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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.

DAVID HUNTER,

Defendant and Appellant.

2d Crim. No. B235495
(Super. Ct. No. F458493)
(San Luis Obispo County)

David Hunter appeals an order recommitting him to the California Department of Mental Health as a mentally disordered offender (MDO). (Pen. Code, § 2962 et seq.)¹ Appellant contends that the evidence is insufficient to support the trial court's finding that his severe mental disorder was not in remission as of the date of Board of Prison Terms (BPT) hearing (§ 2962, subd. (a).) We affirm.

Facts and Procedural History

On March 28, 2011, appellant filed a superior court petition challenging a BPT determination that he met the criteria for treatment as an MDO. (§ 2966, subd. (b).) Appellant waived jury trial and stipulated that Doctor J. Odom's report be received into evidence.

Doctor Odom, a staff psychiatrist at Atascadero State Hospital (ASH), reported that appellant suffered from schizoaffective disorder, bipolar type, exhibitionism,

¹ All statutory references are to the Penal Code unless otherwise stated.

polysubstance dependency, and antisocial personality disorder. The doctor opined that appellant met all the MDO criteria and the severe mental disorder was not in remission because appellant exhibited overt signs and symptoms (argumentativeness, intrusiveness, exposing genitals to female staff, masturbation and sleep disturbance) in the year prior to the BPT hearing.

Forensic Psychologist Alette Coble-Temple, Ph.D. interviewed appellant two months before the BPT hearing and testified that appellant was in "partial remission." When asked if appellant was in remission as of date of the BPT hearing (March 25, 2011), Dr. Coble-Temple stated, "I haven't seen him since January 14 [2011], so I can't speak to symptoms after the 15th."

Substantial Evidence

Appellant argues that the trial court erred in finding that he was not in remission. As in any sufficiency-of-the-evidence appeal, we review the entire record in the light most favorable to the judgment to ascertain if there is any reasonable, credible evidence to support the challenged finding. (*People v. Beeson* (2002) 99 Cal.App.4th 1393, 1398.)

A prisoner is subject to involuntary treatment as an MDO if the prosecution demonstrates, among other factors, that the prisoner's severe mental disorder "is not in remission or cannot be kept in remission without treatment." (§ 2962, subd. (a)(1).) "The term 'remission' means a finding that the overt signs and symptoms of the severe mental disorder are controlled either by psychotropic medication or psychosocial support. A person 'cannot be kept in remission without treatment' if during the year prior to the question being before the Board of Prison Terms or a trial court, he or she has been in remission and he or she has been physically violent, except in self-defense, or he or she has made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family, or he or she has intentionally caused property damage, or he or she has not voluntarily followed the treatment plan." (*Ibid*, (a)(3).)

The trial court discredited Dr. Coble-Temple's testimony because the doctor opined that appellant was in "partial remission" in January 2011 but had no opinion whether appellant was in remission on the date of the BPT hearing, March 25, 2011. The doctor did, however, say that appellant manifested no overt symptoms when she interviewed him on January 14, 2011.

Appellant argues that Doctor Odom's MDO findings do not establish, as a matter of law, that the mental disorder was not in remission. Doctor Odom's report refers to a February 28, 2011 incident in which appellant was "observed naked openly masturbating in his room" Hospital staff charted the incident as a "target symptom[]: mania." Doctor Coble-Temple said the incident could be an active symptom of the mental disorder but it could also be a healthy coping mechanism to avoid angry outbursts.

Appellant claims that hospital staff saw him masturbating during a room check and it is absurd to conclude the incident is a mental illness symptom. He argues that Doctor Odom's MDO findings lack foundation because the doctor did not interview him and referred to medical records outside the one-year BPT hearing period.

Doctor Odom opined that appellant "continued to experience mania during the past year" and cited instances of inappropriate conduct with female staff, exhibitionism, hyperactive thought and speech, and confrontational behavior. The report stated that these signs and symptoms tracked a long history of mental illness dating back to 1996 when appellant exposed his genitals to female staff and engaged in open masturbation. Appellant was subject to a *Keyhea* involuntary medication order 2007. (See *Keyhea v. Rushen* (1986) 178 Cal.App.3d 526, 542; *In re Qawi* (2004) 32 Cal.4th 1, 27.) A follow-up evaluation noted that appellant continued to suffer from visual and auditory hallucinations, manic features, rapid speech, and sexually inappropriate behaviors such as exposing himself and masturbating in front of staff.

Doctor Odom reported that appellant was admitted to ASH as a MDO in December 2009 and continued to receive psychotropic medications pursuant to the *Keyhea* order until February 1, 2010. After the order expired, appellant refused his medication on March 12, 2010.

Doctor Odom opined that the mental disorder was not in remission because appellant exhibited the following signs and symptoms in the year prior to the BPT hearing:

1. On April 22, 2010, appellant engaged in an act of exhibitionism by exposing his genitals to female staff. Hospital staff noted that appellant "showed symptoms of mania." A phallogometric assessment was conducted on July 21, 2010 and "indicated significant arousal responses to confrontation with exhibitionistic behavior toward female adults." ~

2. On July 14, 2010 appellant was treated for "hyperactive . . . rapid speech, circumstantial thought process," and "irritable" behavior. On July 30, 2010, appellant exhibited increased symptoms of mania. 3. On September 8, 2012 appellant acted inappropriately toward

female staff and was "yelling with rapid and pressured speech."

4. On October 6, 2010, appellant's lithium medication was restarted "because of increased symptoms of mania (i.e., pressured speech, racing thoughts and insomnia . . . loud and confrontational with others)."

5. On December 20, 2010, appellant exhibited "rapid speech. . . blunted effect." `6. On February 28, 2011, appellant was "observed naked openly masturbating in his room."

Hospital staff diagnosed the behavior as "target symptoms: mania."

Appellant complains that Doctor Odom's report is based on hearsay and out-dated medical records but waived the error by not objecting. It is settled that medical experts may base their opinions on any matter made known to the expert that is the type of information reasonably relied upon by an expert in forming his opinion. (Evid. Code § 801, subd. (b); *People v. Catlin* (2001) 26 Cal.4th 81, 137.) "A psychiatrist may and should take into account the prisoner's entire [medical] history in making an MDO evaluation." (*People v. Pace* (1994) 27 Cal.App.4th 795, 799.)

Although Doctor Coble-Temple believed that appellant was in partial remission, the trial court was free to reject her MDO findings and accept Doctor Odom's report. (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 923.) We do not reweigh the evidence on appeal. (*People v. Butler* (1999) 74 Cal.App.4th 557, 563.) The evidence amply supports the trial court's finding that the severe mental disorder was not in remission and could not be kept in remission without treatment. (See *People v. Bowers*

(2006) 145 Cal.App.4th 870, 879 [single psychiatric opinion constitutes substantial evidence]; *People v., Superior Court (Williams)* (1991) 233 Cal.App.3d 477, 490 [same].)

The judgment (recommitment order) is affirmed.

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YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Barry T. LaBarbara, Judge
Superior Court County of San Luis Obispo

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