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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ROBERT SAVAGE, Defendant and Appellant.	2d Crim. No. B272257 (Super. Ct. No. 16PT-00105) (San Luis Obispo County)

Robert Savage appeals from an order finding him to be a mentally disordered offender (MDO) and committing him for treatment to the Department of State Hospitals as a condition of parole. (Pen. Code, § 2962 et seq.)[1] The commitment offenses were two counts of making criminal threats in violation of section 422. In 2011 he was sentenced as a second strike offender to prison for six years.

Appellant's sole contention is that the evidence is insufficient to show that the commitment offenses met the

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

following MDO criteria of section 2962, subdivision (e)(2)(Q) (hereafter subdivision (e)(2)(Q)): "A crime in which the perpetrator expressly or impliedly threatened another with the use of force or violence likely to produce substantial physical harm in such a manner that a reasonable person would believe and expect that the force or violence would be used." We affirm.

Facts

Dr. Megan Brannick, a forensic psychologist, testified as to the facts underlying the commitment offenses: Appellant "walked into the victim's place of business on two occasions. On the first occasion he threatened the victim . . . with a shovel stating he would kill him. On the second occasion, the events were similar and he also produced a knife." The parties stipulated that this testimony would be admitted for the limited purpose of showing (1) that appellant's mental disorder was one of the causes of or an aggravating factor in the commission of the commitment offenses (§ 2962, subd. (b)), and (2) that "by reason of his . . . disorder, [appellant] represents a substantial danger of physical harm to others." (§ 2972, subd. (c).) Dr. Brannick's testimony was inadmissible to show that the commitment offenses met the criteria of subdivision (e)(2)(Q). (See *People v. Stevens* (2015) 62 Cal.4th 325, 329 ["a mental health expert's testimony in support of a defendant's MDO commitment may not be used to prove the defendant committed a qualifying offense involving one of the offenses specified in section 2962, subdivision (e)(2)(A) through (O) or involved behavior described in subdivision (e)(2)(P) or (Q)"].)

People's Exhibit A, a certified copy of a CLETS computer printout of appellant's criminal history, was admitted

into evidence without objection.[2] The printout shows that appellant's violations of section 422 involved the "use" of a "weapon."

The People claim that an April 27, 2015 Mental Health Evaluation Addendum (Addendum) shows that appellant used a *deadly* weapon. The Addendum is part of People's Exhibit B, to which appellant did not object. The Addendum states that appellant was convicted of "Criminal Threat to Cause GBI/Death (Use of Deadly Weapon)."

People's Exhibit B was not admitted for all purposes. The People offered it for the limited purpose of proving that appellant had "been in treatment for [his] severe mental disorder for 90 days or more within the year prior to [his] parole or release." (§ 2962, subd. (c).) Thus, the Addendum is not evidence that appellant met the criteria of subdivision (e)(2)(Q).

Standard of Review

"In considering the sufficiency of the evidence to support MDO findings, an appellate court must determine whether, on the whole record, a rational trier of fact could have found that defendant is an MDO beyond a reasonable doubt, considering all the evidence in the light which is most favorable to the People, and drawing all inferences the trier could

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[2] "CLETS" is an abbreviation for California Law Enforcement Telecommunications System. (*People v. Martinez* (2000) 22 Cal.4th 106, 113.) The trial court asked appellant's counsel if he objected to the admission of People's Exhibit A. Counsel responded, "Well I think it's properly certified, your honor, so I don't have any objection to it."

reasonably have made to support the finding. [Citation.]" (*People v. Clark* (2000) 82 Cal.App.4th 1072, 1082.)

Discussion

Appellant's convictions of making criminal threats in violation of section 422, together with his use of a weapon, constitute substantial evidence that he "expressly or impliedly threatened another with the use of force or violence likely to produce substantial physical harm in such a manner that a reasonable person would believe and expect that the force or violence would be used." (Subd. (e)(2)(Q).) To prove a violation of section 422, "the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat . . . was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances. [Citation.]" (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

Appellant argues that, because of differences between section 422 and subdivision (e)(2)(Q), the evidence is insufficient to satisfy the MDO criteria. We discuss below the alleged differences and explain why they are inconsequential.

1. "Subdivision (e)(2)(Q) requires a threat of force or violence 'likely to produce substantial [physical] harm,' while section 422 requires a threat to commit a crime that involves 'death or great bodily injury,' a completely different standard." But if a crime "will result in death or great bodily injury" (§ 422, subd. (a)), it will also be "likely to produce substantial physical harm." (Subd. (e)(2)(Q).)

2. "Subdivision (e)(2)(Q) requires a threat involving the use of 'force or violence.' By contrast, section 422 refers not to the means used, but to the result, i.e., 'death or great bodily injury to another person.' As a result, a threat to commit poisoning or some other crime that results in death or GBI but does not involve force or violence would be covered by section 422, but not by subdivision (e)(2)(Q)." (See *People v. Collins* (1992) 10 Cal.App.4th 690, 697 ["the infliction of 'serious bodily injury' as defined in section 243, subdivision (f)(5) could be accomplished without use of force or violence, i.e., when a person sends poison candy to his or her victim and the victim suffers 'serious bodily injury'"].)

We need not decide whether appellant's analysis is correct. Since the evidence shows that appellant used a weapon during the commission of the section 422 violations, he must have "expressly or impliedly threatened another with the use of force or violence." (Subd. (e)(2)(Q).)

3. "Under section 422, a threat may be made through an intermediary. (*In re David L.* (1991) 234 Cal.App.3d 1655, 1659.) By contrast, subdivision (e)(2)(Q) requires that the threat be made by the 'perpetrator,' i.e. the prisoner sought to be committed." Appellant presents no argument and cites no authority in support of his assertion that "perpetrator" in

subdivision (e)(2)(Q) means the prisoner sought to be committed. Section 2962 uses the word "prisoner" throughout its subdivisions. Had the legislature intended that the "perpetrator" in subdivision (e)(2)(Q) should mean the "prisoner," it would have said so. For example, section 2962, subdivision (e)(2)(P) provides, "A crime not enumerated in subparagraphs (A) to (O), inclusive, in which the *prisoner* used force or violence, or caused serious bodily injury as defined in paragraph (4) of subdivision (f) of Section 243." (Italics added.)

4. "Section 422 provides that a threat may be directed against the victim's immediate family; by contrast, subdivision (e)(2)(Q) contains no such provision, and instead refers to the threatening of 'another.'" But a threat against a member of the victim's immediate family is a threat against "another" within the meaning of subdivision (e)(2)(Q).

5. "Section 422 requires that the subject of the threat be placed in a position of 'sustained fear,' while subdivision (e)(2)(Q) requires that the subject believe and expect that [force or] violence would be used. . . . [A] person may fear violence but not expect or believe that it is likely to occur, which would render the perpetrator subject to section 422 but not subdivision (e)(2)(Q)." Section 422, subdivision (a) provides that the threat "to commit a crime which will result in death or great bodily injury" must be "so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an *immediate prospect of execution of the threat*, and thereby cause[] that person reasonably to be in sustained fear." (Italics added.) Where, as here, a weapon was used during the commission of a violation of section 422, "a reasonable person

would believe and expect that . . . force or violence would be used." (Subd. (e)(2)(Q).)

Disposition

The judgment (order of commitment) is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Roger T. Picquet, Judge*

Superior Court County of San Luis Obispo

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

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Eric J. Kohm, Deputy Attorney General, for Plaintiff and Respondent.

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* (Retired Judge of the San Luis Obispo Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)