

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Detention of
GARY ALLEN SHAW,

Appellant.

No. 40723-0-II

UNPUBLISHED OPINION

Johanson, J. — Gary Allen Shaw appeals his sexually violent predator (SVP) commitment under chapter 71.09 RCW. He argues that the State did not establish that (1) his antisocial personality disorder makes him *currently* unable to control his behavior; (2) his “personality disorder” makes him at risk to engage in predatory acts of sexual violence, as opposed to any crime, because there was no evidence that he suffered from “paraphilia or any other sexual disorder”, Br. of Appellant at 24; or (3) he will be more likely than not to commit predatory acts of sexual violence if released because the actuarial instrument results are unreliable predictors of the risk to reoffend and other factors that the State’s expert witness relied on were “irrelevant.” Br. of Appellant at 29. We affirm.

FACTS

I. Shaw's Sexually Violent Offenses and SVP Commitment Petition

In March 1985, when he was 21 years old, Shaw raped and murdered two women in separate incidents occurring 16 days apart. The first victim had picked Shaw up when he was hitchhiking. Shaw raped and stabbed the second victim, a woman who had offered him a ride home after meeting him at a bowling alley, after she refused to have sex with him a second time following a consensual sexual encounter.

In June 1985, Shaw pleaded guilty to two counts of first degree murder committed while “[c]ommitting or [a]ttempting to [c]ommit [r]ape in the [s]econd [d]egree.” Clerk’s Papers (CP) at 110. The court sentenced him to 32 years and 4 months of confinement. In December 2006, shortly before Shaw’s scheduled release from confinement, the State filed a petition seeking civil commitment as an SVP.

II. Commitment Hearing

The matter proceeded to a bench trial on January 25, 2010. Forensic psychologist Dr. Robert Wheeler, Ph.D. testified for the State. Clinical psychologist Dr. Theodore Donaldson, Ph.D. testified for Shaw. Shaw also testified and presented several witnesses who testified about their interactions with him at the Special Commitment Center (SCC), where Shaw had been sent during the pendency of his commitment proceedings.

A. Dr. Wheeler

Dr. Wheeler testified that he had extensively interviewed Shaw for more than 10 hours over a two-day period in 2006. In addition to this interview, Dr. Wheeler administered “formal

psychological testing,” including the Minnesota Multiphasic Personality Inventory (MMPI), and followed up with a structured interview focusing on Shaw’s emotional experiences and other “behavior that may be relevant to the [SVP] issues.” 1 Verbatim Report of Proceedings (VRP) at 35-36. Dr. Wheeler also reviewed the police and investigative reports related to Shaw’s adult criminal history; his juvenile criminal history and court records; Department of Corrections’ records, including medical records and “institutional adjustment” records; Shaw’s deposition; and Dr. Donaldson’s deposition.

1. Shaw’s sexual history

Dr. Wheeler testified that Shaw’s noncriminal sexual history was as follows: (1) at age 5, a teenage female family friend sexually molested him; (2) at age 7 or 8, a teenage male violently raped him at gunpoint; (3) from age 10 and a half to age 14, he regularly engaged in sexual intercourse with this teenage male’s sister; (4) at age 12, he had consensual sex with a 12-year-old girl; (5) when in custody as a juvenile, he had a sexual relationship with a female staff member; and (6) he later had numerous sexual relationships with other women, including several women he worked with and female customers he encountered while selling magazine subscriptions door-to-door in another state. Shaw also admitted to having had some “rape fantasies” involving a girl he met over the CB radio who had “teased him sexually” and another woman he felt had “teased him” or “used” him. 1 VRP at 58, 61.

Dr. Wheeler stated that Shaw felt that he had “been victimized throughout his childhood,” “more harshly treated by his parents,” and “setup [sic] by his siblings to get him in trouble.” 1 VRP at 62. Dr. Wheeler believed Shaw’s perception of his family’s treatment “was a significant

source of his chronic anger that became focused in particular on females,” as evidenced by Shaw’s feelings toward the “two young women who he felt had used him and teased him because they didn’t want to have to go through with having intercourse with him.” 1 VRP at 62.

Shaw’s past criminal sexual history¹ included: (1) an indecent liberties accusation involving an 8-year-old girl when Shaw was 15;² (2) a conviction for of the first degree statutory rape of a 6-year-old boy; and (3) the two March 1985 sexually motivated murders, when he was “approximately 21 or 22.” 1 VRP at 38. Dr. Wheeler opined that Shaw’s sexually-related criminal history was (1) relevant to whether Shaw had a “mental disorder that predisposes him to sexual violence,” and (2) “one of the most important predictors of future sexual violence is past sexual violence.” 1 VRP at 38.

In describing the first murder, Shaw told Dr. Wheeler that he had forced himself on the victim, that he recalled “feeling intensely enraged” and “quite intensely angry with” the victim during the course of the incident, and that this anger intensified even after the rape was complete and the victim was unconscious. 1 VRP at 47. When he described the second murder, he asserted that he had first had consensual sex with the victim but that he had “exploded with

¹ Dr. Wheeler also summarized Shaw’s nonsexual past criminal history, which included: (1) a 1979 knife assault of a teenage boy; (2) a probation violation; (3) a 1983 arrest for “simple assault,” which was later “amended to fighting”; (4) failure to appear on the “simple assault”; (5) a 1984 arrest for minor in possession of liquor; and (6) in 1985, three failure-to-appear warrants involving reckless driving, no operator’s license, and fighting. 1 VRP at 55-56.

² Accordingly to Dr. Wheeler, Shaw had asserted that this incident occurred when the girl walked in on him while he was masturbating and he “became very angry, and . . . forcefully grabbed the victim and threatened to kill her” if she told anyone about the incident. 1 VRP at 40. At trial, Shaw denied having said that he threatened to kill the girl. But he admitted that he “threatened” to “get” the girl if she talked about the incident. 4 VRP at 400-01.

anger” when she refused to have sex with him a second time. 1 VRP at 54. He then raped her at knifepoint and stabbed her. Shaw asserted that he had been drinking and/or taking drugs before both murders. Dr. Wheeler noted that Shaw was at first evasive and vague when he talked about the details of these crimes and that he did not reveal all the details described above until confronted with additional information.

Dr. Wheeler was not concerned about any incidents during Shaw’s confinement in prison and at the SCC. He stated, however, that Shaw twice had drug issues while in custody, once for “abuse of opiates,” and “more recently in 2006” for abusing Benadryl that had been prescribed as a sleep aid. 1 VRP at 64.

2. Diagnosis

Dr. Wheeler diagnosed Shaw with (1) alcohol and cannabis dependency limited by his current controlled living environment; (2) intermittent explosive disorder; and (3) antisocial personality disorder (ASPD).³ In regard to the intermittent explosive disorder, Dr. Wheeler testified:

[D]iagnostically intermittent explosive disorder means that a person has discrete episodes of very aggressive outbursts of behavior that result in assault or property destruction, and the key element is that the level of aggression is far disproportionate, grossly out of proportion to any precipitating event or psychosocial stressor.

1 VPR at 67. He explained that he arrived at this diagnosis because the murders both involved

³ Although Dr. Wheeler saw some indications suggesting a paraphelia not otherwise specified nonconsenting persons diagnosis, he could not conclude that Shaw had this diagnosis in part because although there were some indicators suggesting this diagnosis, there were other indicators that did not support this diagnosis.

violence that “was grossly disproportionate even to the level of violence it would take to have gotten his victims to submit to his sexual demands.” 1 VRP at 68. But he also explained that he had reservations about this diagnosis because this type of behavior could also be “an expression of another disorder which in this case would be [ASPD].” 1 VRP at 68.

Dr. Wheeler concluded that the two murders were sexually motivated, noting that Shaw had stated that they may have been in response to having been “screwed over by women, [his] mom and every girlfriend [he] had.” 1 VRP at 76. And when Dr. Wheeler questioned Shaw “specifically about the sexual context of the murders, [Shaw] said, quote, ‘Power. To take something from them because I had been taken from,’ end quote.” 1 VRP at 76. Shaw also stated that the violent rape he had experienced as a child

might have created the desire, quote, ‘to impose myself on women, show that I was stronger than them, because of all the girlfriends that I had who used their sexuality over me, who teased me,’ end quote. And then he went on and talked more about his resentment towards his girlfriends whom he felt had led him on sexually.

1 VRP at 76. Dr. Wheeler also testified:

When ultimately he [(Shaw)] acknowledged, quote, “I might have a sexual problem,” unquote, but he emphasized that the problem primarily was one of rage toward women, which he again associated with being teased and led on by them and using their sexuality to make fun of him or to . . . make fun of men or humiliate men more generally.

1 VRP at 77.

When the State questioned him about the relationship between [ASPD] and sex offenses, Dr. Wheeler responded:

You’ll notice that the DSM IV^[4] offers broad categories of antisocial

⁴ The Diagnostic and Statistical Manual of Mental Disorders (Am. Psychiatric Ass’n, 4th ed.

behavior. Generally involving aggressiveness directed towards others or repeated property destruction categories of behavior.

It describes broad categories of assaultiveness which would obviously include sexual assaultiveness and irritability, which could be expressed in innumerable ways. [The DSM IV] doesn't specify every way—every possible way in which someone might manifest their antisociality, rather it provides broad constructs for conceptualizing it.

Another way of thinking about it is that it is not the diagnosis that commits the assaults, it's the person who commits the assaults. And the fact that it does not explicitly require sexual behaviors as the means by which the antisociality is expressed does not, in my opinion at least, mean that it cannot be one way that the antisociality is reflected.

In my view, Mr. Shaw's—the combination of his—these broad characteristics of antisociality, which is this tendency to be—to violate rules, to manipulate people, to use other people for your own purposes, to fail to profit from experience, to get into trouble repeatedly, to abuse substances, all of which are frequent correlates of this, provide the foundation for his sexually assaultive behavior. But the focus of the sexually assaultive behavior derives from his anger towards females and the resentment he holds towards them. And ultimately I think the sexual assaultive behavior arises from those factors fueled additionally possibly by drugs and alcohol, primarily alcohol.

1 VRP at 94-95 (emphasis added).

Dr. Wheeler admitted that not everyone with ASPD commits sex offenses, but he opined that this was not an unusual manifestation of the disorder. He then stated that Shaw's ASPD is a mental disorder that causes him serious difficulty controlling his sexually violent behavior. He testified that Shaw's ASPD was “associated with serious difficulty controlling his behavior, as evidenced by the pattern of aggressive behavior that [he had] testified about throughout [that day]. And it exemplifies serious difficulty controlling his behavior, including his sexually violent behavior, and as a manifestation of his antisocial personality disorder.” 1 VRP at 108.

Dr. Wheeler also testified that the fact Shaw had had little trouble since his 1985

incarceration, did not mean that Shaw was no longer dangerous. Dr. Wheeler stated that personality disorders “tend to be chronic” but that ASPD “sometimes remits somewhat behaviorally” between the ages of 40 and 50. 1 VRP at 97. Although Dr. Wheeler had not observed any evidence of remission in Shaw’s case, Shaw’s behavior had, for the most part, been “manageable in an institutional setting.” 1 VRP at 97. But Dr. Wheeler stated ASPD was often manageable in a controlled setting, and he expressed concern that Shaw had engaged in some forms of substance abuse even while in this controlled environment. Additionally, Dr. Wheeler observed that Shaw’s MMPI showed a high score on “a scale that is nominally named psychopathic deviant,” which “measures . . . the kinds of attitudes and histories characteristic of people, many of whom will have” ASPD. 1 VRP at 98.

3. Actuarial Risk

Dr. Wheeler evaluated Shaw’s risk of reoffense using four actuarial instruments, the Static-99R, the Static-2002R, the Minnesota Sex Offender Screening Tool Revised (MsSOST-R), and the sex offender risk appraisal guide (SORAG). Shaw’s Static-99R score placed him in the “high risk range,” between the 94.9 and 97.8 percentile, and established an “absolute probability of sexual recidivism” at 39.9 percent for 5 years, 48.6 percent for 10 years, and potentially higher for the later years. 1 VRP at 117, 119. Shaw’s Static-2002R score placed him in the “moderate high risk range,” with a risk of recidivism at 26.3 percent for 5 years and 36 percent for 10 years. 1 VRP at 117. Shaw’s MsSOST-R scores placed him “on the highest five levels of risks conceptualized by the developer,” in the “greater than the 94th percentile.” 1 VRP at 118. But Dr. Wheeler was unwilling to estimate any risk of reoffense based on the MsSOST-R because the

MsSOST-R was being updated.

Shaw's SORAG score, which measures the risk of recidivism with violent crime rather than just sexually violent crime and is "more inclusive" than the other instruments, placed him "into the highest of all risk levels as conceptualized by the developers," and estimated his risk of recidivism at 100 percent within 7 years. 1 VRP at 118, 120. Dr. Wheeler acknowledged that the SORAG was more inclusive, but he stated that this was counterbalanced by the fact sexual violence is often undetected and it is common for sexual offenses not to be charged or measured as sexual in nature. 1 VRP at 120. Dr. Wheeler testified that the SORAG developers had studied the underreporting and charging issues and that they "had determined at least in one significant experiment, the SORAG predicts sexual violence well" despite having been designed to predict a more "inclusive criterion." 1 VRP at 121.

Dr. Wheeler further opined that all of the actuarial instruments likely underestimated the lifetime risk of reoffense because of under reporting and charging issues. And he recognized that there is a "marked decline in recidivism among large groups of sex offenders" after age 60, and he indicated that he had considered this factor when evaluating Shaw's scores. 1 VRP at 124.

Dr. Wheeler also testified about the various subject pools used in the instruments. For instance, he testified that the Static-99R evaluated two major reference groups: "routine sex offenders and the non routine-sex offenders." 1 VRP at 128. The "non routine-sex offenders" group included two subsets of subjects, one of which was "selected based on what is presumed to be their treatment need" and reflected a population who had been preselected for treatment. 1 VRP at 128. The second subset comprised subjects who were considered "high risk," specifically,

those who were selected for consideration as SVPs or “as mentally disordered dangerous offenders.” 1 VRP at 128. He opined that Shaw was in this “high risk” subcategory due to his referral for an SVP evaluation and because he had been “screened by the End of Sentence Review Committee.” 1 VRP at 129. Dr. Wheeler noted that the screening procedures used to categorize an offender as a potential SVP “include[] factors unrelated to these actuarial instruments.” 1 VRP at 130.

Dr. Wheeler further testified that in addition to interviewing Shaw in 2006, he had periodically reviewed Shaw’s records from the SCC and had recently reviewed Dr. Donaldson’s notes and deposition and Shaw’s recent deposition. Dr. Wheeler had also rescored the actuarial instruments and applied newer actuarial instruments that were not available in 2006. He stated that the opinions he had expressed at trial were based on all the information he had, not just the information he had in 2006.

4. Nonactuarial considerations

Dr. Wheeler also testified that although the actuarial instruments provided some evidence of the probability of reoffense and were “the best scientific evidence that we have in terms of probability estimates,” it was still necessary to “apply some level of analysis to [the actuarial results] based on expertise.” 1 VRP at 124. After considering various “outside factors” such as Shaw’s “[a]ntisocial orientation, substance abuse, intimacy deficits, hostility, negative emotionality, and inadequate self-assessment of risk,” factors that studies have shown are statistically correlated with sexual recidivism, Dr. Wheeler concluded that Shaw’s risk of recidivism within the next 15 years was “more likely than not.” 1 VRP at 137. Dr. Wheeler

observed that although some, but not all, of the additional factors he had considered may have been incorporated into some of the actuarial instruments, the most important variable that was not included in these instruments was an “antisocial orientation,” a factor that he believed “predicts recidivism among sex offenders.” 1 VRP at 138.

Dr. Wheeler also stated that Shaw’s incarceration since 1985 complicated the risk assessment. But he testified that ASPD remains fairly stable and that any potential decline in Shaw’s ASPD as he aged was reduced by Shaw’s high level of psychopathy on the Hare Psychopathy Checklist Revised.

Ultimately, Dr. Wheeler opined that “Mr. Shaw’s [ASPD] not only causes him serious difficulty controlling his sexually violent behavior, but makes it likely that he’s going to engage in predatory acts of sexual violence.” 1 VRP at 144. He testified, “It’s my opinion that Mr. Shaw’s antisocial personality disorder is more likely than not to cause him to commit predatory acts of sexual violence if he is not confined in a secure facility.” 1 VRP at 108. He also testified that Shaw’s lack of sex offender treatment and an unrealistic proposed release plan heightened his concern about Shaw’s potential to reoffend.

On cross-examination, Shaw’s counsel vigorously questioned Dr. Wheeler about the actuarial instruments and potential redundancies in the measurement tools and Dr. Wheeler’s professional evaluation. When Shaw’s counsel asked Dr. Wheeler whether his consideration of various “dynamic risk factors,” 2 VRP at 225-26, gave double weight to some of the same factors considered in the Static-2002R, Dr. Wheeler responded,

I relied on the actuarial instruments and necessarily extrapolate beyond them because the law essentially requires a judgment of lifetime risk not, ten year risk.

I added to that information, “dynamic risk factors” *taking into account the points that you are very correctly making, that there may be some redundancy between those and the instruments.* We don’t have a specific scientific way of determining or identifying to what degree they may or may not be redundant, but they may be in some respects.

And then I added to that information my own clinical judgment, based on my interviews, my psychological testing of Mr. Shaw, and my assessment related to his perception of his risk.

And from that combination of those factors, it is my judgment, to a reasonable psychological certainty, that over his lifetime, he’s more likely than not to commit a sexual violent offense if released.

2 VRP at 227-28 (emphasis added).

B. Dr. Donaldson’s Testimony

Dr. Donaldson testified that he evaluated Shaw in 2008. He agreed with Dr. Wheeler’s diagnoses of ASPD and substance abuse. But he opined that this diagnosis did not satisfy the SVP requirements for a variety of reasons and that nothing he had learned indicated that Shaw demonstrated the lack of volitional control required for an SVP finding. Noting that the large proportion of the prison population could be diagnosed with ASPD, he opined that an ASPD diagnosis did not indicate “a predisposition to sexual violence,” and, therefore, there must also be some type of “paraphilic diagnoses” to establish the statutory SVP criteria. 3 VRP at 262-63. Dr. Donaldson also stated that Shaw had not exhibited any “predisposition to sexual violence” since his 1985 arrest and opined that Shaw would have exhibited “signs and symptoms” of such predisposition even while incarcerated if any such predisposition had existed. 3 VRP at 266.

Dr. Donaldson also challenged the Static-99’s and other actuarial instruments’ “base rate,” asserting that the “base rate” in Washington was significantly lower. 3 VRP at 272. He further criticized how some of the instruments broke down the reference groups and disagreed with Dr.

Wheeler's comparison of Shaw to a preselected high-risk reference group. He further opined that the actuarial instruments were not accurate predictors because they were not based on the SVP commitment "statutory requirements" and were "really out of date." 3 VRP at 283. And he criticized Dr. Wheeler's use of dynamic risk factors, asserting that these kinds of measurements were not valid when predicting the behavior of someone who had been continuously incarcerated because they were developed using subjects that were paroled into the community.

C. Shaw's Testimony

Shaw testified that during his interview with Dr. Wheeler, Dr. Wheeler "was trying to push [his (Shaw's)] buttons" and "[g]et [him] angry" and that Dr. Wheeler was a "jerk" who made him "uncomfortable" during the entire interview. 4 VRP at 401-02. But Shaw emphasized that although Dr. Wheeler had made him angry, he "didn't explode" and, instead, managed his anger using some of the "anger management techniques [he had] learned." 4 VRP at 402.

Shaw admitted that during this interview, he was not at first forthcoming about the murders because these crimes "disgust[ed]" him, he had "blanked them out" for a long time, and he did not like to think about them. 4 VRP at 402. He was unable to explain why the crimes happened, but he stated that he had pleaded guilty because he been doing drugs and drinking at the time of the crimes. He then testified that he had changed while in prison because he knew if he did not change, he would do drugs and alcohol again and "end up back in prison." 4 VRP at 403. He denied having consumed alcohol in prison even when it was available. But he admitted that he had abused "narcotics" and Benadryl. 4 VRP at 403.

Shaw further testified that he planned to continue in a Native American spiritual circle program he had become involved with at the SCC even if he was released. And he indicated that when released, (1) he could live with a sister, a niece, or a prison friend's father; (2) his support system within the Native American spiritual circle program, Alcoholics Anonymous, and Narcotics Anonymous would be available to help him stay off of drugs and alcohol; and (3) he wanted to find a job and to work on his computer, reading, writing, and math skills. He was also aware that his sex offender status and registration requirements could make it hard to find a job and housing. But he denied being a risk to anyone if he was released.

D. Shaw's Other Witnesses

Volunteers and other participants who had worked with Shaw in a Native American spiritual circle program at the SCC, SCC employees that Shaw had worked for, and the SCC chaplain also testified. These witnesses testified about Shaw's growth and dedication to the Native American spiritual circle program, his hard work and dedication to his jobs, his increased ability to express his anger in positive ways, his stabilizing influence with the other residents at the SCC, and his lack of angry or aggressive behavior.

The trial court ruled that the State had proved beyond a reasonable doubt that Shaw was an SVP and entered an order of commitment. Shaw appeals.

ANALYSIS

I. Standard of Review and SVP Requirements

In reviewing a trial court's SVP findings, we apply criminal standards. *In re Det. of Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003), *cert. denied*, 541 U.S. 990 (2004). We

review challenges to the trial court's findings of fact and conclusions of law by determining whether substantial evidence supports the challenged findings and whether those findings support the trial court's conclusions. *State v. Madarash*, 116 Wn. App. 500, 509, 66 P.3d 682 (2003). Substantial evidence is "evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 837-38, 755 P.2d 806 (1988) (quoting *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986)). We consider the evidence in the light most favorable to the State. *Madarash*, 116 Wn. App. at 509 (citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). And if the record contains conflicting testimony, we will not disturb the trier of fact's credibility and weight determinations. *State v. Hughes*, 154 Wn.2d 118, 152, 110 P.3d 192 (2005), *abrogated on other grounds by Washington v. Recuenco*, 548 U.S. 121, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

RCW 71.09.060(1) provides that, in order to commit someone as an SVP, the fact finder must find beyond a reasonable doubt that the person is an SVP. RCW 71.09.020(18) defines an SVP as, "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(7) provides, "Likely to engage in predatory acts of sexual violence if not confined in a secure facility' means that the person more probably than not will engage in such acts if released unconditionally from detention on the [SVP] petition." "In order to commit an individual, and thus significantly curtail his or her rights, due process requires the State to prove that the alleged

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SVP is mentally ill and *currently* dangerous.” *In re Det. of Moore*, 167 Wn.2d 113, 124, 216 P.3d 1015 (2009) (emphasis added) (citing *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992); *In re Pers. Restraint of Young*, 122 Wn.2d 1, 27, 857 P.2d 989 (1993), *superseded by statute on other grounds as recognized by In re Det. of Ross*, 102 Wn. App. 108, 113, 6 P.3d 625 (2000)).

II. Current Inability to Control Behavior

Shaw first argues that although Dr. Wheeler “believe[d]” that Shaw’s ASPD caused him to have serious difficulty controlling his behavior before his 1985 incarceration,⁵ the State failed to establish that Shaw was *currently* unable to control his behavior due to his ASPD at the time of the commitment proceedings. Br. of Appellant at 19-20. We disagree.

Dr. Wheeler testified that (1) Shaw’s past sexual violence, including the two rapes and murders, was “one of the most important predictors of future sexual violence,” 1 VRP at 38; (2) Shaw has ASPD and scored “near” the level of a “psychopath” on the Hare Psychopathy Checklist-Revised; 1 VRP at 148; (3) ASPD “tend[s] to be chronic,” 1 VRP at 97; (4) although ASPD may remit with age, people with ASPD *and* high levels of psychopathy experience less of decline than those who rank low on the psychopathy scale; (5) Shaw’s use of opiates and overdosing on Benadryl showed that he had continued to violate rules regarding drug use even in a controlled environment; (6) Shaw “reacted negatively” to questions about certain topics and sometimes “seemed a bit on the verge . . . of becoming agitated” with Dr. Wheeler, which indicated “a low threshold of agitation,” 1 VRP at 70; and (7) Shaw had not received any sex offender treatment during his incarceration. This testimony is sufficient to persuade a fair-minded, rational person that Shaw was still unable to control his behavior due to his ASPD and supports the trial court’s finding that Shaw’s ASPD currently impaired his ability to control his behavior.

Shaw further contends that Dr. Wheeler’s lack of control evidence should be given little weight because his opinions were based on information he gathered in 2006, well before the

⁵ Shaw does not challenge Dr. Wheeler’s or the trial court’s conclusion that he (Shaw) was unable to control his behavior due to his ASPD at the time of his 1985 incarceration.

hearing and before Shaw started participating in the Native American spiritual circle program at the SCC. The record belies this claim. Dr. Wheeler testified that in addition to evaluating Shaw in 2006, he had periodically reviewed Shaw's SCC records and had recently reviewed Dr. Donaldson's notes and deposition and Shaw's recent deposition. Dr. Wheeler had also rescored the actuarial instruments and applied newer actuarial instruments that had not been available in 2006. And he testified that the opinions he expressed at trial were based on *all* the information he had, not just the information he had in 2006.

Shaw also contends that his behavior during his 2006 interview demonstrated that he was able to control his behavior despite his ASPD because he did not lose control of his anger during Dr. Wheeler's interview. Dr. Wheeler testified that during this interview, he noticed that when various topics arose, Shaw "reacted negatively to the line of interviewing, he seemed a bit on the verge . . . of becoming agitated with" Dr. Wheeler. 1 VRP at 70. Dr. Wheeler opined that this was evidence of "a low threshold of agitation." 1 VRP at 70. That Shaw may not have lost control of his anger or agitation during the interview does not demonstrate that Shaw is generally in control of his behavior. In fact, Dr. Wheeler's characterization of Shaw's reactions demonstrating "a low threshold of agitation" suggests that Shaw may still have difficulty controlling his behavior. The fact Shaw was able to control himself to some degree during an interview with a mental health professional in a controlled environment, particularly when Shaw was aware that his behavior was highly relevant to his SVP commitment proceeding, does not demonstrate that Shaw had gained the ability to control stronger emotional reactions in an uncontrolled environment.

Shaw next contends that his witnesses established that he was “respectful, reliable, and able to resolve conflict verbally and non-aggressively.” Br. of Appellant at 21. Although potentially relevant to Shaw’s abilities in a controlled environment, this evidence was not relevant to Shaw’s abilities to control his behavior generally, particularly in sexually-related situations. In sum, we hold that substantial evidence supports the trial court’s finding that Shaw was currently unable to control his behavior due to his ASPD.

III. Relationship Between ASPD and Crimes of Sexual Violence

Shaw next argues that the State failed to prove that he was more likely to commit a new crime of sexual violence, “as opposed to simply a new crime,” because the evidence did not “connect Shaw’s [ASPD] with a drive to commit sex crimes” or establish that Shaw suffered from any paraphilia or other sexual disorder. Br. of Appellant at 23-24. Again, we disagree.

Although neither expert diagnosed Shaw with any specific sexual disorder,⁶ Dr. Wheeler testified that (1) although not everyone with ASPD commits sex offenses, the commission of sex offenses is not an unusual manifestation of this disorder; and (2) Shaw exhibited anger and resentment toward women and his ASPD had manifested in the past with sexual violence. Although Shaw’s anger and intermittent explosive disorder may have also played a role in his sexual offenses, Dr. Wheeler’s testimony established that Shaw’s sexual crimes were also, at least in part, a manifestation of Shaw’s ASPD.

⁶ We note that although Dr. Wheeler did not diagnose Shaw with paraphilia or any other sexual disorder, he testified that he could not rule out a paraphilia not otherwise specified nonconsenting persons diagnosis based on the information he had because there was some evidence inconsistent with this diagnosis but “the validity of the inconsistent evidence was hard to assess.” 1 VRP at 106.

Citing *Foucha*, 504 U.S. at 71; *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997); and *Kansas v. Crane*, 534 U.S. 407, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002), Shaw argues that his risk of committing criminal offenses in general, as opposed to sexually violent offenses, is not sufficient to support the SVP commitment. Shaw is correct that not just “any mental disease or defect is sufficient to justify continued custody” and that “[d]ue process requires that the nature of the commitment bear some reasonable relation to the purpose for which the individual is committed.” *State v. Klein*, 156 Wn.2d 103, 119-20, 124 P.3d 644 (2005) (alteration in original) (quoting *Foucha*, 504 U.S. at 79). He is also correct that “a diagnosis of a mental abnormality or personality disorder is not, in itself, sufficient evidence for [the finder of fact] to find a serious lack of control.” *Thorell*, 149 Wn.2d at 761-62. But Dr. Wheeler’s testimony went beyond diagnosing Shaw with ASPD, it was also sufficient to establish that because of his ASPD, Shaw was at risk of committing additional sexually violent offenses against women, not just that he was at risk of committing crimes in general. *See Thorell*, 149 Wn.2d at 761-62 (“[A] diagnosis of a mental abnormality or personality disorder is not, in itself, sufficient evidence for a jury to find a serious lack of control. Such a diagnosis, however, when coupled with evidence of prior sexually violent behavior and testimony from mental health experts, which links these to a serious lack of control, is sufficient for a jury to find that the person presents a serious risk of future sexual violence and therefore meets the requirements of an SVP.”). Accordingly, this argument has no merit.

Furthermore, to the extent Shaw is asserting that *Foucha* establishes that the State cannot rely on an ASPD diagnosis in an SVP commitment proceeding, our Supreme Court expressly

rejected that argument in *Young*, 122 Wn.2d at 37 n.12. Similarly, to the extent Shaw is relying on *Hendricks* and *Crane* to establish that the State cannot rely on ASPD to justify an SVP commitment, this reliance is misplaced. Although *Hendricks* was diagnosed with pedophilia, it does not necessarily follow that a finding of pedophilia or any specific sexual mental disorder is *required* in every case. Instead, the relevant portion of *Hendricks* is that the diagnosed disorder or condition, whatever it may be, must impair the respondent's ability to control his dangerous behavior. *See Hendricks*, 521 U.S. at 360. And, as to *Crane*, although the *Crane* court acknowledged that a large portion of the prison population may suffer from ASPD, it did not hold that ASPD can never be the basis of an SVP commitment, as long as the condition resulted in sufficient lack of control and was linked to a propensity to commit sexual offenses as opposed to "ordinary" crimes. *See Crane*, 534 U.S. at 413.

Shaw fails to show that an underlying ASPD diagnosis without an additional paraphilia or other sexual disorder diagnosis cannot support an SVP commitment. He also fails to show that there was not substantial evidence that his ASPD made him likely to engage in predatory acts of sexual violence as opposed to other types of nonsexual offenses.

IV. Reliance on Actuarial Instruments and Dynamic Risk Factors

Finally, Shaw argues that the State failed to show that he was more probably than not likely to engage in predatory acts of sexual violence if not confined in a secure facility because (1) the actuarial instruments are unreliable predictors of his risk to reoffend, and (2) the dynamic risk factors Dr. Wheeler relied on were irrelevant.⁷ Again, we disagree.

⁷ Shaw does not argue that the actuarial instruments were inadmissible. Instead, he focuses on whether they supported the trial court's findings.

Shaw first contends that none of the actuarial instruments established that he was more likely than not to engage in predatory acts of sexual violence because none of the instruments established that his risk of reoffense was over 50 percent. Although no actuarial instrument established a risk of over 50 percent, Dr. Wheeler testified that the actuarial instruments underestimate the frequency of reoffense because sex crimes are underreported and/or often charged as other offenses and that other “dynamic risk factors” needed to be considered. 2 VRP at 225-26. The actuarial instruments *and* Dr. Wheeler’s testimony provide substantial evidence supporting the trial court’s finding that Shaw’s personality disorder makes him more likely than not to engage in predatory acts of sexual violence unless he remains confined to a secure facility.

Shaw next contends that the actuarial instruments’ results were “unreliable” because they “studied a broad range of sex offenders to determine risk factors, including high risk sex offenders” that included “offenders with sexual disorders such as paraphilia and pedophilia” who, he asserts, are “*presumably . . . more likely to reoffend*” than he is because he was not diagnosed with such a disorder. Br. of Appellant at 26 (emphasis added). Shaw’s assertion that offenders who are diagnosed with “sexual disorders” are more likely to reoffend than someone with an ASPD diagnosis is pure conjecture. Accordingly, we reject this argument. Furthermore, to the extent any information about offenders with sexual disorders have a higher rate of reoffense than those with ASPD, that fact goes to weight issues that we will not disturb. *Hughes*, 154 Wn.2d at 152.

Shaw further contends that the actuarial instruments were “unreliable” because they

predict the probability of rearrest or conviction only for “*any* sex offense, not specifically for the probability of ‘predatory’ acts of ‘sexual violence’” as defined by RCW 71.09.020(10)⁸ and (17).⁹ Br. of Appellant at 26. Dr. Wheeler’s testimony indicates that some of the actuarial instruments, such as the MsSOST-R, measured sexual recidivism, and that other instruments, such as the SORAG, measured the risk of violent reoffense generally. But Dr. Wheeler also testified that more refined studies of the SORAG indicate that it is a good predictor of sexual violence “even though it’s designed to be predicting the more inclusive criterion.” 1 VRP at 121. Although Dr. Wheeler testified that the actuarial instruments are “universally used” to assess risk in “sexually

⁸ RCW 71.09.020(10) provides: “‘Predatory’ means acts directed towards: (a) Strangers; (b) individuals with whom a relationship has been established or promoted for the primary purpose of victimization; or (c) persons of casual acquaintance with whom no substantial personal relationship exists.”

⁹ RCW 71.09.020(17) provides:

“Sexually violent offense” means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this chapter, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

violent predator” cases, Shaw is correct that Dr. Wheeler never testified that the actuarial instruments specifically measured the risk of *predatory*, violent sexual offenses. 1 VRP at 110. But Shaw ignores that Dr. Wheeler considered numerous additional factors in determining that Shaw’s risk of committing *predatory* acts of sexual violence, including the nature of Shaw’s prior offenses, which clearly included offenses that would be classified as predatory acts of sexual violence. That the actuarial instruments measured a broader category of reoffense does not mean that the tests were not relevant to determining Shaw’s risk of committing predatory acts of sexual violence in the future. The actuarial instruments, in conjunction with Dr. Wheeler’s testimony about other relevant factors, were sufficient to support the SVP findings. Furthermore, that the actuarial instruments are not an exact or complete measure of risk goes to the weight issues that we will not disturb. *Camarillo*, 115 Wn.2d at 71.

In a footnote, Shaw also suggests that the actuarial instruments cannot support the trial court’s findings because the base rates used in the actuarial instruments were higher than the “base rate for Washington offenders.” Br. of Appellant at 28, n.5. There was significant testimony about the possible differences in base rates. But again, the evidence as a whole supports the trial court’s findings and this information goes to weight issues that we will not address. *Camarillo*, 115 Wn.2d at 71.

Shaw further argues that the actuarial instruments already considered some of the dynamic factors Dr. Wheeler considered. But Dr. Wheeler clearly identified this potential duplication. That there may have been some overlap between the actuarial instruments and dynamic factors goes to weight issues that we will not disturb. *Camarillo*, 115 Wn.2d at 71.

Shaw fails to show that any potential defects related to the actuarial instruments or dynamic factors undermine the trial court’s findings and most of his arguments relate to weight issues we will not address.¹⁰ *Camarillo*, 115 Wn.2d at 71. Accordingly, these arguments also fail.

Because none of Shaw’s arguments show that the trial court’s findings were not supported by substantial evidence, we affirm the SVP commitment.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Johanson, J.

We concur:

Armstrong, P.J.

Van Deren, J.

¹⁰ Shaw also argues that Dr. Wheeler’s reliance on dynamic factors was improper because Shaw had been incarcerated since 1985 and did not exhibit any signs of “deviant sexual behavior and had no anger management or major behavior problems.” Br. of Appellant at 28. This argument appears to be the same as his first argument in section II above, whether Shaw was *currently* unable to control his behavior.