NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. PASHTOON FAROOQI, Defendant and Appellant.	G053684 (Super. Ct. No. M-15620) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed.

Susan K. Shaler for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Collette C. Cavalier, Kelley Johnson, and A. Natasha Cortina, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Pashtoon Farooqi (defendant) to be a sexually violent predator (SVP) under the Sexually Violent Predators Act (SVPA). (Welf. & Inst. Code, § 6600 et seq.)[1] He appeals from the judgment and order of indefinite commitment to the custody of the State Department of State Hospitals (DSH).

Defendant argues the trial court infringed his state and federal constitutional rights to witness confrontation and due process by allowing the People's expert witnesses to testify about case-specific facts (*People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*)), the evidence is insufficient to support the SVP finding, and the court committed instructional error. In a supplemental brief, defendant argues section 6600, subdivision (a)(3) violates his constitutional right to due process.

The Attorney General concedes the court erred by allowing one of the People's experts to recite case-specific facts about a single incident, but he also argues the case-specific facts were properly admitted under other exceptions to the hearsay rule, or introduced by live testimony, and there was no prejudice in any event.

We agree any evidentiary error was harmless in light of the volume of evidence properly admitted. We also reject defendant's challenge to the sufficiency of the evidence, his asserted instructional error, and his constitutional challenge to subdivision (a)(3) of section 6600, and affirm the judgment.

FACTS AND PROCEDURAL HISTORY

In March 2014, the People filed a petition to commit defendant as an SVP under the SVPA. The petition alleged a single qualifying offense: In April 1996, defendant pled guilty to assault with intent to commit mayhem, rape, sodomy, oral

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[1] All further undesignated statutory references are to the Welfare and Institutions Code.

copulation, or other specified offense and commission of same acts in the course of burglary of first degree. (Pen. Code, § 220.)

Both parties requested pretrial rulings on the admissibility of hearsay evidence.[2] As pertinent here, defendant sought to prevent the People's expert witnesses from testifying about his "prior offenses, arrests and convictions," except for the qualifying offense, and to exclude the testimony of any victims, or alleged victims, of defendant's nonqualifying sex crimes, on grounds of relevance (Evid. Code, § 210), hearsay (Evid. Code, § 1200), Evidence Code section 352, and *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*)).

Following the Evidence Code section 402 hearing, the court ruled documentary evidence of defendant's qualifying offense was admissible, citing section 6603, subdivision (a)(3). The court overruled defendant's motion to exclude victim testimony about his nonqualifying offenses, concluding such testimony was relevant, not hearsay, and more probative than prejudicial.

1. *Prosecution Case*

a. Steven Jenkins, Ph.D.

Steven Jenkins is a licensed psychologist under contract with DSH to perform SVP evaluations. Since 2007, Jenkins has completed over 260 SVP evaluations, and he has testified in court about 30 times. Jenkins said he had classified roughly 19

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[2] Defendant moved to exclude all of the following evidence: (1) the testimony of "any 'victims' or 'alleged victims,'" on grounds of relevance and Evidence Code section 352; (2) references to prior convictions, except for the qualifying conviction, under hearsay, relevance, and Evidence Code section 352 grounds; (3) references to 'any sexual conduct and/or arrests that did not result in sexual convictions" under Evidence Code section 352; and (4) prevent "the [People's] experts from testifying to any unreliable inadmissible hearsay."

Defendant also sought "to prevent misconduct and limit prosecutor's argument to the evidence presented," for extra preemptory strikes consistent with a "'Life Case,'" and he invoked his Fifth Amendment right to remain silent.

percent of the people he had evaluated to be SVP's, and he sometimes changed his opinion.

Jenkins explained the three criteria for determining whether someone meets the statutory definition of an SVP. An evaluator must determine whether (1) the individual has committed a sexually violent offense as defined by section 6600 against one or more persons, (2) the individual has a diagnosed mental disorder that predisposes him or her to commit sexually violent or criminal acts, and (3) the individual is likely to commit additional sexually predatory acts without appropriate treatment in custody due to his or her diagnosed mental disorder. Predatory sexual offenses are sexual offenses directed against a stranger, or casual acquaintance.

Jenkins said a referral for an evaluation includes a packet of information from the DSH and the Department of Corrections and Rehabilitation about the subject. The packet includes the subject's history of sexual offenses, mental and physical health records, court records, police reports, probation officer reports, and in custody rules violations related to his or her criminal activity.

Jenkins initially evaluated defendant in 2014, and he prepared a report following an extensive interview. Jenkins completed a second evaluation a year later at the request of the court. Defendant declined to participate in the second interview, but Jenkins had additional records to evaluate.

When considering whether defendant had a qualifying mental diagnosis, Jenkins began with defendant's criminal history. Jenkins testified defendant had been convicted of misdemeanor solicitation in 1993. Jenkins talked to defendant about the offense, and Jenkins asked if defendant had a sexual interest in prostitutes. Defendant "denied having any sexual interest in prostitutes, denied having any fantasies or anything like that regarding prostitutes . . . ." However, defendant also referred to his use of prostitutes, "as needing sex."

In 1994, defendant was arrested for another sexual offense while on probation for the misdemeanor. According to certified court records introduced by the People, defendant was charged with an April 1994 kidnapping and attempted forcible rape of E.A., but the charges were later dismissed. Jenkins said defendant's arrest while on probation showed a disregard for outside rules.

Defendant's qualifying offense occurred in 1995. That year, defendant was arrested on charges of forcible rape (Pen. Code, § 261), assault with intent to commit rape (Pen. Code, § 220), and kidnapping (Pen. Code, § 207, subd. (a)) of Sally T. Defendant pled guilty to assault with intent to commit rape in 1996. The People introduced a copy of the police report, and a certified copy of the record of the conviction.

Jenkins testified to the underlying facts as gleaned from the police report. According to the police report, on December 23, 1995, Sally was waiting at a bus stop when defendant pulled up in his car and asked her if she wanted a ride. Sally accepted the offer, but defendant did not drive Sally to her destination.

Instead, defendant asked Sally if she was a hooker. Sally said, "No," and she asked defendant to let her out of the car. Instead, defendant moved to her side of the car, straddled her body, pinned her against the car seat, and threatened to touch her. Sally started to cry, but defendant reached under her shirt and fondled her breasts. Defendant told Sally to stop crying and smile because they were going to have sex.

Sally said, "Please don't do that to me." Defendant replied, "Well, I have a condom," and "You said you were a hooker." Sally told defendant she was pregnant. She was afraid defendant would hurt her, but defendant waved off her concern. Defendant kept Sally pinned and forced her to have sexual intercourse. When a pedestrian came by, defendant stopped and moved his car to a different location.

At his new location, defendant demanded Sally perform oral sex on him. When she refused, defendant became angry and forcefully told her to "touch it." Afraid, Sally fondled defendant's penis. Defendant then forced her to have sexual intercourse a

second time. When Sally pleaded for him to stop, he threatened to take off the condom, and he told Sally he had a knife and would use it.

Sally thought defendant ejaculated, and although he used a condom, it must have broken. Defendant told Sally to put her pants on and he dropped her off on a main street. He assured Sally he would deny the incident if she reported it to the police.

Nevertheless, Sally memorized the license plate number of defendant's car and notified police. A medication examination revealed Sally had a bruised cervix, she was two months pregnant, and there was semen in her vagina.

Jenkins emphasized the fact defendant used force, violence, and threats, to commit the crimes, and he noted that defendant seemed to get pleasure from the victim's distress. According to Jenkins, this is consistent with a sexually violent offense as it pertains to the SVP criterion. When Jenkins talked to defendant about the case. Defendant admitted having sex with Sally, but he denied raping her.

Jenkins also testified defendant had been arrested for sex offenses in May 1996. Jenkins reviewed various documents related to the May 1996 offenses, including a felony complaint, information, abstract of judgement, and a guilty plea form. The People submitted certified copies of these documents, and according to the documents, defendant was charged with sexual battery by restraint (Pen. Code, § 243.4, subd. (a)), and false imprisonment by violence (Pen. Code, § 236), against A.C.[3]

In August, defendant pled guilty to assault with intent to commit rape, and he admitted forcefully touching A.C.'s buttocks with the specific intent of sexual arousal, and to prevent her escape from him, as a factual basis for his plea. Jenkins testified, "There are several features about [the 1996] offense that are important, suggest that

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[3] The information also charged defendant with the misdemeanor battery (Pen. Code, § 242) of C.Z. on the same day, but the charge did not result in a conviction.

sexual preoccupation; two victims, charged with two victims within a 30 minute period of time [at the] same location . . . ."

Jenkins continued by stating defendant was released on parole in 2001, and discharged from parole in 2004. In 2005, defendant failed to register as a sex offender after his release from prison, and he pled guilty to violating two counts of Penal Code section 290, subdivision (g)(2). The People submitted certified copies of the information, and abstract of judgment, for this case.

In December 2007, defendant was charged with assault with intent to commit a sexual offense (Pen. Code, § 220, subd. (a)) against S.C., and misdemeanor sexual battery (Pen. Code, § 243.4, subd. (e)(1)) against Megan S.

Certified court records show the original complaint was dismissed by the People, but the charges were refiled, and a new count of false imprisonment by violence (Pen. Code, §§ 236, 237, subd. (a)) against S.C. was added. Following a trial, a jury convicted defendant of false imprisonment by violence in August 2008.

Jenkins also considered defendant's adjustment to prison, and the People introduced copies of reports of some in custody rules violations. According to prison records, defendant had violated rules by fighting, stealing state property, and taking food. In Jenkins mind, this meant defendant had difficulty obeying outside structure.

Based on Jenkins's review of defendant's criminal history, background, statements, and in custody rules violations, he diagnosed defendant with "other specified paraphilic disorder non-consent." Jenkins said defendant's interest in coercive sex with nonconsenting partners is what drove the disorder. Defendant demonstrated sexual arousal at his victim's distress in the 1995 attack on Sally, and the sexual assaults or attempted sexual assaults defendant committed between 1994 and 2007 demonstrated a pattern.

Jenkins relied on several factors to support his diagnosis: For instance, all of defendant's sexual assault victims were nonconsenting women, who resisted or fought

back, which Jenkins believed indicated a pattern of seeking nonconsensual sex. Defendant grabbed, pulled, and isolated his victims, and the victims said defendant seemed aroused by their distress. He committed several offenses while on probation or parole.

Furthermore, defendant committed two, separate sexual offenses in quick succession, in the incidents with A.C. and C.Z., which showed defendant had difficulty managing his sexual urges. Jenkins testified defendant's other specific paraphilic disorder, non-consent, made him a "very serious and well-founded risk for engaging" in sexually violent predatory behavior if released.

Jenkins said he considered the results of defendant's Static-99R evaluation. Defendant received a score of 8 on the diagnostic scale, which placed him in the 91st percentile and the high risk category.

Jenkins used another actuarial tool known as the Structure Risk Assessment Forensic Version (SRA-FV). Jenkins looked at risk estimates for defendant based on "routine sex offender" samples, but Jenkins believed the SRA-FV "underestimated [defendant's] risk." He then compared the scores defendant would obtain using the "high risk high needs" sample. Using this formula, defendant had a 35.1 percent recidivism risk within a five-year period. Factoring in defendant's Static-99R score raised the risk of reoffending to 36.3 percent within five years, and 48.5 percent within 10 years. However, Jenkins believed the recidivism percentage rates for the high risk needs group underestimate the actual rate of reoffense for the group.

Jenkins also used a third actuarial tool known as PCL-R2, which measures a person's level of psychopathy. Defendant's low score indicated his psychopathy did not influence his risk for sexual offending. Jenkins did not believe defendant would seek sex offender treatment on his own if released.

Finally, Jenkins said he also considered the fact defendant had become an adult in a country where men and women do not date. Jenkins believed this cultural difference stunted defendant's social skills with women.

b. Christopher North, Ph.D.

Licensed psychologist Christopher North had been an employee of the DSH for about 20 years at the time of trial. North had completed over 1,000 SVP evaluations, and he had testified as an expert witness more than 100 times.

North evaluated defendant in February 2014, and he updated his evaluation in 2015, although defendant refused to be interviewed. In 2014, North interviewed defendant at Chuckawalla Valley State Prison. During that interview, defendant admitted his 1993 conviction for soliciting a prostitute. Defendant told North he did not know why he had solicited prostitutes so many times over the years.

In North's opinion, defendant suffered from "other specified disruptive impulse control and conduct disorder," based on defendant's difficulty controlling his aggressive sexual impulses. Based on defendant's score of 8 on the Static-99R, North determined defendant had a 35 percent risk of recidivism within a five-year period of being released. However, North believed 35 percent underestimated the actual reoffense risk. Furthermore, North did not believe defendant would seek sex offender treatment if he was released.

North considered the PCL-R, and agreed with Jenkins's assessment of defendant's psychopathic tendencies. He also considered the SRA-FV. In North's opinion, defendant met the statutory criteria for civil commitment as an SVP.

c. E.A. - 1994 Offense

In the early morning hours of April 15, 1994, E.A. was walking to work when a car stopped. A man, defendant, got out of the car. He was wearing only a long shirt, without pants and underwear, and he approached E.A. Defendant grabbed E.A.'s shoulders and pushed her into the car. Defendant drove around for about 20 minutes. He

eventually parked under an apartment building. Defendant told E.A. to touch his penis. E.A. jumped out of the car and ran away. Defendant, still clad only a long shirt, followed E.A. on foot, but he quickly decided to follow her in his car. When E.A. tried to cross the street, defendant aimed the car at her, but she crossed over a center divider and escaped.

E.A. moved to Corona, California, almost immediately after the incident. The case was dismissed when she could not be located for trial. E.A. agreed to testify at the current proceedings because she did not "want that other people have to feel the pain that I'm feeling."

d. S.C. – 2007 Offense

During the afternoon of December 22, 2007, S.C. walked from her motel room to a gas station on Beach Boulevard in Anaheim to buy cigarettes. As S.C. walked back to her motel room, defendant rode past her on his bicycle, and he squeezed and fondled her breasts.

S.C. ran away from defendant, but a few minutes later, he ran out of a carport and grabbed S.C.s wrist. As they struggled, defendant pulled S.C. farther into the carport. S.C. said he seemed very angry.

Defendant held his wallet in one hand, and S.C.'s wrist with the other. He said he had money, and "this won't take long." S.C. told defendant, "this is not going to happen," and she stomped on defendant's foot. Defendant released his grip, and S.C. managed to get away. S.C. flagged down a passing police car, and she gave them a statement. Sherry testified at the 2008 trial.

e. Megan S. - 2007 Offense

A few minutes after the incident with S.C., defendant rode his bicycle past Megan S. He offered Megan $60 to go behind the buildings and into a nearby alley with him. Megan said, "Fuck off. You got the wrong idea. Get the fuck away from me." Defendant was persistent, and he tried to block Megan's path. Megan felt "incredibly threatened." Defendant reached out and grabbed Megan's derriere. Around that time, a

police car drove by, circled back, and caught defendant. Megan also testified at trial. Defendant was convicted of false imprisonment.

f. Santa Ana Police Officer John Corby

In 2005, John Corby contacted defendant after defendant reported that someone had stolen his car. Corby obtained defendant's address during the contact. During his follow up investigation, Corby learned defendant had failed to register as a sex offender, as required under Penal Code section 290.

2. *Defense Expert Witnesses*

a. Dr. Allen Frances

Allen Frances is a board certified psychiatrist. A former professor at Cornell, Columbia, and Duke Universities, Frances was the chair of the task force drafting three editions of the DSM: the DSM-III, DSM-IIIR and DSM-IV. Around 1,000 experts were involved in the process, which took about five years to complete. In 2013, the current edition of the DSM, DSM-V, was published.

Frances reviewed Jenkins and North's evaluations, but he did not meet defendant or review source materials. Frances testified the diagnostic community has consistently rejected the idea that coercive sex constituted a mental disorder. After the creation of the DSM-III, some clinicians included coercive sex as an official category under the paraphilia disorder, which includes exhibitionism, sadism, pedophilia, and others. The designated categories were defined mental disorders with a set criteria for diagnosis.

With respect to "other specified" paraphilia category, there were no set criteria for diagnosis. Frances said the decision had been made not to include coercive sex as an official paraphilia category, or include it as an example of other specified paraphilia.

In Frances's opinion, the "other specified" paraphilia category could be useful for billing purposes, but it was not a valid, reliable diagnosis in a forensic setting.

Frances found the fact Jenkins and North came to contradicting diagnoses showed the unreliability of the "other specified" category.

Frances testified the facts would have to show defendant needed non-consensual contact to feel aroused. The evaluator would need extraordinary evidence to support this diagnosis, and examine all the reasons the person might be the rare person who is aroused by force. In Frances's opinion, Jenkins had simply restated the facts of the offenses, and there was nothing to distinguish defendant's sexual offenses from ordinary sexual assaults.

In the 1995 and 2008 offenses, defendant offered to pay the women for sex. In 1996, defendant asked C.Z. to "kiss me, hug me, please." These facts suggested to Frances that defendant wanted to pay or seduce consent from the women. Thus, defendant's failure to pay, or seduce women, led him to commit sex crimes. Frances said someone with the mental disorder diagnosed by Jenkins would not offer to pay for sex, or try to obtain consent.

Frances testified North made up his diagnosis of other specified disruptive impulse conduct disorder with aggressive sexuality. Frances had never seen that diagnosis in an SVP evaluation, and there was no mention of it in the literature. The section of the DSM North's diagnosis came from included antisocial personality disorder, intermittent explosive disorder, kleptomania, and pyromania, but it had nothing to do with sex.

Frances testified the "other specified" category in the disruptive impulse conduct disorder section of the DSM was reserved for people who did not fit the full diagnostic criteria for one of those specific disorders. In Frances's opinion, North's diagnosis would mean every rapist has a mental disorder. Frances believed forensic evaluators should adhere to a higher standard.

b. Brian Abbott

Brian Abbott, a licensed clinical psychologist in private practice since 2002, reviewed Jenkins and North's evaluations. He did not meet, or interview, defendant, or review any documents.

Abbott also thought North made up the diagnosis of other specified disruptive impulse control and conduct disorder with aggressive sexuality. He did not believe the DSM permitted inserting such a diagnosis into that particular category.

Jenkins's diagnosis suffered from a lack of sufficient information to justify the diagnosis of other specified paraphilic disorder, non-consent. A clinician must first rule out all other reasons for the person committing rape, which Jenkins did not do. Moreover, Jenkins and North considered defendant's past offenses, but they had no recent objective indicia of the diagnosis.

Abbott disagreed Jenkins's method of assessing defendant's risk of recidivism. Jenkins provided numbers for the routine samples group and the high-risk group, which caused Jenkins's to overestimate defendant's recidivism risk. Moreover, in 10 years, defendant would be in the 50-to-59 age group and the recidivism rate for that age group is only around 20 percent.

Abbott said the additional factors Jenkins considered either duplicated the Static 99R factors, or they were not predictive. Abbott had published an article on this issue in 2011, and according to him, several studies showed those additional factors decreased accuracy, and resulted in an overstated recidivism risk.

DISCUSSION

1. *Hearsay Evidence*

a. *Background - The SVPA*

The SVPA took effect on January 1, 1996. It provides for the involuntary civil commitment of certain sexual offenders after the completion of their prison terms.

Section 6600, subdivision (a)(1), defines a "'Sexually violent predator'" as

"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." SVP's "have previously been convicted of sexually violent crimes and currently suffer diagnosed mental disorders which make them dangerous in that they are likely to engage in sexually violent criminal behavior." (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 902.)

Sexually violent offenses are felony violations of Penal Code sections 261, 262, 264.1, 269, 286, 288, 288a, 288.5, or 289, "when committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person," or "any felony violation of [Penal Code sections] 207, 209, or 220" that are "committed with the intent to violate [Penal Code sections] 261, 262, 264.1, 286, 288, 288a, or 289 . . . ." (§ 6600, subds. (a)(2)(A)-(I), (b).)

In addition, the SVPA specifies that a "[c]onviction 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. The existence of *any* prior convictions may be shown with documentary evidence. The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of State Hospitals." (§ 6600, subd. (a)(3); italics added.)

b. Argument

Defendant argues the court committed reversible error by admitting "case-specific and testimonial hearsay" through the People's expert witnesses, Jenkins and North. He relies on *Crawford, supra,* 541 U.S. at pp. 53-56, and *Sanchez, supra,* 63

Cal.4th at page 684 for this proposition, and he alleges the court's error violated his state and federal constitutional rights to witness confrontation, and a fair trial.[4]

Citing section 6600, subdivision (a)(3), and *People v. Otto* (2001) 26 Cal.4th 200, 214 (*Otto*), the Attorney General contends defendant's qualifying conviction was independently proven by admissible documentary evidence, and or the testimony of the victim, proved the non-qualifying convictions and rules violations.

The Attorney General concedes Jenkins's testimony about the details of the 1996 offense involving C.Z. violated *Sanchez*, because there was no other independently admissible evidence of the arrest. Nevertheless, the Attorney General contends any error was harmless.

Defendant argues section 6600, subdivision (a)(3), and *Otto, supra,* 26 Cal.4th at page 214, "do not survive after *Sanchez*." Moreover, he asserts section 6600, subdivision (a)(3) violates due process by admitting testimonial hearsay of his qualifying offense, citing *Crawford, supra,* 541 U.S. at pages 33-36.

Defendant's arguments rest on the notion SVP proceedings include all the due process rights accorded criminal defendants. They do not. *Crawford's* rule against testimonial hearsay has no application in quasi-civil SVP proceedings. (*Otto, supra,* 26 Cal.4th at p. 214; *People v. Angulo* (2005) 129 Cal.App.4th 1349, 1367.) Parties in a civil proceeding, such as commitment proceedings under the SVPA, do not have a Sixth Amendment right to confrontation. (*People v. Bona* (2017) 15 Cal.App.5th 511, 520 (*Bona*); *People v. Roa* (2017) 11 Cal.App.5th 428, 455 (*Roa*).)

Civil proceedings retain a federal due process right to confrontation, but "'[d]ue process in a civil proceeding "is not measured by the rights accorded a defendant in criminal proceedings, but by the standard applicable to civil proceedings."'" (*Bona,*

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[4] Specifically, defendant challenges Jenkins and North's testimony about his in custody rules violations, the 1993 and 1996 prior sexual offenses, the 1995 qualifying offense, and his 2005 conviction for failing to register as a sex offender.

supra, 16 Cal.App.5th at p. 520.) "'"'The due process clause of the Fourteenth Amendment does not guarantee to the citizen of a state any particular form or method of procedure.'" [Citation.]' [Citation.]" (*Ibid.*) Defendant had no Sixth Amendment right to confrontation.

Nevertheless, California's evidentiary rules apply to both criminal and civil proceedings. (*People v. Bocklett* (2018) 22 Cal.App.5th 879, 890; [*Sanchez* applied to civil proceedings under the SVPA]; *Roa, supra,* 11 Cal.App.5th 455, [same]; *People v. Burroughs* (2016) 6 Cal.App.5th 378, 406-407 [same].) In pertinent part, the *Sanchez* court held, "[w]hen any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay." (*Sanchez, supra,* 63 Cal.4th at p. 686.)

But section 6600, subdivision (a)(3), creates an exception to the hearsay rule. Under this statute, the People may use documentary evidence to prove the pertinent details of the defendant's predicate offenses. (*Burroughs, supra,* 6 Cal.App.5th at p. 409, 411, citing *Otto, supra,* 26 Cal.4th at p. 206 [section 6600(a)(3) allows the use of multiple-level hearsay to prove the details of the sex offenses *for which the defendant was convicted.*

Moreover, the court admitted documentary evidence of defendant's rules violations under Evidence Code section 1280 as an official record, defendant admitted his 1993 conviction for solicitation during his 2014 initial interview with North (Evid. Code, § 1220 [party admission]), and the People presented live testimony about three of defendant's nonqualifying offenses, and his 2005 failure to register. In light of this properly admitted evidence, any remaining improperly admitted hearsay was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

2. *Sufficiency of the Evidence*

There are three elements to an SVP commitment finding: (1) conviction of "a sexually violent offense"; (2) a diagnosed mental disorder that makes a person a

danger to the health and safety of others; and (3) the mental disorder makes it likely the defendant will engage in "sexually violent criminal behavior." (§ 6600, subd. (a)(1).)

Defendant challenges the sufficiency of the evidence to support the second element. Pointing to the divergent opinions of Jenkins and North, defendant assert's the testimony of the People's expert witness was too contradictory, conclusory, and speculative to constitute substantial evidence. We disagree.

When addressing a challenge to sufficiency of the evidence in support of an SVP finding, an appellate court reviews the record in the light most favorable to the judgment to determine whether it is supported by substantial evidence. (*People v. Sumahit* (2005) 128 Cal.App.4th 347, 352.)

Substantial evidence is "evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Poulsom* (2013) 213 Cal.App.4th 501, 518.) We do not redetermine the credibility of witnesses, or reweigh the evidence, and we must draw all reasonable inferences, and resolve all conflicts, in the judgment's favor. (*Poulsom,* at p. 518.)

The jury credited the testimony of the People's expert witnesses, and their testimony was neither conclusory, nor speculative. Jenkins and North gave detailed explanations of their different diagnoses, and they explained how defendant's mental disorder made him likely to reoffend. We cannot reweigh the experts' testimony and decide the defense experts' testimony should have been given more weight. In addition, the testimony of defendant's victims was very compelling. We conclude substantial evidence supports the jury's finding defendant is an SVP under the SVPA.

3. *Instructional Error*

a. CALCRIM No. 3454-Background

The trial court instructed the jury with the following version of CALCRIM No. 3454, an instruction applicable to an initial SVP commitment proceeding:

"The Petition alleges that [defendant] is a sexually violent predator. To prove the allegations, the People must prove beyond a reasonable doubt that: "One, he has been convicted of committing sexually violent offenses against one or more victims; Two, he has a diagnosed mental disorder; Three, 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 predator criminal behavior; And, four, it is necessary to keep him in custody in a secure facility to ensure the health and safety of others.

"The term 'diagnosed mental disorder' *includes* conditions either existing at birth or acquired after birth, that affects a person's ability to control emotions and behavior and predisposes that person to commit sexual – to commit criminal sexual acts to an extent that makes him or her a menace to the health and safety of others.

"A person is *likely* to engage in sexually violent predatory behavior if there's a substantial, serious, danger and well-founded risk that the person will engage in such conduct if released into the community. The *likelihood* that the person will engage in such conduct does not have to be greater than 50 percent.

"Sexually violent criminal behavior is predatory if it is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or with whom a person a relationship has been established or promoted for the primary purpose of victimization.

"A violation of Penal Code section 220, assault with intent to commit rape as enumerated in . . . section 6600[, subdivision](b) is a sexually violent offense when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the victim or another person or threatening to retaliate in the future against the victim or any other person.

"As used here, a conviction for committing a sexually violent offense includes a prior conviction for Penal Code section 2[]20, assault with intent to commit

rape that resulted in the [defendant] receiving probation or a jail or prison sentence for a fixed period of time.

"You may not conclude that [defendant] is a sexually violent predator based solely on his alleged prior conviction without additional evidence that he currently has such a diagnosed mental disorder. In order to prove that [defendant] is a danger to the health and safety of others, the People do not need to prove a recent overt act committed while he was in custody.

"A recent overt act is a criminal act that shows a likelihood that the actor may engage in a sexually violent predatory criminal behavior." (Italics added.)

b. Argument

Defendant argues reversal is required because the version of CALCRIM No. 3454 given to the jury defined the term "mental disorder" in an impermissibly ambiguous way, because it failed to adequately explain the above-italicized words "includes" and "likely."

Notwithstanding his argument, defendant concedes the challenged portion of the instruction tracks the language of section 6600, subdivision (c). Generally, the statutory language is "'an appropriate and desirable basis for an instruction.'" (*People v. Estrada* (1995) 11 Cal.4th 568, 574.) However, defendant argues a reasonable juror could have misunderstood the word "includes" in the instruction to mean there could be qualifying mental disorders not mentioned in section 6600, subdivision (c). As for the word, "likely," defendant asserts "[t]he jury was provided with no standard for what 'likely' in this context meant." Neither claim has merit.

We review challenged instructions de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) An appellate court "review[s] . . . the instructions as a whole in light of the entire record." (*People v. Lucas* (2014) 60 Cal.4th 153, 282, disapproved on a different point in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19.) An instruction is ambiguous or misleading if the instructions as a whole created a reasonable

likelihood that the jury misconstrued or misapplied the instruction. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1237; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1249.) There was no such likelihood here.

CALCRIM No. 3454 specifically told the jury a diagnosed mental disorder *includes* conditions either existing at birth or acquired after birth, and specifically focused the jury on the fact the mental disorder must affect the person's ability to control their emotions and behavior, and predisposes them to "*commit criminal sexual acts to an extent that makes him or her a menace to the health and safety of others.*" (Italics added.) This language is simply not susceptible of the misinterpretation defendant adopts. The word "includes" as used in CALCRIM No. 3454 clearly refers to the time a person acquired [illegible] mental disorder. It may be at birth, or sometime after birth, but in any [illegible] mental disorder must control their behavior and make them a menace to society.

As for the word "likely," the instruction states, "A person is *likely* to [illegible]ually violent predatory behavior if *there is a substantial serious, and well-founded risk [illegible] will engage in such conduct if released into the community. The likelihood that the person will engage in such conduct does not have to be greater than 50 percent.*" (Italics added.) Defendant's argument notwithstanding, the italicized language above constitutes an adequate definition of what "likely" means in the SVP context.

On appeal, we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions that are given. (*People v. Richardson* (2008) 43 Cal.4th 959, 1028; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 83.) Defendant has failed to persuade us the jury misunderstood the words, "includes" and "likely" in CALCRIM No. 3454 in the way he suggests.

c. Unanimity Instruction

Defendant asserts the court should have instructed the jury to not only reach a unanimous finding, but also unanimously agree on which of the two mental disorders ascribed to him by the People's expert witnesses qualified him as an SVP. Citing *Richardson v. United States* (1999) 526 U.S. 813, 816-817, defendant contends, "[t]here is no rational or legal basis to conclude the requirement for unanimity in an SVP commitment proceeding is different from, or less than, the unanimity required for criminal trials." Not so.

In an SVP case, the jury must unanimously agree the defendant suffers from a diagnosed mental disorder, but evidence he or she suffers from more that one such disorder simply provides alternative theroies as to hos this requirement is met. (*People v. Carlin* (2007) 150 Cal.App.4th 322, 347 [jury need not unanimously agree on which prior convictions involved substantial sexual conduct, and constituted substantial sexual conduct]; *People v. Fulcher* (2006) 136 Cal.App.4th 41, 59 [SVP proceedings are civil in nature and the rule requiring a unanimity instruction does not apply].) The SVPA does not require a unanimous verdict on each, separate element necessary to support that finding. Thus, the court was not required to instruct the jury they had to unanimously agree which "diagnosed mental disorder" qualified defendant as an SVP.

APPENDIX B

Order denying review by the Supreme Court of the State of California, September 12, 2018, Docket No. S250016

Court of Appeal, Fourth Appellate District, Division Three - No. G053684

S250016

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

PASHTOON FAROOQI, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice