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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. SERAFIN GARCIA, Defendant and Appellant.	B266805 (Los Angeles County Super. Ct. No. ZM007118)

APPEAL from an order of the Superior Court of Los Angeles County, Stanley Blumenfeld, Judge. Reversed.

Rudy Kraft, 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, Assistant Attorney General, Susan Sullivan Pithey, Scott A. Taryle and Esther P. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

In 1994, appellant Serafin Garcia was convicted of two counts of lewd acts on a child, in violation of Penal Code section 288, subdivision (a), along with two counts of first degree burglary, in violation of Penal Code section 459. Prior to his scheduled release from prison in 2004, the People filed a petition to commit Garcia as a sexually violent predator within the meaning of the Sexually Violent Predator Act. (Welf. & Inst. Code, § 6600 et. seq.[1] (SVPA or Act).) The People alleged that Garcia had been convicted of multiple sexually violent offenses, as that term is defined under the SVPA. (See § 6600, subd. (a)(2).) In addition to his convictions for lewd acts on a child, the People alleged that Garcia had been convicted in 1984 of one count of forcible rape, in violation of then-Penal Code section 261, subdivision (2).[2] After many years of delay, the case went to trial in 2015. The jury found the petition true, and the trial court ordered Garcia committed indefinitely to the custody of the Department of Mental Health.

Garcia challenges the trial court's order. He contends that the prosecution's expert witnesses included extensive inadmissible case-specific hearsay in their testimony against him, and that in consequence, his trial was a miscarriage of justice. We agree and reverse.

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[1] Unless otherwise specified, subsequent statutory references are to the Welfare and Institutions Code.

[2] In 1990, the Legislature amended Penal Code section 261. Subdivision (2), under which Garcia was convicted, was renumbered subdivision (a)(2) without relevant substantive change. (See Stats. 1990, ch. 630, § 1.)

FACTUAL BACKGROUND AND TRIAL PROCEEDINGS

The trial court admitted into evidence records of Garcia's two convictions for sexually violent offenses, including transcripts of preliminary hearings in those cases. The following account is drawn from the transcripts of those preliminary hearings.

A. The 1984 Conviction

At about 1:40 a.m. on March 13, 1984, Garcia approached R.P. as she was walking near her home in a trailer park in South El Monte. Garcia grabbed her, pushed her down on the ground, lay on top of her, and began kissing her and touching her thighs. A woman in a nearby trailer came outside when she heard R.P.'s cries for help, and Garcia fled.

D.S. lived in the same trailer park and was legally blind, able to see only through her peripheral vision. Approximately 20 minutes later, D.S. was awakened by loud banging sounds. She got up to investigate, and discovered Garcia inside her trailer. He grabbed her, and they fell to the floor. She told him she was thirsty, so he let her up to pour a glass of water. D.S. tried to talk to Garcia, but he would not respond. He grabbed her again, unfastened her bra, and touched her breasts. D.S. was able to escape briefly, but Garcia pulled her back inside the trailer. He let her up again, and she went to make coffee. She struck him on the head with the coffee cup, and he grabbed her and pulled her into the bedroom. Garcia threw D.S. on the bed, undressed her, and raped her. Afterward, he fell asleep on the bed, and D.S. was able to escape and find a friend to call the police. When the police arrived, Garcia was still asleep in the bed.

Garcia ultimately pled guilty to one count of forcible rape, one count of first degree burglary, and one count of assault with intent to rape.

B. The 1994 Conviction

V.S., age nine, testified that Garcia came into her house around 4:00 a.m. on September 13, 1993. He came into her bed and promised to give her money if she let him touch her private parts. He touched her left leg above the knee and tried to open her shorts, and he put his hand under her blouse. She moved his hand away. She yelled, and he left the room. By the time V.S.'s parents woke up to see what was happening, Garcia had already left.

F.M. lived in El Monte in a home with his two young nieces, D. and Y. D., who was eight years old at the time, testified that on December 19, 1993, Garcia entered her bedroom and got into bed with her and Y. Garcia touched D. on her breast and her waist area. He told her to be quiet, or he would hit her. Garcia also hugged Y., age seven, and touched her hair. F.M. heard screaming from one of the girls' bedrooms. F.M. ultimately found Garcia in the garage stealing a bicycle and Garcia fled. F.M. and D. drove around the neighborhood searching for Garcia and eventually found him nearby as the police were taking him into custody.

Garcia was convicted after a court trial of two counts of lewd acts on a child and two counts of first degree burglary.

C. Expert Testimony at Trial

The bulk of the testimony at trial came from experts in psychology and psychiatry, including three experts who testified on behalf of the People, and two who testified for Garcia. The People's experts testified that, in their opinion, Garcia had a diagnosed mental disorder that contributed to his sexually violent acts, and that he was likely to commit similar offenses if released. Garcia's experts testified that they did not diagnose Garcia with a mental disorder.

In explaining the basis for their conclusions, the experts testified in detail regarding Garcia's previous cases, including

the two prior convictions for sexually violent offenses described above. (See § 6600, subd. (a)(2).) In SVPA proceedings, these offenses are often referred to as "qualifying convictions." The experts also testified about several other incidents in which Garcia was either investigated or convicted of offenses that were not qualifying convictions. The most detailed description of these incidents came from the testimony of Dana Putnam, a clinical and forensic psychologist who evaluated Garcia and testified for the People. Putnam explained that he had reviewed medical and hospital records of evaluations of Garcia, along with legal documents pertaining to Garcia's convictions, such as police reports, abstracts of judgment, and probation officers' reports. The People did not seek to admit into evidence preliminary hearing testimony or other documentation of the non-qualifying offenses.[3]

Putnam described an incident in 1981 for which Garcia was convicted of assault and battery of a woman named Grace. According to Putnam, "at 12:45 in the morning Grace was walking down an alley. She was jumped from behind and her mouth was covered and she was pulled from the alley towards a garage area, and she was screaming and her screaming alerted some men who were nearby who ran to her assistance. And when the men ran to her assistance, Mr. Garcia fled the scene." In Putnam's opinion, "the only sensible explanation for the behavior is that [Garcia] was intending to sexually assault" Grace.

Putnam went on to describe the events surrounding Garcia's 1984 convictions for forcible rape, burglary, and assault with intent to rape. His account of those events substantially corresponds with that described above. (See Factual Background and Trial Proceedings, part A., *ante*.)

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[3] As is discussed below, at the time of the trial, expert testimony regarding hearsay statements on which the expert relied were admissible at trial regardless of the admissibility of the underlying hearsay.

Putnam later described a 1992 incident in which Garcia came into contact with a 10-year-old girl named Claudia. Putnam testified that Claudia "was walking down the street and . . . noticed that a man was following her. And she was getting nervous about this man who was following her. She's looking over her shoulder. She starts to speed up to walk faster; he starts to speed up. He's about 10 to 15 feet behind her. She gets very concerned and she runs into an office. And she runs into the office and then Mr. Garcia is seen looking around and waving and trying to find her." According to Putnam, when the police arrived, Garcia spontaneously "said he wasn't following that little girl down Rush Street, or something to that effect." There is no indication in the record that Garcia was charged with any crime following this incident.

Shortly thereafter, Putnam testified about another incident from 1992. According to Putnam, "just two months [after Garcia allegedly followed Claudia,] there was a burglary and attempted rape and this involved a family and a separate offense with a woman. There was a woman who was sleeping on the floor with her two daughters and she awoke to see Mr. Garcia lying on his side staring at . . . her 10-year-old daughter." Putnam testified that this occurred at about 5:00 a.m. When Garcia "saw the mother awaken[ ] and noticed him . . . he took off with the bicycle from the house."

Approximately one hour later, Garcia "show[ed] up in the bed of a woman in a home for mentally unstable persons. And this was 42-year-old Barbara's bed. Barbara woke up and found him there. He put a hand over her mouth and another hand was used to choke her. And she said she feared for her life and was afraid she was going to be raped and killed and she screamed. And then he left after she screamed and he was later apprehended." The record indicates that Garcia was convicted of one count of first degree burglary for this offense.

Putnam then described the facts surrounding Garcia's 1994 convictions for burglary and lewd acts on a child. His account corresponded substantially with the preliminary hearing transcripts described above. (See Factual Background and Trial Proceedings, part B, *ante*.)

The other expert witnesses in the case testified about these same events. None of the other witnesses described the facts of Garcia's offenses in the same detail as Putnam did.

DISCUSSION

The SVPA authorizes the state to continue to confine certain inmates on an indefinite basis after the expiration of the term of their prison sentences if the state can show that those inmates are SVPs. (See *People v. Allen* (2008) 44 Cal.4th 843, 857.) The Act defines SVP as "a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1).) For purposes of the SVPA, sexually violent offenses include, among others, rape and lewd acts on a child. (See § 6600, subd. (b).) In order to commit an inmate under the Act, after filing a petition seeking commitment of an inmate under the Act, the People must first establish that there is "probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release." (§ 6602.) Subsequently, in a trial during which the inmate is entitled to appointed counsel and a jury (§ 6603, subd. (a)), the People must prove beyond a reasonable doubt that the inmate is an SVP. (§ 6604.)

The Act requires the participation of experts in psychiatry or psychology. Prior to filing a petition seeking to commit an inmate, the Department of Corrections and Rehabilitation must refer the inmate to the State Department of State Hospitals

for evaluation by two practicing psychiatrists or psychologists. (§ 6601, subds. (a)(1), (c) & (d).) Without the agreement of two evaluators that the inmate meets the criteria for commitment, commitment proceedings may not continue. (§ 6601, subds. (d) & (e).) At trial, the inmate is entitled to retain experts of his own to examine him. (§ 6603, subd. (a).) Because of the central role of psychologists and psychiatrists in evaluating inmates, expert testimony almost invariably plays a central role in proceedings under the SVPA: " 'In civil commitment cases, where the trier of fact is required by statute to determine whether a person is dangerous or likely to be dangerous, expert prediction may be the only evidence available.' " (*People v. Lowe* (2012) 211 Cal.App.4th 678, 684, quoting *People v. Ward* (1999) 71 Cal.App.4th 368, 374.)

Expert testimony in SVPA proceedings is subject to the same rules of evidence as in other cases, including the law pertaining to hearsay. Evidence Code section 1200, subdivision (a), defines hearsay as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." Unless an exception applies, hearsay evidence is inadmissible. (Evid. Code, § 1200, subd. (b).) Expert witnesses are frequently allowed to testify regarding out-of-court statements that otherwise would be barred by the hearsay rule under two separate justifications. First, experts may testify regarding general knowledge in their fields of expertise. (See Evid. Code, § 801, subd. (b).) As the court explained in *People v. Sanchez* (2016) 63 Cal.4th 665, 676 (*Sanchez*), " '[t]he common law recognized that experts frequently acquired their knowledge from hearsay, and that "to reject a professional physician or mathematician because the fact or some facts to which he testifies are known to him only upon the authority of others would be to ignore the accepted methods of professional work and to insist on . . . impossible standards." ' "

Second, experts have been allowed to testify as to statements containing specific information regarding the case at hand, on the theory that the information is not offered for the truth of the matter asserted, and hence did not fall within the definition of hearsay at all. (See Evid. Code, § 1200, subd. (a).) Instead, the testimony was admitted only for the purpose of explaining the basis for the expert's opinion. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 618-619 (*Gardeley*), disapproved by *Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13.)

In *Sanchez*, our Supreme Court took issue with this second type of expert testimony. Following the reasoning of a majority of justices of the United States Supreme Court in *Williams v. Illinois* (2012) 567 U.S. 50 [132 S.Ct. 2221, 183 L.Ed.2d 89] (*Williams*), the *Sanchez* court concluded that it was impossible for a factfinder to evaluate experts' case-specific hearsay statements without considering those statements for the truth of the matter asserted: "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. In such a case, 'the validity of [the expert's] opinion ultimately turn[s] on the truth' (*Williams, supra,* 567 U.S. at p. ___ [132 S.Ct. at p. 2258] (conc. opn. of Thomas, J.)[ ]) of the hearsay statement. If the hearsay that the expert relies on and treats as true is *not* true, an important basis for the opinion is lacking." (*Sanchez*, *supra*, 63 Cal.4th at pp. 682–683.)

The *Sanchez* court concluded[4] as follows: "If an expert testifies to case-specific out-of-court statements to explain

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[4] The court in *Sanchez* also analyzed expert testimony on out-of-court statements in light of the Sixth Amendment's confrontation clause. (*Sanchez*, *supra*, 63 Cal.4th at pp. 680, 685.) Garcia concedes that because SVPA proceedings are civil, rather than criminal, in nature, the federal and state

the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception." (*Sanchez*, *supra*, 63 Cal.4th at pp. 684.) The court clarified that "[a]ny expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general 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.)

One published case, *Burroughs*, *supra*, 6 Cal.App.5th 378, has applied *Sanchez* to civil proceedings under the SVPA.[5] The court noted that in that case, "the People's experts related extensive . . . case-specific facts they gleaned from documents such as police reports, probation reports, and hospital records. The sole reason the trial court gave for admitting this testimony was that it served as the basis of their opinions." (*Id.* at p. 407, fn. omitted.) The same is true regarding the extent of case-specific expert hearsay testimony in this case, and we reach the same conclusion as did the *Burroughs* court: "Under *Sanchez*, admission of expert testimony about case-specific facts was error—unless the documentary evidence the experts relied upon was independently admissible." (*Id.* at p. 407.)

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confrontation clauses do not apply to them. (*People v. Burroughs* (2016) 6 Cal.App.5th 378, 405, fn. 6 (*Burroughs*).) We therefore do not address this aspect of the *Sanchez* opinion.

[5] Because this case was not final at the time of the *Sanchez* decision, we follow the "basic postulate of appellate review" that the current state of the law applies on appeal, rather than the law at the time of trial. (*People v. Charles* (1967) 66 Cal.2d 330, 335.) Hence, the law established in *Sanchez* applies to this case.

One relevant hearsay exception, which applies only in the context of proceedings under the SVPA, is established by section 6600, subdivision (a)(3). That subdivision provides in part that "[c]onviction of one or more of the crimes enumerated in this section shall constitute evidence that may support a court or jury determination that a person is a sexually violent predator, but shall not be the sole basis for the determination. The existence of any prior convictions may be shown with documentary evidence. The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of State Hospitals." (§ 6600, subd. (a)(3).) Our Supreme Court has held that "the only reasonable construction of section 6600[, subdivision] (a)(3) is that it allows the use of multiple-level hearsay to prove the details of the sex offenses for which the defendant was convicted." (*People v. Otto* (2001) 26 Cal.4th 200, 208; accord, *Burroughs*, *supra*, 6 Cal.App.5th at p. 409.) The trial court admitted into evidence documents pertaining to Garcia's qualifying convictions, and there was no error in allowing experts to testify as to information contained in those documents.[6]

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[6] Garcia contends that, although documents pertaining to his qualifying convictions were admissible pursuant to the hearsay exception established in section 6600, subdivision (a)(3), the trial court erred by allowing the People's expert witnesses to testify about specific facts contained in those documents. But this position is inconsistent with our Supreme Court's holding in *Sanchez* that "[w]hat 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*." (*Sanchez*, *supra*, 63 Cal.4th at p. 686, second italics added; accord, *Burroughs*, *supra*, 6 Cal.App.5th at p. 407.) The presence of competent evidence regarding the subject of the

By its own terms, the hearsay exception created by section 6600, subdivision (a)(3), applies only to documentary evidence of convictions for sexually violent offenses. Although the People are correct that the SVPA by design requires that experts play a central role in examining inmates and testifying regarding their opinions, nothing in the Act indicates that experts in SVPA proceedings are free from ordinary restrictions on their testimony. Accordingly, we agree with the court in *Burroughs* that the SVPA does not provide for the admission of documentary evidence of offenses other than qualifying convictions. (See *Burroughs*, *supra*, 6 Cal.App.5th at p. 411.)

In this case, the expert testimony contained voluminous amounts of case-specific hearsay pertaining to non-qualifying offenses. As detailed above, Putnam's testimony essentially summarized the facts of several cases that were not qualifying convictions and for which the People did not seek to admit documentation into evidence. In one of those cases, Putnam alleged as fact misconduct by Garcia in a case in which he was not convicted and appears never even to have been arrested or charged.

The People contend that Garcia forfeited any objection to the admission of the case-specific hearsay by failing to object at trial. We disagree. Although a party must ordinarily raise an issue at the trial court in order to preserve the argument on appeal, that requirement is excused when an objection would be futile. (See *People v. Anderson* (2001) 25 Cal.4th 543, 587.) As we have described above, at the time of trial, Supreme Court precedent allowed for the admission of case-specific hearsay in expert testimony as a means of establishing the basis of the expert's opinion. (See *Gardeley*, *supra*, 14 Cal.4th at pp. 618-619, disapproved by *Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13.)

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experts' testimony reduces the risk from the testimony, in that the jury may evaluate for itself the evidence on which the expert relied, without needing to take the expert at his or her word.

In at least one case in which a defendant objected to the admission of case-specific hearsay in expert testimony, the court stated that it found the argument "compelling" but rejected it because "we must follow *Gardeley* and the other California Supreme Court cases in the same line of authority." (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1131.) Garcia had no reason to believe his objection would be any more successful in this case.

We review errors regarding the admission of evidence under the standard established in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). Under this standard, an error requires reversal if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Ibid.*)

The errors in this case require reversal. The hearsay in this case allowed the People to argue more effectively that Garcia's behavior fit a well-established pattern, and that his actions were the consequence of a mental disorder. This is crucial in a commitment proceeding under the SVPA, because in order to prove that an inmate is an SVP, it is not enough to show simply that the inmate has been convicted of qualifying offenses. Indeed, the Act specifies that jurors must "be admonished that they may not find a person a sexually violent predator based on prior offenses absent relevant evidence of a currently diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(3).) The People contend that the admission of information on non-qualifying offenses was harmless because the jury's verdict was ultimately based on the experts' opinions regarding Garcia's mental state, not on the specific acts he committed. But a jury's decision whether to accept an expert's opinion necessarily depends on the facts supporting that opinion: "The jury may conclude a fact necessary to support the [expert's] opinion has not been adequately proven, even though there may be

some evidence in the record tending to establish it." (*Sanchez*, *supra*, 63 Cal.4th at p. 675.) Garcia's actions, including his non-qualifying offenses, provided important support for the opinions of the People's experts. Without the testimony about those offenses, the jury might have reached a different conclusion. Just as in *Burroughs*, we cannot conclude the error in this case was harmless because "the improperly admitted hearsay permeated the entirety of appellant's trial and strengthened crucial aspects of the People's case." (*Burroughs*, *supra*, 6 Cal.App.5th at p. 412.)

The People contend that any error in admitting the hearsay regarding non-qualifying offenses was harmless because many of the materials the experts relied on were hospital or medical records that would have been admissible under the business records exception to the hearsay rule. (See Evid. Code, § 1271.) We are not persuaded. The People relied on pre-*Sanchez* case law allowing experts to describe the hearsay that formed the basis of their opinions, and for that reason the record does not demonstrate that the facts relied on by the experts met the *Sanchez* criteria. In any case, a great deal of the facts on which Putnam relied did not come from medical records at all.

DISPOSITION

The order of the trial court is reversed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

LUI, J.