Filed 9/5/18 P. v. Thompson CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. GREGORY THOMPSON, Defendant and Appellant.	B282852 (Los Angeles County Super. Ct. No. ZM032498)

APPEAL from an order of the Superior Court of Los Angeles County, Renee F. Korn, Judge. Affirmed.

Christopher Lionel Haberman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, David E. Madeo and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

In October 2001, appellant Gregory Thompson entered a plea of not guilty by reason of insanity (NGI) to one count of assault with intent to commit a specified sex crime. (Pen. Code, § 220.)[1] Appellant was committed to the California Department of Mental Health and admitted to Patton State Hospital (Patton), with a maximum commitment date of January 2, 2017. (§ 1026.) He now appeals from an order following a jury trial to extend his commitment under section 1026.5, subdivision (b). Appellant challenges the admission of excerpts of his medical records as more prejudicial than probative. He also contends the trial court erred in permitting case-specific hearsay evidence in support of expert opinion of his disability, in violation of *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Background Offense and Commitment*

According to a report submitted to the trial court, in January 2000, appellant approached a woman, grabbed her purse, pushed her to the ground, and attempted to pull down her pants. Appellant was not taking his prescribed psychotropic medications and was experiencing auditory and visual hallucinations at the time of the offense. Appellant was admitted to Patton in November 2001 pursuant to section 1026 after pleading NGI with a maximum commitment date of January 2, 2017.

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[1] Unspecified statutory references will be to the Penal Code.

In September 2016, the People filed a petition to extend appellant's maximum commitment date under section 1026.5, subdivision (b). The first trial on the petition in February 2017 ended in a mistrial. In May 2017, a second jury returned a verdict resulting in the extended commitment from which appellant appeals.

II. *Prosecution Evidence*

In the trial at issue, the People presented testimony by Brenda Starkins, appellant's social worker at Patton, Dr. Risa Grand, a psychiatrist who evaluated appellant, and Dr. Krista Soto, appellant's psychologist at Patton. The People also presented appellant's testimony from the February 2017 trial.

A. *Brenda Starkins*

Brenda Starkins, a licensed clinical social worker at Patton, was part of appellant's treatment team and had known him since September 2016. She testified that, because appellant was committed under section 1026, he needed to meet nine criteria before being discharged. He needed to: (1) voluntarily take his psychotropic medication; (2) have insight into his illness; (3) attend at least 90 percent of his group meetings; (4) demonstrate an understanding of how his prior use of substances played a role in his decisionmaking; (5) understand that he had a mental illness and the role it played in the commitment offense; (6) understand how his mental illness and drug use had the potential to lead to future acts of violence against others; (7) develop a viable wellness and recovery action plan; (8) develop coping mechanisms to

manage his symptoms of mental illness; and (9) accept the terms and conditions of discharge, such as community outpatient treatment.

Starkins had worked with appellant for only five months and stated that she had had minimal interaction with him because he did not get out of bed to attend his group meetings. Thus, appellant did not meet criterion (3) above. She also did not believe appellant displayed insight into his diagnosis and symptoms (criterion (2)) because of his unwillingness to attend his group meetings. She further testified that appellant did not meet any of the final three discharge criteria ((7), (8), and (9)).

B. *Read-Back of Appellant's Prior Testimony*

At his February 2017 trial, appellant testified that he agreed with his diagnoses of schizophrenia and paranoia and acknowledged that the medication he was taking was helpful. He stated that he would continue to take the medication if he were not in a hospital setting.

Appellant admitted that his behavior toward the woman he assaulted was not appropriate because he did not have permission to touch her. However, he believed he was protecting her from rapists by placing her in a situation to defend herself. He also stated that his conduct was part of an audition for a pornography career.

As to a July 2015 incident in which he struck another patient in the hospital, he stated that his conduct was not appropriate but explained that he hit the other patient because he was delusional at the time and the person had frequently used racial slurs against him.

Appellant believed that if he hit the man, he (appellant) "would be walking off the stage, off the set that I was on performing."

Appellant previously had been hospitalized after he "got naked in the middle of the street as a protest of the physical world." He had been drinking and using marijuana at the time.

C. *Dr. Grand*

Dr. Grand, a forensic psychiatrist and expert witness, was appointed in January 2017 to evaluate appellant and prepare a report. She interviewed appellant for an hour to determine whether he has a mental illness and currently represents a substantial risk of physical harm to others. She also reviewed two hospital reports and appellant's medical records.

Dr. Grand opined that appellant suffers from schizophrenia, a chronic psychotic illness in which a person has a break from reality. When Dr. Grand asked appellant about his commitment offense, appellant stated that he had been concerned about rapists in the neighborhood and thought that he was protecting the victim by simulating a rape. Appellant believed that his actions were directed by God.

Appellant also told Dr. Grand that he had been auditioning for a pornographic movie and that his behavior was being observed to determine if he could become a porn star. He thought that he was auditioning and being filmed in the hospital. Dr. Grand expressed concern that, 17 years after the offense, appellant still held the same false belief regarding his conduct.

Appellant had a history of alcohol and marijuana use prior to his hospitalization, but he had not used drugs for five years because they were difficult to obtain in the hospital. Dr. Grand opined that appellant was at risk of using drugs if released from the hospital and that drug and alcohol use increased the risk of harm because it would interfere with appellant's judgment.

Dr. Grand asked appellant about the July 20, 2015 incident in which he hit someone at the hospital. Appellant told Dr. Grand that he "went up to a patient from behind, without any verbal warning, and punched him repeatedly in the back of the head" as "part of a political protest for not being able to have sex in the hospital." Appellant stated that this was "part of a pornographic movie audition, . . . to be a god-like person." Appellant also explained that the other patient had said derogatory statements to him seven months earlier. Dr. Grand expressed concern about appellant's statement that punching the other patient "was a non-violent act because it was a political protest about sex," which reflected "thought disorganization and a lack of understanding."

Appellant told Dr. Grand that he was first hospitalized at the age of 17, when he had religious delusions that he was God. Appellant also still held the belief that a needle was implanted in his body during that hospitalization. Appellant did not trust psychiatrists or psychotic medications. Appellant told Dr. Grand that his discharge plan was to move to Saudi Arabia to become a porn star.

Dr. Grand opined that appellant suffered from schizophrenia and that, as a result of his schizophrenia, currently posed a substantial

danger of physical harm to others. She explained that her opinion was based on several risk factors, including appellant's "impaired reality," his maintenance of the delusions that had resulted in the violent commitment offense, his assault of someone in the hospital despite being on medication, and his history of substance abuse.

D. *Dr. Soto*

Dr. Soto, a psychologist at Patton, prepared the court report recommending the extension of appellant's commitment date.[2] In her testimony, Dr. Soto read selected entries from appellant's medical record: (1) a May 12, 2007, interdisciplinary note by a psychiatric technician, stating that appellant punched a patient in the stomach after a dispute about the television channel; (2) a May 2, 2007, psychiatrist note stating that a nurse reported that appellant was naked in front of female staff and refused to return to his room; (3) an October 2010 monthly psychiatry progress note stating that appellant denied staff reports that he was talking to himself, but that he continued to have auditory and visual hallucinations; (4) a December 2010 monthly report stating that appellant explained that he hit a wall because he was having auditory and tactile hallucinations; and (5) a January 23, 2017 nurse's progress note stating that appellant was seen talking to himself, denied hearing voices, was "very delusional," and took his medications and attended his group when reminded.

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[2] Appellant raised various objections to Dr. Soto's testimony that will be discussed below.

Dr. Soto had contact with appellant from 2011 to 2016 and provided him with regular individual therapy for about 18 months. She testified that appellant suffered from delusions such as believing his name was in the Koran and that he was Pope Gregory. Dr. Soto interviewed appellant in July 2015 to ask him about the incident when he hit a fellow patient. Appellant stated that he heard voices telling him to do it.

In April 2016, Dr. Soto asked appellant about the commitment offense, and he said that he was trying to protect the victim from being assaulted by assaulting her himself. Appellant also stated that he did not have a mental illness and wanted to stop taking medication. Dr. Soto believed appellant continued to be dangerous because he did not believe he had schizophrenia and thus did not recognize symptoms or warning signs of danger.

III. *Defense Evidence*

Appellant did not present any evidence.

IV. *Jury Verdict*

The jury returned a verdict that appellant "has a mental disorder, disease, or defect and as [a] result of this disorder, disease, or defect, he currently poses a substantial danger of physical harm to others and has serious difficulty controlling his dangerous behavior." The court ordered appellant returned to Patton for a two-year extension, with a maximum confinement date of January 2, 2019. Appellant timely appealed.

DISCUSSION

I. *General NGI Commitment Extension Framework*

A person committed to a state hospital after being found NGI may be kept in custody no longer than the maximum term of imprisonment for the offense of conviction. (§ 1026.5, subd. (a)(1).) An NGI commitment may be extended beyond this period in two-year increments when the prosecution proves, beyond a reasonable doubt, that "by reason of a mental disease, defect, or disorder" the defendant "represents a substantial danger of physical harm to others" and that as a result of the mental disease, defect or disorder, the defendant has, "at the very least, serious difficulty controlling potentially dangerous behaviors." (§ 1026.5, subd. (b)(1), (b)(8); *People v. Zapisek* (2007) 147 Cal.App.4th 1151, 1165-1166.) In the hearing for the petition on extended commitment, "[t]he person shall be entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings." (§ 1026.5, subd. (b)(7).) "The rules of discovery in criminal cases shall apply." (*Id.* subd. (b)(3).)

II. *Evidentiary Objections to Admission of Medical Records*

Appellant contends the trial court erred in allowing Dr. Soto to read selected excerpts from his medical records to the jury because they were hearsay and were more prejudicial than probative. "A trial court's ruling on the admissibility of evidence, including one that turns on the hearsay nature of the evidence, is reviewed under the abuse of discretion standard. [Citation.]" (*People v. Roa* (2017) 11 Cal.App.5th

428, 442 (*Roa*).) "A trial court has abused its discretion when its ruling "'fall[s] 'outside the bounds of reason.'" [Citation.]" (*People v. Kopatz* (2015) 61 Cal.4th 62, 85.) "As a general rule, the erroneous admission of hearsay evidence will not result in a reversal unless it is reasonably probable the defendant would have received a more favorable result had the evidence not been admitted. [Citations.]" (*People v. Landau* (2016) 246 Cal.App.4th 850, 866.)

A. *Background*

Appellant filed two motions in limine before the February 2017 trial, which he renewed at the May trial. First, appellant moved that all of defense counsel's objections at trial be deemed objections under both the federal and state constitutions. (See *People v. McKinnon* (2011) 52 Cal.4th 610, 629, fn. 14 [constitutional arguments not forfeited on appeal where "[p]retrial, the trial court granted counsel's motion to deem all of his trial objections and motions to be made under the Fifth, Sixth, Eighth, and Fourteenth Amendments"]; *People v. Vines* (2011) 51 Cal.4th 830, 865, fn. 15, overruled on other grounds by *People v. Hardy* (2018) 5 Cal.5th 56 [issue preserved for review where trial court ordered that "'all defense counsel's objections at trial be deemed objections under the Constitutions of both the State of California and the United States"'].) Second, appellant sought to exclude proposed expert testimony as inadmissible hearsay under *Sanchez*.

The trial court heard argument regarding the motions at a May 17, 2017 hearing. The parties discussed *Sanchez* and *Crawford v.*

Washington (2004) 541 U.S. 36, but the court did not believe the medical records would be inadmissible under *Crawford*.

The court asked the parties to indicate which excerpts of the medical records were at issue, but the prosecutor stated that he needed the witness to examine the records first. Defense counsel raised the issue again after the jury was sworn, but the prosecutor again stated that he did not know which parts of the records he would rely upon until Dr. Soto examined them the morning before she testified. Defense counsel asked the court to exclude the record, estimated by the court to be "a foot and a half" high, under section 1054.1.[3] He argued that the People had had three months in which to identify which records would be introduced. The court denied the motion.

On the last day of testimony, the prosecutor reviewed appellant's medical records with Dr. Soto and informed the court that he sought to introduce portions of eight documents. Defense counsel objected to all the documents on numerous grounds, which we describe in detail below. Defense counsel also asked for a continuance, arguing that the records were thousands of pages long, including hundreds of potential witnesses, and that he did not have the resources to investigate without

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[3] The transcript indicates the parties discussed section 1054, but they presumably were referring to section 1054.1, which requires the prosecutor to "disclose certain materials and information to the defendant or his or her counsel." (*Rubio v. Superior Court* (2016) 244 Cal.App.4th 459, 478 (*Rubio*).) "The People comply with this obligation by affording a defendant the opportunity to examine, inspect or copy discoverable items. [Citation.]" (*Ibid.*)

knowing which witnesses would be at issue. The court denied the request as untimely. The court excluded two incidents and admitted the rest.

B. *Appellant's Objections*

Appellant challenges the introduction of five records that Dr. Soto read to the jury and relied upon in opining that appellant was currently dangerous.[4]

1. *May 12, 2007 Interdisciplinary Note*

Appellant objected to the note written by a psychiatric technician, which stated that appellant hit a patient in the stomach on May 12, 2007. Defense counsel argued that the incident was over 10 years old and thus not relevant to a current risk assessment. Defense counsel also questioned the veracity of the statements and asked for a continuance in order to investigate the staff member who wrote the note.

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[4] We disagree with respondent's contention that appellant forfeited any *Sanchez* or *Crawford* claim. Not only did he raise them in his motion in limine, he also raised the issues at the May 17, 2017 hearing. Defense counsel also argued that the October 2010 report was written by "a different doctor than we'll be having testify," which raises a confrontation clause issue. He raised the confrontation issue again as to the December 2016 report.

2. *May 2, 2007 Report*

Appellant objected to the May 2007 report, written by psychiatrist Dr. Chiritescu, that a nurse reported appellant said "voices told him" to become naked in front of staff. Defense counsel argued because this was not a violent act, it was not relevant, and that he could not investigate the incident because it was unclear who wrote the note.

3. *October 2010 Monthly Psychiatry Progress Note*

Appellant objected to an October 2010 note by Dr. Chiritescu that she asked appellant about reports that he was seen talking to himself and was having visual and auditory hallucinations. Defense counsel argued that the report was not relevant because it did not indicate violence and that it was not recorded at or near the time of the incident. He reiterated his argument that this was a "progress report from a different doctor than we'll be having testify."

4. *December 21, 2010 Report*

Appellant objected to a December 2010 report by Dr. Chiritescu that appellant explained that he struck a wall on December 15, 2010 because he was having auditory and tactile hallucinations. Defense counsel questioned the relevance and the timeliness of the observations.

5. *December 23, 2016 Nurse's Progress Note*

Appellant objected to a report containing general observations that appellant was seen talking to himself. Defense counsel argued that these were not personal observations, and that the report did not

meet the business records exception and was "double hearsay." He further argued that appellant would be unable to confront the nurse who wrote the observations.

The court found that all five documents were relevant and could be discussed by Dr. Soto as long as the People established the business record exception to the hearsay rule.

C. *Evidence Code section 352*

As to appellant's objections that the challenged evidence was more prejudicial than probative under Evidence Code section 352, those decisions are left to the trial court's discretion. (*Roa*, *supra*, 11 Cal.App.5th at p. 442.) All the challenged evidence was clearly probative to the question whether appellant, "by reason of a mental disease, defect, or disorder represents a substantial danger of physical harm to others." (§ 1026.5, subd. (b)(1).) Indeed, the supposed prejudicial nature of the evidence is simply that it helped demonstrate the seriousness of appellant's mental illness. The court's ruling as to the probative value of the evidence was not an abuse of discretion.

D. *Business Records* (*Evidence Code section 1271*)

"Hearsay, defined as an out-of-court statement by someone other than the testifying witness offered to prove the truth of the matter stated, is generally inadmissible unless it falls under an exception. [Citations.] Documents like reports, criminal records, hospital records, and memoranda—prepared outside the courtroom and offered for the truth of the information they contain—are usually themselves hearsay

and may contain multiple levels of hearsay, each of which is inadmissible unless covered by an exception. [Citation.]" (*People v. Yates* (2018) 25 Cal.App.5th 474, 482 (*Yates*).)

"Codified by [Evidence Code] section 1271, the business records exception to the hearsay rule permits admission of hearsay to prove an act, condition, or event if the following foundational requirements are met: '(a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.' [Citations.] It is the burden of the party offering the evidence to establish that these foundational requirements have been met. [Citation.] The trial court is vested with broad discretion to determine whether a party has laid a proper foundation for admission of records under section 1271, and the court's exercise of that discretion "'will not be disturbed on appeal absent a showing of abuse.'" [Citation.] ¶ Hospital records and similar documents are often admissible as business records, assuming a custodian of records or other duly qualified witness provides proper authentication to meet the foundational requirements of the hearsay exception. [Citations.]" (*People v. McVey* (2018) 24 Cal.App.5th 405, 414.) "A foundation of this nature ensures that the entries are made by personal knowledge, not on secondhand information days following the act, condition or event. [Citations.]" (*People v. Dean* (2009) 174 Cal.App.4th 186, 197, fn. 5 (*Dean*).)

"'"Whether a particular business record is admissible as an exception to the hearsay rule . . . depends upon the 'trustworthiness' of such evidence, a determination that must be made, case by case, from the circumstances surrounding the making of the record. [Citations.]"' [Citation.] 'The foundation for admitting the record is properly laid if in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission.' [Citation.]" (*People v. Zavala* (2013) 216 Cal.App.4th 242, 246.)

Here, Dr. Soto testified that she had been working as a psychologist at Patton for over 10 years and was familiar with the preparation and use of patient medical records. The records are kept in the regular course of business at the hospital. They are regularly consulted for the purpose of treating the patient and their purpose is to track the patient's treatment and progress. Records that discuss a specific interaction with the patient are made near the time of the incident; summaries might be made a week or month later. Regardless, all the staff members who write notes in the medical records are under a duty to be as accurate as possible in the reports.

Dr. Soto's testimony established that the writings were made in the regular course of business, and she was qualified to testify to their identity and mode of preparation. However, her testimony that some "notes might be a summary a week later or a month later" is not sufficient to establish that the "writing was made at or near the time of the act, condition, or event," or that the time of preparation indicated its trustworthiness. (Evid. Code, § 1271, subds. (b), (d).) "The cases generally do not set forth any particular framework for this timeliness

requirement. If it is unclear when the business entry was made, and there is no testimony concerning custom and practice in regard to timeliness, the court cannot assume that the entry was made 'at or near the time of the event.'" (Simons California Evidence Manual (January 2018 Update) § 2:61.) We conclude that, although some of the five documents were inadmissible, appellant was not prejudiced by their admission.

The May 12, 2007 note was written by a psychiatric technician who documented an incident he witnessed on that date and thus was made at the time of the event. This statement was admissible.

The May 2, 2007 statement by Dr. Chiritescu documented a conversation with a nurse, who reported that appellant was naked before staff on May 1, 2007. Although this statement was made near the time of the event, it was double hearsay, and the prosecutor did not offer a foundation for each level of hearsay. This statement accordingly was inadmissible. (See *Yates*, *supra*, 25 Cal.App.5th at p. 482 [hospital records containing multiple levels of hearsay are inadmissible unless each level is covered by an exception].)

The October 2010 progress note was a monthly summary, which would not necessarily be recorded "at or near the time of the act, condition, or event." (Evid. Code, § 1271, subd. (b).) However, the excerpt Dr. Soto read was Dr. Chiritescu's documentation of her interview of appellant that same date. Dr. Chiritescu wrote that, "during today's interview," appellant described auditory and visual

hallucinations he was having.[5] This statement accordingly was admissible.

The December 21, 2010 statement was Dr. Chiritescu's report of her conversation with appellant in which she asked him about a December 15, 2010 incident. It is not clear whether a statement six days after an incident is at or near the time of the event for purposes of Evidence Code section 1271. (See, e.g., *Dean*, *supra*, 174 Cal.App.4th at p. 197, fn. 5 [suggesting that "secondhand information days following the act" is not sufficient]; *People v. Crosslin* (1967) 251 Cal.App.2d 968, 976 [business record foundation properly laid where fingerprint card was prepared in the normal course of business on same date of defendant's arrest].) However, Dr. Chiritescu was appellant's treating psychiatrist at the time, and a report written six days after her interview of the patient does not seem unreasonably long after the interview. (Compare *Prato-Morrison v. Doe* (2002) 103 Cal.App.4th 222, 229 [document prepared almost eight years after events not made at or near time]; *Reisman v. Los Angeles City School Dist.* (1954) 123 Cal.App.2d 493, 503 [report made two years and two months after event not at or near the time].)

The December 2016 nurse's progress note was inadmissible because it was merely a progress report covering a month-long period, and stating that appellant had been seen talking to himself. There is no indication of specific dates or events.

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[5] Appellant's own statements are admissible as party admissions. (Evid. Code, § 1220; *Yates*, *supra*, 25 Cal.App.5th at p. 485.)

"The standard for prejudice applicable to state law error in admitting hearsay evidence is whether it is reasonably probable the appellant would have obtained a more favorable result absent the error." (*Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1286.) The foundational requirements of Evidence Code section 1271 were not met to at least two of the five records. Nonetheless, there was overwhelming admissible evidence supporting the jury verdict. We discuss the evidence in detail below in the context of the more stringent *Chapman* standard. We conclude that it is not reasonably probable appellant would have obtained a more favorable result absent the erroneous admission of the certainty of the entries.

III. *Confrontation Clause*

Appellant contends that even if the medical records fell under the business records exception to the hearsay rule, his confrontation clause rights were violated by the admission of the records.

Sanchez "adopt[ed] the following rule: When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez*, *supra*,

63 Cal.4th at p. 686, fn. omitted.) An expert "may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so," but an expert may not relate "case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id.* at pp. 685, 686.) Thus, "a court addressing the admissibility of out-of-court statements must engage in a two-step analysis. The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial hearsay*, as the high court defines that term." (*Id.* at p. 680.)

The rule announced in *Sanchez* applies to proceedings under section 1026.5. (See *People v. Jeffrey G.* (2017) 13 Cal.App.5th 501, 504, 509, fn. 6 [applying *Sanchez* to a defendant committed after being found NGI who petitioned under section 1026.2 to be transferred from a state hospital to a conditional release program]; *People v. Burroughs* (2016) 6 Cal.App.5th 378, 405, fn. 6 ["Although *Sanchez* was a criminal case, the court stated its intention to 'clarify the proper application of Evidence Code sections 801 and 802, relating to the scope of expert testimony,' generally. [Citation.] Those code sections govern the admission of expert testimony in civil cases as well, and nothing in *Sanchez* indicates

that the court intended to restrict its holdings regarding hearsay evidence to criminal cases."].)

After discussing the United States Supreme Court's "various formulations of what makes a statement testimonial," *Sanchez* explained that "[t]estimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*Sanchez*, *supra*, 63 Cal.4th at pp. 687, 689.)

"Although *Crawford* and its progeny have 'not settled on a clear definition of what makes a statement testimonial, [our state Supreme Court has] discerned two requirements. First, "the out-of-court statement must have been made with some degree of formality or solemnity." [Citation.] Second, the primary purpose of the statement must "pertain [] in some fashion to a criminal prosecution." [Citations.]' [Citation.]" (*People v. Gallardo* (2017) 18 Cal.App.5th 51, 66.)

Dr. Soto testified that the primary purpose of the medical records was to track appellant's progress, treatment, and response to treatments. The statements accordingly were not testimonial because they were not "made 'with a primary purpose of creating an out-of-court substitute for trial testimony.' [Citation.]" (*Sanchez*, *supra*, 63 Cal.4th at p. 688.)

Even if the statements admitted through Dr. Soto were testimonial, their admission was harmless beyond a reasonable doubt.

(See *Sanchez*, *supra*, 63 Cal.4th at p. 698 [applying harmless error analysis to the confrontation clause violation].) The testimony of Dr. Grand (the expert assigned by the court to evaluate appellant and prepare the report), Starkins, and appellant himself establishes that appellant "by reason of a mental disease, defect, or disorder represents a substantial danger of physical harm to others." (§ 1026.5, subd. (b)(1); see *Sanchez*, *supra*, 63 Cal.4th at p. 698 ["Determining prejudice [from confrontation violation] requires an examination of the elements of the gang enhancement and the gang expert's specific testimony."].)

Dr. Grand described her conversation with appellant about a July 2015 incident in which he hit someone at the hospital because he believed he was auditioning for a pornographic movie. She further testified that, at the time she interviewed him in February 2017, appellant still believed he was being filmed in the hospital and was auditioning for a pornographic movie. He also still believed he had been helping the victim of his commitment offense by simulating a rape. She opined that appellant, as a result of his schizophrenia, currently posed a substantial danger of physical harm to others, citing several risk factors.

"A single psychiatric opinion that a person is dangerous because of a mental disorder constitutes substantial evidence to justify the extension of commitment. [Citation.]" (*People v. Williams* (2015) 242 Cal.App.4th 861, 872.) However, we need not rely solely on Dr. Grand's testimony because, in addition, Starkins testified that appellant displayed a lack of insight into his commitment offense, and appellant's own testimony from the February 2017 trial indicated that he still

believed he was attempting to protect the victim when he assaulted her. Appellant also testified about the July 2015 incident, explaining that he hit the person because he was experiencing delusions that he was performing as a porn star.

This case is unlike *Sanchez*, in which the court concluded the confrontation clause violation was prejudicial because the testimonial hearsay offered through the gang expert was the main evidence of the gang enhancement allegations. (*Sanchez*, *supra*, 63 Cal.4th at p. 699.) Other than the "case-specific hearsay testimony, the facts of defendant's underlying crimes revealed that, acting alone, he possessed drugs for sale along with a weapon to facilitate that enterprise." (*Ibid.*) The gang expert's testimonial hearsay regarding the defendant's gang affiliation accordingly was not harmless beyond a reasonable doubt. (*Ibid.*)

In light of the testimony of Dr. Grand, Starkins, and appellant himself, we conclude any alleged confrontation clause violation was not prejudicial.

IV. *Denial of Continuance*

After learning which excerpts of the medical records the People were relying upon, appellant sought a continuance to investigate the specific witnesses at issue. The trial court acknowledged that the medical records were "voluminous," but stated that defense counsel had received the records and therefore denied the motion as untimely. The court reasoned that, despite the size of the records, the only issue at trial was the likelihood of appellant currently posing a risk to the

community and that defense counsel accordingly could have examined the records to find incidents likely to be raised at trial.

"'[T]he decision whether or not to grant a continuance of a matter rests within the sound discretion of the trial court. [Citations.] The party challenging a ruling on a continuance bears the burden of establishing an abuse of discretion, and an order denying a continuance is seldom successfully attacked.' [Citation.]" (*People v. Anderson* (2018) 5 Cal.5th 372, 397 (*Anderson*).)

Criminal discovery rules, which apply in section 1026.5 proceedings (§ 1026.5, subd. (b)(3)), are found in section 1054 et seq. (*Hines v. Superior Court* (1993) 20 Cal.App.4th 1818, 1821; *People v. Thompson* (2016) 1 Cal.5th 1043, 1093 ["Discovery in criminal cases is governed by section 1054"].) Section 1054.1 requires the prosecutor to disclose to the defendant, inter alia, "(b) Statements of all defendants," and "(f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial." (§ 1054.1, subds. (b), (f).) The disclosures are to be made "at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred." (§ 1054.7.)

As noted above, the prosecutor complies with the requirement of section 1054.1 "by affording a defendant the opportunity to examine, inspect or copy discoverable items. [Citation.]" (*Rubio*, *supra*, 244

Cal.App.4th at p. 478.) Appellant does not dispute that he received "*all* 15 years" of his medical records within the 30 days before trial required by section 1054.7. He contends, however, that the statute requires the prosecutor to specify which excerpts of the record will be offered into evidence.

The statute does not support appellant's position, and he does not point us to any caselaw to support it. He concedes that he received the medical records as required by the criminal discovery rules. The trial court did not abuse its discretion in denying his request for a continuance.[6] (See *Anderson*, *supra*, 5 Cal.5th at p. 397 [where nothing in the record suggested three weeks "was an inadequate amount of time for defendant to prepare for [a witness'] testimony," the trial court "acted within its discretion in denying a continuance"].)

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[6] We further disagree with appellant's argument that his due process rights were violated. "Due process has never been held to require precise equality or symmetry between the prosecutor's and the defendant's abilities and resources to obtain discovery or investigate. Instead, the due process reciprocity requirement is intended to avoid an unfair trial, especially unfair surprise to the defendant. [Citation.]" (*People v. Appellate Division of Superior Court* (*World Wide Rush, LLC*) (2011) 197 Cal.App.4th 985, 994.) The prosecution complies with due process requirements by disclosing "exculpatory and impeachment evidence that is favorable to the accused and material on the issue of guilt or punishment. [Citations.]" (*J.E. v. Superior Court* (2014) 223 Cal.App.4th 1329, 1334-1335.) Nothing in the record indicates that appellant did not receive the requisite evidence.

DISPOSITION

The order extending appellant's commitment for two years is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

COLLINS, J.

MICON, J.*

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