COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1553

COMMONWEALTH

vs.

PAUL ST. MARTIN.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant, Paul St. Martin, has been convicted of several sexual offenses, starting with noncontact offenses, each increasing in severity, and culminating in the rape of his stepdaughter. Before his most recent incarceration for the rape expired, the Commonwealth commenced the present action under G. L. c. 123A, § 12, seeking to civilly commit the defendant as a sexually dangerous person (SDP). Following a jury trial, at which three experts testified that the defendant suffered from a mental abnormality (pedophilia and exhibitionism) and would likely commit further sexual offenses if not confined, he was found to be an SDP and committed to the Massachusetts Treatment Center. On appeal, the defendant contends the evidence was insufficient because, although his most recent offenses were contact offenses, his past pattern of noncontact offenses

required the Commonwealth to show that any predicted future noncontact offenses would instill in his future victims a reasonable apprehension of a contact offense. He also asserts that he was provided ineffective assistance of trial counsel and challenges the admission of expert testimony. We affirm.

Background. In March 2006, the defendant pleaded guilty to one count of rape of a child with force (G. L. c. 265, § 22A), three counts of indecent assault and battery on a child under fourteen years of age (G. L. c. 265, § 13B), one count of dissemination of obscene matter (G. L. c. 272, § 29), and one count of open and gross lewdness (G. L. c. 272, § 16). The victim, who was the defendant's stepdaughter, stated that the offenses occurred over the course of several years, from approximately 1997 to 2004. During this extensive period of sexual abuse, the defendant would touch the victim's breasts and vaginal area, expose his penis to her and make her touch it, masturbate in front of her, and show her pornographic images. Sometime between 2000 and 2002, the defendant raped her anally. Reflecting on his sexual offenses against his stepdaughter, the defendant stated that he felt "trapped, smothered" in his marriage and "[t]he only place I had control was in my

stepdaughter's bedroom." He felt "[n]o judgment by [his stepdaughter]" and used "sex as coping."[1]

Between 1993 and 2003, a period overlapping in part with his sexual abuse of his stepdaughter, the defendant was convicted of several noncontact sexual offenses against other victims, including indecent exposure; lewd, wanton, and lascivious conduct; and open and gross lewdness. In 2003, the defendant, who was in his car, approached a woman who was walking, exposed his penis, masturbated, and asked the victim, "Do you want some of this?" Ten years earlier in 1993, the defendant was convicted of noncontact offenses following an incident during which he exposed his penis to at least three women at a mall parking lot. He followed them in his car, as they circled the lot, fearful to leave. The defendant explained that he was motivated to commit these offenses to prove he was sexually aroused by women and to deny his homosexuality. Separately, he explained that he felt "emasculated at home," "feeling as if he had a lack of power and control," and that he exposed himself "to be acknowledged that [he] was a man" and to regain "some semblance of control." In 1980, while on a beach, the defendant (then fourteen years old) exposed his penis to a

[1] During his first interview with Dr. Katrin Rouse-Weir, one of the qualified examiners, the defendant indicated that he did not know why he had assaulted his stepdaughter.

woman, who was approximately thirty yards away, and masturbated. As with the aforementioned noncontact offenses, the defendant explained that he had wanted to prove he liked women. The defendant did not complete sex offender treatment while incarcerated.

The defendant has a lengthy criminal history and while incarcerated was subject to nineteen disciplinary reports. The disciplinary reports show that the defendant engaged in repeated instances of the same misconduct despite being disciplined. For example, he was sanctioned several times for possessing gambling materials, stealing, and making clothing with pockets in contravention of Department of Correction rules. In 2016, the defendant was sanctioned for engaging in sexual behavior with another inmate, triggering a Prison Rape Elimination Act investigation.

In June 2017, before the defendant's scheduled release on the child rape conviction, the Commonwealth filed a petition to civilly commit the defendant on the basis that he "is a 'sexually dangerous person' as defined in G. L. c. 123A, § 1[](i), and likely to engage in sexual offenses if not confined to a secure facility." At trial, two qualified examiners and one independent expert opined that the defendant meets the statutory definition of an SDP, and that he is likely to sexually reoffend if not confined in a secure facility.

The first qualified examiner -- Dr. Katrin Rouse-Weir -- opined that the defendant suffers from pedophilia and exhibitionistic disorder, that his history of sexual offenses shows that he repeatedly has acted on his deviant sexual interest in prepubescent girls and repeatedly, compulsively, and impulsively (despite numerous arrests, convictions, and sanctions) engaged in exhibitionism, and that he suffers from a mental abnormality, as defined by G. L. c. 123A, § 1.[2] This sexual deviancy, Rouse-Weir testified, "is a significant factor indicating risk of re-offense." Rouse-Weir noted that the defendant's belief that he committed his prior crimes due to his homosexuality illustrated cognitive distortion and that his failure to complete sex offender treatment during his incarceration indicated that he had not yet engaged in a crucial process designed to help him manage his problematic sexually deviant behaviors and interests. Instead, he has used sex as a coping mechanism and has not yet confronted his sexually deviant interests.

Rouse-Weir also opined that, in addition to his pedophilia and exhibitionism (each of which are robustly associated with an

[2] General Laws c. 123A, § 1, defines "[m]ental abnormality" as "a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons."

increased risk of sexual reoffense), the defendant presents with antisocial orientation characterized by impulsivity, criminality (including committing crimes often and repeatedly while incarcerated), and aggression. This antisocial orientation increases his risk of sexual reoffense, according to Rouse-Weir. Significantly, the defendant exhibited other factors associated with increased risk to reoffend sexually, including long-standing substance abuse, multiple victims, stranger victims, and engaging in sexual offenses even after being arrested and sanctioned. The defendant demonstrated intimacy deficits as showcased by his sexual assault on his stepdaughter, the fact that he has few stable adult relationships, and his sexual preoccupation with children. Rouse-Weir also noted that, although a woman from a church visited the defendant on a weekly basis while he was incarcerated, he knew few details about the woman, which was indicative of his continuing intimacy deficits. Rouse-Weir testified that the defendant scored a six on the Static 99R,[3] which correlates to a general recidivism rate of about twenty-one percent. In light of these factors, Rouse-Weir concluded that "it would be reasonable to expect that [the defendant] would re-offend sexually if released from a secure

[3] Rouse-Weir explained that the Static 99R is a metric used by qualified examiners as part of their standard practice, which considers some static risk factors and provides "a probability value based on a five-year re-conviction rate."

facility." Rouse-Weir opined that the defendant could not safely engage in outpatient treatment in the community because of his tendency to manage stress (as would be occasioned by sex offender treatment) by engaging in sexual behavior. Acknowledging that outpatient treatment was available in the community, Rouse-Weir explained that, based on her knowledge, for the last eighteen years the Massachusetts Treatment Center "is the only place that you can receive the intensive sex offender treatment that involves all the recommended components of sex offender treatment. Outpatient treatment doesn't provide that same level of intensity or treatment experience exposure. They just don't have, for example, behavioral treatment or psycho educational classes."

The other qualified examiner -- Dr. Gregg Belle -- testified similarly, opining that the defendant suffered from mental abnormalities in the form of exhibitionistic and pedophilic disorders. Based on an empirically guided and actuarial risk assessments,[4] and considering the defendant's sexually deviant preferences, antisocial orientation, history of convictions, substance abuse history, intimacy deficits, poor problem solving, and use of sex as coping, Belle opined that the defendant is likely to reoffend if not confined to a secure

[4] Belle also used the Static-99R tool, obtaining the same results as Rouse-Weir.

facility and that outpatient treatment was insufficient to mitigate these risk factors.

Dr. Carol Feldman, who reviewed the defendant's records, but did not interview him, agreed that the defendant suffered from a mental abnormality of pedophilia. She also opined that he had an antisocial personality disorder. She based that opinion on his "[r]eckless disregard for the health and safety of others, lack of impulse control, no remorse, irritability, deceitfulness, impulsivity, failure to plan ahead" and his behaviors in exposing himself to women. She noted that the defendant's failure to complete sex offender treatment was significant because successful treatment allows individuals to develop internal controls over their sexually deviant impulses.

The jury found that the defendant is an SDP, and the trial judge committed him to the Massachusetts Treatment Center at Bridgewater for an indefinite term of one day to life.

Discussion. 1. Sufficiency of the evidence. We review the defendant's challenge to the sufficiency of the evidence to determine "whether, after viewing the evidence (and all permissible inferences) in the light most favorable to the Commonwealth, any rational trier of fact could have found, beyond a reasonable doubt, the essential elements of sexual

dangerousness."[5] Commonwealth v. Boyer, 61 Mass. App. Ct. 582, 589 (2004). On appeal, the defendant contends that because his prior offenses include noncontact offenses, the Commonwealth was required (but failed) to adduce sufficient evidence that any predicted noncontact offense would "instill in his victims a reasonable apprehension of being subjected to a contact sex crime." Commonwealth v. Suave, 460 Mass. 582, 588 (2011). Acknowledging that the three experts testified that he was likely to reoffend sexually if not confined to a secure facility, the defendant contends that their failure to articulate that he was likely to reoffend through a noncontact offense giving rise to a fear of a contact offense is fatal. The Commonwealth argues that Suave is inapposite because here, the Commonwealth proceeded on a theory that the defendant's noncontact offenses had escalated, giving rise to his present conviction for contact offenses, including rape, against his stepdaughter. Cf. Commonwealth v. Spring, 94 Mass. App. Ct. 310, 320-322 (2018) (failing to request Suave instruction was

[5] "In order to find the defendant is a 'sexually dangerous person,' the Commonwealth must prove three things: (1) the defendant has been convicted of a '[s]exual offense,' as defined in G. L. c. 123A, § 1; (2) he suffers from a '[m]ental abnormality' or '[p]ersonality disorder,' as those terms are defined in § 1; and (3) as a result of such mental abnormality or personality disorder, the defendant is likely to engage in sexual offenses if not confined to a secure facility" (citation omitted). Commonwealth v. Suave, 460 Mass. 582, 584 n.3 (2011).

constitutionally ineffective assistance of counsel where defendant's criminal history showed de-escalation in conduct from contact sex offenses twenty-two years earlier to more recent noncontact sex offenses).

Here, the evidence was sufficient to allow the jury to conclude, beyond a reasonable doubt, that, absent a civil commitment, the defendant was likely to commit another contact offense. The defendant engaged in an escalating pattern of sexual offenses, transitioning from noncontact sexual offenses in 1980, 1993, and 2003 against strangers to contact sexual offenses against his stepdaughter, whom he abused for years before his incarceration in 2006. While incarcerated, the defendant continued to violate disciplinary rules, including engaging in sexual behavior with another inmate. He suffers from pedophilia and exhibitionism and has not completed available sex offender treatment. Instead, he has used sex as a coping mechanism. He has an antisocial orientation as well as numerous other risk factors that make him likely to reoffend sexually. On this record, a jury could reasonably conclude that the defendant was likely to reoffend through a contact offense.

Even if we assume arguendo that the predicted future offense was another noncontact offense, thereby triggering the requirements of Suave, there was sufficient evidence for the jury to conclude that such an offense would instill a reasonable

apprehension of being subject to a contact sex crime. Indeed, a reasonable trier of fact could conclude, based on the direct evidence, that his past noncontact offenses (at the mall parking lot in 1993 during which he pursued his victims who were fearful to leave and his 2003 offense in his car when he asked the victim, "Do you want some of this?" as he masturbated) had instilled just this type of apprehension.[6]

Next, the defendant maintains the Commonwealth failed to prove that he has "serious difficulty in controlling" his sexual behavior, as required by Kansas v. Crane, 534 U.S. 407, 412-413 (2002). The defendant's argument apparently relies on Rouse-Weir's opinion that he did not suffer from a personality disorder -- "a congenital or acquired physical or mental condition that results in a general lack of power to control sexual impulses." G. L. c. 123A, § 1.[7] The argument ignores Feldman's opinion that the defendant suffered from a personality

[6] The defendant maintains that he was provided with ineffective assistance of trial counsel because his counsel did not request a Suave instruction. The jury were instructed on the essence of the requirements under Suave; and, as set forth, supra, the evidence was strong that the defendant was likely to commit a contact offense or a noncontact offense giving rise to a reasonable apprehension of a contact offense. Thus, the defendant's counsel's failure to raise a spurious argument did not deny the defendant a "substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).

[7] Belle also opined that the defendant did not qualify under the statutory definition of "personality disorder."

disorder (which includes a "general lack of power to control")[8] and the testimony of all three experts that he suffered from a mental abnormality (which includes a conclusion that the defendant has a condition affecting his emotional or volitional capacity in a manner that predisposes him to commit criminal acts to a degree that makes him a menace to the health and safety of other persons, see note 2, supra) and their opinions that he was likely to reoffend sexually if released from a secure facility. This showing of the defendant's overall inability to manage his sexually deviant impulses outside of confinement was sufficient to meet the requirements of due process set forth in Crane.

2. Admissibility of expert testimony. The defendant challenges the admission of expert testimony regarding the efficacy of inpatient treatment as opposed to outpatient treatment, the superiority of group treatment over individual therapy, the impact of sex offender treatment on likelihood to reoffend, the defendant's deviant sexual interest in children, and the defendant's intimacy deficits, as exhibited by his lack of information regarding a woman who visited him weekly. The

[8] In Dutil, petitioner, 437 Mass. 9, 17-18 (2002), the Supreme Judicial Court held that the requirement of the then-existing SDP statute that the Commonwealth show a "general lack of power to control" generally complied with the due process requirements of Crane.

defendant argues that the experts should not have been permitted to offer such testimony because they did not cite sources supporting their opinions, and because there are studies (which the defendant raises for the first time on appeal) that support different conclusions. We disagree.

Qualified examiners' testimony, based on their experience, knowledge, and informed judgment, is admissible in SDP proceedings. See Commonwealth v. Baxter, 94 Mass. App. Ct. 587, 590, 592 (2018); Commonwealth v. Bradway, 62 Mass. App. Ct. 280, 286 (2004). Of course, the defendant was free to cross-examine the experts on their testimony.[9] See Baxter, supra at 592 ("In the absence of evidence suggesting that the reliability of the witness's testimony is in doubt . . . , the remedy for the

[9] The defendant did not challenge the experts' qualifications or statements at trial. Cf. Commonwealth v. Ortiz, 93 Mass. App. Ct. 381, 386–387 (2018) (judge applied Daubert-Lanigan to penile plethysmograph test challenged for its evidentiary value as diagnostic tool); Gammell, petitioner, 86 Mass. App. Ct. 8, 13–14 (2014) (same); LeSage, petitioner, 76 Mass. App. Ct. 566, 571–573 (2010) (voir dire proper where Commonwealth failed to show "qualified examiner" possessed level of experience required by statute).

defendant's concerns is in forceful cross-examination and argument, not in exclusion").[10]

Judgment affirmed.

By the Court (Green, C.J, Milkey & Wendlandt, JJ.[11]),

Joseph F. Stanton

Clerk

Entered: October 7, 2020.

[10] To the extent the defendant's other arguments have not been explicitly addressed, they "have not been overlooked. We find nothing in them that requires discussion." Commonwealth v. Brown, 479 Mass. 163, 168 n.3 (2018), quoting Commonwealth v. Domanski, 332 Mass. 66, 78 (1954).

[11] The panelists are listed in order of seniority.