued pretrial hearing, Saco stated: "Patient neurologically was alert according to my notes and oriented to name and place, not to time. He explained Nordahl "was not aware of the date."

Presumably after reading Nordahl's deposition, the court conducted another hearing outside the presence of the jury on August 17, 2009. Appellant's counsel argued Nordahl's proposed testimony was unreliable and that "the district attorney . . . has no reason to believe it's reliable." The court ruled as follows: "All right. The court finds at the time the deposition was taken the declarant was able to understand the oath, and I will allow the deposition testimony in. [¶] I will also require that both counsel enter into a written statement that at the time of the deposition she was diagnosed with dementia

Alzheimer's, and at the present time she is diagnosed with the same dementia, Alzheimer's, but at this time she is unable to understand the oath and to come to court."

During trial, on August 20, 2009, the court read the following to the jury: "It is stipulated between the [appellant] and the respondent and his counsel that at the time of the taking of the deposition of Mary Nordahl, she had been diagnosed with dementia, Alzheimer's. It is further stipulated that according to her doctor, Mary Nordahl is currently incompetent to testify at this proceeding."

A reader read the August 14, 2008 deposition testimony of Mary Nordahl. Nordahl's opinion of appellant was established right at the beginning when she was asked if she remembered appellant, who lived in the same trailer park. She responded: "Yes. And I hate his guts." Nordahl said appellant "was using that little girl." Nordahl testified the girl had a mental disorder and was very pretty. She said she saw appellant kiss the girl and touch her breast and vagina, and that the girl was crying and "was trying to get away from him." According to Nordahl, appellant was with other little girls at the trailer park as well. She said one was blond and another brunette. Nordahl said he threatened her, and that he told her he was going to kill her. Nordahl called the police. When she spoke with the police officer, Nordahl said the officer wrote down what she said.

Witness Michelle Lauron

Witness Michelle Lauron is a deputy district attorney who was present when Dawn was interviewed for the purpose of evaluating the possibility of a criminal case against appellant. She was called as a witness by appellant's lawyer. When she was asked by appellant's counsel whether Dawn's case had been rejected by the district attorney's office or sent out for further investigation, she said she was aware it had been sent out for some further investigation and follow-up.

During her testimony, the following questions and answers, statements by the court and comments by appellant's counsel were made when the prosecutor questioned Lauron:

Q: "So after you interviewed Dawn . . . you reported your conclusions with respect to her durability to the deputy DA who had the discretion to file or not file; is that correct?"

A: "I did report. I did discuss it with other deputy DA's. I don't know if it was for the sake that I didn't have the discretion to file as much as I wanted to report back to them what my impressions were."

The court: "You did that?"

A: "I believe — yeah, I did. I know I did."

The court: "Next question."

Q: "And what were your statements to them regarding your impressions?"

Appellant's counsel: "Objection. Calls for speculation."

The court: "Overruled. [¶] You may state — do you have a recall of what you told the deputy who had the responsibility to issue the case?"

A: "I recall what my impressions were and what I would have conveyed, yes."

The court: "The objection is overruled. [¶] You may testify as to what the impressions that you reported to the deputy who had the responsibility to file or not file the case."

A: "My impressions of this case was that while I believed [Dawn], I did not believe that she —"

Appellant's counsel: "Objection, your Honor. Her —"

The court: “The objection is sustained. The answer is stricken. The jury is admonished to disregard it. [¶] You reported what your impressions were; is that correct?”

A: “Recorded it?”

The court: “Reported it.”

A: “Reported it, yeah.”

The court: “That’s the end of the examination in this area.”

Outside the presence of the jury, the prosecutor stated to the court: “Your Honor, I only wanted to comment on the fact that when the court overruled the objection of counsel, I don’t know what Ms. Lauron was going to say because she’s the deputy. I wasn’t there.” The prosecutor explained the questions were asked because appellant’s counsel had “insinuated all along . . . that if they believed [Dawn], they would have gone out and found corroborative evidence, so they didn’t believe her.”

II

DISCUSSION

Admission of Deposition of Mary Nordahl

Appellant argues “the trial court committed reversible error by admitting the deposition of Mary Nordahl because its contents were more prejudicial than probative.” He argues Dawn’s testimony was rife with incredible claims. He seems to be arguing the evidence had little probative value and was very prejudicial because the testimony of a person with dementia was used to corroborate the testimony of a person who is developmentally disabled.

“(c) Any party may use for any purpose the deposition of any person or organization, including that of any party to the action, if the court finds any of the following: [¶] . . . [¶] (2) The deponent, without the procurement or wrongdoing of the proponent of the deposition for the purpose of presenting testimony in open court, is any

of the following: [¶] . . . [¶] (C) Dead or unable to attend or testify because of existing physical or mental illness or infirmity.” (Code of Civ. Proc., § 2025.620, subd. (c).)

“(a) Except as otherwise provided . . . ‘unavailable as a witness’ means that the declarant is any of the following: [¶] . . . [¶] (3) Dead or unable to attend or to testify at the hearing because of then-existing physical or mental illness or infirmity.” (Evid. Code, § 240, subd. (a)(3).) “Except as otherwise provided by statute, all relevant evidence is admissible.” (Evid. Code, § 351.) “‘Relevant evidence’ means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.)

A trial court’s ruling on a request to admit deposition testimony is reviewed for abuse of discretion. (*Monroy v. City of Los Angeles* (2008) 164 Cal.App.4th 248, 265-266.) “A trial court’s discretionary ruling under [Evidence Code section 352] “‘must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]” [Citation.]” (*People v. Williams* (2008) 43 Cal.4th 584, 634-635.)

Nordahl’s observations of appellant touching Dawn’s breast and vagina and Dawn trying to get away from him were clearly relevant to the issues in this case. No doubt the evidence prejudiced appellant’s position, but “‘[p]rejudice” as contemplated by section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context,

merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice. . . . “The “prejudice” referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, “prejudicial” is not synonymous with “damaging.” [Citation.]” [Citation.]” (*People v. Branch* (2001) 91 Cal.App.4th 274, 286.)

Here the trial judge conducted numerous hearings and read the deposition before ruling and then explained to the jury that Nordahl suffered from dementia. Deposition answers are simply evidence to be considered and weighed in conjunction with other evidence. (*Murillo v. Superior Court* (2006) 143 Cal.App.4th 730, 736.) Under the circumstances we find in this record, we cannot conclude the trial court abused its discretion when it permitted the deposition testimony of Nordahl to be read at trial.

Hearsay Statements of Mary Nordahl

Appellant argues: “The trial judge committed reversible error when it ruled, incorrectly, that hearsay statements from Mary Nordahl were admissible as prior consistent statements on rebuttal if appellant introduced her prior testimony at the parole hearing.” It’s difficult to understand this portion of appellant’s argument.

Apparently Nordahl testified on appellant’s behalf at a parole revocation hearing. The word “apparently” is used here because there is no citation in appellant’s brief to a transcript or other records from the parole hearing. He cites only to the reporter’s transcript in the instant trial where his trial counsel informed the court of Nordahl’s part in his parole revocation hearing.

Each side argued to the trial court about what evidence each wanted to introduce after Nordahl’s deposition was read to the jury. The prosecutor told the court

appellant's counsel intended to introduce prior inconsistent statements of Nordahl by way of something that happened at the 1996 parole revocation hearing. In expectation of evidence damaging to its case, the prosecution wanted to introduce statements Nordahl made to two police officers about defendant threatening her.

The court heard from both sides and ruled: "So the court is not going to allow the calling of these two witnesses in the People's case in chief. If you put on the statement at the parole hearing impeaching her testimony, then I will allow [the prosecutor] to put on prior consistent statements."

Appellant cites to nothing in the record to indicate he ever *did* introduce any statements Nordahl made at the parole hearing. It appears he decided not to introduce the evidence at trial because in his opening brief here, he states the trial judge "erred when he threatened appellant with its admission."

There is simply not enough in this record for us to analyze this portion of appellant's argument. We have only sketchy details of what Nordahl said at the parole hearing and what the two prosecution witnesses were expected to say if they had been called to testify. The burden is upon appellant to provide an adequate record on appeal. (*Dawson v. Toledano* (2003) 109 Cal.App.4th 387, 402.) Accordingly, we deem this argument to be waived.

Vouching for a Witness's Credibility

Appellant next contends "reversible error occurred when Deputy District Attorney Lauron testified that she believed the rape allegations made by Dawn." Appellant asks us to "[s]uppose that Deputy DA Lauron had testified that she had not recommended filing charges because she *did not* believe that Dawn . . . was telling the truth. Is it probable that even a single juror would have ignored her assessment and

found Dawn . . . to be credible?” The Attorney General contends appellant has not demonstrated prejudice by Lauron’s testimony.

People v. Sergill (1982) 138 Cal.App.3d 34, is the only case appellant cites to support his argument that Lauron’s testimony vouched for Dawn’s credibility. In *Sergill*, the court said the child’s credibility in that case was “critical.” (*Id.* at p. 41.) Dawn’s testimony was also important, but there is a mountain of other evidence in this case besides Dawn’s testimony.

At the beginning of trial, the court told the jury: “If I order testimony stricken from the record, you must disregard it and not consider it for any purpose.” When Lauron said she believed Dawn, the court very appropriately stepped in instantaneously and instructed the jury to disregard what she said, struck the words from evidence and stopped all testimony in that area. “Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court’s instructions. [Citation.]” (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Thus, Lauron’s words are not in evidence because the court’s actions prevented the witness from possibly infecting the trial by stopping that area of questioning and striking that portion of her testimony. Under these circumstances, we cannot find error.

But even if error did result, we determine the result would have been the same had Lauron not testified as she did. Under *People v. Watson* (1956) 46 Cal.2d 818, 836, we must examine the entire case and determine whether it is reasonably probable that a result more favorable to appellant would have been reached had this evidence not been admitted. As this lengthy opinion shows, we have examined the entire case and we conclude appellant was not prejudiced.

Legal Consent

Next appellant says his commitment “should be reversed because the jury was never instructed on the definition of legal consent.” He states in his opening brief: “Developmentally disabled though she may have been, Dawn . . . had a nuanced understanding of sex and was certainly capable of legal consent.”

His argument centers around a special jury instruction given to the jury: “The People presented evidence that the [appellant] committed the crime of rape of a developmentally disabled woman in 1995 against Dawn [Appellant] has never been criminally charged nor convicted of this offense. This crime is defined for you below: [¶] 1. [Appellant] had sexual intercourse with a woman; [¶] 2. He and the woman were not married to each other at the time of the intercourse; [¶] 3. The woman had a developmental disability that prevented her from legally consenting; [¶] 4. [Appellant] knew or reasonably should have known that the woman had a developmental disability that prevented her from legally consenting; AND [¶] 5. The developmental disability rendered the woman incapable of giving legal consent. [¶] You may consider this evidence in determining if [appellant] meets the criteria of a sexually violent predator, only if the People have proved by a preponderance of the evidence that [appellant] in fact committed the crime of rape of a mentally disabled woman against Dawn [¶] A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely in determining whether [appellant] meets the criteria of a sexually violent predator.” During the jury instruction conference, appellant’s counsel was specifically asked whether there were any comments about the language. Counsel said there were none.

The trial court further defined rape for the jury as follows: “Forcible rape is a sexually violent offense when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the victim”

Appellant complains that the court did not, on its own, instruct the jury with CALCRIM No. 1004. In fact, in the special instruction given, most of the verbiage of CALCRIM No. 1004 was given. The portion of it that was not given states: “A woman is *prevented from legally consenting* if she is unable to understand the act, its nature, and possible consequences.”

Of course, since appellant’s counsel did not speak up when the court asked for any comments regarding the special instruction, we do not know why the verbiage that is now being complained about was not given. It could be that, since Dawn quite clearly and quite often stated she told appellant to stop and tried to fight him off, that the court and/or counsel did not think the deleted language was necessary.

The record reflects it was left to the jury to find, as a question of fact whether or not Dawn was incapable of giving consent. Dawn said she did not consent. Appellant points to no evidence to indicate she did consent. In fact, several of the statements in his brief imply his position was that he never had sex with Dawn. Nothing in the record indicates the jury was confused or required a definition of consent.

We do not find there was error in not providing a definition to the jury. The common or ordinary meaning of consent, to approve or to agree to something or else to comply with what is done or proposed by someone else, suits the present situation. (See *People v. Carapeli* (1988) 201 Cal.App.3d 589, 593.) But even if there was error, we find that under these circumstances it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Martinez* (2010) 47 Cal.4th 911, 955.)

Equal Protection

The right to the equal protection of the laws is found in article I, section 7 of the California Constitution and in the Fourteenth Amendment of the United States Constitution. “The concept of equal protection recognizes that persons who are similarly situated with respect to a law’s legitimate purposes must be treated equally. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.)” (*People v. Brown* (2012) 54 Cal.4th 314, 328.) Decisions of the United States and California Supreme Courts “have used the equal protection clause to police civil commitment statutes to ensure that a particular group of civil committees is not unfairly or arbitrarily subjected to greater burdens. [Citations.]” (*McKee I* (2010) 47 Cal.4th 1172, 1199.)

Appellant complains that in making a commitment indeterminate under the Sexually Violent Predators Act (SVPA) and thereafter placing the burden on the SVP to obtain release, SVP’s are treated more harshly than similarly situated involuntary civil committees. The first step in any equal protection analysis is to determine whether two or more groups are ““similarly situated for purposes of the law challenged.”” [Citation.]” (*McKee I, supra*, 47 Cal.4th at p. 1202.) In *McKee I*, the Supreme Court found SVP’s are similarly situated with individuals who have been found to be MDO’s under the Mentally Disordered Offender Act (Pen. Code, § 2960 et seq.). (*McKee I, supra*, 47 Cal.4th at p. 1203.) Both ““have been found, beyond a reasonable doubt, to suffer from mental disorders that render them dangerous to others.”” (*Ibid.*) ““Furthermore, the purpose of the MDO Act and the SVPA is the same: to protect the public from dangerous felony offenders with mental disorders and to provide mental health treatment for their disorders.’ [Citations.]” (*Ibid.*) MDO’s are not committed for an indefinite period and cannot be confined beyond the statutory determinate term absent periodic proof beyond a reasonable doubt that the person continues to suffer from a mental disorder and is dangerous. (*Id.* at pp. 1201-1202.) In other words, the SVPA

treats SVP's more harshly than the similarly situated MDO's. "[I]mposing on one group an indefinite commitment and the burden of proving they should not be committed, when the other group is subject to short-term commitment renewable only if the People prove periodically that continuing commitment is justified beyond a reasonable doubt, raises a substantial equal protection question that calls for some justification by the People." (*Id.* at p. 1203.)

Because such confinement involves a fundamental liberty interest, the difference in treatment between MDO's and NGI's on the one hand and SVP's on the other is subject to strict scrutiny under an equal protection analysis. (*McKee II* (2012) 207 Cal.App.4th 1325, 1332, citing *McKee I, supra*, 47 Cal.4th at pp. 1184, 1197-1198, 1208-1209.) Under a strict scrutiny analysis, the state is required to demonstrate the difference in treatment is necessary to serve a compelling state interest. (*McKee I, supra*, 47 Cal.4th at p. 1197-1198, quoting *People v. Moye* (1978) 22 Cal.3d 457, 465.) The state has a compelling state interest in protecting society from dangerous persons and in its treatment of those confined due to mental illness. (*McKee I, supra*, 47 Cal.4th at pp. 1203-1204.)

In *McKee I*, the Supreme Court remanded the matter to the trial court to provide the People an opportunity to show "that, notwithstanding the similarities between SVP's and MDO's, the former as a class bear a substantially greater risk to society, and that therefore imposing on them a greater burden before they can be released from commitment is needed to protect society." (*McKee I, supra*, 47 Cal.4th at p. 1208.) The court provided some guidance to the trial court, stating the requisite showing may be made by demonstrating "the inherent nature of the SVP's mental disorder makes recidivism as a class significantly more likely. Or it may be that SVP's pose a greater risk to a particularly vulnerable class of victims, such as children. Of course, this latter justification would not apply to SVP's who have no history of victimizing children. But

in the present case, McKee's previous victims were children. Or the People may produce some other justification." (*Ibid.*, fn. omitted.)

On remand after the decision in *McKee I*, the trial court conducted a 21-day evidentiary hearing, at the conclusion of which the trial court found the People carried their burden to justify the disparate treatment of SVP's (*McKee II*, *supra*, 207 Cal.App.4th 1330), by presenting "substantial evidence to support a reasonable perception by the electorate that SVP's present a substantially greater danger to society than do MDO's or NGI's, and therefore the disparate treatment of SVP's under the Act is necessary to further the People's compelling treatment of the mentally disordered." (*Id.* at pp. 1330-1331.)

We agree with the analysis in *People v McKee II*, *supra*, 207 Cal.App.4th 1325. "... SVP's have significantly different diagnoses from those of MDO's and NGI's, and that their respective treatment plans, compliance and success rates are likewise significantly different." (*Id.* at p. 1347.) "[A]s a class, SVP's are clinically distinct from MDO's and NGI's and that those distinctions make SVP's more difficult to treat and more likely to commit additional sexual offenses than MDO's and NGI's.' In particular, SVP's are less likely to participate in treatment, less likely to acknowledge there is anything wrong with them, and more likely to be deceptive and manipulative." (*Ibid.*)

We find the reasoning and conclusion of *McKee II* persuasive. Accordingly, we reject appellant's equal protection challenge to the SVPA.

III
DISPOSITION

The judgment is affirmed.

MOORE, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.