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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RICARDO RAMOS, Defendant and Appellant.	B248750 (Los Angeles County Super. Ct. No. ZM012788)

APPEAL from an order of the Superior Court of Los Angeles County, Candace J. Beason, Judge. Affirmed.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, and Eric E. Reynolds, Deputy Attorney General, for Plaintiff and Respondent.

A jury found defendant Ricardo Ramos to be a "sexually violent predator." The court committed him to the custody of the Department of State Hospitals for appropriate treatment and confinement in a secure facility for an indeterminate term pursuant to Welfare and Institutions Code section 6604.[1] This appeal followed.

The sole issue on appeal is whether there is substantial evidence that it is likely defendant will engage in sexually violent predatory behavior if he is released into the community.

SEXUALLY VIOLENT PREDATOR LAW

"'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." (§ 6600, subd. (a)(1).) "The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator." (§ 6604.) In addition to finding that the person is likely to engage in sexually violent criminal behavior, the finder of fact also must conclude that the act is "predatory," which "means an act is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization." (§ 6600, subd. (e); *People v. Hurtado* (2002) 28 Cal.4th 1179, 1186.) If trial is by jury, the verdict must be unanimous. (§ 6603, subd. (f).)

In an appeal from a finding that a person is a sexually violent predator in the sense of subdivision (a)(1) of section 6600, the appellate court "review[s] the whole record most favorably to the judgment to determine whether there is substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could have made the requisite finding under the governing standard of proof." (*People v. Flores* (2006) 144 Cal.App.4th 625, 632, citing *In re Jerry M.* (1997) 59 Cal.App.4th 289, 298.) The credibility and weight of the expert testimony presented

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[1] Undesignated statutory references are to the Welfare and Institutions Code.

at trial is for the jury to determine, and it is not up to the appellate court to reevaluate it. (*People v. Poe* (1999) 74 Cal.App.4th 826, 831; *People v. Mercer* (1999) 70 Cal.App.4th 463, 466–467.)

FACTS

It is not contested that defendant was convicted in 1998 of two counts of violating subdivision (b)(1) of Penal Code section 288.[2] It also is uncontested that defendant has a diagnosed mental disorder of pedophilia. The only remaining issue is whether defendant is likely to engage in sexually violent predatory criminal behavior if released into the community.[3]

The victims, ages 11 and 13 when the molestations began, were sisters and the daughters of defendant's girlfriend, with whom defendant was living. The abuse lasted approximately two years. The younger victim estimated there were 120 separate incidents of molestation. The abuse of both children was extensive and included, but was not limited to, sexual intercourse. We do not detail the abuse to which defendant subjected these unfortunate children. Suffice it to say that it was vicious, very cruel, and degrading in the extreme.

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[2] "Except as provided in subdivision (i), any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years." (Pen. Code, § 288, subd. (a).) "Any person who commits an act described in subdivision (a) by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, is guilty of a felony and shall be punished by imprisonment in the state prison for 5, 8, or 10 years." (Pen. Code, § 288, subd. (b)(1).)

[3] The People's burden is to prove that the person has committed a sexually violent offense against two or more victims, that the person has a currently diagnosed mental disorder, and that the person is likely to engage in sexually violent predatory criminal behavior. (*People v. Grassini* (2003) 113 Cal.App.4th 765, 775; § 6600, subd. (a)(1); CALCRIM No. 3454.)

Two psychologists testified for the People. They were Harry Goldberg, Ph.D., and David Walsh, Ph.D. Both doctors were charged with assessing the likelihood that defendant would reoffend if returned to the community. "Likelihood" has been defined in this context as a "substantial, serious and well-founded risk." (CALCRIM No. 3454.) Both concluded that it was likely that defendant would reoffend if returned to the community. Both based their opinions that defendant would be likely to reoffend primarily on "dynamic" rather than "static" factors.

"Static" factors are those not subject to change. They tend to involve past history, such as prior sexual misconduct, or things that do not change, such as age at a particular time. Certain standardized tests, sometimes called "actuarial instruments," generate scores based on static factors. It is necessary to consider "Dynamic" factors as well. These are not taken into account in standardized tests. These factors focus upon things that change, such as a defendant's response to treatment.

The result Dr. Goldberg and Dr. Walsh both obtained when considering only static factors was that there was only a "low to moderate" risk that defendant would reoffend. According to Dr. Goldberg's analysis, the Static 99-R assessment test yielded a recidivism rate of 19.7 percent within 10 years and the SORAG assessment test, also a static assessment, showed defendant to be in the moderate risk category.

However, both doctors called by the People rated defendant as likely to reoffend based on their assessment of the dynamic factors. The dynamic factors Dr. Goldberg considered were that defendant had a sexual interest in children, he had a sexual preoccupation as shown by an excessive amount of reoffending, he lacked emotional, intimate relationships with adults, he had a preference for children over adults, he showed callousness by his lack of remorse and lack of empathy, he exhibited stubbornness, obstinacy, and poorly managed anger, he was impulsive and lacked realistic long-term goals, and his decision making was dysfunctional. Dr. Goldberg concluded these factors placed him in a high risk category for reoffending.

Dr. Goldberg noted that defendant has never admitted that he abused the children. Defendant has not participated in sex offender treatment because, in defendant's opinion,

he does not need the treatment; he has no problems. Dr. Goldberg also noted that, despite having been diagnosed with a mental disorder, having been convicted of molesting two minors regularly over a two-year period, and never receiving treatment, defendant thinks it would be alright for him to baby-sit children.

According to Dr. Goldberg, although the static, actuarial assessments indicate a low to moderate risk of reoffending, the dynamic factors, including defendant's refusal to undertake treatment and the callous nature of the abuse that he committed, make it likely that he will commit sexually violent predatory crimes in the future.

Dr. Goldberg also considered that in 1988 defendant was arrested for a sexual assault on a 21-year-old woman. The arrest did not result in charges against defendant. Dr. Goldberg considered it because it indicated defendant's desire for power and control.

While the static assessments performed by Dr. Walsh yielded low to moderate risk predictions, Dr. Walsh testified that the dynamic factors appropriate to consider in evaluating defendant included defendant's intimacy deficits, that he had engaged in sexual relationships with the children over their physical, verbal and emotional objections, defendant's poor sexual self-control, and the extended period during which the abuse took place. Dr. Walsh concluded defendant had a deviant sexual and emotional makeup in that he was sexually aroused even though the children were resisting and screaming. Dr. Walsh testified that defendant told him that he had not undergone any treatment because he did not have any type of condition that required treatment. In addition, Dr. Walsh noted that, after defendant had moved out of the children's house, he approached the older child on the street and threatened her with a knife. Dr. Walsh concurred with Dr. Goldberg that defendant presented a substantial risk of reoffending if released.

Defendant testified at trial and denied that he molested the girls. While in prison, defendant sent letters to them. One letter had a drawing with a heart that stated, "'I will never forget you.'"

The defense called two psychologists who confirmed that defendant had been diagnosed with pedophilia but who did not think that defendant posed a risk if released.

In light of the substantial evidence standard, it is not necessary to detail the defense testimony, except perhaps to note that the defense psychologists both testified that it was not significant that defendant did not accept responsibility for his crimes.

DISCUSSION

The principal thrust of defendant's briefing on appeal is that the People's experts did not give sufficient weight to the static tests in reaching their conclusions, and may have scored them inappropriately, or lacked training in them, or failed to follow prescribed protocols in scoring them[4] so that defendant's test scores as to the static factors should have been even lower than they were. In making this argument, defendant merely sets up a straw man, which he predictably knocks down. The static tests are a straw man because they were not the basis of the opinions of Drs. Goldberg and Walsh. Their opinions were that, *despite* the low to moderate risk scores that resulted from the static tests, the dynamic factors were more persuasive in this case than the static factors and indicated there was a likelihood that defendant would reoffend if returned to the community.

Defendant did not object at trial that these experts were unqualified or that their opinions were based on matter "of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject." (Evid. Code, §§ 801, subdivision (b); *id.*, §§ 802, 803.) Having failed to do so, defendant may not make those objections for the first time on appeal.

If defendant's arguments on appeal are *not* to the qualifications of the experts or the propriety of the bases of their opinions, which defendant waived by failing to object, then they must be arguments that the People's experts were not as persuasive as the defendant's experts. Such an argument is misplaced. "The credibility of the experts and their conclusions [are] matters resolved against defendant by the jury. [An appellate court is] not free to reweigh or reinterpret the evidence." (*People v. Mercer* (1999) 70

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[4] In his reply brief, defendant contends that Dr. Walsh failed to or was unable to follow protocol. Issues raised for the first time in the reply brief ordinarily will not be considered. (*Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 322.)

Cal.App.4th 463, 466-467.) "Moreover, we must draw all reasonable inferences in favor of the judgment." (*Ibid*.) The applicable standard of review is "substantial evidence," not the better or the best evidence, as defendant essentially argues.

Indeed, the same arguments made on appeal were presented to the jury, which rejected them. For instance, at trial defense experts relied on a so-called "meta-analysis," which considered data from a large number of subjects and concluded there is a low correlation between recidivism and failure to take responsibility for or get treatment in connection with sex crimes. Defense counsel cross-examined Dr. Goldberg about this meta analysis. Dr. Goldberg certainly was entitled as an expert to conclude, despite this "meta analysis," that a sex offender who denies he committed the crime, lacks remorse, and refuses to obtain treatment is likely to offend again because he has not been taught to control, or perhaps does not desire to control, the urges that led him to his crime in the first place.

Moreover, Drs. Goldberg and Walsh were authorized by law to rely on the dynamic factors they did rely on. In discussing the statutory protocol under section 6601, subdivision (c) for evaluating the likelihood of reoffending, our Supreme Court stated as follows: "This protocol 'shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders. Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder.' (*Ibid*.) Insofar as the protocol calls for assessment of the nature, degree, and severity of the person's mental disorder, it appears to allow consideration whether the disorder, though dangerous if untreated, is of a kind and extent that can be effectively treated in the community, and whether the disorder leaves the person willing and able to pursue such treatment voluntarily. Moreover, section 6601, subdivision (c), says the protocol 'shall include' the enumerated risk factors, but does not say the enumerated factors are exclusive. Thus, insofar as the protocol permits, the evaluators may consider any factor which, in their professional judgment, is relevant to the ultimate issue whether the person

is a substantial danger to reoffend if free in the community . . . ." (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 927.)

We see nothing in the testimony of Drs. Goldberg or Walsh that establishes the testimony was not "reasonable, credible, [or] of solid value" or that the jury could not legitimately have made the findings it did based on their testimony. Thus, the substantial evidence test is satisfied based on the testimony of these experts.

Having addressed the principal thrust of defendant's arguments, we now turn our attention to other specific arguments. First, defendant argues that Dr. Goldberg did not present the jury with substantial evidence to support his conclusion. This projectile is seriously misdirected. Dr. Goldberg discussed at considerable length the dynamic factors that effectively render defendant a risk if released.

One point defendant emphasizes is that some factors allegedly were counted twice in Dr. Goldberg's analysis. Even if this were true, it would not deprive Dr. Goldberg's conclusions of their substantial basis or allow us to reweigh the jury's decision.

Defendant also contends it was error for Dr. Goldberg to "override" the static assessments based on dynamic factors. Dr. Goldberg carefully explained why the dynamic factors also must be taken into consideration. He weighed both types of factors and found the dynamic factors entitled to more weight than the static factors in this case. For example, it seems entirely appropriate for Dr. Goldberg to give great weight to the dynamic factor that defendant abused these two children in terrible ways more than 120 times over a two-year period, but shows no remorse.

Defendant also is incorrect in arguing Dr. Goldberg "overrode" the static assessments in favor of his "unguided clinical opinion." He explained how and why the dynamic factors must be taken into consideration, which is not an "unguided clinical opinion." Indeed, the dynamic factors he identified are very pertinent and material.

Turning to Dr. Walsh, defendant contends Dr. Walsh's testimony was "inadequate as a matter of law" based on his decision to give more weight to the dynamic factors and less weight to the static factors, as well as on his alleged failure to score the tests properly or to be trained adequately as to one of the tests. Defendant also contends Dr. Walsh

improperly used his personal moral beliefs to evaluate him. He tethers this argument to the thinnest of reeds, relying on Dr. Walsh's testimony that his confidence in static tests is undermined because they rely on self-reporting by the defendant and "they are not capable of getting a perfectly valid self-report from these individuals about what they have and have not done. So it's missing that. Now that tells me that just, again, as a clinician, that I don't know the other half of this test. And I know, just as a general human being, or at least my own morals, that the cost of a mistake is big with child victimization, so it tells you to go the extra mile." We do not find this testimony evidence that Dr. Walsh utilized improper factors, based his decision on personal bias, or that his testimony was inadequate as a matter of law.

Finally, defendant objected to the use of jury instruction CALCRIM No. 3454 because the last sentence states, "The likelihood that the person will engage in such conduct does not have to be greater than 50 percent," arguing that such an instruction allows a 10 percent chance to be deemed a likelihood. As required by *People v. Roberge* (2003) 29 Cal.4th 979, 988–989, the jury was instructed that a person is "likely" to engage in sexually violent predatory criminal behavior "if there is a substantial, serious, and well-founded risk that the person will engage in such conduct if released into the community." Defendant's concern is adequately addressed by that portion of the instruction.

We are satisfied the jury's finding is supported by substantial evidence, which is contained in the thorough analyses and testimony of Drs. Goldberg and Walsh.

DISPOSITION

The jury's finding and the ensuing order of commitment are affirmed.

NOT TO BE PUBLISHED.

MILLER, J.*

We concur:

CHANEY, Acting P. J.

JOHNSON, J.

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