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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. EMMANUEL GONZALES GUILLEN, Defendant and Appellant.	2d Crim. No. B283213 (Super. Ct. No. 17PT-00241) (San Luis Obispo County)

Emmanuel Gonzales Guillen appeals the trial court's order committing him to the Department of State Hospitals for treatment as a mentally disordered offender (MDO) (Pen. Code,[1] § 2962 et seq.). Appellant contends (1) the evidence fails to establish that his severe mental disorder was a cause or aggravating factor in his commission of the commitment offense

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

(§ 2962, subd. (b)); and (2) the court applied an incorrect standard of proof in finding that appellant met the MDO criteria. We affirm.

FACTS AND PROCEDURAL HISTORY

Appellant pled no contest to assault by means likely to produce great bodily harm (§ 245, subd. (a)(4)) and was sentenced to four years in state prison. Prior to his scheduled parole release date, the Board of Parole Hearings (BPH) determined that he met the criteria for MDO treatment and sustained the requirement of treatment as a condition of his parole. Appellant petitioned for a hearing pursuant to section 2966, subdivision (b). Counsel was appointed to represent him and he waived his right to a jury trial.

Dr. Brandi Mathews, a psychologist at Atascadero State Hospital (ASH), testified at the hearing for the prosecution. Dr. Mathews interviewed appellant and reviewed his prior MDO evaluations and his hospital records and reports. Based on this information, the doctor opined that appellant met the criteria for MDO treatment.[2]

Appellant suffers from schizophrenia, and the disorder "was at least an aggravating factor" in his commission of the commitment offense. Dr. Matthews concluded that the disorder was in remission as of the date of the BPH hearing, but could not be kept in remission without treatment because "in the past year he has been physically violent and he has not voluntarily followed his treatment plan."

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[2] The parties stipulated that appellant had received at least 90 days of treatment during the year prior to this scheduled parole release date, as set forth in subdivision (c) of section 2962.

Dr. Mathews also opined that appellant represented a substantial danger of physical harm to others by reason of his mental disorder. The doctor explained that appellant "has a history of becoming violent when he's symptomatic. It's my opinion that he was paranoid at the time of the qualifying offense that occurred in 2014, he was not taking his medications and he engaged in a high level of violence." Appellant also assaulted two other inmates in September 2016 while he was symptomatic.

Another "significant factor" supporting the doctor's conclusion was appellant's "limited insight into his mental illness and his lack of understanding for the importance of medication compliance." Appellant had failed to take his medication while on probation and had tested positive for methamphetamine and marijuana. Dr. Mathews explained that the use of illicit drugs, particularly methamphetamine, would exacerbate the symptoms of appellant's schizophrenia and render his prescribed medications ineffective. Moreover, appellant told Dr. Mathews "'I don't really have a mental illness and I don't need the medications.'"

DISCUSSION

§ 2962

As relevant here, a defendant cannot be committed for MDO treatment unless the prosecution proves beyond a reasonable doubt that (1) he suffers from a severe mental disorder that is not in remission or cannot be kept in remission without treatment; and (2) the disorder was a cause or aggravating factor in his commission of the offense upon which the commitment is based. (§ 2962, subds. (a) & (b); *People v. Clark* (2000) 82 Cal.App.4th 1072, 1075-1076.) Appellant contends the second factor was not sufficiently proven. He claims

that Dr. Mathews' "bare opinion" that his schizophrenia "'was at least an aggravating factor'" in his commission of the offense is insufficient as a matter of law to sustain the requisite finding.

We agree with the People that appellant forfeited his claim by failing to object when Dr. Mathews offered her opinion. "[T]he failure to object to the admission of expert testimony . . . at trial forfeits an appellate claim that such evidence was improperly admitted. [Citations.]" (*People v. Stevens* (2015) 62 Cal.4th 325, 333.) Although appellant frames his claim as one of insufficient evidence, he essentially contends that no foundation was laid for Dr. Mathews' challenged opinion as required under Evidence Code section 801. (See *Stevens* at p. 335.) Because appellant did not raise a foundational objection below, he forfeited any claim that no foundation was laid for the doctor's opinion. (See *Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, 1339-1340 [defendant could not claim on appeal that plaintiff's experts' opinions were "too terse and conclusory to amount to substantial evidence" because his "real complaint" was that the experts' opinions lacked foundation and he made no such objection below]; see also *People v. Fuiava* (2012) 53 Cal.4th 622, 655 [a defendant "ordinarily cannot obtain appellate relief based upon grounds that the trial court might have addressed had the defendant availed himself or herself of the opportunity to bring them to that court's attention"].)

In any event, the claim lacks merit. "[A]n MDO hearing contemplates expert opinion testimony on . . . factors[] including whether the defendant's severe mental disorder was one of the causes of or an aggravating factor in the commission of the crime. (§ 2962, subd. (b).) As to those factors, the expert may rely on hearsay documents that are 'of a type that reasonably may be

relied upon by an expert in forming an opinion upon the subject to which his testimony relates.' (Evid. Code, § 801, subd. (b).)" (*People v. Stevens*, *supra*, 62 Cal.4th at p. 336.)

Here, Dr. Mathews' opinions were based upon her interview of appellant and her review of his prior MDO evaluations and his hospital records and reports. Appellant did not object to the doctor's reliance on any of this information. Moreover, in concluding that appellant represented a substantial danger of physical harm to others by reason of his schizophrenia (§ 2962, subd. (d)(1)), Dr. Mathews opined that "he was paranoid at the time of the qualifying offense" and "was not taking his medications and he engaged in a high level of violence." Contrary to appellant's claim, this evidence also provides a foundation for the doctor's opinion that appellant's schizophrenia was a cause or aggravating factor in his commission of the commitment offense, as provided in subdivision (b) of section 2962. Appellant's claim thus fails.

Standard and Burden of Proof

Appellant contends the court applied an incorrect standard of proof and erroneously shifted the prosecution's burden of proof to him in finding that he met the MDO criteria. We are not persuaded.

In his closing argument, defense counsel asserted that appellant could not be found to represent a substantial danger of physical harm to others by reason of his mental disorder (§ 2962, subd. (d)(1)) because Dr. Mathews had testified that appellant's disorder was currently in remission. The prosecutor responded that "we have the uncontradicted opinion of a medical professional" that although appellant's disorder was in remission, "he does meet criteria 4B," i.e., his disorder could not be kept in

remission without treatment, and that "if he were to be released he would be at great risk of decompensation." The prosecutor then offered "[i]t's very clear . . . that [appellant] does meet all these criteria far beyond any reasonable doubt, and I'll submit . . . on that basis."

In addressing Dr. Mathews' opinion that appellant's severe mental disorder was in remission but could not be kept in remission without treatment, the court posited: "And I've often wondered, it's sort of a Catch-22, if I can use that expression, and it seems to me that . . . on the first go-around . . . I guess I think that I'm obligated . . . to uphold the findings, assuming that there's nothing cockeyed about the opinion. But it seems to me that on the second go-around, if there is a second go-around, then you've got two years . . . of being in remission, then . . . I think . . . the opinion lifts. So . . . that's always been my practical consideration, although technically I suppose the [expert] might again opine . . . that they couldn't be kept in remission without treatment if they're unwilling to participate in treatment."

The court asked defense counsel if he had any comments on the subject and added, "I mean you're asking me to disregard the opinion of the expert is basically what you're doing." After defense counsel essentially reiterated his earlier position, the court said, "But I think fundamentally you're asking me . . . to disregard [Dr. Mathews'] opinion, and it just seems to me that as to her expert testimony . . . that I can't do that. Now, . . . I haven't had any go-arounds on the second time where the person [is] in a [recommitment] petition and they come back the second time and they're still in remission and the expert then opines the same thing as Dr. Mathews did, then you begin to worry."

Appellant contends the court's remark that it was "'obligated'" to accept Dr. Mathews' opinions unless they were "'cockeyed'" reflects "an improper evidentiary presumption that is . . . inconsistent with the MDO statute." Appellant further asserts that the court's comments reflect that it "improperly placed upon appellant, rather that the People, the burden of establishing that the various elements of the MDO statute were – or, more accurately, were not – met." He also claims that "[t]he trial court's purported distinction between the first and second 'go-arounds,' i.e. between an initial and a recommitment petition, is belied by Penal Code section 2966, subdivision (b), which requires proof beyond a reasonable doubt, and which applies to all proceedings . . . under the MDO statute."

The court's comments, albeit inartful, do not evince any misunderstanding regarding the proper standard or burden of proof that applies in MDO proceedings. The court's remark that it felt "obligated" to accept Dr. Mathews' opinions unless they were "cockeyed" reflect an understanding that those opinions could not be arbitrarily rejected. (See *In re Marriage of Battenberg* (1994) 28 Cal.App.4th 1338, 1345.) Because the MDO expressly contemplates expert testimony on the relevant criteria, Dr. Mathews offered such testimony based upon her interview with appellant and her review of his records, and appellant offered no evidence to contradict that testimony, the court had no legitimate basis for rejecting the doctor's opinions. Moreover, the court's comments regarding initial commitments versus recommitments merely reflect an understanding that a longer duration of remission could weigh against a finding that the defendant currently represents a substantial danger of physical

harm to others, such that he no longer qualifies for an MDO commitment.

DISPOSITION

The judgment (MDO commitment order) is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

H. Morgan Dougherty, Judge
Superior Court County of San Luis Obispo

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

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