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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. ALEJANDRO MAGANDA, Defendant and Appellant.	B267641 (Los Angeles County Super. Ct. No. ZM011150)

APPEAL from an order of the Superior Court of Los Angeles County. Thomas Rubinson, Judge. Reversed and remanded.

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell and Scott A Taryle, Deputy Attorneys General, and Yun K. Lee, Deputy Attorney General, for Plaintiff and Respondent.

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A jury found Alejandro Maganda (Maganda) to be a sexually violent predator (SVP). He argues that the jury's finding must be overturned for a number of reasons. Most of his arguments lack merit, but he is correct that the trial court erred in allowing the People's experts to testify to case-specific facts that are inadmissible under *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). Because that testimony was prejudicial, we are compelled to reverse.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In September 1997, a jury convicted Maganda of committing a lewd act upon a child under the age of 14. Maganda had on two occasions enticed a five-year-old boy into his garage, pulled down the boy's pants, and then kissed and digitally penetrated the boy's anus.

II. Procedural Background

In January 2007, the Los Angeles County District Attorney (the People) filed a petition to commit Maganda under the Sexually Violent Predators Act (SVP Act) (Welf. & Inst. Code, § 6600 et seq.).[1] In July 2014, the trial court found probable cause to hold Maganda over for trial.

The People requested a jury trial, and trial commenced in September 2015. The jury returned a true finding that Maganda qualified as a sexually violent predator, and the trial court committed him to the Department of State Hospitals for an indeterminate term.

Maganda filed this timely appeal.

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1 All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

DISCUSSION

The SVP Act allows for the civil commitment of a person following his release from incarceration if (1) the person "has been convicted of a sexually violent offense against one or more victims"; (2) the person "has a diagnosed mental disorder"; and (3) that disorder "makes [him] a danger to the health and safety of others in that it is likely that he . . . will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1); *People v. Roberge* (2003) 29 Cal.4th 979, 987-988 [third element requires proof of "a *substantial danger*, that is, a *serious and well-founded risk*, of committing such crimes [again] if released from custody"].)

Maganda levels several attacks on the jury's finding that he qualifies as a sexually violent predator under the SVP Act: (1) the trial court erred in conducting a jury trial; (2) the court erred in not evaluating his competency prior to trial; (3) his commitment as a mentally disordered offender (MDO), which began in November 2006, precludes a finding that he is also a SVP; (4) the court answered a jury question incorrectly; (5) the court erred in allowing the People's two expert witnesses to testify to case-specific hearsay facts in violation of *Sanchez*, *supra*, 63 Cal.4th 665; and (6) the court erred in admitting a portion of Maganda's prison records. We consider each argument.

I. Wrongful Denial of Court Trial

Maganda first argues that the SVP Act guarantees him a right to a court trial, even when the People request a jury trial. This argument turns on a question of statutory interpretation, so our review is de novo. (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1247.)

Subdivision (a) of section 6603 expressly guarantees an alleged SVP the right "to a trial by jury," and subdivision (b) expressly guarantees the People the "right to demand that the trial be before a jury." (§ 6603, subds. (a) & (b).) Subdivision (e) provides a default rule in the event *neither* party requests a jury trial: "If the person subject to this article or the [People] does not demand a jury trial, the trial shall be before the court without a jury." (§ 6603, subd. (e).) Under this scheme, the trial court acted properly in conducting a jury trial because the People requested one.

Maganda resists this conclusion, arguing that subdivision (e)'s use of the word "or" means that *either* party's failure to request a jury trial means that the court must conduct a bench trial. We reject this argument because it would effectively rewrite subdivisions (a) and (b): These subdivisions expressly indicate *either* party can demand a jury trial, while Maganda asks us to read them to mean that there is only a jury trial if *both* parties demand one. We are not allowed to rewrite statutes. (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 956.) Maganda also cites several cases, but none of them supports his argument. (Cf. *People v. Blackburn* (2015) 61 Cal.4th 1113, 1116-1117 [court may not conduct bench trial in MDO proceeding absent defendant's personal waiver]; *People v. Tran* (2015) 61 Cal.4th 1160, 1163-1164 [same, in proceedings for further commitment following finding of not guilty by reason of insanity].)

II. Refusal to Evaluate Competence to Stand Trial

Maganda asserts that the trial court erred in allowing his SVP trial to go forward without first assessing his competency to stand trial, as Maganda had requested; according to Maganda,

this violated his right to due process. We review this constitutional question de novo. (*In re Taylor* (2015) 60 Cal.4th 1019, 1035.)

Maganda's claim is squarely foreclosed by *Moore v. Superior Court* (2010) 50 Cal.4th 802 (*Moore*). There, our Supreme Court held that "due process does not require mental competence on the part of someone undergoing a commitment or recommitment trial under the SVP[Act]." (*Id.* at p. 829.) *Moore* reached this conclusion after balancing the alleged SVP's significant liberty interest against the many protections against infringement of that interest present in SVP trials—namely, the requirement that the alleged SVP be represented by counsel, the alleged SVP's right to retain experts to perform evaluations, and the requirement of jury unanimity. These protections mean that the alleged SVP himself or herself plays a relatively minor role in the SVP proceedings, rendering his or her competence of less significance. (*Id.* at pp. 825, 829.)

Maganda seeks to distinguish *Moore*, arguing that the disorder that renders him incompetent (schizophrenia) is different from the disorders that qualify him as an SVP (schizophrenia, pedophilic disorder, alcohol use disorder). Maganda's claim fails factually because there is overlap between the disorders. Maganda's claim also fails legally because the extent of overlap is irrelevant: *Moore* did not turn on such considerations, and Maganda offers no persuasive reason why we should limit *Moore* as he suggests. Maganda also says *Moore* is wrongly decided, but we are without authority to disagree with *Moore*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.)

III. MDO Commitment as a Bar to Prosecution Under SVP Act

Maganda contends that the trial court erred in committing him as an SVP when he was already found to be an MDO under the Mentally Disordered Offender Act (Pen. Code, § 2960 et seq.). At bottom, his argument challenges the jury's ultimate factual finding, which we review for substantial evidence. (*People v. Wright* (2016) 4 Cal.App.5th 537, 545.)

Maganda's contention is based entirely on *People v. Putney* (2016) 1 Cal.App.5th 1058. There, the court held that a person who had been sentenced to prison for 25 years to life for an intervening criminal offense did not pose "a danger to the health and safety of others" under the SVP Act (§ 6600, subd. (a)(1)) because he had no prospect of being released for many years. (*Putney*, at pp. 1068-1069.) *Putney* does not assist Maganda because his commitment as an MDO lasts for one year at a time, not 25 years to life. (*Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1063, disapproved on other grounds in *People v. Harrison* (2013) 57 Cal.4th 1211, 1230, fn. 2.) What is more, Maganda's commitment as an MDO was set to lapse just three months after the jury verdict in the SVP case. *Putney*'s bar does not apply in this case.

IV. Erroneous Response to Jury Note

Maganda argues that the trial court erred in responding to a jury note. We review such claims for an abuse of discretion. (See *People v. Beardslee* (1991) 53 Cal.3d 68, 97.)

During deliberations, the jury submitted a note asking: "What happens to . . . Maganda if we go with [the] Defense, and say the 'People' haven't proven their case"? After consulting with the parties and obtaining the consent of Maganda's attorney, the court told the jury that it would not answer the question because

the jury's job was to assess whether the "three elements" of the SVP Act were proven and that, if those elements are not proven, the jury is to "vote that the petition is not true . . . without regard[] to what will happen, where [Maganda] will go, what he will do, in either direction."

This response was legally correct. A jury's task in an SVP proceeding is solely to determine whether the alleged SVP qualifies as an SVP under the statute; "[t]he consequences of a 'true' finding" or a "not true" finding "have no relevance to" this question. (*People v. Rains* (1999) 75 Cal.App.4th 1165, 1169-1170.) We accordingly reject defendant's argument that the court's response was misleading and that his attorney was ineffective for agreeing to that response.

V. Erroneous Admission of Hearsay

Maganda next asserts that the trial court erred in admitting inadmissible hearsay. We review a court's evidentiary rulings for an abuse of discretion (*People v. Waidla* (2000) 22 Cal.4th 690, 725 (*Waidla*)), bearing in mind that a trial court abuses its discretion when it makes an error of law (*People v. Patterson* (2017) 2 Cal.5th 885, 894).

A. Pertinent Facts

1. The People's case at trial

The People called two expert witnesses at trial. Maganda had refused to meet with either expert.

The first expert was Dr. G. Preston Sims (Dr. Sims). Dr. Sims first testified about the "sexually violent offense" alleged as the qualifying offense—namely, Maganda's 1997 conviction. In describing the facts underlying that conviction, Dr. Sims drew on the facts set forth in the probation officer's report and the preliminary hearing transcript.

Dr. Sims next opined that Maganda suffers from three "diagnosed mental disorders"—namely, pedophilic disorder, schizophrenia, and alcohol use disorder. In coming to this conclusion, Dr. Sims relied in part upon Maganda's 2003 convictions for child molestation and for failing to register as a sex offender, which was based upon his act of soliciting a teenage boy for sex. Dr. Sims also related to the jury several of Maganda's statements memorialized in the parole charge sheet in that case—namely, that "God sent me here to have sex with little boys" and that he had "had sex with other kids between the ages of 12 years and older." Dr. Sims also relied upon statements that Maganda had made to several other people over the years—namely, that (1) "God intended for me to be a child molester"; (2) he had molested anywhere from 20 to 300 other children; (3) children, including the five-year-old victim of his 1997 conviction, were attracted to him; (4) he was aware of what he was doing when he molested the children; (5) he had been written up for sex-related offenses while at Atascadero State Hospital; (6) he had tried to molest his nephew when the nephew was six years old and would have continued molesting the five-year-old victim of his 1997 conviction if he had not been discovered by the victim's father. Dr. Sims informed the jury that defendant had made these statements during interviews with Dr. Dawn Starr in 2006, 2009, and 2014; to a Dr. Simon in 2006; to the admitting psychiatrist at the Atascadero State Hospital in 2007; to a Dr. Yakish in 2010; and to a Dr. Malinek in 2012. Dr. Sims also relied on medical records documenting Maganda's alcohol abuse.

Dr. Sims finally opined that Maganda presented a serious and well-founded risk of reoffending against children. He based this opinion on two actuarial risk instruments (STATIC-99R and

STATIC-2000R) that placed Maganda's risk of reoffending in the next five years at 26 percent and his risk of reoffending in the next 10 years at 32 percent. Dr. Sims also relied on many of Maganda's statements to others (as described above); on Maganda's refusal to take medication or participate in treatment, as reflected in hospital records and conversations Dr. Sims had with hospital personnel; and the sexually inappropriate incidents Maganda engaged in while in prison and in state hospitals.

The People's second expert was Dr. Michael Musacco (Dr. Musacco). Like Dr. Sims, Dr. Musacco opined that Maganda suffers from pedophilic disorder, schizophrenia, and alcohol use disorder. Dr. Musacco relied upon the preliminary hearing transcript from Maganda's 1997 conviction and the statements Maganda made to others. Like Dr. Sims, Dr. Musacco opined that Maganda posed a serious and well-founded risk of reoffending and based his opinion on the results of a STATIC-99 test, on the facts underlying Maganda's 1997 conviction, on the statements Maganda made to others, and on psychological evaluations conducted by other doctors.

2. The defense case at trial

Maganda testified in his own defense. He admitted to the facts underlying the 1997 conviction and testified to his belief that the five-year-old victim liked being molested. Maganda testified to the facts underlying his 2003 convictions. He admitted to attempting to molest his nephew. And he bragged that he was "almost a psychologist," that did not participate in any treatment while he was in Mexico, and that he lied when he told the psychiatrists and psychologists that he had molested between 20 and 300 children. He admitted having sex with a hospital roommate for money.

B. Pertinent Law

Expert witnesses may offer opinions based on inadmissible evidence, as long as it is "of a type that reasonably may be relied upon" by experts in the field. (Evid. Code, § 801, subd. (b).) Prior to *Sanchez*, our Supreme Court had held that expert witnesses could not only rely on inadmissible evidence (including hearsay evidence) in forming their opinions, but could also relate that inadmissible evidence—both general background information regarding the expert's knowledge or experience as well as case-specific facts—to the jury as long as the jury was instructed that the expert's recitation of the case-specific facts could only be considered for its effect on the expert's opinion, and not for its truth. (*People v. Coleman* (1985) 38 Cal.3d 69, 92, overruled by *Sanchez*, *supra*, 63 Cal.4th at p. 686; *People v. Montiel* (1993) 5 Cal.4th 877, 918-919, overruled by *Sanchez*, *supra*, at p. 686; accord, *People v. Dean* (2009) 174 Cal.App.4th 186 [applying these rules in SVP proceedings].)

Sanchez put an end to that practice. *Sanchez* preserved an expert's ability to rely on and cite "background information accepted in [his or her] field of expertise." (*Sanchez*, *supra*, 63 Cal.4th at p. 685.) *Sanchez* also preserved an expert's ability to rely on and "tell the jury *in general terms*" that he relied upon hearsay evidence. (*Id.* at p. 685, italics in original.) But *Sanchez* rejected the earlier notion that case-specific facts had any non-hearsay purpose: "When an expert relies on hearsay to provide case-specific facts, considers the statements as true, and relates them to the jury as a reliable basis for the expert's opinion," *Sanchez* ruled, "it cannot logically be asserted that the hearsay content is not offered for its truth." (*Sanchez*, *supra*, 63 Cal.4th at pp. 682-683.) Thus, under *Sanchez*, an expert may not relate

case-specific facts with a limiting instruction; instead, those facts must be excluded unless, as *Sanchez* indicated, they are "properly admitted through an applicable hearsay exception" or are "covered by a hearsay exception." (*Id.* at pp. 684, 686.)

Sanchez is not confined to criminal cases. In fact, two recent cases have found it applicable to SVP proceedings as well. (*People v. Burroughs* (2016) 6 Cal.App.5th 378; *People v. Roa* (2017) 11 Cal.App.5th 428 (*Roa*).)

C. Analysis

Sanchez applies here. *Sanchez* applies to cases that are not yet final at the time *Sanchez* was handed down. (See *People v. Guerra* (1984) 37 Cal.3d 385, 400.) What is more, Maganda preserved this issue by objecting to the People's experts' recitation of case-specific facts.

Some of the case-specific facts that Dr. Sims and Dr. Musacco related to the jury were properly presented to the jury, either (1) because they were otherwise in evidence or fell within a hearsay exception, or (2) because Maganda admitted those facts during his testimony. All of the facts drawn from the "documentary evidence" underlying Maganda's 1997 conviction, which was his qualifying conviction, were admissible under section 6600, subdivision (a)(3). (*People v. Otto* (2001) 26 Cal.4th 200, 208 (*Otto*); see also Pen. Code, § 969b.) Moreover, Maganda himself testified to those facts. As a result, we reject Maganda's arguments that the trial court erred in allowing the expert witnesses to testify about the facts underlying his 1997 conviction. For similar reasons, the trial court did not err in allowing the experts to relate all of the case-specific facts Maganda admitted to during his testimony—namely, the facts underlying his 2003 convictions, his attempted molestation of his

nephew, and his refusal of treatment. Maganda's testimony constitutes independent proof of those facts.

However, the trial court erred in allowing Dr. Sims and Dr. Musacco to present many case-specific facts to the jury. All of the statements that Maganda made to psychiatrists, psychologists, hospital staff, medical personnel, and others they interviewed are hearsay. (See Evid. Code, § 1200, subd. (a).) Although Maganda's statements to those individuals constitutes a party admission (Evid. Code, § 1220), the documents recording those statements are a separate layer of hearsay for which there must be separate hearsay exception (*People v. Riccardi* (2012) 54 Cal.4th 758, 831, overruled in part on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216). Here, there is no such exception. Although statements contained in hospital records can sometimes qualify as business records under the business records exception (Evid. Code, § 1271; *People v. Nelson* (2012) 209 Cal.App.4th 698, 710; cf. *People v. Ayers* (2005) 125 Cal.App.4th 988, 994 [statements made by participants and bystanders contained in business records do not fall within business records exception]), they do so only if a proper foundation is laid by a custodian of records or other duly qualified witness (*In re R.R.* (2010) 187 Cal.App.4th 1264, 1279-1280). No such foundation was laid here. Also, all of the statements Maganda made in the parole charge sheet associated with his 2003 convictions are inadmissible because they do not pertain to a qualifying offense and thus fall outside the hearsay exception set forth in section 6600, subdivision (a)(3).

The People resist this conclusion, arguing that (1) Maganda's statements are party admissions, and (2) *Sanchez* looks to whether the case-specific statements are "covered by a

hearsay exception," not whether they were formally admitted into evidence, and the hearsay in this case is covered by such an exception. We reject both arguments. As noted above, the fact that Maganda's statements are party admissions does not render them admissible because there are additional layers of hearsay. And the People overstate the clarity of *Sanchez*'s holding when it comes to when case-specific statements may still be relayed by an expert. As noted above, *Sanchez* itself refers to formal admission into evidence *and* being covered by a hearsay exception. (*Sanchez*, *supra*, 63 Cal.4th at pp. 684, 686.) However, we need not decide this issue in this case because the hospital and other records in this case were neither formally admitted into evidence nor covered by any applicable hearsay exception.

D. Prejudice

We further conclude that there is a "reasonable probability" that the jury would have returned a different finding had the inadmissible evidence been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837.) The improperly admitted evidence includes Maganda's statements that "God intended for [him] to be a child molester," that he had molested dozens if not hundreds of children, that he was aware of what he was doing, and that he felt the children enjoyed being—and, in fact, wanted to be—molested. This evidence had a devastating quality to it that convinces us that, even with all of the admissible evidence that could support a finding of SVP status, it had an effect on the jury's finding. (Accord, *People v. Luker* (1965) 63 Cal.2d 464, 475 ["devastating" evidence was prejudicial under *Watson* standard].)

In light of this conclusion, we have no occasion to consider Maganda's separate argument that the erroneous admission of

hearsay also violated due process because it denied him the right of confrontation. (*Otto*, *supra*, 26 Cal.4th at p. 214.)

VI. Erroneous Admission of Chronological History Portion of Maganda's Prison Records

Maganda also argues that the trial court erred in admitting the six-page "chronological history" portion of Maganda's prison records. We review this evidentiary question for an abuse of discretion. (*Waidla*, *supra*, 22 Cal.4th at p. 725.)

Maganda is correct that the trial court erred in admitting the "chronological history" portion of his prison file because that portion falls outside of the hearsay exceptions set forth in section 6600, subdivision (a)(3) and Penal Code section 969b. (*Roa*, *supra*, 11 Cal.App.5th at p. 453 [so holding].) However, in light of our conclusion that we must reverse, we need not evaluate whether this error was prejudicial.

DISPOSITION

The judgment is reversed and remanded.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

I concur:

_____, J.
CHAVEZ

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ASHMANN-GERST, J.—Dissenting.

I respectfully dissent.

In section V., the majority addresses Alejandro Maganda's (Maganda) objection to the experts' relation to the jury of certain hearsay evidence. While I agree that some of the case-specific facts that Dr. G. Preston Sims and Dr. Michael Musacco related to the jury were properly presented and others arguably were not, I do not find any prejudice to Maganda. (*People v. Prieto* (2003) 30 Cal.4th 226, 247 [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].) The undisputedly admissible evidence of Maganda's horrific and heinous misconduct is overwhelming. For example, Maganda testified[1] about the circumstances involving his predicate offense in detail: In 1996, he pulled down the victim's shorts, kissed the victim's buttocks, and digitally penetrated him. According to Maganda, the victim said to him "you can continue doing more to me," which led Maganda to believe that the child had been molested previously. The victim also hugged and kissed Maganda, leading Maganda to believe that the child liked to be molested.

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1 In so concluding, I am not persuaded by Maganda's appellate counsel's speculation that Maganda might not have testified had the trial court not allowed this evidence. Maganda's trial attorney advised against him testifying, allowing the inference that Maganda was determined to testify no matter what.

Maganda also testified that he "made a sexual proposition" to a boy who Maganda believed was 13 or 14 years old following his deportation to Mexico and return to Los Angeles.

And, Maganda stated that he lied to the psychiatrists and psychologists when he told them that he had molested between 40 and 300 children. According to Maganda, he laughs when he hears evaluating doctors say that he is suffering from schizophrenia and pedophilia.

In light of this overwhelming evidence, it is not reasonably probable that the jury would have returned a verdict more favorable to Maganda had the evidence that the majority finds objectionable not been mentioned. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Archer* (2000) 82 Cal.App.4th 1380, 1390, 1394.)

_____, Acting P. J.
ASHMANN-GERST