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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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.

JEROMY SMITH,

Defendant and Appellant.

2d Crim. No. B272287
(Super. Ct. No. 16PT-00223)
(San Luis Obispo County)

Jeromy Smith appeals from the judgment entered after the trial court determined that he was a mentally disordered offender (MDO). (Pen. Code, § 2960 et seq.)[1] Appellant contends that expert opinion testimony was received in violation of *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) to prove that appellant cannot be kept in remission without treatment. (§ 2962, subd. (a)(1).) We conclude that the error was harmless and affirm the judgment.

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

Factual and Procedural History

In 2008, appellant was convicted of battery with serious injury (§ 243, subd. (d)) and sentenced to eight years state prison. On December 29, 2015, the Board of Parole Hearings (BPH) determined that appellant was an MDO and committed him to Atascadero State Hospital (ASH) for treatment. (§ 2962, subds. (a)-(d).) Appellant petitioned the superior court for trial and waived jury. (§ 2966, subd. (b).)

Doctor Meghan Brannick, a forensic psychologist at ASH, testified that appellant suffered from schizoaffective disorder, bipolar type, a severe mental disorder manifested by auditory hallucinations, paranoia, bizarre behavior, racing thoughts, irritability, agitation, and depressed mood. Appellant was hospitalized on three prior occasions based on MDO qualifying offenses and had a history of violent behavior that was related to the severe mental disorder. Before appellant was transferred to ASH, appellant was treated for mental illness in prison and subject to a *Keyhea* involuntary medication order (*Keyhea v. Rushen* (1986) 178 Cal.App.3d 526) from April 16, 2015 through January 6, 2016.

Doctor Brannick opined that appellant met all the MDO criteria and posed a substantial danger of physical harm to others by reason of the severe mental disorder.[2] Although the

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[2] "A determination that a defendant requires treatment as an MDO rests on six criteria, set out in section 2962: the defendant (1) has a severe mental disorder; (2) used force or violence in committing the underlying offense; (3) had a disorder which caused or was an aggravating factor in committing the offense; (4) the disorder is not in remission or capable of being kept in remission absent treatment; (5) the prisoner was treated for the disorder for at least 90 days in the year before being

mental disorder was in remission at the time of the BPH hearing, Doctor Brannick did not believe appellant could be kept in remission because he intentionally caused property damage, was violent, and engaged in threatening behavior during the year prior to the BPH hearing. (See § 2962, subd. (a)(3); *People v. Burroughs* (2005) 131 Cal.App.4th 1401, 1408 [patient who is technically in remission, but who has committed a violent act within the past year and continues to present a substantial risk of harm by reason of his mental disorder, is subject to MDO commitment].) Over defense objection, Doctor Brannick testified that appellant had a rules violation report for fighting on October 31, 2015 and a second rules violation report for threatening an inmate on August 13, 2015.

Sanchez

Appellant contends that the rules violation reports are hearsay and not the proper subject of expert opinion testimony in a MDO case. It is settled that expert testimony may not be used as a conduit for the admission of otherwise inadmissible hearsay. (See *People v. Szeto* (1981) 29 Cal.3d 20, 40.) In *Sanchez*, *supra*, 63 Cal.4th 665 our Supreme Court held that an expert cannot "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id.*, at p. 686.) The court noted: "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general*

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paroled; and (6) because of the disorder, the prisoner poses a serious threat of physical harm to other people." (*People v. Clark* (2000) 82 Cal.App.4th 1072, 1075–1076.) The sole issue on appeal is whether criteria number 4 was satisfied, i.e., whether appellant can be kept in remission without treatment.

terms that he did so. . . . [¶] What an expert *cannot* do is relate as true 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.)

Appellant argues that the expert testimony about the rules violation reports must be stricken and that the remaining evidence does not support the finding that appellant cannot be kept in remission without treatment. As in any sufficiency-of-the-evidence appeal, we view the entire record in the light most favorable to the judgment, drawing all reasonable inferences, and resolving all conflicts in favor of the judgment. (*People v. Clark*, *supra*, 82 Cal.App.4th at p. 1082.)

Apart from the rules violation reports, Doctor Brannick relied on a host of reliable sources in opining that appellant could not be kept in remission without treatment. The doctor interviewed appellant, reviewed appellant's medical file and treatment records, and consulted with the hospital treatment team. The doctor also reviewed a legal file regarding appellant's prior MDO commitment at Patton State Hospital and prior evaluations by other MDO evaluators. All of it was pertinent to whether appellant was treatment compliant and voluntarily taking his medication. Under the MDO act, the phrase "'cannot be kept in remission without treatment'" means "that one of four specific acts have occurred during the previous year - a violent act except in self-defense, a serious threat, intentional property damage *or failure to follow the treatment plan*. . . . [Section 2962, subdivision (a)(3)] defines in precise terms the conduct that will show the patient 'cannot be kept in remission without treatment,' which is an alternative basis for satisfying the remission criterion

for an MDO recommitment." (*People v. Burroughs*, *supra*, 131 Cal.App.4th at p. 1407, italics added.)

Appellant was not voluntarily taking his medication which is why the *Keyhea* order was in place. When appellant was admitted to ASH on January 6, 2016 for treatment, he was still subject to the *Keyhea* medication order. Doctor Brannick testified without objection that appellant took his medication because of the *Keyhea* order, not because he accepted that it was necessary to keep his mental illness in remission. "A reasonable person, whose mental disorder can be kept in remission with treatment, must, at minimum, acknowledge if possible the seriousness of his mental illness and cooperate in all the mandatory components of his treatment plan." (*People v. Beeson* (2002) 99 Cal.App.4th 1393, 1399.)

Appellant did not acknowledge the seriousness of his illness or his need for medication and had a pattern of repeatedly offending when institutionalized, incarcerated, or on conditional release. Doctor Brannick explained that appellant has been on involuntary medication 100 percent of the time since 2009. "Under section 2962, not voluntarily following the treatment plan is essentially an exception to the finding that the illness is in remission." (*People v. Beeson*, *supra*, 99 Cal.App.4th at p. 1400.) Substantial evidence supports the finding that appellant suffers from a severe mental disorder that cannot be kept in remission without treatment and poses a substantial danger to others by reason of the severe mental disorder. (*People v. Bowers* (2006) 145 Cal.App.4th 870, 879 [single psychiatric opinion constitutes substantial evidence].) The alleged error in receiving expert testimony about the rules violations report was harmless beyond

a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Sanchez*, *supra*, 63 Cal.4th at p. 698.)

The judgment (MDO commitment order) is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Gayle L. Peron, 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.