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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.

BRYAN DOOLEY,

Defendant and Appellant.

G045827

(Super. Ct. No. M-11783)

OPINION

Appeal from a judgment of the Superior Court of Orange County, Derek Guy Johnson, Judge. Affirmed.

Laurel M. Nelson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood and Bradley A. Weinreb, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant is a juvenile sex offender whose confinement was extended after a jury determined that, if released, he would be physically dangerous to the public due to a mental disorder that causes him to have serious difficulty controlling his behavior. (See Welf. & Inst. Code, §§ 1800, et seq.) He contends his jury was misinstructed on the law and its verdict is not supported by substantial and reliable evidence. He also contends he was denied equal protection because he was not afforded the same procedural protections that are provided to other inmates who are subject to involuntary commitment. Finding no basis to disturb the judgment, we affirm.

#### FACTS

Born in 1987, appellant had a horrific childhood. His mother was a drug-addicted prostitute, and his father, also a drug user, physically and sexually abused him and the other children in the family. Appellant was also sexually abused by a neighbor and one of his teachers. Unsurprisingly, appellant molested his younger sister and eventually sought out other victims.

At the age of 14, appellant attempted to molest several young victims. He was placed on probation, but he continued to prey on younger children, mostly boys. In 2003, at age of 16, he was declared a ward of the juvenile court for committing sexual battery and engaging in lewd conduct with multiple children. The record does not reveal the precise number of children appellant victimized during these offenses. However, he subsequently admitted he molested as many as 40 children during his childhood. His maximum term of confinement was set at eight years and four months.

Appellant was initially placed in a sexual offender program in Riverside County, but within months he was terminated from the program for continuing to act out sexually. He couldn't keep his hands off other wards and was often caught staring at their genitals in the bathroom. Appellant also admitted he frequently fantasized about having sex with young boys.

In 2004, appellant was housed at the Orange County Juvenile Hall. During that time, he was often found in possession of pictures of young children, some of whom were naked and appeared as young as four years old. Appellant admitted cutting the pictures out of magazines and using them to masturbate. He said his therapy wasn't helping him and he simply couldn't control his sexual urges. He also said he was certain he would reoffend if he were released from custody.

In 2005, at the age of 18, appellant was sent to the California Youth Authority, now known as the Division of Juvenile Justice (DJJ). While in treatment there, it became clear appellant's attitudes about sex were deeply engrained due to his abusive upbringing. One of the main objectives of his treatment team was to help him understand it is not normal for children to engage in sex. His treatment team also tried to educate appellant about the dynamics of victimization and the triggers that can set off sexually inappropriate behavior. Initially, appellant appeared receptive to the treatment and cut down on his picture-hoarding behavior. However, in the spring of 2006, he admitted to sneaking a parenting magazine out of the library and using it as masturbation material.

Later that year, appellant was caught having sex with a ward named "Blanco." Appellant had asked permission to use the bathroom, but guards discovered him orally copulating Blanco in the shower. Although Blanco was as old as appellant, 19, he looked much younger than that at the time. He was described as being very short, with child-like features, and having a well-known reputation for promiscuous behavior. When confronted about the incident, appellant said he had been feeling "horny" and was having trouble controlling his sexual urges.

In 2007, Dr. Inga M. Talbert, a staff psychologist at the DJJ and a member of appellant's treatment team, evaluated appellant using an extensive questionnaire known as the Multiphasic Sex Inventory. During the interview, appellant claimed he hadn't looked at any pictures of children during the last six months. And while he still

had sexual fantasies involving children and masturbated with them in mind, he said he was having fewer deviant fantasies than before.

However, Dr. Talbert found appellant was not entirely forthcoming with regard to his sexual obsession and tended to justify his deviancy. She also found marked evidence of cognitive distortions, immaturity and poor decisionmaking. Although appellant was making some progress in treatment, Dr. Talbert believed he suffered from chronic pedophilia and needed much more work and time to address his problem with children. In her view, appellant still hadn't internalized the concepts he was being taught or sufficiently dealt with his own history of sexual abuse. Therefore, she recommended he remain in custody for further treatment.

During 2008 and 2009, appellant continued to participate in therapy. He also held a job in the print shop and was studying toward an associate degree. At times he struggled with the concepts discussed in therapy and failed to complete his homework assignments, but overall, he was believed to be making good progress toward his treatment goals. In a supplemental report prepared in March 2009, Dr. Talbert wrote that appellant had been working to decrease his deviant sexual fantasies and had not been found with any pictures of children for masturbatory stimulation since 2006. Because there was no evidence of recent inappropriate sexual behavior by appellant, Dr. Talbert felt there was no need to extend his confinement. She still believed appellant was a potential danger due to his pedophilia, but she believed he had the condition sufficiently under control to justify his release.

In early 2010, however, appellant admitted it was a daily struggle for him not to think about having sex with children. Although he claimed to be having far fewer deviant fantasies than before, he told a counselor in March 2010 that he felt he needed more time to complete his treatment plan and that he wasn't ready to be released from custody. He also revealed he had engaged in sexual conduct with other wards in his prior placements.

The following month, in April 2010, a female guard discovered appellant masturbating in his cell late one evening. The incident was deemed significant because the guard had been passing by appellant's cell every 30 minutes that night as part of her inspection duties. Since her inspections were set on regular intervals, it was suspected that appellant masturbated at a time when he knew or should have known she would be coming by his cell.

Appellant was subsequently transported to the Chaderjian Youth Correctional Facility, where he began participating in an intense therapy program called the Inner Child Workshop. Because appellant had such a terrible childhood, it was very difficult for him to revisit it in an attempt to work through his sexual abuse issues. However, he persevered and eventually completed the program. His progress was on display in early 2011, when another ward made a sexual advance toward him. Instead of submitting to temptation, appellant rebuffed the advance and reported it to his counselor.

However, on the heels of that incident, appellant began hoarding his medication as part of a suicide scheme. He had planned to overdose around his birthday in March 2011, but ultimately decided against it. He later explained he always felt guilty around his birthday because he had a twin who had died at birth. Appellant said he simply couldn't come to terms with the fact his twin had died instead of him.

As appellant's expected release date neared, the state petitioned to extend his confinement pursuant to the Extended Detention Act (EDA). (Welf. & Inst. Code, §§ 1800, et. seq.)<sup>1</sup> The trial court determined there was probable cause to support the petition, and in July 2011 a jury was empanelled to hear the case.

At trial, Wesley Maram, Ph.D., testified as an expert witness on behalf of the state. Dr. Maram is a clinical and forensic psychologist who specializes in the treatment, testing and assessment of sex offenders. He has evaluated hundreds of adult

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code.

sex offenders to determine whether they met the criteria for commitment under the Sexually Violent Predators Act (SVPA). (§§ 6600 et seq.) He has also treated and tested many juvenile sex offenders over the years. However, this is the first case in which he was asked to evaluate and testify about whether a particular juvenile offender should be committed under the EDA.

Although Dr. Maram has received training on the EDA criteria, he said there is no standard protocol for testing individuals to determine whether they meet that criteria. In evaluating appellant, Dr. Maram did not personally interview him. Rather, he conducted a “paper evaluation” by reviewing the records in appellant’s voluminous file and using that information to determine whether it would be safe for him to be released into the community. He prepared his initial report in 2009 and did a follow-up report two years later in 2011.

Dr. Maram testified that while appellant’s primary mental illness is pedophilia, he also suffers from psychosis, not otherwise specified. In addition, he’s also been diagnosed with schizophrenia, schizoaffective disorder, bipolar disorder, pyromania and depression at various times over the years. Pedophilia is characterized by intense recurring sexually arousing fantasies directed at prepubescent children. Given appellant’s long history of pedophilic interest and acting out, Dr. Maram believed he had a rather severe case of the disorder. And although appellant had made some progress in treatment, Dr. Maram was concerned about several aspects of his record.

For one thing, appellant’s record indicates he has been somewhat inconsistent with his treatment plan. While there have been times when he’s shown considerable dedication to the plan, at various points he has failed to do his homework, shown little emotion or focus and been disengaged from the treatment process. In 2010, he was reported to have very little insight into himself or the concept of victim consent. And, he has struggled with empathy, intimacy, relationship and trust issues. Appellant has also reported that his medications are not always effective and that he has

experienced hallucinations and voice commands telling him to engage in violent behavior.

Dr. Maram was also troubled by the fact that appellant had a sexual encounter with Blanco, he masturbated in plain view of a guard, he secretly hoarded his medications as part of a suicide plan, he continues to have pedophilic fantasies, and he has admitted he needs further treatment before being released. In Dr. Maram's clinical judgment, these facts not only evidence emotional instability and poor judgment, they show appellant still has a sexual preoccupation with children, continues to have problems regulating his sexual behavior, and needs further treatment.

As part of his evaluation of appellant, Dr. Maram utilized a variety of actuarial instruments, including the STATIC-99, HCR-20 and the STABLE-2007. Dr. Maram testified that, in statistical terms, these instruments have about a 65 to 70 percent accuracy level. He referred to them as analytical "tools" that helped him formulate his opinions about appellant. He did not rely on them exclusively, but instead used them in conjunction with his own clinical judgment to assess appellant's recidivism risk.

In utilizing the STATIC-99, Dr. Maram looked at ten unchangeable factors in appellant's background. He admitted consideration of only ten factors is not enough to get a complete picture of the person being tested. He also conceded the STATIC-99 is designed for adult offenders and is "not the best test in the world" for assessing juvenile offenders who are now adults, such as appellant. Still, Dr. Maram believed the test has some utility for assessing juvenile offenders. He used it with caution in this case, simply to get a sense of appellant's risk level compared to adult offenders. As it turned out, appellant tested in the 90th percentile, meaning he was in the top 10 percent in terms of dangerousness.

In administering the HCR-20, Dr. Maram looked at both static and dynamic, i.e., changeable, risk factors in appellant's background that are associated with sexual recidivism. After measuring those factors on a standard scale and applying his

own clinical judgment to them, Dr. Maram determined appellant presented a “high risk” for recidivism. On cross-examination, Dr. Maram admitted the HCR-20 is designed for adult offenders and is most accurate when the evaluator personally interviews the test subject in the course of the evaluation process. Nonetheless, Dr. Maram was confident in appellant’s HCR-20 tests results because he had access to vast amounts of information about appellant’s personal history and his progress in treatment.

The STABLE-2007 is a testing mechanism that was developed by looking at recidivism factors in a group of Canadian adult sex offenders living in an outpatient setting. Because appellant did not match that test group, Dr. Maram only used the STABLE-2007 as a guide with respect to appellant; he did not utilize the specific scoring system associated with the test.

In the end, after analyzing all of the information in appellant’s record and considering all of the testing results, Dr. Maram concluded in his initial 2009 report that appellant met the criteria for commitment under the EDA in that: 1) He has a mental disorder; 2) the disorder causes him serious difficulty controlling his dangerous behavior; and 3) he would be physically dangerous to others if released from custody.

As noted, Dr. Maram evaluated appellant again in 2011, at which time he utilized an updated version of the STATIC-99. Appellant scored in the upper 90th percentile on that test, indicating he had a 45 percent chance of reoffending within 5 years, and a 55 percent chance of reoffending within 10 years. Dr. Maram also applied the Structured Risk Assessment Test, which is used to assess psychological factors and long-term vulnerabilities. Appellant scored in the highest risk category available on the test, leading Dr. Maram to believe he still has “profound treatment needs.” Just as he did in 2009, Dr. Maram concluded in his 2011 report that appellant met the criteria for commitment under the EDA. He was firmly convinced appellant’s “mental disorders, the pedophilia combined with the psychosis, make him” physically dangerous to others.

The defense countered Dr. Maram's testimony with the expert opinions of Dr. Krys Hunter, who is a clinical and forensic psychologist for the DJJ. Dr. Hunter has testified as an expert witness in over 100 cases and is considered a "super trainer" because she teaches other psychologists how to conduct forensic evaluations of sex offenders. She is the DJJ's primary EDA evaluator for all of Northern California.

Dr. Hunter is also appellant's treating psychologist at the Chaderjian Youth Correctional Facility. At the time of trial, she had been working with appellant for about eight months. That is why she did not formally evaluate appellant on behalf of the state in this case. As Dr. Hunter admitted, treating psychologists have a natural interest in seeing their patients succeed and are generally inclined to give an overly favorable assessment of their patients' progress. Still, that did not stop Dr. Hunter from testifying on appellant's behalf in this case.

Based on her treatment of appellant, Dr. Hunter believes he suffers from schizophrenia and depression. She said appellant hears voices and sees images that are not there, and when he gets depressed, the symptoms tend to get worse. While appellant can ignore the voices most of the time, if he's under stress or not taking his medications, they begin to sound like his father and can be very stressful to him.

Dr. Hunter thinks appellant also suffers from pedophilia "by history." She used the phrase "by history" because, in her view, juvenile sex offenders commit their crimes for revenge or for opportunistic reasons, not because they are attracted to children. Therefore, in diagnostic terms, they cannot be categorized as true pedophiles.

Dr. Hunter found it significant that in the last six months leading up to trial, appellant's sexual urges have not interfered with his daily functioning and he has not acted on those urges. Dr. Hunter viewed this as proof that appellant can control his urges. She does not believe appellant suffers from any personality disorders, has any antisocial traits or has "any difficulty whatsoever controlling his behaviors."

In coming to that conclusion, Dr. Hunter made a distinction between planned and impulsive behavior. She was not troubled by the fact that appellant had sex with Blanco in 2006, because it was planned and consensual. Nor was she concerned that appellant was caught masturbating in his cell in 2010 because all of the wards “frequently masturbate.” It was more important to Dr. Hunter that appellant has not engaged in impulsive behavior, such as grabbing or groping people in a sexual fashion, which would reflect lack of control on his behalf.

Speaking to the DJJ’s sex offender treatment program, Dr. Hunter said the program has 10 stages, and each stage has roughly 10 assignments or exercises associated with it. Appellant struggled on some of the stages but was ultimately able to finish the “core” aspects of the program. Dr. Hunter admitted appellant’s ability to complete the program did not mean he was cured or would not reoffend. Still, she thought it was a significant accomplishment that he was able to get through all 10 stages.

Dr. Hunter was also encouraged by appellant’s progress in group therapy. She testified that appellant has made friends and taken a leadership role in his group. He’ll confront his peers if he thinks they are lying or shirking, and he’s able to give and take advice, which is a sign of maturity. He now understands that children are vulnerable and fragile and should not be having sex. He is able to see how his own abusive childhood has shaped his attitudes about sex, and he is eager to learn how to deal with sexual issues in an appropriate manner. Most importantly, in Dr. Hunter’s opinion, appellant has demonstrated in his daily living that he has internalized his treatment plan. By behaving himself and refraining from sexually inappropriate conduct, he has demonstrated he is capable of controlling his dangerous behavior and can contribute to society in a positive fashion.

As for the actuarial testing that Dr. Maram conducted in this case, Dr. Hunter thought it was meaningless because the instruments he utilized are designed to be used on adult offenders or juvenile offenders when they are still underage. As such, they

would not accurately reflect appellant's risk of recidivism. Dr. Hunter said there are no actuarial tests to assess the risk of recidivism for a person like appellant, who offended as a juvenile but is currently over the age of 18. However, from a purely statistical standpoint, Dr. Hunter believed appellant's risk of reoffending was "very low."

Dr. Hunter was also of the opinion that appellant's history of deviant behavior was not particularly relevant in determining whether he should be committed under the EDA. She said the central question was not appellant's past behavior but how much difficulty he currently has controlling his dangerous behavior. Dr. Hunter was convinced that, by virtue of maturity and addressing his risk factors and history of victimization, appellant has demonstrated the ability to control his dangerous behavior and utilize strategies to prevent himself from reoffending.

The jury did not see it that way. It found true beyond a reasonable doubt the allegation that, if released, appellant would be physically dangerous to others because of a mental disorder that causes him serious difficulty controlling his behavior. As such, the court extended appellant's confinement by committing him to the DJJ for two years.

## I

Appellant contends the trial court was remiss for failing to give an instruction analogous to the presumption of innocence instruction that is given in criminal cases. He had asked the court to instruct the jury to presume he did not meet the criteria for commitment and the allegations in the petition were not true, but the trial court determined such an instruction was unnecessary. We agree.

The trial procedures applicable for EDA proceedings are set forth in section 1801.5. Pursuant to that section: 1) "The person shall be entitled to all rights guaranteed under the federal and state constitutions in criminal proceedings[;]" 2) "The court's previous order entered pursuant to Section 1801 [regarding probable cause for trial] shall not be read to the jury, nor alluded to in the trial[;]" 3) "A unanimous jury verdict shall be required in any jury trial[;]" 4) "As to either a court or a jury trial, the standard of proof

shall be that of proof beyond a reasonable doubt[;]” and 5) The issue to be decided is whether the person is “physically dangerous to the public because of his or her mental or physical deficiency, disorder, or abnormality which causes the person to have serious difficulty controlling his or her dangerous behavior[.]” (§ 1801.5.)

By its terms, the statute does not expressly require the trial court to instruct the jury to presume the allegations in the commitment petition are not true. It does entitle the subject of the petition to all of the constitutional rights that are provided in criminal cases, including the standard of proof of proof beyond a reasonable doubt. However, while the presumption of innocence is an important aspect of that standard, the United States Supreme Court has determined that a “defendant is not entitled automatically to an instruction that he is presumed innocent of the charged offense. [Citation.] An instruction is constitutionally required only when, in light of the totality of the circumstances, there is a “genuine danger” that the jury will convict based on something other than the State’s lawful evidence, proved beyond a reasonable doubt.” (*Delo v. Lashley* (1993) 507 U.S. 272, 278.)

Likewise, our own Supreme Court has held that the failure to instruct on the presumption of innocence does not amount to constitutional error, so long as the jury is instructed to decide the case based upon the evidence adduced at trial and told not to consider the fact the defendant has been arrested and brought to trial. (*People v. Aranda* (2012) 55 Cal.4th 342, 355-356.)

In this case, the jury was instructed, “The fact that a petition to extend [appellant’s] commitment has been filed is not evidence that the petition is true. You must not be biased against [appellant] just because the petition has been filed and this matter has been brought to trial. The [state] is required to prove the allegations of the petition are true beyond a reasonable doubt. [¶] [Reasonable doubt defined.] [¶] In deciding whether the [state] has proved the allegations of the petition are true beyond a reasonable doubt, you must impartially compare and consider all the evidence that was

received throughout the entire trial. Unless the evidence proves what must be proved in this proceeding . . . beyond a reasonable doubt, you must find the petition is not true.” (CALCRIM No. 219, as modified.)

These instructions made it clear to the jurors that they were to base their decision solely on the evidence that was adduced at trial. Appellant fears that in determining the truth of the charges against him, the jury may have considered his original commitment offenses and his subsequent confinement in the DJJ. However, the circumstances of appellant’s crimes and his custodial history were proven by lawful means and properly admitted into evidence for the jury’s consideration. Because there was no danger the jury decided the case based on factors *other than the state’s evidence*, the court did not violate appellant’s rights by failing to instruct the jury to presume the allegations in the petition were not true.

## II

Appellant also faults the trial court for failing to instruct the jury that “current” dangerousness is a criteria for commitment under the EDA. Although the court did not explicitly instruct the jury in that manner, its instructions properly informed the jury that appellant could only be committed if he was dangerous at the time of trial. We discern no functional difference.

As noted above, the issue to be decided in an EDA trial is this: “Is the person physically dangerous to the public because of his or her mental or physical deficiency, disorder, or abnormality which causes the person to have serious difficulty controlling his or her dangerous behavior?” (§ 1801.5.) The statute does not specifically require a finding of “current” dangerousness, but as the Attorney General concedes, due process generally demands such a finding before a person may be civilly committed because of mental infirmity. (See *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1162; *Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 177-178.)

Even though the trial court did not use the words “current” or “currently” in instructing the jury on the requirements for commitment in this case, its instructions were worded so as to preclude a true finding on the petition unless the jury found appellant was currently dangerous. Speaking to the requirements for commitment, the court explained, “The petition alleges that [appellant] *is* physically dangerous to the public because of a mental . . . disorder . . . that *causes* him to have serious difficulty controlling his dangerous behavior. [¶] To prove this petition is true, the [state] must prove beyond a reasonable doubt that: [¶] One, he *has* a mental . . . disorder . . . . [¶] Two, the mental . . . disorder . . . *causes* him serious difficulty in controlling his dangerous behavior. [¶] And three, because of his mental . . . disorder . . . he would be physically dangerous to the public if released from custody.” (Italics added.)

By describing the requirements for commitment in the present tense, the court signaled that current dangerousness was a prerequisite for having appellant involuntarily committed. (Cf. *People v. Carroll* (2007) 158 Cal.App.4th 503, 513-514 [Legislature’s use of present tense in SVPA indicated requirements of act, including dangerousness, must currently exist at the time of trial to justify a person’s commitment under the act].) The expert testimony and the attorneys’ closing arguments also brought this point home. Considering everything the jurors were told, it is not reasonably likely they interpreted the court’s instructions as not requiring a finding of current dangerousness. Therefore, the instructions are not cause for reversal. (See *People v. Franco* (2009) 180 Cal.App.4th, 713, 720 [in assessing claim of instructional error, appellate court must consider the record as a whole, including the parties’ closing arguments, to determine whether there is a reasonable likelihood the jury construed the challenged instructions in a manner that violated the defendant’s rights].)

### III

Appellant also contends his equal protection rights were violated because his confinement was extended based largely on the testimony of a single expert witness,

Dr. Maram, who did not follow a standard testing protocol in determining whether he met the criteria for commitment under the EDA. Appellant contends other type of offenders, such as a sexually violent predators (SVP's) and mentally disordered offenders (MDO's), can only be committed when standardized testing protocols are followed and at least two professionals agree that commitment is warranted, and had those same protections been afforded to him, his case never would have gone to trial. However, as appellant admits, he did not raise this claim in the trial court. Therefore, it has been forfeited. (*People v. Alexander* (2010) 49 Cal.4th 846, 880, fn. 14; *People v. Burgener* (2003) 29 Cal.4th 833, 860-861, fn. 3; *Neil S. v. Mary L.* (2011) 199 Cal.App.4th 240, 254.)

Notwithstanding his failure to raise it below, appellant asks us to consider his equal protection argument on the basis the alleged violation of his rights was “clear” and “obvious.” However, the California Supreme Court has indicated that, when it comes to involuntary commitment procedures, juvenile offenders may be treated differently than adult offenders without violating equal protection. (*In re Lemanuel C.* (2007) 41 Cal.4th 33. ) Indeed, simply because “the Legislature has made it more difficult to commit a more serious, adult offender — especially one who faces the stigma of being declared an SVP [or MDO] — does not give rise to an equal protection violation.” (*Id.* at pp. 48-49.) Thus, the failure to afford appellant all of the procedural protections afforded adult offenders who are subject to commitment did not constitute clear or obvious error. We see no reason to depart from the forfeiture rule in this case. (See generally *In re Seaton* (2004) 34 Cal.4th 193, 198-199 [explaining rationale for the forfeiture rule and noting it applies even when the complained of error is based on an alleged violation of the defendant's fundamental constitutional rights].)

#### IV

Appellant's remaining claims have to do with the strength of the evidence that was presented against him. He contends the evidence was not only insufficient to

justify the jury's findings, but it was so unreliable and untrustworthy that his trial and subsequent commitment violate due process. We cannot agree.

In reviewing the sufficiency of the evidence to support a commitment under the EDA, “[t]he question to be determined is whether, on the whole record, there is substantial evidence from which a rational trier of fact could have found each essential element beyond a reasonable doubt. [Citations.] We must consider all the evidence in the light most favorable to the People, drawing all inferences the trier could reasonably have made to support the finding. [Citation.]” (*In re Anthony C.* (2006) 138 Cal.App.4th 1493, 1503.)

Establishing a conflict in the evidence is not enough to impugn the jury's verdict, especially when, as here, the conflict arises from the proverbial “battle of the experts.” While experts must form their opinions based on “relevant, probative facts rather than conjecture,” the jury is generally free to “give each expert opinion the weight they feel it deserves and may disregard any opinion they find unreasonable. [Citation.]” (*In re Brian J.* (2007) 150 Cal.App.4th 97, 115.) No due process will be found unless the state's evidence was so unreliable or prejudicial that it rendered the trial fundamentally unfair. (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

In challenging the sufficiency of the state's evidence, appellant claims there is not substantial evidence proving that, “*at the time of trial*, [he] posed a risk to society because he had a diagnosed mental disorder that caused a serious difficulty controlling his dangerous behavior . . . .” (Italics added.) Appellant acknowledges there is an abundance of evidence showing he engaged in sexually deviant behavior up until at least 2006. However, he contends that evidence doesn't mean much because the EDA and due process require a finding of *current* dangerousness.

We disagree. Appellant's criticism of the state's evidence as being based on historical evidence is not well taken because in determining whether a person is subject to commitment, the jury may properly consider the person's criminal history, his

behavior while in confinement and the extent to which he has progressed on his treatment plan over time. (See *In re Brian J.*, *supra*, 150 Cal.App.4th at pp. 115-120; *In re Anthony C.*, *supra*, 138 Cal.App.4th at pp. 1503-1509.) Indeed, our Supreme Court has recognized that past criminal conduct may be a *significant factor* in predicting an inmate's future behavior should he be released from custody. (*In re Shaputis* (2011) 53 Cal.4th 192, 219.)

Like many child molesters, appellant was the victim of childhood sexual abuse himself. That set him on a course of sexually deviant behavior at a very young age, as reflected in the nature of his initial commitment offenses, which involved sexual battery and lewd conduct involving children. By the time he was made a ward of the court at the age of 16, appellant, had already victimized as many as 40 children, most of whom were boys. His initial years in confinement were marked by excessive picture hoarding, constant pedophilic fantasies and a pronounced inability to control his sexual urges involving children. And when Dr. Talbert evaluated him in 2007, she was convinced he needed further treatment to address his problems.

In 2009, Dr. Talbert prepared an updated report based on appellant's treatment records. At that time, she felt appellant "had actually made some progress in treatment" and was no longer having serious difficulty controlling his dangerous behavior. At the trial in 2011, however, Dr. Talbert admitted she had not been involved in appellant's treatment since 2009, nor was she aware of how he was currently doing. Thus, she was unable to render an opinion as to whether appellant met the criteria for commitment *at the time of trial*.

Drs. Maram and Hunter did have access to appellant's complete, updated file. As such, they were qualified to speak to the issue of appellant's current dangerousness and his present suitability for commitment. Unlike Dr. Hunter, Dr. Maram never treated or interviewed appellant. However, Dr. Hunter admitted that treating psychologists often lack the objectivity needed to render an accurate assessment

of their client's risk of recidivism. She also admitted there is no standard protocol for testing individuals to determine whether they meet the criteria for commitment under the EDA. Because of this, and because Dr. Maram had access to vast amounts of information about appellant's background and treatment history, the jury could reasonably consider his opinions in reaching their verdict.

Although Dr. Hunter was critical of the actuarial testing instruments Dr. Maram employed in this case, Dr. Maram made it very clear throughout his testimony that he did not base his opinions solely on the data he gathered from utilizing those instruments. Rather, the data was simply one of the many factors he considered in formulating his opinion about appellant's dangerousness. Dr. Maram was the first to admit there are no testing devices that are perfectly suited to test the recidivism risk of someone like appellant. Yet, he felt the tests he employed, which indicated appellant was a "high risk" for reoffending, could give him an approximate idea of how appellant compared to other offenders in terms of both static and dynamic factors in his background. Given that Dr. Maram considered the testing data with a grain of salt to supplement – not dictate – his own clinical judgment, the jury was entitled to consider his opinion that appellant is a physical danger to others due to his serious inability to control his dangerous behavior.

Irrespective of Dr. Maram's opinions, the record shows that appellant suffers from psychotic symptoms such as hallucinations and delusions. He has received voice commands telling him to engage in violent behavior, and he nearly took his own life a few months before the trial commenced in 2011. As recently as 2010, appellant admitted it was a constant struggle for him not to think about having sex with children, and even he thought he needed further treatment and was not ready to be released from custody.

Based on all of the evidence that was presented, we are convinced a reasonable jury could find appellant remains a physical danger to others because of a

mental disorder which causes him serious difficulty controlling his dangerous behavior. Although it was not undisputed or unassailable in every respect, the evidence on that key issue was substantial in nature and sufficiently reliable to satisfy the constitutional requirement of due process. We therefore have no occasion to disturb the judgment.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.