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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LUTHER DALE WINN,

Defendant and Appellant.

E053634

(Super.Ct.No. SWF015676)

OPINION

APPEAL from the Superior Court of San Bernardino County. Helios (Joe) Hernandez, Judge. Affirmed.

Chris Truax, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr. and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

A jury adjudged defendant to be a Mentally Disordered Offender and he was recommitted for involuntary treatment at Atascadero Hospital. (Pen. Code, § 2970.)¹ Defendant appeals, claiming there is insufficient evidence to support one aspect of the jury's adjudication, i.e., that he represents a substantial danger of physical harm due to his mental illness. We reject his contention and affirm.

ISSUE AND DISCUSSION

The People's expert and the defendant's expert disagreed on only one aspect of the jury's implied finding that defendant is a mentally disordered offender, viz, that because of his schizophrenia, he presently represents a substantial danger of physical harm to others.

Defendant testified that in 2003, he was at a liquor store parking lot in Temecula. He denied that a police officer approached him and he said he would hit the officer with a roundhouse crescent kick² and the officer "would be finished." However, defendant admitted pleading guilty to a violation of section 69, resisting the police with force or violence, as a result of this incident. According to the People's expert, during this incident, defendant talked about doing a crescent kick, and about finding out where the officer lived so defendant could "play with him." Additionally, the officer felt threatened by defendant and he placed defendant in handcuffs. In the expert's opinion, the restraints

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

² Defendant, who testified that he is 5'10" tall and weighs 170 pounds, admitted he was trained in the martial arts, including Taekwondo.

prevented defendant from hitting the officer. Defendant admitted at trial that he was not taking medication at the time of this incident.

A Riverside County deputy sheriff who was present during a March 2006 incident³ testified that the police had received a complaint from the principal of a nearby elementary school about abandoned vehicles, some of which were burned out and had broken glass, parked near bus stops used by his students and those attending a high school. The officer and his partner, both in uniform, went to the area in a marked patrol car and were taking down the license plate numbers of the vehicles when defendant approached them. The officers got out of their patrol car and told defendant that they were going to tow the vehicles and clean up the area. Defendant became upset and said if they towed his van, there would be serious problems, which the officer took as a threat. Defendant shouted that he wanted to take a polygraph exam and he said he was going to get his shotgun. He began to walk toward the cab of his van. The officer feared that defendant was going to retrieve a shotgun, so he and his partner grabbed defendant's arms and a struggle ensued. Defendant locked his arms against his chest and the two officers struggled with him for six minutes to get them unlocked, so they could put handcuffs on him. During the struggle, all three fell to the ground. Also during the struggle, defendant ignored the officers' orders that he put his hands behind his back.

³ Despite the officer's testimony that he was the male officer who was present during the March 2006 incident, defendant testified that he was not.

Defendant was unable to hit the officer, as the latter had both of his hands on defendant's arms. The officer's knees got scraped up and bruised and his partner's right knee sustained the same kind of injuries and she pulled a muscle in her back. Typically, Riverside County deputies do not travel in pairs in that area, and the closest back-up was 20 miles away. There was no shotgun in defendant's van and it appeared as though he was living in it. Had the officer been told by defendant that he did not want his van towed because he was living in it, the officer probably would not have had it towed. Defendant admitted that he pled guilty to resisting the police by force or violence in connection with this incident. At trial, defendant admitted that he was not taking medication at the time of this incident.

Following his conviction for the 2006 incident, defendant was released to parole in November 2008, and violated parole by disturbing the peace on January 23, 2009. During this interval, according to the prosecution expert, defendant threatened others but was not violent. On January 23, 2009, while free on parole, defendant went to the courthouse to get some documents, was told to leave and then threatened and yelled at a security guard.⁴ The police were called and they arrested defendant.

In November 2009, while confined to Atascadero Hospital, defendant behaved inappropriately during a group session and his treatment team addressed this with him. Defendant became agitated and was told to leave the room. Defendant responded that

⁴ In his opening brief, defendant incorrectly refers to this incident as occurring "in a mall."

they had better watch what they were doing. He then blocked the doorway so staff could not leave the room. An alarm was set off and defendant lunged towards staff members and threatened them. He also demanded to take a polygraph examination. He was placed in room seclusion and was involuntarily medicated. This required a conclusion by three doctors that defendant represented a danger of harm to others due to his mental illness.⁵ According to the prosecution expert, defendant did not become physical due to the swift response by staff to the alarm.

In July 2010, according to the prosecution expert, defendant, while medicated, threatened to hit his treating physician with a paddle because he wanted to be taken off involuntarily administered medication.

In April 2011, while still at Atascadero Hospital, defendant was performing karate kicks in a common area. A hospital police officer told defendant to stop doing this, as his actions could be interpreted by some other patients as being threatening. However, defendant did not stop. The officer told defendant that he would escort defendant back to his unit. Defendant began walking with the officer, then turned and took a combative stance towards the officer, saying, "I'm going to fucking slap you." The officer sounded an alarm, which set off an intercom message letting staff know that there was a problem and its location. Staff members in the area and two other police officers came to where

⁵ Defendant was involuntarily medicated a second time, in November 2010, and a third time, in April 2011.

defendant was. Defendant said to all of them, “When I get out of here, I’m going to fuck you up.” Defendant was placed on a gurney in full body restraints, which is the most restrictive response to a problem at the hospital.

According to the prosecution’s expert, jail notes for an unspecified date or dates⁶ indicated that defendant threatened to kill others and he told a deputy that he hated law enforcement officers.⁷ Defendant admitted that in addition to being convicted twice of the felony of resisting an officer with force or violence, he was also convicted of the misdemeanor of not following a police officer’s order and, either separately or as part of the same case, he was convicted of resisting the police in Huntington Beach. He allowed that following one of his arrests, he may have refused to give the police any information about himself for booking purposes, other than a number. Defendant admitted at trial that he suffered a misdemeanor conviction for making terrorist threats. This occurred after a 17-19 year old female flipped him off. The incident report stated that defendant had threatened to kill someone. He pled guilty, he said at the instant trial, perhaps due to duress. He was not on medication at the time of this incident. Defendant admitted on the stand that he did not believe he had a mental illness and, if released, he would not seek help from a doctor for his mental condition.

⁶ The prosecution expert testified that defendant went from Atascadero Hospital in November 2010 to Riverside County jail, then returned to Atascadero in April 2011.

⁷ The only evidence that defendant was in jail at any relevant time was the testimony of the defense expert that he did not see jail reports from the period November 29, 2010 to the day of his testimony, which was May 17, 2011.

The prosecution's expert testified that past behavior is one of the greatest predictors of future behavior and patients who have insight into their mental illness can guard against inappropriate behavior. She opined that part of defendant's delusional system was that he misperceives the intentions and behaviors of others, for example, he believes people are threatening him when they are not.⁸ She reported that during periods defendant was forcibly medicated his behavior was appropriate. She opined that defendant represented a substantial danger of physical harm to others despite the fact that he had struck no one, due to the fact that he was restrained on most of the above-described occasions from actually getting physically violent. She said that the fact that defendant was currently in the structured setting of a mental hospital, rather than the relative freedom of normal society, was very significant in determining that he presented a substantial danger of physical harm to others. She explained that many times, due to paranoia or misinterpretation, defendant had made threats or took a fighting stance and

⁸ According to defendant, during the 2003 incident, the police officer told defendant, "I'm going to ambush you and shoot you dead when the sun goes down if you don't have a light on your bike." The prosecution expert identified this specifically as an incident of defendant's misperception of the intentions or behaviors of others. Defendant testified at the instant trial that he had responded to the officer that he might shoot the officer back, which defendant did not consider to be an inappropriate remark. According to defendant, the officer pulled his baton and weapon on defendant and pointed. Defendant theorized that this police officer may actually have been a security guard posing as a police officer. Defendant also testified that, during the March 2006 incident, both police officers jumped out of their patrol car and tackled him after he placed his hands over his head upon being told that he was going to be searched. Defendant said the male officer pulled defendant's arms down and held him in a bear hug while the female officer punched defendant 20-30 times in the face and may have also kicked him. {RT 85, 87}

had to be restrained. Further, he had a history of refusing to take medication, said he would not take medication if released and he claimed that he did not have a mental illness. She said that defendant was more at risk when he felt threatened and he blamed others for past incidents, which only increased his paranoia and misperception of the intentions of others. She theorized that a person who responds to armed police officers the way defendant did would respond similarly to unarmed laypeople if he perceived that they had threatened him. The defense expert disagreed with the prosecution, primarily on the basis that defendant had not actually harmed anyone physically in a significant way.

In asserting that there was insufficient evidence to support the jury's finding that defendant represented a substantial danger of physical harm to others, defendant ignores all the incidents discussed above except for one, i.e., the events of March 2006.

Defendant asserts that his passive resistance to the officers' attempt to handcuff him, which unintentionally resulted in both officers being slightly injured, is an insufficient basis to conclude that he represented a substantial danger of physical harm to others. In so doing, defendant not only ignores all the other evidence of his reaction to other stimuli on other occasions, but he misconstrues the theory presented by the prosecution's expert and the prosecutor, himself, about the basis for this finding. The prosecutor spoke, during argument to the jury, about all the above-discussed incidents and how they revealed an escalating pattern of responses by defendant to being told what to do by authority figures. The point both the prosecution expert and the prosecutor made about the lack of actual violence by defendant was that in each incident, defendant was engaged with either armed police officers or mental hospital staff members, both of whom were

trained and equipped to and did control defendant in the kind of situations that developed. The fear that the prosecution's expert and the prosecutor addressed was that when out in the real world, dealing with people who were not so trained and equipped, defendant would not be so controlled and he would resort to actual violence. Given defendant's established opposition to medication and his promise that he would not take it if released from confinement, there was a substantial likelihood that the type of situations described above, many of which occurred when defendant was not medicated, would recur. The prosecutor argued that the minor injuries incurred by the officers in March 2006 were minor because the officers were trained and able to gain control of defendant before he had a chance to substantially injure them. Based on the testimony of the male officer, the prosecutor argued that the next time defendant confronted a police officer who asked defendant to do something defendant did not want to do, there might be no partner there to support the officer and no back-up available and, in these circumstances, defendant could not be physically prevented from getting violent.

Defendant's assertion here that, despite adequate provocation, he has not previously responded in violence against the police, thus disproving the prosecution's theory, required that the jury misinterpret the testimony of the male officer concerning the March 2006 incident. He testified that during the struggle to get defendant to release his hands from their position on his chest so he could be cuffed, the female officer "pulled out her baton, to try to pry his arm over. But at no point was he ever struck . . . with the baton." In his opening brief, defendant summarizes this as himself "being prodded with a nightstick" and he suggests that the fact that he did not respond to

this with violence contradicts the prosecution's theory that in an uncontrolled setting, he could get violent. However, defendant ignores the circumstances. The female officer used her nightstick not to prod defendant without justification but to try to pry his arms off his chest after defendant struggled with both of them and their efforts to get his arms behind him with their hands so he could be cuffed proved unsuccessful. The fact that defendant did not strike either of the officers during the incident, while admirable, does nothing to call into question the prosecutor's theory or the prosecution's expert opinion, considering the fact that defendant initially caused, then escalated, the situation.

In his opening brief, defendant asserts that he "only has . . . serious verbal confrontations with police officers." The record belies his claim. He ignores the facts that, according to the prosecution expert, between November 2008 and January 23, 2009, while defendant was out of custody, he threatened others; that on January 23, 2009, he threatened a security guard at a courthouse; that in November 2009, he lunged at and threatened staff members at Atascadero Hospital; that in July 2010, he threatened his treating physician at Atascadero; that during the April 2011 incident at Atascadero, he threatened staff members; that he threatened to kill others while he was in jail and, according to his own testimony, he was convicted of making terrorist threats based on his reaction to a teenager flipping him off.

Contrary to defendant's assertion, the prosecution's theory about the substantial danger of physical harm defendant represented was not based merely on the 2006 incident, during which both officers involved were slightly injured. It was based on all the above described incidents which established a pattern that defendant was unable to

become violent because most of his activities occurred in a structured setting, where a police officer or hospital staff were able to contain defendant before he became violent, but once out of custody, there would be no such containment, therefore, defendant posed such a danger. Defendant's assertion, in his opening brief, that "there does not seem to have been any proper theory advanced by the prosecution at all" is inconsistent with the record and the prosecutor's argument to the jury. We were able to discern the above-stated theory and in our opinion, it could not have been clearer.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

KING
J.