

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 10th day of June, 2021.

Present: Lemons, C.J., Goodwyn, Powell, Kelsey, McCullough, and Chafin, JJ., and Koontz, S.J.

Michael Shawn Edwards, Appellant,

against Record No. 200537
Circuit Court No. CL2009-10762

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Fairfax County.

This appeal arises from a judgment of the trial court following an annual-review hearing of Michael Shawn Edwards’s civil commitment, in which the court determined that Edwards remains a sexually violent predator and in need of inpatient treatment. On appeal, Edwards challenges the sufficiency of the evidence demonstrating that he remains a sexually violent predator and the trial court’s refusal to order a second evaluation at the conclusion of the annual review to assess whether Edwards could be conditionally released. Because Edwards’s sufficiency argument is meritless and his request for a second evaluation is moot, we affirm.

I.

“In accordance with established principles of appellate review, we view the facts in the light most favorable to the Commonwealth, the prevailing party below,” and “accord the Commonwealth the benefit of all inferences fairly deducible from the evidence.” *Shivaee v. Commonwealth*, 270 Va. 112, 127 (2005).

So viewed, the evidence demonstrates that Edwards was convicted of rape in 1987. Prior to his release from prison, the Commonwealth filed a petition to civilly commit him as a sexually violent predator. In 2010, a jury found Edwards to be a sexually violent predator under Code § 37.2-900 because he has “a mental abnormality and/or a personality disorder” that makes “it difficult to control his predatory behaviors” and “likely to engage in sexually violent acts,” and

the trial court subsequently found him in need of inpatient treatment. 1 J.A. at 3-4. For the next several years, the court determined at Edwards's annual reviews that he remained a sexually violent predator in need of inpatient treatment. In December 2015, the court approved Edwards for conditional release but found that he remained a sexually violent predator because his "mental abnormalities and personality disorder have not so changed that he no longer presents an undue risk to public safety." *Id.* at 11. Less than a year after his conditional release, however, Edwards violated the conditions of his release by viewing sexually suggestive material involving minor females on YouTube. As a result, the trial court recommitted Edwards to inpatient treatment in 2017.

In December 2019, the trial court conducted its second annual review since Edwards's return to inpatient treatment. At the beginning of the hearing, the Commonwealth noted that it was "assuming Mr. Edwards is not requesting discharge," either conditionally or unconditionally, because Edwards had not requested a second evaluation. *Id.* at 27. The Commonwealth repeated this assertion twice more during the hearing. *See id.* at 122-23, 164-65. Edwards's counsel "agree[d] that there is no second opinion" and that Edwards had "elected to go forward with the testimony of Dr. Dennis," the Commonwealth's expert in the diagnosis, risk assessment, and treatment of sex offenders. *Id.* at 29; *see also id.* at 123. Edwards made no specific argument during the hearing regarding conditional release, did not present any expert testimony to rebut the Commonwealth's expert, and only argued that the Commonwealth's evidence was insufficient to demonstrate that he was a sexually violent predator.

At the hearing, Dr. Dennis testified that Edwards remained a sexually violent predator and that "he still requires intensive inpatient treatment" despite making "some limited recent progress." *Id.* at 51. In his annual-review evaluation that was entered into evidence, Dr. Dennis diagnosed Edwards with Antisocial Personality Disorder, Other Specified Paraphilic Disorder (Non-Consent), and several substance-use disorders. 2 *id.* at 182.* Dr. Dennis described these diagnoses as "long-term" and "very stable." 1 *id.* at 68. Dr. Dennis found that Edwards met the following criteria to be diagnosed with Other Specified Paraphilic Disorder (Non-Consent): (1)

* This Court has sealed one of the two joint appendices filed in this appeal. To the extent that this order mentions facts found in the sealed record, we unseal only those specific facts, finding them relevant to the decision in this case. The remainder of the previously sealed record remains sealed.

“[e]jaculation or other clear signs of sexual arousal during events that are clearly non-consensual” combined with a “[r]eason to believe that the offender’s arousal was at least partially due to the non-consensual nature of the interaction,” (2) “[r]aping under circumstances with high likelihood of being caught,” and (3) “[h]aving concomitant consenting sexual partners.” 2 *id.* at 182-83. In diagnosing Edwards with this paraphilic disorder, Dr. Dennis especially noted the “aggressive and sadistic nature” of the crime that led to Edwards’s conviction in Virginia, “which included forcing the victim to fellate Mr. Edwards to orgasm after he anally sodomized her,” “having her fellate him a second time shortly after the first attack,” and ejaculating on the “victim’s face and in her mouth.” *Id.* at 183. Specifically regarding the diagnosis of Antisocial Personality Disorder, Dr. Dennis noted in his evaluation that the disorder “is acquired or congenital, affects Mr. Edwards’[s] emotional and/or volitional capacity, and by causing him difficulty controlling his predatory behavior, predisposes him to engage in sexually violent acts.” *Id.* at 184 (emphasis omitted). Dr. Dennis further opined that “the presence of antisociality and deviant sexual interests points to a higher recidivism risk than the presence of either factor alone.” *Id.*

Dr. Dennis’s evaluation also provided an actuarial risk assessment for Edwards that placed him in the highest category of offender risk, the “Well above average risk” category, which is a category “that offends at a rate 5.25 times greater than the rate of offenders in the middle of the risk distribution.” *Id.* at 190-91. Dr. Dennis also evaluated Edwards’s risk by reviewing his “treatment progress and dynamic risk factors,” or, in other words, “factors that increase the likelihood of a sexual offense and define that internal risk.” *See id.* at 191-97. One particular risk factor involved Edwards’s sexual interests, which included “[s]exualized [v]iolence” or “an interest in sadism or a preference for coercive sex over consenting sex.” *Id.* at 196. Dr. Dennis specifically pointed to a separate incident that occurred in Florida where Edwards raped his victim, “punched her multiple times, detained her against her will, and was undeterred by the presence of another adult male.” *Id.* Dr. Dennis concluded that Edwards’s “continued arousal” during his crimes in both Virginia and Florida “points to a high probability that he is sexually aroused by the violent component of his offenses.” *Id.* Although Dr. Dennis noted some improvement in certain risk factors, he testified that he had not “see[n] any major changes,” 1 *id.* at 111, and concluded in his evaluation that Edwards’s “condition has not so changed that he is no longer a sexually violent predator” and that he “needs continued intensive

inpatient treatment” such that “conditional release is not recommended,” 2 *id.* at 200. Completing the treatment facility’s three-phase program and “developing the skills to manage his sex offender risk in the community,” among others, were identified by Dr. Dennis as necessary criteria for Edwards to be suitable for conditional release. *Id.* at 199. Dr. Dennis noted that Edwards was still in the first phase of his treatment program at the time of his evaluation and that he had not met the attendance requirement to move to the second phase. In particular, Dr. Dennis testified that Edwards’s “lack of involvement in the treatment program means that he has not addressed the issues that we would expect to be associated with a reduction in risk,” and thus, Dr. Dennis did not “see any major changes in the reduction in his risk.” 1 *id.* at 112.

Based upon the evidence presented, the trial court ultimately found that Edwards remained a sexually violent predator in need of inpatient treatment, but the court requested that a second expert evaluate Edwards for the next annual review. Edwards then asked the trial court whether it would entertain an evaluation from a second expert if the court would grant him a continuance of the present annual review to obtain one. The Commonwealth argued that the trial court did not have the authority to bifurcate the annual-review hearing in such a fashion and that Code § 37.2-910(B) required Edwards to obtain a second evaluation prior to the annual-review hearing. The trial court agreed that the statute precluded it from granting Edwards’s request but reiterated that it wanted to hear from a second expert at the next annual review. Edwards now appeals to us.

II.

On appeal, Edwards challenges the sufficiency of the evidence to support the trial court’s finding that he remained a sexually violent predator and the trial court’s ruling that it had no authority to order a second evaluation at the conclusion of the 2019 annual-review hearing. We find his first argument to be meritless and his second argument to be moot.

A.

First, sufficient evidence supports the trial court’s finding that Edwards remained a sexually violent predator. A “[s]exually violent predator” is defined as “any person who (i) has been convicted of a sexually violent offense . . . and (ii) because of a mental abnormality or personality disorder, finds it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts.” Code § 37.2-900. At each annual review for a sexually violent predator, “[t]he burden of proof at the hearing shall be upon the Commonwealth to prove

to the court by clear and convincing evidence that the respondent remains a sexually violent predator.” Code § 37.2-910(C). “Clear and convincing evidence is the degree of proof that affords the fact finder a firm belief or conviction concerning the allegations that a party seeks to establish” and “exceeds the ‘preponderance’ standard, but does not reach the level of certainty required in criminal cases of ‘beyond a reasonable doubt.’” *Commonwealth v. Miller*, 273 Va. 540, 551 (2007) (citations omitted). Thus, “[i]n reviewing the sufficiency of the evidence on appeal, we apply an established standard of review” and “will approve the circuit court’s holding unless it is plainly wrong or without evidentiary support.” *Id.* (citing Code § 8.01-680).

Edwards does not dispute that he was convicted of a sexually violent offense in 1987, but he does dispute whether the Commonwealth sufficiently proved that he was “likely to engage in sexually violent acts” as the result “of a mental abnormality or personality disorder” that makes it “difficult to control his predatory behavior,” Code § 37.2-900. Dr. Dennis’s uncontradicted evaluation and testimony support the finding that Edwards remained a sexually violent predator by clear and convincing evidence. The combination of Edwards’s diagnoses of Antisocial Personality Disorder and Other Specified Paraphilic Disorder (Non-Consent) creates a higher recidivism risk for Edwards. Dr. Dennis also determined that Edwards’s actuarial risk assessment placed him in the highest risk category, that his dynamic risk factors had not significantly changed, and that his lack of involvement in his treatment program does not indicate that he has made significant enough progress to be released. Despite Edwards’s contention that his poor attendance in his treatment program does not demonstrate that he is likely to engage in sexually violent acts, Edwards has not rebutted Dr. Dennis’s conclusion that Edwards’s risk factors have not been sufficiently reduced to make him suitable for release. Based upon the Commonwealth’s evidence, we cannot say that the trial court was plainly wrong or that its finding that Edwards remained a sexually violent predator lacked evidentiary support.

B.

Next, Edwards and the Commonwealth dispute whether Code § 37.2-910(B) permits Edwards to request a second evaluation at the conclusion of an annual-review hearing. That statute provides:

Prior to the hearing, the Commissioner shall provide to the court a report reevaluating the respondent’s condition and recommending treatment. The report shall be prepared by a licensed psychiatrist or a licensed clinical psychologist skilled in

the diagnosis and risk assessment of sex offenders and knowledgeable about the treatment of sex offenders. *If the Commissioner's report recommends discharge or the respondent requests discharge*, the respondent's condition and need for secure inpatient treatment shall be evaluated by a second person with such credentials who is not currently treating the respondent.

Code § 37.2-910(B) (emphases added). While the trial court agreed with the Commonwealth that the statute precluded the court from granting such a request for a second evaluation after the annual-review hearing had concluded, the trial court did direct Edwards to obtain a second evaluation prior to his next annual review. In a joint letter to the Court dated May 27, 2021, Edwards and the Commonwealth have informed us that a second expert has since evaluated Edwards and that the evaluation has been distributed to the circuit court, Edwards, and the Commonwealth. Edwards will receive the benefit of that second expert's evaluation at his next annual review scheduled for July 28, 2021.

“Generally, a case is moot and must be dismissed when the controversy that existed between litigants has ceased to exist.” *Virginia Broad. Corp. v. Commonwealth*, 286 Va. 239, 247 (2013). “It is not the office of courts to give opinions on abstract propositions of law, or to decide questions upon which no rights depend, and where no relief can be afforded.” *E.C. v. Virginia Dep't of Juv. Just.*, 283 Va. 522, 530 (2012) (quoting *Franklin v. Peers*, 95 Va. 602, 603 (1898)). An exception to this general rule exists “[i]f the underlying dispute is capable of repetition, yet evading review.” *Virginia Broad. Corp.*, 286 Va. at 248 (citation omitted). This exception applies “where the following two circumstances are simultaneously present: ‘(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.’” *Spencer v. Kemna*, 523 U.S. 1, 17-18 (1998) (alterations and citation omitted).

Edwards's challenge to the trial court's denial of his request for a second evaluation meets neither prong of the exception. As to the first prong of the exception, Edwards has not demonstrated that his challenge to the trial court's denial of his request for a second opinion evaluation could not have been fully litigated before his next annual review. This Court could have expedited the review of Edwards's appeal. *See* Rule 5:4 (authorizing motions, including motions to expedite); Rule 5:18(d) (authorizing the Court to expedite the granting of a petition for appeal prior to receiving the brief in opposition). Even so, Edwards did not request, nor did

this Court grant, such an expedited review. As to the second prong, Edwards has not demonstrated that he reasonably expects to be subject to the same denial of a second evaluation in the future. At the conclusion of the December 2019 annual-review hearing, the trial court directed Edwards to obtain a second evaluation prior to the next annual review. That second evaluation has since occurred, and Edwards will receive the benefit of that evaluation at his next annual review scheduled for July 28, 2021.

The controversy between Edwards and the Commonwealth as to whether the trial court could have granted a request for a second evaluation at the conclusion of an annual-review hearing, as opposed to only before the hearing, no longer exists, and there is no relief that this Court can now grant to Edwards. Thus, Edwards's challenge to the trial court's denial of his request to obtain a second evaluation is moot.

III.

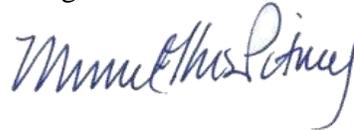
In sum, the trial court did not err in finding that Edwards remained a sexually violent predator, and Edwards's request that he be permitted to obtain a second evaluation at the conclusion of his 2019 annual-review hearing is now moot.

This order shall be certified to the Circuit Court of Fairfax County.

A Copy,

Teste:

Douglas B. Robelen, Clerk



By:

Deputy Clerk