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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MARK SOKOLSKY, Defendant and Appellant.	B212437 (Los Angeles County Super. Ct. No. ZM003650)

APPEAL from a judgment of the Superior Court of Los Angeles County, Norm Shapiro, Judge. Affirmed as modified.

Richard E. Holly, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Kenneth C. Byrne and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

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*Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts II and III of the Discussion.

Mark Sokolsky appeals from a jury verdict adjudicating him a sexually violent predator under Welfare and Institutions Code section 6600 et seq. (Sexually Violent Predator's Act (SVPA)).[1] Appellant argues he is entitled to a hearing on his right to represent himself in propria persona in this court. He also challenges the sufficiency of the evidence of his risk of reoffending, and contends that his involuntary commitment violates his due process rights. Appellant asserts that the Static-99 test employed by the psychological evaluators should not have been admitted without an evidentiary hearing under *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*). Respondent contends that the two-year commitment imposed was unauthorized under Proposition 83.

In the published portion of this opinion we conclude appellant has no right to self-representation on appeal and that summary denial of his application was not an abuse of discretion. We decline appellant's renewed request to represent himself made at oral argument. We also agree with respondent that the proper term of commitment was indeterminate and modify the term of commitment on that ground. In the unpublished portion of this opinion (parts II and III) we find sufficient evidence of appellant's risk of reoffending and reject his argument that a *Kelly* hearing was required as to the Static-99 test. As modified, the judgment is affirmed.

FACTUAL AND PROCEDURAL SUMMARY

Appellant and the district attorney stipulated that appellant was convicted of multiple counts of felony molestation of children under 14 years of age in 1979 and again in 1989. These felonies qualified as sexually violent offenses for the purposes of the SVPA. After the 1979 conviction, appellant was sent to Patton State Hospital as a mentally disordered sex offender (MDSO). He was returned to court nine months later, after having been found untreatable because he would not acknowledge his sex offenses.

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1 Statutory references are to the Welfare and Institutions Code unless otherwise indicated.

The earlier proceeding finding him a mentally disordered sex offender was reversed.[2] After new and conflicting psychological evaluations, the trial court found appellate was not an MDSO and placed him on probation. Appellant violated probation five months later by showing pornography to children. He was sent to prison and was released in March 1983.

In 1988, while living with his second wife, appellant was arrested and convicted for molesting his stepdaughters.[3] He was convicted of five counts of child molestation and sentenced to 21 years in prison.

In March 2000, the district attorney filed a petition under section 6250 et seq., alleging appellant was likely to engage in sexually violent predatory criminal behavior if released and requesting a trial to determine whether he is a sexually violent predator under the SVPA. Probable cause was found that appellant came within the statute and a jury trial was held. The jury found appellant to be a sexually violent predator and he was committed on August 12, 2008, for a period of two years. This timely appeal followed.

DISCUSSION

I

Appellant sought to represent himself on appeal. We summarily denied that request. Appellant's petition for mandate/prohibition and stay was denied by the California Supreme Court. The United States Supreme Court denied his petition for writ of certiorari.

Appellant acknowledges that *People v. Scott* (1998) 64 Cal.App.4th 550, 579, held that the right to self-representation recognized in *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*) does not extend to appeals. Citing *Martinez v. Court of Appeal* (2000) 528 U.S. 152, 163, and *Price v. Johnston* (1948) 334 U.S. 266, 284, he argues an appellate

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2 Apparently appellant had not acquiesced to the proceedings.

3 Appellant claims he fathered one of the two girls.

court has discretion to grant a request for self-representation on appeal. Appellant argues that the denial of his request deprived him of a substantial right.

Alternatively, appellant argues that due process entitles him to a hearing on his request for self-representation because of the significant liberty interests at stake in a proceeding under the SVPA. He cites *People v. Williams* (2003) 110 Cal.App.4th 1577, which held that once the state granted a statutory right to self-representation in an MDSO hearing, that interest is protected by due process.

In *People v. Fraser* (2006) 138 Cal.App.4th 1430 (*Fraser*), the Court of Appeal held that a defendant has no right to self-representation in an SVPA trial. The court concluded there is no constitutional right to self-representation in a civil commitment proceeding under the SVPA, under either the rationale of *Faretta* or the due process clause of the United States Constitution. (*Id.* at p. 1444.)

The appellant in *Fraser* cited no direct authority to support application of the *Faretta* right to self-representation to a civil commitment proceeding under the SVPA. He also acknowledged that the only decision on the issue, *People v. Leonard* (2000) 78 Cal.App.4th 776, 784, merely assumed without deciding that individuals subject to the SVPA are to receive the same constitutional protections accorded criminal defendants, including the right to self-representation. (*Fraser, supra*, 138 Cal.App.4th at p. 1444.) Fraser based his claim to a right to self-representation on the *Faretta* rationale of respect for the individual and the Sixth Amendment right to make one's own defense. (*Id.* at p. 1445.) Self-representation is required, he argued, to ensure a defendant is able to present a defense of his own choosing.

The *Fraser* court observed that the United States Supreme Court has not extended the right to self-representation under *Faretta* to proceedings other than criminal prosecutions. It cited *Martinez v. Court of Appeal, supra,* 528 U.S. 152, in which the court declined to extend the right to appeal from a criminal conviction. (*Fraser*, *supra*, 138 Cal.App.4th at p. 1445, citing *Martinez*, *supra*, 528 U.S. at pp. 159-160.)

In addition, the Court of Appeal in *Fraser* examined California cases which found no Sixth Amendment right to self-representation in proceedings other than criminal

prosecutions. In *People v. Williams, supra,* 110 Cal.App.4th 1577, 1588, the court rejected a claim that a defendant in a proceeding to commit him as a mentally disordered sex offender had a constitutional right to self-representation. In *In re Angel W.* (2001) 93 Cal.App.4th 1074, 1080-1083, the court ruled that a parent's right to self-representation in a juvenile dependency proceeding is statutory rather than constitutional. In *Conservatorship of Joel E.* (2005) 132 Cal.App.4th 429, an objector's request to represent himself in a conservatorship proceeding was found to have no basis in the Sixth Amendment because it applies exclusively to criminal prosecutions. (*Id*. at p. 435.) In light of the nonpunitive purpose of commitment of a conservatee, the court concluded that the proceedings are not "'sufficiently akin to criminal prosecutions to warrant Sixth Amendment protection.'" (*Ibid*.)

The *Fraser* court concluded that the rationale of these cases applied to preclude application of the Sixth Amendment to SVPA proceedings: "The California Supreme Court has established that SVPA proceedings have a nonpunitive purpose." (*Fraser*, *supra*, 138 Cal.App.4th at p. 1446, citing *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1144 (*Hubbart*).) It held: "Consequently, because a civil commitment proceeding under the SVPA has a nonpunitive purpose and is therefore not equivalent to a criminal prosecution, we determine that there is no Sixth Amendment right to self-representation in SVPA proceedings." (*Fraser*, at p. 1446.)

Fraser's alternative claim to a constitutional right to self-representation under the due process clause also was rejected. The court acknowledged that a defendant in an SVPA proceeding is entitled to due process protections because civil commitment involves a significant deprivation of liberty. (*Fraser*, *supra*, 138 Cal.App.4th at p. 1446, citing *People v. Otto* (2001) 26 Cal.4th 200, 209 (*Otto*).) But the due process rights applicable in an SVPA proceeding are those accorded in civil proceedings rather than criminal. (*Ibid.*) The court applied four factors identified by the *Otto* court to determine whether due process requires the right to self-representation in SVPA proceedings: "'(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any,

of additional or substitute procedural safeguards; (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail; and (4) the dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official.' (*Otto*, *supra*, 26 Cal.4th at p. 210.)" (*Id*. at p. 1447.)

The private interests identified in *Fraser* were liberty, reputation, and freedom from unwanted treatment. (*Fraser*, *supra*, 138 Cal.App.4th at p. 1447.) The court concluded that the second factor, the value of self-representation, weighed against a constitutional right "because it is well established that self-representation does not 'further the fairness or accuracy of the proceedings.' (*Conservatorship of Joel E.*, *supra*, 132 Cal.App.4th at p. 438.)" (*Id.* at p. 1447, also citing language in *Faretta*, *supra*, 422 U.S. at p. 834 and *People v. McDaniel* (1976) 16 Cal.3d 156, 164.) The third factor, the government's interest in SVPA proceedings, was found not to weigh against finding a constitutional right to self-representation because the *Fraser* court concluded self-representation was unlikely to place significant fiscal or administrative burdens on the government or impede the government's interest in protecting the public. (*Id*. at p. 1448.)

The defendant's dignitary interest in SVPA proceedings was the fourth factor considered by the *Fraser* court. It found: "[T]he dignitary interest protected in an SVPA proceeding is not equivalent to the *Faretta* concept of respect for the individual in a criminal prosecution. The California Supreme Court has explained that a person subject to the SPVA has a dignitary interest 'in being informed of the nature, grounds and consequences of the SVP commitment proceeding' and in 'presenting his side of the story before a responsible government official.' [Citation.]" (*Fraser*, *supra*, 138 Cal.App.4th at p. 1448.) The court concluded that self-representation is not necessary to protect a defendant's dignitary interest in an SVPA proceeding, which contains built-in procedural safeguards to protect this interest. (*Ibid.*) It also provides a right to counsel. (§ 6603, subd. (a).)

We agree with the analysis of the court in *Fraser*, *supra*, 138 Cal.App.4th 1430, and determine that this analysis leads to the conclusion that there is no constitutional right to self-representation on appeal from an SVPA commitment. Appellant also argues that, even if he does not have a right to argue before this court in propria persona, we have discretion to allow him to do so. At oral argument, his attorney urged that we exercise that discretion by granting appellant's request. We have considered counsel's argument and reconsidered appellant's original request. We decide that this matter should proceed as briefed, with appellant being represented by his attorney of record, and we decline the renewed request to allow him to represent himself.

II

Appellant challenges the sufficiency of the evidence that he currently suffers from a mental disorder that renders him unable to control his volition to commit sexually violent offenses. He argues that he currently poses no threat to commit a sexually violent predatory offense as required by the SVPA. His argument is focused on the latter element.

The SVPA, "as originally enacted (Stats. 1995, ch. 763, § 3, p. 5922), provided for the involuntary civil commitment for a two-year term of confinement and treatment of persons who, by a unanimous jury verdict after trial (Welf. & Inst. Code, former §§ 6603, subd. (d), 6604), are found beyond a reasonable doubt to be an SVP (former § 6604)." (*People v. McKee* (2010) 47 Cal.4th 1172, 1185 (*McKee*), fn. omitted.) "As originally enacted, an SVP was defined as 'a person who has been convicted of a sexually violent offense against two or more victims for which he or she received a determinate sentence 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.' (Former § 6600, subd. (a).) A 'sexually violent offense' included a Penal Code section 288 lewd act on a child under age 14. (Former § 6600, subd. (b); *Hubbart*, *supra*, 19 Cal.4th at p. 1145.) Under the Act, a person is 'likely' to engage in sexually violent criminal behavior (i.e., reoffend) if he or she 'presents a substantial danger, that is, a serious and well-founded risk, that he or she will commit such crimes if free in the

community.' (*People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 922.)"[4] (*Id*. at p. 1186.)

"Proposition 83, passed by the voters in November of 2006, modified the terms by which sexually violent predators (SVP's) can be released from civil commitment under the [SVPA]. In essence, it changes the commitment from a two-year term, renewable only if the People prove to a jury beyond a reasonable doubt that the individual still meets the definition of an SVP, to an indefinite commitment from which the individual can be released if he proves by a preponderance of the evidence that he no longer is an SVP." (*People v. McKee*, *supra*, 47 Cal.4th at pp. 1183-1184.)

"We review sufficiency of the evidence challenges under the SVP Act according to the same standard pertinent to criminal convictions. [Citation.] We thus review the entire record in the light most favorable to the judgment to determine whether substantial evidence supports the determination below. [Citation.] We may not determine the credibility of witnesses, nor reweigh any of the evidence, and we must draw all reasonable inferences in favor of the judgment below. [Citation.]" (*People v. Fulcher* (2006) 136 Cal.App.4th 41, 52 (*Fulcher*).)

The *Fulcher* court explained: "In order to establish that defendant was an SVP, the People must prove that (1) *defendant was convicted of two separate sexually violent offenses*; (2) he had a diagnosable mental disorder that made him a danger to the health or safety to others; (3) his disorder makes it likely he will engage in sexually violent criminal conduct if released; and (4) his sexually violent criminal conduct will be predatory in nature. (*People v. Roberge* (2003) 29 Cal.4th 979, 985; *Cooley v. Superior*

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4 As amended by Proposition 83 in 2006, section 6600, subdivision (a)(1) now provides: "'Sexually violent predator' means a person who has been convicted of a sexually violent offense against *one* or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." There is no dispute in this case that appellant committed qualifying sexual offenses within the meaning of the SVPA.

Court (2002) 29 Cal.4th 228, 243; *People v. Hurtado* (2002) 28 Cal.4th 1179, 1186; § 6600, subd. (a).)" (136 Cal.App.4th at p. 52.)

The People's case was based on the testimony of Drs. Jack Vognsen and Douglas Korpi, both psychologists. Appellant argues that their opinions were "based entirely upon appellant's past history of sexual abuse last occurring nearly 20 years ago. Neither their more recent interviews nor their reviews of his custodial record have produced any current evidence supporting their conclusions that appellant is an SVP." In particular, he attacks the reliance of the People's psychologists on the Static-99 test instrument, which is designed to measure the risk that a sexual offender may reoffend. He contends that the test is unreliable as applied here because the score it produces does not change over time because it does not include an assessment of present circumstances, such as the offender's age or health problems.

Appellant argues that during his nearly 17 years of incarceration, there is no evidence indicating a continuing sexual deviancy. He describes his 14 violations of prison rules between 1992 and 1998 as not being either sexually or aggressively related. He also contends "there is no substantial evidence that a person of appellant's age [56] continues to pose a serious risk of sexual abuse."

In a related argument, appellant contends that his involuntary commitment is a violation of his federal right to due process because there was no substantial evidence that he currently poses a serious risk of reoffending. He cites *Kansas v. Crane* (2002) 534 U.S. 407, 413, for the proposition that involuntary commitment is prohibited unless there is "proof of serious difficulty in controlling behavior." Thus, he argues, "the failure of proof that appellant poses a current risk of reoffending is a constitutional infirmity requiring reversal of appellant's commitment."

In *Hubbart v. Superior Court, supra,* 19 Cal.4th 1138, our Supreme Court explained that the SVPA "makes clear that it is the present inability to control sexually violent behavior which gives rise to the likelihood that more crimes will occur, and which makes the SVP dangerous if not confined. The danger and threat of harm posed to the community necessarily exist whenever such a mental disorder is found—a finding

required for commitment as an SVP. Nothing in the statute permits the trier of fact to conclude that the committed person 'currently' suffers from a 'diagnosed mental disorder' and is 'a danger,' even though he is not likely to commit sexually violent crimes and does not pose a present and substantial threat to public safety." (*Id*. at p. 1162.)

The Supreme Court in *Hubbart* expressly rejected an argument that the SVPA is flawed "because it authorizes the use of prior qualifying sex crimes to prove that the alleged predator is mentally disordered and dangerous" and "does little more than establish a 'presumption' of danger based on past crimes." (19 Cal.4th at p. 1163.) It held: "We disagree. Notwithstanding the nuances of psychiatric diagnosis and the difficulties inherent in predicting human behavior, the United States Supreme Court has consistently upheld commitment schemes authorizing the use of prior dangerous behavior to establish both present mental impairment and the likelihood of future harm. ([*Kansas v.*] *Hendricks* [(1997)] 521 U.S. 346, 358; *Heller* [*v. Doe* (1993)] 509 U.S. 312, 323; *Allen* [*v. Illinois* (1986)] 478 U.S. 364, 371; *Minnesota v. Probate Court* [(1940)] 309 U.S. 270, 274.)" (*Hubbart v. Superior Court, supra,* 19 Cal.4th 1138, 1163-1164.) Additionally, the *Hubbart* court concluded "the Legislature could reasonably conclude that the evidentiary methods contemplated by the Act are sufficiently reliable and accurate to accomplish its narrow and important purpose—confining and treating mentally disordered individuals who have demonstrated their inability to control specific sexually violent behavior through the commission of similar prior crimes. As noted, the Act precludes commitment based solely on evidence of such prior crimes. (§ 6600, subd. (a).) We find no patent due process violation on this ground." (*Id*. at p. 1164.)

Contrary to appellant's characterization of the evidence, the People's psychologists relied on a number of factors in addition to appellant's history of sexual molestation in reaching the conclusion that he poses a sufficient risk of reoffending, and qualifies as a sexually violent predator under the SVPA. Although both psychologists used the Static-99 test instrument, it was only one of several measures and factors upon which they relied.

Dr. Vognsen performed a total of eight evaluations of appellant's risk of reoffending over time. He administered four different actuarial instruments, including the Static-99, in addition to a clinical assessment of appellant to determine whether the actuarial results were correct. In addition to the four actuarial tests, Dr. Vognsen took into account the following factors: appellant's sexual deviance (diagnosis as pedophile); treatment failure; refusal to participate in treatment at Patton Hospital; poor ability to cooperate with supervisors; poor general self-regulation (impulsiveness); poor cognitive problem solving; history of lying and anger control problems; and diagnosis with a personality disorder. In his opinion, based on all these factors, appellant is likely to reoffend.

Dr. Korpi also performed a number of evaluations of appellant, the last occurring one month before trial. He testified that appellant was 56 at the time of trial and the risk of his reoffending would drop at age 60. Dr. Korpi administered four actuarial measures including the Static-99. On each, appellant scored in the medium-high to high risk of sexually reoffending. Dr. Korpi acknowledged that the Static-99 "is just an approximate test."

Factors identified by Dr. Korpi as increasing the risk appellant would reoffend included: his diagnosis as a pedophile; three arrests for sexual offenses; a boy victim; and his identification with children and grooming them to be victims by befriending them. Another factor considered was that appellant had both sexual offenses with children and a nonsexual battery on his wife, which increased the risk of reoffending. Appellant's history of employment problems and gambling problems demonstrated an inability to settle into a career, which indicates that he is not well socialized. His parents separated before appellant was 16, a recognized risk factor. Dr. Korpi also noted appellant's parole and probation violations, one of the clearest factors for reoffending. In addition, appellant has a history of disciplinary violations in custody and problems with anger. Another factor considered by Dr. Korpi was appellant's failure to complete sex-specific treatment.

Dr. Korpi cited appellant's failure to self-regulate, including his current impulsive and hostile behavior and problems with authorities. As an example, Dr. Korpi noted appellant had thrown pills and forged a nurse's signature on an affidavit about his need for contact lenses. Another factor supporting the conclusion that appellant was at risk of reoffending was that he is alone in the world with no family and friends. When asked about appellant's amenability to treatment, Dr. Korpi responded: "He thinks, one, there is nothing wrong with him, so he doesn't need treatment; and, two, he thinks treatment is absurd. His treatment is God."

In *People v. Burris* (2002) 102 Cal.App.4th 1096, there was evidence that while awaiting trial and sentencing as to one victim, the defendant committed new sex crimes, repeatedly violated parole (one violation was a new sexual offense) and persistently committed prison rule violations. The *Burris* court held that this was substantial evidence of lack of control. (*Id*. at p. 1109.) It found sufficient evidence that the defendant had a mental illness that made him unlikely to be deterred by the threat of criminal punishment and thus likely to reoffend, which amounted to sufficient evidence of lack of control. (*Id*. at pp. 1110-1111.) In the present case, there was evidence that appellant violated probation and parole by committing new sexual offenses with children, and had 14 rule violations while incarcerated.

A defendant's refusal to undergo treatment was found to constitute "potent evidence that he is not prepared to control his untreated dangerousness by voluntary means" in *People v. Sumahit* (2005) 128 Cal.App.4th 347, 354. The court explained: "The availability of treatment is at the heart of the SVPA. [Citation.] 'Through passage of the SVPA, California is one of several states to hospitalize or otherwise attempt to treat troubled sexual predators.' (*Hubbart v. Superior Court*[*,supra,*] 19 Cal.4th 1138, 1143 . . . .) Accordingly, one of the key factors which must be weighed by the evaluators in determining whether a sexual offender should be kept in medical confinement is 'the person's progress, if any, in any mandatory SVPA treatment program he or she has already undergone; [and] *the person's expressed intent, if any, to seek out and submit to any necessary treatment* . . . .' [Citation.] A patient's refusal to cooperate in any phase

of treatment may therefore support a finding that he 'is not prepared to control his untreated dangerousness by voluntary means if released unconditionally to the community.' (*Ibid*.)" (*Id*. at pp. 354-355.)

There was evidence that appellant adamantly and consistently refused treatment for his sexual crimes. He was returned from Patton State Hospital after his first conviction, having been found "untreatable." Thereafter, at Coalinga, he again refused treatment. Dr. Vognsen testified that appellant said he was relying on his religion and God to keep him from reoffending. Appellant's reliance on religion to keep him from reoffending was similar to statements he made after his first conviction, before he committed the crimes which led to his second trial and conviction.

Dr. Vognsen and Dr. Korpi testified that appellant was reported for 14 rules violations while incarcerated; constantly tried to "worm out" of rules; was verbally aggressive with staff, was profane with staff, threw things at staff, threatened staff if he did not get his way, and was angry and confrontational with staff in 2007 and 2008. In addition, he falsified a purported declaration from a registered nurse in a court filing.

We find substantial evidence to support the determination of the jury that appellant is a sexually violent predator within the meaning of the SVPA, and that there was no violation of appellant's federal constitutional right to due process.

III

Appellant also argues that a hearing on the admissibility of the Static-99 evidence was required under *People v. Kelly*, *supra*, 17 Cal.3d 24. In *People v. Therrian* (2003) 113 Cal.App.4th 609, 611, the court held: "[W]hen an expert's opinion regarding the likelihood of defendant reoffending is not based solely upon the results of a Static-99 test . . . , a *Kelly* hearing on the admissibility of expert's testimony regarding the test is not required." (Fn. omitted.) Relying on *People v. Stoll* (1989) 49 Cal.3d 1136, 1157, the *Therrian* court reasoned that the *Kelly* test had never been applied to expert medical testimony """even when the witness is a psychiatrist and the subject matter is as esoteric as the reconstitution of a past state of mind or the prediction of future dangerousness, or even the diagnosis of an unusual form of mental illness not listed in the diagnostic

manual of the American Psychiatric Association . . . ."' [Citations.]" (*Therrian, supra*, at p. 615.)

The Court of Appeal in *Therrian* determined that the *Kelly* rule had been applied to unproven techniques or procedures that appear to provide some "'definitive truth which the expert need only accurately recognize and relay to the jury, . . .'" (113 Cal.App.4th at p. 614.) It reasoned that "'absent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to *Kelly*/*Frye*.' [Citation.] 'In most other instances, the jurors are permitted to rely on their own common sense and good judgment in evaluating the weight of the evidence presented to them. [Citations.]'" (*Id*. at p. 614.)

The experts in *Therrian* had made clear that the Static-99 "was not definitive," and that many other risk factors were considered in forming an expert opinion of likelihood to reoffend. (113 Cal.App.4th at p. 615.) Under these circumstances, the Court of Appeal concluded the trial court did not err by admitting expert testimony based on the Static-99 test without a *Kelly* hearing. (*Id*. at pp. 615-616.)

Here, as in *Therrian*, *supra*, 113 Cal.App.4th 609, the experts did not rely solely on Static-99 predictions and acknowledged the test's limitations. The jury was presumably able to use its common sense and judgment in evaluating the experts' opinions. We adopt the reasoning of *Therrian* and find no error in the admission of Dr. Vognsen and Dr. Korpi's testimony regarding the Static-99 test without a *Kelly* hearing.

IV

Respondent contends imposition of a two-year commitment was invalid because at the time, the law required commitment for an indeterminate term. As we explain, we find merit in the contention and modify the commitment term to reflect an indeterminate term.

On November 7, 2006, the voters approved Proposition 83, which went into effect the next day.[5] (*McKee*, *supra*, 47 Cal.4th at p. 1186.) The proposition changed the term for a person found to be a SVP from two years to an indeterminate term. As modified by

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[5] This proposition is commonly known as "Jessica's Law." (*People v. Glenn* (2009) 178 Cal.App.4th 778, 815.)

the proposition, section 6604 now reads in pertinent part: "'If the court or jury determines that the person is a sexually violent predator, the person shall be committed *for an indeterminate term* to the custody of the State Department of Mental Health for appropriate treatment and confinement in a secure facility designated by the Director of Mental Health . . . .'" (*People v. Shields* (2007) 155 Cal.App.4th 559, 562-563 (*Shields*); see also *McKee*, *supra*, 47 Cal.4th at pp. 1186-1187.)

The court in *Shields* reviewed the statements of intent in Proposition 83: "[P]roposition 83 states that the change from a two-year term to an indeterminate term is designed to eliminate automatic SVP trials every two years when there is nothing to suggest a change in the person's SVP condition to warrant release: '"The People find and declare each of the following: [¶] . . . [¶] (k) California is the only state, of the number of states that have enacted laws allowing involuntary civil commitments for persons identified as sexually violent predators, which does not provide for indeterminate commitments. California automatically allows for a jury trial every two years irrespective of whether there is any evidence to suggest or prove that the committed person is no longer a sexually violent predator. As such, *this act allows California to* protect the civil rights of those persons committed as a sexually violent predator while at the same time *protect society and the system from unnecessary or frivolous jury trial actions where there is no competent evidence to suggest a change in the committed person*."' (Historical and Statutory Notes, 47A West's Ann. Pen. Code [(2007 supp.)] foll. § 209, p. 430, italics added; Prop. 83, § 2, subd. (k).)" (*Shields*, *supra*, 155 Cal.App.4th at p. 564.)

The People's trial brief addressed the change in the commitment period: "[D]ue to the ambiguity concerning the retroactive application of the law at the time, and because of concern over judicial resources in trial and appellate courts, the Los Angeles County District Attorney's Office, the Los Angeles County Public Defender's Office and former presiding judge of the Criminal Courts David Wesley entered into a stipulation prior to the passage of the new law. The stipulation provides that all SVP initial commitment petitions which were already filed before the passage of Jessica's law would have a two-

year commitment imposed instead of an indeterminate commitment. The People will abide by the stipulation and ask the court to accept the stipulation in this case." After the jury reached its verdict, both counsel and the court agreed that the appropriate term of commitment was two years. A two-year commitment was imposed consistent with the local policy agreement.

The propriety of this arrangement in light of Proposition 83 is before the Supreme Court in *People v. Castillo* (S171163). The order granting review states: "The issue to be briefed and argued is limited to the following: Did the Court of Appeal err by increasing the term of defendant's commitment under the Sexually Violent Predator Act from two years to an indeterminate term pursuant to the 2006 amendments to Welfare and Institutions Code section 6604, when the Los Angeles County District Attorney had stipulated that only the two-year commitment term would be sought?"

Appellant argues respondent is estopped from taking a position contrary to that taken by the district attorney's office at trial. We disagree. Because Proposition 83 was in effect at the time of trial, and when the commitment was imposed, the trial court had power only to impose an indeterminate commitment in conformity with section 6604 as modified. The application of the indeterminate commitment provision of Proposition 83 to pending petitions to extend commitment under the SVPA was approved in *Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 1289: "Because a proceeding to extend commitment under the SVPA focuses on the person's current mental state, applying the indeterminate term of commitment of Proposition 83 does not attach new legal consequences to conduct that was completed before the effective date of the law. [Citation.] Applying Proposition 83 to pending petitions to extend commitment under the SVPA to make any future extended commitment for an indeterminate term is not a retroactive application." (See also *People v. Whaley* (2008) 160 Cal.App.4th 779, 798.)

We acknowledge that a proceeding under the SVPA is civil in nature and is designed to provide treatment to mentally disordered individuals who cannot control sexually violent behavior. (*People v. Carlin* (2007) 150 Cal.App.4th 322, 332.) We find *People v. Renfro* (2004) 125 Cal.App.4th 223 instructive. In that case, the defendant had

entered into a plea agreement that conditioned his guilty plea on the prosecutor's promise that the offense could not be used as a qualifying offense in a future proceeding to commit the defendant as a mentally disordered sex offender. The *Renfro* court recognized that this type of proceeding was civil in nature rather than criminal and, like the SVPA, was intended to provide mental health treatment for offenders presently suffering from severe mental illness rather than to punish them for past offenses. (*Id*. at pp. 231-232.) But in light of the mandatory statutory parole scheme governing such proceedings, the court in *Renfro* refused to enforce a plea agreement that would effectively have nullified the statutory scheme.

Rejecting the defendant's argument that the prosecution was estopped from not honoring the plea bargain, the court held: "[T]he MDO provision of Renfro's plea agreement went beyond the sentencing court's authority. Specific performance of the plea agreement would undermine the MDO law and, in so doing, undermine public policy, public safety and the administration of justice by our courts." (*People v. Renfro*, *supra*, 125 Cal.App.4th at pp. 232-233 ["neither the prosecution nor the sentencing court has authority to impose a prison sentence without parole or to alter the applicable period of parole established by the Legislature and imposed by the Board of Prison Terms"].)

In addition, we note that appellant has failed to demonstrate any detrimental reliance on the local policy. That is, he did not agree to surrender or forego any actual or potential benefit he might have received under that policy. Instead, as he had a right to do, he contested the commitment and a full trial was held during which the opinions of the People's experts were challenged and examined by appellant's attorney. In addition, an expert psychologist testified on behalf of appellant. Under those facts, we find no basis for estoppel.

The trial court erred in imposing a two-year term of commitment when the applicable law under section 6604 required imposition of an indeterminate commitment.

DISPOSITION

Appellant's commitment order is modified to reflect the indeterminate term mandated by the SVPA (§ 6604) as modified by Proposition 83. The judgment is affirmed in all other respects.

CERTIFIED FOR PARTIAL PUBLICATION.

EPSTEIN, P.J.

We concur:

WILLHITE, J.

SUZUKAWA, J.