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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. SPENCER MOSS, Defendant and Appellant.	2d Crim. No. B298019 (Super. Ct. No. 16PT-00584) (San Luis Obispo County)

Spencer Moss appeals his commitment to the Department of State Hospitals after a jury found true an allegation that he was a mentally disordered offender (MDO). (Pen. Code,[1] §§ 2962, 2972, subd. (c).) Moss contends the commitment order should be vacated because: (1) a forensic psychologist related case-specific hearsay to the jury, and (2) the trial court and a juror committed misconduct. We affirm.

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

FACTUAL AND PROCEDURAL HISTORY

The prosecution's case

Sean Headland is a psychiatric technician at Atascadero State Hospital (ASH). He testified that ASH staff would often find contraband—such as safety pins, paper clips, and string—in Moss's possession. He also said that "every time" staff searched Moss's room for contraband he "would try to dart into the room . . . so [ASH staff] wouldn't take it."

During a February 2016 search of Moss's room, Headland noticed a tear in Moss's pants. He offered him a new pair. The pair Moss selected was too large, and he accused Headland of "[t]rying to make [him] look like a clown." As Moss put on a smaller pair, he said that Headland was "being such a jerk." Moss threw the larger pair of pants at Headland. Staff members helped Headland restrain Moss.

ASH Police Officer John Hurst testified that ASH staff called him "on a daily basis regarding [Moss's] mail and contraband." Hurst once found Moss in possession of string, which was a safety concern because it could be used as a weapon. Another time Hurst found contraband previously taken from Moss inside a package that was returned to ASH after Moss sent it. When ASH staff took contraband from Moss, he turned red, clenched his fists, breathed heavily, and tightened his muscles.

Hurst helped to restrain Moss after he threw the pair of pants at Headland. He said that one criterion for restraining a patient was that a staff member determined them to be dangerous.

Police Officer Anthony Glau worked in the ASH mailroom. In January 2016, he searched a package Moss had sent. He discovered contraband inside, including string and

pieces of cardboard and mylar. Glau worried that Moss had scissors and that he could use the string to hurt himself or others.

Around the same time, ASH Unit Supervisor Wendy Herndon was concerned about another package in Moss's name because of the large amount of packaging tape (another form of contraband) on it. During a subsequent search of Moss's room, ASH staff members found a jacket with a tear in the inner lining. Inside the lining were more contraband items: "glue, a makeshift sewing needle, [and] a bobby pin."

Forensic psychologist Angie Shenouda conducted an MDO evaluation of Moss in June 2016. As part of her evaluation, Dr. Shenouda reviewed Moss's probation reports, prior MDO evaluations, hospital records, and treatment plan. She also interviewed him and reviewed ASH staff members' notes.

Dr. Shenouda opined that Moss met the criteria to qualify as an MDO. Based on the records she reviewed and her interview with him, Dr. Shenouda concluded that Moss suffers from schizophrenia. Moss's delusions, disorganized speech, intentional property damage, and physical violence tended to show that his schizophrenia was not in remission and could not be kept in remission without treatment. Moss said he would not take his medication if released. Dr. Shenouda believed him because Moss was previously under an involuntary medication order. His lack of insight and belief that he did not suffer from a mental disorder reinforced her belief that Moss would not continue treatment if released.

Dr. Shenouda concluded Moss presented a danger of physical harm to others due to his schizophrenia. To reach her conclusion, she reviewed Moss's records and "considered several factors, including his history of severe mental-illness-related

violence, his remission status . . . , his insight and history of treatment compliance, and . . . his discharge plans." The report detailing how he threw a pair of pants at Headland showed that he could react aggressively. The report stated that during that incident he demonstrated precursors to violence, including "heavy breathing, clenched fists, tense body muscle—or tense posture, loud voice," "angry tone, and glaring."

Additionally, a probation report indicated that Moss had been previously subject to a psychiatric hold. An abstract of judgment showed that he had been convicted of four counts of assault by a prisoner on a non-prisoner. A probation report said that he committed the assaults "because he believed he was being targeted by certain individuals" due to "inform[ing] law enforcement about some illegal activity." To Dr. Shenouda, this statement was consistent with Moss's "longstanding history of believing that he ha[d] been illegally or wrongfully detained."

Dr. Shenouda also testified about Moss's discharge plans. Moss said his finances were "stable because he [was] a professional golf player and a professional photographer." He could live anywhere upon release, "'[b]ut until [he could] get control of people who kidnap[ped him], then that [was] probably not a good idea.'" This statement concerned Dr. Shenouda because Moss's belief about kidnappers "place[d] any individual at risk, should he decide that [the] person . . . he [was] looking at [was] the individual that kidnapped him."

Moss's evidence

An ASH police officer who investigated some of Moss's complaints said that Herndon told her that Moss was not aggressive during their January 2016 encounter. A registered nurse at ASH said he did not consider Moss a dangerous patient.

But the nurse said he was not qualified to testify about dangerousness in the community versus dangerousness in the hospital.

Postverdict proceedings

After the jury determined that he qualified as an MDO, Moss told the trial court that he was "concerned about the jury being tainted." He said that the daughter of his former attorney was on the jury, and she "spoke to [the court] about something." Moss explained that he:

> *Marsden* motioned [the former attorney] and had a complaint prepared to send in to the [S]tate [B]ar about him regarding the matters, but ASH hospital [*sic*] destroyed the legal paperwork; so it never got processed. By the time [Moss] was able to follow up on that, [he] found out that [the attorney] had died, and [he] felt that it was unnecessary to beat a dead horse by filing a complaint.

Moss said that he was concerned that his former attorney's daughter may have seen him in court previously, in jail clothes and shackles, and may have told her fellow jurors about him.

The trial court said that its only interaction with the juror was when she identified her father and said that he "'thought very highly'" of the court.

DISCUSSION

Case-specific hearsay

An expert cannot "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." (*People v. Sanchez* (2016) 63 Cal.4th 665, 686; see also *People v. Bona* (2017) 15 Cal.App.5th 511, 520 (*Bona*) [*Sanchez* applies in MDO proceedings].) Moss contends, and the Attorney General concedes, the trial court erred when it admitted Dr. Shenouda's testimony about Moss's involuntary medication order, his psychiatric hold, and some of his previous assaults because these case-specific facts were derived solely from probation reports and other records. We agree. (*Sanchez*, at p. 686.) But the error was harmless.

An MDO commitment requires proof that: (1) a person committed a specified crime using force or violence, (2) that person has a severe mental disorder, (3) that disorder is not in remission or cannot be kept in remission without treatment, (4) the disorder caused or was an aggravating factor in the commission of the underlying offense, (5) the person had received at least 90 days of treatment for the disorder, and (6) the person represents a substantial danger of physical harm because of the disorder. (*People v. Harrison* (2013) 57 Cal.4th 1211, 1218; see § 2962.) Moss argues it is "reasonably probable" the jury would have reached a result more favorable to him had the trial court prevented Dr. Shenouda from testifying to case-specific hearsay because that hearsay was "particularly critical" to prove the third, fourth, and sixth criteria. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Covarrubias* (2016) 1 Cal.5th 838, 887 [*Watson* standard applies to erroneous admission of hearsay].)

But Dr. Shenouda's improper testimony was not the only evidence of these criteria. Moss told Dr. Shenouda that he did not believe he suffered from a mental disorder and that he would not continue to take his medication if released. Dr. Shenouda personally observed Moss and witnessed his delusions

first hand. His delusions led her to believe that his schizophrenia was a factor in Moss's assaults. They also placed others at risk if he were released "should he decide that [the] person . . . he [was] looking at [was] the individual that kidnapped him."

Other witnesses also described Moss's delusions, his violent reactions, and his inability to follow ASH's rules. Headland described how Moss would try to prevent ASH staff from removing contraband from his room and how he once threw a pair of pants at him. Hurst described how he had to restrain Moss and how restraining a patient tended to show that they were dangerous. Hurst, Glau, and Herndon described how Moss's possession of contraband presented safety concerns. This evidence shows that it is not reasonably probable the jury would have determined that Moss did not qualify as an MDO even in the absence of Dr. Shenouda's inadmissible testimony. (*Bona*, *supra*, 15 Cal.App.5th at p. 522; see, e.g., *People v. Beeson* (2002) 99 Cal.App.4th 1393, 1399 [noncompliance with treatment, denial of mental illness, and denial of need for treatment show mental disorder not in remission]; *People v. Ward* (1999) 71 Cal.App.4th 368, 374 [expert testimony alone evidence of future dangerousness].) The error in admitting that testimony was therefore harmless.

Juror and trial court misconduct

Moss contends a juror committed misconduct because she did not disclose that she was the daughter of his prior attorney during either voir dire or trial. He contends the trial court committed misconduct because it did not inquire more fully about that juror's potential bias.[2] But Moss did not move for a

[2] Moss also contends the trial court committed misconduct because it did not disclose that the juror said that her father

mistrial when he discovered the juror was the daughter of his former attorney, did not request that the court speak to her about any potential bias, and did not say anything when he overheard the juror speaking to the court. He has forfeited his contentions. (*People v. Russell* (2010) 50 Cal.4th 1228, 1250.)

In any event, the contentions fail on the merits. Moss cites no evidence that the juror in question knew that her father previously represented Moss. (Cf. § 1120 [juror must disclose personal knowledge of any fact in controversy in the cause].) Nor was there any evidence that the trial court knew that the juror's father represented Moss. The court was thus not required to inquire about her potential biases. (Cf. *ibid.* [if juror has knowledge about a case, court must examine them and determine whether good cause for discharge exists].) Even if it were, the error would not require reversal since the record here does not show that the juror was, in fact, biased. (*People v. Burgener* (1986) 41 Cal.3d 505, 520-522, disapproved on another point by *People v. Reyes* (1998) 19 Cal.4th 743, 756.)

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thought highly of the court, and that his attorney provided ineffective assistance because he did not move for a mistrial upon learning that the juror's father was his former attorney. But he supports neither contention with analysis or citation to case law. We do not consider them here. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1028.)

DISPOSITION

The MDO commitment order is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Barry T. LaBarbera, Judge

Superior Court County of San Luis Obispo

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

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