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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GREGORY DEVALLE, Defendant and Appellant.	A153804 (San Francisco City and County Super. Ct. No. SCN225709)

Gregory Devalle appeals from convictions of robbery, assault and battery. He seeks a conditional reversal of the judgment and remand for the trial court to conduct a mental health diversion eligibility hearing pursuant to Penal Code section 1001.36, which became effective after he was convicted and sentenced. As we will explain, we agree that a conditional reversal and remand is appropriate.

BACKGROUND

The incident underlying appellant's convictions occurred on the morning of February 4, 2016. A witness leaving the Powell Street BART station observed appellant yell at the victim, an older man, and forcefully punch him in the face, causing the victim to instantly fall backward onto his head and lie unresponsive on the ground as appellant continued to yell profanities at him. Appellant seemed to be in an "altered state," whether due to drugs or a mental health crisis; he was "screaming and wired" his body was tense and he "seemed sort of like unhinged." The witness exclaimed something and appellant "snapped out of it," reached into the victim's pocket and then ran away. Another witness who happened to be looking out a fifth floor office window saw an older

man fall to the ground and another man, “leaning over him and just rolling him around like a rag doll,” going through his pockets, then walking away quickly.

Appellant was arrested that evening. When contacted by police officers, he appeared to be nervous, belligerent and “under the influence of something.” Among the items in his possession was a wallet containing a driver’s license and several credit cards in the name of the victim.

The victim suffered severe traumatic brain injury. He was in a medically induced coma for four days to control intracranial pressure, and was hospitalized for about two weeks. According to the testimony of a friend who had known him for 20 years, at the time of trial the victim was “65 to, at the most, 80 percent of who he was” before.

Appellant had previously been arrested on October 16, 2013, after punching a man at a BART station and taking the wallet the man dropped as he fell down. Walking toward the station, the man had noticed appellant giving him “dirty looks” and yelling obscenities, but ignored him and continued on his way, then was surprised by the punch as he prepared to use his Clipper Card to enter BART. The two men yelled at each other, the man demanding his wallet and appellant calling him the “N word” and saying he wanted to fight him. Appellant was arrested when he fell while trying to run from nearby police officers. In a statement to the police that night, the victim said he thought appellant was “psycho” and the things appellant had been saying sounded like “the gibberish that you hear a lot of crazy people say,” although he testified at trial that appellant had seemed lucid and he meant that appellant was “extremely aggressive” without provocation.

Appellant testified that he was molested by several people as a child, had been on various medications throughout his life, beginning with Ritalin when he was six years old and including Adderall, Depakote, Seroquel, Effexor, Remerom and lithium, and had been hospitalized in mental health institutions multiple times, beginning at age 10 or 11. He had not taken his prescribed medication since his most recent hospitalization about five or six years prior to the present trial. He had smoked marijuana every day since age 13 and had experimented with “all the street drugs from . . . crack cocaine to heroin.”

Prior to the present offenses, he was using methamphetamine approximately every other day and crack cocaine once a week.

Appellant remembered the October 2013 incident but not the current one. He did not know why he assaulted the victim and did not recognize the police officers who testified at trial. He remembered being with some people the night before the February 4 offenses and thought they had "some drinks" and used methamphetamine.

Appellant was diagnosed with bipolar disorder when he was 11 years old, by a licensed clinical social worker at the Sacramento County Mental Health Hospital. He was again diagnosed with bipolar disorder by Dr. Laeeq Evered, a clinical psychologist and neuropsychologist hired by the defense, who assessed appellant in July 2016, and reviewed his mental health records, police reports, video of the incident, and reports from the prosecution's psychiatrist. Evered also diagnosed appellant with attention deficit hyperactivity disorder (ADHD) and substance abuse disorder, and cognitive testing showed him to have an IQ of 77.[1] Evered did not see evidence of a significant anxiety disorder but did see symptoms of "PTSD trauma, which is related to anxiety disorders." He testified that marijuana typically increases the likelihood of a manic episode in a person with bipolar disorder and can have a calming effect on ADHD; a person with an IQ of 77 could be "more vulnerable" to a manic state; and a person in a manic state could be unconscious of his or her conduct. Alcohol can also increase bipolar symptoms.

Evered testified that the "constant moving" shown in the videotape was one of the symptoms of acute mania. A person with acute methamphetamine intoxication might display excessive movement, but "much more movement" and "purposeless movement" would be shown by someone in an acute manic state. It appeared from the video that appellant was speaking "almost constantly," which was consistent with the "pressured speech" of a person in a manic state. Evered opined that appellant could have been in a

[1] Evered testified that with respect to functioning, this IQ was at the sixth percentile, meaning 94 percent of the population performs better than appellant, and that appellant performed at less than the first percentile in several "critical areas" for organization and abstraction.

manic state when he assaulted the victim and could have been in something "very similar to a dream state" or sleepwalking. Evered acknowledged that appellant's conduct during and after the assault, including reaching into the victim's pockets and quickly leaving the scene, was consistent with conscious, goal oriented behavior.

Psychiatrist Mikel Matto, on behalf of the prosecution, interviewed appellant in September 2017, and reviewed his records. Matto found no "obvious signs of acute mental illness." He diagnosed appellant with "other specified anxiety disorder," "other specified depressive disorder," substance abuse disorder and ADHD.

Matto rejected a diagnosis of bipolar disorder because he concluded appellant did not meet the criteria for manic episodes.[2] Asked about the diagnosis of bipolar disorder when appellant was 11 years old, Matto noted that the diagnosis code was for what was then called bipolar "not otherwise specified," meaning the person did not meet the criteria for bipolar disorder but there were features of it or something that made the clinician want to monitor it; that no medications were prescribed; and that bipolar disorder is very difficult to diagnose in children.

Matto testified that appellant's movements in the video immediately before the assault, "lurching and stepping back, and having a hard time standing still in a very rapid way" were "beyond what I would expect for fidgetiness like I might see in someone with ADHD"; that in a person who was not intoxicated they might indicate anxiety or mania; and that they were consistent with someone under the influence of methamphetamine. Appellant told Matto he did not remember being arrested and the last thing he remembered was smoking a " 'mother F'ing bit of weed' " and walking back toward Powell Street, and before that drinking "[p]robably at least a full bottle" of Gray Goose

[2] Specifically, Matto testified that appellant did not describe having an elevated form of distractibility during periods when he was not sleeping, the rapid thoughts he described were not related to sleepless periods, he described feeling tired during the day, which was more consistent with insomnia than mania, he described his mood as "okay" rather than the "supergood, superpowerful or hyper irritated" mood associated with mania.

vodka around 3:00 a.m. Appellant said he had been "on a binge of drugs," "[p]artying for maybe two days" with methamphetamine, cocaine, drinking and smoking marijuana.

Appellant was tried by a jury on charges of robbery (Pen. Code, § 211),[3] assault with force likely to cause great bodily injury (§ 245, subd. (a)(4)) and battery with serious bodily injury (§ 243, subd. (d)), with allegations that in connection with the robbery and assault counts appellant personally inflicted great bodily injury upon the victim (§ 12022.7, subd. (a)) and personally inflicted great bodily injury causing the victim to become comatose due to brain injury and to suffer paralysis (§ 12022.7, subd. (b)). He was found guilty on all three counts, and the jury found the great bodily injury allegations true in connection with the assault but not true in connection with the robbery. Appellant was sentenced to a total prison term of seven years, consisting of a lower term of two years for the assault with a consecutive five years for the section 12022.7, subdivision (b), enhancement. The court stayed lower term sentences of two years each for the robbery and battery counts, as well as a three-year term for the section 12022.7, subdivision (a), enhancement.

This appeal followed.

DISCUSSION

Appellant's sole contention on this appeal is that he is entitled to a conditional reversal of his convictions to enable the trial court to conduct a mental health diversion eligibility hearing pursuant to section 1001.36.

Section 1001.36 creates a "pretrial diversion" program for certain defendants who suffer from a diagnosed and qualifying mental disorder. (§ 1001.36, subd. (b)(1)(A).)[4]

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[3] Further statutory references are to the Penal Code unless otherwise indicated.

[4] Diversion may not be ordered for defendants charged with specified current offenses: Murder or voluntary manslaughter; offenses for which conviction would require registration as a sex offender pursuant to section 290, except for indecent exposure (§ 314); rape; lewd or lascivious act on a child under 14 years of age; assault with intent to commit rape, sodomy or oral copulation; rape or sexual penetration in concert with another person; continuous sexual abuse of a child; and use of a weapon of mass destruction. (§ 1001.36, subd. (b)(2).)

" '[P]retrial diversion' " is defined as "the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment," subject to a number of requirements. (§ 1001.36, subd. (c).) The stated purpose of section 1001.36 "is to promote all of the following: [¶] (a) Increased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety. [¶] (b) Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings. [¶] (c) Providing diversion that meets the unique mental health treatment and support needs of individuals with mental disorders." (§ 1001.35.)

Pursuant to section 1001.36, a trial court may grant pretrial diversion to a defendant who meets all of the six requirements specified in subdivision (b)(1) of the statute. (§ 1001.36, subd. (a).) "At any stage of the proceedings, the court may require the defendant to make a prima facie showing that the defendant will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion" and "[i]f a prima facie showing is not made, the court may summarily deny the request for diversion or grant any other relief as may be deemed appropriate." (§ 1001.36, subd. (b)(3).)

The maximum period of pretrial diversion is two years. (§ 1001.36, subd. (c)(3).) If the defendant commits additional crimes or otherwise performs unsatisfactorily in the diversion program, the trial court may reinstate the criminal proceedings. (§ 1001.36, subd. (d).) "If the defendant has performed satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion." (§ 1001.36, subd. (e).) If the court dismisses the charges upon successful completion of diversion, "the arrest upon which the diversion was based shall be deemed never to have occurred." (§ 1001.36, subd. (e).)

As previously indicated, section 1001.36 was enacted after appellant was sentenced. The question whether the statute applies retroactively to cases like appellant's that are not yet final is currently pending before the California Supreme Court in *People v. Frahs* (2018) 27 Cal.App.5th 784 (*Frahs*), review granted December 27, 2018, S252220. *Frahs*, applying the rule of *In re Estrada* (1965) 63 Cal.2d 740, as applied in *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, held that section 1001.36 applies retroactively because it confers a potential " 'ameliorating benefit' " that the Legislature intended "to apply as broadly as possible." (*Frahs*, at p. 791.)

Since briefing was completed in the present case, the Fifth District Court of Appeal took the opposite position in *People v. Craine* (2019) 35 Cal.App.5th 744 (*Craine*), petition for review pending, petition filed July 1, 2019. *Craine* held that "section 1001.36 does not apply retroactively to defendants whose cases have progressed beyond trial, adjudication of guilt, and sentencing." (*Id.* at p. 760.) While recognizing that section 1001.36 "confers a potentially ameliorative benefit to a specified class of persons" (*id.* at p. 754), the *Craine* court concluded that "the text of section 1001.36 and its legislative history contraindicate a retroactive intent with regard to defendants . . . who have already been found guilty of the crimes for which they were charged." (*Id.* at p. 749.) The Sixth District Court of Appeal, in *People v. Weaver* (2019) 36 Cal.App.5th 1103, 1111–1112 (*Weaver*), petition for review pending, petition filed July 24, 2019, reached the same conclusion as *Frahs*, disagreeing with *Craine.*

We agree with the reasoning of the *Frahs* and *Weaver* courts and join them in concluding section 1001.36 applies retroactively to cases not yet final. As the issue is already pending in the California Supreme Court, no useful purpose would be served by reiterating the careful analyses set forth in those cases.

Respondent argues that even if the statute applies retroactively, a remand is not necessary because no court would find appellant eligible for diversion. One of the six prerequisites for granting diversion is that the court be "satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community." (§ 1001.36, subd. (b)(1)(F).) Respondent points to the

probation report, which notes that appellant was on probation when he committed the present offenses and that his score for violent recidivism risk was medium (indicating medium "risk of being arrested for a new misdemeanor or person felony offense within two years in the community") and his score for general recidivism risk was high (indicating high "risk of being arrested for a new misdemeanor or felony offense within two years in the community"). Respondent asserts that a "medium risk of appellant committing a violent offense within two years is inconsistent with a finding under section 1001.36, subdivision (b)(1)(F) that appellant 'will not pose an unreasonable risk of danger to public safety,' meaning he will not 'commit a new violent felony' if he were 'treated in the community.' "

Appellant's offense was unquestionably violent and serious. But respondent ignores the precise definition of "unreasonable risk of danger to public safety" employed in section 1001.36. Section 1170.18, subdivision (c), defines "unreasonable risk of danger to public safety" as "an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667." Section 667, subdivision (e)(2)(C)(iv), in turn, lists the following offenses: "A 'sexually violent offense' as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code"; specified sexual offenses against a child under 14 years of age; any homicide or attempted homicide; solicitation to murder; assault with a machine gun on a peace officer or firefighter; possession of a weapon of mass destruction; and "[a]ny serious or violent felony offense punishable in California by life imprisonment or death."

The safety related requirement set forth in section 1001.36 is thus not that the court must be satisfied the defendant will not pose *any* unreasonable risk of danger to public safety, but specifically that the defendant will not pose an unreasonable risk of committing one of the violent felonies listed in section 667, subdivision (e)(2)(C)(iv). (§ 1001.36, subd. (b)(1)(F).) The record contains no evidence appellant has ever committed one of these offenses, and neither the present offense nor the 2013 assault provides a basis for finding an "unreasonable risk" of him doing so in the future.

Furthermore, even as to appellant's dangerousness in general, while the trial court commented that appellant had "engaged in violent conduct which is a serious danger to society," it nevertheless imposed a low term prison sentence, finding the mitigating circumstances of the offense—including his "mental disease, disorder, or defect" — outweighed the aggravating circumstances. Significantly, the court did not have occasion to consider whether the risk appellant posed would be mitigated by the mental health treatment he would receive if diversion was granted.

Section 1001.36 provides a non-exhaustive list of mental disorders that may make a defendant eligible for diversion: The court must be "satisfied that the defendant suffers from a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, but excluding antisocial personality disorder, borderline personality disorder, and pedophilia." (§ 1001.36, subd. (b)(1)(A).) As the trial court noted, there was disagreement among the experts as appellant's specific diagnosis. He was diagnosed as a child, and again by Dr. Evered, with bipolar disorder—one of the disorders expressly listed in section 1001,36, subdivision (b)(1)(A). Dr. Matta disagreed with this diagnosis. But Matta's diagnoses—other specified anxiety disorder, other specified depressive disorder, substance abuse disorder and ADHD—are all mental disorders "identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders. (§ 1001.36, subd. (b)(1)(A).) Neither Evered nor Matta diagnosed appellant with any of the mental disorders listed in section 1001.36, subdivision (b)(1)(A), as precluding eligibility.

Remand is appropriate in this case because the record "affirmatively discloses that [appellant] appears to meet at least one of the threshold requirements, namely, he suffers from a diagnosed mental health disorder. (See § 1001.36, subd. (b)(1)(A).)" (*Weaver, supra,* 36 Cal.App.5th at pp. 1121–1122; *Frahs, supra,* 27 Cal.App.5th at p. 791.) The trial court will have to determine whether all the requirements set forth in section 1001.36, subdivision (b)(1)(A), are satisfied in this case, but, contrary to respondent's

position, we cannot say as a matter of law that appellant would not be able to establish eligibility.

DISPOSITION

The judgment is conditionally reversed and the matter is remanded to the trial court with directions to hold a hearing under section 1001.36 to determine whether to grant appellant diversion under that statute. If the trial court grants and appellant successfully completes diversion, the trial court shall dismiss the charges. (§ 1001.36, subd. (e).) If the trial court does not grant diversion, or if it grants diversion but appellant does not satisfactorily complete diversion (§ 1001.36, subd. (d)), then the trial court shall reinstate the judgment. (*Weaver, supra,* 36 Cal.App.5th at p. 1122; *Frahs, supra,* 27 Cal.App.5th at p. 796.)

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Kline, P. J.

We concur:

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Richman, J.

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Stewart, J.

People v. Devalle (A153804)