

NOT DESIGNATED FOR PUBLICATION

No. 118,914

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Care and Treatment of
ROBERT J. SIGLER.

MEMORANDUM OPINION

Appeal from Barton District Court; MIKE KEELEY, judge. Opinion filed November 2, 2018.
Affirmed.

Kristen B. Patty, of Wichita, for appellant.

Dwight R. Carswell, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before MCANANY, P.J., PIERRON and LEBEN, JJ.

PER CURIAM: In 2007, Robert J. Sigler was convicted of criminal sodomy with a child 14 or more years of age but less than 16 years of age, indecent solicitation of a child, and furnishing alcohol to a minor for illicit purposes. He was sent to prison for a term of 84 months. Just before he was scheduled to be released from prison, the State filed an action under the Kansas Sexually Violent Predator Act, K.S.A. 59-29a01 et seq., to have Sigler civilly committed for care and treatment as a sexually violent predator.

The case proceeded to trial to the court. The State's experts testified Sigler suffered from mental abnormalities and a personality disorder. Sigler's expert, on the other hand, testified that Sigler did not show any symptoms of a major mental disease or defect. The State's experts rated Sigler a four on the static-99 test, indicating he would be a moderate-high risk to reoffend. Sigler's expert opined that Sigler's score on the static-99 test was less than four but, in any event, the static-99 test does not reliably reflect the risk

associated with reoffending. Sigler presented evidence that he did not reoffend while in prison and that he had received education that would allow him to control himself.

In July 2015, the district court denied relief on the State's petition. The court found that Sigler, who had been convicted of a sexually violent crime, suffered from a mental abnormality or personality disorder. But the State was required to prove its case beyond a reasonable doubt. Under that standard, the district court found that the evidence was insufficient to prove that Sigler was likely to act out on his mental abnormality or personality disorder or that Sigler had serious difficulty controlling his dangerous behavior. The district court released Sigler on parole.

Logan Hall was assigned to supervise Sigler's parole. As a condition of parole, Sigler was banned from participating in any chat rooms, bulletin boards, or social networking sites for the purpose of sexual gratification. He was also banned from having any contact with a minor. If incidental contact occurred, he was required to report it to Hall.

In August 2015, Hall found out that Sigler had created a Facebook profile and confronted Sigler about it. He reviewed with Sigler his parole requirements.

In September 2015, Sigler gave a boy a ride home from work in his car. Sigler reported the incident to Hall and informed Hall that he did not find out that the boy was a minor until a day after he had given him a ride.

In November 2015, Hall learned that Sigler had opened a social media account through which he obtained almost 100 pages/profiles relating to nude or partially nude men. Hall seized Sigler's laptop and phone. Sigler admitted that he viewed these pornographic websites in order to masturbate and that some of the males depicted on the

websites may have been minors between the ages of 14 and 17. Sigler was arrested and returned to prison for a 90-day sanction.

A week before Sigler was scheduled to be released from prison, the State filed the current action to have Sigler civilly committed for care and treatment as a violent sexual predator. The State alleged that Sigler's mental condition, ability to control his dangerous behavior, and likelihood of reoffending had materially changed since the district court's prior determination. The State cited Sigler's behavior while on parole, his inability to follow the conditions of parole, and the opinion of Dr. Derek Grimmell that Sigler was not mentally stable enough to be in the community where his risk could not effectively be managed.

Citing *In re Care and Treatment of Sporn*, 289 Kan. 681, 215 P.3d 615 (2009), Sigler contended that this second action was barred by res judicata or collateral estoppel. But the district court determined that the State's current action was based on a material change in Sigler's mental condition since the first case so that neither res judicata nor collateral estoppel barred the proceedings.

At Sigler's jury trial, the State presented testimony regarding Sigler's parole violations and the fact that Sigler was terminated from a counseling program because he was at an increased risk while he was in the community. The State introduced evidence that Sigler used pornographic material, failed to share his problems with his counselor, failed to cope with his fantasies about naked children, and was unable to control his urges and stop the arousal cycle. His counselor opined that he had been a moderate risk when he entered the program, but he scored as a high risk before being arrested again for violating his parole. Dr. Mitchell Flesher testified that Sigler scored a four on the Static-99R test and that Sigler was in the moderate-high risk category for reoffending.

Dr. Grimmell opined that Sigler was at an increased risk of reoffending and was unable to control his behavior. Grimmell recommended Sigler be civilly committed to be treated as a sexually violent predator based on Sigler's deviant sexual interest in child pornography, his personality disorder, the number of times he victimized another individual, his choice of male victims, his unwillingness to admit his urges to his therapy group and to address them, and his unwillingness to work with his doctors and therapists to get better. Grimmell stated that Sigler was at an increased risk of reoffending if he were to remain in the community.

Grimmell commented at one point that

"this case is more dramatic than most because he was actually civilly committed once, and then his commitment was overturned by an appeals court. And a lot of guys would have said, wow, that was a real shot across my bow. I better be very careful on parole. But not Mr. Sigler."

Grimmell testified that this testimony was based on his assumption that Sigler had been released because an appellate court overturned his first commitment and that Sigler was only released because his sentence got overturned. This, of course, was incorrect.

To counter this last point, Sigler testified that he had never appealed his prior conviction and that he was not released because his commitment was overturned. Both Sigler and the State explained during their opening statements and closing arguments, and the court instructed the jury, that Sigler had not been committed during the first civil commitment proceeding. The court instructed the jury: "In 2013 a petition seeking to involuntarily commit Robert J. Sigler as a sexually-violent predator was filed and was ultimately denied. Do not speculate or otherwise concern yourselves with any potential reasons for any decisions in a prior petition."

Sigler called Dr. Bruce Nystrom as a witness. Nystrom did not provide a Static-99R score for Sigler, but he opined that Sigler was in the moderate to high risk category for reoffending.

The jury found that Sigler was a sexually violent predator, and the district court ordered that Sigler be involuntarily committed for care and treatment. Sigler appeals.

Res Judicata and Collateral Estoppel

Sigler argues that the district court erred in not dismissing this second action under the doctrines of res judicata and collateral estoppel. He contends that he was not convicted of a second criminal offense, which he considers to be a necessary predicate, and moreover the State failed to establish a detrimental change in his mental status.

Whether the State's cause of action was barred by res judicata or collateral estoppel is a question of law over which we have unlimited review. Res judicata requires "(1) identity in the thing sued for, (2) identity of the cause of action, (3) identity of the persons and parties to the action, and (4) identity of the quality of persons for or against whom claim is made." *Sporn*, 289 Kan. at 686. On the other hand, collateral estoppel requires (1) a prior judgment on the merits which determined the rights and liabilities of the parties on the issue, (2) the same parties or parties who are in privity with one another, and (3) that the issue was determined in the prior case and was necessary to support the prior judgment. See *In re Tax Appeal of City of Wichita*, 277 Kan. 487, 506, 86 P.3d 513 (2004).

A person may be subject to a successive civil commitment proceeding under K.S.A. 2017 Supp. 59-29a03 based on the same sexually violent offense if the State shows there has been a material change in the offender's mental condition or risk assessment which renders the offender a danger to the community. See *Sporn*, 289 Kan.

at 688. A material change in the defendant's mental condition or risk assessment is sufficient to avoid res judicata and collateral estoppel because the issue—the defendant's mental condition at the time the current petition was filed—is different from the issue at the time of the filing of the prior action. See 289 Kan. at 687-88. This reasoning has been adopted in other jurisdictions as well. See *In re Thomas R.*, 224 Ariz. 579, 585, 223 P.3d 1158 (2010); *Turner v. Superior Court*, 105 Cal. App. 4th 1046, 1061-62, 130 Cal. Rptr. 2d 300 (2003); *Commonwealth v. Chapman*, 444 Mass. 15, 21-24, 825 N.E.2d 508 (2005); *Parr v. State*, 482 S.W.3d 508, 511-15 (Mo. App. 2016).

But merely showing that Sigler viewed pornography and visited sexually explicit websites is not enough to distinguish the present action from the prior one. As stated in *Sporn*:

"[V]iewing pornography and sexually explicit websites on the computer [does not] define a material change in Sporn's mental status. To the contrary, those facts appear to be offered simply to shore up or corroborate the previous diagnosis and risk assessment, with the hope that a second jury would reach a different result on the same underlying evidence." 289 Kan. at 689.

Here, the State went beyond that in establishing a material change in Sigler's mental condition so as to permit this second civil commitment proceeding. As explained in *Turner*:

"At the very least, the prosecution's supporting reports must contain information showing the evaluating professionals understood and accepted, for purposes of the current diagnosis, the prior jury finding as true, and then explain why despite that prior finding, the facts are sufficiently different so that the individual is now a dangerous person who is likely to reoffend within the meaning of the SVPA." 105 Cal. App. 4th at 1062.

In the State's current proceedings, Sigler's parole violation and his viewing online pornography were not the sole bases for the State's claim. The State showed that Sigler changed from being a person who could control his actions while confined in prison during the first proceeding to being a person who could not control his actions when released into the community. In the first case, Sigler had completed a sex offender treatment program, created a post-release plan to prevent himself from reoffending, and generally showed a willingness to talk to his counselors about his mental condition and to receive help for his mental condition. But in the current case the State presented evidence that Sigler began having fantasies about naked children but refused to discuss these fantasies with his counselor. The State also showed that Sigler's risk had increased. His counselor testified that she tested Sigler's risk factor every week using the Acute 2007 test and that Sigler's risk changed from moderate to high in the time he was attending counseling. Even Sigler's own expert, Dr. Nystrom, testified that Sigler was in the moderate to high risk category for reoffending.

Sigler argues that no change was shown because the State's experts scored him as a four on the Static-99R test in both proceedings. The Static-99R score does not change over time because it is based on static conditions such as lifelong personality disorders and lifelong deviant sexual interests. Thus, a consistent score of a four on the Static-99R test does not mean that there was no change in Sigler's mental condition, but rather that his personality risk remained high despite treatment. In any event, the Static-99R was only one factor in the court's assessment. The remainder of his actions evidence an unwillingness to seek help in the community.

The proceedings in the State's current action were sufficiently different from those in the prior action for neither *res judicata* nor collateral estoppel to apply. The district court did not err in denying Sigler's motion to dismiss.

Failure of the District Court to Sua Sponte Declare a Mistrial

Sigler claims that the district court violated his due process rights when it failed to declare a mistrial sua sponte after Dr. Grimmell, one of the State's experts, incorrectly testified that Sigler had previously been civilly committed and that he was only released from his civil commitment after an appellate court overturned the district court's decision.

Sigler failed to object to this testimony at trial. His failure to do so constitutes a waiver of this argument on appeal. See *State v. King*, 288 Kan. 333, 349, 204 P.3d 585 (2009). This is true even in the face of an argument that consideration of the issue is necessary to serve the ends of justice or to prevent denial of fundamental rights. In *State v. Solis*, 305 Kan. 55, 63, 378 P.3d 532 (2016), the court "[s]pecifically refused to allow the contemporaneous objection rule to be circumvented by the caselaw exception that is designed to serve the ends of justice or prevent a denial of a fundamental right."

Sigler's argument fails even if we carve out as a separate issue whether the district court erred in not on its own declaring a mistrial once this erroneous testimony was interjected into the trial. A trial judge's power to declare a mistrial sua sponte "is to be used only with great caution, under proper circumstances, to insure that all parties receive a fair trial." *State v. Lewis*, 238 Kan. 94, 97, 708 P.2d 196 (1985). It should only be exercised when there has been a fundamental failure in the proceeding and the prejudice cannot be cured or mitigated through a jury admonition or a jury instruction. *State v. Ward*, 292 Kan. 541, 551, 256 P.3d 801 (2011).

Dr. Grimmell's mistake in his testimony was cured in a number of ways. Both Sigler and the State explained during their opening statements and closing arguments that Sigler had not been committed during the first proceeding. Sigler testified that he had never appealed his prior conviction and that he had not been released because his commitment was overturned. Finally, the court instructed the jury: "In 2013 a petition

seeking to involuntarily commit Robert J. Sigler as a sexually-violent predator was filed and was ultimately denied. Do not speculate or otherwise concern yourselves with any potential reasons for any decisions in a prior petition." These steps were sufficient to cure the false impression created by Dr. Grimmell's testimony. There was no need for the district court to declare a mistrial, and the court did not err in failing on its own to do so.

Affirmed.