DIVISION ONE
FILED: 3/21/2013
RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

	) No. 1 CA-MH 10-0074 SP
	)
IN RE NEIL E.	) DEPARTMENT D
	)
	) MEMORANDUM DECISION
	)
	) Not for Publication –
	) (Rule 28, Arizona Rules
	) of Civil Appellate Procedure)
	) No. P1300CV201000271
	)
	)
_____	) **FILED 3/21/2013**

Appeal from the Superior Court in Yavapai County

Cause No. P1300CV201000271

The Honorable William T. Kiger, Judge

AFFIRMED

Yavapai County Attorney's Office — Prescott
By Jack H. Fields, Deputy County Attorney
Attorneys for Appellee

Daniel R. Raynak — Phoenix
Attorney for Appellant

G E M M I L L, Judge

¶1 Neil E. appeals the determination of the jury that he is a sexually violent person ("SVP") pursuant to Arizona Revised

Statutes ("A.R.S.") section 36-3701(7) (Supp. 2012).[1] For the following reasons, we affirm the jury's determination of his SVP status and his order of confinement.

FACTS AND PROCEDURAL HISTORY

¶2 We review the evidence in the light most favorable to upholding the jury's verdict. *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 53, ¶ 13, 961 P.2d 449, 451 (1998).

¶3 On November 28, 2001, Neil pled guilty to one count of attempted child molestation, a class 3 felony, and two counts of attempted sexual conduct with a minor, also class 3 felonies. This plea agreement stemmed from Neil's sexual contacts with three brothers. Neil was sentenced to prison for seven and a half years based on his plea agreement. He was released from prison in September 2007. Neil was arrested again in December 2007, based on his sexual contact with a mentally disabled young man. On September 30, 2008, Neil pled guilty to vulnerable adult abuse, a class 4 felony stemming from the December 2007 arrest, and he was sentenced to two and a half years in prison. In February 2010, the State filed a petition seeking Neil's detention and treatment as an SVP. The trial court in this SVP trial took judicial notice of Neil's prior convictions.

¶4 Prior to the SVP trial, Neil filed a motion *in limine*

[1] We cite the current versions of statutes when no material revisions have occurred since the events in question.

and an amended motion *in limine* attempting to limit the testimony of the State's expert, Dr. Barry Morenz. The principal basis for the motions was to limit or exclude the information creating the basis for Dr. Morenz's final evaluation report and from events surrounding Neil's previous convictions as being too prejudicial or "easily anger[ing] the jury." The trial court denied the motion after a response was filed by the State and subsequent oral argument was heard.

¶5 At trial, the State presented testimony from its expert, Dr. Morenz. Dr. Morenz opined that Neil met the standards of an SVP. Specifically, Dr. Morenz stated Neil was a pedophile and he had an attraction to prepubescent males. The State also presented testimony from Neil's former probation officer, Renee Mascher, regarding statements made to her by police officers about Neil "trolling for potential victims at the Golden Corral [restaurant] and [that he] had propositioned an eighteen-year-old Hispanic male." Mascher also offered her opinion that Neil was a pedophile attracted to young men.

¶6 Detective Pam Edgerton testified for the State about her investigation and about Neil's sexual involvement with the developmentally disabled young man. Her testimony included information obtained from Neil's sister leading to other investigations and information from young men at a Golden Corral restaurant. Judith Gorenc, the developmentally disabled man's

case worker and vocational rehabilitation counselor, testified about the young man's physical appearance and mental ability.

¶7 Investigator Wendy Parkison gave testimony concerning her past investigations of Neil's interaction with neighborhood youths and about Neil inviting them to his garage theater to watch films. Neil told Parkison that he had the theater in his garage for his bed and breakfast business. Parkison also testified that in 1996, based on her discussions with a juvenile probation officer, that a youth had received "back rubs" from Neil. Parkison interviewed Neil and discovered that he worked as a custodian at a school.

¶8 At the close of trial, the jury unanimously decided that Neil met the criteria for an SVP and that he should be civilly committed for treatment.

¶9 Neil timely appeals, and we have jurisdiction in this matter pursuant to A.R.S. §§ 12-120.21(A)(1) (2003) and 36-546.01 (2009).

ANALYSIS

¶10 Neil raises three categories of issues on appeal, claiming the trial court erred: first, whether the State's expert, Dr. Morenz, was competent to testify; second, whether the State proved all four elements required for SVP status beyond a reasonable doubt; and third, whether the court admitted into evidence improper evidentiary material through hearsay,

impermissible character evidence, and unfairly prejudicial evidence.[2]

I. Dr. Morenz's Qualifications

¶11 Neil claims that Dr. Morenz was not a competent witness because he did not meet the criteria for a competent professional as dictated by A.R.S. §§ 36-3703 (2009) and 36-3701(2) (Supp. 2012). According to Neil, Dr. Morenz failed to testify that he was familiar with the state's treatment programs, and he was not approved by the court because he failed to meet the court's guidelines.

¶12 We review for an abuse of discretion the trial court's determination of whether a witness may be designated as an expert. *State v. Lee*, 189 Ariz. 608, 613, 944 P.2d 1222, 1227 (1997).

¶13 Section 36-3703 requires that both sides in these cases provide a competent professional to perform evaluations of the defendant unless both parties stipulate to the use of one expert. Section 36-3701(2) defines a competent professional as one who has familiarity with the state's treatment programs and

[2] In his opening brief, Neil initially described another issue regarding the instructions given by the court to the jury describing what the State must prove to prevail. Except for this brief reference, Neil does not develop this argument in the remainder of his opening brief nor mention it in his reply brief. We conclude he has waived this argument. *See* ARCAP 13(a)(6); *see also Little v. State*, 225 Ariz. 466, 468 n.4, ¶ 7, 240 P.3d 861, 863 n.4 (App. 2010). Additionally, we have reviewed the jury instruction at issue and find no error.

approval of the superior court based on superior court guidelines.

¶14 Rule 702 of the Arizona Rules of Evidence provides for the admission of expert testimony if scientific evidence will assist the trier of fact with the evidence. "The test of whether a person is an expert is whether a jury can receive help on a particular subject from the witness." *State v. Davolt*, 207 Ariz. 191, 210, ¶ 70, 84 P.3d 456, 475 (2004). The SVP statute requires more; it demands the expert be competent as defined above.

¶15 Dr. Morenz testified that he had conducted extensive examinations of sexually violent persons over several years. The trial court and the jury were able to hear Dr. Morenz discuss his extensive background in psychiatry and his experience with SVP issues particularly.

¶16 Dr. Morenz's curriculum vitae ("CV") was admitted into evidence without objection. Dr. Morenz's CV described a substantial portion of his professional training and experience including, for example: 1999, member of the Arizona Supreme Court Ad-Hoc Committee on standards for "Sexually Violent Person" evaluations; 2001 to present, member of the Association for the Treatment of Sexual Abusers; 1998 to present, Psychiatric Screenings Evaluator under Arizona's SVP law for the Arizona Department of Corrections; and, participation in several

seminars on the subject of sexual offenses.

¶17 We understand Neil's argument to be that Dr. Morenz needed to expressly testify at trial, after being questioned, that he was familiar with specific state treatment programs. But, the State is not required to prove Dr. Morenz's competency by testimony alone. Dr. Morenz's CV is relevant evidence supporting Dr. Morenz's status as an expert and his competency in this matter. Section 36-3701 does not require that the doctor's qualifications be received in their totality by oral testimony. Section 36-3701(2), instead, requires a competent witness to be "[f]amiliar" with the state's treatment programs. Dr. Morenz's CV and his foundational testimony adequately demonstrated his knowledge of and familiarity with the state's programs. Additionally, the State requires a CV from each treating individual when a petition is filed for SVP status. *See* A.R.S. § 36-3702(C)(9)(c) (Supp. 2012). The trial court considered Dr. Morenz competent and thus, meeting the court's guidelines. *See Carrel v. Lux*, 101 Ariz. 430, 441, 420 P.2d 564, 575 (1966) (stating that determining expert witness competency is in the sound discretion of the trial court). We do not discern any abuse of discretion in the trial court's ruling on this issue.

II. Sufficiency Of The Evidence To Support Finding Neil To Be An SVP

¶18 Neil contends that Dr. Morenz failed to testify that Neil met the four criteria needed to prove that Neil was an SVP, and therefore his motion for judgment as a matter of law at the end of the State's case should have been granted. The final instructions provided to the jury required proof of four elements and may be summarized as follows: 1) Neil has been convicted of a sexually violent offense; 2) Neil has a mental disorder; 3) Neil's mental disorder causes him to have serious difficulty controlling his sexually violent behavior; and 4) that as a result, Neil is highly probable to commit sexually violent acts in the future.

¶19 The State argues that Dr. Morenz testified that Neil committed sexual offenses in the past, suffered from pedophilia, a mental disorder, had difficulty controlling his impulses, and was likely to reoffend.

¶20 We review a grant or denial of a motion for judgment as a matter of law *de novo*, and we view the evidence in the light most favorable to the party opposing the motion. *See Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 505, 917 P.2d 222, 234 (1996).

¶21 As stated in A.R.S. § 36-3701(7), a "[s]exually violent person" means a person who: "(a) [h]as ever been

convicted of or found guilty but insane of a sexually violent offense . . . [and] (b) [h]as a mental disorder that makes the person likely to engage in acts of sexual violence." The Arizona Supreme Court has interpreted the language and meaning of the statute to clarify the term "likely." *In re Leon G.*, 204 Ariz. 15, 23, ¶ 27, 59 P.3d 779, 787 (2002). For civil commitment, according to *Leon G.*, the state must prove beyond a reasonable doubt "that (1) the person has a mental disorder . . . that predisposes the person to commit sexual acts to such a degree that he or she is dangerous to others and (2) the *mental disorder makes it highly probable* that the person will engage in acts of sexual violence." *Id.* at ¶ 28 (emphasis in original).

¶22 Based on this record, we conclude that Dr. Morenz provided adequate testimony enumerating the criteria necessary for civil commitment under A.R.S. § 36-3701. He testified that Neil was convicted of past sexually violent offenses including a 2001 conviction based on sexual contact with three young, male children. The testimony satisfied the past sexually violent conviction requirement within the statute. The trial court also took judicial notice of Neil's prior convictions.

¶23 Dr. Morenz further testified that Neil was a pedophiliac, meaning Neil suffered from a "paraphilia" or mental and personality disorder as provided under A.R.S. § 36-3701(5). Dr. Morenz defined pedophilia as an "individual who has

recurrent sexual urges, behaviors, [and] fantasies of having sexual contact with prepubescent boys." Dr. Morenz also substantiated the pedophilia with testimony that Neil put himself in situations where he has access to children. For example, Neil set up a home theater in his garage and invited neighborhood children over to watch films, and he worked as a custodian at a school. We conclude this testimony satisfied the mental disorder requirement.

¶24 Furthermore, Dr. Morenz testified that in his opinion, Neil was highly likely to reoffend again because Neil kept putting himself in situations with a "tremendous risk for future . . . sex offenses." On re-direct examination, Dr. Morenz again stated that Neil was highly likely or "highly probable" to reoffend. Each of these statements constituted evidence of the element of "likely" to engage in acts of sexual violence. *See Leon G.*, 204 Ariz. at 23, ¶ 27, 59 P.3d at 787 (defining the word "likely" to mean highly probable).

¶25 On cross-examination, Dr. Morenz testified that Neil was "high-risk" and that "his behaviors suggest that he does have serious difficulties in controlling his impulses." Dr. Morenz further explained that part of his high-risk assessment was based on Neil's actions and conviction for having sexual contact by "[taking] advantage of a mentally retarded young man to gratify his own sexual impulses." Additionally, a juror

submitted a question to Dr. Morenz, asking why a six-month requirement is in place for a designation of pedophilia. Dr. Morenz responded that the timeline was necessary to distinguish between someone who is testing the waters versus someone who has "establishe[d] some kind of pattern . . . of repetitive, recurring urges in this particularly deviant way."

¶26 Based on Dr. Morenz's entire testimony at trial and viewing the evidence in the State's favor, we conclude that a reasonable jury, as the trier of fact, could make the required findings designating Neil as an SVP. We therefore determine that the trial court correctly denied Neil's motion for judgment as a matter of law at the close of the State's case.

III. Witness Testimony

¶27 Neil raises several contentions concerning hearsay statements, character evidence, and prejudice regarding the following witnesses: Dr. Morenz, Parkison, Detective Edgerton, Mascher, and Gorenc.

Dr. Morenz's Testimony and SVP Evaluation Report

¶28 Neil argues that Dr. Morenz's report "contained multiple layers of hearsay" and was admitted over objection. The trial court noted Neil's objection but admitted Dr. Morenz's report. Neil might have requested a limiting instruction explaining to the jury that the statements made by others in Dr. Morenz's report were not to be considered for their truth and

were not conclusive of Neil's guilt, but were only to be considered for the limited purpose of evaluating Dr. Morenz's opinion on Neil's SVP status. However, a trial court does not err if counsel fails to request a limiting instruction, and the court is not required to offer a limiting instruction *sua sponte* even if the evidence should be used only for a limited purpose pursuant to Arizona Rule of Evidence 105. *See State v. Nordstrom*, 200 Ariz. 229, 247, ¶ 51, 25 P.3d 717, 735 (2001); *State v. Roscoe*, 184 Ariz. 484, 491, 910 P.2d 635, 642 (1996).

¶29 We review the admission or rejection of evidence for an abuse of discretion. *See Davolt*, 207 Ariz. at 208, ¶ 60, 84 P.3d at 473. The Arizona Rules of Evidence ("Rule(s)") are applicable to SVP proceedings pursuant to A.R.S. § 36-3704(B) (2009). Hearsay is defined by Rule 801(c) as "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement."[3] To admit hearsay evidence, the trial court must find that the statements fit any one of the many exceptions to the hearsay rule. *See State v. Bass*, 198 Ariz. 571, 577, ¶ 20, 12 P.3d 796, 802 (2000); *cf. State v. Palmer*, 229 Ariz. 64, 74, ¶ 37, 270 P.3d 891, 901 (App. 2012) (Eckerstrom, P.J., dissenting) (recognizing

[3] We quote the Arizona Rules of Evidence in their current form because any revisions since the time of trial are stylistic rather than substantive.

the thirty-one hearsay exceptions found in Rules 803 and 804). Rule 805 addresses hearsay within hearsay. The Rule provides: "Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule."

¶30 Further, Rule 703 permits expert opinion testimony that may be hearsay if it is based on facts or data reasonably relied upon by experts in the particular field. Dr. Morenz relied on both facts and data to compile his evaluation report concerning Neil's SVP designation. *See, e.g.*, *State v. Tucker*, 215 Ariz. 298, 315, ¶ 60, 160 P.3d 177, 194 (2007) (concluding proper admissibility of statements by expert under Rule 703 was not hearsay "because the information was offered, not for its truth, but for the limited purpose of showing the basis" for the expert's opinion); *Pipher v. Loo*, 221 Ariz. 399, 402, ¶¶ 8, 10, 212 P.3d 91, 94 (App. 2009) (concluding that there was no evidence that the doctor's research in his career field was untrustworthy and that the doctor's reliance on his own research and experience while testifying satisfied Rule 703); *cf. In re Commitment of Pletz*, 619 N.W.2d 97, 104-05, ¶¶ 29-32 (Wis. Ct. App. 2000) (concluding committee letters were not the type of evidence relied upon by experts in the field and were entered into evidence in error, but finding the error harmless).

¶31 Other jurisdictions also allow hearsay evidence when

determining SVP status if it provides a basis for the expert's opinion and as long as it is evidence that is reasonably relied upon by experts within the given field. *See, e.g., In re Detention of Coe*, 250 P.3d 1056, 1066, ¶ 31 (Wash. Ct. App. 2011); *In re Manigo*, 697 S.E.2d 629, 634 (S.C. Ct. App. 2010); *In re Commitment of G.G.N.*, 855 A.2d 569, 578 (N.J. Super. Ct. App. Div. 2004).

¶32 Neil argues in his reply brief that the hearsay testimony deprived him of his right to confront what was said about him outside of court during the course of trial. Because an SVP determination is a civil matter – even though it involves a deprivation of liberty – any constitutional confrontation rights protected by *Crawford v. Washington*, 541 U.S. 36 (2004), are not applicable because the Sixth Amendment and *Crawford* pertain only to criminal cases. *See In re Commitment of Frankovitch*, 211 Ariz. 370, 375, ¶ 16, 121 P.3d 1240, 1245 (App. 2005) (*Crawford* principles do not apply to SVP determinations because they are civil actions).

¶33 Here, Dr. Morenz assessed Neil to see if he had a mental disorder that would cause him to be highly probable to commit sexual violence in accordance with the SVP statutes. Dr. Morenz relied on prior events in Neil's life for his report including: Neil's arrest records, probation records, police reports, other psychiatric evaluations, etc., in order to create

a complete picture concerning Neil's diagnosis and potential designation as an SVP. *See, e.g., Hudgins v. Sw. Airlines, Co.*, 221 Ariz. 472, 484, ¶ 31, 212 P.3d 810, 822 (App. 2009) (citing 1 Morris K. Udall et al., Arizona Practice: Law of Evidence § 131 at 287-88 (3d ed. 1991) and "noting police reports are admissible pursuant to Rule 803(8)(B) [public records exception to hearsay rule] in civil cases but not in criminal cases"). Furthermore, Dr. Morenz explained the information he relied on and how he took it into consideration, as is generally permitted under Rule 703.

¶34 We therefore conclude that the trial court did not err by overruling the hearsay objections regarding Dr. Morenz's testimony and report.

¶35 Neil's final argument against the admission of Dr. Morenz's report is based on prejudice. Rule 403 states: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Neil asserts that the trial court did not make the necessary Rule 403 assessment. The State's counterargument is that Neil filed an amended motion *in limine* arguing the prejudicial effect of several items of evidence including information that Dr. Morenz was going to use in

forming his expert opinion. The State cites *In re Commitment of Jaramillo*, 217 Ariz. 460, 465, ¶ 18, 176 P.3d 28, 33 (App. 2008), for the proposition that the trial court need not make express Rule 403 findings as long as the record reveals that "the necessary factors were argued, considered, and balanced by the trial court as part of its ruling." (Citation omitted.)

¶36 We are persuaded by *Jaramillo* because Neil presented both a motion and amended motion *in limine* (arguing *inter alia* Rule 403 issues) before the trial court and the State responded to the motion. The trial judge also heard oral argument on Neil's motion and cautioned the State "to be very careful as to what is brought out in the course of trial." Based on this record, the trial judge had the opportunity to balance any prejudicial effect against the probative value of Dr. Morenz's report and the bases for it. We presume the trial court knows and applies the law correctly and did so here. *See State v. Medrano*, 185 Ariz. 192, 196, 914 P.2d 225, 229 (1996).

¶37 For these reasons, we conclude that the trial court did not err by admitting Dr. Morenz's report into evidence.

Parkison's and Edgerton's Testimony

¶38 Neil argues that several statements made at trial by law enforcement officers were hearsay. Yavapai County Sheriff's Office Investigator Parkison described discussions between a juvenile probation officer and a juvenile probationer in 1996.

The discussions included information involving interactions between Neil and the probationer. Parkison testified that the probation officer expressed concern that Neil was having children come to his garage theater to "watch cartoons and other inappropriate things." Parkison also interviewed the juvenile probationer. Parkison testified that the "juvenile himself had talked about [Neil] discussing his sexuality with him and giving back rubs in his home."

¶39 Also, Detective Edgerton of the Yavapai County Sheriff's Office testified about her investigation concerning Neil's contact with young boys. One of the leads she received was from Neil's sister. Detective Edgerton testified to what Neil's sister told her about an event in Wickenburg, and Detective Edgerton was able to use that information to find a Wickenburg Police report that discussed Neil trying to hire an eighteen-year-old grocery store bagger that he was interested in "romantically." Additionally, Detective Edgerton testified about her use of a Yavapai-Prescott Tribal Police report concerning Neil's interaction with two young males on two separate occasions at a Golden Corral restaurant. She testified about what one young man told her regarding Neil propositioning him.

¶40 Rule 703 states:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

Expert testimony that discusses another person's reports is admissible under this rule if the expert reasonably relied on these matters in reaching his own conclusion. *State v. Smith*, 215 Ariz. 221, 228, ¶ 23, 159 P.3d 531, 538 (2007). "Such testimony is not hearsay because it is offered not to prove the truth of the prior reports or opinions, but rather is offered only to show the basis of the testifying expert's opinion." *Id*. Similarly, this testimony from those who authored these reports was not offered for its truth but to lend credence to the forming of the expert opinion. *See State v. Lundstrom*, 161 Ariz. 141, 148, 776 P.2d 1067, 1074 (1989) ("Facts or data underlying the testifying expert's opinion are admissible for the limited purpose of showing the bases of that opinion, not to prove the truth of the matter asserted."); *see also State v. Poehnelt*, 150 Ariz. 136, 152, 722 P.2d 304, 320 (App. 1985) (holding that admitting school record into evidence was not error because it was admissible under Rule 703 as the basis for Child Protective Services worker's expert testimony). This "basis testimony" can be challenged by the opposing party both

on cross-examination and with the testimony of an opposing expert witness. In accordance with the jurisprudence of our supreme court in *Smith* and cases cited therein, however, statements that would ordinarily be hearsay if offered for their truth are not hearsay when offered in support of an expert's analysis and conclusions.

¶41 Here, the testimony of the law enforcement officers was from reports used by Dr. Morenz to form his opinion that Neil had a continued interest in young men and a proclivity to engage in sexual relations with them. *See* Ariz. R. Evid. 703. Dr. Morenz relied upon several police reports in forming his opinion that Neil was an SVP. Although Dr. Morenz stated that he did not rely on the Wickenburg Police report when drafting his own written evaluation, he did testify that he referenced the report. We conclude, accordingly, that the trial court did not abuse its discretion in overruling Neil's hearsay objection to this evidence.

Mascher's Testimony

¶42 Neil contends that Mascher was allowed to testify about hearsay opinions from other officers that Neil was "trolling for potential victims at the Golden Corral and had propositioned an eighteen-year-old Hispanic male." We find this argument waived because Neil did not object to this testimony on hearsay grounds at trial and it was not preserved in Neil's

amended motion *in limine* either. *See State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 18-19, 115 P.3d 601, 607 (2005) (failing to make objections at trial waives review on appeal absent fundamental error). Moreover, Neil has not argued on appeal that this testimony constituted fundamental error.

¶43 Even if we concluded this argument was not waived, Mascher's testimony would be admissible for the same reasons stated above. Dr. Morenz relied upon Mascher's probation report in forming his opinion of Neil's status as an SVP, and Dr. Morenz previously disclosed the Golden Corral incident on direct examination. This information was part of the basis of Dr. Morenz's expert opinion. *See* Ariz. R. Evid. 703. We therefore conclude that the trial court did not abuse its discretion in allowing Mascher's testimony regarding the Golden Corral incident.

¶44 Neil also objects that Mascher was allowed to express her opinion that Neil "was a pedophile who is sexually aroused" by young men. Neil supports his argument with *Sanchez v. Old Pueblo Anesthesia, P.C.*, 218 Ariz. 317, 322, ¶ 18, 183 P.3d 1285, 1290 (App. 2008), which states that the "intent of Rule 26(b)(4)(D) is simply to limit the presentation of cumulative evidence, and its limits allow one expert for each medical issue."

¶45 We disagree with Neil's narrow reading of *Sanchez* and

its application to the facts of this case. We do not believe the State violated the "one expert per side" presumption.

¶46 The State argues that Mascher was giving her "lay opinion" based on twenty years of experience as a probation officer, ten years of experience with sex offenders, and her time as Neil's probation officer.

¶47 The State supports its position with Rule 701 and *Frankovitch*. Rule 701 provides:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

¶48 In *Frankovitch*, the defendant argued that a second doctor's testimony was given as an independent expert in violation of Arizona Rule of Civil Procedure 26(b)(4)(D) (presumption of one expert per side) and that the testimony was developed in preparation solely for trial. 211 Ariz. at 373, ¶ 9, 121 P.3d at 1243. We disagreed and held that the doctor's testimony at issue was based on his prior examinations of Frankovitch and that he was therefore testifying more as a fact witness than as an independent expert witness. *Id.* at 374, ¶ 12, 121 P.3d at 1244.

¶49 We conclude Mascher's opinion was proper for

determining whether Neil had tendencies to place himself in contact with young men, a fact at issue for SVP status. *See* Ariz. R. Evid. 405(b); *Jaramillo*, 217 Ariz. at 463, ¶ 11, 176 P.3d at 31. Mascher met with Neil once a month and investigated allegations that Neil was propositioning young men. As Neil's probation officer, Mascher was in a position to perceive Neil's ongoing behavior and actions and to attempt to help him conform his behavior to the terms of his probation. We conclude that it was within the discretion of the trial court to admit her lay opinion testimony.

Gorenc's Testimony

¶50 Neil makes the same argument concerning lay witness testimony by Gorenc. Gorenc testified about a mentally disabled young man whom Neil had been with sexually, saying that the man looked like a fourteen-year-old boy. The State argues that Gorenc's testimony fits "squarely within the *Frankovitch* definition of a 'witness to the facts giving rise to the action.'" 211 Ariz. at 374, ¶ 12, 121 P.3d at 1244 (citation omitted). We agree.

¶51 The trial judge allowed Gorenc to testify to the developmentally disabled man's appearance, demeanor, and intelligence. She was his vocational rehabilitation counselor and case manager. As a lay witness, she had direct contact with the young man and was able to provide the court and jury with

information relevant to his appearance and mental incapacity. Neil already admitted to sexual contact with this young man and pled to charges concerning this contact. Gorenc's testimony highlighted the young man's age and appearance, which was consistent with the State's contentions and other testimony, including Dr. Morenz's assessment that Neil was attracted to and had performed sexual acts with youthful or younger men. Gorenc testified to her personal knowledge and observations regarding this young man, and we find no abuse of discretion by the trial court admitting her testimony.

Rule 403 Weighing Of Neil's Phone Conversation

¶52 Neil's final argument is based on a fifteen-minute recording of a conversation between Neil and his sister while he was incarcerated and awaiting trial for the charges based on his sexual contact with the developmentally disabled young man. Neil asserts that the trial court did not listen to the recording prior to it being played for the jury and, therefore, was not able to make a determination if the recording was more prejudicial than probative according to Rule 403.

¶53 At trial, the State argued the recording was already admitted into evidence and it was probative of the facts including Neil's admissions about his involvement with and the mental state of the developmentally disabled young man, and the separate incident with the grocery store bagger. While the jury

was excused, the trial judge acknowledged that he had not listened to the recording; he was concerned that this item was previously admitted into evidence but concluded that it was more probative than prejudicial based on the State's arguments.

¶54 "Rule 403 weighing is best left to the trial court and, absent an abuse of discretion, will not be disturbed on appeal." *State v. Fernane*, 185 Ariz. 222, 226, 914 P.2d 1314, 1318 (App. 1995) (citation omitted). Generally, the balancing is viewed in favor of the proponent of the evidence, in this case the State. *See id.*

¶55 Ordinarily, the trial court will listen to the audio recording or order a transcript of the recording for review prior to publishing it to the jury. After listening to the recording, however, we conclude for all intents and purposes that this recording is a rant by Neil's sister, whereby she chastises Neil for his predicament. The recording is laced throughout with Neil's sister's profanity and ire.

¶56 In the recording, Neil admits to the young man's state of mind and admits he believed that the young man was "slow" but not mentally retarded. Neil also briefly acknowledges that he spoke to a teenage grocery bagger in violation of his probation conditions. In *State v. Evans*, 639 S.W.2d 792, 795 (Mo. 1982), the trial court allowed the taped confession and admissions of the defendant to be played to the jurors during their

deliberations. The trial court did not listen to the recording because it was already admitted into evidence as an exhibit. *Id.* The Supreme Court of Missouri concluded that the recording was properly admitted, that it did not include facts that were not already in evidence, and that there was no prejudice to the defendant. *Id.*; *see also Doby v. State*, 557 So.2d 533, 541-42 (Miss. 1990) (finding no error and determining that "the record is simply silent as to whether the Court listened to [the recording]. . . . In cases such as this, we strongly urge the circuit court to listen carefully to the tape before it is received into evidence and, particularly, before the jury is allowed to hear it.").

¶57 After listening to the recorded conversation in our present case, we acknowledge that the recording was probably harmful to Neil's defense. One reasonable interpretation is that based upon the way Neil's sister was speaking to him, she already considered him guilty. Nonetheless, "not all harmful evidence is unfairly prejudicial," and unfair prejudice exists if the evidence "has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror." *See State v. Lee*, 189 Ariz. 590, 599-600, 944 P.2d 1204, 1213-14 (1997). Moreover, the presence of profanity does not automatically create a risk of unfair prejudice that substantially outweighs the probative value of evidence. *See*

United States v. Pirani, 406 F.3d 543, 555 (8th Cir. 2005) (concluding that tape recording of defendant that included his expressive swearing did not violate Federal Rule of Evidence 403).

¶58 The recording in this case substantiated that the developmentally disabled victim was in fact not fully competent in Neil's mind; Neil considered him slow. The trial court had already taken judicial notice of Neil's prior convictions, including the vulnerable adult abuse conviction involving the young man. The recording further corroborated other testimony that Neil was propositioning a young grocery store bagger. Officer Aaron Hadley confirmed Neil's contact with the grocery store worker. Dr. Morenz also testified how these types of incidents impacted his evaluation and determination that Neil was an SVP. Neil was basically a passive speaker in the taped conversation, and he was not using the vulgar language; only his sister was doing so.

¶59 We recognize that the recording was cumulative of other evidence in the record; however, we cannot say that the trial court's ruling constituted an abuse of discretion. Nor can we say that having the jury listen to the recording created any emotional response within the jurors. According to the trial court, the recording was more probative than prejudicial because the jury was able to hear Neil make admissions about a

victim's slow nature and Neil's interaction with the grocery store bagger. We find no abuse of discretion and no reversible error here.

¶60 Finally, even if some of the challenged evidence should not have been admitted, it was cumulative and most likely harmless in its effect, in light of the permissible scope of Dr. Morenz's testimony and the entirety of the evidence against Neil.

CONCLUSION

¶61 For the foregoing reasons, we affirm the jury's determination of Neil's SVP status and uphold the commitment order.

/s/

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JOHN C. GEMMILL, Judge

CONCURRING:

/s/
_____
JON W. THOMPSON, Presiding Judge

/s/
_____
MAURICE PORTLEY, Judge