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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY DANIEL,

Defendant and Appellant.

2d Crim. No. B278894
(Super. Ct. No. 16PT-00659)
(San Luis Obispo County)

Anthony Daniel appeals from the judgment after the trial court found that he was a mentally disordered offender (MDO). (Pen. Code, § 2962 et seq.)¹ Appellant's commitment offense was felony vandalism, i.e., kicking out a police car window while the car was in motion. (§ 594, subd. (a).) Appellant contends that the evidence does not support the trial court's finding that the offense satisfied the force or violence criterion of section 2962, subdivision (e)(2)(P) or (Q). We affirm.

¹ All statutory references are to the Penal Code.

Commitment Offense

On July 19, 2014, City of Downey Police Officer Roger Sy received a call that appellant was attempting to light a fire inside a Denny's restaurant. The restaurant manager reported that appellant tried to set a flyer and sugar packets on fire with a cigarette lighter. Officer Sy took the lighter from appellant, determined that appellant was on parole for arson, and arrested him for attempted arson. Appellant was put in the back of a patrol car.

Appellant was agitated and told Officer Sy to make a left turn at a red light. The officer told him he could not do that. Angry, appellant raised his feet and kicked out the passenger window as the car drove up to the traffic light. Two or three cars were stopped next to the police car. Officer Sy feared that people in the other cars would be hurt by the shattering glass, that appellant would flee requiring the officer to chase him down the middle of the road, and that the patrol car would get rear-ended.

Discussion

To commit a prisoner under the MDO law, the prosecution must prove, among other things, that the prisoner was convicted of a qualifying 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.) 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.”

Appellant contends that reversal is required pursuant to *People v. Green* (2006) 142 Cal.App.4th 907. There, 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 held that the commitment offense was not a qualifying offense under the MDO statute 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* (2007) 156 Cal.App.4th 922, the commitment offense was possession of flammable or combustible materials with the intent to set fire to property. (*Id.* at p. 924.) Defendant set fire to a dumpster that scorched an adjacent building. We held that defendant impliedly used force or violence to produce substantial physical harm to the occupants of the building, as contemplated by 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, or the defendant had kicked out a second story window above a busy sidewalk.” (*Id.* at pp. 928-929.)

Unlike *Green*, appellant argued with Officer Sy and kicked out the car window as they drove up to the stop light. Officer Sy was concerned that other people would be injured, that appellant would have to be chased down in the street, and that

the patrol car would be rear-ended. The trial court found that appellant kicked out “the rear passenger window so that it shattered while the officer was driving. I believe his testimony was he was coming up to a stoplight. He further testified that there were two or three vehicles stopped to the right of him. So, under the totality of the circumstances under which this vandalism was committed, I do believe it qualifies as a crime of force or violence against a person, not just a piece of property.”

On review, we consider all the evidence in the light which is most favorable to the People and draw all inferences the trier of fact could reasonably have made in finding the commitment offense was a crime of force or violence against a person. (*People v. Clark* (2000) 82 Cal.App.4th 1072, 1082 [applying substantial evidence standard of review].) We do not reweigh the evidence or substitute our judgment for that of the trier of fact. (*Ibid.*)

It is uncontroverted that appellant argued with Officer Sy and kicked out the car window as they approached the stop light. Appellant complains there is no evidence about the direction or intensity of the shattered glass, how close the other vehicles were next to the police car, or whether the people in the other vehicles were in the “line of fire” or otherwise in danger. Appellant did not cross-examine Officer Sy about these matters or posit these theories at trial. The evidence shows that appellant, by his actions, threatened to use force or violence against anyone who kept him in the car. The prosecution was not required to prove intent to harm, only that the crime involved the implied threat to use force or violence on a person to produce substantial physical harm. (See, e.g., *People v. Labelle* (2010) 190 Cal.App.4th 149, 153 [defendant kicked out car window as officer

stood next to car door].) Kicking out a police car window while the car is in motion is highly dangerous and likely to produce substantial physical harm to the driver or a motorist passing by. It is analogous to a defendant “kick[ing] out a second story window above a busy sidewalk.” (*People v. Kortesmaki, supra*, 156 Cal.App.4th at p. 929.) It took no leap of logic for the trial court to find that the offense qualified as a crime of force or violence against a person, not just a piece of property. (§2962, subd. (e)(2)(Q); *People v. Labelle, supra*, at pp. 152-153.)

Disposition

The judgment is affirmed.

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YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Jacquelyn H. Duffy, Judge

Superior Court County of San Luis Obispo

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, Scott A. Taryle, Supervising Deputy Attorney General, Tannaz Kouhpainezhad, Deputy Attorney General, for Plaintiff and Respondent.