IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN RE PIMA COUNTY MENTAL HEALTH NO. A20150054001

No. 2 CA-MH 2016-0006-SP
Filed February 3, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f)

Appeal from the Superior Court in Pima County
No. A20150054001
The Honorable Kenneth Lee, Judge

AFFIRMED

COUNSEL

Steven R. Sonenberg, Pima County Public Defender
By Michael J. Miller, Assistant Public Defender, Tucson
Counsel for Appellant

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

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Staring and Judge Miller concurred.

E S P I N O S A, Judge:

¶1 After a jury trial, B.A. was determined to be a sexually violent person (SVP) pursuant to the Sexually Violent Persons Act (SVPA), A.R.S. §§ 36-3701 to 36-3717. The trial court committed him to the custody of the Arizona Department of Health Services. On appeal, he asserts his commitment is improper because: (1) "the state did not present testimony about [his] probability of committing sexually violent offenses, only sexual offenses"; and (2) the state only "presented evidence that the probability of re-offense was 51% or more," which is not "highly probable" as required by the SVPA. We affirm.

¶2 A person may be civilly committed if the state proves, beyond a reasonable doubt, that the person is an SVP. *See* § 36–3707(A), (B); *In re Leon G.*, 204 Ariz. 15, ¶ 28, 59 P.3d 779, 787 (2002). An SVP is one who "[h]as ever been convicted of or found guilty but insane of a sexually violent offense . . . ." and "[h]as a mental disorder that makes the person likely to engage in acts of sexual violence." § 36–3701(7). As to the latter requirement, our supreme court has held the term "likely" means "highly probable." *In re Leon G.*, 204 Ariz. 15, ¶ 27, 59 P.3d at 787.

¶3 B.A. does not contest that he has been convicted of a sexually violent offense, nor that he has a mental disorder that results in his committing sexual acts and that he shows an abnormal sexual interest in children. He contends only that the state failed to show those acts would be "of sexual violence" or that it was highly probable he would commit them.

¶4 The first of B.A.'s claims centers on the testimony of a forensic psychologist, Dr. Harry Hoberman, that B.A. was likely to commit "sexual offense[s]," without describing those offenses as "sexually violent." Hoberman, however, stated that B.A. was "highly probable to commit another act of hands-on sexual abuse of a child." B.A. contends that sexual abuse is not a sexually violent offense as defined by § 36-3701(6) and that, by referring to "hands-on sexual abuse," Hoberman's testimony could only support a conclusion he intended to commit sexual abuse of a child as defined by Arizona law—that is, sexual contact involving only the female breast. *See* A.R.S. §§ 13-1401(A)(3); 13-1404(A).

¶5 Assuming, without deciding, that an individual can only be an SVP if he or she is likely to commit the offenses enumerated in § 36-3701(6), we nonetheless find no error. The term sexual abuse was not defined in the jury instructions, and nothing in the record suggests the prosecutor or Hoberman intended the reference to sexual abuse to refer only to conduct violating the sexual abuse statute. That term may be used to refer generally to any improper sexual contact with a child. *See Sexual Abuse*, Black's Law Dictionary (10th ed. 2014) (defining "sexual abuse," inter alia as "[a]n illegal or wrongful sex act, esp. one performed against a minor by an adult"). There is no evidence that B.A.'s sexual interest in children was limited to the female breast. Indeed, his previous offenses included him "putting his hands down [the] pants [of a five-year-old girl] and fondling her vaginal area," fondling the buttocks and vaginal area of a nine-year-old girl, and touching the genitals of a two-year-old boy and a four-year-old boy. And, virtually any sexual contact with a child other than contact with the female breast constitutes a violent sexual offense. *See* § 36-3701(6).

¶6 B.A. next asserts his commitment is improper because "[t]he state presented evidence that the probability of re-offense was 51% or more, which is a standard of more likely than not rather than highly probable." As noted above, our supreme court determined that the term "likely," as used in the SVPA, means "highly probable," not merely "probable." *In re Leon G.*, 204 Ariz. 15, ¶ 27, 59 P.3d at 787. Here, the jury was instructed that "[l]ikely means

highly probable" and that "[h]ighly probable is more than more likely than not, but less than beyond a reasonable doubt."

¶7 The heart of B.A.'s argument is the following exchange between his counsel and Hoberman:

> Q. Now I want to talk to you about the fourth prong, highly probable to re-offend in a sexually violent offense. As you understand it in Arizona, highly probable means at least 51 percent; doesn't it?
>
> A. It does.

B.A. reasons, therefore that Hoberman "only testified that the risk [of B.A. reoffending] was more likely than not." But Hoberman did not testify that B.A. had only a fifty-one percent chance of reoffending—he merely agreed with B.A.'s counsel that "highly probable" meant "at least 51 percent."[1] Hoberman's testimony, viewed as a whole, would allow a jury to conclude B.A.'s chance of reoffending was much greater.[2] For example, Hoberman noted B.A.

---

[1]We agree with B.A. that a fifty-one percent probability that a person convicted of a sexually violent offense would reoffend in his or her lifetime would not meet the standard of "likely" as contemplated by the SVPA. *See In re Leon G.*, 204 Ariz. ¶ 25, 59 P.3d at 786. We need not determine, however, what minimum numerical probability would meet that standard, nor do we suggest the state is required to identify a numerical probability to prove its case.

[2]As we understand this argument, B.A. asserts only that Hoberman's statement rendered his opinion insufficient to meet the state's burden, not that his statement injected some legal error in the proceeding. And, because the jury could properly find B.A. was likely to reoffend, we need not address his argument that we should review the issue for fundamental error based on his failure to raise it below. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) (in criminal proceeding, failure to raise claim forfeits review for all but fundamental, prejudicial error); *Romero v. Sw. Ambulance*,

had estimated his own risk of reoffending as "25 to 30 percent," which Hoberman characterized as "high," but nonetheless B.A. had believed he did not require treatment. Hoberman also noted B.A. had engaged in high risk behavior when out of custody, such as entering a church nursery and touching children, entering the play area of a shopping mall, and masturbating to child pornography. Hoberman further indicated that the results under one evaluation tool, which showed a twenty-seven percent likelihood B.A. would reoffend within five years, should be "double[d]" to correct for underreporting, that the same five-year rate also should be doubled to "provide[] . . . a better estimate of sex offense recidivism over a period of 20 years," and that B.A. could be expected to live for at least thirty more years.

¶8 Based on the foregoing, the jury's verdict finding B.A. an SVP and the trial court's commitment order are affirmed.

---

211 Ariz. 200, n.3, 119 P.3d 467, 471 n.3 (App. 2005) (doctrine of fundamental error employed sparingly, if at all, in civil cases).