DIVISION ONE
FILED: 08/27/2013
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE THE MATTER OF DONALD P.	1 CA-MH 13-0010 SP
	DEPARTMENT B
	MEMORANDUM DECISION (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Mohave County

Cause No. S8015CV201200205

The Honorable Lee Frank Jantzen, Judge

AFFIRMED

Matthew J. Smith, Mohave County Attorney — Kingman
By James J. Zack, Chief Deputy County Attorney
Attorneys for Appellee

Ronald S. Gilleo, Mohave County Legal Defender — Kingman
By Diane S. McCoy, Deputy Legal Defender
Attorneys for Appellant

K E S S L E R, Judge

¶1 Appellant, Donald P., appeals from an order of commitment entered pursuant to Arizona Revised Statutes

("A.R.S.") section 36-3705 (Supp. 2012)[1] finding Appellant to be a sexually violent person ("SVP") pursuant to A.R.S. § 36-3701(7) (Supp. 2012). For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 In 2002, Appellant was convicted of sexual conduct with a minor, a class six felony, and attempted sexual assault, a class three felony, and sentenced to a total of 10.75 years' imprisonment for these crimes. In February 2012, prior to Appellant's scheduled release from prison, the Mohave County Attorney filed a petition for detention alleging that Appellant was an SVP pursuant to A.R.S. § 36-3701(7).[2] The petition alleged that Appellant suffered from a mental disorder as defined in A.R.S. § 36-3701(5)[3] that makes him likely to engage in acts of sexual violence.

¶3 Prior to trial, Appellant's counsel filed a motion in limine objecting to the following evidence: 1) any reference to

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[1] We cite to the most recent version of the statute when there are no relevant material changes.

[2] Section 36-3701(7) defines a "[s]exually violent person" as someone who has "been convicted of or found guilty but insane of a sexually violent offense" and has "a mental disorder that makes the person likely to engage in acts of sexual violence."

[3] Section 36-3701(5) defines "[m]ental disorder" as "a paraphilia, personality disorder or conduct disorder or any combination of paraphilia, personality disorder and conduct disorder that predisposes a person to commit sexual acts to such a degree as to render the person a danger to the health and safety of others."

a 1965 police report ("Azusa Report"), which was related to a California child molestation charge; 2) any reference to a non-testifying doctor's report other than to the extent that any expert relied on that report; 3) any reference to facts pertaining to any underlying conviction that is not directly related to the issue of whether Appellant's alleged mental disorder makes him likely to engage in acts of sexual violence; and 4) any mention of any other convictions beyond the fact that Appellant had one conviction for a sexually violent offense. In response, the State argued that its expert, Dr. Barry Morenz, reasonably relied on police reports and court documents related to Appellant's multiple prior convictions to form his opinion, and that the evidence Appellant sought to preclude was admissible pursuant to Arizona Rule of Evidence ("Rule") 703 and necessary for the jury to evaluate the experts' opinions and determine if Appellant met the criteria for an SVP.

¶4 The superior court denied Appellant's motion in limine in its entirety. A two-day trial followed, during which Dr. Morenz and Appellant's expert Dr. Richard Samuels testified and the following exhibits were admitted into evidence without objection from Appellant: 1) the Azusa Report; 2) documents related to the 2002 convictions, including the presentence report and investigation narratives; 3) a 1993 arrest report from Nevada relating to Appellant's failure to register as a sex

offender; 4) a police report related to a 1999 conviction for aggravated assault; 5) documents related to a 1982 conviction in California for child molestation; 6) documents related to a 1978 conviction in California for assault with intent to commit sodomy; 7) documents related to a 1972 probation violation in California; 8) a police report related to a 1999 arrest in Arizona for aggravated assault; and 9) "pen packs" from California and Arizona.

¶5 The jury found Appellant to be an SVP, and the court ordered Appellant to be committed to a state hospital for treatment. Appellant timely appealed. This Court has jurisdiction pursuant to A.R.S. § 12-2101(A)(10)(a) (Supp. 2012).

DISCUSSION

¶6 Appellant argues that the superior court erred in admitting police reports and court records regarding Appellant's prior convictions because 1) they contained inadmissible hearsay; 2) the experts did not rely on them to form their opinions; 3) they contained inadmissible character evidence; and 4) their admission was unfairly prejudicial. "We review the trial court's decision to admit evidence of prior acts for an abuse of discretion." *In re Commitment of Jaramillo*, 217 Ariz. 460, 462, ¶ 5, 176 P.3d 28, 30 (App. 2008). We view the evidence in the light most favorable to affirming the trial

court, "which entails maximizing its probative value and minimizing its prejudice." *State v. Petzoldt*, 172 Ariz. 272, 276, 836 P.2d 982, 986 (App. 1991). When an appellant has not provided us with a transcript of the trial itself, we presume that whatever occurred during the trial supports the trial court's ruling. *Johnson v. Elson*, 192 Ariz. 486, 489, ¶ 11, 967 P.2d 1022, 1025 (App. 1998).

¶7 The State argues that Appellant waived any objections to evidence other than to the Azusa Report because he did not timely object to their admission during trial and because his motion in limine focused only on the Azusa Report. We disagree with the State as to the effect of the motion in limine. Appellant's motion in limine was more inclusive than the State purports. Appellant moved to preclude references to "any convictions . . . other than to the stipulation that [Appellant] does have *a* conviction of a sexually violent offense." A ruling on "[a] properly made motion in limine will preserve appellant's objection on appeal without need for further objection if it contains specific grounds for the objection." *State v. Briggs*, 112 Ariz. 379, 382, 542 P.2d 804, 807 (1975). Appellant's motion sufficiently stated grounds for objection and the court denied the motion. The State confirmed during oral argument on Appellant's motion in limine that it was "not seeking to introduce any reports of mere arrests or un-convicted activities

of the [Appellant]. They are all [related to] convictions." Thus, except for the issue of whether the experts relied on the reports, which we address below, Appellant preserved his objection to the evidence of prior convictions on appeal.

¶8 Under Arizona's SVP statutes, the State must prove beyond a reasonable doubt that the respondent is a sexually violent person. *Jaramillo*, 217 Ariz. at 462, ¶ 6, 176 P.3d at 30; A.R.S. § 36-3707(A), (B) (2009). The State must prove that the respondent suffers from a mental disorder that "predisposes the person to commit sexual acts to such a degree that he or she is dangerous to others," and that it is "highly probable that the person will engage in acts of sexual violence." *Jaramillo*, 217 Ariz. at 462, ¶ 6, 176 P.3d at 30 (quoting *In re Leon G.*, 204 Ariz. 15, 23, ¶ 28, 59 P.3d 779, 787 (2002)). In SVP proceedings, the superior court "may admit evidence of past acts that would constitute a sexual offense pursuant to A.R.S. § 13-1420[4] [(2010)] and the Arizona [R]ules of [E]vidence." A.R.S. § 36-3704(B) (2009).

¶9 Appellant acknowledges that A.R.S. § 36-3704(B) makes the Arizona Rules of Evidence applicable to SVP proceedings, but argues that the police reports and other court documents

[4] Section 13-1420(A) provides: "If the defendant is charged with committing a sexual offense, the court may admit evidence that the defendant committed past acts that would constitute a sexual offense and may consider the bearing this evidence has on any matter to which it is relevant."

contained information that was not admissible under the last sentence of Rule 703. We disagree. Rule 703 allows an expert to disclose to the jury facts or data that would otherwise be inadmissible if that evidence forms the basis of the expert's opinion, is the type of information reasonably relied upon by experts in the field, is offered for the limited purpose of showing the basis of the expert's opinion, and its "probative value in helping the jury evaluate the opinion substantially outweighs [the] prejudicial effect."

¶10 Dr. Morenz evaluated Appellant, and in his report, stated that he reviewed the court documents and police reports that were admitted into evidence. Dr. Morenz noted that Appellant "was a very poor historian, making it difficult to obtain meaningful information from him," and that he obtained Appellant's history "from the collateral records." Dr. Morenz reported that although Appellant "minimized" his history of sex offenses against boys, the Azusa Report contained Appellant's statement that he had "committed a large number of acts of this type . . . with boys from ages 11 to 18." Dr. Morenz determined Appellant's likelihood for sex offense recidivism was "moderate to high" based on the Static-99-R assessment, and he concluded:

> [Appellant] does warrant diagnoses . . . that may predispose him . . . to commit sexual acts to such a degree as to render him a danger to the health and safety of others. . . . [Appellant] has demonstrated that he has serious difficulty in controlling his

> sexually deviant impulses as he continued through the years to commit[] sexually deviant acts despite having suffered serious legal consequences . . . . If [Appellant] were to be released into the community with no supervision he would probably represent a significant risk of sex offense recidivism especially if he had contact with underage boys.[5]

It is clear from the report that Dr. Morenz relied on the documents related to Appellant's prior convictions to complete the Static-99-R assessment and to form a diagnosis and opinion, especially because it was difficult to obtain meaningful information directly from the Appellant.

¶11 Appellant's expert, Dr. Samuels, also reported that he reviewed the police reports and court records before forming his

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[5] Ultimately, Dr. Morenz's report concluded that Appellant "does not meet the criteria under Arizona law for being committed as a sexually violent person" because he would require "considerable support and supervision" to survive due to his age and moderately severe dementia, and with such supervision, it is not highly probable he would commit future sex offenses. However, the State also introduced into evidence a guardianship referral investigation report from the Mohave County Public Fiduciary, the admission of which is not challenged on appeal. The report concluded that the public fiduciary was "unable to qualify 'a demonstration of need' to warrant consideration for guardianship for [Appellant]," and explained that "[a] guardian is held to ensure the Ward resides in the least restrictive setting and is not applied to protecting the community's need but focuses instead on the Ward's need exclusively." Therefore, even though Dr. Morenz opined that Appellant's need for supervision would make it less probable for him to re-offend, the fiduciary report suggests that he would not receive that supervision from the county. Because the trial transcripts are not part of the record on appeal, we presume that Dr. Morenz's trial testimony supported the court's finding that Appellant met the criteria for an SVP. *See Johnson*, 192 Ariz. at 489, ¶ 11, 967 P.2d at 1025.

opinion. Dr. Samuels noted in his report that "[Appellant] has recidivated several times since 1965," and that Appellant had a "preference for adolescent males." Although Dr. Samuels ultimately reached a different conclusion than Dr. Morenz, it is clear he relied on information contained in the records to form his opinion. Furthermore, we presume the trial testimony is consistent with these reports, indicates that the experts relied upon these records in forming the basis of their opinions, and are the type of evidence upon which an expert would reasonably rely in forming an opinion on these topics pursuant to Rule 703. *See Johnson*, 192 Ariz. at 489, ¶ 11, 967 P.2d at 1025. The superior court also properly limited the purpose for which the documents were admitted by instructing the jury that the evidence could only be used to explain the opinions of the experts.

¶12 The final inquiry is whether "probative value in helping the jury evaluate the opinion substantially outweighs [the] prejudicial effect" of admitting such evidence. Ariz. R. Evid. 703. Such a decision involves the superior court balancing various factors and, accordingly, substantial discretion is afforded to such decisions on appeal. *See State v. Tucker*, 215 Ariz. 298, 314, ¶ 58, 160 P.3d 177, 193 (2007). To be sure, here, the superior court referred to Rule 403, which contains a different standard to determine admissibility, as

well as Rule 405, which addresses methods of proving character. That said, from the record provided, the superior court determined that the information was "crucial" and "relevant evidence and it will not [be] too prejudicial for the jury," concluding admissibility of the evidence was "not unfairly prejudicial." On this record, the superior court properly could conclude that the probative value of the facts and data offered, "in helping the jury evaluate the opinion substantially outweighs their prejudicial effect." *See* Ariz. R. Evid. 703.[6]

¶13 Appellant argues on appeal that the experts testified at trial that they did not rely on all of the documents to form their opinions; rather, they relied on mostly the Static-99-R score and only a few details from some of the documents. Thus, according to Appellant, the documents should not have been admissible under Rule 703. Appellant, however, has failed to provide this Court with a copy of the trial transcripts. Thus, to the extent that Appellant argues the experts testified at trial that they did not rely on the documents to form their

[6] This record thus refutes Appellant's argument that the court did not make express findings about the probative nature of the evidence Appellant now contends should not have been admitted. Appellant's argument that the court erred by failing to make express findings is also waived because he failed to request such findings before the superior court. *See Jaramillo*, 217 Ariz. at 465, ¶ 18, 176 P.3d at 33.

opinions, we presume the trial transcripts support the court's ruling. *See Johnson*, 192 Ariz. at 489, ¶ 11, 967 P.2d at 1025.[7]

¶14 Appellant next argues that even if the records fit within Rule 703, they were inadmissible character evidence under Arizona Rule of Evidence 404 and were irrelevant under Arizona Rule of Evidence 401. As noted above, the evidence was relevant and, indeed, was fairly characterized by the superior court as

[7] Even if the trial transcripts revealed that the experts did not rely upon the documents in forming their opinions, as Appellant alleges, Appellant waived this issue. Even though Appellant filed a motion in limine before trial, he was nevertheless required to object during trial if and when it was revealed that the experts did not rely on the documents. The minute entries from trial documented that the exhibits were admitted without objection from Appellant's counsel. "In determining whether a motion in limine has preserved an issue on appeal, the essential question is whether or not the objectionable matter is brought to the attention of the trial court in a manner sufficient to advise the court that the error was not waived." *State v. Lichon*, 163 Ariz. 186, 189, 786 P.2d 1037, 1040 (App. 1989) (citation and internal punctuation omitted)). The State argued before trial that the experts relied "heavily" on the documents and that the Static-99-R results were based on questions that were "very offense specific." If, in fact, it was revealed during trial that the experts did not rely on the documents to form their opinions, Appellant was required to object at that time. *Id.* (holding that although "[i]t is generally true that an objection is not required when a motion in limine has been made," defendant did not preserve the issue for appeal because his failure to object during trial "deprived the court of a meaningful opportunity to consider the issue" he raises on appeal). Therefore, Appellant waived this Rule 703 objection based on the experts' trial testimony.

"crucial."[8] Nor did the age of some of the records make them irrelevant. This Court determined in *Martin v. Reinstein* that "[b]ecause incarcerated [p]etitioners have not been in an environment that allows them to re-offend, the legislature permits the trier of fact to consider prior offenses in determining whether an individual . . . [is] likely to engage in future acts of sexual violence. That these convictions may be several years old does not strip them of relevancy." 195 Ariz. 293, 315, ¶ 73, 987 P.2d 779, 801 (App. 1999). The trial court did not err in determining the records related to Appellant's prior convictions were relevant.

¶15 As to the character evidence issue, even assuming that Rule 404 applies to evidence admitted pursuant to the last sentence of Rule 703, there was no error here. "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion," Ariz. R. Evid. 404(a), but may be admissible for other purposes, *see, e.g.*, Ariz. R. Evid. 404(b).

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[8] The Supreme Court, in considering the admissibility of evidence in an SVP proceeding, has held that when determining whether it is likely that a person will engage in future sexually violent conduct, "[p]revious instances of violent behavior are an important indicator of future violent tendencies." *Kansas v. Hendricks*, 521 U.S. 346, 357-58 (1997) (quoting *Heller v. Doe*, 509 U.S. 312, 323 (1993)); *see also Martin v. Reinstein*, 195 Ariz. 293, 315, ¶ 73, 987 P.2d 779, 801 (App. 1999) ("We agree with the Supreme Court that prior convictions serve a significant evidentiary purpose in establishing the potential for future dangerousness.").

Here, the records were not admitted to prove Appellant committed a sexual offense or to prove that Appellant suffered from the requisite mental disorder. The jury was instructed that the evidence could only be used to explain the opinions of the experts. Even without such a limitation, "[t]he propensity to commit acts of sexual violence is an operative fact that determines the rights and liabilities of an allegedly sexually violent person and is therefore an essential element of the [S]tate's SVP case[] [and] thus permits the use of specific instances of conduct to prove such a propensity." *Jaramillo*, 217 Ariz. at 463, ¶ 11, 176 P.3d at 31 (internal citation omitted) (construing Rule 405(b)). Thus, the records to which Appellant objects were not inadmissible character evidence.[9]

[9] Appellant also filed a motion to dismiss or restore competency based on Appellant's alleged Alzheimer's related dementia, which argued that he could not receive due process because he could not effectively assist his counsel. The superior court denied Appellant's motion. Appellant argues on appeal that even if the police and court records were properly admitted, their admission violated Appellant's due process because he "lacked the ability to challenge the statements" therein. Although Appellant does not specifically challenge the superior court's denial of his motion to dismiss, we find the court properly denied it. Even if Appellant's dementia hindered his ability to effectively assist his counsel, it does not mean he was entitled to dismissal to restore competency. The superior court correctly noted that there are no civil rules that are equivalent to Arizona Rule of Criminal Procedure 11 to initiate a procedure to determine competency, and there are no rules or procedure in place to restore someone to competency in a civil case. "[C]ommitment proceedings under the SVP Act are strictly civil in nature . . . [and] [t]he legislature's provision of some of the safeguards applicable in criminal

CONCLUSION

¶16 For the foregoing reasons, we affirm the superior court's order of commitment.

/s/
DONN KESSLER, Presiding Judge

CONCURRING:

/s/
ANDREW W. GOULD, Judge

/s/
SAMUEL A. THUMMA, Judge

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trials . . . does not transform SVP proceedings into criminal prosecutions with the full panoply of rights applicable there." *In re Commitment of Conn*, 207 Ariz. 257, 259, ¶ 7, 85 P.3d 474, 476 (App. 2004) (internal citations and quotation marks omitted).