NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

IN RE THE COMMITMENT OF DEREK KNOTT	2 CA-MH 2012-0010-SP DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. A20110049001

Honorable Deborah Bernini, Judge

AFFIRMED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Appellee

Lori J. Lefferts, Pima County Public Defender
By Michael J. Miller
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Attorneys for Appellant

H O W A R D, Chief Judge.

¶1 In July 2012, a jury found appellant Derek Knott to be a sexually violent person (SVP) pursuant to Arizona's Sexually Violent Persons Act, A.R.S. §§ 36-3701 through 36-3717. The trial court committed Knott to the custody of the Arizona Department of Health Services for placement in a licensed facility under the supervision of the Arizona State Hospital. On appeal, Knott challenges the court's denial of his motion for directed verdict, arguing there was insufficient evidence he had been convicted of a sexually violent offense or that he had a mental disorder that made it highly probable he would engage in future sexually violent acts, and argues the court erred when it committed him in the absence of a unanimous jury verdict. He asks that we reverse the judgment that he is a SVP and order his release. We affirm for the reasons stated below.

¶2 We review an order for involuntary treatment to determine if there is substantial evidence supporting the ruling. *In re Maricopa Cnty. Mental Health No. MH 2008-001188*, 221 Ariz. 177, ¶ 14, 211 P.3d 1161, 1163 (App. 2009). And, we view the evidence in the light most favorable to affirming the court's ruling. *Id.* Unless the factual findings upon which the court's order is based are clearly erroneous or unsupported by substantial evidence, we will not disturb it. *In re Maricopa Cnty. Mental Health No. MH 94-00592*, 182 Ariz. 440, 443, 897 P.2d 742, 745 (App. 1995). Under the SVP Act, a person may be civilly committed if the state proves beyond a reasonable doubt that the person named in the petition is sexually violent. *See* § 36-3707(A), (B). A sexually violent person includes one who has been convicted of a sexually violent offense

and exhibits "a mental disorder that makes the person likely to engage in acts of sexual violence." § 36-3701(7). In 2001, Knott was convicted, inter alia, of attempted sexual assault and was placed on intensive probation for ten years "subject to the special conditions of probation for sexual offenders." In 2011, as Knott neared the end of his incarceration for convictions of attempted voyeurism and stalking, subsequent offenses committed while he was on supervised release for the attempted sexual assault conviction, the state filed a petition alleging Knott is a SVP as defined in § 36-3701(7).

¶3 At Knott's civil commitment trial in July 2012, *see* § 36-3706, psychologists Sergio Martinez, engaged by the court to evaluate Knott, and Richard Samuels, testifying on Knott's behalf, both testified Knott had been convicted of various offenses, including attempted sexual assault, a sexually violent offense under § 36-3701(6)(a), (c). They also testified Knott had more recently been convicted of attempted voyeurism and stalking, at least one of which was committed while he was on community release and wearing a global positioning system monitor.

¶4 Martinez ultimately concluded that Knott's criminal history contributed to his opinion that Knott was highly likely to reoffend as a SVP and that he is a SVP under Arizona law. Martinez diagnosed Knott with the mental disorders of voyeurism and paraphilia not otherwise specified (paraphilia NOS).[1] He testified the diagnosis of

[1]According to Martinez, paraphilia NOS is a sexual diagnosis characterized by "behaviors that an individual displays that obviously involve some sexual component . . . a deviancy in terms of . . . a sexual type of behavior."

paraphilia NOS was based partly upon Knott's criminal history, which included convictions of attempted sexual assault and sexual abuse of a minor, in addition to incidents when Knott had touched his sister's friends for "sexual gratification." All of this had led Martinez to believe there was "another problem other than just voyeurism." Martinez also acknowledged that having both voyeurism and paraphilia NOS "make it difficult for someone to control themselves." Samuels agreed with Martinez's diagnosis of voyeurism, but opined that Martinez incorrectly had "equate[d] the act of committing a sex crime with having [the] mental disorder [of paraphilia]."

¶5 Martinez evaluated Knott by using psychological assessment tools designed to measure an offender's likelihood to reoffend sexually. That evaluation yielded the following results: Knott scored a nine on the "Static-2002R" test, which Martinez characterized as a high-risk category; Knott had a 48.3 percent risk to commit another sexual offense, a rate Martinez considered "pretty high" in comparison to the "recidivism rate in general" of three percent; and, Knott scored a nine on the "MnSOST-R" test, placing him in a "high risk category with a 70 percent chance of sexual recidivism within a period of six years." In contrast, Samuels "discredited" the MnSOST-R test, and used different scales than Martinez to evaluate Knott's test scores, ultimately concluding Knott "is at a relatively modest risk" to reoffend sexually in the next five to ten years, and that he is not a SVP under Arizona law.

¶6 On appeal, Knott first argues the state presented insufficient evidence to establish he had been convicted of a sexually violent offense, as required under § 36-

3701(7)(a). Knott does not dispute that the offense alleged in the petition, attempted sexual assault, qualifies as a sexually violent offense under the statute. Nor does he dispute that both Martinez and Samuels testified he had been convicted of a sexually violent offense. Rather, he asserts their testimony, as the only evidence on this issue, constitutes hearsay. He thus argues the state did not prove he had been convicted of a sexually violent offense as the statute requires. Implicitly acknowledging he did not object on this ground below,[2] and further acknowledging that "[t]he majority rule is that if hearsay evidence is admitted without objection, it becomes competent evidence admissible for all purposes," Knott nonetheless argues the verdict can be reversed where the hearsay is "the sole proof of an essential element of the state's case." *State v. McGann*, 132 Ariz. 296, 299, 645 P.2d 811, 814 (1982).

¶7 The preferred method of proving prior felony convictions is through documentary evidence, such as a certified copy of the convictions, and additional evidence identifying the individual as the person previously convicted. *State v. Hauss*, 140 Ariz. 230, 231-32, 681 P.2d 382, 383-84 (1984); *see also State v. Robles*, 213 Ariz. 268, ¶ 16, 141 P.3d 748, 753 (App. 2006) (prior convictions should be proved with "certified conviction documents bearing the defendant's fingerprints"). However, because Knott did not object to the use of Martinez's and Samuels's testimony on the ground now raised, we review his argument on appeal only for fundamental, prejudicial

[2]Both attorneys, as well as Martinez and Samuels, repeatedly referred not only to Knott's conviction for attempted sexual assault, but to the facts surrounding that offense, and that he had pled guilty to it.

error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object to alleged error in trial court results in forfeiture of review for all but fundamental error). Fundamental error review is rarely used in civil cases, but can be invoked in situations that may result in the denial of a constitutional right. *Ruben M. v. Ariz. Dep't of Econ. Sec*., 230 Ariz. 236, ¶ 15, 282 P.3d 437, 440 (App. 2012). Fundamental error requires the defendant to establish that error occurred, the error was fundamental, and the error resulted in prejudice. *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

¶8 Additionally, because Knott does not appear to argue in his opening brief that fundamental error occurred, instead suggesting for the first time in his reply brief that his due process rights were violated based on the admission of the challenged testimony, again without expressly stating fundamental error occurred, he has waived fundamental error review, and we decline to address his claim. *See State v. Guytan*, 192 Ariz. 514, ¶ 15, 968 P.2d 587, 593 (App. 1998) (we do not address issues raised for first time in reply brief); *see also State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (failure to argue alleged error fundamental results in waiver).

¶9 Moreover, we note that in closing argument, both the state and Knott's attorney referred to his conviction for attempted sexual assault. Knott's attorney expressly told the jury, "He has one sexually violent conviction." "[A]dmissions made by counsel in opening statements[, and by analogy in closing arguments,] are generally binding on a party, may be considered by the jury, and obviate 'the necessity of fuller

proof.'" *State v. Gray*, No. 2 CA-CR 2012-0094, ¶ 9, 2013 WL 388725 (Ariz. Ct. App. Jan. 31, 2013), *quoting Moore v. Blackstone*, 20 Ariz. 328, 330-31, 180 P. 526, 527 (1919).

¶10 Knott next argues the state failed to prove he had a mental disorder that made it highly probable he would engage in sexually violent acts, as required under § 36-3701(7)(b). Martinez testified that because the focus of a person diagnosed with voyeurism is "not on actually having contact" with the victim, such a diagnosis, without more, reduces the risk of the diagnosed individual committing a sexually violent offense. Relying on this testimony, Knott contends the legally required nexus between the mental disorder and the person's dangerousness is absent. *See In re Leon G.*, 204 Ariz. 15, ¶ 28, 59 P.3d 779, 787 (2002) (under SVP statute, state must "establish[] nexus" between mental disorder and dangerousness and prove disorder makes person act in certain manner). Knott further argues that, based on the only remaining diagnosis, paraphilia NOS, a diagnosis he claims is unsupportable, there is no evidence upon which to conclude he suffers from a mental illness establishing he is a sexually violent person.

¶11 "Mental disorder" is defined by the statute 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." § 36-3701(5). As the state correctly points out, Martinez testified that, although a diagnosis of voyeurism may minimize the risk of the person committing a sexually violent offense, it does not entirely

eliminate it, particularly when accompanied by another diagnosis, as here. And, as Martinez also testified, the diagnosis of paraphilia NOS applies when "there's sufficient information to know that there's a problem but you can't really pinpoint exactly which one of those paraphilias . . . this individual fit[s] into." Based on the conflicting testimony from Martinez and Samuels on the issue of paraphilia NOS, we can infer the jury, as the trier of fact, resolved the conflict by finding more credible Martinez's testimony that paraphilia NOS is a valid diagnosis that applies to Knott, a finding we will not disturb. *In re Commitment of Frankovitch*, 211 Ariz. 370, ¶ 19, 121 P.3d 1240, 1245 (App. 2005) (trial court in best position to determine credibility of witnesses).

¶12 Finally, although he acknowledges that "the SVP statutes do not specify the number of jurors or the number required to render a verdict," Knott nonetheless argues the finding made by six of the eight jurors that he is a SVP should be reversed. He contends, in part, that because our legislature has imposed the criminal standard of beyond a reasonable doubt in SVP cases, a unanimous jury verdict should apply as it does in criminal cases. However, we previously have found "[t]he legislature's provision of some of the safeguards applicable in criminal 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, ¶ 7, 85 P.3d 474, 476 (App. 2004), *quoting Allen v. Illinois*, 478 U.S. 364, 372 (1986). Moreover, as we found in *State ex rel. Romley v. Yarnell*, 198 Ariz. 164, ¶ 7, 7 P.3d 970, 972 (App. 2000), the agreement of six or more of eight jurors is sufficient to commit a sexual predator as a SVP. And, we

concluded in that case, "if the legislature had intended to require a unanimous verdict [in SVP cases], it could and would have done so explicitly." *Id.* ¶ 7. It did not.

¶13 For all of these reasons, we affirm.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge