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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. TYRONE SANDERS, Defendant and Appellant.	B276135 (Los Angeles County Super. Ct. No. ZM019113)

APPEAL from a judgment of the Superior Court of Los Angeles County, Harry Jay Ford III, Judge. Reversed.

Gerald J. Miller, 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, Senior Assistant Attorney General, Susan Sullivan Pithey and Heather B. Arambarri, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Tyrone Sanders, appeals from a judgment of commitment as a sexually violent predator (SVP) under the Sexually Violent Predators Act (SVPA) (Welf. & Inst. Code, § 6600 et seq.).[1] Defendant argues: "[T]he trial court fundamentally and prejudicially erred in admitting [hearsay] evidence regarding [defendant's] alleged rules violations and sexual misconduct while in prison or the state hospital, including specifically with respect to the alleged July 6, 2015 masturbation incident, the facts of which were disputed by [defendant]." Defendant raised this issue in the trial court. On appeal, defendant relies on *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), which was decided three days after defendant filed his notice of appeal. We agree reversal is required under *Sanchez*.[2]

II. BACKGROUND

Defendant was in custody from 1987 to 2005. He was placed at Atascadero State Hospital in 2005 and at Coalinga State Hospital in 2007, where he remained until the time of trial. On May 9, 2012, a petition was filed alleging that defendant met the criteria of a SVP. Specifically, the petition alleged defendant had been convicted of a sexually violent offense against one or more victims, suffered from one or more mental disorders that

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[1] Further statutory references are to the Welfare and Institutions Code unless otherwise noted.

[2] Defendant does not assert any due process violation.

made him a danger to others, and the mental disorders made it likely he would commit sexually violent crimes if released from custody. (§ 6600, subd. (a)(1).) In April 2016, a jury was selected to consider these questions. The jury found defendant was a SVP.

III. DISCUSSION

A. The Inadmissible Hearsay Evidence

Under the SVPA, a person found to be a SVP may be civilly committed at the conclusion of their prison term. (*People v. Shazier* (2014) 60 Cal.4th 109, 125-126; *Reilly v. Superior Court* (2013) 57 Cal.4th 641, 646.) The SVPA defines an SVP as: (1) "a person who has been convicted of a sexually violent offense against one or more victims"; (2) "who has a diagnosed mental disorder that makes the person a danger to the health and safety of others"; and (3) the diagnosed mental disorder makes it "likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1).) The burden is on the People to prove each of the foregoing three elements beyond a reasonable doubt. (§ 6604; *People v. Roa* (2017) 11 Cal.App.5th 428, 443; *People v. Burroughs* (2016) 6 Cal.App.5th 378, 404.)

The record shows there was no doubt the first element was met. Defendant had been twice convicted of forcible rape, as well as kidnapping, forcible oral copulation and assault with intent to commit rape. He committed the first rape in 1979, when he was 17 years old. In addition, the jury had before it substantial evidence relating to how these convictions fit the category of sexually violent offenses. We need not provide details of those offenses to resolve the issue before this court. Suffice it to say

they were violent sexual assaults that included choking, punching and threatening to kill the victims as well as the use, in one case, of a knife and, in another, a gun. Regarding the second element, there was equally strong evidence that the defendant suffered from paraphilic disorder, that is, "becoming sexually aroused to non-consenting forced sex with another individual," antisocial personality disorder and exhibitionistic disorder. It is the latter diagnosis that will be further discussed as well as evidence relating to the third element, i.e., the likelihood of reoffending.

During the course of the trial, the People's experts testified that there were at least 29 incidents of sexually acting out behavior that occurred while defendant was in a variety of custodial settings. The most recent such incident, and the one that is the subject of this appeal, was discussed in a July 6, 2015, Coalinga State Hospital interdisciplinary progress note. The People's experts relied on these incidents in diagnosing defendant with current mental disorders—paraphilic and exhibitionistic disorders—and in finding defendant was likely to reoffend.

Dr. Kathleen Longwell read reports by other evaluators who had reviewed defendant's prison records. Based on those reports, Dr. Longwell testified defendant had exposed his genitals to staff members at least once while in California Youth Authority custody, at least once in the county jail, and 29 times in state prison. Dr. Longwell further testified defendant's state hospital records revealed he had exposed his genitals to hospital staff members. According to the interdisciplinary progress note prepared by the staff person who witnessed the event, the last time defendant had exposed himself was on July 6, 2015. Defendant told Dr. Longwell he exposed himself to both male and

female staff members and he did so because he was angry. Dr. Longwell considered it significant that defendant had been engaging in exhibitionism since he was 17.

Dr. Harry Goldberg similarly testified defendant had first exposed himself to other people while a juvenile in California Youth Authority custody. Dr. Goldberg gleaned that information from a California Youth Authority record. Dr. Goldberg further testified based on defendant's prison records that defendant had been "infracted 29 times [while incarcerated] for exposing [himself] or masturbating in front of guards . . . ." State hospital treatment plans and interdisciplinary progress notes documented defendant had engaged in "incidents of exposure, masturbation" in the hospital setting including as recently as July 2015.

The admissibility of the foregoing evidence was discussed at length prior to the presentation of testimony. The trial judge agreed that the information in the reports was hearsay and was quite concerned about the potential prejudice if any of the details of the July 6, 2015 incident were mentioned. He thus directed the prosecutor to admonish his witnesses to refer to the incident in general terms, and the prosecutor had no problem doing so. The judge also said he would give a limiting instruction to the jurors specifically stating that the evidence was not admitted for its truth but only to evaluate the expert's opinion. And whenever reference was made to the incident by a witness, the judge repeatedly did so. Notwithstanding the best efforts of the trial court, we find that the admission of the experts' testimony about the July 2015 incident was error pursuant to our Supreme Court's recent decision in *Sanchez*. (Accord, *People v. Roa, supra*, 11 Cal.App.5th at p. 433; *People v. Burroughs, supra*, 6 Cal.App.5th at p. 383.)

In *Sanchez,* our Supreme Court held that when an expert relates to the jury case-specific facts—that is, "those relating to the particular events and participants alleged to have been involved in the case being tried"—and treats the content of those statements as true to support the expert's opinion, the statements are hearsay. (*Sanchez, supra*, 63 Cal.4th at pp. 676, 686.) The court explained: "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, it cannot logically be asserted that the hearsay content is not offered for its truth." (*Id.* at p. 682.) The evidence is inadmissible, therefore, unless it is independently proven or covered by a hearsay exception. (*Id.* at p. 686.) Moreover, the hearsay problem cannot be avoided by a limiting instruction such as was given in the present case. (*Id.* at p. 684.) The Supreme Court explained: "Once we recognize that the jury must consider expert basis testimony for its truth in order to evaluate the expert's opinion, hearsay . . . problems cannot be avoided by giving a limiting instruction that such testimony should not be considered for its truth." (*Id.* at p. 684.) The evidence defendant engaged in behavior of a sexual nature in the presence a hospital staff member on July 6, 2015, was inadmissible case-specific hearsay. It was not independently proven, nor was it covered by a hearsay exception.

The People argue the evidence was admissible under Evidence Code section 1220 because, "[Defendant] acknowledged his 29 write-ups for exposing his genitals and masturbating in front of staff during his interviews with the prosecution expert, Dr. Longwell . . . , and defense expert, Dr. Fisher . . . ." Evidence Code section 1220 provides: "Evidence of a statement is not made

inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity."

While we agree that the defendant's statements to the experts fall within this exception, he did not tell them that he engaged in the exhibitionistic behavior that is of concern to us here. The testimony by Dr. Longwell on this matter was quite general:

"Q. [Counsel] And you previously stated that you reviewed the custody records of Mr. Sanders as to the time when he was in CYA, jail, and prison. And what was the evidence that you would use as to those records that he has this [exhibitionistic] disorder?

"A. [Dr. Longwell] Because they were multiple, at least 29 write-ups for engaging in this type of behavior.

"Q. [Counsel] When you interviewed Mr. Sanders, did you talk about those incidents?

"A. [Dr. Longwell] I did.

"Q. [Counsel] What was discussed?

"A. [Dr. Longwell] Well, Mr. Sanders admitted that he did them. He said that--he said that he did them because he was angry and that he did--he said he directed them towards both male and female staff."

When the defendant talked to Dr. Fisher about his past exhibitionistic conduct, the focus was on events that happened long before July 2015. Dr. Fisher testified as follows:

"Q. [Counsel] Now, you were aware as part of your record review that there was documented as many as 29 incidences while Mr. Sanders was in custody, primarily while he was at

prison between 1985 and 2000 for acts of exposure, masturbating in his cell, for example?

"A. [Dr. Fisher] Correct.

"Q. [Counsel] Did you have any discussions with Mr. Sanders about that?

"A. [Dr. Fisher] I did.

"Q. [Counsel] Did he explain to you what ceased [*sic*] him to engage in that kind of conduct with reference to a particular month and year?

"A. [Dr. Fisher] Yeah, he did. He remembered it very clearly as the last time that he had exposed himself like that was --I think he said, February 2nd of 2000, maybe 2002. I have a date in my report, but it was 2000 or 2002."

The People further assert there was independent proof of defendant's sexual misconduct because defendant testified about it at trial. But the defendant's testimony did not include an admission that he performed an act with any type of sexual intent as characterized by the People's experts.[3]

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[3] The following exchange took place at trial:

"Q. [Counsel] And, similarly, when the experts were testifying, they described the fact that you had a write-up in July of 2015--although, this time not in the TV room--in the sports room stroking your penis inside of your pants.

"Did you receive that write-up?

"A. [Defendant] No. I received the notation, but it wasn't a write-up.

"Q. [Counsel] Okay. So it was noted; is that correct?

"A. [Defendant] Yes, it was.

B. Prejudice

We must determine whether it is reasonably probable the verdict would have been more favorable to defendant absent improper admission of the hearsay evidence. (*People v. Roa, supra*, 11 Cal.App.5th at pp. 454-455; *People v. Burroughs, supra*, 6 Cal.App.5th at p. 412.) In *Roa*, the Court of Appeal for this appellate district, Division 2, held the admission of expert testimony relating case-specific facts derived from district attorney investigator's reports and state hospital records was error under *Sanchez*. The reports and records were not admitted into evidence. There was no independent proof of the case-specific facts. And the evidence was not covered by a hearsay exception. (*People v. Roa, supra*, 11 Cal.App.5th at p. 452.) In *Burroughs*, Division 4 of the Court of Appeal for this appellate district held it was error under *Sanchez* to allow experts to relate case-specific facts reflected in probation reports, police reports and state hospital reports. (*People v. Burroughs, supra*, 6 Cal.App.5th at pp. 407-411.) The judgments in both *Roa* and *Burroughs* were reversed after each court concluded that without the inadmissible evidence, it was reasonably probable that the result would have been more favorable to the defendant.

"Q. [Counsel] And when you were approached by the female staff member, did you say, "I am going to take my dick out now, bitch?"

"A. [Defendant] No. What I said it was this here. "You got me F'd' up." I said, "I'm not taking it out on you where I put holes in my pants or my pockets. Check my chart. I used to get off on pulling it out on you, not stroking it inside of my pants." I said, "I don't get off like that." That's what I said."

At first glance, it would be hard to reach the conclusion that the evidence about the July 2015 incident would have made a difference in this case. After all, there was very strong evidence about the defendant's disturbing, violent and reprehensible behavior to support the diagnosis of paraphilic, exhibitionistic, and antisocial personality disorders. Even defendant's experts conceded that defendant was suffering from different mental diseases. And, based on the behavior that occurred up until 2000, there was clearly enough evidence to reach the conclusion that the defendant suffered from exhibitionistic disorder.

However, the jurors were called upon to find beyond a reasonable doubt that defendant was likely to reoffend. Factored into the opinion given by the People's experts on this issue was the evidence of *recent* exhibitionism. At least, that is how the behavior was characterized by the People's witnesses. The prosecutor, in his closing argument, also made reference to the recent offensive sexual behavior. He argued defendant had a very long history of exposing his genitals to and masturbating in front of others beginning when he was 17 or 18. He further argued the fact defendant had "acted out . . . as recently as July of 2015" was evidence of defendant's danger to others.

Moreover, the jury was clearly concerned about the July 2015 incident. They requested a read-back of defense expert Dr. Fisher's testimony on cross-examination "regarding [the] July 2015 incident, and documents marked for identification as Exhibit(s) 24 and/or 26." Dr. Fisher testified that on July 6, 2015, defendant was "touching himself" in a public area open to patients and staff; his hand was in his pants and he was making

stroking motions in his groin area.[4] Dr. Fisher's description of the July 2015 incident was based on a psychologist's handwritten note in defendant's chart summarizing nursing notes. The note was marked as exhibit 24. The jury later asked to see exhibit 24. The trial court responded that the exhibit was not admissible "and may not be considered for the truth of the statements contained therein."

The jury also requested a read-back of the cross-examination and re-cross-examination of defense expert Dr. Mary Jane Adam's testimony regarding the July 2015 incident. Dr.

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[4] Dr. Fisher testified: "Q [the prosecutor] Okay. And you talked about whether or not, essentially, the masturbation was done in private versus public being relevant; correct? [¶] A Yes. [¶] Q [the prosecutor] Was the masturbation that went on on the July 6th incident in [defendant's] room? [¶] [Defense counsel]: Objection. Assumes facts not in evidence that there was any masturbation. [¶] The Court: Overruled. [¶] The Witness: I was just going to say, I'm not even comfortable calling it 'masturbation' because the note, I believe, says 'touching himself.' But, no, it wasn't in his own personal bedroom. No. [¶] Q [the prosecutor] . . . The note actually said his hand was in his pants. He was making stroking motions in his groin area; is that correct? [¶] A There's different versions of -- [¶] Q [the prosecutor] Well, I'm referring to exhibit 24. That is the only marked exhibit as to this incident that we've now laid foundation for and viewed in court. [¶] As to exhibit 24, which is that note, that is how it is described; correct? [¶] A I'm sure you're reading it correctly off there. Yes. [¶] Q [the prosecutor] And that incident did not take place in his room; did it? [¶] A No. [¶] Q [the prosecutor] Where did it take place? [¶] A In the sports room I think it was called. [¶] Q [the prosecutor] And the sports room is a public room open to all of the patients; correct? And staff come in and out? [¶] A Correct."

Adams had not reviewed any Coalinga State Hospital records, psychiatric notes or reports from July 2015 in forming an opinion about defendant's current mental condition. Dr. Adams agreed the psychologist's handwritten note in defendant's chart, exhibit 24, documented "an incident involving masturbation and exposing." Dr. Adams opined the conduct could be relevant to a diagnosis but more information was needed. That it happened in July 2015 would be relevant as the most recent incident. Dr. Adams also testified the 29 incidents of defendant exposing himself while in prison did not fit the criteria for an exhibitionistic disorder diagnosis because the female correctional officers defendant directed the conduct at were not strangers to defendant. As a result, defendant's motivation was different.

Also before the jury was evidence that defendant had recently suffered an episode of Bell's Palsy, a serious illness, and had been diagnosed with diabetes. Dr. Adams opined defendant's health conditions reduced his risk of reoffending. Another defense expert, Dr. Fisher, testified the risk of reoffending decreased with age. He cited studies showing persons aged 55 had a recidivism rate between 5 and 10 percent. At the time of trial, defendant was 54. Defendant's age factored into Dr. Fisher's opinion defendant was not likely to reoffend. Defendant testified that while in the state hospitals he had endured two shoulder operations and suffered from diabetes, high blood pressure and deterioration of the spine.

Granted, the exposure and masturbation evidence pales in comparison to the lurid, outrageous and violent acts in defendant's background. Moreover, the amount of testimony regarding the July 6, 2015 incident was not extensive. However, the experts squarely placed before the jury evidence defendant

had acted out sexually beginning when he was 17 and continuing into his 50s. That defendant had engaged in such conduct as recently as July 6, 2015, less than a year prior to trial, was very persuasive evidence that defendant had current mental disorders that made him a danger to others and made it likely he would reoffend if released. It is reasonably probable the jury's verdict would have been more favorable to defendant had the case-specific hearsay evidence been excluded.

IV. DISPOSITION

The judgment of commitment is reversed.

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LANDIN, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

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