Filed 1/14/20 P. v. Andrew H. CA6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW H.,

Defendant and Appellant.

2d Crim. No. B298502
(Super. Ct. No. 19PT-00443)
(San Luis Obispo County)

The Mentally Disordered Offender (MDO) Act [(Pen.Code, § 2960 et seq.)] "permits the government to civilly commit for mental health treatment certain classes of state prisoners during and after parole."[1] (*In re Qawi* (2004) 32 Cal.4th 1, 23.) Andrew H. appeals from an order finding him to be an MDO and committing him for treatment to the Department of State Hospitals as a condition of parole. The qualifying offense is assault by means of force likely to produce great bodily injury. (§ 245, subd. (a)(4).) For that offense appellant was sentenced to prison for three years.

[1] All statutory references are to the Penal Code.

Appellant's sole contention is that the evidence is insufficient to show that he met the following MDO criterion of section 2962, subdivision (d)(1): "[B]y reason of his or her severe mental disorder the prisoner represents a substantial danger of physical harm to others." We affirm.

The Qualifying Offense: Underlying Facts

The victim of the felony assault was appellant's brother-in-law. The facts underlying the assault are set forth in the report of the San Diego County Sheriff's Department, which was admitted into evidence as "Respondent's [Exhibit] B." Appellant's counsel said he had "no objection" to the admission of the report. The following facts are taken from the report.

The assault was committed in July 2016. The victim said: "[Appellant] and [victim] were drinking when [appellant] 'snapped.' [Appellant] yelled 'I don't give a Fuck, I have PTS [post-traumatic stress disorder (PTSD)], I'll murder you!' [Appellant] began punching [victim] for no reason. [Victim] lost consciousness for an unknown amount of time. [Victim] woke up with [appellant] sitting over him and [appellant] was punching him in the face. [Appellant] was laughing as he was assaulting [victim]."

Victim's niece said: At a family party, she "saw her step-father, [appellant], choking her uncle, [victim]." Victim was "intoxicated and 'talking crap' toward [appellant]. [Appellant] then grabbed [victim by the] left side of his neck with his right hand and then threw [victim's] head against the kitchen counter. [Victim's] head hit the edge of the kitchen counter and he fell on the kitchen floor on his back. [Appellant] them mounted [victim] with both his legs on top of [victim's] hips. [Appellant] then punched [victim] in the face about eight times."

Appellant said that victim "became disrespectful and started threatening [him]. [Victim] belonged to a gang and was telling [appellant] he was going to have members of [the] gang murder [appellant]. [Victim] leaped forward in an aggressive manner and [appellant] pushed [him] back in self-defense. [Victim] fell backwards and hit his head on the kitchen counter. [Appellant] lost his balance and fell on top of [victim]. [Victim] continued to attack [appellant] while [victim] was on the floor. [Appellant] punched [him] two times in self-defense."

Victim "had lacerations on his left nostril, above his right eye, inside his mouth and on [the] right side of his lip. [He] also had severe contusions in both eyes, lumps on his forehead and a broken nose."

Testimony at MDO Trial

The People called Dr. Dia Gunnarsson as their expert witness. She was employed as a "forensic evaluator at Atascadero State Hospital." She testified as follows: Appellant has a severe mental disorder - "bipolar disorder with psychotic features." The disorder is not in remission. "[H]is mental disorder was a least an aggravating factor in the commission of the [qualifying] offense." Appellant's "underlying thinking . . . for his behavior at the time [of the offense] was paranoid in nature: this belief that he was in danger, that his family was in danger, and he needed to go after his brother-in-law to protect himself." Appellant "also seemed to believe that not only [had] his brother-in-law . . . made these threatening statements, but he also believed that his wife had repeatedly tried to kill him." Appellant told staff at the hospital that he was "'highly skilled in combat.'" Because of appellant's severe mental disorder, he "represent[s] a substantial danger of physical harm to others."

As his expert witness, appellant called Dr. Christopher Simonet, a consulting psychologist for the Department of State Hospitals. Dr. Simonet opined that appellant has a severe mental disorder - "schizoaffective disorder bipolar type or possibly bipolar one disorder with psychotic features." But Dr. Simonet "did not have sufficient evidence to conclude that his severe mental disorder was a cause [of] or aggravating factor" in the commission of the qualifying offense. Dr. Simonet further opined that appellant does not, by reason of his mental disorder, represent a substantial danger of physical harm to others. His opinion was "primarily based on the absence of any demonstrated nexus . . . between his severe mental disorder and violent behavior." Dr. Simonet noted that the victim had said appellant "made comments about . . . hating Mexicans and people with Middle Eastern dissent [*sic*, descent]." Appellant told Dr. Simonet that the victim was Mexican.

Appellant testified that he is not violent and does not have bipolar disorder or a severe mental disorder. He has "post-traumatic stress disorder" as a result of two combat tours of duty in Iraq and Afghanistan. He does not take any medication and does not "feel the need to take medications." According to appellant, the victim was the aggressor. He "came towards" appellant and "said he was going to kill [appellant]." Appellant "just reacted."

Discussion

Appellant claims that the evidence is insufficient to show that "by reason of his . . . severe mental disorder [he] represents a substantial danger of physical harm to others." (§ 2962, subd. (d)(1).) "The substantial evidence rule applies to appellate review of the sufficiency of the evidence in MDO proceedings. [Citation.]

We review the record in the light most favorable to the judgment to determine whether it discloses substantial evidence—'evidence that is reasonable, credible, and of solid value'—such that a reasonable trier of fact could find beyond a reasonable doubt that [appellant met the MDO criteria]." (*People v. Labelle* (2010) 190 Cal.App.4th 149, 151.) "'In conducting such a review, we '"presume[ ] in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.]" [Citations.] "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.". . .'" (*People v. Harris* (2013) 57 Cal.4th 804, 849.)

Substantial evidence supports the trial court's finding that, by reason of his severe mental disorder, appellant represents a substantial danger of physical harm to others. In July 2016, he attacked the victim and caused serious facial injuries. According to Dr. Gunnarsson, appellant's "behavior seems to be impulsive, erratic, sort of out of the blue, which would be consistent with his diagnosis, which can manifest with elements of impulsivity and mood changes." Appellant "was described as going from being pleasant to all of [a] sudden very angry." "[T]he underlying thinking or motivation that he seemed to have had for his behavior at the time [of the assault] was paranoid in nature: this belief that he was in danger, that his family was in danger, and he needed to go after his brother-in-law to protect himself." Appellant "continue[s] to express and present" similar paranoid

beliefs. "For example, when [Dr. Gunnarsson] spoke with [appellant], he . . . seemed to believe that not only [had] his brother-in-law . . . made these threatening statements, but . . . that his wife had repeatedly tried to kill him."

The trial court could have reasonably inferred that appellant's attack was unprovoked. The victim said that appellant had just "'snapped.'" Racial animus may have been a factor in the assault. The victim was of Mexican descent, and appellant had "made comments about . . . hating Mexicans." Appellant seems to have found humor in his brutality. He was laughing while he repeatedly punched the defenseless victim in the face.

Appellant appeared to take pride in his act of violence. He told Dr. Gunnarsson "that his qualifying offense . . . made him more suitable for security work because it showed that he . . . could defend himself without losing control of the situation and could react instantly to a threat without thinking about it." Appellant boasted to staff at the hospital that he was "'highly skilled in combat.'"

Appellant lacked insight into his severe mental disorder. He denied having such a disorder and said he did not "need coping skills." He told Dr. Gunnarsson that "he does not have a mental illness other than PTSD, and that his PTSD is well-managed and not bothering him at all." He said "that he did not require any hospitalization or any treatment in a hospital or otherwise" and "that he is not taking any medications because he does not need medications." Dr. Simonet testified that "the absence of being medicated in someone with a severe mental disorder is considered a risk factor for violence."

Dr. Gunnarsson opined that the violent nature of the qualifying offense "raised concerns . . . that outside of the hospital setting with him not being in remission and not involved in treatment, that he would be at a high risk of . . . behavior [similar to that displayed during the commission of the qualifying offense]." "[H]is mental illness is not properly treated at the moment, not properly managed. Particularly of concern with bipolar is how it could be cyclical. So his symptoms . . . are at a higher risk of becoming worse without that treatment."

Conclusion

A reasonable trier of fact could find beyond a reasonable doubt that appellant met the MDO criteria. The evidentiary record provides a reliable basis for Dr. Gunnarsson's expert opinion that, because of appellant's severe mental disorder, he "represent[s] a substantial danger of physical harm to others." The violent nature of the qualifying offense, along with appellant's paranoid beliefs, impulsivity, racial animus, denial of his severe mental disorder, and refusal to take medication or seek treatment, elevated the risk that he would again engage in violent conduct if he were released into the community.

Disposition

The order finding appellant to be an MDO and committing him for treatment to the Department of State Hospitals is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J. TANGEMAN, J.

Hugh F. Mullin, Judge

Superior Court County of San Luis Obispo

Gerald J. Miller, under appointment by the Court of Appeal for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Acting Supervising Deputy Attorney General, Charles S. Lee, Deputy Attorney General, for Plaintiff and Respondent.