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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. JERMAINE JOHNSON, Defendant and Appellant.	2d Crim. No. B277314 (Super. Ct. No. 16PT-00454) (San Luis Obispo County)

Jermaine Johnson appeals from the judgment after the trial court found he was a mentally disordered offender (MDO). (Pen. Code, § 2962 et seq.)[1] The commitment offense was for residential burglary and involved a forcible entry in which appellant kicked open the door and entered holding a knife. The trial court found that the offense satisfied the threat

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

of force or violence criterion of section 2962, subdivision (e)(2)(P) or (Q).[2] We affirm.

Facts and Procedural History

In 2013, appellant kicked open the front door of a board and care home and, brandishing a knife, confronted a woman inside the house. Appellant was convicted of first degree residential burglary and sentenced to state prison. On March 21, 2016, the Board of Prison Terms determined that appellant was an MDO. Appellant petitioned the superior court and waived jury trial.

Doctor Brandi Mathews, an MDO expert, testified that appellant suffered from bipolar disorder with psychotic features, a severe mental disorder manifested by mood swings, hypersexual manic episodes, psychotic symptoms, paranoia, and disorganized thinking. When appellant committed the burglary, he was delusional and believed a rapist lived there. His plan was to kill the rapist. The doctor opined that the mental disorder was

[2] "A determination that a defendant requires treatment as an MDO rests on six criteria, set out in section 2962: the defendant (1) has a severe mental disorder; (2) used force or violence in committing the underlying offense; (3) had a disorder which caused or was an aggravating factor in committing the offense; (4) the disorder is not in remission or capable of being kept in remission absent treatment; (5) the prisoner was treated for the disorder for at least 90 days in the year before being paroled; and (6) because of the disorder, the prisoner poses a serious threat of physical harm to other people." (*People v. Clark* (2000) 82 Cal.App.4th 1072, 1075–1076.) The sole issue on appeal is whether criteria number 2 was satisfied, i.e., whether appellant used force or violence in the commission of the burglary.

a cause or aggravating factor in the commitment offense and that appellant met all the MDO criteria except criteria 2, i.e., that the commitment offense involved force or violence.

The trial court found that appellant used "force or violence when he kicked the front door open and left the wooden casing broken and splintered wood on the ground." Although no verbal threats were made, appellant did enter the residence holding a knife. The trial court found "there was an implied threat towards another with use of force or violence likely to produce substantial physical [h]arm in such a manner that a reasonable person would believe and expect that . . . force or violence would be used." The trial court agreed the crime of residential burglary covers a wide spectrum of behavior and can be committed without force or violence. "But under the specific circumstances of this case, there was a person present. [Appellant] . . . kicked open the door, and entered with a knife. And I believe that those circumstances are sufficient beyond a reasonable doubt to find that [appellant] meets criteria number 2."

Threat of Force or Violence

Our task on appeal is to determine whether a rational trier of fact could have made the finding that appellant used force or violence in committing the burglary. (*People v. Clark*, *supra*, 82 Cal.App.4th at pp. 1082-1083 [applying substantial evidence standard of review].) To commit a prisoner under the MDO law, the prosecution must prove, among other things, that the prisoner was convicted of a violent offense listed in section 2962, subdivision (e)(2)(A) through (O), or that the commitment offense comes within the catchall provisions of subdivision (e)(2)(P) or (e)(2)(Q). (*People v. Kortesmaki* (2007)

156 Cal.App.4th 922, 926.) Although burglary is not an enumerated offense, subdivision (e)(2)(P) includes any crime "not enumerated . . . in which the prisoner used force or violence, or caused serious injury . . . ." Subdivision (e)(2)(Q) includes any crime "in which the perpetrator expressly or impliedly threatened another with the use of force or violence likely to produce substantial physical harm in such a manner that a reasonable person would believe and expect that the force or violence would be used."

Citing *People v. Green* (2006) 142 Cal.App.4th 907, appellant argues that the destruction of an inanimate object does not satisfy the force or violence requirement. In *Green,* the commitment offense was felony vandalism. Defendant was detained for shoplifting, was angry about being placed in a police car, and kicked out the car window. (*Id*. at p. 910.) We concluded that the commitment offense was not a qualifying offense because "the application of force against an inanimate object does not fall within section 2962, subdivision (e)(2)(P)." (*Id*. at p. 913.)

In *People v. Kortesmaki*, *supra*, 156 Cal.App.4th 922, the commitment offense was possession of flammable materials with intent to set fire to property. Defendant set fire to a dumpster that scorched an adjacent building. We held that defendant impliedly threatened to use force or violence to produce substantial physical harm to the building occupants within the meaning of section 2962, subdivision (e)(2)(Q). (*Id.* at pp. 928-929.) Affirming the MDO commitment, we distinguished *Green* because in *Green* "there was no evidence the defendant 'expressly or impliedly threatened another with the use of force or violence' in committing the vandalism. The result would have been

different in that case if, for example, someone was standing near the window when the defendant kicked it out . . . ." (*Ibid.*)

That is the scenario here. The victim looked through the peephole just after appellant knocked. Appellant kicked open the door, breaking the door frame and splintering wood. When appellant forcibly entered the house holding a knife, the victim said "'Are you going to do this?'"

Appellant argues there was no threat of force or violence because he turned and ran, and the victim gave chase. Deputy Sheriff Mike Lynn responded to the 911 call and testified that the victim was upset, scared, and "disheveled" and in shock. Although the victim said she had 12 brothers and was not afraid, the victim appeared to be scared and warned the deputy that appellant had a knife.

The trial court reasonably concluded that appellant used force or violence against a person when the victim looked through the peephole and kicked the door open. This supports the finding that the forced entry "met the subdivision (e)(2)(P) criterion involving the actual use of force or violence against a human being." (*People v. Labelle* (2010) 190 Cal.App.4th 149, 153 [defendant kicked out car window as officer stood next to car door].)

Assuming that the burglary did not involve force or violence, the evidence supports the alternate finding that appellant made an implied threat to use force or violence likely to produce substantial physical harm in such a manner that a reasonable person would believe and expect that force or violence would be used. (§ 2962, subd. (e)(2)(Q); see, e.g., *People v. Kortesmaki*, *supra*, 156 Cal.App.4th at p. 928 [threat to set fire with flammable substance]; *People v. Butler* (1999) 74

Cal.App.4th 557, 561-562 [stalking]; (*People v. Townsend* (2010) 182 Cal.App.4th 1151, 1155 [possession of Molotov cocktail].) To satisfy the force or violence criterion, "substantial physical harm" does "not require proof that the threatened act was likely to cause great or serious bodily injury." (§ 2962, subd. (e)(2)(Q).) The prosecution does not have to prove intent to harm, only that the crime involved the implied threat to use force or violence on a person. (See *People v. Labelle*, *supra*, 190 Cal.App.4th at p. 153.)

Here, the specter of appellant kicking down a door and confronting the victim with a knife would cause a reasonable person to believe appellant was threatening to use force or violence likely to produce substantial harm. It matters not whether the victim was fearless or chased appellant. In *People v. Labelle*, *supra*, 190 Cal.App.4th 149, the officer chased defendant, put defendant in a patrol car, and grabbed the door handle and ordered defendant to stop kicking the car window just before defendant kicked out the window. We held that the evidence was sufficient to support the finding that the commitment offense (felony vandalism) satisfied the section 2962, subdivision (e)(2)(Q) criterion for an express or implied threat of the use of force or violence. (*Id.* at p. 153.) The same analysis applies here. When it comes to implied threats of force or violence, actions speak louder than words.

Substantial evidence supports the finding that the burglary qualified as a crime of force or violence against a person. (§2962, subd. (e)(2)(P) or (Q); *People v. Labelle*, *supra*, 190 Cal.App.4th at pp. 152-153.) "The purpose underlying the MDO law is to protect the public by identifying those offenders who exhibit violence in their behavior and pose a danger to society.

[Citation.]" (*People v. Dyer* (2002) 95 Cal.App.4th 448, 455.) Appellant is such a person.

Disposition

The judgment (MDO commitment order) is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Jacquelyn H. Duffy, Judge

Superior Court County of San Luis Obispo

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