COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-638

ROBERT BROWN, petitioner.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The petitioner sought discharge from his civil commitment as a sexually dangerous person (SDP) pursuant to G. L. c. 123A, § 9. A Superior Court jury returned a verdict that the petitioner remains sexually dangerous. On appeal, the petitioner claims that the judge abused her discretion in admitting evidence that the petitioner's score on the Static-99R actuarial test placed him in a category of "[w]ell above average" risk of reoffense.[1] The petitioner also argues that one of the qualified examiners should not have been permitted to testify because she lacked sufficient experience with sexually aggressive offenders. We affirm.

Background. The jury could have found the following facts. In 1990, at age fourteen, the petitioner was adjudicated

[1] "The Static-99R is an actuarial tool, designed to predict the recidivism risk of sexual offenses in adult male sex offenders who have been convicted of at least one sexual offense." Commonwealth v. George, 477 Mass. 331, 335 n.2 (2017).

delinquent for committing indecent assault and battery on a seven year old girl (victim 1). The petitioner cornered victim 1, "grabbed her by the shoulders, kissed her on the mouth, and then grabbed her in the crotch area." The petitioner was placed on probation for that conduct, which he violated, resulting in his commitment to the Department of Youth Services (DYS) until he turned eighteen. After he was released, in 1994, the petitioner sexually assaulted a fourteen year old neighbor (victim 2) on two consecutive nights. The petitioner pinned victim 2's hands behind her head while she told him to stop, tried to kiss her, attempted to put his hands down her pants, and did put his hands under her shirt. The petitioner was convicted of indecent assault and battery and received a suspended sentence. The sentence was imposed in 1996, after the petitioner violated probation.

The petitioner was charged with various nonsexual offenses in the 1990s through 2000. He was adjudicated delinquent for larceny under $250 and breaking and entering in the nighttime with the intent to commit a felony. He was charged as an adult with assault with a dangerous weapon, assault and battery with a dangerous weapon (ABDW), ABDW on a person over sixty, assault with intent to maim, attempted murder, kidnapping, and threats; however, those charges were dismissed for lack of prosecution. The petitioner was convicted of shoplifting, injury to a county

building, buying or receiving stolen property, possession of burglarious tools, unlicensed possession of a firearm, breaking and entering in the nighttime with the intent to commit a felony, and larceny over $250.

The petitioner's governing offenses were committed in 2000, when he violently raped victim 3 at knifepoint. After forcing victim 3 into a dark area, the petitioner beat her and raped her orally, vaginally, and anally. Victim 3 was seriously injured during the attack. The petitioner pleaded guilty to aggravated rape, assault by means of a dangerous weapon, and armed robbery, and was sentenced to prison for ten years.

In 2010, as the petitioner's release date approached, the Commonwealth sought his commitment as an SDP. The petitioner was adjudicated an SDP in 2011 and committed to the Massachusetts Treatment Center (treatment center). See G. L. c. 123A, § 14. While committed, the petitioner was charged with two crimes[2] and pleaded guilty to, or was found guilty of over seventy disciplinary infractions. The petitioner has a history of using human waste to assault other inmates and prison staff.

In connection with his petition for discharge, the petitioner was examined by two qualified examiners (QEs), Dr.

[2] The petitioner pleaded guilty to making threats and received a thirty-day sentence. A charge of assault and battery was dismissed for lack of prosecution.

Katrin Rouse-Weir and Dr. Leah Robertson. See G. L. c. 123A, §§ 1, 9. Both QEs drafted reports and testified at trial. The Commonwealth also presented the testimony of community access board (CAB) member Dr. Gregg Belle.[3] All three experts opined that the petitioner suffers from a mental abnormality which makes it likely he will reoffend sexually, such that he remains an SDP. Specifically, the experts testified that the petitioner suffers from sexual sadism disorder, antisocial personality disorder, and borderline personality disorder. These cause the petitioner to demonstrate "a general lack of power to control his sexual impulses." Both QEs gave the petitioner a Static-99R score of seven, which Dr. Rouse-Weir stated placed the petitioner in the highest risk level -- "[w]ell above average."

Discussion. 1. Static-99R results. The petitioner filed a motion in limine to exclude any reference to the Static-99R risk "labels" because they lacked probative value. In particular, the petitioner sought to exclude testimony that the petitioner's Static-99R score indicated that he presented a "[w]ell above average" risk of reoffense. Relying on Commonwealth v. George, 477 Mass. 331, 339 (2017), the

[3] The CAB is affiliated with the Department of Correction and "conduct[s] annual reviews of and prepare[s] reports on the current sexual dangerousness of all persons at the treatment center." G. L. c. 123A, § 6A. See Santos, petitioner, 461 Mass. 565, 566 n.2 (2012).

petitioner claims error in the judge's denial of his motion in limine.

In George, the Supreme Judicial Court held that the Static-99 risk of reoffense categories in place at the time "lack[ed] probative value in the sexual dangerousness calculus and should not be admitted at trial." 477 Mass. at 339. The Court noted, however, that test developers were working on new Static-99R risk category labels to address the shortcomings of the risk category labels then in place. The Supreme Judicial Court took "no position on the admissibility of those [new] labels." George, supra at 340 n.8. The petitioner contends, without supporting authority, that the new labels, including the "[w]ell above average" risk used in this case, remain inadmissible until the Supreme Judicial Court states otherwise.

We need not resolve this evidentiary question because we are confident that any error in the admission of the expert's conclusion that the petitioner presented a "[w]ell above average" risk "did not influence the jury, or had but very slight effect." Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994), quoting Commonwealth v. Peruzzi, 15 Mass. App. Ct. 437, 445 (1983). The experts did not rely exclusively on the Static-99R and its risk categories in forming their opinions, and the limitations of the test were explained to the jury. The experts also considered the petitioner's family history, criminal

history, incarceration records, treatment history, and diagnoses of sexual sadism disorder, antisocial personality disorder, and borderline personality disorder. In addition, the jury heard evidence that the petitioner scored higher on the Static-99R than ninety-seven percent of the sex offenders taking the test. From this evidence alone, the jury could have rationally concluded that the petitioner presented a "[w]ell above average" risk of reoffense. Finally, any prejudice from Dr. Rouse-Weir's testimony was mitigated by the judge's instruction that the jury were "free to reject the [expert] testimony and opinion in whole or in part," which we presume the jury followed. Commonwealth v. Cooper, 100 Mass. App. Ct. 345, 355 (2021). For these reasons we are not persuaded that the limited reference to the "[w]ell above average" risk category was unduly prejudicial.

2. Qualification of QE. While QEs must meet certain statutory requirements and be designated by the Commissioner of Correction, see Chapman, petitioner, 482 Mass. 293, 303 (2019); G. L. c. 123A, § 1, the ultimate determination whether a witness qualifies as an expert lies with the judge. LeSage, petitioner, 76 Mass. App. Ct. 566, 571 (2010). We review the judge's decision for abuse of discretion or error of law. Id.

The petitioner argues that it was an abuse of discretion to admit Dr. Robertson's testimony because she lacked two years of experience with "sexually aggressive offenders." G. L. c. 123A,

§ 1. Because the petitioner did not raise this specific challenge at trial, we review for a substantial risk of a miscarriage of justice. See R.B., petitioner, 479 Mass. 712, 717-718 (2018) (waived claims in SDP cases reviewed under same standard as in criminal cases). For the reasons that follow, we discern no abuse of discretion in the admission of Dr. Robertson's testimony, much less a substantial risk of a miscarriage of justice.

First, Dr. Robertson worked as a unit therapist for civilly committed men for nine months in 1999 to 2000. The parties stipulated that this work involved sexually aggressive offenders. Then, for eleven months from September 2004 to August 2005, Dr. Robertson co-led treatment groups for inmates convicted of offenses such as "rape, indecent assault and battery, kidnapping, maybe even attempted murder." For ten months after that, Dr. Robertson assessed and treated juveniles in DYS custody who had committed crimes like assault and battery and rape. In 2018, Dr. Robertson was appointed to the CAB and designated a QE. Since then, she has participated in three CAB reviews, evaluated fourteen people, and acted as a QE for three evaluations of sexual offenders. This evidence amply supports

the judge's conclusion that Dr. Robertson had the requisite experience with sexually aggressive offenders.[4]

Judgment affirmed.

By the Court (Vuono, Sullivan & Kinder, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: January 14, 2022.

[4] The petitioner's challenge to Dr. Robertson's credibility based on discrepancies between her testimony during her voir dire examination and her curriculum vitae went to the weight of her testimony, not its admissibility. See Commonwealth v. Husband, 82 Mass. App. Ct. 1, 6 (2012).

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