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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

Conservatorship of the Person of S.A.	2d Civil No. B276247 (Super. Ct. No. 14PR-0145) (San Luis Obispo County)
PUBLIC GUARDIAN OF THE COUNTY OF SAN LUIS OBISPO, as Conservator, etc., Petitioner and Respondent, v. S.A., Objector and Appellant.	

S.A. appeals an order granting the petition of the Public Guardian of the County of San Luis Obispo (Public Guardian) for reappointment as the conservator of her person. A jury found beyond a reasonable doubt that she continues to be gravely disabled as a result of mental disorder. (Welf. & Inst.

Code,[1] § 5000 et seq.; Lanterman-Petris-Short Act (LPS Act).) S.A. contends that a special instruction that told the jury that conservatorship ends no more than one year later violates due process by reducing Public Guardian's burden of proof. We agree the instruction was erroneous, but conclude it was not prejudicial, and affirm.

BACKGROUND

S.A. suffers from schizoaffective disorder. She has not lived independently for more than 20 years. She has had many commitments to the psychiatric health facility and several LPS conservatorships.

S.A.'s mother obtained a restraining order after S.A. tried to stab her with a knife. S.A. then violated the restraining order. The court found her incompetent to stand trial on the resulting misdemeanor charge and two psychiatrists concluded she was gravely disabled. The court appointed Public Guardian to be conservator of her person for one year. It renewed the appointment in June 2015 for another year.

During the renewed conservatorship, S.A. lived at board and care facilities. She did not always take her medication. In August of 2015, she lit another resident's hair on fire. In May of 2016, she fractured her roommate's eye socket with a rock while her roommate was sleeping. S.A. was admitted to the psychiatric health care facility three times during the year.

Toward the end of the year, Public Guardian requested reappointment. S.A. challenged its petition and requested a jury trial. (§ 5350, subd. (d).) Before trial, Public Guardian filed proposed jury instructions that included a special

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise stated.

instruction that conservatorship ends after one year, during which the conservatee is entitled to further hearings on whether she is gravely disabled, and that the conservator could end the conservatorship sooner. S.A. did not object.

Rose Drago, M.D., testified that as a result of S.A.'s schizoaffective disorder, she is unable to provide for her basic personal needs. S.A.'s paranoia, distrust, and lack of insight impair her ability to provide for her own food, clothing and shelter, even when she is stabilized by medication. And S.A. has "really no history . . . of . . . being medication compliant on her own." S.A. was not medicated when she lit the woman's hair on fire or when she hit her roommate's face with a rock. Drago based her opinion on her personal observations over 10 years during which she periodically treated and evaluated S.A., and a pretrial review of medical records and interview of S.A.

Drago told the jury that conservatorship lasts for one year. She said it occasionally ends sooner, sometimes because the person is evaluated sooner and sometimes by mutual agreement.

S.A. testified that she does not have a mental illness and does not want medication. S.A. said she has two "Section 8" apartments, and "went together" with someone to build a home in San Miguel, "and ha[s] been locked up ever since they knew I had a home." For employment, she is "a secretarial science legal with a minor, with a scholarship." "[T]o feed [her]self" she "called San Luis Obispo Mental Health and ordered a half a head of cattle for $250."

S.A. said she lit the other resident's hair on fire because the woman is homosexual and tried to infect S.A. with lupus by putting her tongue in S.A.'s ear. S.A. hit her roommate

with a rock because the roommate was trying to seduce her and S.A. found ketchup in her drawer and food plates by her bed which told her the roommate was abusing her while she slept. S.A. said she had prior conservatorships and that she had been released previously.

The court instructed the jury: "A conservatorship automatically terminates in one year, unless another petition is filed at the end of the one-year period and it is proven in a court of law that the conservatee is presently gravely disabled. During that year, the conservatee is entitled to other hearings on whether she is presently gravely disabled. This trial now being conducted constitutes such a hearing. During the conservatorship year, the conservator may also end the conservatorship, based on a qualified opinion that the conservatee is no longer gravely disabled."

The court also instructed the jury that it "must not consider or discuss the type of treatment, care or supervision that may be ordered if a conservatorship is established." (CACI No. 4004.) It instructed the jury that S.A. is presumed not to be gravely disabled and it was Public Guardian's burden to prove beyond a reasonable doubt that she is.

In closing, counsel for Public Guardian told the jury, "you have an opportunity here to help a very ill woman get the help she needs," and asked the jury to "permit [Public Guardian] to continue with her staff to ensure that [S.A.] gets the care she needs." She told the jury that in 1968 "mentally ill people were being locked up and . . . in locked facilities for a very long period of time," but now, under the LPS Act, "the idea is, let's make sure that we bring them back every year for a reappointment and for a hearing to make sure that the person still meets that definition

that the Legislature put in place of a grave disability." Counsel also said that, "the law requires [her] to prove . . . that [S.A.] does suffer from a mental disorder and, as a result of that disorder, she is unable to provide for her food, clothing, or shelter."

DISCUSSION

The LPS Act authorizes the superior court to appoint a conservator of the person for one who is gravely disabled. (§ 5350.1; *Conservatorship of John L.* (2010) 48 Cal.4th 131.) Grave disability exists when "as a result of a mental health disorder, [the person] is unable to provide for . . . her basic personal needs for food, clothing, or shelter." (§ 5008, subd. (h)(1)(A).) The proposed conservatee has a right to jury trial on the question of grave disability at which the party urging conservatorship has the burden of proof beyond a reasonable doubt. (*Conservatorship of John L.*, at p. 143.) S.A. contends the instruction violates her right to due process because it minimizes the consequences of the verdict thereby reducing the burden of proof.

S.A. did not forfeit her claim when she did not object to the instruction. (Code Civ. Proc., § 647; *Maureen K. v. Tuschka* (2013) 215 Cal.App.4th 519, 530 ["[I]n a civil case, a party is deemed to have objected to an erroneous jury instruction; there is no waiver for failure to object"].) S.A did not affirmatively agree to the instruction, and no exception to this rule against forfeiture applies because S.A. does not claim on appeal that a correct instruction should have been modified or clarified. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 948; *Conservatorship of Gregory* (2000) 80 Cal.App.4th 514, 520.) We therefore do not reach S.A.'s alternate claim of ineffective assistance of counsel.

LPS commitment proceedings are subject to the due process clause because significant liberty interests are at stake.

(*Conservatorship of John L.*, *supra*, 48 Cal.4th at p. 150.) Conservatorship can result in involuntary confinement, loss of personal rights, and social stigma. (*Ibid.*) But an LPS proceeding is civil. (*Conservatorship of George H.* (2008) 169 Cal.App.4th 157, 162 [no sua sponte duty to instruct jury that LPS conservatorship not necessary for a person who can accept voluntary treatment].) "[T]he stated purposes of the LPS Act foreclose any argument that an LPS commitment is equivalent to criminal punishment in its design or purpose." (*Conservatorship of John L.*, at p. 151.) Thus, not all safeguards required in criminal proceedings are required in LPS proceedings. (*Ibid.* [due process did not require personal presence of proposed LPS conservatee at trial].)

In criminal cases, jurors must not consider the consequences of the verdict in arriving at their decision. (*People v. Moore* (1968) 257 Cal.App.2d 740, 750.) For example, in *People v. Sorenson* (1964) 231 Cal.App.2d 88, 91-92, the prosecutor committed reversible misconduct when he argued in a sanity trial the defendant should be imprisoned, not hospitalized, because a doctor might "turn[] him loose." (*Id.* at p. 91.) The only question before the jury was whether or not he was sane when he committed the crime. (*Ibid.*) The argument was an improper "appeal to the jurors to abdicate their lawful role and to decide the issue of sanity in terms of their own opinion that imprisonment, not hospitalization, was [the] defendant's proper fate. In effect, the district attorney was urging the jury to usurp functions reposed by statute in other hands." (*Id.* at p. 92.) The argument also misstated the law by suggesting that if the defendant were hospitalized, a doctor could release him without a

judicial hearing. (*Ibid.*) The evidence was close and a miscarriage of justice required reversal. (*Id.* at p. 94.)

S.A. asks us to extend the rule applied in criminal cases to LPS proceedings as a matter of due process because of the important liberty interests at stake. Our colleagues in the Fifth Appellate District extended the rule to civil commitment proceedings for mentally disordered sex offenders (MDSO) and sexually violent predators (SVP) in *People v. Allen* (1973) 29 Cal.App.3d 932, 934 (*Allen*) and *People v. Rains* (1999) 75 Cal.App.4th 1165, 1167 (*Rains*). But neither case relied on due process as a basis for the holding. Instead, the improper evidence was deemed irrelevant.

In *Allen*, *supra*, 29 Cal.App.3d at page 934, the trial court committed prejudicial error when it allowed the prosecutor to argue "[Allen] needs help" and to ask questions about the benefits that could flow from involuntary treatment as an MDSO. The appellate court held, "it is improper for the jury to consider what disposition of the defendant may be made or what treatment he may receive." (*Id.* at p. 936.) It reasoned that treatment information is irrelevant to the sole issue for the jury: whether "the person [is] a mentally disordered sex offender." (*Id.* at p. 935.) Instead, a complex statutory framework entrusts decisions about treatment to the judge, with input from psychiatrists and the state hospital. (*Ibid.*) The court held that the principles which prohibit consideration of the consequences of the verdict in criminal cases apply to MDSO proceedings which are civil but, "in many respects, . . . penal in nature and effect" (*id.* at pp. 937-938), but it did not articulate the standard by which it measured prejudice. It stated the evidence was "close" and the statements that a verdict would result in beneficial and

curative treatment were misleading because even if the jury found Allen was an MDSO, a court could find he was not amenable to treatment and incarcerate him. (*Id.* at pp. 934, 938.)

Similarly, in *Rains*, a trial court erred when it allowed the prosecution's experts in an SVP trial to testify that a "true" finding would result in civil commitment to a psychiatric facility for treatment and that the commitment would be reviewed every two years. (*Rains*, *supra*, 75 Cal.App.4th at p. 1171.) The appellate court found the evidence was irrelevant to the two questions before the jury: (1) whether the defendant had a diagnosed mental disorder, and (2) whether that disorder makes him a danger to the health and safety of others in that it is likely he will engage in sexually violent criminal behavior. (*Ibid.*) But the error did not "result in a miscarriage of justice" as would be required for reversal under Evidence Code section 353 and article VI, section 13 of the California Constitution. (*Id.* at p. 1170.) The evidence that Rains was an SVP was undisputed, Rains presented no defense, the testimony was a brief response to a juror's concern that a "true" finding would result in a prison sentence, the trial court instructed the jury not to consider the consequences of the verdict, and the prosecutor told the jury, "[i]t is not your function to decide what should happen to" Rains. (*Id.* at pp. 1170-1172.)

As in *Allen* and *Rains*, information about the consequences of conservatorship for S.A. was irrelevant to the only question before S.A.'s jury: whether, as a result of a mental health disorder, she is unable to provide for her basic personal needs for food, clothing, or shelter. (§ 5008, subd. (h)(1)(A).) The instruction was erroneous.

But no miscarriage of justice resulted. Other instructions clearly stated the burden of proof and identified the sole question before the jury. Counsel for Public Guardian emphasized these instructions in closing argument. And the evidence was not close. Drago's testimony that S.A.'s paranoia, distrust, and lack of insight impair her ability to provide for her own food, clothing and shelter was based on personal observations over many years and was uncontradicted by any expert. S.A. reinforced this testimony when she testified about the many people she believes are preying upon her. S.A. did not articulate any rational plan for meeting her basic personal needs. The jury deliberated for 20 minutes and unanimously agreed that S.A. is gravely disabled beyond a reasonable doubt.

Where an instruction in a criminal case relieves the prosecutor of its burden to prove every element of the offense beyond a reasonable doubt, the error is structural and reversal is required. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282.) But this is a civil case. (*Conservatorship of John L.*, *supra*, 48 Cal.4th at p. 150.) And even if we were to apply the standard of *Chapman v. California* (1967) 386 U.S. 18, on the theory that the invitation to consider irrelevant information undermined S.A.'s due process right to a fair trial (see *Bruton v. Unites States* (1968) 391 U.S. 123, 131, fn. 6), we would find it harmless beyond a reasonable doubt. The overwhelming evidence of S.A.'s grave disability precludes reversal.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Denise de Bellefeuille, Judge

Superior Court County of San Luis Obispo

Jean F. Matulis, under appointment by the Court of Appeal, for Objector and Appellant.

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