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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM GRANT CROOKS,

Defendant and Appellant.

D067502

(Super. Ct. No. CR56642)

APPEAL from an order of the Superior Court of San Diego County, Peter C.

Deddeh, Judge. Affirmed.

Laurel M. Nelson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Annie Featherman Fraser, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant William Grant Crooks appeals from the trial court's order, following a jury trial, extending his commitment to a state mental hospital for two years pursuant to Penal Code section 1026.5, subdivision (b). Crooks contends that the record from the trial does not contain substantial evidence to support a finding either that he lacks the ability to control dangerous behavior or that he currently poses a substantial risk of physical harm to others. We disagree; two psychiatrists testified that Crooks was still dangerous to others and had serious difficulty controlling his dangerous behavior. Accordingly, we affirm the order extending Crooks's commitment.

I.

STATEMENT OF THE CASE

In January 1982, the superior court found Crooks not guilty by reason of insanity of the following crimes: vehicular manslaughter (see former Pen. Code, § 192, subd. 3(a); Stats. 1945, ch. 1006, § 1, p. 1942); hit and run (Veh. Code, § 20001); and assault with a deadly weapon (Pen. Code, § 245, subd. (a)). The prosecution of those crimes included the allegation that Crooks used a personal firearm during the commission of a felony (Pen. Code, § 12022.5). In February 1982, the court found that Crooks had not recovered his sanity and committed him to the Department of Mental Health pursuant to Penal Code section 1026.

Since then, other than during short periods of placement in outpatient treatment (followed by revocation of outpatient status), Crooks has been committed to Patton State Hospital (Patton). After the maximum confinement based on the original charges and finding, the People have obtained two-year extensions of commitment from September

1989 through the present. Crooks's appeal is from the order of commitment following the most recent extension of commitment proceedings based on the People's petition filed in March 2014.

The trial on the People's petition took place over the course of four days in January 2015. The People called two expert witnesses (Michael Takamura, M.D., a court appointed psychiatrist, and Peter Martin, M.D., a psychiatrist from Patton), and Crooks called three percipient witnesses (two psychiatric technicians from Patton and a licensed vocational nurse from Patton). No exhibits were introduced into evidence. Following instruction and closing arguments, the jury found that Crooks was still suffering from a mental disease, defect, or disorder and remained a substantial danger to others.

Based on the jury's finding, the court entered an order extending Crooks's commitment for a two-year period until August 8, 2016, pursuant to Penal Code section 1026.5. Crooks timely appealed.

II.

DISCUSSION

On appeal, Crooks presents only one argument: "The jury's finding that [Crooks] qualified for extended commitment under Penal Code section 1026.5 lacked the requisite substantial evidence to establish that his mental illness resulted in serious volitional impairment or that it caused him to be a current danger to others if released."

(Capitalization & bolding omitted.)

A defendant like Crooks who is found not guilty by reason of insanity may be confined in a state hospital for no more time than "the longest term of imprisonment

which could have been imposed for the offense or offenses of which the person was convicted," which the Legislature refers to as the "'maximum term of commitment.'" (Pen. Code, § 1026.5, subd. (a)(1).) In addition, prior to the completion of a term of commitment (whether a maximum term or any additional extended term), the commitment may be extended for two years upon a showing that, "by reason of a mental disease, defect, or disorder," the defendant "represents a substantial danger of physical harm to others." (*Id.*, subd. (b)(1); see *id.*, subd. (b)(4) & (8).) Establishing a substantial danger of physical harm to others "requires proof that the person has serious difficulty controlling his dangerous behavior." (*People v. Williams* (2015) 242 Cal.App.4th 861, 872 (*Williams*).) The factors required for an extended commitment must be proven beyond a reasonable doubt. (*Ibid.*; see Pen. Code, § 1026.5, subd. (b)(7).)

As determinative in the present appeal, "[a] single psychiatric opinion that a person is dangerous because of a mental disorder constitutes substantial evidence to justify the extension of commitment." (*Williams, supra*, 242 Cal.App.4th at p. 872; accord, *People v. Bowers* (2009) 169 Cal.App.4th 1442, 1450; *People v. Zapisek* (2007) 147 Cal.App.4th 1151, 1165.) Here, the parties agree that the testimony from the People's two experts, Drs. Takamura and Martin, established that, as a result of his mental disease, disorder or defect,¹ Crooks had difficulty controlling his behavior to the extent that he remained a substantial danger of physical harm to others — as required to

¹ The record indicates that Crooks suffers from schizoaffective disorder of the bipolar type with a history of polysubstance dependence.

extend the commitment under Penal Code section 1026.5, subdivision (b). Our independent review of the record confirms the parties' analysis of the experts' testimony.

Thus, the record contains substantial evidence to support the jury's verdict that Crooks's commitment should be extended. The testimony from the experts — which is uncontradicted — provides the evidentiary basis for the jury's finding, and Crooks does not argue otherwise.

Instead, Crooks focuses on the factual bases for the experts' opinions and argues that the underlying factual assumptions (on which the opinions were based) are not supported by substantial evidence.² For example, Crooks suggests that, because the record does not contain evidence of Crooks's violence since the events in 1981 that resulted in his original commitment, there is no substantial evidence that he poses a danger of harm to others. Relying on cases like *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763 (*Saelzler*) and *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472

² Dr. Takamura testified that he based his opinion on: Crooks's lack of acceptance of responsibility for the 1981 incident in which he killed a person (instead, continuing to blame a roommate or to attribute the event to sleep deprivation); Crooks's evasiveness and defensiveness regarding past events, including problems, mental illnesses and diagnoses; Crooks's lack of insight, awareness and/or appreciation of any mental disorder, including the need and importance for medication to help with such disorders; Crooks's failure to accept he had a substance abuse problem; a few of Crooks's psychiatric reports, including one as recent as October 2014; Crooks's likely failure to continue taking his medication if released; and Crooks's lack of a realistic plan for his release.

Dr. Martin testified that he based his opinion on: Crooks's lack of insight into his mental disease; Crooks's history, including noncompliance with taking prescribed medication and substance abuse; Dr. Martin's personal observations of Crooks; statistics; Crooks's impulsivity; Crooks's symptomology; Crooks's difficulty in accepting other people's opinions; a risk of violence given Crooks's mania about being supervised; and Crooks's lack of a realistic plan for his release.

(*Leslie G.*), Crooks argues that, where experts' opinions are based on speculation or conjecture, the opinions may not qualify as substantial evidence. (*Saelzler*, at p. 775; *Leslie G.*, at p. 487.)

The problem with Crooks's argument is that he is presenting it to us *in the first instance* on appeal. If Crooks believed that the facts underlying the experts' opinions lacked foundation or were speculative or otherwise objectionable, he was obligated to raise those concerns in the trial court. Although Crooks frames the issue on appeal as one challenging the substantiality of the evidence in support of the jury's finding, he does not direct his substantial evidence argument to evidence in support of the finding — namely, the experts' opinions. Instead, he is challenging the bases on which the experts relied in reaching their opinions. As such, Crooks's real complaint is that the opinions of the experts should not have been admitted into evidence because of a lack of foundation. Because the parties had not focused on this issue in their merits briefs, we asked for and received supplemental briefing. (Gov. Code, § 68081.)

We begin with the understanding that an expert opinion based on " ' "guess, surmise or conjecture" ' " should be excluded. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770 (*Sargon*).) That is because " 'the expert's opinion may not be based "on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors." ' " (*People v. Moore* (2011) 51 Cal.4th 386, 405.) Exclusion of such opinion " ' "is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony *assist the trier of fact* to evaluate the issues it must decide?" ' " (*Sargon*, at p. 770, italics added; *Moore*, at p. 405;

italics added.) Not surprisingly, therefore, "*the trial court* acts as a gatekeeper to exclude speculative or irrelevant expert opinion." (*Sargon*, at p. 770, italics added.)

In *Sargon*, our Supreme Court reviewed certain prerequisites for the admission into evidence of expert testimony, summarizing: "under Evidence Code sections 801, subdivision (b), and 802, *the trial court* acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative."³ (*Sargon, supra*, 55 Cal.4th at pp. 771-772, italics added.) These three grounds for excluding expert testimony are the same arguments that Crooks asserts on appeal (albeit in the context that the record in the present appeal lacks substantial evidence to support the jury's verdict). Accordingly, the trial court, not the appellate court, is the proper forum in which Crooks should have raised any issue regarding the sufficiency of the underlying bases for the experts' opinions; we cannot make this

³ Evidence Code section 801, subdivision (b) provides: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] . . . [¶] (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion."

Evidence Code section 802 provides: "A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based."

determination in the first instance. As presented, therefore, Crooks improperly asks us to act as gatekeeper — a position reserved exclusively for the trial court. (*Id.* at pp. 769 & fn. 5, 770, 771, 772, 781.)

In addition, our review of the record indicates that, in the trial court, Crooks did not raise his concern about the alleged lack of substantial evidence to support either expert's opinion. He could have, for example, filed a motion in limine prior to trial to preclude the anticipated testimony, asserted an evidentiary objection at the time the prosecutor asked the expert his opinion, or moved to strike the opinion after it was offered (and requested an instruction, if necessary). By not doing so, Crooks failed to preserve for appellate review the admissibility of either expert's opinion; thus, Crooks forfeited the issue for appeal. (*People v. Holt* (1997) 15 Cal.4th 619, 666 [*Miranda v. Arizona* (1966) 384 U.S. 436 waiver]; *Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, 1340 (*Bermudez*) [expert testimony]; *SCI California Funeral Services, Inc. v. Five Bridges Foundation* (2012) 203 Cal.App.4th 549, 563 [expert testimony].) "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made" (Evid. Code, § 353, subd. (a).) The purpose behind this procedural requirement is particularly appropriate here: failure to object "denies the opposing party the opportunity to offer evidence to cure the asserted defect." (*Holt*, at p. 666; accord, *SCI Cal. Funeral Services*, at p. 564 [expert testimony].) Had the trial court been

presented with and sustained an applicable objection, the People may have been able to overcome it.⁴

We find further support for our conclusion in *Bermudez supra*, 237 Cal.App.4th 1311, where the defendant's presentation on appeal is strikingly similar to Crooks's presentation here. In *Bermudez*, the defendant appealed from a judgment awarding the plaintiff considerable damages for past medical expenses. (*Id.* at p. 1338.) He argued that substantial evidence did not support the award, in part because the facts underlying the plaintiff's experts' opinions as to the reasonableness of the medical charges were "too terse and conclusory to amount to substantial evidence." (*Id.* at p. 1339.) The Court of Appeal rejected this argument, explaining that the issue on appeal did not involve a substantial evidence review of the facts underlying the expert testimony. (*Id.* at pp. 1339-1340.) "Though not framed in this fashion, [the defendant's] real complaint" was the lack of foundation for the experts' opinions. (*Id.* at pp. 1339-1340.) However, because the defendant did not object on this basis in the trial court, he was precluded from asserting the argument on appeal. (*Id.* at p. 1340.) Here, too, Crooks's failure to object to the admissibility of the experts' opinions in the trial court precludes Crooks from arguing on appeal that the jury should not have been allowed to base its decision on the experts' opinions. As in *Bermudez*, "[w]e leave the question of how courts should fulfill their

⁴ Moreover, had the trial court been presented with and sustained an applicable objection, we would have a trial court ruling to review on appeal. (See *Sargon, supra*, 55 Cal.4th at p. 773 ["we review [trial court's] ruling excluding or admitting expert testimony for abuse of discretion".])

gatekeeper role in a case like the instant one for *an appeal in which the parties have actually litigated the issue at trial.*" (*Id.* at p. 1340, italics added.)

Crooks's principal authorities do not suggest a different result. The procedural context of both *Saelzler*, *supra*, 25 Cal.4th 763, and *Leslie G.*, *supra*, 43 Cal.App.4th 472 distinguishes them from Crooks's case. In both *Saelzler* and *Leslie G.*, the plaintiff appealed from an adverse summary judgment. (*Saelzler*, at p. 766; *Leslie G.*, at p. 476.) In both cases, the defendant had met its initial burden, shifting the burden of production to the plaintiff to present evidence that would establish a triable issue of material fact as to causation. (*Saelzler*, at pp. 768, 775; *Leslie G.*, at pp. 481-482.) Each plaintiff attempted to meet this burden by submitting testimony from an expert that the defendant's breach of the duty of due care was a substantial factor in causing the plaintiff's injuries. (*Saelzler*, at p. 771; *Leslie G.*, at pp. 478-479.) Because each appeal was from a summary judgment, each appellate court was *reviewing de novo* the trial court's determination that the evidence from the plaintiff's expert established a triable issue of material fact as to causation. (*Saelzler*, at pp. 767, 772; *Leslie G.*, at pp. 481, 483.) As such, each appellate court was required to apply *the same general principles as the trial court* (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 717; *Kolodge v. Boyd* (2001) 88 Cal.App.4th 349, 356), which included "independently determin[ing] the construction and effect of the facts presented to the trial court as a matter of law" (*Kolodge*, at p. 356). In its *de novo* review, each appellate court independently determined that, because there was no factual basis for the plaintiff's expert's opinion — i.e., the opinion was based on speculation, conjecture or inferences — the testimony was insufficient for plaintiff to meet her

evidentiary burden in opposition to the defendant's showing in support of its motion for summary judgment. (*Saelzler*, at p. 781; *Leslie G.*, at p. 488.) Stated differently, each of the appellate courts determined *in the first instance* the effect of the expert's testimony as to causation. (*Kolodge*, at p. 356.)

In contrast, in the present appeal we are reviewing a record from a jury trial in which two experts provided solid opinions (that fully support the jury's verdict) and testified to the facts on which those opinions were based. To the extent Crooks now contends those underlying facts are not supported by substantial evidence (or are speculative, remote or conjectural), he did not preserve that issue for appellate review by failing to challenge the experts' testimony at trial. This is more than a procedural technicality; by failing to raise the issue at trial, there is no court ruling for us to review.

Crooks's supplemental authorities are no more persuasive.

In *Jennings v. Palomar Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, the appellate court was reviewing a decision from the trial court that excluded the expert's testimony based on the *timely motion to strike at trial* that the testimony was based on speculation. (*Id.* at pp. 1112 [*trial court ruled opinion based on speculation*], 1116 [*trial court granted motion to strike*].)

In *In re Anthony C.* (2006) 138 Cal.App.4th 1493, an appeal from a judgment of extended commitment following trial, the prosecution's expert's testimony was deemed insubstantial on appeal to sustain a finding that the ward would be dangerous to the public because of his mental or physical deficiency, disorder or abnormality, as required by Welfare and Institutions Code section 1801. (*Anthony C.*, at pp. 1499, 1508-1509.)

However, the appellate court did not base its ruling on an examination of the sufficiency of the evidence in support of the expert's opinion. Rather, the appellate court simply ruled that, even considering the evidence from the prosecution expert, "there was no testimony Anthony's mental abnormality caused him serious difficulty controlling his sexually deviant behavior." (*Id.* at p. 1507.) This is in contrast to the present appeal where two experts opined that Crooks was still dangerous to others and had serious difficulty controlling his dangerous behavior.

In *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, the issue was whether the trial court, in first entertaining a petition for an involuntary civil commitment, has authority to *review for legal error* the expert evaluations which are required prior to the filing of the petition under Welfare and Institutions Code section 6601. (*Id.* at pp. 895 ["material legal error"], 901 & fn. 5, 910.) As such, a trial court's *legal ruling* regarding the sufficiency of the evaluator's report under section 6601 is reviewed *de novo*.⁵ (*Troyer, supra*, 240 Cal.App.4th at p. 669.) In contrast, here Crooks asks us to review a jury's factual finding for substantial evidence following trial.

As Crooks correctly argues, in *People v. Beach* (1968) 263 Cal.App.2d 476, we stated that expert opinion "is of little value" when based on an assumption of fact for

⁵ In contrast with the posttrial substantial evidence review we are conducting here, in the *de novo* review of a pretrial ruling under Welfare and Institutions Code section 6601, "we are not deciding whether the evaluators' reports were reliable, valid or accurate. These questions are inherently factual. We are deciding only whether, as a question of law, their reliability, validity or accuracy could be determined in the context of a motion to dismiss at this preliminary stage of the [Sexually Violent Predator Act] proceeding, where neither party is entitled to an evidentiary hearing." (*People v. Superior Court (Troyer)* (2015) 240 Cal.App.4th 654, 670, fn. 9 (*Troyer*).)

which there is no direct evidence. (*Id.* at p. 487.) However, we made that statement in the context of our ruling on appeal that substantial evidence supported a factual finding contrary to the finding urged by the expert's opinion. (*Id.* at p. 488 [court found defendant sane; defense expert's opinion was that defendant was not sane].) We merely explained why the trial court may have discounted or discredited the expert's testimony *in the first instance*; we did not apply that standard on appeal to determine whether substantial evidence supported the trial court's finding. (*Id.* at pp. 487-488.)

In *Smith v. Workmen's Comp. Appeals Bd.* (1969) 71 Cal.2d 588, the decedent died from congestive heart failure, and the Workmen's Compensation Appeals Board denied benefits based on the finding that the decedent's disease did not arise out of his employment. (*Id.* at p. 589.) The proper legal inquiry for a denial of benefits in *Smith*, however, was not whether the decedent's employment caused the heart disease, but whether his work aggravated or accelerated the disease. (*Id.* at p. 592.) Because the board relied on that part of the expert's testimony containing evidence of a lack of causation between the employment and the disease — which was not the proper legal standard for denying benefits — the expert's testimony did not contain substantial evidence to support the denial of benefits. (*Id.* at p. 593.) The Supreme Court did not base its decision on the substantiality of the evidence in support of the underlying facts on which the expert relied.

In *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1111, our Supreme Court ruled that the trial court abused its discretion in certifying a plaintiff class. Crooks tells us that the basis of the ruling was that the testimony of two medical experts

on which class certification was based "was not sufficient because their opinions lacked sufficient relevant and factual bases to be deemed ' "substantial evidence." ' " We disagree. The court ruled that "[t]aken as a whole, the medical expert testimony plaintiffs presented in support of their motion for class certification is too qualified, tentative and conclusionary to constitute substantial evidence" (*Id.* at p. 1111.) Contrary to Crooks's representation, the court did not mention a lack of "sufficient relevant and factual bases" underlying the expert testimony in that case or otherwise base its decision on the evidence in support of the facts or assumptions on which the expert testimony was based.

Finally, Crooks's reliance on *People v. Prunty* (2015) 62 Cal.4th 59 is misplaced. We agree with Crooks to the extent he tells us that the prosecution's expert's testimony in support of the gang participation charge (Pen. Code, § 186.22, subd. (b)) did not contain substantial evidence to establish that the gang subsets to which the various defendants belonged constituted a single organization. (*Prunty*, at pp. 82-83.) We disagree, however, with Crooks's suggestion that this ruling was based on an insufficiency of evidence to support the facts or assumptions underlying the expert's testimony. The court's ruling was based on the substantiality of the expert's testimony; i.e., the evidence contained *in the expert's testimony* was insufficient to support a factual finding necessary to obtain a conviction under Penal Code section 186.22, subdivision (b). (*Prunty*, at pp. 82-85.) In contrast, as we explained *ante*, in the present case the evidence contained *in the experts' testimony* fully satisfies the requirements necessary to extend Crooks's commitment under Penal Code section 1026.5, subdivision (b).

In sum, in the present appeal, the prosecution's experts both testified that, as a result of a schizoaffective disorder, Crooks had difficulty controlling his behavior to the extent that he remained a substantial danger of physical harm to others. This testimony is substantial evidence to support the jury's finding (and related court order) that Crooks's commitment should be extended pursuant to Penal Code section 1026.5, subdivision (b). Although Crooks characterizes the issue on appeal to be whether the record contains substantial evidence to support the experts' opinions, the real issue is whether the record contains a sufficient foundation for the admissibility of the experts' testimony. By failing to assert such an objection in the trial court, however, Crooks failed to preserve for appellate review the admissibility of either expert's opinion and, accordingly, forfeited the issue for appeal.

DISPOSITION

The order extending Crooks's commitment is affirmed.

IRION, J.

WE CONCUR:

NARES, Acting P. J.

PRAGER, J.*

* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.