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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. PATRICK COLE SCARPACI, Defendant and Appellant.	A146964 (Solano County Super. Ct. No. VCR 157924)

I.

INTRODUCTION

Patrick Cole Scarpaci appeals the trial court's order denying his request for conditional release for outpatient status pursuant to Penal Code section 1603.[1] Appellant contends the trial court abused its discretion in finding he had not met his burden of demonstrating he could be safely treated in the community. We conclude, after careful consideration of the expert testimony, the nature and circumstances of appellant's crime, and the ability of appellant to be properly supervised in the community, the trial court did not err in denying appellant release. We affirm.

[1] All statutory references are to the Penal Code, unless otherwise indicated.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. Appellant's Conviction and Prior Periods of Outpatient Placement

In 2002, the Solano County District Attorney's Office charged appellant with the first degree murder of his mother, Kathryn Scarpaci. (§ 187, subd. (a).) We take a description of the crime from our prior decision denying appellant outpatient status:

"Appellant committed his offense at a time when he was not getting along with his mother; she wanted him to go to school and follow her other rules and he was being defiant. . . . [A]ppellant stabbed his mother in her jugular vein, took her head by the hair and slammed it against concrete, then pulled out one of her eyeballs with his hand and cut the other one out with the knife he used to stab her. After killing her, appellant bathed her and stuffed her body in a plastic hamper which he put in the trunk of her car." (*People v. Scarpaci* (2014 Cal. App. Unpub. LEXIS 8260 at *7 (*Scarpaci*).)

At the time of the offense, appellant stated that he heard voices and people were out to get him. He believed people were trying to poison him, his mother was an alien, and he wanted to see " 'what made her tick.' " (*Scarpaci*, *supra*, 2014 Cal. App. Unpub. LEXIS 8260 at *7.)

Appellant entered into a plea bargain where he pleaded no contest and was found not guilty by reason of insanity. Appellant was committed to the Solano County Department of Mental Health for placement for a maximum term of life. (*Scarpaci*, *supra*, 2014 Cal. App. Unpub. LEXIS 8260 at *1-*2.)

In 2002, while in Solano County Jail, appellant attacked his psychologist during an interview in his cell. In another incident, appellant barricaded himself in his cell and it took 10 deputies to restrain him.

In 2005, while appellant was being treated at Patton State Hospital, he attacked a female patient. In another incident in 2005, he attacked a male patient with no provocation.

On August 14, 2009, the trial court found that appellant was no longer a danger to himself or the community, under section 1604, and ordered his conditional release to the

Solano County Conditional Release Program (CONREP) for outpatient placement and supervision. (*Scarpaci*, *supra*, 2014 Cal. App. Unpub. LEXIS 8260 at *2.) In September 2010, appellant was detained and placed in a 40-day temporary hospitalization for violating conditions of his outpatient placement. (*Ibid*.) In July 2012, appellant was again hospitalized after showing symptoms of schizophrenia similar to those he displayed before killing his mother. He became paranoid, he was suspicious of his CONREP worker, turned off the gas in his apartment because he believed it was poisoning him, unplugged his refrigerator and feared his food was poisoned, causing him a 30-pound weight loss. (*Ibid*.)

In October 2012, the court issued an order continuing appellant's outpatient status if he remained in Napa State Hospital for a year and complied with all CONREP directives. (*Scarpaci*, *supra*, 2014 Cal. App. Unpub. LEXIS 8260 at *2.) In January 2013, the prosecutor filed a petition to revoke appellant's outpatient status because he was a danger to the health and safety of others. In 2013, the court held a hearing and ordered appellant's outpatient status be revoked and that he be confined to the state hospital or a treatment facility. This division affirmed that order in an unpublished decision. (*Id*. at *1.)

B. Request for Outpatient Status and Evaluations

In December 2014, appellant filed a petition for writ of habeas corpus that the court deemed to be a request for outpatient status.

The court appointed Dr. Kathleen O'Meara to examine appellant and submit a report before a scheduled hearing on June 17, 2015. The court also ordered MHM [Mental Health Management] Services of California, Inc. (MHM), the CONREP for Solano County, to submit a written recommendation regarding appellant's request for release to outpatient status before the scheduled hearing date.

MHM submitted a report recommending appellant be released to outpatient treatment because he could be safely and effectively treated in the community. Suzanne Dunne, the then-program director for Solano County CONREP, interviewed appellant on April 30, 2015. She described his mood as "a little despondent and dysthymic." In

discussing the murder of his mother, Dunne found him to be "disconnected from the level of rage and anger underlying his behavior during the crime." He minimized the conflict in his relationship with his mother. Dunne concluded: "Given the severity of the crime, denial and/or minimization of relationship issues that contributed to his instant offense is highly concerning."

Appellant acknowledged that during his prior period of release he withheld information from CONREP and felt that reporting to CONREP was a hindrance rather than a support. He stated he would be able to work with CONREP in the future, "but was not very convincing in his delivery." Due to these concerns, Dunne recommended that appellant be released into transitional residential treatment program to allow him to adjust in a structured environment.

Dr. O'Meara interviewed appellant for one hour and 45 minutes. She had previously interviewed appellant in 2013 and completed an evaluation. Dr. O'Meara recommended appellant be returned to outpatient status with continued treatment in specific areas. Dr. O'Meara found that both appellant's readiness for release and the vigilance and knowledge of his treatment team were relevant in assessing whether he could be treated in the community safely. When he was previously released and decompensated, his "symptoms evolved because he lacked fully integrated insight but also because there was a lack of effective intervention of his progressing deterioration." She recommended appellant's release "contingent upon his receipt of treatment that encompasses consistent depth and quality in order to minimize the risk of relapse in the future."

On August 12, 2015, the first day scheduled for the hearing, prior to taking testimony, the court reviewed the requirements of section 1604 and the report submitted by MHM/CONREP for Solano County. The court noted the report failed to provide a treatment plan as required by statute. Defense counsel stated that she had spoken with Suzanne Dunne at MHM, and she said it was an "oversight." The court voiced its concern that MHM had overlooked its main responsibility imposed by statute: to provide

a supervision plan for community release. The court stated the hearing could not go forward without a plan and requested the doctor in charge of MHM to appear in court.

At the next hearing date, Dr. Mark Naas, the interim director of MHM in Solano County, explained they failed to submit a treatment plan because the former community program director, Suzanne Dunne, did not understand the requirements of section 1603. Since the last hearing, a clinician, Katie Copeland, prepared a treatment plan. Copeland is an unlicensed marriage and family therapist intern with a master's degree. Copeland had not met appellant or talked to his treatment team at Napa State Hospital; she had just reviewed the file.

Dr. Naas, who supervises all the other MHM facilities, was acting as the interim director because there was no current director at MHM in Solano County. There are two clinicians, both unlicensed marriage and family therapy interns, an administrative assistant, and a vacant community program director position.[2] They also have a psychiatrist, who is available via Telepsych, who provides online appointments. Psychiatric appointments are provided by video on a bi-monthly basis. There is no local psychiatrist in Solano County to see patients. The court inquired who was responsible for supervision of convicted murderers who are released into the community, and Dr. Naas responded it would be the clinicians.

During the hearing, the court requested MHM's file on appellant. The court expressed "grave concern" that the file had no intake sheet, no clinician assigned to appellant, and it simply contained notes.

C. The Conditional Release Hearing

Beginning on September 10, 2015, the court heard testimony from five doctors and three clinical social workers. Three people testified from MHM/CONREP.

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[2] MHM had to seek a waiver from the Department of State Hospitals in order to have unlicensed individuals conduct supervision.

Dr. Mark Naas

Dr. Naas, a psychologist, testified he had hired a new director for CONREP Solano, and they planned to hire an onsite psychiatrist to be available for some number of hours each month. He stated Solano County CONREP was developing a policy and procedure manual because they did not currently have one in place.

Dr. Naas reviewed the prior program director's (Dunne) report to the court on appellant. It stated appellant was a little despondent and dysthymic, meaning a low level of depression. The report stated that appellant seemed disconnected from the anger and rage associated with his crime. He also minimized the conflicts with his mother. Naas testified that appellant's denial or minimization of the conflict in his relationship with his mother was highly concerning because he needed to be aware of the internal triggers that preceded his past violence in order to be monitored in the community properly. Appellant had a contentious relationship with CONREP, which raised concerns because it was "vitally important" that he is able to follow the rules set out for him, and to disclose any symptoms he is experiencing.

Dr. Naas testified that he believed CONREP could safely and effectively treat appellant in the community. However, in an email dated September 4, 2015, a few days before the hearing, he stated that Solano County CONREP must address a few issues before they could treat appellant successfully. Specifically, the treatment team had only had limited contact with appellant (1.5 hours total), they needed to secure housing, develop a plan to deal with the press, and handle CONREP staffing fluctuations. In order for appellant not to present a danger to the community, each of the items needed to be addressed.

Dr. Naas could not discuss appellant's readiness for community placement relative to his last release. He had not reviewed the records from appellant's 2009 release.

Dr. Naas testified that he became aware in January 2015 that Solano County CONREP had no internal systems to track court orders. During 2015, two program directors were asked to leave: the first was fired, and the second was demoted and transferred.

Suzanne Dunne

Suzanne Dunne, a clinical social worker, was the former director of MHM Solano County for a period of five months. She was demoted from that position for getting into a heated argument with a client. She conducted a discharge assessment of appellant in April 2015. She believed appellant was "dysthymic" because he had a flat affect and his mood seemed down. He denied the conflict with his mother prior to the murder, and indicated in her report that she was "highly concerned." He also did not have a good response for how to handle resentment toward CONREP. Even with these issues, she felt he could be safely treated in the community.

In preparing her report on appellant, she was not aware of the Penal Code requirements and had previously only prepared one report. She failed to prepare a written treatment plan for appellant. Appellant's report was the one and only report she completed in Solano County. While acting as the program director for Solano County, she was also the program director for Sonoma County and carried a full caseload as a clinician.

Dr. Jack Martin

Dr. Jack Martin, a licensed psychologist, testified as a consultant with MHM. He had more than 20 years of experience as a prison psychologist dealing with mentally ill inmates, but he only began working with mentally ill people in the community during the previous month. He was hired by MHM to help them develop systems and policies because they were missing court deadlines, and the agency was being sued for failing to provide "sufficient, adequate, timely services."

When the court ordered MHM be subpoenaed for this case, Dr. Martin reviewed appellant's file so he could testify in court. Dr. Martin was not aware of appellant's past incidents of violence except the murder. He testified MHM's current plan for appellant did not include daily contact.

Dr. Ann Folker

Dr. Ann Folker, the treating clinical psychologist at Napa State Hospital, testified she has been working with patients committed as not guilty by reason of insanity for

10 years. She had been treating appellant for approximately 10 months. She testified appellant was in remission, meaning he had shown no symptoms for a year.

Dr. Folker described appellant's prior revocation as being caused by a series of stressors: he broke up with his girlfriend, he socialized with people with criminal records (against the rules of CONREP), his grandmother died, and he lacked insight and awareness of his illness. In the past three years, he gained insight and understanding of his illness and the gravity of his crime.

She noted her concern that CONREP had sent two different individuals to meet with appellant over the past year. A consistent clinician is preferable to develop trust. She testified appellant was a "low risk" for community release under CONREP supervision. She recommended appellant be released to Gateways, a transitional housing program, to have a gradual progression into the community. She stated she believed appellant could be safely treated in the community.

On cross-examination, Dr. Folker admitted that in a report in April 2015, she stated appellant was "low to moderate" risk if supervised by CONREP, but claimed this was an error. In a report from January 2015, she also identified him as "low to moderate" risk under CONREP supervision. Dr. Folker further testified that another report issued in September 1, 2015, that identified appellant as "low to moderate" risk was an error. A moderate risk individual requires more supervision than a low risk individual. She also admitted she had not reviewed the records or reports from Patton State Hospital in making her assessment, but she was aware that appellant had a prior diagnosis of bipolar disorder.

Dr. Folker testified the danger to community would increase if CONREP could not provide a 24-hour contact in case of emergency.

Dr. Leif Skille

Dr. Leif Skille, a staff psychiatrist at Napa State Hospital since 1999, began treating appellant in April 2014. He stated appellant's diagnosis was schizophrenia along with two substance abuse disorders (marijuana and alcohol). Appellant received a shot once per month of an atypical antipsychotic, Abilify. Appellant had a history of not

taking his medication. Appellant expressed concerns about his medication dosage and whether it was increasing his blood pressure. During his previous decompensation in 2012, he began to have symptoms even while taking a lower dose of Abilify.

Dr. Skille testified that during the incident in 2012, appellant's symptoms should have been identified far sooner, and two months was too long; "two days of any concerns with Mr. Scarpaci is too much."

Dr. Skille testified that he did not believe appellant was a danger to the community "as long as he has very good supervision." He needs regular meetings with a psychiatrist, weekly check-ins with a case worker, once a week therapy sessions with a psychologist, and at least weekly substance abuse treatment. Dr. Skille had concerns about Solano County CONREP supervising appellant and whether they could properly handle appellant's outpatient treatment. He testified they are currently not prepared to supervise him.

In his January 2015 report, Dr. Skille's opinion was that appellant would be a danger to the community if he was released. He would be a danger if he went off his medication because he has a serious mental illness. He is in a higher category of risk because he acted on his delusions and killed his mother.

He expressed concerns with appellant's "self-will" and lack of humility. This came out in appellant's concerns about his medication and dosage and his desire to challenge his prior revocation in the courts.

Marc Rios-Klein

Marc Rios-Klein, a licensed clinical social worker in Napa State Hospital discharge unit, has worked with appellant since 2013 on preparing for treatment in the community. He testified he felt appellant could work with CONREP.

Amy Davis

Napa State Hospital clinical social worker Amy Davis works on addiction issues with patients and supervised appellant's substance recovery group and parricide group (for individuals who had killed a family member). She testified appellant has shown remorse for killing his mother. She believed he could communicate with CONREP better

than during his release in 2012 because he was properly medicated, he has matured, and he has "done a lot more work" on his mental health.

Dr. Kathleen O'Meara

Dr. Kathleen O'Meara, the court-appointed expert, evaluated appellant in April 2013 and July 2015, and reviewed his records. In 2013, Dr. O'Meara did not believe appellant was ready for release. Appellant did not have a good grasp of his relapse indicators and what happened when he previously decompensated. He had faulty thinking patterns, sabotaged treatment, and had a tendency toward resentment. By 2015, appellant had made "remarkable progress." She felt he would be willing to follow CONREP's rules. Dr. O'Meara stated appellant could be safely treated in the community "provided that the level of depth and quality of the care he needs is provided." He requires careful medication management and regular treatment with a clinician and one-on-one daily check-ins.

Dr. O'Meara testified that when he manifested symptoms in 2012, he should have been treated or rehospitalized sooner. The purpose of outpatient treatment is to keep the person safe and keep the community safe, so the person needs to be closely supervised by someone who knows their personality and signs of relapse. Appellant requires daily contact. The organization monitoring him should have sufficient infrastructure and policies and procedures in place, but MHM had failed to develop them. The current MHM/CONREP treatment plan seemed to be a perfunctory approach. Solano County MHM also had substantial turnover and lacked continuity of care. Dr. O'Meara voiced concern with the lack of training for MHM staff and appellant potentially being supervised by unlicensed interns without the necessary experience. She was also concerned about the lack of a psychiatrist on staff.

In November 2014, appellant requested to be taken off his medication because he believed it was causing him high blood pressure. This could be an indication of mental illness or it could be a reasonable concern about the medication.

Dr. O'Meara reviewed the report prepared by Ms. Dunne at CONREP and admitted Dunne had valid concerns. Specifically, appellant minimized the conflict in his

relationship with his mother and he needed to work on that issue. She stated the reemergence of symptoms happens progressively, not overnight. The triggers for deterioration can be discontinuing medication, use of drugs or alcohol, and severe stress.

Dr. O'Meara's recommendation for release was contingent upon CONREP having a structure in place of "consistent depth and quality." She opined appellant was not dangerous right now, but could become dangerous in the future.

D. The Trial Court's Ruling

The court found that appellant had committed "a brutal, savage murder and mutilation" of his mother and after the killing he went skating. The testimony at the hearing showed that after 10 years, he was starting to show remorse and empathy.

"Without a properly-functioning Conrep program in the county, the system of managing mentally-ill violent offenders transitioning out of state hospital, the community is placed in peril, and the clients are not properly served." The court found that the Solano County CONREP is "beyond dysfunctional," noting there are no written policies and procedures, no formal training for the staff, missed court deadlines and chronic staff turnover. The court expressed its belief that the program should be investigated by the California Department of State Hospitals and the Attorney General of California. "MHM in Solano is institutionally incapable of correcting its deficiencies, and any belated efforts now have been prompted by this case and the publicity that has ensued . . . are band-aids and duct tape." The court concluded that Solano MHM should not be supervising violent offenders.

The court recognized that a dysfunctional CONREP program is not alone grounds for denying appellant outpatient treatment. In this regard, the court found Dr. Naas lacked credibility. He was overseeing MHM in several counties including Solano, yet did not seem to know about their operations. The court concluded "he simply did not know what he was doing both as a manager and as a clinician." Therefore, the court gave his conclusion regarding appellant's dangerousness "very little weight."

The court also "discounted" Suzanne Dunne's opinion because she was the program director for only five months, she was not properly trained, she was juggling

three jobs, and she was demoted from the position for unprofessional behavior. Dunne testified that she did not know how to prepare the required report for the court.

The court similarly gave little weight to Dr. Martin's testimony "given the very small amount of time he's had to review this case, the hastily-arranged interview of the defendant, and his lack of knowledge regarding defendant's history of violence."

The court stated that Dr. Folker was biased toward appellant and not an impartial professional, noting that she testified any prior negative statements she had made about appellant were "mistakes," including her low-to-moderate risk assessment. The court concluded she was not honest in her testimony.

Dr. Skille was not aware of appellant's full history of violence. He stated that he would only recommend release if appellant was on injectable medication, and if he had adequate CONREP supervision.

The court found Dr. O'Meara to be credible and qualified. Dr. O'Meara testified that appellant could be released into the community with proper supervision. Appellant could be treated safely if "the level and depth and quality of care were there," his medication was managed, he had daily check-ins and oversight. Dr. O'Meara observed that appellant's case was unique because he was one of a small number of paranoid schizophrenics who kill. If appellant were released and his symptoms reemerged, he would be dangerous. Dr. O'Meara concluded appellant was not a danger "with many qualifications." Appellant must take his medication, not be in stressful situations, and not use drugs or alcohol. But, appellant has previously tried to do this and failed.

At the conclusion of the testimony the court found appellant had failed to prove by a preponderance of the evidence that he is not currently dangerous, and denied the petition for release.

III.

DISCUSSION

A. Standard of Review

We review the court's decision denying outpatient status for an abuse of discretion. (*People v. McDonough* (2011) 196 Cal.App.4th 1472, 1489 (*McDonough*).)

" 'The term judicial discretion implies the absence of arbitrary determination, capricious disposition, or whimsical thinking. [Citation.] "When the question on appeal is whether the trial court has abused its discretion, the showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion. An appellate tribunal is not authorized to substitute its judgment for that of the trial judge. [Citation.]" [Citation.] Discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered.' [Citation.]" (*People v. Sword* (1994) 29 Cal.App.4th 614, 626 (*Sword*), quoting *People v. Henderson* (1986) 187 Cal.App.3d 1263, 1268 (*Henderson*).)

B. Grounds for Outpatient Release

For a person to be placed on outpatient status, "the court shall consider all of the following criteria: [¶] (1) Whether the director of the state hospital or other treatment facility to which the person has been committed advises the committing court and the prosecutor that the defendant would no longer be a danger to the health and safety of others, including himself or herself, while under supervision and treatment in the community, and will benefit from that status. [¶] (2) Whether the community program director advises the court that the defendant will benefit from that status, and identifies an appropriate program of supervision and treatment." (§ 1603, subd. (a).) Under section 1026.2, the trial court is given discretion to determine if a defendant poses danger to the health and safety of others due to his mental disease, defect or disorder under supervision and treatment in the community. (§ 1026.2, subd. (e).)

" 'Outpatient status is not a privilege given the [offender] to finish out his sentence in a less restricted setting; rather it is a discretionary form of treatment to be ordered by the committing court only if the medical experts who plan and provide treatment conclude that such treatment would benefit the [offender] and cause no undue hazard to the community.' [Citation.]" (*Sword*, *supra*, 29 Cal.App.4th at p. 620.) In evaluating whether or not a defendant would present a danger while on outpatient supervision, a court may disregard the recommendation of doctors and expert witnesses provided that the court has nonarbitrary reasons for doing so. (*Id.* at p. 629; *People v. Cross* (2005)

127 Cal.App.4th 63 (*Cross*).) In reaching its conclusion, "the court shall consider the circumstances and nature of the criminal offense leading to commitment and shall consider the person's prior criminal history." (§ 1604, subd. (c).)

Appellant contends that all of the treatment staff both at MHM and Napa State Hospital who testified at the hearing recommended he be conditionally released to outpatient treatment, but the court overruled the experts' recommendations and denied release. Appellant argues the court abused its discretion because it based its decision on the dysfunctional and inadequate care available through Solano County CONREP rather than on appellant's danger to the community.

In an outpatient release hearing, the burden of proof rest on the defendant to prove he is not a danger to the community by a preponderance of the evidence. (*Sword*, *supra*, 29 Cal.App.4th at p. 621.)

1. The Court's Evaluation of the Expert Recommendations

Appellant disagrees with the court's credibility determinations, which discounted the testimony of five of the eight testifying witnesses.

This case is similar to *Sword*, *supra*, 29 Cal.App.4th 614. In *Sword*, Sword murdered his tenant because God commanded him to do it. (*Id.* at p. 619.) He was found not guilty by reason of insanity and committed to Patton State Hospital. (*Ibid.*) The Patton State Hospital doctors and CONREP staff concluded Sword would not be a danger on outpatient status. (*Id.* at pp. 624-625.) The trial court rejected the experts' conclusions because of the gaps in their understanding and knowledge of Sword's case and their failure to consider relevant facts. (*Id.* at p. 625.) The trial court rejected one doctor's testimony because he was unaware of prior incident of decompensation in Sword's file, and another doctor was unaware of an incident of Sword talking to himself. (*Id.* at pp. 627-628.)

The appellate court held: "The reasons stated by the trial court are not arbitrary, capricious, or an abuse of discretion." (*Sword*, *supra*, 29 Cal.App.4th at p. 628.) The court held that the release decision is not solely a medical or expert decision; the court's role is to apply the "community standard" and not just "rubber-stamp" the medical

experts. (*Ibid.*) "The fact that the statute requires the trial court to approve or disapprove the expert's recommendations shows the discretion placed in the trial court. [Citation.]" (*Ibid.*)

The appellate court concluded the trial court was not obliged to follow the recommendations of the doctors or expert witnesses if it has nonarbitrary reasons for reaching a different conclusion. (*Sword*, *supra*, 29 Cal.App.4th at p. 629.) The trial court did not abuse its discretion in denying Sword outpatient status.

Appellant relies on *Cross*, *supra*, 127 Cal.App.4th 63 to argue the trial court erred. Cross murdered his roommate, but was found not guilty by reason of insanity due to his paranoid schizophrenia and committed to Patton State Hospital. (*Id.* at pp. 67-68.) Cross sought to be released to outpatient treatment. The CONREP evaluator found him suitable for release as long as he complied with his medication regime. (*Id.* at p. 68.) Two Patton State Hospital doctors and the nursing staff all recommended Cross be released for outpatient treatment. (*Id.* at pp. 69-70.) The trial court denied release due to Cross's "age [79 years old] and condition," his ongoing mental illness, and the concern there would not be a structure to ensure he would take his medication. (*Id.* at p. 74.)

The appellate court concluded the trial court did not express any doubts about the experts' knowledge of Cross's history and did not identify any areas of deficiency in their testimony. (*Cross*, *supra*, 127 Cal.App.4th at p. 74.) The court cited Cross's age and condition, which supported granting of the application because they rendered him less physically able to harm anyone. (*Ibid.*) The court's concern that the program could not ensure Cross took his medication was contrary to the undisputed evidence at the hearing. (*Ibid.*) Cross's proposed treatment plan was to commit him to a locked nursing facility where he would have constant supervision by a nursing staff who would administer his medication. (*Ibid.*) "The evidence presented no reason to conclude appellant would enjoy any less supervision or restriction upon his actions and movement in the nursing facility than he did at Patton State Hospital." (*Id.* at p. 75.)

The appellate court held: "[T]he factors cited by the trial court in denying appellant's application either are not supported by the record or are inadequate. They do

not constitute nonarbitrary reasons for denying the application based upon the unanimous recommendations of appellant's treatment team." (*Cross*, *supra*, 127 Cal.App.4th at p. 75.)

Cross is factually distinguishable. Cross was a medically fragile 79-year-old man who needed a walker for mobility. (*Cross*, *supra*, 127 Cal.App.4th at pp. 67-70.) He had no prior periods of release or decompensation and he was being released to a secured, locked nursing facility with 24-hour supervision. (*Id.* at pp. 69-70.) Appellant is a young man in the prime of his life who would be initially released to transitional housing, but then would be in a boarding house in the community. He would not have 24-hour supervision and MHM's plan did not provide for daily contact. Appellant had a significant prior period of decompensation.

Cross is also legally distinguishable. In *Cross*, the trial court did not identify any areas of deficiency in the expert's testimony, and the court's concerns about Cross's medication compliance were contrary to the undisputed testimony. (*Cross*, *supra*, 127 Cal.App.4th at p. 74.)

Here, the trial court carefully analyzed the testimony of each expert and explained the weaknesses in their testimony. (See *Sword*, *supra*, 29 Cal.App.4th at pp. 627-628.) The court found Dr. Naas had limited knowledge both about appellant's case and about the operations of MHM/CONREP in Solano County. Suzanne Dunne was the program director for only five months and was demoted for unprofessional conduct. She had not been properly trained to evaluate appellant or prepare the necessary report for the court. Appellant was the first murder case she had assessed and only the second report she had ever prepared.

Similarly, Dr. Martin lacked any detailed knowledge of appellant's case. He was hired by MHM in advance of the hearing to help the Solano CONREP draft policies and procedures. He had reviewed appellant's case just prior to the hearing and met with appellant for 90 minutes. Dr. Martin had no prior experience working with high-risk people in the community.

The court found that Dr. Sandy Folker was not credible in her assessment and was biased in favor of appellant. She claimed that her two prior assessments of appellant as "low to moderate" risk were in error. She had also failed to consider appellant's full history of violence, including the incidents at Patton State Hospital.

Both Dr. Skille and Dr. O'Meara gave qualified recommendations for appellant's release contingent upon appellant being carefully supervised. Dr. Skille testified that appellant would not be a danger "as long as he has very good supervision." Dr. Skille stated appellant needed regular meetings with a psychiatrist, but MHM's original plan was for monthly contact by Telepsych, an online video psychiatry service. MHM was in the process of hiring an on-site psychiatrist for some number of hours each month and a new director, but their current staff was two unlicensed clinical interns.

Dr. Skille further testified that he had concerns about Solano County CONREP supervising appellant and he did not believe they could properly supervise him.

The court relied heavily on Dr. O'Meara's assessment that appellant could be safely treated in the community only *if* he were carefully supervised. Appellant required daily contact with someone who had the skills to manage the relationship. Dr. O'Meara testified that MHM staff lacked the training and experience to properly supervise appellant, and she was concerned about appellant being supervised by unlicensed interns. Appellant must also be compliant with this medications, avoid stress, and any use of drugs or alcohol. The court noted that while appellant required daily contact with MHM/CONREP, Dr. Martin testified that their current plan did not include daily contact.

In *Cross*, the court did not express doubts about the experts' knowledge or gaps in their understanding. (*Cross*, *supra*, 127 Cal.App.4th at p. 74.) But like *Sword*, the trial court here analyzed the testimony and rejected many of the conclusions presented by the experts because of gaps in their knowledge and understanding of appellant's case. The trial court did not simply rubber-stamp the medical experts' recommendation, but applied

the community standard to assess dangerousness. (*Sword*, *supra*, 29 Cal.App.4th at p. 625.)[3]

In addition, as discussed in more detail below, the court also analyzed the seriousness of the offense, the glaring deficiencies in the CONREP program, and appellant's proposed supervision.

2. Seriousness of the Offense

Appellant argues the seriousness of his offense was not sufficient to deny him outpatient status.

The court may consider the nature of the underlying offense. "A primary concern of a court called upon to decide whether to grant outpatient treatment to an individual committed to a state hospital as the result of a violent act caused by mental illness, is whether outpatient treatment will pose an undue risk to the safety of the community. [Citation.] For that reason, a court considers 'the circumstances and nature of the criminal offense leading to commitment and . . . the person's prior criminal history.' (§ 1604, subd. (c).) After all, commitment of an act constituting a criminal offense and the fact that the act was caused by a mental illness permit an inference that at the time of the verdict the defendant was mentally ill and dangerous. [Citation.] As it relates to current dangerousness, however, the inference may become weaker as substantial time elapses. (See, e.g., *In re Lawrence* (2008) 44 Cal.4th 1181, 1219 . . . ['At some point . . .

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[3] Appellant makes a related argument that the court did not apply the correct legal standard in determining whether appellant was dangerous. The standard in the Penal Code is: "The court shall hold a hearing to determine whether the person applying for restoration of sanity would be a danger to the health and safety of others, due to mental defect, disease, or disorder, if under supervision and treatment in the community." (§ 1026.2, subd. (e).) Appellant cites to one short exchange between the court and Dr. O'Meara to assert the court improperly considered appellant's future dangerousness rather than whether he was currently dangerous. The court, however, was inquiring under what circumstances appellant presented a danger. The court stated: "This Court views Dr. O'Meara's testimony as qualified: He's not a danger with many qualifications." There is no evidence the court applied the incorrect legal standard, and the court found by a preponderance of the evidence that appellant had failed to prove he was not currently dangerous.

when there is affirmative evidence, based upon the prisoner's subsequent behavior and current mental state, that the prisoner, if released would not currently be dangerous, his or her past offense may no longer realistically constitute a reliable or accurate indicator of the prisoner's current dangerousness.']).)" (*McDonough*, *supra*, 196 Cal.App.4th at pp. 1490–1491, italics omitted.)

Here, the trial court began its ruling by noting that appellant committed "a brutal, savage murder and mutilation" of his mother and after the killing he went skating. After 10 years, he was just starting to show remorse and empathy. Even though a substantial amount of time had elapsed since the murder, appellant displayed similar symptoms and behaviors during his outpatient release in 2012. His CONREP social worker, Marco Sanchez, testified at the prior hearing in 2013, about appellant's decompensation and how Sanchez feared for his own safety. (*Scarpaci*, *supra*, 2014 Cal. App. Unpub. LEXIS 8250 at *4-*5.) Sanchez testified that he was "very concerned about his personal safety" when visiting appellant in June and July 2012. Sanchez "had assumed the role of making and enforcing rules in appellant's life and it appeared that appellant perceived him the same way he had perceived his mother before the murder." (*Id*. at *14.)

The trial court properly considered the nature of the offense and appellant's prior periods of decompensation as part of the larger analysis of dangerousness.

3. Inadequacies of the MHM/CONREP Program

Appellant contends the court should not have denied appellant conditional release based upon the inadequacies of the CONREP program. Appellant relies on *McDonough*, where the appellate court found the trial court's reasons for denying release were arbitrary. (*McDonough*, *supra*, 196 Cal.App.4th at pp. 1490–1491.) In *McDonough*, nothing in the record refuted the experts' findings that McDonough had insight into her mental illness, knew her symptoms and triggers, and understood her need for medication. (*Id*. at p. 1491.) The trial court's view that the CONREP program was a "joke" and failed to provide an appropriate program of supervision and treatment was not an appropriate consideration. "[T]he state may not continue to confine an individual who is no longer mentally ill or dangerous by its failure to provide the court with an adequate outpatient

treatment program. To hold otherwise would place upon the patient an undue burden to prove that which is beyond the patient's ability or control." (*Id.* at pp. 1487, 1492.)

McDonough distinguished *Henderson*, where the court found the outpatient treatment program was "inadequate to protect society from an individual the court had determined was still dangerous." (*McDonough*, *supra*, 196 Cal.App.4th at p. 1493.) The *McDonough* court held that where a patient is no longer mentally ill or dangerous, the court cannot deny outpatient status because of flaws in the outpatient treatment program. (*Ibid.*)

Henderson involved the proposed release of a mentally disordered sex offender under section 1603. (*Henderson*, *supra*, 187 Cal.App.3d at pp. 1264-1266.) Several doctors recommended Henderson be placed on outpatient status for treatment, although one doctor found him to be a continuing danger. (*Id.* at pp. 1265-1266.) The trial court found that " 'the outpatient program that has been outlined and submitted is insufficient to constitute an adequate protection to society. . . . [¶] I do not feel that program, that is the Court's opinion and judgment, that that program is not sufficient for that purpose.' " (*Id.* at p. 1268.) The appellate court applied the abuse of discretion standard and considered whether the trial court relied on the proper factors in making its decision and whether those factors were supported by the record. (*Id.* at p. 1269.) It concluded there was sufficient evidence that Henderson was still a danger to the community, and "the outpatient program submitted by the Los Angeles County Department of Health was inadequate to protect society." (*Ibid.*) The trial court's decision was not an arbitrary decision based on whimsical thinking but was within the bounds of reason so there was no abuse of discretion. (*Id.* at p. 1270.)

The court in *Sword* reached a similar result finding the trial court's concerns about the outpatient program were not "arbitrary or unrealistic. They were each based on the idea that the outpatient treatment program . . . would not sufficiently control defendant to assure society that defendant would not be a danger to others. Since the statute requires the community program director to identify an appropriate plan of supervision and treatment (§§ 1602, subd. (a)(2), 1603, subds. (a)(2) & (c)), the trial court apparently

concluded that the treatment plan described by [CONREP] was inadequate because it did not meet the statutory requirements. This reason was found to be sufficient in the *Henderson* case, and we find it sufficient here. [Citation.]" (*Sword*, *supra*, 29 Cal.App.4th at pp. 630–631.)

This case is more analogous to *Henderson* and *Sword* than *McDonough*. While the court unambiguously found the Solano MHM/CONREP seriously lacking in having a program in place that could provide adequate treatment and supervision to protect society from appellant, unlike *McDonough*, here the evidence also supported the court's separate finding that appellant still suffered from mental illness and related symptoms that made him a danger to the community without sufficient supervision.

As discussed above, the court appropriately considered the violent nature of appellant's offense, his subsequent acts of violence, his inability to recognize relapse triggers in the past, the 2012 period of decompensation, and the need for medication compliance in order for him to remain asymptomatic. These findings are all supported by evidence in the record.

To be sure, the court's concomitant finding concerning the inadequacies in the county program were also amply supported by the record. For example, Dr. Skille testified that Solano County CONREP could not properly supervise appellant and that he was not a danger to the community only if he had "very good supervision." Dr. O'Meara similarly testified that appellant would not be a danger only if CONREP had a "structure" in place of "consistent depth and quality." She, however, found CONREP's plan for appellant was "perfunctory," and that they did not have the training and knowledge to properly supervise him.

The court found that Solano County CONREP was "beyond dysfunctional" without written policies and procedures, no formal training for staff, and chronic staff turnover.

A court's valid concerns "the outpatient treatment program . . . would not sufficiently control defendant to assure society that defendant would not be a danger to others" is a proper basis to deny release. (*Sword*, *supra*, 29 Cal.App.4th at p. 631;

Henderson, *supra*, 187 Cal.App.3d at p. 1268 [“ ‘the outpatient program that has been outlined and submitted is insufficient to constitute an adequate protection to society’ ”].)

Under *Sword* and *Henderson*, the trial court properly concluded Solano County MHM/CONREP could not provide adequate supervision to ensure appellant would not be a danger to the community. Appellant cites no authority that the trial court was obligated to issue corrective orders to MHM, or to release appellant to a different CONREP program, nor was this ever requested.

In conclusion, we find the trial court properly determined that appellant did not meet his burden of proof in demonstrating that he could be treated safely in the community.

IV.

DISPOSITION

The order denying appellant conditional release for outpatient status is affirmed.

RUVOLO, P. J.

We concur:

REARDON, J.

RIVERA, J.