IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 4/16/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN RE THE MATTER OF ROYCE Z.	)	1 CA-MH 12-0058 SP
	)	DEPARTMENT D
	)	**MEMORANDUM DECISION**
	)	Not for Publication – (Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Coconino County

Cause No. S0300CV201200166

The Honorable Dan Slayton, Judge
The Honorable Danna D. Hendrix, Judge (Retired)

AFFIRMED

David Rozema, Coconino County Attorney — Flagstaff
By Timothy G. McNeel, Deputy County Attorney
Attorneys for Appellee

David Goldberg — Fort Collins, CO
Attorneys for Appellant

G E M M I L L, Judge

¶1 After a jury trial, Appellant Royce Z. ("Appellant") was found to be a sexually violent person ("SVP") and was

committed to the Arizona Community and Protection Center in accordance with Arizona Revised Statutes ("A.R.S.") § 36-3707 (2009). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 The State filed a petition for detention on March 13, 2012, while Appellant was incarcerated for a 2008 conviction of attempted sexual abuse in Maricopa County. The State sought commitment in Coconino County based on the predicate offense of a 2004 conviction for attempted kidnapping, presumably because sexual abuse is not a qualifying predicate offense under A.R.S. § 36-3701(6) (Supp. 2012) but attempted kidnapping may qualify if determined to be sexually motivated under subsection (6)(b).

¶3 Appellant, in a motion to dismiss or change venue, argued that collateral estoppel and double jeopardy prevented the State from retrying the issue of sexual motivation in the attempted kidnapping. The motion was denied. At the pretrial conference, Appellant argued that the trial should be bifurcated, with determination of the issue of sexual motivation tried first and then, if necessary, the determination of SVP status. The court denied the request but allowed for supplemental briefing. On the first day of trial, the court confirmed its denial but allowed Appellant to prepare a limiting instruction for the jury.

¶4 On January 13, 2004, Appellant approached 19-year-old

S.P., a student at Northern Arizona University, from behind while she was entering her dorm, and he slammed her against a wall. S.P. screamed, and Appellant told her to be quiet. S.P. ran away from him, but Appellant ran after her and tackled her to the ground. Appellant then climbed on top of her and placed his hand over her mouth. After a minute or two, other students chased Appellant away from S.P. Appellant was arrested and charged with kidnapping, assault, and criminal trespass. He pled guilty to attempted kidnapping, a class 3 felony, and was sentenced to four years in prison.

¶5 In addition to the testimony regarding the attempted kidnapping incident, the State presented testimony from two sexual abuse victims, in support of the alleged SVP status. On May 25, 2008, Appellant was in a pool in Phoenix when he grabbed the breasts of 12-year-old M.D. and put his finger inside the shorts of 15-year-old J.L. This incident led to Appellant's arrest and conviction for four counts of sexual abuse and attempted sexual abuse.

¶6 Finally, the State and Appellant each presented testimony from a mental health professional. The State's witness diagnosed Appellant with antisocial personality disorder and pedophilia, placing him in a "high-risk" category to reoffend under standard actuarial assessments. Appellant's witness disagreed with the diagnoses of the State's witness,

finding only alcohol dependence and personality disorder not otherwise specified. Appellant's witness, however, also placed Appellant in a "high-risk" category to reoffend.

¶7 In the final jury instructions, the trial court told the jury only to consider the testimony of S.P., Appellant, and the arresting officer to determine sexual motivation in the attempted kidnapping. The jury was given separate jury forms on which to rule on sexual motivation and SVP status, and they were told that they need not rule on SVP status if they did not find the attempted kidnapping conduct had a sexual motivation. The jury returned unanimous verdicts finding Appellant's prior conviction to be sexually motivated and finding Appellant to be a sexually violent person. Appellant was subsequently committed.

¶8 Appellant timely appeals the jury verdict and commitment order. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. § 12–2101(A)(10) (Supp. 2012).

ANALYSIS

¶9 Under Arizona's SVP statutes, an individual may be civilly committed if the state proves beyond a reasonable doubt that the individual is a sexually violent person. A.R.S. § 36–3707. A sexually violent person is one who has ever been convicted of a sexually violent offense and has a mental

disorder that makes the person likely to engage in acts of sexual violence. A.R.S. § 36-3701(7). A sexually violent offense can be one of a number of potentially non-sexual crimes (including attempted kidnapping) if the court at the time of sentencing or civil commitment proceedings determines beyond a reasonable doubt that the act was sexually motivated. A.R.S. § 36-3701(6)(b).

I. The doctrines of double jeopardy and collateral estoppel do not preclude the trial court from determining whether Appellant's prior attempted kidnapping conviction was sexually motivated.

¶10 Whether the State violated a defendant's right against double jeopardy is a question of law that is reviewed de novo. *State v. McGill*, 213 Ariz. 147, 153, ¶ 21, 140 P.3d 930, 936 (2006). Similarly, whether collateral estoppel applies is a question of law that is reviewed de novo. *Corbett v. ManorCare of Am., Inc.*, 213 Ariz. 618, 623, ¶ 10, 146 P.3d 1027, 1032 (App. 2006). Also, the interpretation of statutes and court rules is reviewed de novo. *In re Commitment of Jaramillo*, 217 Ariz. 460, 462, ¶ 5, 176 P.3d 28, 30 (App. 2008).

¶11 Appellant asserts that the finding of sexual motivation in his attempted kidnapping conviction violated his constitutional protection against double jeopardy. U.S. Const. amend. V. As conceded by Appellant, this court has expressly refused to apply double jeopardy to an SVP trial, which is a

civil proceeding for the protection of the public. *Martin v. Reinstein*, 195 Ariz. 293, 307, ¶ 38, 987 P.2d 779, 793 (App. 1999). "Because the commitment is civil, it is not a second punishment, and the proceedings pursuant to the [SVP] Act are not a second prosecution." *Id*. The availability of some of the safeguards of criminal trials "does not transform SVP proceedings into criminal prosecutions." *In re Commitment of Conn*, 207 Ariz. 257, 259, ¶ 7, 85 P.3d 474, 476 (App. 2004).

¶12 Appellant's argument that the determination of sexual motivation acts as a second criminal trial within the civil commitment proceeding is unpersuasive. In determining sexual motivation, the finder of fact must decide whether an individual falls within a potentially dangerous group of individuals eligible for commitment. The determination is for the purpose of the civil commitment trial; it does not amend the prior conviction. Contrary to Appellant's assertion, no additional criminal punishment was imposed after this SVP trial.

¶13 Alternatively, Appellant argues that he negotiated dismissal of the sexual motivation element in his guilty plea for attempted kidnapping, and therefore collateral estoppel prevents the State from retrying that issue. The first concern with this argument is that Appellant has provided no evidence that this issue was negotiated as part of his plea. Appellant stated before trial and on appeal that he specifically

negotiated to drop a finding of sexual motivation. However, neither the sentencing minute entry nor the pre-sentence report before the court refers to any allegation of sexual motivation, dismissed or otherwise. Appellant was charged with crimes to which a finding of sexual motivation could be attached under A.R.S. § 13-118 (2010), but that alone is not proof that such a finding was ever considered or was part of the negotiation.

¶14 Furthermore, even if we assume that Appellant did negotiate the dismissal of an allegation of sexual motivation, collateral estoppel would not apply because the issue was not actually litigated. In *In re Commitment of Taylor*, 206 Ariz. 355, 357, ¶ 9, 78 P.3d 1076, 1078 (App. 2003), this court held that a trial court may make the determination of sexual motivation in a prior conviction during current SVP proceedings "if the sentencing court did not previously do so." Appellant posits that the sentencing court in his attempted kidnapping case made that determination by choosing not to add a finding of sexual motivation to his conviction. Therefore, Appellant argues, the State had the opportunity to litigate this issue and should be collaterally estopped from litigating it again. We disagree. The opportunity to have litigated an issue does not, in this context, constitute actual litigation of that issue.

¶15 We therefore reject Appellant's double jeopardy and collateral estoppel arguments.

II. The jury had substantial evidence upon which to determine that Appellant's conviction for attempted kidnapping was sexually motivated and that Appellant is a sexually violent person.

¶16 This court will affirm civil commitment orders if they are supported by substantial evidence. *Jaramillo,* 229 Ariz. at 583, ¶ 7, 278 P.3d at 1286. "We view the facts in the light most favorable to sustaining the trial court's judgment and will not set aside the related findings unless they are clearly erroneous." *In re MH 2008-001188*, 221 Ariz. 177, 179, ¶ 14, 221 P.3d 1161, 1163 (App. 2009).

¶17 The first prong of an SVP determination is finding that the defendant has been convicted of a sexually violent offense. A.R.S. § 36-3701(7)(a). Accordingly, the State's initial burden in this case was to prove beyond a reasonable doubt that Appellant's prior felony conviction for attempted kidnapping was sexually motivated. A.R.S. § 36-3707(A). Sexual motivation, as defined by A.R.S. § 13-118(C), is found when one of the purposes for which the defendant committed the offense was the defendant's sexual gratification. Appellant argues that no evidence was presented to the jury from which they could find a sexual motivation in the attempted kidnapping incident.

¶18 The basic facts of what occurred on the night of the attempted kidnapping are not in dispute. The victim, S.P., testified that Appellant slammed and held her against a wall

outside her dorm, told her to be quiet, tackled her when she ran away, pinned her down with his hand on her mouth and his face close enough to hers to feel his breath upon it. Appellant then ran away when other students approached.

¶19 Because the trial judge granted a limiting instruction despite denying bifurcation, the jury was instructed to consider only the testimony of S.P., Appellant, and Officer Manning when determining sexual motivation. When describing the incident at trial, S.P. did not testify to any belief from her perspective whether the crime was sexually motivated or not. Appellant testified that he grabbed S.P. because he thought she was someone he knew and that he tackled her and placed his hand on her mouth because her screaming caused him to panic and he wanted to apologize for grabbing the wrong person. Appellant also testified, in response to questions from counsel for the State, to being convicted of four counts of sexual abuse and attempted sexual abuse, admitting that he touched the underage victims inappropriately while intoxicated.

¶20 Therefore, even without direct testimony of motivation, the circumstantial evidence was substantial enough for a jury to determine that the crime was sexually motivated beyond a reasonable doubt. It is for the jury to decide the credibility and weight given to any evidence presented in the case, whether direct or circumstantial. Because a person's

motivation for committing a crime is so rarely explicitly stated, a reasonable jury may infer motivation from the facts proven before them. It was up to the jury to decide the Appellant's motivations given the circumstances of the attempted kidnapping and the Appellant's explanation of the incident. We conclude, even with the unnecessary limiting instruction (discussed below), that the jury had substantial evidence to determine that one of the Appellant's purposes in the attempted kidnapping was his sexual gratification.[1]

¶21 In addition to finding sexual motivation for the predicate offense, an SVP determination requires that the defendant have "a mental disorder that makes the person likely to engage in acts of sexual violence." A.R.S. § 36-3701(7)(b).

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[1] We note an error in the court's instructions to the jury regarding the majority necessary to reach a decision on the issue of sexual motivation before moving on to SVP status. The court initially instructed the jury, "If at least six of you determine that the Attempted Kidnapping of [S.P.] was committed with sexual motivation, you should then consider whether or not [Appellant] is a sexually-violent person." This was a proper statement of the majority needed to establish the threshold issue. However, the court then told the jury, "If at least six of you do not determine that the Attempted Kidnapping of [S.P.] was committed with sexual motivation, you should not consider whether or not [Appellant] is a sexually-violent person." This latter statement is an incorrect instruction because the State needed a majority to prove sexual motivation; Appellant did not need the same majority to disprove it. Rather, if three of the jury members did not find sexual motivation beyond a reasonable doubt, the threshold issue would have been determined in favor of Appellant and the trial would have been completed. This error, however, is not asserted on appeal, and because the jury unanimously found that the attempted kidnapping was sexually motivated, we do not perceive any fundamental, reversible error.

In *Kansas v. Crane*, 534 U.S. 407, 413 (2002), the Supreme Court held that in SVP commitments, the state must have "proof of serious difficulty in controlling behavior," an element of lack of volition. The Arizona Supreme Court held in *In re Leon G.*, 204 Ariz. 15, 22, ¶ 22, 59 P.3d 779, 786 (2002), that the mental disorder element of the Arizona statute should be read to implicitly require the lack of control element. The court reaffirmed that the word "makes" in the SVP statute means impairs or tends to overpower a person's ability to control his behavior. *Id*. at 23, ¶ 28, 59 P.3d at 787. The court also held that "likely" should be read as "highly probable." *Id*. at ¶ 27. The Appellant argues that the jury did not have substantial evidence to support a finding that he has a mental disorder that impairs his control and creates a "high probability" he will continue to commit sexually violent acts. We disagree.

¶22 At trial, the State's expert witness, Dr. Moran, diagnosed Appellant with pedophilia and antisocial personality disorder. On cross-examination, Dr. Moran stated that Appellant "has as much volitional control as anybody else does in this courtroom," and that neither antisocial personality disorder nor alcohol abuse impair volition. However, he then stated on re-direct that Appellant's alcohol abuse combined with his pedophilia impairs his ability to control his sexual behavior.

¶23 Regarding likelihood to reoffend, Dr. Moran's

statistical analysis found on one metric that Appellant scored in the 99th percentile of all sex offenders tested, 6.5 times higher than the typical sex offender, and that the recidivism rate of the group in which he falls is 52.2 percent in five years and 61.9 percent in ten years. On another metric, Dr. Moran scored Appellant in the 94th percentile of sex offenders with a risk of reconviction at 29.5 percent for five years and 38 percent for ten years. Both metrics place Appellant in their respective "high-risk" categories. Though Appellant's expert witness assigned him a lower aggregate score, Appellant still fell in the "high-risk" group.

¶24 The State also provided evidence of past sexual acts to prove Appellant's likelihood to commit to sexually violent acts. *See* A.R.S. § 36-3704(B) (2009) ("The court may admit evidence of past acts that would constitute a sexual offense pursuant to § 13-1420 and the Arizona rules of evidence."). Sexual abuse victims M.D. and J.L. testified to being inappropriately touched by the Appellant at a public pool. Dr. Moran also testified that in his review of Appellant's criminal record, he found that Appellant had twice been arrested but not convicted for sexual assault of children, and that Appellant had a felony conviction for sexual indecency. We conclude, therefore, that the jury had substantial evidence from which they could find that Appellant has a mental disorder that makes

him likely to commit sexually violent acts.

III. The trial court's decision not to bifurcate the trial was not an abuse of discretion because the same evidence would have been admissible in each case had they been severed.

¶25 A trial court's decision regarding separate trials or bifurcation is reviewed for abuse of discretion. *Romero v. Sw. Ambulance*, 211 Ariz. 200, 203, ¶ 5, 119 P.3d 467, 470 (App. 2005). The trial court is given broad discretion in deciding whether to bifurcate issues within a trial. *Cota v. Harley Davidson, a Div. of AMF, Inc.*, 141 Ariz. 7, 11, 684 P.2d 888, 892 (App. 1984).

¶26 Arizona Rule of Civil Procedure 42(b) states that, "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy," a court may order a separate trial of any claim or of any separate issue within a claim. Bifurcation is appropriate when the court believes that separate trials will achieve those purposes. *Mulhern v. City of Scottsdale*, 165 Ariz. 395, 398, 799 P.2d 15, 18 (App. 1990). This decision depends on the peculiar facts and circumstances of each case. *Saxion v. Titan-C-Mfg., Inc.*, 86 F.3d 553, 556 (6th Cir. 1996). In fact, the Supreme Court of Tennessee has held that the interests of justice warrant a bifurcation "in only the most exceptional cases." *Ennix v. Clay*, 703 S.W.2d 137, 139 (Tenn. 1986).

¶27 Appellant sought a bifurcated trial, in which the issue of sexual motivation of the attempted kidnapping would be tried first to avoid the possible prejudice of evidence of past sexual acts, which he contended was relevant to determination of SVP status but not sexual motivation. The trial court denied this request but granted a limiting instruction, under the apparent impression that evidence of past acts should, in fact, be excluded from consideration on the issue of sexual motivation of the attempted kidnapping conduct. The original denial of bifurcation was apparently based on a consideration of the inapplicability of Arizona Rule of Evidence Rule 404(c). However, we will affirm a trial court's ruling when the correct decision is reached "even though it was based upon the wrong reasons." *State v. Sardo*, 112 Ariz. 509, 515, 543 P.2d 1138, 1144 (1975). Here, a denial of bifurcation was ultimately an appropriate decision because the other act evidence was admissible even in regard to the threshold issue of sexual motivation for the attempted kidnapping conduct.

¶28 In *State v. Coghill*, 216 Ariz. 578, 582, ¶ 13, 169 P.3d 942, 946 (App. 2007), this court outlined four provisions of the Arizona Rules of Evidence that govern the admissibility of other-act evidence. First, Rule 404(b) requires that the evidence be admitted for a proper purpose. Rule 404(b) states that evidence of past acts is not admissible to prove character

to show action in conformity therewith, but it is admissible to prove (among other things) motive. Here, the evidence of past acts was not excluded by Rule 404 but, instead, was admissible under Rule 404(b) to prove motive. The evidence of other acts was not admissible to prove character to show action in conformity therewith, because no action needed to be proven. Appellant had already been convicted of the past act – the attempted kidnapping conduct.

¶29 Second, Rule 402 requires that the evidence be relevant. Under Rule 402, all relevant evidence is admissible unless the United States or Arizona Constitution, an applicable statute, the Rules of Evidence, or other Supreme Court rules provide otherwise. Evidence is "relevant" if it has any tendency to make a fact more or less probable than it would be without the evidence. Ariz. R. Evid. 401(a). Here, the evidence of past sexual acts makes Appellant's sexual motivation in the attempted kidnapping more probable because it points to a pattern of sexual desire when making physical contact with young women or girls.

¶30 Third, Rule 403 requires that the danger of the unfair prejudice of the evidence not outweigh the probative value. Unfair prejudice is found if the evidence suggests a decision on an improper basis. *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993). The evidence here was not introduced to prove

any action and could only be used to establish a pattern that points to a sexual motivation in the attempted kidnapping. There was little danger of the jury being unfairly tempted to use the evidence for anything other than its intended purpose. Therefore, because the evidence was not unfairly prejudicial, it was admissible under Rule 403.

¶31 Fourth, Rule 105 requires that the judge give an appropriate limiting instruction upon request. The trial court did give limiting instructions, and Royce is not arguing on appeal that the limiting instructions were insufficient or erroneous.

¶32 Because the evidence of Appellant's past sexual acts would have been admissible on the question of sexual motivation of the attempted kidnapping conduct, the trial court's denial of bifurcation was not error.

CONCLUSION

¶33 Double jeopardy and collateral estoppel did not preclude the issue of sexual motivation from being tried in the SVP proceeding. The jury had sufficient evidence to support the findings of sexual motivation and SVP status. The decision not to bifurcate was not an abuse of discretion because the other act evidence would have been admissible on the issue of sexual motivation during the attempted kidnapping conduct. For these

reasons, we affirm.

/s/

JOHN C. GEMMILL, Presiding Judge

CONCURRING:

/s/

JON W. THOMPSON, Judge

/s/

DONN KESSLER, Judge