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CERTIFIED FOR PARTIAL PUBLICATION*

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. KENNETH IAN EDMONTON, Defendant and Appellant.	C036988 (Super. Ct. No. CR94463)

APPEAL from a judgment of the Superior Court of Sacramento County, James L. Long, Judge. Affirmed.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, W. Scott Thorpe, Supervising Deputy Attorney General, Clayton S. Tanaka and Jane N. Kirkland, Deputy Attorneys General, for Plaintiff and Respondent.

Ishikawa Law Office and Brendon Ishikawa, under appointment by the Court of Appeal, for Defendant and Appellant.

Defendant Kenneth Ian Edmonton appeals his commitment under the Sexually Violent Predators Act (SVPA). (Welf. & Inst. Code,

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts I, III, and IV of the Discussion.

§ 6600 et seq.) A jury found defendant guilty of two sexually violent offenses and likely to engage in future sexually violent criminal behavior as a result of a diagnosed mental disorder. The trial court ordered defendant committed for two years to the custody of the State Department of Mental Health as a sexually violent predator (SVP). (Welf. & Inst. Code, § 6604.) Defendant appeals, challenging the sufficiency of the evidence, alleging instructional error, and arguing the court erred in permitting expert testimony regarding psychological instruments without proof of reliability or general acceptance within the scientific community. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In December 1999 the Sacramento County District Attorney filed a petition for the extension of defendant's commitment as an SVP. (Welf. & Inst. Code, § 6604.) The petition alleges defendant previously had been convicted of two sexually violent offenses within the meaning of Welfare and Institutions Code section 6600, subdivision (b): a 1974 rape in Nevada and the commission in 1989 of lewd and lascivious acts on a child under the age of 14.[1] The petition also alleges defendant suffers a current medical disorder making him likely to commit a sexually violent offense upon release from custody.

A jury trial followed. Defendant admitted a 1974 conviction by a Nevada jury of one count of rape by force and

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[1] Defendant was convicted in 1990 for the 1989 offenses.

two counts of robbery by force. The Nevada court sentenced defendant to 15 years in prison on the rape charge.

Defendant also admitted that in 1990 a jury convicted him of nine counts of lewd and lascivious acts with a child under the age of 14. (Pen. Code, § 288, subd. (a).) The court sentenced defendant to 19 years in prison. Because defendant's appeal centers on this second prior conviction, we shall provide some detail of the offenses from the preliminary hearing transcript.

In June 1989 defendant offered to watch an employee's two children, 10-year-old C. and eight-year-old V., over the weekend. After arriving at defendant's apartment and going swimming, C. changed out of her bathing suit. While she changed her clothes, defendant entered the bedroom.

After she put on bike pants and a cropped top, C. did a handstand. Defendant held her waist and flipped up her cropped top, saying "look at your little boobies." C. then wrestled with defendant in the living room in front of a video camera. Defendant offered her $100 if she could pin him. After they wrestled, defendant gave V. a beer and C. a wine cooler. Defendant said he would give C. $5 for each glass of wine cooler she drank. C. drank three or four glasses of wine cooler.

Defendant gave C. see-through pajamas belonging to his wife and asked her to try them on. After C. put them on over her own pajamas, defendant told her the pajamas should be worn without anything underneath. C. took off the wife's pajamas because she

did not think it was appropriate for someone her age to be wearing something like that.

Defendant played a pornographic video for C. and V. After watching the video, the three of them went to bed, with defendant lying between C. and V. After V. fell asleep, defendant rubbed C.'s left breast, thigh, and bottom. C. moved away from defendant, but defendant pulled her back and kissed her.

At trial on the petition to commit defendant as an SVP, the prosecution presented testimony by two mental health experts. Dr. Elaine Finnberg, a licensed psychologist, evaluated defendant and concluded he suffered from a current mental disorder making it likely he would commit future sexually violent acts if not treated or held in custody. Finnberg testified defendant suffered from two diagnosable mental disorders: paraphilia involving sexual interests focused on nonconsenting adults or children, and personality disorder with antisocial and borderline features arising out of personality traits that have become chronic.

Finnberg based her paraphilia diagnosis on the 1974 rape conviction and the 1990 lewd and lascivious acts conviction as well as on videotapes belonging to defendant that depicted sexual activity between defendant and young girls or defendant and women who were not aware they were being videotaped. Finnberg based her personality disorder assessment on defendant's criminal history, including nonsexual offenses, and defendant's planning of the 1989 offenses.

Finnberg also testified defendant received a score on the Static-99 diagnostic tool that indicated a likelihood of future sex offenses. She testified, however, that she put "very little" weight on the Static-99 in reaching her conclusion.

The prosecution's other expert, Dr. Kathleen Longwell, concluded that based on her evaluation of defendant, he met the criteria for commitment as an SVP. Longwell based her opinion on research data regarding sexual recidivism in known sex offenders.

Longwell administered the RRASOR and Static-99, actuarial instruments adopted by the Department of Mental Health. These actuarial instruments suggested defendant could be categorized with a group of persons who are anticipated to be likely to reoffend. Longwell also considered defendant's denial that he was at risk of reoffending, his lack of remorse, and his tolerant attitude toward child molestation.

Longwell concluded defendant suffers from "paraphilia not otherwise specified and personality disorder not otherwise specified with narcissistic and antisocial traits," which render him likely to engage in future sexually violent behavior.

Defendant testified in his own behalf. He denied committing the 1974 rape in Nevada.

Defendant also testified his actions in 1989 involving C. had been misinterpreted. He admitted "frolicking" with C. but denied commenting on her breasts; offering his wife's pajamas; providing alcohol; showing pornographic videos; or touching her breasts, thigh, or buttocks. He explained the video of the pair

wrestling resulted from V.'s playing with the video camera. The defense argued that defendant utilized neither force nor duress on C. The defense noted C. testified at the earlier trial that the alcohol did not cause her to feel drunk.

The defense also presented testimony by Dr. Theodore Donalson, a clinical psychologist specializing in forensic psychology. Donalson evaluated defendant and reviewed the reports of Drs. Finnberg and Longwell. In Donalson's opinion, defendant should not be diagnosed as suffering from paraphilia.

According to Donalson, the DSM-IV's definition of paraphilia includes elements of guilt and remorse over crimes committed. Donalson found defendant's history revealed no guilt or remorse over the 1974 or 1989 offenses. Further, according to Donalson, with paraphilia, there has to be some indication the person is "compelled" to the behavior. Donalson discovered no evidence that defendant did not freely choose to engage in the behaviors for which he was convicted. Donalson testified no pattern connected the 1974 and 1989 offenses that would allow for a paraphilia not otherwise stated as defined by the DSM-IV. Ultimately, Donalson found defendant not compelled to commit sex offenses.

Donalson further testified that the screening instruments used by Finnberg and Longwell did not predict whether or not the future sexual offense would involve violence. He stated the screening instruments, including the Static-99 and the RRASOR, do not predict whether defendant is likely to reoffend, but rather project the recidivism rate of a statistically similar

group. Donalson concluded these screening instruments fail to accurately reflect a defendant's potential as an SVP.

The jury found the allegations of the two perquisite offenses to be true and found defendant likely to engage in future sexually violent criminal behavior as a result of a diagnosed mental disorder. The court ordered defendant committed for two years to the custody of the Department of Mental Health. Defendant filed a timely notice of appeal.

DISCUSSION

I. Sufficiency of the Evidence

Defendant contends there was insufficient evidence that his convictions of nonforcible lewd and lascivious touchings constitute sexually violent offenses. This dearth of evidence, defendant contends, precludes his commitment as an SVP. Defendant does not dispute that his 1974 rape conviction constitutes a qualifying offense within the meaning of the SVPA.

To civilly commit a defendant under the SVPA, the People must prove beyond a reasonable doubt that: (1) the defendant has been convicted of at least two separate sexually violent offenses, (2) the defendant has a "diagnosed mental disorder," and (3) the defendant's disorder makes it likely he will engage in sexually violent behavior if released. (Welf. & Inst. Code, § 6600, subd. (a)(1); *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1144-1145 (*Hubbart*); *People v. Poe* (1999) 74 Cal.App.4th 826, 830.)

Welfare and Institutions Code section 6600, subdivision (b) defines a sexually violent offense as certain enumerated

felonies, including violations of Penal Code section 288, "when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury . . . ." In the alternative, Welfare and Institutions Code section 6600.1 provides: "(a) If the victim of an underlying offense that is specified in subdivision (b) of Section 6600 is a child under the age of 14 and the offending act or acts involved substantial sexual conduct, the offense shall constitute a 'sexually violent offense' for purposes of Section 6600. [¶] (b) 'Substantial sexual conduct' means penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender."

On appeal, where a defendant challenges the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether substantial evidence supports the determination of the trial court. To be substantial, evidence must be of ponderable legal significance, reasonable in nature, and credible. We draw all reasonable inferences in favor of the judgment. We may not reweigh or reinterpret the evidence. (*People v. Mercer* (1999) 70 Cal.App.4th 463, 466-467.)

Defendant contends the evidence is insufficient to support a finding that he committed a sexually violent offense because his touching of C. was not accomplished by duress, force, or coercion. He argues that because he was convicted under Penal Code section 288, subdivision (a) instead of Penal Code

section 288, subdivision (b), the forcible child molestation statute, his conviction can only serve as a prerequisite offense if additional proof exists that the touching was accomplished by means of force or duress.[2]

The People contend the evidence introduced concerning the 1989 offenses supports a finding of force. According to the People, "[T]he disparity between the height, weight, and age of [defendant] and the victim was very clear. The victim herein was only 10 years old. [Defendant], in turn, was an authority figure who was entrusted by the victim's parents to care for the victim and her younger brother. In the probation officer's report of this offense, the victim stated that during the wrestling incident, [defendant] 'held her tight and would not let her go.' [Citation; fn. omitted.] Likewise, when the victim attempted to move 'away,' [defendant] 'pushed [the

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[2] Penal Code section 288 provides, in pertinent part: "(a) 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. [¶] (b)(1) 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 three, six, or eight years."

victim] back towards him.'" The People conclude this evidence reveals a use of force to obtain the victim's compliance.

Defendant labels this argument "fatal[ly] flawed." Defendant criticizes the probation report as skeletal and derivative. He also argues his actions were, in part, merely an effort to keep C. from falling off the bed, not a use of force.

We disagree. C. testified as to defendant's restraining her at two points during the evening. In the first instance, C. was asked: "Q. Do you remember at the end of the videotape the last time you were on the bed with [defendant], were you trying to get away from him then? [¶] A. Yes. [¶] Q. Why was that? [¶] A. Because he -- my shirt was always flipping up, and I was getting more -- [¶] . . . [¶] . . . My shirt was flipping up and I was getting worn out. [¶] [Prosecutor]: Q. Were you able to get away from him? [¶] A. No. [¶] Q. How come? [¶] A. Because he was holding me tight. [¶] Q. So he wouldn't let you go? [¶] A. Right."

In the second instance, C. described defendant's touching of her breast, thigh, and buttocks. The prosecution asked C.: "Q. After he touched you on your bottom, what happened then? [¶] A. I moved away and then I had my leg off the bed and then he says, we don't want you to fall, then he pushed me back towards him."

The evidence of force consists of more than merely a brief reference in a probation report; C.'s testimony establishes the element of force required by section 6600, subdivision (b). We find the evidence sufficient to sustain the jury's verdict.

II. Reliance on Legally Insufficient Theory

Defendant contends "[t]he prosecution relied on a legally insufficient theory offered to prove the duress element required for a forcible offense under the SVPA." Defendant concedes the prosecution may present two or more alternative theories of the case but argues that when one theory fails to meet the legal requirements for an SVP commitment, the reviewing court must determine which theory the jury used to convict. If the record does not conclusively prove the jury based its verdict on a legally correct theory, reversal must follow. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1121-1122, 1128.)

According to defendant, the prosecution improperly relied on the requirement of duress. During closing argument, the prosecution stated: "Duress. Duress is an interesting definition because it is broader than what we normally would think, and just so you know, duress means, and the instruction is disjunctive in the sense it gives you multiple options. Duress means a direct or implied, it says threat of force which doesn't apply here, violence, which doesn't apply under duress, danger which doesn't apply under duress, these facts, but hardship would apply. [¶] What hardship was applied? She was given alcohol. A ten-year-old girl was given four glasses of a wine cooler, as she said, three to four glasses of wine cooler. And this hardship must coerce a reasonable person of ordinary susceptibilities. That is not you or I, but of a ten-year-old girl, to, one, perform an act which otherwise would not have been performed. She said I didn't want to do these things, or,

and again, in the . . . alternative acquiesced to one which otherwise would not have submitted. What took place after she was given alcohol by the defendant? He groped her breasts, he put his hand on her thigh, he continued to molest her on the bed. Doing it under those circumstances is evidence of duress. [¶] You may think of duress in terms of menacing, threatening manners. It isn't that narrow, and you have the definition. It is going to be your job to see whether or not these facts fit within that, the definition. Regardless of what I say, regardless of what [defense counsel] says, that is a factual determination that you must make."

During jury deliberations, the jury asked the court: "Can we get a definition of hardship under duress?" The court responded: "Hardship has a common meaning. Please use the common meaning of hardship."

Defendant, relying on *People v. Green* (1980) 27 Cal.3d 1 (*Green*), argues the prosecution relied on a legally insufficient theory requiring reversal. Because the record does not establish that the jury based its verdict on a legally correct theory, defendant argues we must reverse.

In *Green*, the jury convicted the defendant of first degree murder and found true the special circumstance of murder committed during a robbery and kidnapping. At trial, the People argued the jury could base its kidnapping verdict on any or all of three distinct segments of asportation of the victim. (*Green*, *supra*, 27 Cal.3d at pp. 62-63.) The Supreme Court found the trial court misinstructed the jury on the law as to the

first segment. (*Id.* at pp. 64-65.) The second segment, a 20-mile asportation, was sufficient to support the kidnapping verdict. (*Id.* at pp. 62-63, 67.) However, as to the third and final segment, a walk of 90 feet to the murder site, the Supreme Court found it insufficient as a matter of law to support the verdict. (*Id.* at pp. 63, 65, 67-68.) Since the jury could have based its kidnapping conviction on this legally insufficient evidence of asportation, the Supreme Court reversed the conviction. (*Id.* at pp. 68-69, 73-74.)

According to defendant, the prosecutor improperly relied on a theory of hardship derived from defendant's plying C. with alcohol to establish that defendant used force. The court, according to defendant, compounded the error by advising the jury to employ the common meaning of hardship. As defendant points out, the Legislature removed "hardship" from the definition of "duress" as to the crime of forcible rape and rewrote the spousal rape statute to include an identical definition. (Stats. 1993, ch. 595, §§ 1, 2, pp. 3120-3122, amending Pen. Code, §§ 261, 262.) Defendant contends the change reflects the Legislature's express desire to delete hardship as a permissible basis for finding duress in any sex crime.

Defendant's perception of legislative intent lacks an essential foundation: statutory language. Penal Code section 261, subdivision (b) states: "*As used in this section*, 'duress' means . . . ." (Italics added.) Penal Code section 262, subdivision (c) mirrors this language and states: "*As used in this section*, 'duress' means . . . ." (Italics

added.) This language unequivocally limits these definitions of duress to Penal Code sections 261 and 262. "When a statute is unambiguous, its language cannot 'be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process. [Citation.]' [Citation.]" (*Shah v. Glendale Federal Bank* (1996) 44 Cal.App.4th 1371, 1374.)

Moreover, case law defining duress for purposes of Penal Code section 288 defines the term to include hardship. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 50.) Repeals by implication are not favored. (*Scott Co. v. Workers' Comp. Appeals Bd.* (1983) 139 Cal.App.3d 98, 105.) We therefore assume that when the Legislature amended the definitions of "duress" for purposes of Penal Code sections 261 and 262, it was aware of the existing case law that defined "duress" differently for purposes of Penal Code section 288 and chose to leave the section 288 definition of "duress" untouched.

We are mindful of the contrary decision in *People v. Valentine* (2001) 93 Cal.App.4th 1241 (*Valentine*). *Valentine* examines the legislative history and concludes that the Legislature intended to exclude "hardship" from the list of threatened harms that qualify as forcible oral copulation or forcible penetration with a foreign object because it removed "hardship" from the definition of "duress" for purposes of forcible rape and spousal rape. (*Id.* at pp. 1248-1250.) The court acknowledged the Legislature "did not bother" to amend Penal Code sections 288a and 289, "or any other major sex crime

statutes," to incorporate the statutory definition of duress crafted into the forcible rape and spousal rape statutes. (*Valentine*, *supra*, 93 Cal.App.4th at p. 1248.) But the court concluded "it appears absurd to interpret the statutory scheme as allowing a threat of hardship to justify a conviction for forcible digital penetration or oral copulation but not for forcible rape or spousal rape." (*Ibid.*)

The court's conclusion is based on its divination of the Legislature's reasons for amending Penal Code sections 261 and 262. According to *Valentine*, the Legislature amended the statutes in an attempt to bring the crime of rape in line with other major sex crimes. The court concluded: "The fact this statutory definition of 'duress' resulted from an attempt to align the elements of rape and other major sex crimes is a further reason for applying that definition to these other sex crimes and not to confine it to rape. As the Penal Code chapter defining all these major sex crimes is presently organized, duress is defined in the earlier code sections, 261 and 262, then used in succeeding sections, without definition, as one of the potential bases for finding a defendant guilty of these other crimes. It is conceivable, barely, the Legislature intended one definition of duress for rape and another broader definition for the other major sex crimes. But it is far more probable the definition they provided in the early sections of this chapter is the one the lawmakers intended courts and jurors to apply every time the term is used in the chapter. The express purpose of amending the rape sections was to make them

identical to the other major sex crimes and allow a conviction for rape to rest on the same finding of duress as would justify conviction for one of the other major sex crimes. We would defeat that purpose were we to construe 'duress' in sections 288a and 289, subdivision (a) differently and more broadly than this same term is defined in sections 261 and 262. In doing so, we would reinstate the problem the Legislature intended to cure in the early 1990's." (*Valentine*, *supra*, 93 Cal.App.4th at p. 1249.)

We disagree with *Valentine's* analysis and harken back to the basic rules of statutory interpretation. The key is applying the rules in the proper sequence. First, we examine the actual language of the statute. In examining the language, we give the words of the statute their ordinary, everyday meanings, unless the statute itself specifically defines those words to give them special meanings. If the meaning is without ambiguity, doubt, or uncertainty, then the language controls. In such cases, there is nothing to interpret or construe. But if the meaning of the words is not clear, we take the second step and refer to the legislative history. The final step, which is to be taken only when the first two steps have failed to reveal clear meaning, is to apply reason, practicality, and common sense to the statutory language. (*U.D. Registry, Inc. v. Municipal Court* (1996) 50 Cal.App.4th 671, 674.)

In the present case the rape statutes define "duress" for the purposes of those statutes only. Case law has defined "duress" for purposes of forcible lewd conduct. We find no

ambiguity, doubt, or uncertainty in the statutes. We discern nothing to interpret that requires us to delve into the legislative history. As to the purported "absurdity" in applying differing definitions of duress, we agree with the concurring opinion in *Valentine* that "[t]he Legislature may very well have had good reason to retain 'threat of hardship' as inclusive in the term 'duress' under the aforementioned Penal Code sections." (*Valentine*, *supra*, 93 Cal.App.4th at p. 1255 (conc. opn. of Woods, J.).)

In sum, we reject defendant's attempt to impute legislative intent from one statute to another and find the prosecution did not rely on a legally insufficient theory in establishing the element of duress in the present case. In doing so, we respectfully disagree with the analysis of *Valentine*, *supra*, 93 Cal.App.4th 1241.

III. Instructional Error

A. Instruction on Diagnosed Mental Disorder

Defendant contends the court erred in refusing to give his proferred instruction defining mental disorder and mental defect. Defendant requested the following instruction: "The definitions of 'mental disorder' and 'mental defect' encompass a current mental condition that renders a person dangerous beyond his or her control."

The court instructed the jury pursuant to CALJIC No. 4.19, stating in part: "Diagnosed 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."

Defendant argues he based his proffered instruction on *People v. Buffington* (1999) 74 Cal.App.4th 1149 (*Buffington*). In *Buffington*, the court considered an equal protection challenge to the SVPA. In finding no constitutional violation, the court noted: "The key consideration for equal protection analysis on the issue of mental disorder standards is not the particular nomenclature or diagnosis of the mental disorder. [Citations.] The key, rather, is that the person whose commitment is sought must be currently suffering from a mental condition that renders him dangerous beyond his control. [Citations.] [¶] The definitions of 'mental disorder' and 'mental defect' in the California involuntary commitment schemes noted above, including the SVPA, all similarly encompass a current mental condition that renders a person dangerous beyond his or her control." (*Id.* at p. 1157.)[3]

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[3] Recently, the United States Supreme Court reaffirmed the necessity for a finding that an offender lacks control over his or her dangerous behavior before commitment as an SVP. In *Kansas v. Crane* (2002) 534 U.S. 407 [151 L.Ed.2d 856], the court reasoned: "It is enough to say that there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." (*Id.* at p. 413 [151 L.Ed.2d at pp. 862-863].)

Defendant argues that under *Buffington*, the court must instruct the jury that a defendant suffers from a mental condition that renders him dangerous beyond his control. Although CALJIC No. 4.19 instructs the jury of the necessity that a defendant suffer from a diagnosed mental disorder, defendant argues the instruction fails to inform the jury that the disorder must make a person unable to control himself or herself. Defendant claims the term "predisposes" in CALJIC No. 4.19 "connotes only an inclination or bias toward the criminal act." He also complains of the failure of CALJIC No. 4.19 to discuss volitional control.

The People contend the SVPA does not require a finding that a defendant will, beyond a reasonable doubt, commit a sexually violent crime but that, beyond a reasonable doubt, the defendant is likely to commit a sexually violent crime. We agree.

CALJIC No. 4.19 instructs the jury as to the diagnosed mental disorder required for commitment as an SVP, specifying a condition affecting the emotional or volitional capacity that predisposes the defendant to commit sexual acts that render the defendant a menace to the health and safety of others. The instruction links the condition to a predisposition to commit criminal acts, alerting the jury that the person, in order to be committed, must currently suffer from a mental condition rendering him dangerous beyond his control. In *Hubbart, supra*, 19 Cal.4th at pp. 1158-1161, the Supreme Court upheld language defining an SVP that parallels the language of CALJIC No. 4.19.

Defendant contends the trial court, in refusing his instruction, failed to instruct the jury on a defense theory of the case. We disagree.

At trial, defendant consistently denied guilt in the rape case and the molestation case. During closing argument, defense counsel denied defendant's guilt in the rape case and argued his Penal Code section 288, subdivision (a) convictions did not qualify as SVPA offenses. A trial court is required to instruct on the general principles of law relevant to the issues raised by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) So also, upon request, the court must instruct on the law applicable to defense theories supported by the evidence. (*People v. Elize* (1999) 71 Cal.App.4th 605, 615.) Isolated comments concerning volitional control in the context of a diagnosed mental disorder do not create a defense theory. The court properly instructed the jury on the definition of mental disorder as set forth in CALJIC No. 4.19. It was under no obligation to do more.

B. Timeliness of Evaluations

Defendant contends the trial court failed to properly instruct the jury on the requirement that mental evaluations older than one year are not considered current for purposes of the SVPA. The People argue defendant has waived the issue. We agree.

Subdivision (a) of section 6600 requires the trial court to admonish jurors that "they may not find a person a sexually violent predator based on prior offenses absent relevant

evidence of a currently diagnosed mental disorder . . . ." Parroting the language of the statute, the trial court instructed the jury that "you may not find [defendant] to be a sexually violent predator based on prior offenses without relevant evidence of a currently 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."

Defendant complains the trial court should have instructed that mental evaluations older than one year are not considered current for purposes of the SVPA. Defendant cites no authority for this proposition, for there is none. To the extent defendant desired an instruction clarifying the meaning of "currently diagnosed mental disorder," it was incumbent upon him to request or propose clarifying language. If the trial court gives an instruction correct in law but the party complains it is too general, lacks clarity, or is incomplete, the party must request the additional or qualifying instruction in order to have the error reviewed on appeal. (*People v. Welch* (1999) 20 Cal.4th 701, 757.) Having failed to make such a request, defendant cannot complain on appeal.

IV. Expert Testimony

Defendant argues the trial court erred by refusing to exclude any expert testimony referring to the RRASOR, PCLR, and Static-99, psychological instruments used in evaluating sexual

offenders.[4] Prior to trial, defendant moved to exclude all evidence of the three actuarial instruments unless the court found them reliable under a *Kelly-Frye* analysis.[5] The court denied the motion.

In denying the motion, the trial court relied on *People v. Ward* (1999) 71 Cal.App.4th 368 (*Ward*). The trial court explained: "[*Ward*] states in civil commitment cases where the trier of fact is required by statute to determine whether a person is dangerous or likely to be dangerous, expert prediction is admissible and is not subject to the judicial test for admission of expert testimony concerning a new scientific technique." On appeal, defendant again contends the expert testimony regarding the RRASOR, Static-99, and PCLR should have been excluded and attempts to distinguish *Ward*.

In *Ward*, *supra*, 71 Cal.App.4th 368, the defendant appealed a jury finding that he was an SVP. He argued the expert evidence did not meet the *Kelly-Frye* standards for admissible scientific evidence because there is no scientifically accepted way of predicting whether a person is likely to engage in acts of sexual violence. (*Id.* at p. 372.) At trial, a psychologist

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[4] RRASOR refers to the Rapid Risk Assessment for Sexual Offender Recidivism, an actuarial tool developed in 1997. Static-99 is an actuarial tool adopted in 2000 as a replacement for the RRASOR. PCLR stands for Psychopathology Checklist-Revised, another actuarial tool.

[5] *People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013.

and a psychiatrist evaluated the defendant and testified he was an SVP. (*Id.* at p. 371.) In rebuttal, a defense expert testified the diagnostic procedures employed by the prosecution's experts were unreliable and unscientific. (*Ibid.*) The trial court found the expert testimony not subject to *Kelly-Frye* because the evidence did not involve a new scientific technique. (*Id.* at p. 373.)

On appeal, the defendant in *Ward* argued the testimony of the prosecution's experts was subject to *Kelly-Frye* and that "predictions of future dangerousness involve scientific techniques which are not generally accepted in the scientific community." (*Ward*, *supra*, 71 Cal.App.4th at p. 373.) The appellate court disagreed, noting: "California distinguishes between expert medical opinion and scientific evidence; the former is not subject to the special admissibility rule of *Kelly-Frye*. [Citation.] *Kelly-Frye* applies to cases involving novel devices or processes, not to expert medical testimony, such as a psychiatrist's prediction of future dangerousness or a diagnosis of mental illness. [Citations.] [¶] Similarly, the testimony of a psychologist who assesses whether a criminal defendant displays signs of deviance or abnormality is not subject to *Kelly-Frye*. [Citation.] In the latter case, the court observed: 'No precise legal rules dictate the proper basis for an expert's journey into a patient's mind to make judgments about his behavior.' [Citation.] It also described a psychological evaluation as 'a learned professional *art*, rather than the purported exact "science" with which *Kelly/Frye* is

concerned . . . .' [Citation.] [¶] Furthermore, in a number of other contexts, the law has often permitted mental health experts to discern present or imminent dangerous behavior. (Pen. Code, § 1026.5, subd. (b)(1) [extension of insanity commitment]; Pen. Code, § 2962 [mentally disordered offenders]; [Welf. & Inst. Code,] § 5300 [conservatorship].) These other situations cannot reasonably be distinguished on the basis that they do not involve sex-related offenses." (*Ward*, *supra*, 71 Cal.App.4th at pp. 373-374.)

Here, defendant argues *Ward* considered only psychiatric expert testimony in general and did not consider the legitimacy of testimony about actuarial instruments such as the RRASOR, PCLR, and the Static-99. According to defendant, "Consistent with *Ward*, [defendant] does not contend that Drs. Longwell and Finnberg were not allowed to based [*sic*] their diagnoses on actuarial instruments. A jury is well suited to deciding whether expert medical opinion should be relied upon by considering the experience and training of the witness in addition to the witness's familiarity with current research methods used to reach a conclusion. [Defendant's] challenge focuses on the presentation of scientific evidence that remains subject to *Kelly*-*Frye* even when presented by the same witnesses who may be qualified to render an expert medical opinion. A jury is not at all suited to deciding whether a complex instrument is generally accepted within the scientific community and is sufficiently reliable to merit consideration."

We find defendant's argument unpersuasive. The experts in the present case did not "present" scientific evidence, they relied on the actuarial instruments defendant objects to in forming their opinions as to defendant's mental state. Neither expert "presented" these actuarial tools independently from a discussion of the bases for her opinion. Under *Ward*, expert psychiatric and psychological testimony in SVP cases is not scientific evidence subject to *Kelly*-*Frye*, nor is the reliance of such experts on actuarial instruments such as the RRASOR, PCLR, and Static-99 subject to *Kelly*-*Frye*.

DISPOSITION

The judgment is affirmed.

RAYE, Acting P.J.

We concur:

MORRISON, J.

HULL, J.