IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

IN THE MATTER OF THE CARE AND TREATMENT OF LESTER BRADLEY a/k/a LESTER B. BRADLEY, a/k/a LESTER BERNARD BRADLEY,	)	
Appellant,	)	**WD80406**
v.	)	**OPINION FILED: May 9, 2018**
STATE OF MISSOURI,	)	
Respondent.	)	

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Mark A. Styles, Jr., Judge

Before Division Two: Karen King Mitchell, Presiding Judge, and Alok Ahuja and Edward R. Ardini, Jr., Judges

Lester Bradley appeals, following a jury trial, a judgment finding him to be a sexually violent predator and committing him to the Department of Mental Health for control, care, and treatment. Bradley raises eight points on appeal. The first two points challenge the trial court's denial of his motion to dismiss based upon the court's failure to hold a probable cause hearing within 72 hours of Bradley's detention, as required by § 632.489.[1] Bradley's third and fourth

[1] All statutory citations are to the Revised Statutes of Missouri (2016), unless otherwise noted.

points challenge the admission of testimony from the State's expert witness Dr. Kimberly Weitl. His fifth point challenges the sufficiency of the evidence to support the jury's determination that Bradley is a sexually violent predator. And his final three points raise constitutional challenges to the Sexually Violent Predator Act (SVPA). Finding no error, we affirm.

Background[2]

This appeal comes after a second jury found Bradley to be a sexually violent predator. The following background information is taken from Bradley's first appeal to this court after his first trial held in January of 2013:

> Beginning in October of 1996, Bradley began molesting his twelve-year-old step-daughter by fondling her vagina, forcing her to fondle his penis, forcing her to lie on top of him and rub herself against his penis, and performing oral sex on her. Bradley advised the victim that she was participating in classes on rape, and at the conclusion, she would receive "feely certificates." These "classes" lasted approximately two months, until Bradley advised the victim of the final lesson, which would involve insertion of his penis into her vagina, after which she would receive a "rape certificate." Bradley advised the victim that after her final lesson, Bradley would then begin lessons with the victim's eight-year-old sister. After Bradley advised the victim of his future plans, the victim reported Bradley's abuse to her mother sometime around Christmas of 1996. Bradley was subsequently charged with and convicted of one count of first-degree statutory sodomy and two counts of second-degree child molestation.
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> While in prison, Bradley completed the Missouri Sex Offender Program (MOSOP) in December 2007, and he was released on parole in March 2008. Conditions of Bradley's parole included: registration as a sex offender, participation in sex offender treatment, no unsupervised contact with children, and no viewing or possessing pornographic material. Within months of being paroled, Bradley began watching pornography and started a relationship with a woman who had a ten-year-old daughter. Bradley would spend two or three nights per week at the woman's home, babysit the daughter without supervision for up to ten hours at a time while the mother worked, and drive the daughter to and from school approximately two days per week, all in violation of his parole conditions. Although he was in sex offender treatment at the time, which required him to self-identify and report risky behaviors, Bradley did not reveal his relationship or his contact with the ten-year-old girl. He did, however, report that, just before he was paroled, he began having sexual fantasies about his prior victim and

[2] We view the facts in the light most favorable to the verdict. *In re Care & Treatment of Murrell v. State*, 215 S.W.3d 96, 100 n.3 (Mo. banc 2007).

masturbating to those fantasies. After his violations were discovered, Bradley's parole was revoked in October 2008 and he returned to the Department of Corrections to finish serving his sentence. When asked about his unauthorized contact with the ten-year-old girl, Bradley indicated: "I'm not attracted to her because she's fat."

Before Bradley's scheduled release date on June 9, 2011, Dr. Kimberly Weitl, a licensed psychologist with the Department of Corrections, filed an end-of-confinement report, indicating her belief that Bradley met the definition of a sexually violent predator (SVP) and referring the matter to the multidisciplinary team (MDT) for further evaluation. The MDT reviewed Bradley's records and unanimously concluded that Bradley did *not* appear to meet the definition of a sexually violent predator. Thereafter, the prosecutors' review committee met and, contrary to the MDT, unanimously concluded that Bradley *did* meet the definition of a sexually violent predator. The Attorney General, acting on behalf of the State, then filed a petition to civilly commit Bradley as a sexually violent predator.

Within the petition, the State requested that the probate court find probable cause to believe that Bradley was a sexually violent predator and set a hearing within 72 hours of his detention on the petition in order to allow Bradley the opportunity to appear and contest the probable cause determination. On May 24, 2011, the probate court entered an order finding probable cause to believe that Bradley met the definition of a sexually violent predator under section 632.480(5) and ordering that Bradley be brought to Jackson County for a probable cause hearing on June 10, 2011 (the day after his scheduled release from the Department of Corrections).

On May 26, 2011, the State filed a motion to move the probable cause hearing due to unavailability of its expert witness on the scheduled hearing date. The State proposed three alternative dates: June 8, June 9, or June 13, 2011. Also on May 26, 2011, Assistant Public Defender Randall Schlegel entered his appearance on Bradley's behalf and consented to either June 8 or June 9, but indicated his own conflict with June 13.

On June 3, 2011, the court held what appears to have been a status or scheduling conference, wherein both the State and Mr. Schlegel appeared, to discuss the State's motion. It appears that, at this hearing, the court indicated that it was not available on any of the proposed dates. The State indicated that it was ready to present evidence in support of the petition. Mr. Schlegel, acting on Bradley's behalf, indicated that Bradley freely and voluntarily waived his right to have the probable cause hearing held within the 72-hour time period prescribed by section 632.489.2, but "request[ed] a continuance of this opportunity." The court found that Bradley freely and voluntarily waived the 72-hour time limitation for the probable cause hearing and that Bradley would not be prejudiced by a continuance of the hearing. The court then ordered that the probable cause

hearing be continued until July 6, 2011, and that Bradley was to remain in the custody of the Jackson County Sheriff's Department until the proceedings were concluded. The court held the probable cause hearing on July 6, 2011, without objection, and found probable cause to believe that Bradley was a sexually violent predator.

Thereafter, pursuant to court order, Bradley was evaluated by Department of Mental Health psychologist, Dr. Stephen Jackson. Although Dr. Jackson believed that Bradley suffered from a mental abnormality (pedophilia) that caused him serious difficulty controlling his behavior, Dr. Jackson did not believe that Bradley was more likely than not to reoffend sexually if not confined; thus, he opined that Bradley was not a sexually violent predator.

The State retained Dr. Angeline Stanislaus, a psychiatrist, to review Bradley's records and determine whether he met the definition of a sexually violent predator. Dr. Stanislaus diagnosed Bradley with both pedophilia and anti-social personality disorder, both of which she deemed to constitute mental abnormalities that caused Bradley serious difficulty controlling his behavior. Dr. Stanislaus also opined, based upon her use of actuarial tools, that Bradley was more likely than not to reoffend sexually if not confined; thus, Dr. Stanislaus was of the opinion that Bradley met the definition of a sexually violent predator.

Bradley retained Dr. Jarrod Steffan, a psychologist, to conduct an evaluation. Dr. Steffan diagnosed Bradley with anti-social personality disorder, a mental abnormality that caused Bradley serious difficulty controlling his behavior. Unlike Drs. Jackson and Stanislaus, however, Dr. Steffan rejected the diagnosis of pedophilia based upon his perception of the victim's stage of puberty at the time of the crimes. Like Dr. Jackson, Dr. Steffan also rejected the notion that Bradley was more likely than not to reoffend sexually if not confined. Dr. Steffan specifically took issue with the manner in which Dr. Stanislaus scored the actuarial instruments when assessing Bradley's future risk; he believed that Dr. Stanislaus improperly relied upon Bradley's parole violation, rather than his sexual convictions, to establish Bradley's index offense for scoring purposes.

On January 4, 2013, twenty-four days before trial and eighteen months after the probable cause hearing, Bradley filed a motion to dismiss due to the court's failure to hold the probable cause hearing within 72 hours of Bradley being taken into custody on the petition. Bradley argued that he did not consent to the untimely hearing and that he was prejudiced in that, without its expert, the State would not have been able to establish probable cause, and Bradley would have been released. Bradley argued that the 72-hour time period was jurisdictional and that the court's failure to timely hold the probable cause hearing deprived the court of jurisdiction to proceed on the State's petition. The State filed a response, conceding that the hearing was held outside of the 72-hour window but arguing that Bradley waived his right to challenge the timing, given his consent to the court's setting of the hearing outside of the 72-hour window.

Bradley v. State, 440 S.W.3d 546, 547-50 (Mo. App. W.D. 2014).

Following the trial, the jury found Bradley to be a sexually violent predator, and he appealed. *Id*. at 550. Bradley raised three claims on appeal; he claimed that the evidence was insufficient to support the jury's determination, that the trial court erred in overruling his motion to dismiss for failure to hold his probable cause hearing within the 72-hour time period prescribed by statute, and that the trial court erred in excluding evidence regarding the MDT assessment. *Id*. This court addressed Bradley's second claim first, holding that there was "no basis for determining that the 72-hour time limit for holding the probable cause hearing [wa]s a jurisdictional prerequisite to proceeding on the State's petition. Rather, it appear[ed] to be mere error, subject to waiver and requiring a showing of prejudice to warrant reversal." *Id*. at 554. We then addressed the State's claim that Bradley had waived his challenge to the timing of the probable cause hearing and held that "Bradley waived his claim of error by failing to raise a timely objection to the court's noncompliance with the statutory time period." *Id*. at 555. In a footnote, we stated:

> In his motion to dismiss, Bradley also argued that attorney Schlegel entered his appearance on Bradley's behalf without first contacting Bradley or determining if Bradley qualified for the Public Defender's services. Thus, it appears that Bradley is also arguing that Mr. Schlegel could not waive the timing on Bradley's behalf because Mr. Schlegel was not, in fact, representing Bradley at the time of the waiver. According to the motion to dismiss, Mr. Schlegel did not represent Bradley before their first meeting on June 7, 2011. Bradley offered no evidence, however, to support this argument. Mr. Schlegel's entry of appearance on Bradley's behalf on May 26, 2011, is evidence that Mr. Schlegel represented Bradley at that time. There is simply no evidence to the contrary. Thus, we will not address the merits of this alternative argument.

Id. at 554 n.10.

On Bradley's third point, we held that "the trial court erred in finding that the MDT evidence was inadmissible under section 632.483.5." *Id*. at 559. But, because we were "unable

to discern whether, absent the erroneous statutory interpretation, the court would have [otherwise] erred in excluding the evidence," we chose to reverse the judgment and remand the case "for further proceedings consistent with th[e] opinion." *Id*. In light of our resolution of the third point, we did not address Bradley's first point regarding the sufficiency of the evidence. *Id*.

Following remand, the court set the matter for a new trial. On August 26, 2016, Bradley filed a renewed motion to dismiss based upon the court's failure to hold his probable cause hearing within 72 hours of his detention on the petition. In the motion, Bradley again claimed that Randall Schlegel did not represent him at the time Schlegel entered his appearance and waived the 72-hour requirement for the probable cause hearing. Bradley argued that he was prejudiced insofar as "the court could not have found that probable cause existed" if it had held the probable cause hearing at the originally scheduled time because the State's expert was unable to appear at that time, and Bradley surmised that, without the expert testimony, the State would have been unable to establish probable cause and Bradley would have been released. In response, the State argued that Bradley's motion should be denied based upon the law-of-the-case doctrine insofar as the issues raised had been addressed by this court in the first appeal. The trial court denied the motion to dismiss, finding "that at the time, Mr. Schlegel was the attorney of record for Mr. Bradley and did do a proper effect of that consent of that waiver, of that 72-hour period."

In the second trial, the State no longer sought to use testimony from Dr. Stanislaus and instead endorsed Dr. Weitl as its expert witness; she authored Bradley's end-of-confinement report but had since left employment with the State of Missouri and entered private practice. Bradley sought to exclude Dr. Weitl as a witness, arguing that, because she had authored the end-of-confinement report, she was precluded from serving as the State's expert by § 632.489.4.

Bradley also filed a motion in limine to limit Dr. Weitl's testimony; specifically, he sought to preclude her from testifying about the "substance of other non-testifying psychologists' opinions regarding their evaluations of Lester Bradley." Bradley identified information from Dr. Stanislaus and Dr. Reitmann as information he wished to preclude. Bradley emphasized that, because the other experts were not going to be testifying, he would not have the opportunity to cross-examine them. The trial court denied Bradley's motions.

At trial, the State's evidence was largely the same as that introduced at Bradley's first trial with the exception that it came in through Dr. Weitl, rather than Dr. Stanislaus. Like Dr. Stanislaus, Dr. Weitl diagnosed Bradley with pedophilia, opined that it constituted a mental abnormality under the definition provided by the SVPA, and determined that Bradley was more likely than not to reoffend if not confined. Dr. Steffan's testimony was also largely the same in the second trial as the first; he diagnosed Bradley with antisocial personality disorder, which he opined constituted a mental abnormality under the statutory definition, but he determined that Bradley's risk of reoffending was *not* more likely than not. And, pursuant to this court's opinion in the first appeal, Bradley offered testimony from Dr. Greg Markway, a member of the MDT, reflecting the fact that the MDT unanimously voted against a determination that Bradley was a sexually violent predator. After receiving all the evidence, the jury found Bradley to be a sexually violent predator, and the court ordered him committed to the Department of Mental Health for control, care, and treatment. Bradley appeals.

Analysis

Bradley raises eight points on appeal. The first two argue error in the court's decision to overrule his motion to dismiss based upon the court's failure to hold his probable cause hearing within 72 hours of his detention on the petition. His third and fourth points challenge the court's

decision to allow Dr. Weitl to testify and discuss findings of other experts upon which she relied. Bradley's fifth point challenges the sufficiency of the evidence to support the jury's verdict. And his final three points raise constitutional challenges to the SVPA. For ease of discussion we address Bradley's points out of order.

A. The constitutional challenges have been rejected by the Missouri Supreme Court.

In Points VI, VII, and VIII, Bradley argues that the SVPA is unconstitutional in that it violates his rights to due process, equal protection, freedom from *ex post facto* laws, and freedom from double jeopardy. Because these claims raise constitutional challenges to a Missouri statute, an issue normally reserved for the exclusive jurisdiction of the Missouri Supreme Court, we must determine whether we have jurisdiction to decide these claims.

"Article V, section 3 of the Missouri Constitution vests th[e Missouri Supreme] Court with exclusive appellate jurisdiction in all cases involving the validity of a statute." *In re Care & Treatment of Brown v. State*, 519 S.W.3d 848, 853 (Mo. App. W.D. 2017) (quoting *McNeal v. McNeal-Sydnor*, 472 S.W.3d 194, 195 (Mo. banc 2015)). "But the Missouri Supreme Court's 'exclusive appellate jurisdiction is not invoked simply because a case involves a constitutional issue.'" *Id.* (quoting *McNeal*, 472 S.W.3d at 195). "To invoke the Court's exclusive jurisdiction, '[t]he constitutional issue must be real and substantial, not merely colorable.'" *Id.* (quoting *McNeal*, 472 S.W.3d at 195). "When a party's claim is not real and substantial, but, instead, merely colorable, our review is proper." *Id.* (quoting *Ahern v. P & H, LLC*, 254 S.W.3d 129, 134 (Mo. App. E.D. 2008)).

"In determining whether a constitutional claim is real and substantial or merely colorable, [the reviewing c]ourt makes a preliminary inquiry as to whether [the claim] presents a contested matter of right that involves fair doubt and reasonable room for disagreement." *Id.* (quoting *Mo.*

Hwy. & Transp. Comm'n v. Merritt, 204 S.W.3d 278, 285 (Mo. App. E.D. 2006)). "If this initial inquiry shows that the claim is so legally or factually insubstantial as to be plainly without merit, the claim may be deemed merely colorable." *Id.* (quoting *Merritt*, 204 S.W.3d at 285).

Here, as Bradley concedes in his brief, each of the constitutional challenges he raises have been addressed and rejected by the Missouri Supreme Court.[3] "Thus, they do not involve fair doubt or reasonable room for disagreement. Rather, they are merely colorable. Accordingly, we have jurisdiction over this appeal." *Id*.

In Point VI, Bradley argues that the SVPA violates both due process and equal protection by failing to provide the least restrictive environment and "there is no alternative to confinement in a total lock down facility." This argument was soundly rejected by the Missouri Supreme Court in *In re Care & Treatment of Kirk v. State*, 520 S.W.3d 443, 450-51 (Mo. banc 2017):

> [T]he SVPA "is narrowly tailored to serve [the] compelling state interest . . . [of] protecting the public from crime," and that "interest justifies the differential treatment of those persons adjudicated as sexually violent predators." *In re Care & Treatment of Norton*, 123 S.W.3d 170, 174 (Mo. banc 2003). "Because the basis for commitment of sexually violent predators is different from general civil commitments, there is no requirement that sexually violent predators be afforded exactly the same rights as persons committed under the general civil standard." *In re Care & Treatment of Coffman*, 225 S.W.3d 439, 445 (Mo. banc 2007).

In Point VII, Bradley argues that the SVPA violates his "rights to due process and a fair trial, equal protection, freedom from double jeopardy and *ex post facto* laws, proof beyond a reasonable doubt, to silence and to counsel" insofar as "commitment under SVPA is a punitive, second punishment." This claim was also directly rejected by the Missouri Supreme Court in *Kirk*:

[3] In a footnote in his brief, Bradley states: "The Missouri Supreme Court denied the constitutional challenges in Points VI-VIII, in *Kirk v. State*, 520 S.W.3d 433 (Mo. 2017). Kirk is pursuing a writ of certiorari. Bradley must preserve these issues for future federal review."

> Applying *Hendricks*,[4] this Court held that—on its face—the SVPA evidences no punitive intent. *In re Care & Treatment of Van Orden*, 271 S.W.3d 579, 585 (Mo. banc 2008). Instead, even though SVPA "proceedings involve a liberty interest, they are civil proceedings." *Id*. This Court's conclusion in *Van Orden* necessarily disposes of Kirk's argument that the SVPA violates constitutional prohibitions against ex post facto laws. *See State v. Honeycutt*, 421 S.W.3d 410, [423] (Mo. banc 2013) (noting "the phrase 'ex post facto law' applies exclusively to criminal laws"). "Because . . . the . . . Act is civil in nature, initiation of its commitment proceedings does not constitute a second prosecution" and, therefore, "does not violate the Double Jeopardy Clause, even though that confinement may follow a prison term." *Hendricks*, 521 U.S. at 369, 117 S.Ct. 2072.

Kirk, 520 S.W.3d at 450.

Finally, in Point VIII, Bradley claims that the SVPA violates "his rights to due process, and equal protection" insofar as the SVPA "permits a mental abnormality finding and commitment because of a condition affecting one's emotional capacity . . . without a showing that the individual has serious difficulty controlling his behavior." As with Bradley's other two constitutional challenges, this claim was addressed and rejected by the Missouri Supreme Court in *Kirk*:

> In *Kansas v. Crane*, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002), the United States Supreme Court held that for civil commitment statutes such as the SVPA to be constitutional, "there must be proof of serious difficulty in controlling behavior." After that decision, this Court determined the SVPA does require such proof. The Court went on to explain, "To comply with *Crane*, the [jury] instruction defining mental abnormality must read as follows: As used in this instruction, 'mental abnormality' means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to commit sexually violent offenses in a degree *that causes the individual serious difficulty in controlling his behavior*." *In re Care & Treatment of Thomas*, 74 S.W.3d 789, 792 (Mo. banc 2002).

Kirk, 520 S.W.3d at 451 (emphasis in original). And, as in *Kirk*, "[t]his instruction was given in [Bradley's] case and was supported by sufficient evidence." *Id.*

[4] *Kansas v. Hendricks*, 521 U.S. 346 (1997).

"Missouri appellate courts are constitutionally bound to follow the last controlling decision of Missouri's Supreme Court . . . ." *State v. Miller*, 536 S.W.3d 374, 379 (Mo. App. W.D. 2018) (quoting *State v. Naylor*, 505 S.W.3d 290, 298 (Mo. App. W.D. 2016)). Accordingly, Bradley's Points VI, VII, and VIII are denied.

B. Bradley's claims regarding the timing of his probable cause hearing are barred by the law-of-the-case doctrine.

Bradley's first and second points both challenge the trial court's denial of his renewed motion to dismiss based upon the court's failure to hold a probable cause hearing within 72 hours of Bradley's detention on the petition.[5] His first point argues that "the trial court lost authority to conduct any further proceedings once it failed to meet the deadline." And his second point argues that the trial court erred in finding that Bradley, through counsel, waived the timing requirement for the probable cause hearing, because Randall Schlegel did not represent Bradley at the time Schlegel consented to the probable cause hearing outside of the 72-hour window. These claims are virtually indistinguishable from those raised in Bradley's first appeal and, therefore, are barred by the law-of-the-case doctrine.

"The doctrine of law of the case governs successive adjudications involving the same issues and facts." *Snelling v. Kenny*, 491 S.W.3d 606, 613 (Mo. App. E.D. 2016). "Generally, the decision of a court is the law of the case for all points presented and decided, *as well as for matters that arose prior to the first adjudication and might have been raised but were not*." *Id.* (quoting *Walton v. City of Berkeley*, 223 S.W.3d 126, 129 (Mo. banc 2007)) (emphasis added). "The doctrine ensures uniformity of decisions, protects the parties' expectations, and promotes

[5] "Generally, a trial court's denial of either a motion to dismiss or a motion for summary judgment is not a final judgment and is not reviewable." *In re Care & Treatment of Brown v. State*, 519 S.W.3d 848, 856 (Mo. App. W.D. 2017) (quoting *In re Care & Treatment of Arnold*, 292 S.W.3d 393, 396 (Mo. App. E.D. 2009)). But "review of the denial of a motion to dismiss, as part of the appeal from a final judgment[,] is . . . for abuse of discretion." *U.S. Bank, N.A. v. Coverdell*, 483 S.W.3d 390, 401 (Mo. App. S.D. 2015) (internal quotation omitted).

judicial economy." *Id.* "The law of the case can advance these goals only if it applies nearly all the time, and discretion to disregard it is exercised only in rare and compelling situations." *Id*.

Here, Bradley's Point I raises the same claim of error based upon the same facts as the second point raised in his first appeal.[6] *See Bradley*, 440 S.W.3d at 553 (rejecting Bradley's claim that the court's failure to hold the probable cause hearing within 72 hours of his detention deprived the court of jurisdiction to proceed and holding that "there is no language in section 632.489 providing for dismissal if the 72-hour time period for the probable cause hearing is not met"; thus, "noncompliance does not divest a court of jurisdiction."). The only distinction between the claim raised in his first appeal and that raised in Point I here is that he is now claiming the trial court lacked "authority" to proceed rather than "jurisdiction."

"Authority concerns a court's power to render a particular judgment or take a particular action in a particular case based on the existing law, while jurisdiction concerns a court's power to render *any* judgment or take *any* action in a particular case." *State ex rel. Zahnd v. Van Amburg*, 533 S.W.3d 227, 230 n.5 (Mo. banc 2017) (emphasis in original). In this case, the circuit court did not *wholly* fail to hold a probable cause hearing as is required by § 632.489.2; instead, it held the hearing outside of the 72-hour time limit specified in the statute, based upon Bradley's consent and the court's inherent authority to control its docket. For the same reasons we previously held that the delay in holding the probable cause hearing did not divest the circuit court of *jurisdiction*, it was not divested of *authority* to act, either. Any other issues presented in Bradley's Point I were already addressed in his first appeal and, therefore, are barred from further consideration here.

[6] In Bradley's first appeal, he argued "that the probate court should have dismissed the proceedings due to the court's failure to hold a probable cause hearing within 72 hours of Bradley's custodial detention on the State's petition. Bradley argues that the court's failure deprived the court of jurisdiction and denied him due process of law." *In re Care & Treatment of Bradley v. State*, 440 S.W.3d 546, 551 (Mo. App. W.D. 2014).

Bradley's second point argues that the trial court erred in finding that he waived the 72-hour time requirement because Schlegel did not represent Bradley at the time Schlegel consented to a rescheduled hearing. This claim was also raised in Bradley's first appeal. Specifically, we noted: "In his reply brief, Bradley argues that he did not consent to the continuance of the date and therefore did not need to show any resulting prejudice. . . . [I]t appears that Bradley is . . . arguing that Mr. Schlegel could not waive the timing on Bradley's behalf because Mr. Schlegel was not, in fact, representing Bradley at the time of the waiver." *Bradley*, 440 S.W.3d at 554, 554 n.10. In our opinion in the first appeal, we declined to "address the merits of this alternative argument" because "[t]here [wa]s simply no evidence" refuting the fact that Schlegel was representing Bradley at the time. *Id*. at 554 n.10. Bradley sought to capitalize on this language from our footnote to argue before his second trial that he was not barred from presenting evidence to support his claim that Schlegel did not represent him at the time. Bradley is, however, incorrect.

"[T]he decision of a court is the law of the case for all points presented and decided, *as well as for matters that arose prior to the first adjudication and might have been raised but were not*." *Walton*, 223 S.W.3d at 129 (emphasis added). Nothing precluded Bradley from presenting evidence in support of his contention regarding Schlegel's representation at the first trial. He is not now entitled to a second bite of the proverbial apple.

Because the facts and issues raised in Bradley's Points I and II in this appeal were raised and addressed in his first appeal, they are now barred from further consideration by the law of the case. Accordingly, Points I and II are denied.

C. The trial court did not err in allowing Dr. Weitl to testify in general or specifically about findings of other experts upon which she relied.

In Bradley's third and fourth points on appeal, he challenges Dr. Weitl's testimony as a whole and, specifically, with respect to her statements regarding the conclusions of other experts she relied on in reaching her opinion. Bradley's Point III argues that, because Dr. Weitl authored Bradley's end-of-confinement report, she was barred by § 632.489.4 from serving as a retained expert for the State. Bradley's Point IV argues that Dr. Weitl was improperly allowed to testify to the conclusions of other non-testifying experts in violation of § 490.065 and his right to confrontation. Neither point is meritorious.

"We review a trial court's admission or exclusion of expert testimony for abuse of discretion." *Pisoni v. Steak 'N Shake Operations, Inc.*, 468 S.W.3d 922, 928 (Mo. App. E.D. 2015). "A trial court abuses its discretion when a ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id*. "An appellant bears the burden of proving that the trial court abused its discretion and showing that [he] has suffered prejudice." *Id*.

The portion of § 632.489.4 that Bradley relies on to support his claim that Dr. Weitl, as the author of his end-of-confinement report, should not have been allowed to testify as the State's expert reads as follows: "The court shall direct the director of the department of mental health to have the person examined by a psychiatrist or psychologist as defined in section 632.005 *who was not a member of the multidisciplinary team that previously reviewed the person's records*." (Emphasis added.) Bradley reads the italicized portion as providing two alternative kinds of people, neither of whom may conduct the court-ordered examination—members of the MDT and anyone who has previously reviewed the person's records.

There are two flaws in Bradley's claim here. First, Dr. Weitl was not the psychologist appointed by the Department of Mental Health to examine Bradley pursuant to a court order.[7] Rather, she was a privately retained expert witness of the State's selection.[8] Thus, the language upon which Bradley relies is inapplicable, even if it would have the effect he claims, which brings us to the second flaw in his argument—the italicized portion does not contemplate two separate categories of individuals. The italicized portion refers solely to a single class of people—members of the MDT who reviewed the person's records. A person is not precluded from serving as an expert if that person, like Dr. Weitl, was never a member of the MDT.

"By what is known as the last antecedent rule, a 'limit[ing] or restrictive clause contained in [a] statute is generally construed to refer to and limit and restrict an immediately preceding clause or antecedent.'" *Gasconade Cty. Counseling Servs., Inc. v. Mo. Dep't of Health*, 314 S.W.3d 368, 374 n.5 (Mo. App. E.D. 2010) (quoting 2A Sutherland Statutory Construction § 47:26 (7th ed.)). Here, the clause, "that previously reviewed the person's records," is a restrictive clause, modifying only the previously stated noun, "member of the multidisciplinary team." Contrary to Bradley's suggestion, it does not create a second group of people precluded from appointment as a reviewing psychologist by the Department of Mental Health.

In short, because Dr. Weitl was not the psychologist appointed by the Department of Mental Health pursuant to a court order, nor was she a member of the MDT, the portion of § 632.489.4 that Bradley relies on is irrelevant and did not bar Dr. Weitl from testifying as an expert in Bradley's case.

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[7] The psychologist originally appointed by the Department of Mental Health was, in fact, Dr. Stephen Jackson. *Bradley*, 440 S.W.3d at 549.

[8] Bradley sought to exclude Dr. Weitl's testimony below on the additional ground that the State was not authorized to hire a privately retained expert. He has not raised that claim on appeal, and it has been rejected by the Eastern District of this court. *See, e.g., In re Care & Treatment of Doyle*, 428 S.W.3d 755, 761 (Mo. App. E.D. 2014) (holding that the "final sentence of Section 632.489.4 indicates an implicit right of either party to hire a private expert at its own expense.").

Point III is denied.

In his fourth point, Bradley argues that the court erred in allowing Dr. Weitl to testify to the opinions and conclusions of non-testifying evaluators, specifically those of Dr. Stanislaus and Dr. Jackson.[9] Bradley argues that doing so violated § 490.065 and his confrontation rights. We disagree.

Section 490.065.3 provides:

> The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.

"Section 490.065.3 permits an expert to consider facts not in evidence in forming an opinion or inference, but a two-step approach must be used to determine the admissibility of that expert opinion." *In re Care & Treatment of Whitnell v. State*, 129 S.W.3d 409, 416 (Mo. App. E.D. 2004). "First, the facts or evidence must be of a type reasonably relied on by experts in the field in forming opinions or inferences on the subject." *Id.* "Second, the trial court must independently decide if the facts and data relied on by the expert meet a minimum standard of reliability, *i.e.*, are otherwise reasonably reliable." *Id.* "The trial court has discretion in deferring to an expert's assessment of what data is reasonably reliable." *Id*.

Here, Dr. Weitl testified that, as an expert in her field of psychology, she relies on the evaluations, opinions, and conclusions of other experts. She testified, "When a colleague has come to the same conclusion, it makes me more confident in my own." "Reliance on

[9] When arguing this motion in limine below, Bradley sought to preclude Dr. Weitl from testifying to the conclusions of only Dr. Stanislaus and Dr. Reitmann. Bradley made no mention of Dr. Jackson. And, in fact, Bradley's expert Dr. Steffan testified that he relied on Dr. Jackson's opinions in formulating his own. Thus, to the extent that Bradley is complaining on appeal about Dr. Weitl's testimony pertaining to conclusions made by Dr. Jackson, we find his claim not to be preserved. And, in light of the fact that his own expert relied on such information, we decline to review Bradley's claim as it relates to the conclusions of Dr. Jackson.

information and the opinions of others does not automatically disqualify an expert's testimony." *In re Care & Treatment of T.D. v. State*, 199 S.W.3d 223, 227 (Mo. App. S.D. 2006) (quoting *Grab ex rel. Grab v. Dillon*, 103 S.W.3d 228, 239 (Mo. App. E.D. 2003)). "An expert can rely on such information provided that those sources are not offered as independent substantive evidence, but rather serve only as a background for his opinion." *Id*. (quoting *Whitnell*, 129 S.W.3d at 416). As such, the State established a sufficient foundation under § 490.065 to allow Dr. Weitl to testify as to the opinions and conclusions of other non-testifying experts. *In re Care & Treatment of Underwood v. State*, 519 S.W.3d 861, 873 (Mo. App. W.D. 2017).

Bradley complains that "there was no attempt to lay foundation or qualify non-testifying evaluators as experts." He argues that "[t]he record is void of evidence of: their knowledge, skill, experience, or training; how they conducted their evaluation or prepared their report; what records they reviewed; or how and why they reached their diagnoses and conclusions." We find this claim to be disingenuous. In Bradley's own motion to exclude this testimony, he repeatedly referred to Dr. Stanislaus and Dr. Reitmann as "experts." Furthermore, he did not object on this foundational basis at trial. "Adequacy of the factual or scientific foundation for expert opinion is . . . waived absent a timely objection or motion to strike." *Nichols v. Belleview R-III Sch. Dist.*, 528 S.W.3d 918, 930 (Mo. App. S.D. 2017) (quoting *Proffer v. Fed. Mogul Corp.*, 341 S.W.3d 184, 187 (Mo. App. S.D. 2011)).

In any event, to the extent Bradley sought to discredit the non-testifying experts' conclusions, he was able to do so through his own witness Dr. Steffan. And "[q]uestions regarding the sources and bases of an expert's opinion affect the weight rather than the

admissibility of the opinion." *Whitnell*, 129 S.W.3d at 416. In short, the trial court did not err in allowing Dr. Weitl to testify to the conclusions of other non-testifying experts.[10]

Point IV is denied.

D. The evidence was sufficient to support the jury's verdict.

In his fifth point on appeal, Bradley argues that the evidence was insufficient to support the jury's verdict finding him to be a sexually violent predator. Specifically, he argues that the evidence was insufficient to support either Dr. Weitl's diagnosis of pedophilia or her conclusion that Bradley was more likely than not to reoffend if not confined. Though couched in terms of a challenge to the sufficiency of the evidence, Bradley's real challenge is again directed at the bases for Dr. Weitl's opinion and conclusions.

"Once an expert opinion has been admitted, as any other evidence, it may be relied upon for purposes of determining the *submissibility* of the case." *In re Care & Treatment of Turner v. State*, 341 S.W.3d 750, 754 (Mo. App. S.D. 2011) (quoting *In re Care & Treatment of O'Hara v. State*, 331 S.W.3d 319, 320 (Mo. App. S.D. 2011)). "An appellant 'cannot "backdoor" an issue relating to the admissibility of expert testimony under the guise of a sufficiency of the evidence argument.'" *Id*. (quoting *O'Hara*, 331 S.W.3d at 320).

Here, the State had to prove that Bradley (1) had been found guilty of a sexually violent offense and (2) suffers from a mental abnormality (3) that makes him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility. § 632.480(5). Dr. Weitl testified that Bradley was convicted of first-degree statutory sodomy, a sexually violent offense under the statutory definition. She further testified that he suffers from

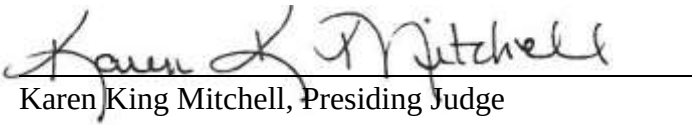
[10] Dr. Weitl did not merely relay other experts' opinions. Though relying on their conclusions in her own analysis, she ultimately reached her own diagnosis and opinion. For this reason, we reject Bradley's claim that he was denied his right to confrontation. *Cf. Graves v. Atchison-Holt Elec. Co-op.*, 886 S.W.2d 1, 7 (Mo. App. W.D. 1994) (holding that "an expert who consults and merely summarizes the content of a hearsay source without applying his own expertise is merely a hearsay witness.").

pedophilia, which qualified as a mental abnormality under the statutory definition. And she testified that, based on her professional opinion, because of his mental abnormality, Bradley was more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility, based on her analysis of various static and dynamic risk factors used in multiple actuarial tools. Thus, the evidence was sufficient to support the jury's determination.

Point V is denied.

Conclusion

The trial court did not err in entering a judgment consistent with the jury verdict finding Bradley to be a sexually violent predator and ordering him committed to the Department of Mental Health for control, care, and treatment. Its judgment is affirmed.



Karen King Mitchell, Presiding Judge

Alok Ahuja and Edward R. Ardini, Jr., Judges, concur.