

JOSEPH DEFENDANT,
Appellant,

v.

**THE PEOPLE OF THE
STATE OF CALIFORNIA,**
Respondent.

**SAMPLE BENCH
MEMORANDUM**

written by

GARY SCHNEIDER

during a judicial externship at the
California Court of Appeal, 4th District, Division 3.

*Although prepared for an actual case, I have changed the
names of the Appellant and his victims because no decision
was certified for publication in this case.*

Under California’s Sexually Violent Predator Act (SVPA), a person may be civilly committed as a sexually violent predator (SVP) if he or she: (1) has been convicted of a sexually violent offense against two or more victims, and (2) suffers from a diagnosed mental disorder that makes it likely that he or she will engage in future sexually violent criminal behavior. (Welf. & Inst Code § 6600, subd. (a).). The jury in this case found that Joseph Defendant (Defendant) meets both of these requirements. Having been found to satisfy the requirements of the SVPA, Defendant was delivered into the custody of the Department of Mental Health. On appeal, Defendant challenges the constitutionality of the SVPA and the sufficiency of the evidence to support the jury’s findings. Defendant also alleges evidentiary and instructional error. In none of these claims do we find any grounds for reversal

* * *

In 1973, Defendant was convicted in Nevada of committing a lewd act against 11-year-old Alice Victim (Alice). Defendant approached Alice at a playground and offered to fix her bicycle. After making several small repairs to young Alice’s bicycle, Defendant pulled a knife, pushed Alice against a wall and fondled her genitalia.

He pled guilty to charges ensuing from this incident and was sentenced to five years in the Nevada prison system.

Twenty years later, in 1993, Defendant sexually assaulted five young girls while working at the Orange County Fair. One of the victims was 13-year-old Betty Victim-Two (Betty). Defendant followed Betty into the haunted house, grabbed her from behind, and then proceeded to grope her breasts and buttocks. Defendant was subsequently convicted of forcible lewd conduct on a child and was sentenced to four years in the California prison system. Before his sentence expired, the Orange County District Attorney petitioned to have Defendant declared an SVP.

Subsequently, two psychologists performed clinical evaluations of the Defendant. During these evaluations, Defendant acknowledged that he began using drugs and alcohol in his early teens and that he had a long-standing sexual preference for pre-pubescent girls. He further admitted that, in addition to the crimes for which he had been convicted, he committed several other sexual offenses that had gone unreported. At trial, the psychologists testified that based on their evaluations, as well as Defendant's medical and criminal history, they believed the Defendant to be a pedophile. Both psychologists also testified that they believed that Defendant's crimes against Alice and Betty constituted sexually violent offenses. Both psychologists offered their opinions that Defendant is likely to re-offend if not treated for his illness.

Two Detectives from the Orange County Sheriff's Office testified that they interviewed Defendant following his 1993 arrest for the incident involving Betty at the Orange County Fair. Defendant told the detectives that he "had an urge" to assault Betty and that it was the first time in years that he had given in to such an impulse. After admitting that young girls sexually aroused him, Defendant conceded that he might very well re-offend in the future. He stated that he had been "holding this back for years and years" and that he needed to "figure out what the hell his problem in order to stop doing this."

I

Defendant asserts that the SVPA is unconstitutionally vague and uses language that undermines the prosecution's burden of proof. We disagree.

The SVPA was enacted in 1995 in order to permit the involuntary civil commitment of dangerous mentally disordered individuals. (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1143.) The impetus for the act was the Legislature's concern over a select group of criminal offenders who are extremely dangerous as a result of mental impairment, and who are likely to continue committing acts of sexual violence even after they have been punished for such crimes. The Legislature indicated that "to the extent that such personas are currently incarcerated and readily identifiable, commitment under the SVPA is warranted immediately upon their release from prison. The act provides treatment for mental disorders from which they currently suffer and reduces the threat of harm otherwise posed to the public. No punitive purpose was intended. [Citation.]" (*Id.* at p. 1144, fn. omitted.)

As noted at the outset, the SVPA requires the state to prove that: (1) the alleged predator has been convicted of a sexually violent offense against two or more victims, and (2) he suffers from a diagnosed mental disorder that makes it likely he will engage in sexually violent behavior (Welf. & Inst Code § 6600, subd. (a).) A sexually violent offense refers to certain enumerated sexual offenses (such as lewd conduct on a minor) that are committed with force or fear, or any act committed against a victim under 14 years old involving substantial sexual conduct. (Welf. & Inst Code §§ 6600, subd. (a), 6600.1, subd. (a); *People v. Superior Court (Johannes)* (1999) 70 Cal.App.4th 558.) The act's requirements must be established beyond a reasonable doubt. (Welf. & Inst Code § 6604.)

Defendant submits that the requirement that the accused is "likely" to engage in sexually violent criminal behavior is unduly vague because the term "likely" is not adequately defined within the statute. He also claims that such a requirement dilutes

the prosecution's burden of proof to mere "preponderance of the evidence" rather than "beyond a reasonable doubt."

As recently explained in *Rupf v. Yan* (2000) 85 Cal.App4th 411, "A statute will be deemed void for vagueness where persons of common intelligence must guess as to its meaning and differ as to its applications. [Citation.] In assessing a vagueness claim, greater tolerance is permitted with legislation imposing civil rather than criminal penalties. [Citation.]" (*Id.* at p. 425.) "All that is required is that the language 'conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices...' [Citation.]" (*Roth v. United States* (1957) 354 U.S. 476, 491.)

In *People v. Roberge* (2000) 85 Cal.App.4th 696, 703, the court rejected the claim that the term likely was so ambiguous as to require further definition for the jury in SVPA proceedings. Noting that the comparatively more complicated phrase "reckless indifference to human life" was found sufficiently self-explanatory in *People v. Estrada* (1995) 11 Cal.4th 568, 578, the court determined that "the simple everyday term 'likely' cannot be said to require further definition or amplification."

Not only is the word commonly understood, its usage has been approved in statutes that are substantially similar to the SVPA. (*Kansas v. Hendricks* (1997) 521 U.S. 346.) As noted in *Hubbart v. Superior Court, supra*, 19 Cal.4th 1138, "The Kansas scheme applied to sex offenders who suffer from a mental disorder which likely impairs their ability to control sexually violent conduct and which 'makes the person likely' to engage in sexually violent crimes. [Citation.] The high court approved of this statutory formula even though dangerousness was expressed in terms of a qualifying mental disorder giving rise to a likelihood of future criminal conduct." (*Id.* at p. 1163; see also *Westerheid v. State* (Fla.App.2000) 767 So.2d 637, 651-653 [likelihood standard set forth in Florida SVPA was not unduly vague].) Based on the foregoing, we are convinced that the term "likely," as used in the California SVPA, is capable of being understood by

people of common intelligence. Simply stated, the use of the term “likely” does not render the SVPA unduly vague.

As for Defendant’s claim that the term “likely” undermines the applicable burden of proof, we are in agreement with *People v. Buffington* (1999) 74 Cal.App.4th 1149, wherein the court stated: “The reasonable doubt standard has not been circumvented or diluted. The meaning of the language of a statute is not to be found in metaphysical subtleties, which may make anything mean everything or nothing. Here, the phrase, ‘likely to engage in sexually violent behavior’ is not a standard of proof. Rather, it is a prediction of dangerousness that the trier of fact must find has been proved beyond a reasonable doubt. Such a prediction is inherent in a finding of ‘dangerousness,’ and may appropriately be based on ‘seriously dangerous propensities.’ [Citations.]

Proof beyond a reasonable doubt that a person is *likely* to be a danger to others is not constitutionally deficient. The people need not [and indeed can not] prove beyond a reasonable doubt that a person *will* commit acts making him a danger to others. To require a finding that a person *will* commit dangerous acts would effectively eliminate all civil commitments based on dangerousness.” (*Id.* at pp. 1153-1154.) We therefore find no constitutional deficiency in the SVPA’s use of the term likely.

II

Defendant also argues that the court erred in allowing the psychologists to opine that his prior convictions qualify as sexually violent offenses. He claims that this testimony usurped the jury’s function as facts finder because the psychologist’s testimony encompassed an ultimate issue in the case before the jury. However, “[t]estimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.” (Evid. Code, § 805.)

Although, Defendant insists that the expert testimony of the psychologists amounted to a directed verdict on the issue of whether he is an SVP. The truth is, the jury was free to decide what weight to give the psychological testimony. (*People v.*

Ward (1999) 71 Cal.App.4th 368, 374.) Under current California law, there is no legal impediment to the admission of expert opinion testimony on the ultimate issues to be determined in SVP proceedings. (*Ibid.*)

III

As its title indicates, the SVPA is targeted at individuals who are likely to engage in sexually violent “predatory” behavior. However, the term “predatory” is not specifically used in the statutory definition of an SVP. (See Welf. & Inst Code § 6600, subd. (a) [SVP describes someone who is “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”].)

Defendant insists that when the trial court judge instructed the jury with the aforementioned statutory definition of a SVP, the Defendant was denied his right to have a jury decide the “predatory” element required by the statute.

Defendant is not the first SVP to raise this issue. The California Supreme Court is currently deciding whether the failure to include the term predatory in the definition of an SVP is legally significant. (See *People v. Torres* (1999) 71 Cal.App.4th 704, rev. granted Aug. 11, 1999 (S079575); *People v. Hurtado* (1999) 73 Cal.App.4th 1243, rev. granted Oct. 20, 1999 (S082112).) Regardless of the California Supreme Court’s decision on this issue, the facts before the trial court in this case establish that the lack of such a jury instruction would not qualify as prejudicial error.

Under the SVPA, “predatory conduct is defined as acts “directed towards 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 purpose of victimization.” (Welf. & Inst Code § 6600, sub. (e).) The evidence left no doubt that Defendant’s victims were either strangers or individuals with whom he established a relationship for the primary purpose of victimization. Taken together, Defendant’s criminal history, pedophilia, and blunt admissions about having uncontrollable sexual impulses toward young girls show that he is a classic sexual predator. Any error that may

have occurred by virtue of the court's failure to include the term "predatory" in the definition of an SVP was therefore harmless beyond a reasonable doubt. (*Neder v. United States* (1999) 527 U.S. 1; *People v. Flood* (1998) 18 Cal.4th 470.) We do believe that this alleged instructional error, whether considered alone or in combination with any other challenged aspect of the proceeding, deprived Defendant of his right to a fair trial.

The judgment of the trial court should therefore be affirmed.