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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

XAVIER GARCIA,

Defendant and Appellant.

A125107

(Solano County
Super. Ct. No. VC35874)

The jury returned a finding that defendant is a sexually violent predator (SVP) as defined in the Sexually Violent Predator Act (Welf. & Inst. Code, § 6600 et seq.) (the Act),¹ and the trial court imposed an involuntary civil commitment upon him for an indeterminate period. In this appeal defendant argues that the trial court erred by admitting testimony on the nature of treatment received by committed sexually violent predators (SVP's), and complains that he was committed on the basis of invalid evaluation regulations. He also claims that the Act, as amended by Proposition 83 in 2006, violates due process, ex post facto, double jeopardy and equal protection principles.

We find no error in the admission of relevant testimony that described the treatment of SVP's. We further conclude that reliance on invalid regulations during the

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

evaluation process of defendant did not result in prejudice to him. We conclude that in accordance with the California Supreme Court’s opinion in *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee I*), the current version of the Act does not contravene due process, ex post facto or double jeopardy considerations. Defendant established disparate treatment of SVP’s for equal protection purposes, but pursuant to the discussion in *People v. McKee* (2012) 207 Cal.App.4th 1325 (*McKee II*), constitutional justification for the distinction exists. We therefore affirm the judgment.

STATEMENT OF FACTS

In March of 2005, and January of 2007, two petitions were filed to extend defendant’s commitment to the State Department of Mental Health (the Department) under the Act, as amended by Proposition 83, an initiative enacted on November 7, 2006, and effective the next day. (*People v. Shields* (2007) 155 Cal.App.4th 559, 562–563.) The petitions were consolidated, and a jury trial on the petitions was held in May of 2009.

At trial, the prosecution presented expert opinion testimony from Dr. Douglas Korpi, a clinical forensic psychologist, who reviewed defendant’s criminal records and interviewed him extensively. Dr. Korpi recounted defendant’s lengthy history of sexual offenses, which began in October of 1966, when he was 16 years old, and continued with regularity – other than a period from 1985 to 1991— until his most recent incarceration in 1993. Defendant’s convictions range from misdemeanor annoying or molesting a child, to lewd and lascivious conduct with a child, failure to register as a sex offender, rape, assault with intent to commit rape, attempted rape, assault with a deadly weapon, kidnapping, and attempted burglary. Four of the crimes he has committed are classified as “sexually violent predatory offenses.”²

Defendant was convicted most recently for an attempted burglary he committed in October of 1993, and for which he received a state prison term of 13 years. He was apprehended after he attempted to forcibly enter a residence carrying a “gym bag” full of

² Defendant does not raise any issues on appeal that contest his prior convictions of the requisite sexually violent offenses to qualify for treatment under the Act, so we need not recite the details of those convictions.

items that comprised a “rape kit.” Defendant admitted that he intended to rape a 12-year-old child named Tiffany in the residence.³

Based on defendant’s history and the interviews he conducted, Dr. Korpi diagnosed defendant as suffering from nonexclusive pedophilia, a sexual attraction to children, coupled with paraphilia, an “aggressive sexuality” known as “the rape diagnosis.” Dr. Korpi essentially characterized defendant as a “sexually violent predator” who is a “rapist and a child molester;” he “likes little kids and to rape women.” Dr. Korpi also offered a “provisional antisocial personality diagnosis” for defendant that “almost meets the criteria for a full-blown diagnosis of antisocial.” Defendant “feels regret” and “self-recrimination” for his crimes, but his sexual disorders cannot be cured; at best, his deviant criminal behavior may be controlled or avoided with treatment. Defendant has marginally participated in six different treatment programs over the years, both in custody and while released on parole, without control of his conduct unless he is incarcerated. Defendant also admitted to Dr. Korpi that he has frequently used drugs. Dr. Korpi identified defendant’s drug abuse as a risk factor for reoffending when he is not in custody.

Dr. Korpi testified that defendant does not “give evidence of his pathology when he’s in custody,” as is common for those with his disorders, but has “trouble controlling” the disorders, “predisposing [him] to sexual offenses” when he is released. Dr. Korpi conducted a “risk analysis” of defendant based on assessment of various known “risk factors” for reoffending. Following the risk analysis and evaluation of defendant’s individual circumstances – including his age, failure to successfully participate in treatment, and lack of monitoring if released – Dr. Korpi concluded that defendant is about “40 percent” likely to reoffend. He offered the opinion that defendant, placed in that percentage group, “poses a serious and well-founded risk to the community to commit another sexually violent offense” if he is not maintained in custody.

³ Two years before, defendant posed as a security officer in a Safeway store and attempted unsuccessfully to escort the same girl, Tiffany, out of the store to molest her.

The prosecution also offered testimony from another forensic psychologist, Dale Arnold, who interviewed defendant in July of 2000. Defendant acknowledged to Dr. Arnold that he had a “sexual preoccupation” that was difficult to control. He also admitted that when he committed the attempted burglary in 1993, he went “to that home with the purpose in mind of raping Tiffany.”

Dr. Jeremy Coles, a clinical and forensic psychologist, testified that he reviewed defendant’s criminal history file and conducted an interview of him in October of 2005. Defendant’s history until the time of his last incarceration in 1993 indicates that he has engaged in “repetitive rape and/or molestation of either nonconsenting females or children, multiple rounds of treatment, multiple rounds of custody,” and has been “generally unable to stay out in the community for less than a year without committing another sex offense starting at the age of 16 and winding up through the age” of 43. Dr. Coles concluded that defendant suffers from “paraphilia not otherwise specified, sex with nonconsenting others,” pedophilia, and antisocial personality disorder. He agreed with Dr. Korpi that defendant’s conditions “don’t go away,” and cannot be cured. Only the symptoms can be controlled with treatment, and defendant has not “participated in sex offender treatment” offered to him. Defendant expressed that he does not have a “sex problem,” is not at risk to reoffend, and does not intend to “go into treatment for sex” if he is released. Based on defendant’s high-risk score of seven on the Static-99 risk assessment, Dr. Coles believes that defendant has “both emotional and volitional deficits that predispose him to commit sex crimes of a sexually violent nature,” and is at high risk to commit sexually violent predatory offenses if released.

In defendant’s testimony he admitted and recounted the offenses described in his criminal history, but claimed that he had not committed any other offenses. The motivation for the offenses, asserted defendant, was essentially his interest in having sex with the victims, whether they consented or not. Defendant realizes “there’s no cure” for his illness. He testified that if he “was to be released” he would go to Texas to live with his family, where he was “set up with a job” in his cousin’s textile business. His family knows about his “sexual past,” and he would disclose his prior offenses to others. He

would also register as a sex offender and “get counseling.” He would not become involved “in a relationship with a woman who has kids.”

The defense presented testimony from nurses and a licensed psychiatric technician who worked in the state facilities in which defendant resided. They had regular contact with defendant since 1993, and did not observe any violent, sexually inappropriate behavior on his part.

Alan Abrams, a physician and psychiatrist, testified for the defense that he interviewed defendant, administered tests to him, and reviewed his records along with the evaluations of other SVP evaluators. Dr. Abrams found that defendant has a “personality disorder” with “schizoid and alexithymic features,” but does not currently have a qualifying diagnosed mental disorder that renders him a person classified as dangerous for purposes of an SVP commitment. He agreed that defendant may have met the criteria for “paraphilia” and “nonexclusive pedophilia” in the “1970’s and 1980’s,” but in light of the absence of any behavioral problems other than “minor write-ups” since his incarceration in 1993, those disorders are currently “either in remission or have disappeared.” Dr. Abrams testified that he does not believe defendant presents a serious and substantial danger of reoffending if released. Defendant’s age of nearly 60 places him in a category of elderly offenders that have a “1 in 20 to 1 in 10 risk of reoffending,” which is not significant and “very easily managed.” Defendant’s risk of reoffending, according to Dr. Abrams, is between five and ten percent.

Dr. Robert Halon, a licensed psychologist, also interviewed defendant, administered formal psychological tests to him, and evaluated his history and diagnoses for the defense. He testified that defendant does not currently have “any form of mental disorder,” although he exhibits signs of antisocial attitudes and characteristics. Dr. Halon considered “paraphilia NOS [not otherwise specified]” to be a “prime candidate” for defendant’s “sexually deviant” behavior when he examined him in 2005, but found that a current differential diagnosis of defendant was “extremely difficult to make.” Defendant may suffer from “paraphilic coercive disorder,” but “all of his sexual behavior” may also have been “related to undiagnosed Asperger’s disorder.” Dr. Halon theorized that the

absence of “any sign of sexual deviance or sexual deviant interest” during the last 15 years of defendant’s incarceration and close observation suggests that he does not suffer from an uncontrollable mental disorder.

Michael Raymond, the Native American Chaplin at Coalinga State Hospital, testified for the defense he teaches the Medicine Wheel classes, a 12-step recovery program attended by defendant which uses “Native American spiritual concepts” to treat addictions and other compulsions. Defendant fully participated in the classes for the past three years, completed the program, and became a mentor to others. While doing so his attitude became less suspicious, angry and fearful.

DISCUSSION

I. Testimony on the Sexually Violent Predator Treatment Program.

Defendant asserts that the trial court erred by admitting testimony from Dr. Korpi in which he described the “quality and content of the sexually violent predator treatment program offered by the Department of Mental Health,” known as the “Phase Program.” Although the program was available to defendant, he did not participate, so he argues that “this information was completely irrelevant.” He adds that the evidence was nevertheless “highly prejudicial,” since it suggested to the jury that “it would be safer not to release him until he completed the treatment program.”⁴

We proceed with our inquiry from the fundamental premise that, “ ‘No evidence is admissible except relevant evidence.’ (Evid. Code, § 350.) ‘ ‘Relevant evidence’ means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.’ (Evid. Code, § 210.)” (*People v. Honig* (1996) 48 Cal.App.4th 289, 342.) “ ‘The test of relevance is whether the evidence tends “logically, naturally, and by reasonable inference” to establish material facts such as

⁴ We recognize that defendant did not object to the evidence on the same ground he is now asserting on appeal. Despite the forfeiture associated with lack of an objection we proceed to examine the merits of the issue to offset and resolve any claim of incompetence of counsel. (See, e.g., *People v. Marshall* (1996) 13 Cal.4th 799, 831–832; *People v. Ashmus* (1991) 54 Cal.3d 932, 976; *People v. Sully* (1991) 53 Cal.3d 1195, 1218; *People v. Morris* (1991) 53 Cal.3d 152, 196; *People v. Williams* (1998) 61 Cal.App.4th 649, 657.)

identity, intent, or motive. [Citations.] The trial court retains broad discretion in determining the relevance of evidence.’ [Citations.]” (*People v. Cunningham* (2001) 25 Cal.4th 926, 995.) However, “A trial court has no discretion to admit irrelevant evidence.” (*People v. Honig, supra*, at p. 343.) We apply an abuse of discretion standard to our review of the trial court’s decision to admit the evidence. (*People v. Lewis* (2008) 43 Cal.4th 415, 502; *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1449.) “ ‘A trial court abuses its discretion when its ruling “fall[s] ‘outside the bounds of reason.’ ” [Citation.]’ [Citation.]” (*People v. Sisneros* (2009) 174 Cal.App.4th 142, 151.)

Defendant acknowledges that his failure to participate in the Phase Program was relevant, and challenges only “the description of and praise for the treatment program.” Dr. Korpi testified that the Phase Program is a “new and improved version” of the programs used at Atascadero when defendant was committed there on multiple occasions, and uses a “relapse prevention model.” According to Dr. Korpi, the current program seeks to discover and confront sex offenders with the “behavior chains” and “risk factors” that resulted in their sexually deviant behavior, so the offenders may then be able to avoid reoffending when they are released into the community. Defendant had been offered the opportunity to enroll every three months, but has refused to participate. Dr. Korpi also agreed that defendant’s failure to partake in the program “was not a good factor for him.”

We find that the explication of the sex offender treatment program by Dr. Korpi was relevant, notwithstanding defendant’s failure to participate in it. The description of the available treatment program, along with defendant’s refusal to take advantage of it, offered the jury pertinent information to assess the likelihood that he will engage in sexually violent criminal behavior if free in the community. Further, the nature of the treatment offered to defendant may have assisted the jury in evaluating the legitimacy of the reasons for defendant’s refusal to participate in it. Finally, evidence of the characteristics of the treatment plan and the potential advantages to the offender if a commitment is continued is also relevant to the jury’s determination of whether the person should be committed for an additional indeterminate term to custody for

appropriate confinement and treatment. After all, it is the prosecution that must sustain the burden of proof – beyond a reasonable doubt – in the SVP prosecution. The challenged testimony from Dr. Korpi aided the jury’s understanding of the treatment schemes available to this defendant; this is particularly so in light of defendant’s claim that he did not require further treatment.

We further conclude that the testimony was not subject to exclusion under Evidence Code section 352. Even relevant evidence may be subject to exclusion in the discretion of the trial court under Evidence Code section 352 “if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice” “ ‘The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.’ [Citations.] ‘Rather, the statute uses the word in its etymological sense of “prejudging” a person or cause on the basis of extraneous factors. [Citation.]’ [Citation.]” (*People v. Zapien* (1993) 4 Cal.4th 929, 958; *People v. Harris* (1998) 60 Cal.App.4th 727, 737.) “ ‘The ‘prejudice’ referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, ‘prejudicial’ is not synonymous with ‘damaging.’ ” [Citation.]’ [Citation.]” (*People v. Coddington* (2000) 23 Cal.4th 529, 588.) Any prejudice associated with admission of the evidence was not extraneous to its probative value. Defendant’s refusal to engage in treatment may have cast him in an unfavorable light, but the nature of the treatment was not prejudicial to him. The testimony was not particularly lengthy, and nothing indicates to us that the jury would have considered it for an improper purpose. Thus, while the probative value of the evidence was not strong, we agree with the trial court’s assessment that it was also not outweighed by any emotional bias or other prejudice it may have evoked against defendant. The trial court did not abuse its discretion by admitting the evidence.

II. The Department of Mental Health's Reliance on Invalid Regulations to Recommend a Commitment Proceeding.

We turn to defendant's complaint that his current commitment was illegally based on regulations for evaluation protocol promulgated by the Department of Mental Health (the Department) that have been found "void." Defendant's argument is that due to the invalidity of the "illegally adopted" regulations, he was "not found to qualify as a sexually violent predator by two evaluators pursuant to the required standardized assessment protocol," as required by the Act. Therefore, his argument proceeds, the "district attorney lacked the statutory authority" to file a commitment petition, and the trial court "lacked fundamental jurisdiction over his case" to issue an SVP commitment order. Defendant maintains that his "state and federal due process rights" have been violated by the "illegal" commitment, and we must "order his immediate release." In the alternative, he suggests that we order a remand with directions to require the Department to "re-evaluate" him in accordance with its recently promulgated "final regulations."

We initiate our examination of defendant's claim that invalid regulations have tainted his commitment by briefly outlining the procedural requirements that attach to an SVP proceeding. The Act mandates compliance with an elaborate network of administrative and judicial procedures, which commences with a screening of the inmate's records by prison officials to determine whether he or she is likely to be an SVP; if so, the inmate is referred to the Department of Mental Health for a full evaluation of SVP criteria under section 6600. (§ 6601, subd. (b).) Two mental health professionals designated by the Department then must "evaluate the person in accordance with a standardized assessment protocol, developed and updated by the State Department of Mental Health, to determine whether the person is a sexually violent predator as defined in this article. The standardized assessment protocol shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders. Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder." (*Id.*, subd. (c).) If the evaluators agree the person meets

those criteria, the director of the Department must forward a request for a commitment petition to the county where the offender was convicted. (*Id.*, subd. (d).) Judicial proceedings then are initiated only if the county’s legal counsel concurs with the director’s recommendation and the district attorney or county counsel files a commitment petition in the superior court. (*Id.*, subd. (i).)

“Once the petition is filed, a superior court judge must ‘review the petition and determine whether the petition states or contains sufficient facts that, if true, would constitute probable cause to believe that [the defendant] is likely to engage in sexually violent predatory criminal behavior upon his or her release.’ (§ 6601.5.) If the judge makes that determination from this facial review, the judge orders the defendant detained in a secure facility pending a probable cause hearing under section 6602.” (*People v. Hayes* (2006) 137 Cal.App.4th 34, 42–43.) If the trial court determines there is probable cause, the SVP petition proceeds to trial. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 245.) Either party may demand a jury trial. Commitment may be ordered only if the defendant is found to be an SVP by a standard of proof beyond a reasonable doubt, and any jury verdict must be unanimous. (*People v. Hayes, supra*, at p. 44; see also §§ 6603, subds. (a), (b), (e) & (f), 6604.)

In 2008, the Office of Administrative Law (OAL), which is charged with, among other functions, enforcing the requirement of adoption of every administrative agency guideline that qualifies as a “regulation” according to specific procedures (Gov. Code, § 11340.5, subds. (a) & (b)), found that provisions of the Department’s assessment protocol used to evaluate potential SVP’s are invalid regulations, adopted without compliance with the Administrative Procedure Act (APA). (*People v. Medina* (2009) 171 Cal.App.4th 805, 813–814 (*Medina*).)⁵ The OAL found only that the protocol did not comply with California administrative law governing how state agencies adopt regulations; it did not evaluate the clinical value or substantive merit of the protocol.

⁵ “The APA requires every administrative agency guideline that qualifies as a ‘regulation,’ as defined by the APA, to be adopted according to specific procedures. (Gov. Code, § 11340.5, subds. (a), (b).)” (*Medina, supra*, 171 Cal.App.4th 805, 813.)

(2008 OAL Determination No. 19 (Aug. 15, 2008) p. 1.) “A regulation found not to have been properly adopted is termed an ‘underground regulation.’ ‘“An underground regulation is a regulation that a court may determine to be invalid because it was not adopted in substantial compliance with the procedures of the [APA].”’ [Citations.] An OAL determination that a particular guideline constitutes an underground regulation is not binding on the courts, but it is entitled to deference.” (*Medina, supra*, at pp. 813–814.) The use of a non-APA-compliant protocol in the SVP screening process prior to 2009 has generated claims, like the one made by defendant here, that SVP judgments are invalid and must be reversed.

Even if we assume that defendant was evaluated during the screening process assessment protocol pursuant to an invalid regulation, we find, as this court previously did in *Medina*, that defendant is not entitled to relief in this appeal. The reliance by the Department upon a mental health evaluation protocol that was subsequently invalidated by the OAL does not undermine the ultimate legitimacy of defendant’s commitment in the present case.

First, defendant never challenged any aspect of the commitment procedure on the ground that the case was initiated pursuant to an “underground regulation” under the APA. His claim of impropriety in the assessment protocol was one that was most appropriately directed to the trial court. (See *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 894, 912–913; *In re Wright* (2005) 128 Cal.App.4th 663, 672.) Much like the forfeiture rule applied to errors in criminal proceedings prior to the filing of the information, defendant’s failure to object to claimed defects in assessment protocol in a timely fashion prior to trial prevented alleviation of the error in the trial court, may result in misallocation of judicial resources, deprives this court of the necessary factual basis for review, and improperly invites the defendant to speculate on the result of the trial and raise the objection following an unfavorable verdict. (See *People v. Jennings* (1991) 53 Cal.3d 334, 357.) Forfeiture of the claim on appeal resulted from defendant’s failure to object in the trial court. (*Medina, supra*, 171 Cal.App.4th 805, 818.)

More importantly, defendant has failed to demonstrate that he suffered prejudice by the use of an invalid regulation in the screening process. (*Medina, supra*, 171 Cal.App.4th 805, 819–820.) The definitive rule established by the California Supreme Court in *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529, is that illegalities in criminal preliminary hearing proceedings which are not “jurisdictional in the fundamental sense” are not reversible per se on an appeal following the subsequent trial. Rather, such illegalities must be reviewed “under the appropriate standard of prejudicial error and shall require reversal only if 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.” (*Ibid.*) The rule articulated in *Pompa-Ortiz* applies equally to denial of fundamental substantive rights and technical irregularities, and to pretrial SVP proceedings as well as preliminary hearings. (*In re Ronje* (2009) 179 Cal.App.4th 509, 517; *People v. Hayes, supra*, 137 Cal.App.4th 34, 50–51; *People v. Butler* (1998) 68 Cal.App.4th 421, 435.)

“ ‘Essentially, jurisdictional errors are of two types. “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.” [Citation.] When a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void, and “thus vulnerable to direct or collateral attack at any time.” [Citation.] [¶] However, “in its ordinary usage the phrase ‘lack of jurisdiction’ is not limited to these fundamental situations.” [Citation.] It may also “be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no ‘jurisdiction’ (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.” [Citation.] “ ‘[W]hen a statute authorizes [a] prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction.’ ” [Citation.] . . .’ [Citations.]” (*Medina, supra*, 171 Cal.App.4th 805, 815–816.)

This court reached the conclusion in *Medina*, and other courts have uniformly concurred, that use of the evaluations conducted pursuant to the invalid assessment protocol does not deprive the trial court of the “fundamental jurisdiction” to hear and

determine the subsequently filed SVPA commitment petition. (*Medina, supra*, 171 Cal.App.4th 805, 815; see also *In re Ronje, supra*, 179 Cal.App.4th 509, 517.) “The trial court has the power to hear the petition notwithstanding the error in using the invalid assessment protocol.” (*In re Ronje, supra*, at p. 518.) The court in *Medina* explained: “Although [the defendant] contends that the initial trial court lacked ‘fundamental’ jurisdiction over his petition, thereby producing a void judgment, his claim does not call into question the court’s personal or subject matter jurisdiction. As to personal jurisdiction, there is no evidence to suggest, and [the defendant] does not contend, that he lacked minimum contacts with the State of California [citation] or that he was not served with the documents necessary to initiate the proceedings. [Citations.] As to subject matter jurisdiction, the superior court was undoubtedly the appropriate court to hear the commitment petition [citations], and there is no claim of untimeliness.” (*Medina, supra*, at p. 816.) The validity and even the existence of the psychological evaluations are not even at issue at either the probable cause hearing or at trial. “[O]nce the petition is filed a new round of proceedings is triggered. [Citation.] 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. [Citation.] In short, like many other matters subject to the principles governing pleas in abatement, the 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.” (*People v. Superior Court (Preciado)* (2001) 87 Cal.App.4th 1122, 1130 (*Preciado*); see also *People v. Scott* (2002) 100 Cal.App.4th 1060, 1063.) The argument that evaluations based on invalid assessment protocols are a procedural prerequisite to jurisdiction, was, the court stated in *Medina, supra*, at page 816, “an argument that the court acted in excess of its jurisdiction, rather than without fundamental jurisdiction.”

Thus, to obtain reversal in this appeal defendant must demonstrate under the appropriate standard of prejudicial error that he was deprived of a fair trial or otherwise

suffered prejudice as a result of use of the invalid preliminary evaluations. (*People v. Pompa-Ortiz, supra*, 27 Cal.3d 519, 529; *In re Ronje, supra*, 179 Cal.App.4th 509, 517; *People v. Hayes, supra*, 137 Cal.App.4th 34, 50–51.) He has not done so. The 2008 OAL Determination No. 19 did not suggest the assessment protocol was flawed or unreliable as an instrument for assessing whether a person might be an SVP. The 2008 OAL Determination No. 19 concerned only the issue whether the assessment protocol was a regulation, and expressly stated it was not evaluating its “advisability or . . . wisdom.” (2008 OAL Determination No. 19, *supra*, p. 1.) Once the petition was filed, the People could not and did not rely on the evaluations, but were required to separately show “ ‘the more essential fact’ ” that defendant was an SVP. (*People v. Scott, supra*, 100 Cal.App.4th 1060, 1063, quoting *Preciado, supra*, 87 Cal.App.4th 1122, 1130.) At the probable cause hearing, defendant had the opportunity to challenge the evaluations and cross-examine the evaluators. (*People v. Hayes, supra*, at p. 43.) He has not established that the invalid assessment protocol was used at the commitment trial, harmed his ability to mount a defense, or in any way influenced the jury to reach the finding that he is an SVP. He received a full-blown trial at which he was represented vigorously by counsel, and a jury found beyond a reasonable doubt, without any reference to the evaluations, that he was an SVP within the meaning of section 6600, subdivision (a)(1). (*People v. Hayes, supra*, at p. 51.) Defendant does not challenge the sufficiency of the evidence at either the probable cause hearing or the commitment trial.

Further, there is no indication in the record that had the petition been dismissed due to the use of noncompliant evaluation protocol, abandonment of the commitment proceedings would have ensued, or that, had the experts used compliant evaluation protocol, an ultimate finding that defendant is not an SVP would have resulted. Whatever procedural irregularity occurred in the Department’s use of an underground regulation in the clinical screening process that found defendant meets the SVP criteria did not taint the jury’s later independent legal determination beyond a reasonable doubt that defendant is an SVP. (*People v. Taylor, supra*, 174 Cal.App.4th 920, 937–938; *Medina, supra*, 171 Cal.App.4th 805, 814–815.)

Thus, defendant's challenge to the evaluations based on the invalid assessment protocol fails for lack of a showing of no prejudice under the *Pompa-Ortiz* rule. For the same reason, his claim his trial counsel was ineffective for failing to challenge the evaluations in the trial court also fails. (*Medina, supra*, 171 Cal.App.4th 805, 819–820.)

III. The Current Act as a Violation of Defendant's Due Process, Ex Post Facto and Double Jeopardy Rights.

Next, defendant argues that the procedures followed in his commitment action under the Act as amended in 2006 abridged his rights to due process, and contravened the prohibitions against double jeopardy and ex post facto laws. We group these contentions together because, as defendant acknowledges, the California Supreme Court recently declared in *McKee I, supra*, 47 Cal.4th 1172, 1184, that the defendant's due process, double jeopardy, and ex post facto challenges to the Act, as amended in 2006 by Proposition 83, are without merit. With the decision in *McKee I*, the law is settled that an indeterminate SVPA commitment, even after the 2006 amendment of the Act, is a civil matter imposing no punishment, and thus neither violates due process rights nor implicates ex post facto or double jeopardy concerns. (*McKee I, supra*, at pp. 1188–1195.) We are bound to follow *McKee I* to reach the same conclusion here. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *People v. Carlin* (2007) 150 Cal.App.4th 322, 348.)

IV. The Current Act as a Violation of Defendant's Equal Protection Rights.

Defendant's final contention is that he was denied equal protection under the present version of the Act. He maintains that the law in its current state "subjects sexually violent predators, but only sexually violent predators, to an indeterminate civil commitment where the burden of proof is placed upon the person to justify his release after the initial commitment and where the person has no right to a jury trial." He argues that "[t]his disparate treatment" of SVP's in comparison to other "involuntary civil commitment" – specifically, mentally disordered offenders (MDO's) and those acquitted due to a finding of not guilty by reason of insanity (NGI acquittees) – "violates their constitutional rights under both the state and federal equal protection clauses."

The decision in *McKee I* resolved the equal protection claim presented by defendant in his favor, although not definitively. The court in *McKee I* found “some merit” to the contention by the defendant that his indeterminate commitment as an SVP violates his right to equal protection. (*McKee I, supra*, 47 Cal.4th 1172, 1196.) The court decided that SVP’s are similarly situated to MDO’s and NGI acquittees for equal protection purposes, as all three classes of individuals are involuntarily committed to protect the public from those who are dangerously mentally ill. (*Id.* at pp. 1203, 1207.) Relying on *In re Moye* (1978) 22 Cal.3d 457, and *In re Smith* (2008) 42 Cal.4th 1251, the court in *McKee I* concluded that SVP’s “bear a substantially greater burden in obtaining release from commitment” than MDO’s and NGI acquittees. (*McKee I, supra*, at pp. 1203, 1208–1209.) The court agreed with the defendant that the People had not yet carried their burden of justifying the differences between the SVP and NGI commitment statutes, but did “not conclude that the People could not meet its burden of showing the differential treatment of SVP’s is justified.” (*Id.* at p. 1207.) Rather, the court “merely conclude[d] that it has not yet done so. Because neither the People nor the courts below properly understood this burden, the People will have an opportunity to make the appropriate showing on remand. It must be shown that, notwithstanding the similarities between SVP’s and MDO’s, the former as a class bear a substantially greater risk to society, and that therefore imposing on them a greater burden before they can be released from commitment is needed to protect society.” (*Id.* at pp. 1207–1208.) The matter was remanded to the trial court to determine whether the People could demonstrate the requisite “constitutional justification” for the distinction. (*Id.* at p 1208; see also *id.* at pp. 1203, 1209.)

We granted rehearing and suspended proceedings in the present appeal pending the finality of the equal protection proceedings ordered in *McKee I, supra*, 47 Cal.4th 1172, 1208–1210. Following a lengthy hearing on the constitutional justification for the disparate treatment as directed in *McKee I*, the trial court found the People presented substantial evidence to support a reasonable perception that SVP’s pose a unique or greater danger to society than MDO’s and NGI acquittees. (See *McKee II, supra*, 207

Cal.App.4th 1325, 1347.) The evidence included expert testimony that SVP's pose a higher risk of reoffending than MDO's or NGI's (*id.* at pp. 1340–1342), and evidence that victims of sexual offenses suffer greater trauma than victims of other offenses due to the intrusiveness and enduring psychological, physiological, social and neuropsychological impacts of sexual assault or abuse. (*Id.* at pp. 1342–1344.) The People in *McKee II* also presented substantial evidence that SVP's have significantly different diagnoses, treatment plans, motivations, degree or extent of compliance with treatment directives, and success rates than MDO's and NGI's. (*Ibid.*) Finally, the evidence supported a reasonable inference that an indeterminate, rather than a determinate (e.g., two-year), term of civil commitment improves, rather than detracts from, the success of treatment plans for SVP's. (*Ibid.*)

On appeal, the Fourth District Court of Appeal concluded that “the People on remand met their burden to present substantial evidence, including medical and scientific evidence, justifying the amended Act’s disparate treatment of SVP’s (e.g., by imposing indeterminate terms of civil commitment and placing on them the burden to prove they should be released). [Citation.] The People have shown that, ‘notwithstanding the similarities between SVP’s and MDO’s [and NGI’s], the former as a class bear a substantially greater risk to society, and that therefore imposing on them a greater burden before they can be released from commitment is needed to protect society.’ [Citation.] The People have shown ‘that the inherent nature of the SVP’s mental disorder makes recidivism as a class significantly more likely[;] . . . that SVP’s pose a greater risk [and unique dangers] to a particularly vulnerable class of victims, such as children’; and that SVP’s have diagnostic and treatment differences from MDO’s and NGI’s, thereby supporting a reasonable perception by the electorate that passed Proposition 83 that the disparate treatment of SVP’s under the amended Act is necessary to further the state’s compelling interests in public safety and humanely treating the mentally disordered. [Citation.]” (*McKee II, supra*, 207 Cal.App.4th 1325, 1347.)⁶

⁶ The court in *McKee II* also noted: “To the extent *McKee* cites evidence, or reasonable inferences therefrom, supporting contrary conclusions or perceptions, or cites inconsistencies or

The California Supreme Court denied review in *McKee II*, and for our purposes the *McKee* proceedings are now final. We disagree with defendant’s contention that *McKee II* is a “badly flawed” opinion that “misunderstood and misapplied the strict scrutiny test” delineated by the Supreme Court in *McKee I*.⁷ We concur with the reasoning and holding of the court in *McKee II*, which is the case specifically demarcated by the California Supreme Court to resolve defendant’s equal protection challenge presented in the appeal before us, and others like it. (*People v. McKnight* (Dec. 12, 2012, A123119) ___ Cal.App.4th ___ [2012 Cal.App. Lexis 1325, *4–*5].) We are also persuaded that the scope of the decision in *McKee II* is not restricted to the defendant in that case alone or only to those SVP’s convicted of crimes against children, like his, but rather its holding applies to the entire class of SVP’s. We therefore conclude that defendant’s recommitment under the SVPA does not violate his equal protection rights.⁸

other flaws in the evidence, he either misconstrues and/or misapplies the standard of review we apply in independently determining whether there is substantial evidence to support a reasonable perception that the disparate treatment of SVP’s under the Act is necessary to further compelling state interests. As quoted above, ‘[w]hen a constitutional right, such as the right to liberty from involuntary confinement, is at stake, the usual judicial deference to legislative findings gives way to an exercise of independent judgment of the facts to ascertain whether the legislative body “has drawn *reasonable inferences based on substantial evidence.*’ ”’ (*McKee, supra*, 47 Cal.4th at p. 1206, italics added.) However, in independently reviewing the record for that substantial evidence, our power begins and ends with the determination whether there is substantial evidence, contradicted or uncontradicted, to support the legislative determination, and when two or more inferences can reasonably be deduced from the evidence, we are without power to substitute our deductions for those of the legislative body. [Citation.] As *McKee* stated, ‘mere disagreement among experts will not suffice to overturn the Proposition 83 amendments. The trial court must determine whether the legislative distinctions in classes of persons subject to civil commitment are reasonable and factually based—not whether they are incontrovertible or uncontroversial. The trial court is to determine not whether the statute is wise, but whether it is constitutional.’ (*McKee*, at pp. 1210–1211, fn. omitted.) We, like the trial court, conclude the disparate treatment of SVP’s under the Act is reasonable and factually based and was adequately justified by the People at the evidentiary hearing on remand. Accordingly, we conclude the Act does not violate McKee’s constitutional equal protection rights.” (*McKee II, supra*, 207 Cal.App.4th 1325, 1348.)

⁷ This is particularly so, we think, in light of the Supreme Court’s denial of review in *McKee II*.

⁸ We granted the parties an opportunity to submit additional briefs to address the decision in *McKee II*. In light of the very thorough presentation of argument in those briefs, we see no reason or need to schedule further oral argument in this case, and deny defendant’s request to do so. We have taken judicial notice of the trial court’s statement of decision in the *McKee II* remand proceedings as requested by defendant.

Accordingly, the order of commitment is affirmed.

Dondero, J.

We concur:

Marchiano, P. J.

Banke, J.