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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.

C.M.,

Defendant and Appellant.

2d Crim. No. B296041
(Super. Ct. No. 18PT-01215)
(San Luis Obispo County)

C.M. appeals an order recommitting him to the Department of Mental Health for treatment as a mentally disordered offender (MDO). (Pen. Code, § 2962 et al.)¹ Appellant contends that the evidence does not support the finding that he suffers from pedophilic disorder or that the mental disorder is not in remission. We affirm.

Procedural History

Appellant was convicted of sexually molesting his prepubescent 12-year-old daughter in 2015 and sentenced to

¹ All statutory references are to the Penal Code.

state prison. (§ 288, subd. (a).) After appellant was transferred to Atascadero State Hospital (ASH) for treatment, the Board of Parole Hearings (BPH) certified appellant as an MDO on January 31, 2018. Appellant challenged the BPH determination in superior court and was found to meet all the MDO criteria. We affirmed the judgment in an unpublished opinion. (*People v. Charles M.* (May 20, 2019, B291469) [nonpub. opn.])

In 2018, the BPH extended appellant's treatment at ASH. Appellant filed a petition in superior court (§ 2966, subd. (c)), and waived jury trial. The trial court found that appellant met all the criteria for an MDO recommitment based on the following evidence.

Doctor Roxanne Rassti, a forensic psychologist at ASH, opined that appellant suffered from Pedophilic Disorder (nonexclusive type, limited to incest), manifested by recurrent urges, fantasies, or behaviors with a prepubescent child for at least six months. In 2015, appellant molested his 12-year-old daughter by penetrating the victim's vagina, mouth, and anus with his penis and fingers. The molestations occurred nightly or every other night the victim stayed with appellant, for a period of six months. Appellant denied committing the offense and denied that he had problems with sexually deviant behavior. Until appellant acknowledged his mental disorder and committed himself to treatment, the doctor opined that it was not clinically possible for appellant to be in remission. Appellant presented a substantial risk of dangerous to others based on his mental disorder-related violence, his poor performance on supervised release, his prior conviction for not registering as a sex offender, and his unwillingness to follow the treatment plan. Appellant lacked insight about his mental disorder, lacked the coping skills

to deal with his mental disorder, and did not have a viable relapse prevention plan.

Appellant's mental health expert, Doctor Michele Reed, opined that appellant did not meet the diagnostic criteria for pedophilia which required persistent sexual thoughts, feelings, or behavior. The doctor stated that incest (i.e., the sexual molestation of a 12-year-old daughter over a six-month period) is not the same as pedophilia and there were no hospital records of appellant exhibiting sexual fantasies or pedophilic interests. Dr. Reed believed the incidents with prepubescent children were isolated and too separated in time to be characterized as sustained and persistent sexual fantasies, interests or behavior.

In rebuttal, Dr. Rassti testified that sustained persistent sexual fantasies or deviant behavior is not a diagnostic criteria for pedophilic disorder. "The diagnostic criteria says that it must be recurrent, which is just suggestive of multiple events throughout a lifetime." It need not be "all the time That is not the intention of the diagnostic criteria." Dr. Rassti's diagnosis was consistent with appellant's mental health records which stated that appellant suffered from pedophilic disorder.

The trial court asked about overt signs and symptoms. Dr. Rassti stated that "[t]he problems with overt symptoms of a pedophilic disorder is [that appellant is] in an environment in which [he is] not even exposed to the stimulus" When asked about overt symptoms, the doctor stated appellant would have to have access to a child, but that could not happen in a controlled hospital environment. "I would say the symptoms are still there given that he has no insight into them or how to manage them." The trial court asked "And those

symptoms are ?” Dr. Rassti explained: “The fact that [appellant] engaged in recurrent sexual behavior with prepubescent -- like his daughter, a prepubescent child, and has a history of it long before that.”

Severe Mental Disorder

Appellant contends that the evidence does not support the finding that he suffers from pedophilic disorder and requests that we take judicial notice of the DSM-5 (American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013)) which indicates that transient sexual behavior is not enough. The trial court, however, sustained appellant’s objection to the DSM-5 materials and did not consider the DSM-5 or receive it into evidence. We are precluded from taking judicial notice of the DSM-5 in the first instance. (*People v. Hardy* (1992) 2 Cal.4th 86, 134.) Under the doctrine of invited error, appellant is barred from requesting that that the DSM-5 be considered. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49.)

The trial court credited Dr. Rassti’s testimony that appellant demonstrated recurrent behavior involving sexual activity with a prepubescent child. When appellant was 17 years old, he was convicted of incest with a 10-year-old half brother. At age 24, appellant had sex with a 15-year-old prepubescent girl. At age 58, appellant sexually molested his 12-year-old daughter over a period of six months. Dr. Rassti stated that appellant engaged in pedophilic behavior “his entire lifespan,” that it was a recurrent pattern of sexual behavior with prepubescent children, and there were multiple victims which meets the “time requirement” and shows that appellant “continues to meet the criteria for pedophilic disorder.” It is settled that the testimony

of a single mental health expert witness is enough to support the finding that appellant suffers from a severe mental disorder. (*People v. Rasmuson* (2006) 145 Cal.App.4th 1487, 1508; *People v. Bowers* (2006) 145 Cal.App.4th 870, 879 [single mental health expert opinion constitutes substantial evidence].)

Mental Disorder Not in Remission

Appellant argues that the evidence does not support the finding that his severe mental disorder is not remission. “A person ‘cannot be kept in remission without treatment’ if during the year prior to the question being before the Board of Parole Hearings,” the person “has not voluntarily followed the treatment plan. In determining if a person has voluntarily followed the treatment plan, the standard shall be whether the person has acted as a reasonable person would in following the treatment plan.” (§ 2962, subd. (a)(3).) Dr. Rassti stated that appellant refused to acknowledge his mental disorder and it prevented appellant from demonstrating “that level of insight, knowledge, coping skills, [or] even develop a relapse prevention plan as to what he would do should he be in a situation in which he would experience those urges” Appellant refused to cooperate in all the components of the treatment plan² and said that he would only do treatment while on parole if he had to. Substantial evidence supported the finding that the mental disorder was not

² Appellant superficially engaged in treatment and stopped talking to his treatment providers for a week. The hospital records stated that appellant was “‘resistant towards treatment,’” challenged authority, and was disruptive, irritable, and argumentative. Two evaluators reported that appellant was not in remission and found little evidence that he could safely manage his sexual interest and behaviors with females aged 12 to 15.

in remission. (*People. v Beeson* (2002) 99 Cal.App.4th 1393, 1400.) Because this is a substantial evidence appeal, we are precluded from reweighing the evidence or substituting our judgment for that of the trial court. (*People v. Clark* (2000) 82 Cal.App.4th 1072, 1083.)

Disposition

The judgment (MDO order recommitted appellant for treatment) is affirmed.

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YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Hernaldo J. Baltodano, Judge

Superior Court County of San Luis Obispo

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