Filed 2/23/10 P. v. Marentez CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. PAUL RUDY MARENTEZ, Defendant and Appellant.	B206971 (Los Angeles County Super. Ct. No. ZM002909)

APPEAL from a judgment of the Superior Court of Los Angeles County. Joan Comparet-Cassani, Judge. Affirmed in part; modified in part; remanded in part.

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, appellant Paul Rudy Marentez was adjudged to be a sexually violent predator within the meaning of Welfare and Institutions Code[1] section 6600, et seq. (the Sexually Violent Predator Act, hereafter "SVPA.") The trial court ordered appellant to be committed to the Department of Mental Health for a period not to exceed two years.

Appellant appeals from the trial court's judgment and order, contending that the Department of Mental Health used "underground" regulations to illegally commit him as a Sexually Violent Predator (hereafter "SVP") and his trial counsel was constitutionally ineffective in failing to make a pre-trial challenge to the validity of the SVP petition. Appellant also contends that the trial court erred in admitting evidence of a 1980 charge of which he was acquitted; permitting the prosecution to present evidence of the SVP treatment program at state hospitals but barring appellant from presenting evidence that those programs were flawed; and making numerous rulings which interfered with his ability to present his case and deprived him of a fair trial. Appellant further contends that the current version of the SVPA is unconstitutional because it caused him to be committed in violation of his equal protection, due process, ex post facto and double jeopardy rights. Respondent contends that the trial court's imposition of a two-year commitment was unauthorized and must be corrected to an indeterminate term. We agree with respondent that appellant's term must be corrected to the legally mandated indeterminate term. In accordance with the California Supreme Court's decision in *People* v. *McKee* (2010) 47 Cal.4th 1172, we remand this matter for a hearing on appellant's equal protection claim. The court's judgment and order are affirmed in all other respects.

---

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Facts

In 1980, appellant was charged with committing a lewd act on a child in violation of Penal Code section 288, but was acquitted in a court trial. The victim was a five-year-old girl, Veronica E. In a 1988 police interview with Long Beach Police Detective Nelson and in a 2007 interview with prosecution expert Dr. Malinek, appellant admitted wrongdoing and misconduct in 1980. Accordingly, details of the 1980 crime were relied on by the prosecution experts in forming their opinions and were conveyed to the jury.

In 1988, appellant was convicted of one count of committing a lewd act on a child in violation of Penal Code section 288, subdivision (a). The victim in that case was a three-year-old boy, Marvin M. In 1993, he was convicted of two counts of committing a lewd act on a child. The victim in that case was a six-year-old boy, Matthew B. These were appellant's two qualifying convictions for purposes of the SVPA.

The details of the three offenses were presented primarily through the testimony of prosecution expert witness Dr. Jack Vognsen. Dr. Vognsen, a psychologist, first interviewed appellant in 1998.

In addition to his evaluation of appellant, Dr. Vognsen reviewed the Department of Corrections Penal Code section 969, subdivision (b), packet, relating to appellant's 1988 lewd act conviction (case number A041071), as well as the police reports. Dr. Vognsen also read the 47-page transcript of the police interview in that case. During the interview between appellant and Detective Nelson of the Long Beach Police Department, they spoke about the details of the incident and whether appellant would plead to the offense.

Dr. Vognsen also spoke with appellant about his 1988 lewd act conviction. Appellant told Dr. Vognsen that he had been on a cocaine binge and was using alcohol at the time of the incident, and that he could not recall the incident. Appellant also said he pled guilty in that case. Appellant admitted to Dr. Vognsen that he committed the 1988 crime and his admissions became "clearer" over the years that Dr. Vognsen saw appellant.

Dr. Vognsen gave the following description of the 1988 incident: On August 7, 1988, appellant approached Marvin M., a three-year-old boy, and lured him into a church bathroom by promising him candy. Inside the bathroom, appellant orally copulated Marvin and asked Marvin to orally copulate him. Marvin's mother became concerned when she lost sight of him. The mother found Marvin exiting the bathroom, and appellant was tying Marvin's shoelaces. Marvin was anxious and told his mother what happened. The mother went home and called the church to determine appellant's identity. The mother learned of the name of appellant's father and she contacted him and the police. According to the police report Dr. Vognsen reviewed, Marvin's mother told the police that appellant called her twice to warn her against calling the police. According to the mother, Marvin told her that the man pulled down his pants and sucked on his "rungita," which in Spanish means "penis." Marvin also said the man asked him to suck on his penis, and that when Marvin refused, they came out of the bathroom after hearing Marvin's mother calling for him.

Dr. Vognsen also testified about the 1980 incident involving Veronica, a five-year-old girl. On May 16, 1980, Veronica's mother took Veronica and her sister to a shoe store, where appellant was working as a shoe salesman. None of the shoes fit Veronica, so appellant asked the mother if he could take Veronica to the back of the store where there were free shoes. The mother agreed. Appellant led Veronica to the back of the store and into a bathroom. Appellant placed her on a chair, took off her panties, and placed his finger inside her vagina. He also orally copulated her vagina, and they left the bathroom. After Veronica and her mother left the store, Veronica told her mother the man did something "bad" to her, and she described what happened. Veronica's mother called the police. Appellant was interviewed and he denied anything happened. Veronica was examined by a doctor. The doctor found no evidence of penetration, but observed that the vaginal opening was slightly reddened which could be consistent with the offenses she described. Dr. Vognsen opined that Veronica's testimony during the preliminary hearing was very consistent with what she told the police. A court trial was

held, and appellant was acquitted of this incident based upon insufficient evidence. In his interviews with Dr. Vognsen, appellant denied molesting the girl.

Dr. Vognsen also reviewed the Department of Corrections Penal Code section 969, subdivision (b), packet, relating to appellant's 1994 conviction (case number NA019542). Dr. Vognsen also reviewed the two related police reports, and he considered them in his evaluations of appellant from 1998 through 2007.

Dr. Vognsen gave the following description of the facts underlying appellant's 1994 conviction: In 1993, appellant began dating Matthew's mother. They stayed together in his apartment for two or three months. On one occasion when appellant and the boy visited a swimming pool, appellant removed Matthew's pants and fondled his penis while they were in the bathroom. Appellant also had Matthew fondle appellant's penis. On a second occasion at a YMCA bathroom, appellant handled Matthew's penis while applying soap to Matthew. Appellant then made Matthew handle appellant's erect penis. In speaking with Dr. Vognsen, appellant denied molesting the boy.

Dr. Vognsen found appellant's involvement with the care of children relevant in determining whether appellant established the relationship with Matthew's mother to victimize the children. Dr. Vognsen also found it significant that appellant had already been sanctioned by his parole officer for being around children, yet he nevertheless decided to involve himself with a woman who had two small children. When Dr. Vognsen questioned appellant about the 1994 case, appellant replied that he was suffering because his wife took his children away and moved to Pennsylvania. Appellant also said that when he was around children, he felt alive and young again. Dr. Vognsen opined that appellant's excuse was not credible, and that his attitude toward children was not uncommon among people who had sex with children. Dr. Vognsen opined the reason why appellant violated his parole was because of his sexual attraction to children. He also opined appellant believed he could do whatever he wanted, and that appellant could not be relied upon to follow rules.

Dr. Vognsen performed various tests on appellant to assess his general cognitive ability. Dr. Vognsen opined appellant performed adequately on the tests and that he was

able to communicate in a straightforward way. Dr. Vognsen also performed an ink blot (Rorschach) test on appellant. As a result of this test, Dr. Vognsen opined appellant's use of logic was peculiar in that he skipped from one type of thought to another unrelated type of thought.

Dr. Vognsen diagnosed appellant with several mental disorders, including antisocial personality disorder, substance abuse disorders, and pedophilia. To be diagnosed with pedophilia, the first criteria requires evidence of either sexually arousing fantasies, sexual urges, or behaviors that involve sexual activity with a prepubescent child. The second criteria requires active sexual urges or fantasies causing distress or interpersonal difficulty, and actions based on those urges. The third criteria requires that the subject be over 16 years old and at least a five year difference between the subject and the child. Dr. Vognsen opined that appellant's pedophilia was evident by the events that occurred in the A041071 and NA019542 cases. He also opined that, assuming the events in the 1980 case involving Veronica were true, this would also possibly support the diagnosis of appellant's pedophilia.

Dr. Vognsen diagnosed appellant with pedophilia and antisocial personality disorder in 1998. He opined that it was commonly accepted that pedophilia is a lifelong condition, and not something "you get over." A pedophile could learn to control these pedophiliac urges. Dr. Vognsen opined appellant's mental disorder predisposed him to the commission of criminal sexual acts. Dr. Vognsen based this opinion on how appellant acted on his urges, which was evidence of his predisposition.

Dr. Vognsen also opined that appellant was likely to engage in sexually violent predatory behavior as a result of his mental disorder without appropriate treatment or custody. In reaching this opinion, Dr. Vognsen relied upon four actuarial risk prediction instruments. One of these instruments was the Static 99, the most commonly used tool in 2008 to evaluate people under the SVP law. Appellant scored a six on the Static 99. Dr. Vognsen explained that a "six category" on the Static 99 fell into the "high risk" category. Under this category, there was a 39 percent chance of being convicted of a new sexual offense five years after release from custody, there was a 45 percent chance of being

convicted of a new sexual offense 10 years after release from custody, and a 52 percent chance of being convicted of a new sexual offense 15 years after release from custody. In addition to the Static 99, Dr. Vognsen also used three other tools to determine the risk of appellant committing a new sexual offense after release from custody - the "Rapid Sexual Offense of Sexual Recidivism" (RRASOR), the "Sex Offender Appraisal Guide" (SORAG), and the "Minnesota Sex Offender Screen Tool" (MNSOST-R). All three tools indicated appellant was a high risk for "sexual reoffending."

Dr. Vognsen opined that as a result of appellant's diagnosed mental disorders of pedophilia and antisocial personality disorder, appellant still needed appropriate treatment and custody.

One of appellant's victims, Matthew B., testified for the prosecution. He was 20 years old at the time of the trial. Matthew testified that he spent time with appellant during Matthew's visits to Matthew's mother's home in 1993 and 1994. While at a shower area inside the YMCA, appellant used his hands to wash Matthew's penis. Appellant touched Matthew's penis longer than Matthew liked and, at the time, Matthew could also see appellant's penis. Matthew did not recall whether he told the police that appellant's penis was erect. Matthew told his mother and grandparents what happened, but they did not believe him. Another incident between appellant and Matthew occurred inside a Stater Brother's store. Appellant followed Matthew into a bathroom stall. Appellant watched as Matthew "went to the bathroom," and appellant made Matthew watch as appellant urinated.

Dr. Hy Malinek, a clinical and forensic psychologist, also testified as an expert witness for the prosecution. He interviewed appellant on July 12, 2007. Prior to the interview, Dr. Malinek reviewed evaluations or letters from Dr. Glen. In regard to the 1988 conviction in case number A041071, Dr. Malinek reviewed a police report, the probation officer's report, the transcript of the police interview, and the Penal Code section 969, subdivision (b), packet.

During their interview, appellant told Dr. Malinek that he committed the crime in the shoe store in 1980. Dr. Malinek opined that appellant's act of luring children as he

did in 1988 was remarkably similar to what happened in 1980, involving Veronica at the shoe store. Dr. Malinek opined that even though appellant was acquitted of the 1980 incident, it was still significant because of the numerous factual similarities with the 1988 incident. In regard to the 1988 incident, appellant twice told Dr. Malinek during a 2007 interview that it was the result of a "pedophilic urge."

Dr. Malinek opined that appellant had been convicted of a sexually violent criminal offense against one or more victims. He also opined appellant had a diagnosable mental disorder that predisposes him to the commission of criminal sexual acts. Like Dr. Vognsen, Dr. Malinek diagnosed appellant with pedophilia. Dr. Malinek explained that there was evidence of appellant's sexual interest in very young children, and that he engaged in oral copulation and digital penetration with children who were three, four, and six years old.

Dr. Malinek opined that appellant acted on these interests on two, if not three, occasions. Dr. Malinek opined appellant's diagnosis of pedophilia is current because it is a chronic and lifelong condition. In assessing appellant, one of the risk assessment tools Dr. Malinek used was the Static 99. Appellant scored a six on this test, which Dr. Malinek concluded was associated with "high risk." In addition to the Static 99, Dr. Malinek also looked at other static and dynamic risk factors. He opined appellant had a sexual deviation which was consistent with high risk.

Dr. Malinek testified that treatment was available for appellant at the Atascadero or Coalinga state hospitals, but appellant was not interested in the treatment, nor did appellant do the assignments in the self-help books he had obtained. Dr. Malinek did not believe appellant was amenable to outpatient treatment, nor did he believe that "Harbor Lights" or the "Ness Center Treatment" would be appropriate for appellant. Dr. Malinek opined there was a serious and well-founded risk that appellant could reoffend.

Appellant testified in his own behalf. Appellant became involved with drugs as a teenager. He also had problems during his 10-year marriage, and he became involved in drug and alcohol use. He worked for nine years as an assistant manager at Al Murray's

Shoe Store. Following his acquittal of the charges stemming from the 1980 incident, he returned to the shoe store and worked there for eight more years.

Appellant's memory of the events leading to his conviction in case number A041071 in 1988 was hazy because of his drug and alcohol use. He pleaded guilty and gradually accepted responsibility for this crime. He believes he committed the crime because of drugs and alcohol.

After he was released from prison, he met with Marina, his high school sweetheart. In August of 1993, appellant was with Marina and Matthew at the YMCA. Appellant went with Matthew into the locker room after swimming and they both showered. Appellant denied he washed Matthew in a way that was sexually enticing. Rather, appellant placed shampoo on Matthew's head. At appellant's parole hearing, he was found not guilty of sexual assault, but found guilty of violating his parole by being around children. Appellant was released from prison after five months. Appellant was then arrested based upon Matthew's statements to the police. Appellant pleaded no contest in that case (NA019542), and accepted a deal of three years plus two years for his prior conviction.

Appellant had written hundreds of letters seeking treatment, and denied that he obsesses about children and sex, or that he has an ongoing interest in children and sex. Appellant admitted he used the term "pedophilic urge" with Dr. Malinek, but he did not know what it actually meant. However, appellant did not believe he would commit a sex crime against a child again.

On cross-examination, appellant denied that he lured Marvin to the bathroom by promising him candy in case number A041071. He admitted he orally copulated Marvin in the bathroom, and that he pulled Marvin's pants down and sucked on his penis. Appellant believed he was at risk for reoffending, and that he had put off sex offender treatment with a professional for 10 years.

Appellant also presented the testimony of two expert witnesses. Dr. Raymond Anderson, a psychologist, interviewed appellant several times over the years, and had spent approximately 15 or 16 hours with appellant. Dr. Anderson assessed appellant in

2000 using the Diagnostic and Statistical Manual (DSM). At that time, Dr. Anderson did not believe appellant qualified for a diagnosis of pedophilia and did not qualify as an SVP, even though he suffered two prior convictions for sexually molesting children. Dr. Anderson explained there was insufficient data to diagnose appellant with pedophilia, and that such a diagnosis would be improper if appellant was severely abusing cocaine and alcohol. Dr. Anderson found it significant that appellant denied he had any strong urges or that his sexual attraction was preferentially directed toward children. Dr. Anderson found there was insufficient evidence to rebut appellant's denial.

Dr. Anderson opined that for the SVP to apply to someone, there had to be a nexus between the internal disorder and the offending. Substance abuse and other mental problems may lead to unusual sexual behavior. Dr. Anderson explained that severe drug users may molest a child, but that behavior would not necessarily be diagnostic of pedophilia.

Dr. Anderson knew of the Static 99 but had never used it. He opined the Static 99 is not particularly useful in predicting serious sexual offenses, and it is a weak predictor of even minor sexual offenses. Dr. Anderson also opined that because appellant is Hispanic and American, that was enough to disqualify him from the Static 99. Dr. Anderson also opined the SORAG is not capable of predicting sexually violent recidivism, and that RRASOR predicts general sexual recidivism only minimally.

Dr. Anderson opined appellant was not likely to reoffend based upon the definition of the SVP law, and that appellant's release plan would realistically keep him from reoffending in a sexually inappropriate way. He opined appellant's "reoffense potential" was three percent.

Dr. William Vicary, appellant's second expert witness, was a psychiatrist who first interviewed appellant in September of 1999. He also saw appellant in April 2003, October 2003, September 2005, and December 2007. Dr. Vicary opined that although appellant met the first two SVP criteria, he did not meet the third criteria because it was not likely appellant would reoffend under the SVP Act. Dr. Vicary explained that most of the Static 99 factors were in favor of appellant not reoffending. He also based his

conclusion on appellant's age, and the changes he saw in appellant since he began seeing him.

Dr. Vicary considered the three different incidents in which appellant was charged with crimes, and he did diagnose him with pedophilia, substance abuse problems, and anti-social personality disorders. However, Dr. Vicary found appellant's substance abuse to be an important factor in his crimes, and that appellant's drug use could explain his behavior. Dr. Vicary opined the Static 99 is overly inclusive and overestimates risk. He believed appellant could be treated in the community, and that there was no longer a serious risk that appellant would reoffend.

In rebuttal, the prosecution presented the testimony of Dennis Brown, the director of the Ness Counseling Center, which contains sex offender groups and parenting groups. In 2007, Brown spoke with appellant about the possibility of being admitted into the Center. Appellant told Brown he sexually offended some children, but he did not provide great detail. Brown was concerned about appellant being admitted into the Center because of an experience he had with a previous SVP and how other people within the Center were not comfortable with having an SVP among them. Based on everything Brown knew about appellant, he did not believe the Center would admit appellant.

Discussion

1. Underground regulations

Welfare and Institutions Code section 6601, subdivision (c) requires that the Department of Mental Health develop a standardized assessment protocol to be used by evaluators to determine whether a person is a sexually violent predator. In August 2008, the Office of Administrative Law (hereafter "OAL") issued a determination that the handbook and protocol published by the Department of Mental Health was an "underground regulation" because it should have been adopted pursuant to the Administrative Procedure Act but was not. The OAL did not find any substantive flaws with the handbook and protocol.

Appellant contends that the illegality of the protocol deprived the district attorney of the statutory authority to file the petition against appellant and the trial court of fundamental jurisdiction over appellant's case.[2] Respondent contends that appellant has forfeited this contention by failing to raise it in the trial court. We consider the merits of appellant's claim because he argues that the alleged error was one of fundamental jurisdiction and that trial counsel's failure to object below amounted to constitutionally ineffective assistance of counsel.

a. Jurisdiction

Appellant has not cited, and we are not aware of, any cases holding that the failure to obtain legally sound evaluations deprives the superior court of fundamental jurisdiction in a case under the SVPA. "In general, the only act that may deprive a court of jurisdiction is the People's failure to file a petition for recommitment before the expiration of the prior commitment." (*People* v. *Whaley* (2008) 160 Cal.App.4th 779, 804; *People* v. *Evans* (2005) 132 Cal.App.4th 950; *Litmon* v. *Superior Court* (2004) 123 Cal.App.4th 1156, 1171.)

There is authority contrary to appellant's position. The First District Court of Appeal has held that the lack of evaluations conducted pursuant to a valid protocol does not deprive a court of fundamental jurisdiction in an SVP case. (*People* v. *Medina* (2009) 171 Cal.App.4th 805, 815-816.) The Fourth District Court of Appeal has held that the complete failure to obtain the evaluations of two mental health professionals did not deprive the court of fundamental jurisdiction to act on an SVP petition. (*People* v. *Superior Court (Preciado)* (2001) 87 Cal.App.4th 1122, 1128-1130.)

---

[2] In his opening brief, appellant acknowledged that this Court has rejected the identical claims in *People* v. *Castillo* (2009) 170 Cal.App.4th 1156. Review was subsequently granted in that case on May 13, 2009, on a different issue. We deny appellant's motion to take judicial notice of the amicus brief filed by the Los Angeles County public defenders in *Castillo*. We also deny appellant's motion to take judicial notice of his opening brief before the Supreme Court in *Castillo*.

Appellant contends that the reasoning of *Medina* is flawed because it takes an overly narrow view of fundamental jurisdiction. The Court in *Medina* takes the view of fundamental jurisdiction used by the California Supreme Court for at least 60 years. "Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties." (*Abelleira* v. *District Court of Appeal, Third Dist.* (1941) 17 Cal.2d 280, 288; *People* v. *American Contractors Indem. Co.* (2004) 33 Cal.4th 653, 660.) When a statute authorizes a prescribed procedure, and the court acts contrary to the authority thus conferred, it has *exceeded* its jurisdiction. (*People* v. *American Contractors Indem. Co.*, *supra*, 33 Cal.4th at p. 661.) That is not the same thing as lacking fundamental jurisdiction.

b. Effect of invalid evaluations

Appellant appears to believe that the illegality of the screening protocols should result in the termination of his commitment and that there should be no further proceedings against him under the SVPA even though he was found to be a SVP following a jury trial. Appellant misunderstands the role of the initial screening evaluations.

The initial identification of SVP's begins when the Department of Corrections screens an inmate's records to determine if he might be an SVP, based on whether the inmate has been convicted of a sexually violent predatory offense and on a review of the person's social, criminal and institutional history. (§ 6601, subd. (a)(2) and (b).) If the Department of Corrections determines that the inmate is likely to be an SVP, the inmate is referred to the Department of Mental Health for a full evaluation. (§ 6601, subd. (b).)

The Department of Mental Health then evaluates the person "in accordance with a standardized assessment protocol, developed and updated by the State Department of Mental Health." (§ 6601, subd. (c).) If the required two evaluators both agree that the person has a diagnosed mental disorder so that he is likely to engage in acts of sexual violence without treatment or custody, the Director of the Department of Mental Health

forwards a request for commitment under section 6602 to county counsel in the appropriate county.

The purpose of the evaluations "is not to identify SVP's but, rather, to screen out those who are not SVP's. 'The Legislature has imposed procedural safeguards to prevent meritless petitions from reaching trial. "[T]he requirement for evaluations is not one affecting disposition of the merits; rather, it is a collateral procedural condition plainly designed to ensure that SVP proceedings are initiated only when there is a substantial factual basis for doing so.'" [Citation.] The legal determination that a particular person is an SVP is made during the subsequent judicial proceedings, rather than during the screening process. [Citation.]" (*People* v. *Medina*, *supra*, 171 Cal.App.4th at p. 814.)

If the county counsel concurs with the Department of Mental Health's recommendation, counsel files a petition for commitment in the superior court. Once the petition is filed, the People cannot rely on the evaluations but are required to show the more essential fact that the person named in the petition is an SVP, that is that he is likely to engage in sexually violent predatory criminal behavior. (*Preciado*, *supra*, 87 Cal.App.4th at p. 1130.) "[A] new round of proceedings is triggered. (*Hubbart* v. *Superior Court* [(1999)] 19 Cal.4th [1138,] 1146 [, 81 Cal.Rptr.2d 492, 969 P.2d 584].) After the petition is filed, rather than demonstrating the existence of the two evaluations, the People are required to show the more essential fact that the alleged SVP is a person likely to engage in sexually violent predatory criminal behavior." (*Preciado*, *supra*, 87 Cal.App.4th at p. 1130; *In re Wright* (2005) 128 Cal.App.4th 663, 672.) At the probable cause hearing, the court's focus on the evaluations shifts from one of assessing formal conformance with procedural requirements to evaluating their probative value on the substantive SVP criteria. "[T]he probable cause hearing is 'a full, adversarial preliminary hearing....' [Citation.] The defendant has the right to the assistance of counsel. (§ 6602, subd. (a).) The hearing 'allow[s] the admission of both oral and written evidence' on the issue of probable cause. [Citations.] Despite their hearsay nature, the reports of the mental health professionals may be admitted – but the defendant may challenge the

reports by calling the professionals to the stand and cross-examining them." (*People* v. *Hayes* (2006) 137 Cal.App.4th 34, 43.)

The probable cause hearing under the SVPA is analogous to a preliminary hearing in a criminal case, as both are designed to protect the accused from having to face trial on groundless or otherwise unsupported charges. "The probable cause hearing, therefore, is only a preliminary determination that cannot form the basis of a civil commitment; the ultimate determination of whether an individual can be committed as an SVP is made only at trial. . . . [Citation.] Like a criminal preliminary hearing, the only purpose of the probable cause hearing is to test the sufficiency of the evidence supporting the SVPA petition." (*Cooley* v. *Superior Court* (2002) 29 Cal.4th 228, 247; *People* v. *Hayes*, *supra*, 137 Cal.App.4th at p. 43.)

The standard of review for irregularities, including the denial of fundamental rights, in a preliminary hearing is the harmless error standard set forth in *People* v. *Pompa-Ortiz* (1980) 27 Cal.3d 519. *Pompa-Ortiz* applies to SVP proceedings. (*People* v. *Hayes*, *supra*, 137 Cal.App.4th at p. 51, citing *People* v. *Hurtado* (2002) 28 Cal.4th 1179, 1190.) Under the *Pompa-Ortiz* standard, "'irregularities in the preliminary examination procedures *which are not jurisdictional in the fundamental sense* shall be reviewed under the appropriate standard of prejudicial error and shall require reversal only if the defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination. The right to relief without any showing of prejudice will be limited to pretrial challenges of irregularities. At that time, by application for extraordinary writ, the matter can be expeditiously returned to the magistrate for proceedings free of the charged defects.'" (*People* v. *Hayes*, *supra*, 137 Cal.App.4th at p. 50, quoting *People* v. *Pompa-Ortiz*, *supra*, 27 Cal.3d at p. 529.) "The rule of *Pompa-Ortiz* applies to denial of substantial rights as well as to technical irregularities," including claims of the denial of counsel and ineffective assistance of counsel at a preliminary hearing. (*People* v. *Hayes*, *supra*, 137 Cal.App.4th at pp. 50-51.)

Here, appellant would have been harmed by flaws in the evaluation protocol only if those protocols had caused the screeners to fail to screen him out as a non-SVP. Since appellant was found to be an SVP after a jury trial, he cannot demonstrate prejudice. The petition commencing this case had a substantial factual basis and was meritorious.

2. Ineffective assistance of counsel

Appellant contends that if we find that his counsel forfeited his claim about the underground regulations, he received ineffective assistance of counsel.

Appellant has the burden of proving ineffective assistance of counsel. (*People* v. *Pope* (1979) 23 Cal.3d 412, 425.) In order to establish such a claim, appellant must show that his counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's error, a different result would have been reasonably probable. (*Strickland* v. *Washington* (1984) 466 U.S. 668, 687-688, 694; *People* v. *Ledesma* (1987) 43 Cal.3d 171, 216-218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland* v. *Washington*, *supra*, 466 U.S. at p. 694.)

Assuming for the sake of argument that appellant's counsel should have objected to the protocol in the trial court and that that objection would have been sustained, we see no probability that appellant would have received a more favorable outcome. The OAL did not find any substantive defects in the protocol. The remedy would have been to remand for a new evaluation. (See *People* v. *Superior Court (Ghilotti)* (2002) 27 Cal.4th 888.) The Department of Mental Health promulgated an emergency regulation within a few months of the OAL's determination, and would no doubt have done the same in response to a court ruling in this case.[3] Appellant speculates that if compliance with the proper procedures might result in a protocol more favorable to him and he might have

---

[3] We grant appellant's request that we take judicial notice of this regulation. We deny appellant's motion to augment the record with copies of the Department of Mental Health's announcement relating to this regulation and finding of emergency that justified the filing of the regulation.

received a more favorable outcome if re-evaluated. It is appellant's burden to demonstrate prejudice. Speculation does not satisfy that burden. More importantly, appellant was adjudged to be a SVP following a jury trial, and there is no reason to think any reasonable protocol would screen him out.

3. Evidence of acts underlying 1980 acquittal

In 1980, appellant was charged with luring a young girl to a bathroom in the store where he worked and molesting her. He was acquitted of this charge. Appellant contends that because he was acquitted of the charges, information showing that he molested the girl was unreliable and not a proper basis for an expert opinion. He concludes that the trial court should have precluded the prosecution experts from relying on that information in forming their opinions or from testifying about any of those facts. Appellant also contends that the expert testimony about the preliminary hearing transcript from the 1980 case, a medical report from that case and the detective's statements during the 1988 interview with him about the 1980 case and documents supporting that testimony were inadmissible hearsay and that the trial court erred in permitting such testimony.

a. Consideration and reliance by experts

Generally, preliminary hearing transcripts, victim statements, police reports and similar evidence are the sorts of materials properly and commonly considered by experts in forming their opinions in SVP cases. (See, e.g., *People* v. *Otto* (2001) 26 Cal.4th 200, 207-209; *People* v. *Whitney* (2005) 129 Cal.App.4th 1287, 1298-1299 [psychological evaluations, victims hearsay statements]; *People* v. *Superior Court (Howard)* (1999) 70 Cal.App.4th 136, 151-155 [documentary evidence including preliminary hearing transcripts, trial transcripts, probation and sentencing reports, Mental Health Department evaluations, victim hearsay statements, evidence within and outside of defendant's prior criminal record]; *People* v. *Mazoros* (1977) 76 Cal.App.3d 32, 44 [police reports and reports of other offenses committed by defendant].)

The fact of an acquittal does not preclude the admission of evidence of the facts underlying the charge. (*People* v. *Mullens* (2004) 119 Cal.App.4th 648.) The reliability of evidence showing the underlying facts of an acquitted charge should be evaluated on a case-by-case basis. (See *People* v. *Otto, supra*, 26 Cal.4th at p. 211.)

Here, appellant acknowledges that some statements he made in a 1988 police interview could "possibly" be understood as saying that he felt guilty because he actually committed the 1980 offense and other statements could "reasonably" be understood as admitting the commission of an "improper action" in 1980.[4] Even given appellant's somewhat understated evaluation of his statements, those statements are sufficient to show that a sexual offense with a minor occurred in 1980, and thus render the documentary evidence about that offense reliable enough to be considered by an expert in forming his opinion. (See *People* v. *Otto, supra*, 26 Cal.4th at p. 211 [most important factor in reliability is conviction, which shows offense did occur].)

We see no error in the expert's consideration of the acts underlying appellant's offense in 1980.

b. Documentary evidence

Appellant contends that even if the experts could properly rely on the facts underlying the 1980 offense, the trial court erred in admitting certain parts of his 1988 interview which concerned the 1980 offense and the preliminary hearing transcript from the 1980 case because both documents were inadmissible hearsay.

i. Detective's statements during interview

The transcript of Detective Nelson's 1988 interview with appellant was admitted into evidence at the trial. During this interview, the detective discussed both the 1988 charges and the 1980 charges. Appellant objects to certain statements by the detective referring to the 1980 charges.

---

[4] Appellant acknowledges that his own statements were admissible at trial.

Appellant complains of the following statements by Detective Nelson during the 1988 interview: (1) "Eight years ago it happened, and, now, it's happened again." and (2) "[Y]ou've committed a crime, just like you've committed one eight years ago. [¶] And eight years ago you slipped through the crack just because a judge decided to acquit you, because he didn't feel there was enough evidence."

We see no error in the admission of the above statements. Throughout the interview, Detective Nelson pointed out the similarities between the victim's account of the 1980 incident and the victim's account of the 1988 incident, as a technique to get appellant to confess to the 1988 incident. The above two statements are just such remarks. Absent an admission by appellant that he committed the 1980 offense, Detective Nelson's statements about the 1980 incident would have been inadmissible hearsay. Appellant did, however, make statements during that interview which can reasonably be understood as admitting wrongdoing in 1980. The above statements by Detective Nelson give necessary context to those admissions.

As appellant himself notes, his admissions, considered in isolation, are somewhat ambiguous. Toward the end of the interview, the following exchange took place:

Appellant: "Hey, this last one, I don't even know why I did it. I don't know why I did it. I don't know why I'd do it. I—"

Nelson: "[D]o you know why you did it eight years ago?"

Appellant: "No."

Nelson: "Well, then, how do you expect to know why you did it this time?"

Appellant: "Cause this – this – like it was – it – it shouldn't happened. It shouldn't happened."

Nelson: "It shouldn't happened eight years ago either; should it had of?"

Appellant: "No, no, I – no."

Throughout the interview, Detective Nelson had described the 1980 incident as "a child was taken into a bathroom and orally copulated" and as "identical" to the 1988 incident. Thus, the only reasonable interpretation of appellant's reference to "it" which

occurred "eight years ago" in his admission is to the act of taking a child into a bathroom and orally copulating her.

We do agree with appellant that Detective Nelson's statement about the 1980 acquittal was irrelevant hearsay. However, we see no prejudice to appellant from this statement. Detective Nelson was simply stating the obvious, since all acquittals in criminal trials occur when the trier of fact decides that the prosecution has not met its burden of producing evidence that shows beyond a reasonable doubt that a crime had been committed.[5]

ii. Preliminary hearing transcript

We agree with appellant that the 1980 preliminary hearing transcript did not fall within any exception to the rule against hearsay. It was error to admit the transcript, but that error did not cause prejudice to appellant.

The prior testimony of a witness is admissible only if the witness is unavailable to testify at trial. (Evid. Code, §§ 1291, 1292.) A witness is unavailable if she is dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity; absent from the hearing and the court is unable to compel his or her attendance by its process; or absent from the hearing and the proponent of his or her statement had exercised reasonable diligence but has been unable to procure his or her attendance by the court's process. (Evid. Code, § 240.) Here, there was no showing that the victim or her mother who testified at the 1980 preliminary hearing were unavailable within the meaning of Evidence Code section 240.

We see no harm to appellant. The preliminary hearing testimony was brief and lacked details. The transcript does not show any strong emotions on the part of the victim. Only two witnesses testified. The victim's mother stated that appellant offered

---

[5] After referring to the 1980 acquittal for lack of evidence, Detective Nelson told appellant that there was "plenty of evidence" for the 1988 charge. Thus, Detective Nelson's apparent purpose for referring to the 1980 acquittal was to convince appellant to confess to the 1988 charges.

her daughter free shoes and asked that the daughter come to the back of the store with him. She also stated that her daughter told her what had happened very shortly after they left the shoe store. The mother did not provide any description of the molestation. The victim herself testified simply that appellant took her into the bathroom and touched her with his hand and mouth in her "pee-pee" area. This added nothing to the conduct which appellant admitted.

c. Testimony by experts

Appellant contends that the trial court erred in permitting prosecution experts Dr. Malinek and Dr. Vognsen to summarize the facts of the 1980 incident in their testimony.

Most of the challenged expert testimony was referring to or quoting from appellant's 1988 interview with Detective Nelson. Since a transcript of this interview was properly before the jury, there was no error in permitting the experts to discuss that interview.

The testimony did include a few minor details that were only found in the police report, and mentioned the contents of the preliminary hearing transcript. Assuming for the sake of argument that it was error to permit this testimony, we see no prejudice to appellant. As we discuss, *supra*, the preliminary hearing testimony added nothing to the conduct which appellant admitted. Dr. Vognsen testified that the police report said that the victim was "examined by a doctor who found no evidence of penetration, but said that the vaginal opening was slightly reddened which would be consistent with the offenses described by the girl." It appears that the statement about consistency was Dr. Vognsen's opinion. Dr. Malinek referred briefly to the redness in his testimony. Again, this would seem to add nothing to the conduct which appellant admitted to Detective Nelson.

4. Treatment programs

Appellant contends that the trial court erred in permitting prosecution experts to testify about details of the sexually violent predator treatment program at state mental hospitals and preventing appellant from presenting evidence attacking the program.

"[A] person's amenability to voluntary treatment, if any is presented, is relevant to the ultimate determination whether the person is likely to engage in sexually violent predatory crimes if released from custody." (*People* v. *Roberge* (2003) 29 Cal.4th 979, 988, fn. 2; see *People* v. *Superior Court (Ghilotti), supra,* 27 Cal.4th at p. 929 ["it would be reasonable to consider the person's refusal to cooperate in any phase of treatment provided by the Department, particularly a period of supervised outpatient treatment in the community, as a sign that the person is not prepared to control his untreated dangerousness by voluntary means if released unconditionally to the community"].)

Here, Dr. Vognsen and Dr. Malinek both based their opinion of appellant in part on his failure to seek treatment for his sex offenses. Both doctors testified that such a failure was a factor listed in recognized instruments for evaluating sex offenders.

Dr. Vognsen testified first. He testified that when he interviewed appellant in 1998, appellant criticized the prison parole system because he was never offered counseling for his sexual misbehavior. Appellant stated, and Dr. Vognsen agreed, that state prisons stopped offering such counseling in the early 1990's. Later in the interview, appellant took the position that he did not need counseling but would, in effect, treat himself.

In a more recent evaluation, appellant told Dr. Vognsen that he had changed his mind and decided to involve himself in treatment. Dr. Vognsen pointed out that treatment had been available to appellant since the probable cause hearing in this matter. From that time on, appellant could have requested a voluntary transfer to a state hospital for treatment.

Dr. Vognsen did not provide any details of the sexual offender treatment program offered at the hospital. He noted that appellant had complained of a lack of sunshine while in county jail and pointed out that patients at the state hospital were allowed to

walk in the yard and take in sunshine. He also pointed out that the hospitals offer chemical dependency treatment.

Dr. Vognsen acknowledged that appellant expressed concerns for his safety at the hospital and showed the doctor a newspaper article about attacks on inmates and patients at state hospitals.

Dr. Vognsen's brief comment that the program offered a chance at sunshine and chemical dependency treatment was relevant. These were things appellant claimed that he wanted but lacked while in county jail, and Dr. Vognsen pointed out that they were available at the hospital. Appellant's reason for declining the voluntary treatment was an issue at trial, and the advantages and disadvantages of the program were certainly relevant in assessing appellant's true reason for not transferring to the program.

Dr. Malinek did provide details of the five phases of the treatment program at state hospitals. We agree with appellant that these details would not be relevant in the absence of evidence that appellant was aware of the details of the program. It would seem reasonable, however, to infer that appellant was familiar with the program, since his possession of the newspaper article indicated that he had done research on the topic. Further, appellant professed himself willing to engage in voluntary treatment if released, and proposed certain treatment programs. It was relevant to compare the programs proposed by appellant, which were primarily substance abuse programs, with a program which focused on treating sexual offenders. Dr. Malinek's description of the state hospital program permitted such a comparison.

Even assuming for the sake of argument that the trial court erred in admitting Dr. Malinek's testimony, we would see no prejudice to appellant. The testimony was brief and there was nothing about the description of the program that would be likely to evoke an emotional response against appellant or for the program.

Appellant contends that the introduction of evidence about the hospital treatment program was prejudicial because it shifted the jury's focus from the issue of whether his proposed voluntary out-patient treatment program would suffice to keep him from being dangerous within the meaning of the statute to the issue of whether he would be even less

dangerous if he was confined to a state hospital. Appellant points to the following statement from the prosecutor's closing statement: "He is not going to be on parole. There will be no court supervision. The best place for Mr. Marentez is at Coalinga where he can go through a five-step program and identify what his triggers are, which he says that he knows what they are."

The prosecutor did not argue, and the evidence did not suggest, that the jury should decide whether appellant would be *less* dangerous if confined than released. The prosecutor argued, appropriately, that appellant would be dangerous if released. Before making the above-quoted remarks, the prosecutor argued that appellant would not stay with a voluntary program in the community because he did not want to revisit his offenses, and that the program that appellant had identified for treatment was not appropriate in any event. The prosecutor followed up the above-quoted remarks by arguing that appellant did not know how to deal with his triggers and if released was at risk of relapsing into drug abuse, which in turn would lead to another sexual offense. The prosecutor then concluded her argument by stating her belief that appellant was likely to re-offend if not confined to a secure facility. This was proper.

Appellant also contends that the court erred in excluding evidence of problems with the state hospital program, specifically a consent decree entered into by the Department of Mental Health with the Department of Justice concerning the adequacy of care at certain state hospitals. He contends that this was relevant to explain his refusal to seek a transfer to a state hospital for treatment.

There is no detail in the record about the consent decree, but there is a reference to a consent decree between the State of California and the United States Department of Justice in *People* v. *Felix* (2008) 169 Cal.App.4th 607. That decree was entered into in August 2006. It appears to be of marginal relevance, since it occurred two years after the 2004 probable cause hearing in this case, and could not, standing alone, explain appellant's failure to seek a transfer between 2004 and 2006. We see no abuse of discretion in the trial court's finding that it was a collateral matter that we require a trial within a trial.

Even assuming that the trial court erred, we would see no probability or possibility that appellant would have received a more favorable outcome if the evidence had been admitted. Appellant's reasons for failing to seek a voluntary transfer to a state hospital after 2004 were a minor issue. There was ample evidence that appellant had not sought formal treatment of any sort for a period of 10 years, had previously stated that he could treat himself but had failed to complete the workbook portions of self-help books that he had acquired, and had told doctors that he did not want to revisit and analyze his offenses, a necessary part of formal treatment programs.

5. Cumulative error

Appellant contends that the cumulative effect of many evidentiary rulings was prejudicial and requires reversal.

To determine whether errors are sufficiently grave to mandate reversal, it is necessary to look at the cumulative effect of the errors. (*People* v. *Cardenas* (1982) 31 Cal.3d 897, 907; see also *People* v. *Pitts* (1990) 223 Cal.App.3d 606, 815.) Reversal is appropriate only where the appellant has demonstrated that he was prejudiced by such errors. (*People* v. *Bradford* (1997) 15 Cal.4th 1229, 1382; *People* v. *Mayfield* (1997) 14 Cal.4th 668, 790.) We have assumed for the sake of argument that some of appellant's claims of error are valid. As we discuss below, the errors were minor and even when viewed collectively could not have prejudiced appellant.

a. Dr. Michael First's unpublished article

Appellant claims the trial court erred by not permitting defense counsel to cross-examine Dr. Vognsen about Dr. Michael First's article.

Evidence Code section 721, subdivision (b) provides in pertinent part: "If a witness testifying as an expert testifies in the form of an opinion, he or she may not be cross-examined in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication unless any of the following occurs: [¶] (1) The witness referred to, considered, or relied upon such publication in

arriving at or forming his or her opinion. [¶] (2) The publication has been admitted in evidence. [¶] (3) The publication has been established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice."

Here, after an objection by the prosecutor, defense counsel contended that Dr. First's article was considered "published" by experts because it had been accepted for publication and was at the press. The trial court did not agree.

The next day, after the prosecutor read the article, the prosecutor argued it should be excluded under Evidence Code section 721, subdivision (b), because there was no evidence Dr. Vognsen considered Dr. First an expert in the field, there was no evidence Dr. First was an expert in the sexually violent predator area, and because there was no evidence Dr. Vognsen relied on the article or considered it reliable authority. The court agreed with the prosecutor's argument and ruled the article was not admissible.[6]

We see no abuse of discretion in the trial court's ruling. Dr. Vognsen testified that he did not read the article until it became an issue during trial, and did not rely on the article in forming his opinion. The article had not been published at the time of trial and there is nothing to indicate that it would have been available to Dr. Vognsen or other experts in the field prior to publication. Thus, there was no probative value in Dr. Vognsen's failure to consider the article.

We do not agree with appellant that it should have been admitted under subdivision (b)(3). There was no testimony that Dr. First's article was a reliable authority, and there was no basis for the trial court to take judicial notice of such a fact.

Appellant contends that since Dr. First was an author and editor of the DSM, any article by him must be considered reliable authority. This argument overlooks the fact that the article was unpublished, but fails in any event. The DSM is a general work on

---

[6] The court asked Dr. Vognsen whether he read Dr. First's article. Dr. Vognsen replied that he read it for two and a half hours the previous night. The court then asked Dr. Vognsen whether he relied on the article in forming his opinion. Dr. Vognsen replied, "No, I didn't."

mental illness and covers many areas of mental illness. There is no evidence that Dr. First was an expert in the field of paraphilia generally, or pedophila in particular. The prosecutor argued that, as far as she knew, this was Dr. First's first article regarding "paraphilia diagnosis" and sexually violent predator cases. Appellant's trial counsel argued that Dr. First's article was similar to a deposition of the doctor. We fail to see the relevance of the deposition. Dr. Vognsen was aware of the deposition and described it as being primarily about the diagnosis of rape paraphilia, and then about diagnoses in general. As part of the general discussion of diagnoses, Dr. First also talked about pedophilia. Dr. Vognsen said the deposition gave him a "general understanding of what's happening out there."

b. Dr. Vognsen's report

Appellant next claims the trial court erred in permitting the prosecutor to question Dr. Malinek about the contents of Dr. Vognsen's report and in telling counsel to stop making objections. We see no prejudice to appellant.

Dr. Vognsen had already testified in the case by the time the prosecutor questioned Dr. Malinek about the report. In that testimony, Dr. Vognsen stated that appellant told him that Matthew's mother was "very eager to team up with him. [¶] At one point, he describes her as being sloppy, she's got fat, she was horny, and I kind of let her take me." According to Dr. Vognsen, "He describes her as being sexually aggressive and they connect up. And they stay together for about three months."

The prosecutor apparently showed Dr. Vognsen's report to Dr. Malinek to make him aware of appellant's statements to Vognsen about his relationship with Matthew's mother, which did not match with the description appellant had given Dr. Malinek. Appellant had described the woman as his high school sweetheart to Dr. Malinek. Dr. Malinek could, and did, consider those statements as impacting appellant's credibility. Since the facts were already in evidence, even if using the report to put those facts in front of Malinek was error, it was clearly harmless error.

Appellant also complains of the court's admonishment to his trial counsel after she objected to the use of Dr. Vognsen's report: "Your objections are not well founded. His statements are not hearsay. He is allowed to look at hearsay and rely on hearsay and you are making many, many objections that are improper, and I want you to stop doing that because you are interfering with our examination. Especially when there is no evidentiary ground."

This admonishment was made at a sidebar. We see nothing improper in a trial court's telling an attorney not to make improper and ungrounded objections. Even assuming for the sake of argument that the trial court was incorrect in its assessment of the merit of counsel's objections, we see no reasonable probability that appellant would have received a more favorable verdict in the absence of the error. Appellant acknowledged that counsel continued to make objections. If she was intimidated, it is not apparent from the record before this court.

c. The Ohio study

Appellant contends that the trial court erred in preventing her from cross-examining Dr. Malinek about an Ohio study of recidivism rates of sexual offenders and in criticizing her in front of the jury.

During appellant's cross-examination of Dr. Malinek on this topic, the trial court intervened to ask: "Are you talking about sex offenders or sexual violent predators? Those are two different categories." Appellant's counsel replied that she was talking about "people who committed sex offenses against children in a predatory fashion." The court then said: "Wait. Are you talking about, well, is the study concerned with sexual violent predators or sex offenders? Those are two different categories." Outside the presence of the jury, the court eventually ruled that "unless that study has something about sexual violent predators, we are not going into it."

The trial court intervened in the cross-examination only after appellant had elicited an acknowledgement from Dr. Malinek about the recidivism rate shown in that study. After the trial court intervened and imposed limits, appellant's counsel was able to

question Dr. Malinek further about the Ohio study and a similar study from Washington State. She was also able to point out that the recidivism rates in those studies were lower than those in the Static 99 test, which was her apparent purpose in using the Ohio study in cross-examination. Thus, even assuming for the sake of argument that the trial court's limitations were improper, there is no basis to find any prejudice to appellant from the limitations.

We see nothing improper in the trial court's comments to appellant's counsel which were made in front of the jury. The trial court does not give the appearance of taking sides, but simply of intervening to clarify a matter. The comments do not reflect negatively on either the court or appellant's trial counsel. We also do not agree that the trial court's ruling must have stopped appellant's counsel from introducing more studies on this topic and interfered with her cross-examination. Appellant's counsel was able to ask a few more questions using information from the Ohio study and to introduce at least one more study on this topic. If there is prejudice, it does not appear in the record before this court.

d. Dr. Malinek's work for defense counsel in another SVP case

Appellant next claims the trial court erred by permitting the prosecutor to elicit testimony that Dr. Malinek had been retained by appellant's trial counsel to assist her in another SVP case.

Information that Dr. Malinek also worked for the defense side in sexually violent predator cases was clearly proper to show a lack of bias. We will assume for the sake of argument that it was error to identify appellant's attorney as one of the defense attorneys for whom Malinek had worked. We see no prejudice to appellant. Dr. Malinek testified that the work was in one case. A one-time hire at some point in the past does not suggest that appellant's counsel was being disingenuous when she attempted to show that Dr. Malinek was biased for the prosecution in this case. Perhaps she was not satisfied with his performance in that case and never intended to hire him again. Perhaps he became pro-prosecution since that case.

e. Violation of the Attorney-Client Privilege

Appellant next claims his attorney-client privilege was violated when the prosecutor asked appellant whether his attorney ever asked him to stop writing letters to Dr. Glen. This claim is forfeited.

Appellant failed to object based on attorney-client privilege. His objections based upon "confidential foundation" and hearsay were insufficient to preserve this issue for appeal. (See *People* v. *Smith* (2007) 40 Cal.4th 483, 508-509.)

Here, the prosecutor asked appellant, "In January of '05 did – were you ever told by your attorney to stop writing . . . letters [to Dr. Glen] again?" Before appellant could respond, defense counsel objected. When the court asked for a reason for the objection, defense counsel replied, "Well, we would talk about confidential foundation." The court overruled the objection. The prosecutor did not repeat the question. Instead, the prosecutor asked a compound question - "So your attorney told you that and you didn't stop after [Dr. Glen] asked you once? [Dr. Glen] had to contact your attorney to tell you to stop; isn't that correct?" Appellant replied, "Yes."

It is far from clear that the information was covered by the attorney-client privilege. For example, after Dr. Glen contacted appellant's attorney to get her to tell appellant to stop writing letters, appellant's attorney may have told Dr. Glen that she passed along the request. That would not be covered by privilege. Absent a clear assertion of the privilege, we cannot conclude that the communication about the letter-writing was covered by the attorney-client privilege.

Assuming that the claim was not forfeited, and that the communication was privileged, we would see no prejudice to appellant from the fact that his attorney told him to stop writing letters to Dr. Glen. There was properly admitted evidence that appellant continued to send information to Dr. Glen after she told him it was inappropriate and that appellant sent the doctor a total of 13 packets of information. Perhaps this behavior might reflect poorly on appellant. The additional fact that appellant's attorney acquiesced to Dr. Glen's request to tell appellant to stop adds nothing.

f. Dr. Jesus Padilla's unpublished report

Appellant next claims the trial court erred by preventing defense counsel from questioning Dr. Vicary[7] about an unpublished report authored by Dr. Jesus Padilla.

Appellant's counsel asked Dr. Vicary whether he was aware of research that specifically addressed individuals from California who have had a score of six as determined by the Static 99. When Dr. Vicary replied he had, counsel asked him what research he was aware of. Dr. Vicary replied, "that research indicates that the evaluators were wrong, incredibly 95 percent of the time, in their predictions." Dr. Vicary explained that information was based on "a study done by Doctor Jesus Padilla who is a staff member at Atascadero."

At that point, the court held a side bar at the request of the prosecutor, and the following colloquy occurred:

Ms. Labrusciano: "What she's referring to is, he was a doctor at Atascadero, and he wrote an article that has not been published. He is now an evaluator for the State. But for him to base his opinion on unpublished material, and I believe it was elicited by counsel, I think this really taints the jury to hear information that really had she presented the question properly, there would have been a motion to strike as irrelevant. And now we have this already before the jury."

Ms. Coleman: "Your Honor, an expert brings to his expertise so much voluminous information. It's not always something that's a published report. It can be their experience, clinical background, things they've observed or heard."

The Court: "Well, it's not going to be an unpublished report. I mean, if my clerk wrote something, we can't base his opinion on that."

Ms. Coleman: "He's talking about something apparently from the Department of Mental Health itself."

The Court: "No. [¶] That's not published and not going to be used. It's stricken."

---

[7] Although appellant refers to Dr. Anderson, the portions of the record appellant cites to refer to Dr. Vicary's testimony.

Appellant contends that an expert may rely on unpublished documents in forming his opinion. Evidence Code section 801 permits such reliance as long as the matter is of a type reasonably relied upon by experts in the field. Here, it is not clear whether the unpublished study fell into that category or not. We will assume for the sake of argument that it did, and that the trial court erred in excluding the report.

We find any error was harmless. Dr. Vicary did not need to refer to Dr. Padilla's report to testify about his opinion that the Static 99 was a weak predictor of recidivism among sexual offenders. Further, the jury was also presented with Dr. Anderson's lengthy testimony that the Static 99 is not particularly useful in predicting serious sexual offenses, and it is a weak predictor of even minor sexual offenses.

g. List of replication studies

Appellant next claims the trial court erred by permitting the prosecutor, on redirect, to question Dr. Malinek about a list of approximately 60 studies that purportedly validated the Static 99.

"Redirect examination's 'principal purposes are to explain or rebut adverse testimony or inferences developed on cross-examination, and to rehabilitate a witness whose credibility has been impeached.' [Citation.]" (*People* v. *Cleveland* (2004) 32 Cal.4th 704, 746.) '"The extent of the redirect examination of a witness is largely within the discretion of the trial court."' (*Id*. at p. 745.)

Appellant acknowledges that his counsel spent a great deal of effort on cross-examination on attacking Malinek's testimony and his claim that the Static 99 is reliable. He also acknowledges that the district attorney was entitled to attempt to rehabilitate Malinek on redirect.

Appellant contends that the list of studies should not have been used on redirect for a variety of reasons. It was a list, not a study, report or similar publication. Malinek was not familiar with many of the studies on the list. At least some of the studies on the list were not replication studies that validated the Static 99. He concludes that the list should have been excluded pursuant to Evidence Code sections 721 and 801.

Dr. Malinek testified that he had read "most" of the studies. In addition, he was, in effect, relying in part on the compiler of the list, which he believed was the Department of Mental Health, to select studies which had validated the Static 99. The list had two areas of significance for him. First, the list showed that the Static 99 was a widely used instrument all over the world and that the test had been applied on different samples of sex offenders to cross-validate it.[8] Second, it was the number of studies that made the list significant to him, not necessarily the details of all of the included studies. As he explained: "[T]he point that this bibliography makes there are extensive publications about the instrument and that it captures relevant risk factors. [¶] It is not about a single individual. It is about the instrument. The more publications you have, the more research interest you have. [¶] The more [the] instrument is applied in different settings, the more you know whether it is useful or not. In that sense the Static 99 is clearly extensively applied." Dr. Malinek added: "I don't think that [the Static 99] would have been used so extensively if it was not relevant."

Appellant has not cited any evidence or authorities showing that a reasonable expert in the mental health field would not rely on such a bibliography. Dr. Malinek gave logical reasons for relying on it. We see no abuse of discretion in the use of the list on re-direct examination.

h. Dr. Brown's testimony

Appellant contends that the trial court erred by permitting Dr. Dennis Brown, the director of the Ness Counseling Center, to testify about the reasons why he wavered in his decision to admit appellant into the Center.

Dr. Brown explained there had been a previous SVP that had stayed at the Center for approximately one month and then left. Brown elaborated: "He spent about 18 years in prison with seven rapes. And what concerned me was the fact that there was no

---

[8] This was apparent from the title of the articles. For example, one article was written in French. Another article concerned Canadian aboriginal sex offenders.

accountability for him to be there. And he stayed with us for about a month and left. Whenever I brought up the issues of why his dislike [sic] for women, he got very upset, didn't want to come for individual counseling, didn't want to deal with the issue, and that was the end of it. And I felt pretty helpless at this time."

The reference to the offender was brief and not repeated. Nothing in Brown's testimony suggests that appellant was comparable to the SVP rapist previously at the Center. We see no possibility of prejudice to appellant.

6. Constitutionality of SVPA

Appellant contends that the current version of the SVPA violates his due process rights because it permits him to be committed indefinitely while placing the burden of proof on him to prove that he no longer qualifies as a SVP; his equal protection rights because it treats him differently than it does other similarly situated civil committees; and violates his right to be protected from ex post facto and double jeopardy laws because the SVP statutes are now punitive rather than civil in nature.[9]

During the pendency of this appeal, the California Supreme Court considered and rejected due process, ex post facto and double jeopardy claims that were virtually identical to appellant's claims. (*People* v. *McKee, supra,* 47 Cal.4th 1172.) In response to McKee's equal protection argument, the Court found that the People had not met its burden of showing that treating SVP's differently than mentally disordered offenders and persons found not guilty by reason of insanity is justified. The Court remanded the matter to the trial court to give the People an opportunity to show that such treatment is justified. We must do so as well.

---

[9] Respondent contends that appellant has forfeited these claims by failing to raise them in the trial court. This contention is not well taken. Appellant was not sentenced to an indeterminate term in the trial court and had no reason to object to the constitutionality of such a term. It was only on appeal that the indeterminate term was imposed, in response to a request by respondent.

7. Two-year commitment

Respondent contends that the trial court exceeded its jurisdiction by imposing a two-year commitment and the commitment must be changed to an indefinite term. We agree.[10]

Proposition 83 was approved by voters on November 7, 2006, and took effect the following day. Among other things, the proposition changed the commitment term for a person found to be a SVP from two years to an indeterminate term. (*People* v. *Shields* (2007) 155 Cal.App.4th 559, 562-563.) As modified, section 6604 admits of no discretion as to the appropriate commitment term. (§ 6604 ["If the court or jury determines that the person is a sexually violent predator, the person shall be committed for an indeterminate term to the custody of the State Department of Mental Health for appropriate treatment and confinement in a secure facility designated by the Director of Mental Health."].) An indeterminate term is the only term authorized by the SVPA, effective November 8, 2006.

Section 6604.1, subdivision (a), also effective November 8, 2006, provides: "The indeterminate term of commitment provided for in Section 6604 shall commence on the date upon which the court issues the initial order of commitment pursuant to that section." Here, the trial court issued its order of commitment on February 28, 2008. The court ordered a two-year term of commitment, consistent with a stipulation among representatives of the district attorney, public defender and superior court. The stipulation was dated October 11, 2006.[11] The stipulation provided that the district attorney's office would seek two-year commitments for all SVP petitions filed before the new legislation's effective date "for cases in which the trial and commitment occur after the effective date of the legislation."

---

[10] This issue is currently before the California Supreme Court in *People* v. *Castillo*, *supra*.

[11] It was filed in this case on January 7, 2008.

Appellant contends that he is not subject to an indeterminate commitment, and that *People* v. *Shields*, *supra*, 155 Cal.App.4th 559, *Bourquez* v. *Superior Court* (2007) 156 Cal.App.4th 1275 and *People* v. *Carroll* (2007) 158 Cal.App.4th 503 are wrongly decided. Those cases hold that application of the amended law to petitions pending on the effective date of the new law does not constitute a retroactive application of the law. We agree with the reasoning of those cases.

Appellant argues that we cannot or should not consider the legality of the commitment order for a number of reasons. We do not agree.

Appellant contends we have no jurisdiction to reach the propriety of the trial court's two-year commitment order because the People did not file a cross-appeal. We find that appellant's timely appeal of the commitment order provided this court with subject matter jurisdiction over the legitimacy of the trial court's commitment order.

Appellant also contends that the People have waived or forfeited the claim by failing to object in the trial court.

If this were a matter of criminal sentencing, there would be no serious question of waiver or forfeiture. Unauthorized sentences or sentences entered in excess of a court's jurisdiction are not subject to waiver or forfeiture. (*People* v. *Smith* (2001) 24 Cal.4th 849, 852.) Here, the trial court had no power to order appellant committed except as conferred by the SVPA, modified by Proposition 83. In light of the jury's verdict, an indeterminate term was the sole remedy available, and the legislative scheme authorizing commitment afforded the court no discretion in formulating alternative commitment

terms or to delay the effective date of the modifications effected by Proposition 83. (§ 6604.)[12]

We recognize that SVP proceedings "are civil in nature and are designed 'to provide "treatment" to mentally disordered individuals who cannot control sexually violent criminal behavior.'" (*People* v. *Carlin* (2007) 150 Cal.App.4th 322, 332.) However, that does not mean that reviewing courts must give effect to legally unauthorized commitment orders. The reasoning of *People* v. *Renfro* (2004) 125 Cal.App.4th 223 is instructive. In that case, defendant Renfro had entered into a plea agreement that conditioned his guilty plea to an assault-related offense on the prosecutor's promise that the offense could not be used as a qualifying offense for a future mentally disorder offender (MDO) commitment. Nevertheless, MDO proceedings were subsequently initiated against Renfro. Following his bench trial, the trial court refused to enforce the agreement and committed him as an MDO. (*Id.* at pp. 227-228.)

In affirming the judgment against the claim that due process required compliance with the plea agreement, the *Renfro* court was cognizant that an MDO proceeding is civil in nature and that the purpose of the MDO statute scheme is to provide mental health treatment for those offenders who are suffering from presently severe mental illness, not to punish them for their past offenses. (*People* v. *Renfro, supra*, 125 Cal.App.4th at pp. 231-232.) The *Renfro* court nevertheless refused to enforce a plea agreement that would effectively "nullify a mandatory statutory parole scheme." (*Id*. at p. 230.) "[N]either the prosecution nor the sentencing court has authority to impose a prison sentence without parole or to alter the applicable period of parole established by the Legislature and

---

[12] Imposition of an indeterminate term would not have amounted to an impermissible retroactive application of a penal statute. "Because a proceeding to extend commitment under the SVPA focuses on the person's current mental state, applying the indeterminate term of commitment of Proposition 83 does not attach new legal consequences to conduct that was completed before the effective date of the law. [Citation.] Applying Proposition 83 to pending petitions to extend commitment under the SVPA to make any future extended commitment for an indeterminate term is not a retroactive application." (*Bourquez* v. *Superior Court*, *supra*, 156 Cal.App.4th at p. 1289; *People* v. *Whaley*, *supra*, 160 Cal.App.4th at pp. 794-797.)

imposed by the Board of Prison Terms." (*Id*. at p. 232; see also *id*. at p. 233 ["the MDO provision of Renfro's plea agreement went beyond the sentencing court's authority"].)

In the same way, we reject the notion that the civil nature of appellant's SVPA proceedings serves to insulate an unauthorized commitment order from appellate review. The rationale for the unauthorized sentence exception to the general forfeiture rule applies with equal force to appellant's commitment order. (*People* v. *Talibdeen* (2002) 27 Cal.4th 1151, 1157 [appellate court properly corrected trial court's omission of state and county penalties under Pen. Code, § 1464, subd. (a), and Gov. Code, § 76000, subd. (a), despite the People's raising the issue for the first time on appeal]; see also *People* v. *Chambers* (1998) 65 Cal.App.4th 819, 823 [failure to object to imposition of two separate restitution fines is not a waiver]; *In re Paul R.* (1996) 42 Cal.App.4th 1582, 1590 [failure to object to denial of offset for direct victim restitution is not a waiver]; *People* v. *Sexton* (1995) 33 Cal.App.4th 64, 69 [failure to object to order for payment of restitution to victim's insurer is not a waiver], disapproved on a separate ground in *People* v. *Birkett* (1999) 21 Cal.4th 226, 247, fn. 20.)

Finally, notwithstanding the unauthorized sentence exception, we have discretion to consider points not raised at trial "when a contention newly made on appeal presents a question of law based upon undisputed facts [citation]." (E.g., *Raphael* v. *Bloomfield* (2003) 113 Cal.App.4th 617, 621, 6 Cal.Rptr.3d 583; *Bialo* v. *Western Mut. Ins. Co.* (2002) 95 Cal.App.4th 68, 73, 115 Cal.Rptr.2d 3.) The determination of whether appellant's two-year commitment was authorized requires no factual determinations.

Appellant further contends that the Attorney General should be estopped from taking a contrary position to that of the district attorney at trial. Generally speaking, the equitable estoppel doctrine applies where one party unfairly induces another to do what he or she would not otherwise have done, resulting in an injury. (*Hair* v. *State of California* (1991) 2 Cal.App.4th 321, 328-329; see *People* v. *Quartermain* (1997) 16 Cal.4th 600, 618 [recognizing the general principle that "when a prosecutor makes a promise that induces a defendant to waive a constitutional protection and act to his or her detriment in reliance on that promise, the promise must be enforced"].) Appellant fails to

show any detrimental reliance on the stipulation to seek only a two-year commitment. He contends that absent his stipulation to extend the time for trial, his case might have been dismissed for failure to bring it to trial in a timely matter or might have been brought to trial before the new law took effect. However, that is simply speculation, and unconvincing speculation at that.

Moreover, as explained in *Renfro*, even in cases where the prosecution has broken its promise, specific performance is neither a favored remedy nor required by the federal Constitution. It would be especially inappropriate when the "plea agreement went beyond the sentencing court's authority" such that it would undermine the applicable legislative scheme "and, in so doing, undermine public policy, public safety and the administration of justice by our courts." (*People* v. *Renfro*, *supra*, 125 Cal.App.4th at p. 233.) Proposition 83's amendment of the commitment term made "it easier to keep one adjudicated an SVP committed and in custody. This change is in keeping with the general intent of Proposition 83 'to strengthen and improve the laws that punish and control sexual offenders.' (Ballot Pamp., Gen. Elec. [(Nov. 7, 2006)] text of Prop. 83, p. 138.)" (*Bourquez* v. *Superior Court*, *supra*, 156 Cal.App.4th at p. 1287.) Here, the evidence supporting the jury's verdict was overwhelming as to every element of its SVP determination, including appellant's future dangerousness.

Disposition

Appellant's term of commitment is corrected to be an indeterminate term. This matter is remanded for a hearing on appellant's equal protection claim. The court's judgment and order are affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, Acting P. J.

We concur:

KRIEGLER, J.

WEISMAN, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.