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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM KARL OLSEN,

Defendant and Appellant.

H036654

(Santa Clara County
Super. Ct. No. 210555)

I. INTRODUCTION

The People filed an amended petition to extend the commitment of William Karl Olsen under the Sexually Violent Predators Act (SVPA; Welf. & Inst. Code, § 6600 et seq.)¹ after his commitment expired on October 5, 2008. The SVPA provides for the involuntary civil commitment for treatment and confinement of an individual who is found, by a unanimous jury verdict (§ 6603, subds. (e) & (f)), and beyond a reasonable doubt (§ 6604), to be a sexually violent predator (hereafter, sometimes SVP). A jury found the allegation that Olsen was a sexually violent predator to be true. By order filed on February 22, 2011, the trial court committed Olsen to the state Department of Mental Health for an indeterminate term.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

On appeal, Olsen raises the following issues: (1) the evidence was insufficient to show that he is currently dangerous; (2) the trial court's response to juror question No. 5 was improper; (3) indeterminate commitment under the SVPA violates his constitutional right to equal protection; and (4) the SVPA violates his due process rights and the ex post facto and double jeopardy clauses and the Eighth and Fourteenth Amendments of the federal constitution.

Pursuant to the ruling of the California Supreme Court in *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee*) that the equal protection challenge to the indeterminate term under the SVPA has potential merit, we will reverse the judgment and remand the matter for further proceedings consistent with *McKee*. We find no merit in the remaining issues raised by Olsen, for the reasons stated below.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Commitment Petition

On September 26, 2008, the People filed an amended petition to extend Olsen's commitment as a sexually violent predator under the SVPA. The petition stated that on October 5, 2000, Olsen was committed as a sexually violent predator to the state Department of Mental Health for two years, and since that date he "has been consistently committed to a new term as a Sexually Violent Predator."² The People asserted that Olsen "continues to meet the criteria for commitment as a sexually violent predator in that he continues to have a current diagnosed mental disorder that makes him a danger to the health and safety of others in that it is likely that he will engage in sexually violent criminal behavior in the future."

² We take judicial notice of this court's opinions in Olsen's previous appeals, including *People v. Olsen* (Nov. 11, 2001, H022135) [nonpub. opn.]; *People v. Olsen* (Feb. 23, 2006, H029046) [nonpub. opn.], and *People v. Olsen* (Mar. 3, 2008, H031692) [nonpub. opn.]. In the last appeal, *People v. Olsen, supra*, H031692, this court reversed the May 30, 2007 order committing Olsen to an indeterminate term as an SVP after finding that an indeterminate term may not be imposed retroactively.

After a probable cause hearing was held, the trial court issued its July 2, 2010 order finding that there was probable cause to believe that (1) Olsen had been convicted of a qualifying sexually violent offense against at least one victim; (2) he has a diagnosable mental disorder; (3) the disorder makes it likely that he will engage in sexually violent criminal conduct if released; and (4) the sexually violent criminal conduct will be predatory in nature. Thereafter, the case proceeded to a jury trial.

B. Jury Trial

The jury trial on the September 26, 2008 petition to extend Olsen's commitment under the SVPA began on January 31, 2011. The following summary of pertinent trial evidence is taken from the reporter's transcripts of the trial.

1. Background

At the age of five, Olsen was placed in foster care due to his mother's health problems. He later graduated from high school and worked as a mechanic and truck driver. He also served in the Army in Vietnam. Olsen has been married twice and has an adult daughter. At the time of trial, Olsen was 61 years old.

The parties' four expert witnesses considered the following six incidents from Olsen's criminal history in developing their opinions.

In 1972, Olsen used a handgun to abduct a 27-year-old woman in her car. After a struggle, Olsen got out of the car and left. There was no indication that a sexual offense had occurred and Olsen was convicted of "grand theft of a person." He served a jail sentence and was placed on probation.

The next incident took place in July 1973, when Olsen picked up two teenage girls, M. and T., who were hitchhiking. After taking the girls to an isolated area where his truck got stuck in the dirt, Olsen had them stand on the truck bed to gain traction. He then pushed T. down a 75-foot ravine and hogtied M. After finding T. and threatening her with a knife, Olsen saw that T. was bleeding profusely. He untied M. and together they brought T. back up to the truck. When the girls asked Olsen why he was doing this,

he said he intended to rape them. Olsen did not rape the girls and instead took them home.

In August 1973, Olsen picked up an 19-year-old hitchhiker, M.L., and took her to an isolated area. When Olsen took out a rope, M.L. pleaded with him not to tie her up. Olsen then ripped off M.L.'s blouse and M.L. said she would do what he wanted her to do. After placing M.L. on the truck bed and raping her, Olsen apologized. M.L. asked him to take her to the hospital because she recently had surgery following a miscarriage. Olsen took M.L. to the hospital and checked himself into the psychiatric unit next door.

Olsen was incarcerated in 1974 and paroled in 1978. He was discharged from parole in 1979 and committed his next sexual offenses in 1980. C., a 16-year-old girl, was picked up by Olsen in January 1980 while she was hitchhiking and taken to Stevens Creek dam. After arriving, Olsen, who had knife, hit C. below the eye and tied her up with rope. Olsen then took C. to another location in the mountains. There, Olsen put a rope around C.'s neck and walked her up a trail to a desolate location, where he orally copulated C., sat on her, untied her, and forced her to orally copulate him. Olsen also sodomized C. and raped her. He then apologized and took C. home.

The next incident occurred in June 1980 and involved S.P., age 19. Olsen picked S.P. up while she was hitchhiking. He put his knife to her throat and cut her slightly, and also orally copulated her. Next, Olsen took S.P. to an isolated area in the mountains, where he tied her hands behind her back with a belt. S.P. screamed in pain when Olsen put his fingers in her anus and then sodomized her. He also made derogatory sexual statements during the course of the sodomy.

The last incident occurred on July 9, 1980, about one month after the incident involving S.P. K. was a 17- year-old beauty college student who met Olsen when he used a pay phone after she used it during her lunch hour. Later that day, Olsen called K. over to his car when she came out of the beauty college. Olsen then pulled K. into his car

by holding a knife to her throat. Olsen had pictures of K. in his car and threatened to kill her.

After getting K. into his car, Olsen tied a rope painfully tight around her neck and gagged her with a cloth and shoestrings. Olsen then drove K. to an isolated area in the hills. On the way, Olsen undressed K. and fondled her. After arriving, Olsen tied K. to a log with ropes attached to her wrists, legs, and neck. He then hit K. in the buttocks with a stick, causing bruises, and sodomized and raped her. After finishing the assault, Olsen was pleasant and talkative with K. He also showed her how to shoot his BB gun. But when K. made the comment, “well, everyone needs friends,” Olsen became very angry and violent. He pushed K. down, sodomized her again, bit her neck, and hit her on the buttocks with his BB gun, breaking it.

Following the 1980 offenses, Olsen pleaded guilty to the sodomy and oral copulation of C. and the sodomy and rape of K. He has been in custody since 1980.

2. Witness Testimony

Testimony of Dr. Owen

Robert Owen, Ph.D. is a licensed clinical psychologist in private practice. Since 1986, he has conducted sexually violent predator evaluations for the Department of Mental Health. The trial court recognized Dr. Owen as an expert in “the diagnosis of mental disorders, treatment, and risk assessment of sex offenders.”

Dr. Owen began his evaluation of Olsen in 2008. At that time, he reviewed Olsen’s criminal record and psychological reports by other evaluators. Dr. Owen also interviewed Olsen on three occasions, in 2009, 2010, and 2011. In Dr. Owen’s opinion, Olsen has the following mental disorders: “sexual sadism, with gender identity disorder, and with a personality disorder involving borderline traits.”

Dr. Owen explained that the diagnosis of sexual sadism requires a pattern of sadistic behavior over a period of at least six months, in which the person is sexually aroused by the physical or psychological harm inflicted upon a nonconsenting victim.

Dr. Owen also explained that a sexual sadist is different from a “typical rapist” due to the “amount of violence that he’s used. . . . A person has to be turned on to violence or degradation of victims.” Dr. Owen further opined that sexual sadism is a chronic condition that does not spontaneously disappear.

The diagnosis of sexual sadism for Olsen was based largely on Dr. Owen’s finding that Olsen’s history of sexual offenses showed that he is sexually aroused in combination with violence and inflicting pain and degradation on the female victim. Dr. Owen also considered Olsen’s social history and Olsen’s statements about his homosexual activity, which included a male lover and cross-dressing.

Although Dr. Owen acknowledged that Olsen had behaved well during his 30 years of incarceration, that did not change Dr. Owen’s opinion that Olsen is a sexual sadist. Dr. Owen pointed out that Olsen had resumed committing sadistic sex offenses after his first incarceration, had not engaged in any treatment for sexual deviance, and lacked insight into what triggered his sex offenses. Additionally, it did not surprise Dr. Owen that Olsen had not engaged in sadistic rape while in custody, since it is unusual for sex offenders to commit rape in prison and “there are a couple of things missing in custody, his truck, his knife, his rope, and teenage girls.”

Dr. Owen also concluded that Olsen is a “volitionally impaired individual” because he has “struggled to contain these sadistic impulses” and had been undeterred from committing further sex offenses after serving a term in prison. In his opinion, Olsen’s mental disorder of sexual sadism is an “entrenched” condition that “causes volitional and emotional impairment” and renders him “likely to engage in sexually violent predatory criminal behavior.”

Additionally, Dr. Owen used risk assessment tools to evaluate Olsen, including the Static-99, which placed him in the moderate high risk category for committing future sexual offenses, and the MnSOST-R, which placed him in the highest risk category. Dr.

Owen's opinion is that Olsen falls between the moderate high to high risk categories for sexual reoffending.

Testimony of Dr. Arnold

Dale Arnold, Ph.D. is a clinical psychologist who has treated sex offenders at Atascadero State Hospital and is currently in private practice. He also performs sex offender evaluations under contract with the Department of Mental Health. The trial court recognized Dr. Arnold as an expert in the diagnosis of mental disorders, treatment of sex offenders, and recidivism.

Dr. Arnold was first assigned to evaluate Olsen in 2004. His evaluation included reviewing Olsen's records, including court records, police records, medical reports, prison records, and state hospital records. Dr. Arnold also interviewed Olsen in 2009, 2010, and 2011. He formed the opinion that Olsen has currently diagnosed mental disorders, including sexual sadism, polysubstance dependence in institutional remission, gender identity disorder, and a personality disorder with antisocial and borderline personality traits.

Regarding the diagnosis of sexual sadism, Dr. Arnold found that the significant aspects of Olsen's sex offenses were using rope to bind the victims, increasing the victims' fear, humiliating the victims, causing pain, and gratuitous violence. Dr. Arnold also noted that Olsen had admitted giving a false history of substance abuse to gain an advantage when he was in jail and was now claiming that he committed the sex offenses due to his unresolved gender identity issue. Dr. Arnold did not believe that a gender identity conflict caused Olsen to abduct the victims, tie them up, and force sex on them "because most transgender persons or homosexually oriented persons don't express this level of anger and violence towards females" He also stated, "Honestly it just makes no sense. Because you feel like a woman in a man's body, it doesn't make sense that you would then . . . abduct people, and tie them up, and then force sex with them. So there's no correlation."

Additionally, Dr. Arnold found it significant that Olsen has consistently declined to engage in treatment for sexual sadism and believes that he has no risk of reoffending, since this attitude indicates his potential for failing to manage risk factors in the future. Olsen's antisocial personality trait of dishonesty was also significant to Dr. Arnold.

Dr. Arnold believes that Olsen's sexual sadism affects his emotional or volitional capacity in a way that predisposes him to commit criminal sexual acts in a degree making him a menace to the health and safety of others. According to Dr. Arnold, Olsen showed volitional impairment when he was released from prison in 1978 and surprised himself by reoffending in 1980. In Dr. Arnold's opinion, sexual sadism is a sexual orientation that "tends to be something that is chronic and lifelong." The fact that Olsen has not raped anyone while in custody did not alter Dr. Arnold's opinion, since Olsen has not had the opportunity to do the things that sexually arouse him, such as isolating a victim, driving her up to the mountains, or tying her up and walking her down a path.

Dr. Arnold also conducted a risk assessment using several tools. The Static-99 Revised test placed Olsen in the moderate high risk category; the Static 2002 Revised test placed him in the low moderate risk category; and the MnSOST-R test placed Olsen in the "most serious group." Dr. Arnold concluded that Olsen poses a serious and well-founded risk for committing future sexually violent predatory acts. He believes that the mental disorder that predisposes Olsen to commit such acts is sexual sadism, not a personality disorder.

Testimony of Dr. Abbott

Brian Abbott, Ph.D. is a licensed clinical psychologist and licensed clinical social worker who testified on behalf of Olsen. His background includes treatment and diagnosis of sex offenders for the past 32 years. Dr. Abbot does not perform evaluations for the state Department of Mental Health because he has concerns that the methodology used does not meet current scientific standards. The trial court recognized Dr. Abbott as

an expert in the area of evaluating, diagnosing, treating, and assessing the risk of sex offenders.

To evaluate Olsen, Dr. Abbott reviewed his records, including hospital records and criminal justice records. He also interviewed Olsen and administered psychological tests. Although Dr. Abbott recognized that Olsen had committed very serious crimes, he concluded that Olsen does not have an antisocial personality disorder because his symptoms are insufficient. Dr. Abbott also determined that Olsen does not have a diagnosis of sexual sadism, based on the “Cumulative Severe Sexual Sadism Scale.” According to Dr. Abbott, none of Olsen’s offenses “reached the cut-off for the diagnosis of sexual sadism.” Dr. Abbott also determined that Olsen does not currently suffer from sexual sadism because he has not displayed any symptoms for the past 30 years, meaning he has not been known to view pornography depicting sexual sadism, has not attempted to sexually assault someone, and has not engaged in sexual activity within the custodial setting that involved sadistic role-play.

Dr. Abbott believes that Olsen is a nonsadistic rapist, which is not a mental disorder, and has acted out his anger and hatred towards females through sexually offending behavior due to the events of his early childhood. Dr. Abbott also believes that Olsen committed the sexual assaults to displace his anger about his gender identity conflicts. In Dr. Abbott’s opinion, Olsen does not suffer from a currently diagnosed mental disorder that makes it likely that he will reoffend in a sexually violent and predatory manner and he does not currently have difficulty controlling his behavior in that regard.

Dr. Abbott acknowledged that Olsen’s score on the Static-99R risk assessment tool placed him in the moderate high range of relative risk. According to Dr. Abbott, the Static-99R test, although it is generally accepted in the field of risk assessment, is not accurate for predicting Olsen’s individual risk of recidivism because it is group-based.

Testimony of Dr. Park

James J. Park, Ph.D. is a clinical psychologist who testified on behalf of Olsen. He has been trained to treat sex offenders since the late 1970's. In addition to private practice, Dr. Park is employed by the California Department of Corrections and Rehabilitation where his caseload for the Chico Parole Unit is mostly comprised of sex offenders. The trial court recognized Dr. Park as an expert in the areas of the treatment, diagnosis, and risk assessment of sex offenders.

Dr. Park was asked to determine whether Olsen fits the criteria of the SVPA because he has a mental disorder that predisposes him to commit sexual crimes. His evaluation included interviewing Olsen three times and reviewing his records from Coalinga State Hospital, previous evaluations, and medical records. Dr. Park also conducted psychological testing, including the Minnesota Multiphasic Personality Inventory and the "Million." The test results showed that Olsen does not have a borderline personality disorder, and he did not score significantly on the antisocial personality scale or the narcissistic personality scale.

Although Dr. Park acknowledged the facts of Olsen's prior sex offenses, he determined that these facts were not consistent with sexual sadism because a diagnosis of sexual sadism requires sexual arousal from the victim's pain, not just the victim's humiliation. Dr. Park also noted that Olsen apologized after sexually assaulting the victims and took them home, which in his view is also inconsistent with sexual sadism. Dr. Park therefore concluded that Olsen does not currently suffer from sexual sadism.

In Dr. Park's opinion, Olsen does not have a serious and well-founded risk of reoffending, because he is now 61 years old and age lowers the risk of low or moderate indicated by the risk assessment tests. Dr. Park also opined that Olsen does not have a condition that would predispose him to commit violent sexual offenses.

Testimony of Olsen

Olsen testified that he is 61 years old and now refers to himself as a woman, although he has not undergone sex change surgery. He admitted that he was convicted of raping three girls, including M.L. in 1973 and C. and K. in 1980. He intended to rape M. and T. but changed his mind.

Olsen acknowledged the facts of his prior sexual offenses and explained that he was on drugs at the time and was cross-dressing in secret. He was angry because he felt that he did not have any control in his life and he was also angry at women who had hurt him, such as the foster mother who abused him, his older sister, his first wife who aborted their child, and his second wife whose child was still born. He expressed his anger through rape “[b]ecause it was a control issue” and because he “identified [himself] as a woman [he] took it out on women.”

Olsen has not participated in sex offender treatment while in custody at either Atascadero State Hospital or Coalinga State Hospital. He believes that the programs do not work because no one has been released, except through a judge’s order, and he has seen other people get worse despite treatment. On his own, Olsen is utilizing a workbook designed for sexual offenders. Olsen does not believe that he is at risk to reoffend, although he had the same belief when he was released from prison in 1978.

Testimony of Hospital Employees

Two employees of Coalinga State Hospital, Anita Valdez and Judith Heaton, also testified.

Valdez is a licensed psychiatric technician who administers medication to Olsen on a daily basis. Her conversations and interactions with Olsen are pleasant. He is allowed to travel freely within the hospital because he has a “house level card” for good behavior.

Valdez wears a small panic button that she can press if she feels threatened. The hospital’s security also includes a fence around the perimeter with watchtowers, locked

doors, security cameras, and an in-house police department that patrols the facility. Patients are not allowed to possess knives or rope.

Heaton is a registered nurse who makes wellness and recovery plans for patients. Until recently, she had daily contact with Olsen when she worked on his unit. She currently sees him on a weekly basis in a group setting. Olsen is allowed to walk freely though the hospital. He also works in the laundry and is an advocate for his peers. Heaton has never been concerned about her safety around Olsen, although she has seen him become frustrated. She wrote a verbal behavior report in 2010 when he made profane and derogatory comments after his hormone medication was discontinued.

3. Jury Verdict and Commitment Order

On February 18, 2011, the jury rendered its verdict finding the petition alleging that Olsen was a sexually violent predator within the meaning of section 6600 to be true. On February 22, 2011, the trial court issued its order committing Olsen to the custody of the State Department of Mental Health for an indeterminate term for appropriate treatment and confinement in a secure facility, pursuant to section 6604. The order further states that it is “subject to a hearing consistent with [*McKee, supra*, 47 Cal.4th 1172].” Olsen subsequently filed a timely notice of appeal.

III. DISCUSSION

A. Sufficiency of the Evidence

Olsen contends that the verdict that he is a sexually violent predator cannot be sustained because the evidence was insufficient to show beyond a reasonable doubt that he is currently dangerous and “likely to engage in sexually violent criminal behavior.” Specifically, Olsen argues that the People’s experts improperly relied almost exclusively on his criminal history, in violation of section 6600, subdivision (a)(3), and “largely ignored” the evidence that he was 61 years old and had not committed any acts of sexual sadism or violence for over 30 years.

The People respond that there was sufficient evidence to prove that Olsen suffers from a current mental disorder and is likely to commit a future sexual offense if released from custody, based on the expert testimony of Dr. Owen and Dr. Arnold.

1. The Statutory Criteria

Our evaluation of the parties' contentions begins with the statutory criteria for a finding that a person is a sexually violent predator under the SVPA.

Section 6600, subdivision (a)(1) provides: “ ‘Sexually violent predator’ means a person who has been convicted of a sexually violent offense against one 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.” The California Supreme Court instructed in *McKee* that “a person is ‘likely’ to engage in sexually violent criminal behavior (i.e., reoffend) if he or she ‘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.’ [Citation.]” (*McKee, supra*, 47 Cal.4th at p. 1186.)

Our Supreme Court has also instructed, with regard to the interpretation of section 6600, subdivision (a)(1), that “[t]he phrase, ‘danger to the health and safety of others,’ is accompanied by language making clear that proof of a ‘recent overt act’ or crime ‘in custody’ is not required. ([§ 6600], subs. (d) & (f).)” (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1144.)

On the other hand, “prior crimes play a limited role in the SVP determination. [Citation.]” (*Moore v. Superior Court* (2010) 50 Cal.4th 802, 817 (*Moore*)).

Section 6600, subdivision (a)(3) provides in part: “Conviction of one or more of the crimes enumerated in this section shall constitute evidence that may support a court or jury determination that a person is a sexually violent predator, but shall not be the sole basis for the determination. . . . Jurors shall be admonished that they may not find a person a sexually violent predator based on prior offenses absent relevant evidence of a

currently 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.”

The statutory definition of “ ‘[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.” (§ 6600, subd. (c).) The California Supreme Court has “made clear that a person is predisposed and likely to reoffend as an SVP if, because of a current mental disorder making it difficult to restrain sexually violent behavior, he [or she] presents ‘a substantial danger, that is, a serious and well-founded risk’ that he [or she] will commit such crimes if released. [Citation.]” (*Moore, supra*, 50 Cal.4th at p. 815.)

The statutory scheme also provides the burden of proof: “The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator.” (§ 6604.)

2. Standard of Review

When assessing the sufficiency of the evidence in proceedings held pursuant to the SVPA, we “review the entire record in the light most favorable to the judgment to determine whether substantial evidence supports the determination below. [Citation.] To be substantial, the evidence must be ‘ “of ponderable legal significance . . . reasonable in nature, credible and of solid value.” ’ [Citation.]” (*People v. Mercer* (1999) 70 Cal.App.4th 463, 466.)

Moreover, “ ‘[i]n reviewing the record to determine the sufficiency of the evidence this court may not redetermine the credibility of witnesses, nor reweigh any of the evidence, and must draw all reasonable inferences, and resolve all conflicts, in favor of the judgment.’ [Citation.]” (*People v. Sumahit* (2005) 128 Cal.App.4th 347, 352 (*Sumahit*)).

3. Analysis

Applying the standard of review, we determine that the evidence was sufficient for the jurors to find beyond a reasonable doubt that Olsen is a sexually violent predator within the meaning of the SVPA.

Olsen challenges the sufficiency of the evidence for the required finding that he has a mental disorder that affects his emotional or volitional capacity and predisposes him to commit criminal sexual acts in a degree constituting the person a menace to the health and safety of others. (§ 6600, subd. (c).) According to Olsen, the People's experts violated section 6600, subdivision (a)(3) by relying almost entirely on his criminal history in forming their opinions. We disagree.

The People's expert witnesses, Dr. Owen and Dr. Arnold, both diagnosed Olsen with the mental disorders of sexual sadism, gender identity disorder, and a personality disorder. Dr. Arnold additionally diagnosed Olsen with polysubstance dependence in institutional remission. Dr. Owen and Dr. Arnold shared the opinion that sexual sadism is a chronic and lifelong condition that causes Olsen to be volitionally impaired and predisposes him to engage in sexually violent predatory criminal acts. This expert testimony was sufficient for the jurors to find that Olsen has a diagnosed mental disorder within the meaning of section 6600, subdivision (c) that renders him currently dangerous. (*Moore, supra*, 50 Cal.4th at p. 815.)

The contrary opinions of Olsen's expert witnesses, Dr. Abbott and Dr. Park, which were apparently rejected by the jurors, do not affect the sufficiency of the evidence regarding Olsen's diagnosed mental disorders and current dangerousness. It is well established that "[t]he credibility and weight of the expert testimony was for the jury to determine, and it is not up to us to reevaluate it. [Citations.]" (*People v. Flores* (2006) 144 Cal.App.4th 625, 633.)

We are also not convinced by Olsen's argument that the testimony of Dr. Owen and Dr. Arnold did not constitute sufficient evidence of Olsen's mental disorders and

current dangerousness because they “largely ignored” the evidence that he was 61 years old and had not committed any acts of sexual sadism or violence for over 30 years. The record reflects that both Dr. Owen and Dr. Arnold considered Olsen’s age and institutional behavior in forming their opinions.

Dr. Owen acknowledged that the risk of sexually reoffending declines with age, but he explained that the Static-99R risk assessment tool adjusted for age and the result was that Olsen’s risk was decreased from “high to moderate high due to his age.” Dr. Arnold also testified that the Static-99R risk assessment tool took Olsen’s age into consideration in evaluating his risk of reoffending. Additionally, Dr. Arnold stated that Olsen’s age was not a protective factor because “he’s quite active. He’s able to . . . run on the treadmill, play racquetball, things of that sort. So I don’t think he has impaired mobility that’s going to reduce his chance of sexually re-offending.”

Dr. Owen and Dr. Arnold also considered the fact that Olsen had not committed any acts of sexual sadism or violence during his past 30 years in custody. That fact did not change Dr. Owen’s opinion that Olsen is a sexual sadist, since the record also showed that Olsen had resumed committing sadistic sex offenses after his first incarceration, had not engaged in any treatment for sexual deviance, and lacked insight into what triggered his sex offenses. Although Dr. Owen acknowledged that Olsen had not engaged in sadistic rape while in custody, Dr. Owen found that was not surprising in light of the things not available to Olsen in custody, including Olsen’s “truck, his knife, his rope, and teenage girls.”

Dr. Arnold similarly concluded that the fact that Olsen has not raped anyone while in custody did not alter his opinion that Olsen’s diagnosis of sexual sadism causes him to be volitionally impaired and predisposes him to engage in sexually violent predatory criminal acts. Dr. Arnold noted that Olsen did not have the opportunity while in custody to do the things that sexually arouse him, such as isolating a victim, driving her up to the mountains, or tying her up and walking her down a path.

Finally, we note that Dr. Owen and Dr. Arnold properly considered Olsen’s failure to undergo treatment during his commitments as a sexually violent predator. Dr. Arnold testified that “the other thing that’s most significant is that since having had the opportunity to engage in quite comprehensive treatment for this disorder [sexual sadism], he’s consistently declined to do so for at least the last ten years,” The California Supreme Court has ruled that “it would be reasonable to consider the person’s refusal to cooperate in any phase of treatment provided by the Department [of Mental Health] . . . as a sign that the person is not prepared to control his untreated dangerousness by voluntary means if released unconditionally to the community.” (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 929.)

For these reasons, we find no merit in Olsen’s challenge to the sufficiency of the evidence regarding his mental disorders and current dangerousness.

B. Juror Question No. 5

1. Background

During deliberations, the jurors submitted juror question No. 5, which stated: “To find that [Olsen] suffers from a diagnosed mental disorder does that mental disorder have to be sexual sadism?”

The trial court provided the jurors with a written answer to juror question No. 5, over defense counsel’s objection, as follows: “You must base your verdict only on the evidence received in the trial. [¶] As defined in Instruction 3454, ‘The term “diagnosed mental disorder” includes conditions either existing at birth or acquired after birth that affect a person’s ability to control emotions and behavior and predispose that person to commit criminal sexual acts to an extent that makes him or her a menace to the health and safety of others.’ [¶] In order to find [Olsen] a sexually violent predator, you must find [Olsen] currently has a ‘diagnosed mental disorder.’ If you do not find [Olsen] has a ‘diagnosed mental disorder’ you must find the Petition Untrue. [¶] *If you find [Olsen] currently has a ‘diagnosed mental disorder,’ you are not, however, required to*

unanimously agree on which ‘diagnosed mental disorder’ [Olsen] has. You must unanimously agree that [Olsen] currently has a ‘diagnosed mental disorder’ and that as a result of a ‘diagnosed mental disorder,’ [Olsen] is a danger to the health and safety of others because it is likely that [he] will engage in sexually violent predatory criminal behavior. The People have the burden of proving this beyond a reasonable doubt.” (Italics added.)

2. The Parties’ Contentions

Olsen contends that the trial court’s answer to juror question No. 5 was improper and violated his right to due process. According to Olsen, there was substantial evidence of only one diagnosed mental disorder, sexual sadism, that predisposed him to commit criminal sexual acts. He therefore argues that instructing the jurors that they did not have to unanimously agree that he suffers from a specific mental disorder—sexual sadism—allowed the jurors to make an inference regarding other mental disorders that was not supported by the evidence and lowered the People’s burden of proof.

Olsen also argues that reversal is required under *Griffin v. United States* (1991) 502 U.S. 46 and *People v. Guiton* (1993) 4 Cal.4th 1116 because juror question No. 5 indicated that some jurors based their finding on a mental disorder other than sexual sadism, although there was not sufficient evidence of another mental disorder that predisposed him to commit criminal sexual acts. Olsen additionally contends that the trial court’s error in answering juror question No. 5 constitutes reversible error because it did not constitute harmless error under either the *Chapman v. California* (1967) 386 U.S. 18 standard (error was harmless beyond a reasonable doubt) or the *People v. Watson* (1956) 46 Cal.2d 818 standard (where not reasonably probable that a more favorable result would have been obtained absent the error, the error is harmless).

The People argue to the contrary that the trial court’s answer to juror question No. 5 properly clarified the instruction previously given, CALCRIM No. 3454,³ by correctly informing the jury that it was not required to unanimously agree on a diagnosed mental disorder. Alternatively, the People maintain that even assuming the evidence showed that sexual sadism was the only mental disorder that resulted in Olsen’s predisposition to commit criminal sexual acts, the trial court properly instructed the jurors that a currently diagnosable mental disorder “must ‘predispose that person to commit criminal sexual acts to an extent that makes him or her a menace to health and safety of others.’ ”

3. Analysis

In criminal cases, “[t]he court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under [Penal Code] section 1138 to determine what additional explanations are sufficient to satisfy the jury’s request for information. [Citation.] . . . It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given.” (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.)

The trial court’s duty is similar in civil cases. Where the jury seeks further guidance during its deliberations by asking questions, it is “ ‘incumbent on the trial court to give instructions on all the vital issues in the case so that the jury w[ill] have a full and complete understanding of the law applicable to the facts.’ [Citation.] ‘The

³ As given, CALCRIM No. 3454 stated in part, “In this trial to prove the allegation [that Olsen is a sexually violent predator], the People must have prove[d] beyond a reasonable doubt that, one, [Olsen] has a diagnosed mental disorder; and two, as a result of that diagnosed mental disorder [he] is a danger to the health and safety of others because it is likely that [he] will engage in sexually violent predatory criminal behavior.”

responsibility for adequate instruction becomes particularly acute when the jury asks specific guidance.’ [Citation.]” (*Bartosh v. Banning* (1967) 251 Cal.App.2d 378, 387.)

The standard of review for a claim of error in the trial court’s response to a juror question is abuse of discretion. “An appellate court applies the abuse of discretion standard of review to any decision by a trial court to instruct, or not to instruct, in its exercise of its supervision over a deliberating jury. [Citation.]” (*People v. Waidla* (2000) 22 Cal.4th 690, 745-746; see also *People v. Smithey* (1999) 20 Cal.4th 936, 985.)

We determine that the trial court did not abuse its discretion when the court responded to juror question No. 5 by instructing the jurors that they were not required to unanimously decide which diagnosed mental disorder Olsen currently has. This court has ruled that “[a]n SVP proceeding is civil, not criminal, and the unanimity requirement for an SVP proceeding is established by statute. [Citation.] Under the SVPA, the jury must determine whether the requirements for classification as an SVP have been established ‘beyond a reasonable doubt’ and the jury’s *verdict* must be unanimous. [Citations.] There is no statutory requirement regarding unanimity for each subpart of the SVP determination.” (*People v. Carlin* (2007) 150 Cal.App.4th 322, 347 (*Carlin*); see also *People v. Fulcher* (2006) 136 Cal.App.4th 41, 59 [criminal rule requiring unanimity instruction does not apply in civil commitment proceedings under the SVPA].)

Accordingly, the trial court was not required under the SVPA to give a unanimity instruction in response to juror question No. 5 that instructed the jurors to unanimously agree regarding the issue of which diagnosed mental disorder Olsen currently has, since that issue is a “subpart” of the determination as to whether a person is a sexually violent predator. (§ 6600, subd. (a)(1).)

Moreover, the trial court’s response to juror question No. 5 also included a correct unanimity instruction, as follows: “You must unanimously agree that [Olsen] currently has a ‘diagnosed mental disorder’ and that as a result of a ‘diagnosed mental disorder,’ [Olsen] is a danger to the health and safety of others because it is likely that [he] will

engage in sexually violent predatory criminal behavior.” The trial court therefore properly instructed the jurors that their ultimate decision as to whether Olsen has a currently diagnosable mental disorder that meets the statutory criteria for classification as a sexually violent predator under the SVPA must be unanimous. (§ 6604; *Carlin, supra*, 150 Cal.App.4th at p. 347.) As the People note, we presume that jurors “understand and follow the court’s instructions. [Citation.]” (*People v. Holt* (1997) 15 Cal.4th 619, 662.)

Accordingly, we determine that the trial court did not err in the further instructions the court gave in response to juror question No. 5.

C. Equal Protection

According to Olsen, the SVPA violates the state and federal equal protection clause because it treats persons committed as SVPs differently than persons committed under other civil commitment schemes.

In *McKee*, the California Supreme Court determined that SVPs and mentally disordered offenders (MDOs; Pen. Code, § 2960 et seq.) are similarly situated for equal protection purposes because their commitments have common features: they have been found to suffer from mental disorders that render them dangerous to others; they have been convicted of a serious or violent felony; and at the end of their prison terms, they are committed to the Department of Mental Health for treatment. (*McKee, supra*, 47 Cal.4th at p. 1203.)

The court also determined that SVPs have “different and less favorable procedural protections” than MDOs because, under the amended SVPA, SVPs “are given indeterminate commitments and thereafter have the burden to prove they should be released (unless the [Department of Mental Health] authorizes a petition for release). In contrast, an MDO is committed for a one-year period and thereafter has the right to be released unless the People prove beyond a reasonable doubt that he or she should be recommitted for another year.” (*McKee, supra*, 47 Cal.4th at p. 1202.)

The *McKee* court also found that SVPs and persons not guilty of a felony by reason of insanity (NGIs; Pen. Code, § 1026.5) are similarly situated and “a comparison of the two commitment regimes raises similar equal protection problems.” (*McKee, supra*, 47 Cal.4th at p. 1207.) Consequently, the court found that as with MDOs, “the People have not yet carried their burden of justifying the differences between the SVP and NGI commitment statutes.” (*Ibid.*)

However, the *McKee* court did not conclude that the People could not meet its burden of showing the differential treatment of SVPs is justified. The court concluded only that the People had not yet done so. (*McKee, supra*, 47 Cal.4th at p. 1207.) Accordingly, our Supreme Court remanded the case to the trial court to allow the People an opportunity to “demonstrate the constitutional justification for imposing on SVP’s a greater burden than is imposed on MDO’s and NGI’s in order to obtain release from commitment.” (*Id.* at pp. 1208-1209, fn. omitted.)

In this case, Olsen raised his equal protection claim in the proceedings below by filing a pretrial objection to the imposition of an indeterminate commitment. Additionally, after the verdict was rendered, defense counsel requested that the trial court indicate in its commitment order that the commitment was subject to “a *McKee* hearing.” The requested language was included in the February 22, 2011 commitment order, which states that it is “subject to a hearing consistent with [*McKee, supra*, 47 Cal.4th 1172].”

On appeal, Olsen contends that since he timely objected to the indeterminate commitment pursuant to *McKee*, the trial court erred in failing to require the People to show that the differential treatment of SVPs is justified prior to issuing the indeterminate commitment order. Olsen argues his constitutional right to equal protection was therefore violated and reversal of the commitment order is required.

The People raise a different issue. They contend that the trial court acted in excess of its jurisdiction by issuing a conditional order that stated the indeterminate commitment was subject to a later *McKee* hearing on the equal protection issue. However, the People

acknowledge that the California Supreme Court has expressed a desire to avoid an unnecessary multiplicity of proceedings on the equal protection issue. The People accordingly ask that the commitment order be reversed for the limited purpose of “striking the ‘subject to’ language,” and further ask that the trial court be directed to consider the equal protection issue in the light of *McKee* and to suspend further proceedings pending finality of the proceedings in *McKee*.

We agree that in order to avoid an unnecessary multiplicity of proceedings, resolution of the equal protection issue in this case should await resolution of the proceedings on remand in *McKee*, including any resulting proceedings in the Court of Appeal or Supreme Court.⁴ We will therefore reverse the commitment order and remand the case to the trial court for the limited purpose of reconsidering Olsen’s equal protection argument in light of *McKee, supra*, 47 Cal.4th 1172. We will also direct the trial court to suspend further proceedings in this case pending finality of the proceedings on remand in *McKee*.

Having determined that the commitment order should be reversed, we need not address the People’s argument that the trial court’s conditional commitment order exceeded the court’s jurisdiction. We also need not address Olsen’s claim, raised for the first time in his reply brief, that the People “forfeited” the equal protection issue by not filing a response to his pretrial objection to the indeterminate commitment.

D. Other Constitutional Claims

Finally, Olsen contends that (1) retroactive application of the amendments to the SVPA enacted pursuant to Proposition 83,⁵ including the provision for an indeterminate

⁴ In *People v. McKee* (2012) 207 Cal.App.4th 1325, petn. for review pending, petn. filed August 24, 2012, the appellate court upheld the trial court’s finding that the People met their burden to justify the disparate treatment of SVPs.

⁵ “On November 7, 2006, California voters passed Proposition 83, The Sexual Predator Punishment and Control Act: Jessica's Law (Proposition 83), which, among other things, amended the SVPA in certain respects, effective November 8, 2006. One

commitment, violates his due process rights; (2) indeterminate commitment under the SVPA violates his federal constitutional right to due process; (3) indeterminate commitment under the SVPA violates his constitutional rights under the ex post facto and double jeopardy clauses; and (4) indeterminate commitment under the SVPA violates the Eighth and Fourteen Amendments prohibition against cruel and unusual punishment.

Olsen acknowledges that the *McKee* court rejected similar constitutional challenges to the amendments to the SVPA pursuant to Proposition 83, finding in part that the amended SVPA is not punitive. (*McKee, supra*, 47 Cal.4th at pp. 1188-1195.) We are bound by our Supreme Court’s decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Olsen states that he raises these issues simply to preserve his federal claims, and for that reason we decline to address them.

IV. DISPOSITION

The February 22, 2011 order committing Olsen to the custody of the state Department of Mental Health is reversed, and the case is remanded to the trial court for the limited purpose of reconsidering Olsen’s equal protection argument in light of *People v. McKee* (2010) 47 Cal.4th 1172, and the resolution of the proceedings on remand in that case (*id.* at pp. 1208-1211). The trial court is directed to suspend further proceedings in this case pending finality of the proceedings on remand in *McKee*. “Finality of the proceedings” shall include the finality of any subsequent appeal and any proceedings in the California Supreme Court.

such change provided for an indeterminate commitment term (See §§ 6604, 6604.1, 6605; [citations].)” (*Moore, supra*, 50 Cal.4th at p. 811, fn. 7.)

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

GROVER, J.*

*Judge of the Monterey County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.