
**IN THE
SUPREME COURT OF MISSOURI**

**IN THE MATTER OF THE CARE)
AND TREATMENT OF)
STEPHEN ELLIOTT,)
)
Appellant,)
)
v.)
)
)
STATE OF MISSOURI,)
)
Respondent.)**

Case No. SC87746

**Appeal from the Circuit Court of Clay County, Missouri
The Honorable Larry D. Harman, Judge**

Respondent's Brief

**JEREMIAH W. (JAY) NIXON
Attorney General**

**CHERYL CAPONEGRO NIELD
Missouri Bar No. 41569
Deputy Solicitor
cheryl.nield@ago.mo.gov**

**Post Office Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Facsimile: (573) 751-8796**

**ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI**

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E. Janus & R. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders:
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Statement of Facts

Since 1975, Stephen Elliott has raped at least seven women and girls, with some of the rapes occurring on the same days. On June 15, 2004, the State filed a petition to commit Elliott as a sexually violent predator under §632.480, *et seq.* (LF 9-13). The case was tried to a jury in Clay County beginning on May 31, 2005, with the Honorable Larry D. Harman presiding (Tr. cover, 1). The evidence, in the light most favorable to the jury's verdict finding Elliott to be a sexually violent predator, is as follows:

In 1975, Elliott was arrested for the rapes of Kathy Stevens and Lila Rice (Tr. 306). Elliott hit Stevens, then raped her vaginally, anally, and orally (Tr. 307). Then, he vaginally and anally raped her again (Tr. 307). Elliott admitted having sexual contact with Stevens, but claimed that it was consensual sex that just got too rough (Tr. 307).

As Stevens was leaving Elliott's apartment following the rapes, Rice was approaching the area (Tr. 308). Stevens was buttoning her blouse as she was leaving (Tr. 308). Elliott told Rice, who was 13 years old, that he needed help getting a "crazy woman" out of his place (Tr. 308).

Elliott pulled Rice into his apartment and vaginally raped her (Tr. 309). Rice was crying; Elliott told her to be quiet and choked her as he was raping her (Tr. 309). Neighbors heard her yelling "no" and "please don't" (Tr. 310).

Elliott was convicted of sexual misconduct in connection with the attacks on Stevens and Rice (Tr. 311).

In 1977, Elliott was arrested for the rape of 12-year-old Janna Griffin (Tr. 310). While Janna was sleeping, Elliott grabbed her, told her she “had the stuff he wanted” and raped her (Tr. 310). During the rape, Elliott was laughing and smiling; he told Griffin not to be mad (Tr. 312). Griffin was crying and afraid (Tr. 312).

Hospital notes showed that Griffin also suffered bruising, and had scratches and a bite mark (Tr. 311). There was also evidence of penetration and sperm (Tr. 311).

Elliott next raped Charlene Mesereau, whom he met at a bar in California (Tr. 312). Elliott tried to persuade Mesereau to leave the bar with him; when she resisted, he hit her and forced his way into her car (Tr. 313). While kissing Mesereau, he choked her until she lost consciousness (Tr. 313). When Mesereau woke up, Elliott was driving (Tr. 313). Elliott told her that he could have killed her and that he would have done so silently (Tr. 313). He also said that he had raped others, but he was going to kill, not rape, her (Tr. 313). Elliott made mention of the Hillside Strangler (Tr. 313).

While driving, Elliott hit a speed bump and lost control of the car to such a degree that he had to grab the steering wheel with both hands (Tr. 313-14). This gave Mesereau the opportunity she needed – she jumped out of the car and escaped (Tr. 314). Elliott was originally arrested for assault with intent to commit rape and kidnaping (Tr. 312).

In 1980, Elliott raped Cory Paulette Lambert (Tr. 228-30). The Saturday following Thanksgiving that year, Lambert went to a club to go dancing (Tr. 230-31). She danced with Elliott (Tr. 231-32). Elliott told Lambert that he was feeling sick and asked her to walk

outside the club with him (Tr. 232-33). She did so, but when Elliott invited her into his car, she declined (Tr. 233). Elliott yelled at her and pushed her into the car anyway (Tr. 233).

Lambert said that she had to go back into the club, but Elliott drove her around the parking lot (Tr. 234). Then Elliott left the club and drove at 80 to 90 mph out to what Lambert described as an “old dump road” (Tr. 234-35). When Lambert grabbed the steering wheel, Elliott got angry and told her not to do it again (Tr. 235).

Elliott parked the car and turned out the lights (Tr. 234). Elliott twisted Lambert’s arm behind her and told her that she better do what he wanted, or he would hurt her (Tr. 235). Elliott pushed Lambert down, put her feet over her head, took her pants off, and raped her vaginally and anally (Tr. 235-36). Lambert estimated that Elliott kept her there, in the car, for around two hours (Tr. 236).

Lambert said that she had to go to the bathroom and Elliott let her out of the car so that she could do so (Tr. 237). But when she tried to put her clothes back on, he told her not to bother (Tr. 237). Lambert tried to run away, but Elliott caught her, pushed her down, and ordered her back in the car (Tr. 237). When Lambert screamed and said that she did not want to get back in the car, Elliott punched her in the face (Tr. 237). Lambert complied (Tr. 238).

Once they were back in the car, Elliott realized the car would not start, so he made Lambert sit in the driver’s seat while he checked under the hood and got the car to start (Tr. 238). Meanwhile, Lambert tried to put the car in gear and locked the driver’s side door, but she could not get the car to go, and Elliott returned to the car, on the passenger’s side

(Tr. 238). Elliott drove Lambert back to the club; Lambert reported the attack to the police (Tr. 239).

In 1981, Elliott raped Betty Carol Downs (Tr. 251-52). On the evening of August 18, Downs left her home to go for a drive but she got a flat tire (Tr. 253-54). Downs pulled into a gas station, but it was closed (Tr. 254). After waiting for help for a while, but receiving none, Downs went into a nearby bar hoping to find someone she knew to help her (Tr. 255).

Downs did not find anyone she knew at the bar, but she had a beer and met Elliott and the two danced (Tr. 255). Elliott offered to change the flat tire on Downs' car (Tr. 256). But once they left the bar, Elliott wanted Downs to go with him in his van so they could go eat breakfast (Tr. 256). Downs said she needed to get home, but Elliott persisted, telling her that once they had gotten breakfast, he would fix her flat tire (Tr. 256-57). Downs relented and went with Elliott in his van (Tr. 257).

Elliott, though, did not drive to a restaurant; instead he drove to the offices of a trucking company and made coffee (Tr. 257). Downs told him she had to go, left the building, and started walking down the street (Tr. 258). Elliott went after her, grabbed her by the arm, and said they were going to breakfast, then he would take her to her car (Tr. 258-59).

Elliott took Downs to his van, then he drove the van to a dark, isolated area behind the office building (Tr. 259). Elliott swung Downs around in the van's seat and grabbed her hands (Tr. 259-60). Downs started crying, which made Elliott mad, so he hit her in the face,

knocking her to the floor of the van (Tr. 260). Elliott held her down, told her to take off her clothes, and threatened her (Tr. 260-61).

Elliott got up and said he had to go to the bathroom and Downs said that she did, too (Tr. 261). Once Elliott had gotten out of the van, Downs grabbed her clothes and ran (Tr. 262). Elliott ran after her and grabbed her (Tr. 262). When Downs screamed, Elliott covered her mouth (Tr. 262). Downs continued to struggle to try to get away, but Elliott pulled her back into his van, pulled her onto a cot in the back of the van, and raped her, both vaginally and anally (Tr. 262-63). Downs tried to resist and bit Elliott on the hand, but Elliott kept her in the van for a couple of hours (Tr. 263-64). Elliott told Downs that he loved her, and he wanted to take her to the mountains and live there with her forever (Tr. 263).

Elliott eventually said he would take Downs back to her car and he let her drive his van there (Tr. 265). Elliott kept saying that he loved her and wanted to see her again (Tr. 265). Elliott told Downs that if she disappeared, no one would notice, and he had friends who could “take care of her” (Tr. 268). When she got back to her own car, Downs drove herself to the emergency room, where she received treatment (Tr. 265-66).

In 1988, Elliott raped 18 year-old Lisa Vodochodsky (Tr. 242-44).¹ Vodochodsky knew Elliott because they shared the same circle of friends; Elliott was around 40 years old at the time (Tr. 243).

¹ At the time of trial, Lisa was known as Lisa Schutter (Tr. 242-43).

On August 3, 1988, Elliott was “cruising around” and he offered Vodochodsky a ride (Tr. 243-44). Elliott drove her to a side road and raped her (Tr. 244-246). Elliott choked Vodochodsky and told her that if she did not cooperate, he would choke her until she passed out and do it anyway (Tr. 245). Elliott made her take her clothes off; she begged him not to do this, and she was crying (Tr. 245). Vodochodsky told him she did not want to become pregnant, but Elliott raped her and ejaculated anyway (Tr. 246).

The court appointed Dr. Jeanette Dunkin, a psychologist and certified forensic examiner, to do a sexually violent predator examination of Elliott (Tr. 284-89). Dr. Dunkin explained the type of information that she reviews to conduct such examinations, including police records, court records, victim statements, and probation and parole reports (Tr. 294-95). She also attempts to interview the subject, though, in this case, Elliott refused to be interviewed (Tr. 295-97). Dr. Dunkin testified that the information she relied upon to evaluate Elliott is the type of information that is reasonably relied upon by professionals in her field (Tr. 297). She also testified that she found the records themselves to be otherwise reasonably reliable (Tr. 297).

Using the Diagnostic and Statistical Manual IV (DSM-IV), Dr. Dunkin testified that to a reasonable degree of scientific certainty, Elliott suffers from sexual sadism, a form of paraphilia (Tr. 301). Paraphilia is characterized by recurrent and intense sexually arousing fantasies, urges, or behaviors which generally involve non-human objects, the suffering or humiliation of oneself or one’s partner, or children and other non-consenting persons (Tr. 302-03). As to sexual sadism in particular, Dr. Dunkin outlined two diagnostic criteria,

or symptoms that would be present in an individual, for this diagnosis to be met (Tr. 304). First, a subject must have recurrent, intense, sexually arousing fantasies where the humiliation of the victim excites the person, and these fantasies must be present for over six months, at a minimum (Tr. 304). Second, the subject needs to have acted on these fantasies with non-consenting persons (Tr. 304-05).

In reaching her diagnosis, Dr. Dunkin reviewed Elliott's arrest history (Tr. 305). Dr. Dunkin noted, as to the rape of Stevens, that the different types of intercourse – vaginal, oral, and anal – played into the humiliation and suffering of the victim (Tr. 307). Similarly, the facts of the attack on Charlene Mesereau showed that Elliott was trying to inflict psychological trauma, consistent with sexual sadism (Tr. 314-15).

Elliott's rape of Lambert was also consistent with sexual sadism. Elliott raped her vaginally and anally, which, again, plays into the suffering and humiliation of the victim (Tr. 307, 315). Adding to the humiliation, when Elliott was raping Lambert anally, he gave her a flashlight and wanted her to watch what he was doing to her in terms of the physical violence (Tr. 316). Also in the rape of Lambert, as well as in Elliott's rapes of other women, his position over them during the rapes was a "common thread" in terms of dominance over them (Tr. 315-16). Finally, while raping Lambert, he hit her in the face, fracturing her cheekbone (Tr. 316-17). But he denied to Lambert that he was a sadist (Tr. 317).

As with Stevens and Lambert, Elliott raped Downs both vaginally and anally (Tr. 318). Elliott told her that if she did not stop crying, he would "make it last all night long" (Tr. 318). He also hit her (Tr. 318). Besides his brutality, Elliott's statements to

Downs could also be seen as part of his sadism; Dr. Dunkin said that Elliott's statements to Downs that he wanted to take her into the mountains and live with her forever could be perceived, by the victim, as indications that Elliott would kidnap her and continue to rape her (Tr. 318).

Elliott was convicted and incarcerated following the rapes of Lambert and Downs, then he was paroled (Tr. 319). And while on parole, Elliott was arrested for the rape of Sandra Talbott (Tr. 319). Elliott took her to a secluded area and raped her; he told her to take her own clothes off so it would not be seen as rape, since she "voluntarily" removed her clothes (Tr. 319-20). As with his other rapes, Elliott held Talbott down in a position of dominance (Tr. 315-16, 320). As part of the humiliation, he instructed her to masturbate (Tr. 320). When Talbott said she was afraid he would hurt her, that made Elliott mad, then he said that he would not hurt her if she was good (Tr. 320-21). Dr. Dunkin noted that this would likely have been perplexing for the victim, Talbott, as there was no way for her to know what kind of conduct was "good" conduct that would prevent her from being hurt by Elliott (Tr. 321). Dr. Dunkin noted that during his sex offender treatment while incarcerated in Missouri, Elliott said that he did not know why he had sex with Talbott, but he indicated that "he thought he liked new pussy" (Tr. 321-22).

Elliott's rape of Lisa Vodochodsky occurred only minutes prior to his rape of Talbott, much like Elliott's rape of Rice following immediately on the heels of Elliott's rape of Stevens (Tr. 306-09, 322). In his rape of Vodochodsky, Elliott used the same position of dominance as with his other rapes (Tr. 315-16, 323). Reminiscent of the attack on Mesereau,

whom he actually choked (Tr. 313), Elliott told Vodochodsky that she needed to stop crying, or he would choke her until she passed out and then he would “do it anyway” (Tr. 323). As part of his infliction of psychological harm, Elliott ejaculated during the rape despite Vodochodsky’s pleas that he not do so, for fear of pregnancy (Tr. 324). Similar to his threats to take Downs into the mountains and live with her forever, Elliott told Vodochodsky that he would lock her up and do it to her every night (Tr. 324).

While awaiting sentencing for the rape of Talbott, Elliott was terminated from his job at an apartment complex (Tr. 325). One of the female residents of the complex reported to Elliott’s supervisor that Elliott “would not take no for an answer” and Elliott was then fired (Tr. 325). This female tenant made a rape allegation as well (Tr. 325). Elliott was also arrested for hitting his girlfriend in the face with a telephone receiver (Tr. 325).

Dr. Dunkin noted, again, the “common threads” in all of Elliott’s rapes – the humiliation and psychological victimization, the physical suffering, and the positioning over the victims where he can see their facial expressions of fear and pain (Tr. 326-27). After reviewing Elliott’s history, Dr. Dunkin opined that Elliott suffers from a mental abnormality that predisposes him to commit sexually violent offenses (Tr. 329-30). In support, she noted that he is aroused by the psychological and physical suffering of his victims (Tr. 329). She also noted his history of convictions for rapes, running from 1975 until 1988, when he was incarcerated (Tr. 329-30).

Dr. Dunkin noted that Elliott’s sexual sadism causes him serious difficulty in controlling his behavior (Tr. 331). Elliott has the drives associated with sexual sadism, and

he does not self-regulate in that he acts on them with non-consenting persons (Tr. 331). Also evidence of Elliott's serious difficulty in controlling his behavior, Elliott raped while he was on probation and the threat of probation revocation has never been a deterrent (Tr. 332). Likewise, the threat of incarceration has never been a deterrent for Elliott, as he raped following incarceration for his sexual offenses in Texas (Tr. 332).

Dr. Dunkin noted that the DSM-IV indicates that those offenders with paraphilia who offend against non-consenting persons likely repeat the behavior until they are caught (Tr. 333). Indeed, Elliott committed some of his rapes on the same days, as against different victims (Tr. 333).

Dr. Dunkin evaluated Elliott's risk of re-offense by looking first, to actuarial instruments and, specifically, the Static-99 (Tr. 336). Dr. Dunkin explained that actuarials are commonly used in psychology and for risk assessment, but they are merely a "starting point" after which she considers individual factors (Tr. 336-38).

Dr. Dunkin explained that the Static-99 looks at factors that are statistically significant in terms of the risk of re-conviction (Tr. 339). The Static-99 is commonly used to evaluate sex offenders, and Dr. Dunkin used it to evaluate Elliott (Tr. 340). On the Static-99, Elliott scored a 7 which places him in the high risk category for re-conviction; a score of 6 or better puts an individual into the high risk category (Tr. 341).

Beyond the static factors of the Static-99, Dr. Dunkin looked to Elliott's individual characteristics and found that they aggravated his risk (Tr. 344). As noted, Elliott continued

to reoffend despite incarceration and being placed on parole or probation (Tr. 345). Also, Elliott has a deviant sexual interest, *i.e.*, sexual sadism (Tr. 345).

Enhancing his risk further, Elliott has not been treated. Elliott was placed in Missouri's Sexual Offender Program (MoSOP) for treatment, but he was terminated from the program (Tr. 345-47). Elliott completed the introductory Phase I, but was terminated from Phase II because his treatment providers felt that he was not discussing his offenses and was distorting what had actually happened (Tr. 347). Elliott also claimed that his victims consented and things just went too far (Tr. 347). Elliott failed to admit his behavior or accept it (Tr. 347).

After Elliott was terminated from treatment, he was offered another chance (Tr. 348). But Elliott only wanted to return to treatment on his terms – he would be in treatment for nine months but he wanted to finish it sooner because he had other things to do (Tr. 348). Because Elliott has never completed treatment, he lacks insight into what triggers his behaviors, and what might cause him to relapse (Tr. 349).

Dr. Dunkin considered the possibility that Elliott had antisocial personality disorder, but did not have enough information to make a diagnosis, since Elliott would not be interviewed (Tr. 350). If present in Elliott, though, a personality disorder could be another aggravating factor as to risk (Tr. 350).

Elliott's substance abuse history also aggravates his risk (Tr. 350-51). Elliott was drinking alcohol and/or using drugs during the commission of his offenses; drinking lowers

inhibitions (Tr. 351). Elliott was briefly treated for substance abuse, but not recently, and he has had alcohol since then (Tr. 351).

That Elliott offended while on parole also increases his risk, as does his long (20 year) offense history (Tr. 352). Dr. Dunkin explained, though, that increasing age tends to lower risk (Tr. 352-53). That said, Dr. Dunkin opined that Elliott's age, while lowering his risk, did not lower it to such a degree that he would not be more likely than not to commit sexually violent offenses (Tr. 353).

Dr. Dunkin also acknowledged that Elliott has some health problems, with his heart and back (Tr. 353). But Elliott is not on any sort of restricted activity (Tr. 353). Dr. Dunkin noted that Elliott's victims were in close proximity to him, and he did not have to pursue them (Tr. 354). Currently, Elliott stands 6'4" tall and weighs 300 pounds (Tr. 354-55).

Dr. Dunkin opined that Elliott is a sexually violent predator (Tr. 355).

Elliott's jury found him to be a sexually violent predator, too, and the court committed him for treatment (Tr. 558; LF 175, 194). Elliott appeals.

Argument

I

Denial of motion to dismiss which asserted that the SVP law violates due process because it does not require immediate or imminent risk.

Elliott argues that the court erred in denying his motion to dismiss the State’s petition because the SVP law violates his right to due process (App. Br. 25). Elliott maintains that because the law “does not require a risk that he is likely” to commit sexually violent offenses “in the immediate future,” it deprives him of his liberty in violation of due process (App. Br. 25). Elliott asserts that the statute is unconstitutional both on its face and as applied (App. Br. 25).

Standard of Review

This Court reviews issues of law de novo. *In the Matter of the Care and Treatment of Bernat*, 2006 WL 1882947 (Mo. banc June 30, 2006). Where a statute is challenged as being unconstitutional, this Court presumes that the statute is constitutional, and the burden of showing otherwise rests on the challenger. *Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc., et al., v. Nixon*, 185 S.W.3d 685, 688 (Mo. banc 2006). “This Court will not invalidate a statute unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts the fundamental law embodied in the constitution.” *Id.*, quoting *Suffian v. Usher*, 19 S.W.3d 130, 134 (Mo. banc 2000) (citations omitted).

Analysis

As Elliott concedes (App.Br. 29), other states with sexually violent predator laws on the books that have considered whether proof of imminent harm is required under due process have rejected that notion.

In *In re the Detention of Selby*, 710 S.W.2d 249 (Iowa 2005), Selby argued, as does Elliott, that Iowa's SVP statute "violate[d] due process because it permit[ted] commitment through showing that the offender is more likely than not to re-offend at some point within his lifetime." *Id.* at 251. Selby urged that the statute could only be constitutional if "the likelihood of re-offense [was]... within a shorter time period, such as within the immediate future." *Id.*

The Iowa Court rejected Selby's argument. After reviewing cases that Elliott also principally relies upon (App. Br. 27-28, relying on *Kansas v. Hendricks*, 521 U.S. 346, 358-60, 117 S.Ct. 2072, 2079-81, 138 L.Ed.2d 501 (1997) and *O'Connor v. Donaldson*, 422 U.S. 563, 574-75, 95 S.Ct. 2486, 2493, 45 L.Ed.2d 396 (1975)) the court in *Selby* found that the language of Iowa's SVP statute, cast in the present tense, and the SVP yearly review procedure, adequately protected Selby's rights. *Id.* at 253. The use of the present tense in the statute insured that the person was both mentally ill and dangerous:

For example, a sexually violent person is defined as one who "suffers from a mental abnormality which makes the person likely to engage" in sexually predatory acts. Iowa Code §229A.2(5) (emphasis added). A mental abnormality is defined

as a “condition *affecting* the emotional or volitional capacity of a person. . . .” *Id.* §229A.2(5) (emphasis added). Based on this language, a person must currently be suffering from a mental abnormality that makes the person likely to engage in sexually violent predatory acts.

Id. at 253.

Moreover, Iowa’s statute provides for yearly review of the commitment. *Id.* “Commitment is not necessarily indefinite. Rather, it is to last no longer than the person is dangerous or suffers from a mental abnormality which makes the person likely to engage in sexually violent predatory acts.” *Id.*, citing *Hendricks*, 521 U.S. at 364, 117 S.Ct. at 2083, 138 L.Ed.2d at 516.

Likewise, in Missouri, the SVP statute and, particularly, the definitional section, casts things in the present tense. Like Iowa, Missouri defines a sexually violent predator, in part, as a “person who *suffers* from a mental abnormality which *makes* the person” more likely than not to engage in predatory acts of sexual violence if not confined. Section 632.480(5), RSMo Cum. Supp. 2005 (emphasis supplied). So, too, as in Iowa and in *Selby*, in Missouri a “mental abnormality” is defined as “a congenital or acquired condition *affecting* the emotional or volitional capacity.” Section 632.480(2), RSMo Cum. Supp. 2005 (emphasis supplied). *See Selby*, 710 S.W.2d at 253. And that condition must be one which “*predisposes* the person to commit sexually violent offenses” – once again, present tense. §632.480(2), RSMo Cum. Supp. 2005 (emphasis supplied). Also as in Iowa, Missouri’s SVP

statute provides for yearly review, *see generally* §632.498, RSMo, so commitment is not indefinite.

Because Missouri's statute is the same as Iowa's in these critical respects, Iowa's conclusion in *Selby* is equally applicable here:

Because we can construe . . . [Iowa's SVP statute] in a constitutional manner, there is no reason to declare it facially unconstitutional simply because it does not provide an explicit time frame for the adjudication of dangerousness. The presence of present tense language and the annual review provision allow . . . [the statute] to comport with due process requirements.

Selby, 710 S.W.2d at 253. *See also In re the Detention of Hollins*, 715 N.W.2d 767 (Iowa 2006) (following *Selby* and rejecting Hollins' claim that the SVP statute was unconstitutional because it considered "a lifetime rather than a temporal risk of reoffending").

California has reached the same conclusion. In *Hubbart v. Superior Court*, 969 P.2d 584 (Cal. 1999), Hubbart claimed that California's sexually violent predator's act violated due process because it permitted confinement based on the "mere likelihood" that someone might offend "at some unspecified time in the future." *Id.* at 599. The California Court rejected Hubbart's challenge, again based on the wording of the statute: "The statutory criteria are expressed in the present tense, indicating that each must exist at the time the verdict is rendered." *Id.* And because of the use of the present tense, the statute ties the threat posed by a sexually violent predator to his current mental state:

By defining the qualifying mental disorder in this fashion, the statute 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 600 (footnote omitted). *See also Hudson v. State*, 825 So.2d 460, 467 (Florida 2002) (following *Hubbart* and rejecting claim that imminent danger must be shown to confine sexually violent predators).

Similarly, in *Beasley v. Molett*, 95 S.W.3d 590, 599 (Texas 2002), alleged sexually violent predators argued, among other things, that Texas’ SVP statute, which requires a person to have a behavioral abnormality that makes it “likely” that the person will engage in predatory acts of sexual violence, was unconstitutional. In particular, the alleged SVP’s argued that “the mere possibility or potential for harm is not serious enough to warrant a deprivation of liberty.” *Id.*

The Texas court rejected this claim. The court noted that Texas' SVP statute, "by its terms require[s] proof of a behavioral abnormality, predisposing the person to commit a sexually violent offense, to the extent that the person becomes a menace to the health and safety of another person." *Id.* at 600. And the term "menace," by definition, is "a threat or imminent danger." *Id.* Therefore, "[i]n its own terms, the Act satisfies any proof requirement of a substantial threat or imminent risk of future harm." *Id.*

Missouri's SVP statute also contains the term "menace." Section 632.480(2), RSMo Cum. Supp. 2005, defines "mental abnormality" as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." And, as noted, a sexually violent predator is a person who "suffers" from a mental abnormality that predisposes him to commit sexually violent offenses, making him a menace. "Menace" encompasses immanency.

Arizona has also considered a claim like Elliott's and has likewise rejected it. In *Martin v. Reinstein*, 987 P.2d 779 (Arizona 1999), persons against whom sexually violent predator petitions had been filed challenged Arizona's sexually violent predator act because it "violate[d] due process by allowing them to be committed without requiring a showing of immediate harm to themselves or others." *Id.* at 799. But as the Arizona Court noted, Arizona's "Act, however, requires more than a mere possibility of dangerousness; it specifically requires that an accused SVP have a mental disorder that renders him 'likely' to engage in acts of sexual violence." *Id.* at 800. As a consequence, Arizona's statute

“sufficiently limits its application to those who provide the greatest threat to society and have the greatest need for treatment.” *Id.* at 801.

Likewise, in Missouri, a sexually violent predator is a person with a mental abnormality who is “more likely than not” to commit predatory acts of sexual violence if not confined. Section 632.480(5), RSMo Cum. Supp. 2005. And, as in Arizona, persons alleged to be SVP’s can “argue to the jury the lack of certainty in predicting future dangerousness.” *Martin*, 987 P.2d at 801.

As noted, Elliott cites some of these cases, but argues that they “do not support the conclusion that the Missouri statutes comport with due process by requiring current or immediate or imminent danger for commitment” (App. Br. 30). But Elliott’s argument on this point is tortured, if not completely incomprehensible. Elliott argues that because Missouri’s statute has an “additional element,” he receives inadequate process (App. Br. 30). That “additional element,” that the predator is more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility, is proven through clinical judgment and actuarial investments (App. Br. 30); in Elliott’s case, he says, Dr. Dunkin assessed his risk “fifteen years in the future” (App. Br. 31). Thus, Elliott argues, “[t]he current or imminent danger is converted to lifetime danger, no matter how far into the future the person’s lifetime may reach” (App. Br. 31).

Elliott’s conclusions simply do not follow from his premises. Whatever risk he might pose into the future, the definitional aspects of Missouri’s SVP statute mean that he has a

current mental abnormality that is such that he cannot control it, and it makes him a menace.

And, if his condition changes, Missouri's statute provides for yearly review.

Elliott's due process challenge, devoid as it is of supporting authority and rejected in the states that have considered like challenges, fails.

II

Denial of pre-trial motion and “permitting” Dr. Dunkin to testify about Elliott’s serious difficulty in controlling behavior.

Elliott argues that the trial court abused its discretion in denying his pre-trial motion to exclude expert testimony on the issue of serious difficulty in controlling behavior and in “permitting” Dr. Dunkin to testify that Elliott has serious difficulty in controlling his behavior (App.Br. 32). Elliott argues that the testimony lacked foundation because “there is no reasonably reliable basis or methodology upon which psychologists can determine an individual’s ability to control behavior” (App.Br. 32).

Standard of review

Ordinarily, the admission of expert testimony “is within the discretion of the trial court and will not be interfered with unless it plainly appears that the discretion is abused.” *Stan Cushing Construction Co., Inc. v. Cablephone, Inc.*, 816 S.W.2d 293, 296 (Mo.App., S.D. 1991). In determining whether the trial court improperly exercised its discretion, this Court should reverse only where the trial court’s “ruling is so arbitrary and unreasonable as to shock our sense of justice and indicate a lack of careful consideration.” *Keyser v. Keyser*, 81 S.W.3d 164, 170 (Mo.App., S.D. 2002).

For reasons explained below, however, Elliott has not properly preserved his claim, so review by this Court, if any, is for plain error that would create manifest injustice or a miscarriage of justice if left uncorrected. *State v. Edmonds*, 188 S.W.3d 119, 125 (Mo.App., S.D. 2006).

Factual background and preservation

Prior to trial, Elliott filed a motion to exclude expert testimony regarding serious difficulty in controlling behavior as any such opinion would be based upon clinical judgment and would not have a scientific basis (Tr. 25-30). Following voir dire, but prior to opening statements, Elliott renewed that motion:

. . . Judge, what I would like to do is renew a couple of motions that we made yesterday. One is the motion to exclude expert opinion regarding serious difficulty.

Again, I expect the state to discuss with Dr. Dunkin and in opening statement. I would object to that and rest on the written motion and *asked that this be considered a continuing objection throughout opening statement.*

THE COURT: Objection's overruled, be continuing in nature.

(Tr. 204) (emphasis supplied).

During Dr. Dunkin's trial testimony, however, Elliott did not object, and the doctor opined regarding Elliott's serious difficulty, without objection or interruption:

Q. And does the condition that Mr. Elliott suffer[s] from, does it cause him serious difficulty in controlling his behavior the, you know, the portion of this mental abnormality?

A. In –

Q. Does it cause him serious difficulty?

A. In my opinion, yes.

Q. Now, specifically, how does the sexual sadism cause Mr. Elliott serious difficulty in controlling his sexual behavior?

A. If you're looking at, like, what serious difficulty is, there's kind of a three prong thing you can look at. There's a drive to commit, have these urges. That would be his drive....

(Tr. 330-31).

Perhaps counsel did not object because he later explored this issue with Dr. Dunkin at length on cross-examination (Tr. 375-382). And, counsel seemed to appreciate the need to object to testimony even though he had filed a pre-trial motion in limine; after all, regarding the Static-99 and actuarials, counsel sought a continuing objection as to opening statement, but renewed his objection to the Static-99 when Dr. Dunkin began testifying about it (Tr. 205, 337).

Under these circumstances, Elliott's claim is unpreserved. "A ruling in limine is interlocutory only and is subject to change during the course of the trial." *State v. Purlee*, 839 S.W.2d 584, 592 (Mo.banc 1992). Such a ruling, by itself, preserves nothing for appeal. *Id.* In order to preserve the claim, Elliott needed do more than file a pre-trial motion to

exclude testimony about serious difficulty² – he needed to object to the evidence regarding serious difficulty when Dr. Dunkin testified about it. *State v. Blackman*, 875 S.W.2d 122, 143 (Mo.App., E.D. 1994). He did not. As a consequence, his point speaks of the trial court’s denial of his pretrial motion and the trial court “permitting” Dr. Dunkin to testify. But a point relied on that refers only to a ruling on a motion in limine is, itself, fatally defective. *State v. Rodgers*, 899 S.W.2d 909, 911 (Mo.App., S.D. 1995).

Elliott argues that he supported his pre-trial motion with case-based arguments at trial (App.Br. 33, citing Tr. 290-91) and that he “renewed his objections in the motion at trial” (App.Br. 34, citing Tr. 327). But these transcript citations do not show objections to Dr. Dunkin opining about serious difficulty. Rather, the first transcript citation (Tr. 290-91) relates to counsel’s objection to using a copy of the statutory definition of “sexually violent predator” as anything other than a demonstrative exhibit, and the second transcript citation (Tr. 327) relates to the definition of mental abnormality as that term was defined in the

² Elliott’s motion, while not styled a motion in limine, was one nonetheless; a motion in limine is “[a] pre-trial motion requesting court to prohibit opposing counsel from referring to or offering evidence on matters so highly prejudicial to moving party that curative instructions cannot prevent predispositional effect on jury.” *State v. Taylor*, 929 S.W.2d 925, 927 n.1 (Mo.App., S.D. 1996), quoting BLACK’S LAW DICTIONARY 1013 (6th ed. 1990).

Thomas opinion.³ Neither relates to serious difficulty; if there is such an objection, Elliott has not cited it, and respondent has not found it. Review, if any, would be for plain error only.

Dr. Dunkin’s testimony and clinical judgment

Elliott concedes that the Court of Appeals, Eastern District, “reject[ed] the argument that Mr. Elliott makes here” in *In the Matter of the Care and Treatment of Whitnell*, 129 S.W.3d 409 (Mo.App., E.D. 2004) (App.Br. 37). That is correct. As *Whitnell* teaches, admission of expert testimony in Missouri is governed by statute. Section 490.065. *Whitnell*, 129 S.W.3d at 413; *State Board of Registration for the Healing Arts v. McDonough*, 123 S.W.3d 146, 153 (Mo. banc 2003). “Testimony ought to be admitted if the expert witness possesses some qualification.” *Whitnell*, 129 S.W.3d at 413. Expert qualifications can come through either specialized experience or education; the extent of training or experience goes to the weight of the testimony, not its admissibility. *Id.*

Under these standards, Dr. Dunkin was plainly qualified to opine as to Elliott’s serious difficulty in controlling behavior. *See* Tr. 284-90. And, as noted, Elliott did not raise any objection during the relevant portion of Dr. Dunkin’s testimony, much less a specific objection based upon §490.065 and *McDonough*.

³ *In the Matter of the Care and Treatment of Thomas*, 74 S.W.3d 789 (Mo. banc 2002).

Undeterred, Elliott argues that *Whitnell* is distinguishable or, barring that, wrongly decided (App. Br. 37). Elliott theorizes that if an expert merely has “some” qualifications, as opposed to “‘specialized experience or education’ and ‘superior knowledge’” then “‘accurate opinions or correct conclusions are impossible” (App. Br. 37 quoting *Whitnell*, 129 S.W.3d at 413). But Elliott parses the court’s language and ignores its ultimate holding.

Elliott also suggests that *In the Matter of the Care and Treatment of Coffel*, 117 S.W.3d 116 (Mo.App., E.D. 2003), and not *Whitnell*, should control (App. Br. 33-38). In *Coffel*, the Court of Appeals, Eastern District, reversed the judgment of commitment, finding “insufficient evidence to support a finding that Angela [Coffel] is more likely than not to reoffend sexually,” *Coffel*, 117 S.W.3d at 127. Principally because there had been no research to date done on female sex offender recidivism, the court rejected as insubstantial expert testimony that, based upon clinical judgment, Coffel was likely to reoffend. *Coffel*, 117 S.W.3d at 127-29. In *dicta*, the Eastern District noted that “[h]ad this case been tried to a jury, it is clear that Dr. Phenix’s opinion as to the likelihood that Angela [Coffel] would reoffend sexually would not be admissible over a proper objection.” *Id.* at 129.

Coffel, therefore, does not speak to expert testimony or expert qualifications, and stands basically for the proposition that no one knows about female sex offender recidivism until studies are done. Of course, that would not apply to Mr. Elliott. Dr. Dunkin was qualified to testify about Elliott’s serious difficulty in controlling his behavior, and Elliott is hard-pressed to claim otherwise where he lodged no timely objection to her testimony on this basis. Finally, to the extent Elliott disagreed with Dr. Dunkin’s conclusions about his serious

difficulty in controlling his behavior, he explored this issue at great length during cross-examination (Tr. 375-94). There was no abuse of discretion, much less manifest injustice.

III

Admission of evidence of the Static-99, an actuarial instrument.

In his final point, Elliott argues that the trial court erred in admitting Dr. Dunkin's testimony about her use of an actuarial instrument, the Static-99, to evaluate Elliott's risk (App.Br. 40). Elliott argues that the results were irrelevant as "they do not address . . . whether Mr. Elliott is more likely to reoffend" because "actuarial instruments reflect only the results of group analysis" (App.Br. 40). While claiming that the results were logically irrelevant, Elliott simultaneously maintains that those results, that supposedly bore no relation to him, were nonetheless prejudicial to him (App.Br. 40).

Standard of review and applicable laws of evidence

"A trial court has considerable discretion in determining whether evidence should be admitted or excluded." *In the Matter of the Care and Treatment of Cokes*, 183 S.W.3d 281, 285 (Mo.App., W.D. 2005), *citing Lewis v. State*, 152 S.W.3d 325, 330 (Mo.App., W.D. 2004). A court abuses its discretion in this regard "only when the exclusion of evidence shocks the sense of justice or indicates an absence of careful consideration." *Cokes*, 183 S.W.3d at 285. "Even then, we will not reverse unless the error had a material effect on the merits of the action." *Id.*

In order to be admissible, evidence must be relevant. *State v. Kennedy*, 107 S.W.3d 306, 310 (Mo.App., W.D. 2003). Relevance, itself, has two components: logical relevance and legal relevance, *id.*, *citing State v. Anderson*, 76 S.W.3d 275, 276 (Mo. banc 2002):

“Evidence is logically relevant if it tends to make the existence of a material fact more or less probable.” *Id.* While evidence must be logically relevant, it need not be conclusive; it is relevant as long as it “logically tends to prove a fact in issue or corroborates relevant evidence which bears on the principal issue.” *State v. Mercer*, 618 S.W.2d 1, 9 (Mo. banc 1981). To be admissible, logically relevant evidence also must be legally relevant. *Anderson*, 76 S.W.3d at 276. Legal relevance refers to the probative value of the evidence weighed against its costs, including unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness. *Id.* Evidence is legally relevant if its probative value outweighs its prejudicial effect. *State v. Mayes*, 63 S.W.3d 615, 629 (Mo. banc 2001). *See also State v. Williams*, 976 S.W.2d 1, 4 (Mo.App. W.D. 1998).

Kennedy, 107 S.W.3d at 310.

That said, where “evidence is relevant, it will not be inadmissible simply because it may be prejudicial,” *State v. Garrison*, 896 S.W.2d 689, 692 (Mo.App., S.D. 1995), *citing State v. Flenoid*, 838 S.W.2d 462, 468 (Mo.App., E.D. 1992), since “relevance, not prejudice, is the touchstone of due process.” *Garrison*, 896 S.W.2d at 692, *quoting State v. Trimble*, 638 S.W.2d 726, 732 (Mo. banc 1982).

Factual background

After lengthy testimony covering Elliott's extensive sexual offending history, Dr. Dunkin began to discuss actuarial instruments, particularly the Static-99, as they relate to risk of reoffense:

Q. Turning your attention to the definition of sexually violent predator, the second question you addressed is whether the mental abnormality makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility, is that correct?

A. Yes.

Q. How do you go about addressing that question, the question of risk?

A. Risk is looked at, essentially what it is, what happens is there's kind of a starting point with what are known as actuarial instruments. And then there are individual risk factors for each person that you look at.

(Tr. 336).

Elliott's counsel then objected to any discussion of actuarials, or the Static-99, on the grounds noted in his pre-trial motion in limine (Tr. 337). *See* LF 62-65 (motion in limine).

Elliott concedes that actuarial instruments, like the Static-99, were found to be admissible in *In the Matter of the Care and Treatment of Goddard*, 144 S.W.3d 848, 851 (Mo.App., S.D. 2004). And he does not dispute that such instruments are reliable and have scientific validity, as *Goddard* has resolved that issue. *See Goddard*, 144 S.W.3d at 851-53. Elliott's challenge is, therefore, a narrow one – he argues that whatever scientific validity the Static-99 has, it was simply not relevant to him, as it addresses groups of individuals, and not Elliott's individual characteristics (App.Br. 42).

This argument completely misperceives what an actuarial is. Actuarial is defined as “relating to statistical calculation, esp. of life expectancy.” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 22 (1993). In the sexually violent predator context, the use of actuarials allows professionals to evaluate an individual's risk based upon the risk factors of those in the group as compared with the risk factors of someone like Elliott. Dr. Dunkin explained it this way:

Q. And, specifically what actuarial instrument did you use first in this case?

A. In this case I used the Static-99.

Q. And the Static-99, specifically what is it?

A. It's an actuarial instrument. It is a, there's a number of items which have been shown through research to be statistically significant in a person's risk to re-offend.

Q. What, what types of, I guess static information, are you talking about?

A. There is a variable, such as a person, age, the number of offenses they have had, the number of victims they have had.

Things like the, the sex of the victim. Whether the victims were related or unrelated to the person. If they were, there were any stranger victims, things of that nature (Tr. 339-40).

Ignoring the fundamental nature of actuarials as a statistical tool, Elliott argues, with nary a citation, that “it is the individual factors, not the actuarial assessment, that is shown by research to be significant to reoffense” (App.Br. 43-44). According to Elliott, “[a] classification based upon the success or failure of a sample group does not have the same consequence” as evaluating Elliott’s individual risk (App.Br. 44). Thus, per Elliott, “[t]here is little probative value in the instrument as it relates to any individual” (App.Br. 44).

Not only are Elliott’s conclusions wholly unsupported, they are, simply, wrong. In *In re Commitment of Simons*, the Illinois court noted that, at the time of the opinion, “experts in at least 19 other states rely upon actuarial risk assessment in forming their opinions on sex offenders’ risks of recidivism” (Missouri among them). 821 N.E.2d 1184, 1192 (Ill. 2004). “Significantly, eight of these states have directly addressed the *Frye* question and concluded either that *Frye* is either inapplicable to actuarial risk assessment or that actuarial risk

assessment satisfies the general acceptance standard.” *Id.* “In fact, in several jurisdictions actuarial risk assessment is mandated by either statutes or regulation.” *Id.* at 1194.

In *Simons*, the court also noted that among professionals in the field, the use of actuarials to evaluate recidivism risk in sex offenders was both accepted and commonplace. Some commentators view actuarials as “state-of-the-art” and suggest that usage is preferable. *Id.* at 1195, citing E. Janus & R. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability*, 40 Am.Crim. L.Rev. 1143, 1145 (2003). Indeed, actuarial instruments, together with a professional’s judgment, are critical in the sexually violent predator context: “a combination of actuarial and clinical methods ‘is commonly advocated by leading forensic practitioners who routinely predict violence in the course of their forensic work.’” *Id.* at 1196, quoting C. Mee & H. Hall, *Risky Business: Assessing Dangerousness in Hawaii*, 24 U. of Haw. L.Rev. 63, 92 (2001).

Plainly, actuarial risk assessments, like the Static-99, are used by forensic examiners to evaluate risk, and are relevant to Elliott as used by Dr. Dunkin to evaluate his risk in particular. While it is true that Elliott was not considered specifically and individually when the statistics were developed, that makes them no less relevant to him. After all, actuarials are used every day to evaluate things like life expectancy, as noted, or insurance risk. And while it may be possible to convince your insurance company that your teenaged son is an extremely careful driver, it seems unlikely at best that you would succeed in convincing the company to lower his car insurance rates on the grounds that your circumspect son was not specifically and individually considered by the insurance actuarials.

Further, to the extent that Elliott suggests that his individual characteristics were not adequately considered or captured in the Static-99 (App. Br. 43-44), Elliott ignores the balance of Dr. Dunkin’s testimony where she evaluated Elliott’s individual facts and circumstances. Indeed, Dr. Dunkin explained that the Static-99 was simply a starting point, after which she evaluated Elliott’s characteristics and circumstances through use of her clinical judgment (Tr. 344). Of course, Elliott disagrees with Dr. Dunkin’s conclusions in this regard, and in his second point relied on he disparages her clinical judgment,⁴ but it cannot be said that she did not consider Elliott as an individual.

Finally, Elliott argues that the Static-99 was not legally relevant, *i.e.*, that it was more prejudicial than probative. In particular, he points to an un-objected to portion of the state’s closing argument to bolster his theory that the Static-99 evidence was “confusing and misleading”: “[i]t confuses individual risk with group risk, and it is misleading because it causes the jurors to substitute the behavior of unknown members of a sample group for that of Mr. Elliott” (App.Br. 45).

Elliott tries to manufacture confusion from testimony and argument that were perfectly plain. Given Elliott’s score of 7 on the Static-99 (the scoring of which only goes

⁴ Indeed, in his second point, Elliott argues that clinical judgment cannot be used or trusted in forensic evaluations, and in his third point, Elliott argues that actuarials are not relevant. Query, therefore, what is left for a sexually violent predator forensic evaluator to evaluate in Elliott’s view of things.

to 6) (Tr. 341), he can be grouped or considered along with the offenders who were looked at in the Static-99 who shared Elliott's score, and of those offenders, 52% were ultimately re-convicted within 15 years (Tr. 342, 426-27). Thus, Elliott's score shows his *risk* of re-conviction, which would explain why Dr. Dunkin "could not say whether Mr. Elliott would be within that portion of the sample group or the other portion of the group which did not reoffend" (App.Br. 45, citing Tr. 427). Because, again, the actuarial measures risk, not certainty. Just because the Static-99 does not target, with pinpoint accuracy, whether Elliott will or will not re-offend or be re-convicted in the future does not make it misleading or confusing, Elliott's attempts at obfuscation notwithstanding.

Conclusion

In view of the foregoing, respondent submits that the probate court's judgment finding Elliott to be a sexually violent predator should be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

CHERYL CAPONEGRO NIELD
Deputy Solicitor
Missouri Bar No. 41569
cheryl.nield@ago.mo.gov

P.O. Box 899
Jefferson City, Missouri 65102
Phone No. (573) 751-3321
Fax No. (573) 751-8796

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 31st day of July, 2006, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

Emmett D. Queener
State Public Defender's Office
3402 Buttonwood Dr.
Columbia, MO 65201
Attorney for Appellant

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 9,055 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

Deputy Solicitor

Respondent's Appendix

Respondent's Appendix Index

1.	Chapter 632.480	A1
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632.480. Definitions. – As used in sections 632.480 to 632.513, the following terms mean: . . .

- (2) **“Mental abnormality”**, a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to health and safety of others; . . .
- (5) **“Sexually violent predator”**, any person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility and who:
 - (a) Has pled guilty or been found guilty, or been found not guilty by reason of mental disease or defect pursuant to section 552.030, RSMo, of a sexually violent offense; or
 - (b) Has been committed as a criminal sexual psychopath pursuant to section 632.475 and statutes in effect before August 13, 1980.