

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN B. HALL,

Defendant and Appellant.

E054554

(Super.Ct.No. FELSS1005076)

OPINION

APPEAL from the Superior Court of San Bernardino County. Katrina West,
Judge. Affirmed.

Christopher Blake, 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, Barry Carlton, and Marissa
Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Steven B. Hall appeals the finding that he should be subject to a civil commitment as a mentally disordered offender (MDO). The current proceeding is the 10th time that defendant has been subject to MDO civil commitment proceedings. Defendant argues that, with respect to the current petition, the trial court erred in failing to advise defendant of his right to a jury trial at the MDO hearing. (See Pen. Code, § 2972, subd. (a).) He contends that the error is prejudicial per se, or, at the very least, that the *Chapman*¹ standard of error (harmless beyond a reasonable doubt) should apply because the error constitutes the violation of a federal constitutional right. We disagree. The right to jury trial is a matter of state law; the appropriate standard of prejudice is the *Watson*² standard, i.e., whether it is reasonably probable that a more favorable result would have been reached in the absence of the error. We conclude that the error was harmless under the *Watson* standard, and we affirm the trial court's MDO order.

FACTS AND PROCEDURAL HISTORY

Defendant was convicted in 1993 of attempted forcible rape. (Pen. Code, §§ 261, subd. (a)(2), 664.) At the time he committed this offense, defendant was already on parole for a previous conviction of rape. At Corcoran State Prison, defendant was evaluated and found to meet the criteria for MDO treatment. He was admitted to Atascadero State Hospital in 1997. In 2000, defendant was transferred to Patton State

¹ *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824].

² *People v. Watson* (1956) 46 Cal.2d 818, 836.

Hospital, as a civilly committed MDO, pursuant to Penal Code section 2972. Since that time, defendant has been subject to nine earlier annual petitions to extend his MDO commitment. On December 7, 2010, the San Bernardino County District Attorney filed a 10th petition to extend defendant's MDO commitment for another year.

The lower court held the MDO hearing on August 24, 2011, and entered an order extending defendant's commitment. The reporter's transcript of the proceedings does not indicate whether the trial court informed defendant, pursuant to Penal Code section 2972, of his right to a jury trial at the hearing.

Defendant appeals, contending that this failure was a structural error in the trial of the issue, mandating reversal per se. The right to a jury trial in civil commitment proceedings is, however, statutory in nature. We conclude that the error in this case was harmless.

ANALYSIS

I. The Failure to Inform Defendant of His Right to a Jury Trial Was Harmless Error

Pursuant to Penal Code section 2972, subdivision (a), the trial court was required to advise defendant of his right to a jury trial. The statutory language is couched in mandatory terms. The record does not affirmatively show that the trial court fulfilled this duty; nothing in the record indicates that the trial court gave the mandatory jury trial advisement or secured defendant's waiver of that right. Defendant further points out that even trial counsel has not submitted an affidavit averring that he advised defendant of his jury trial rights.

As defendant recognizes, however, “[t]he question is one of prejudice.” Defendant points to *People v. Bailie* (2006) 144 Cal.App.4th 841 (*Bailie*), a case under Welfare and Institutions Code section 6500 (civil commitment of a mentally retarded person), and suggests that it treated the failure to advise the appellant of the right to a jury trial as a “structural error,” subject to reversal per se. *Bailie* itself undermines the claim of per se reversal for “structural error,” however. Instead, the court there adopted a “totality of the circumstances” test to determine whether the right to a jury trial was or had been implicitly waived. (*Bailie*, at p. 847.) The *Bailie* court stated, “Citing *People v. Howard* (1992) 1 Cal.4th 1132, county counsel suggests that the failure to advise defendant of his jury trial right should not be reversible ‘if the record affirmatively shows that [the waiver of jury trial] is voluntary and intelligent under the totality of the circumstances.’ [Citation.] However, as we noted in *Alvas*, “‘a waiver implies, among other things, a knowledge that the right existed.’” ([*People v.*] *Alvas* [1990] 221 Cal.App.3d [1459,] 1465.) The totality of present circumstances does not suggest defendant had knowledge that his jury trial right *existed*. Accordingly, the judgment must be reversed.” (*Ibid.*)

Bailie involved a decision on the initial petition to declare the appellant a mentally retarded person who was a danger to himself and others, pursuant to Welfare and Institutions Code section 6500. There had been no other proceedings on the issue. The clerk’s minutes (but not the reporter’s transcript) indicated that the appellant’s trial attorney had requested a contested hearing. Neither the minutes nor the reporter’s

transcript made any reference to a jury trial. (*Bailie, supra*, 144 Cal.App.4th 841, 843.)

The matter was tried to the court. The totality of those circumstances failed to indicate in any manner that the appellant had ever been apprised by anyone of the right to a jury trial.

Here, we do not have such circumstances. This is defendant's 10th MDO proceeding. He has been repeatedly subject to various MDO proceedings since 1993. With respect to the ninth proceeding, the issue arose whether trial counsel could forgo a jury trial without defendant's personal waiver, and even waive jury trial on defendant's behalf over defendant's objection.³ This court decided that issue adversely to defendant, and he does not contest that point further. In addition, the prior proceedings indicate that defendant was cognitively and actually aware of his right to a jury trial in MDO proceedings; that was the very basis of his *Marsden* motions. The "totality of the circumstances" here do not support the conclusion that defendant did not know the right to a jury trial existed. He was well aware of that right.

The proceedings in *Bailie* were under Welfare and Institutions Code section 6500 et seq., which involves persons who suffer from mental retardation. "[T]here is no question that mental illness and mental retardation are separate and distinct conditions which require different treatment and/or habilitation." [Citations.] 'Mental retardation is

³ See *People v. Hall* (Mar. 21, 2011, E050780 [nonpub. opn.]), review denied June 8, 2011, S192219, in which this court decided that trial counsel could waive defendant's right to a jury trial, even over defendant's objections, even in light of defendant's repeated *Marsden* motions (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*)) to appoint new counsel, based in large part on counsel's decision to waive a jury.

an impairment in learning capacity and adaptive behavior Mental retardation is not an illness to be treated with drugs and therapies which have been developed for the mentally and emotionally ill.’ [Citation.] The United States Supreme Court has also stressed the same factual distinction. [Citation.] The Legislature has recognized this factual distinction and created a coherent scheme for treating mental illness (§ 5150 et seq.) and a different scheme for treating mental retardation (§ 6500 et seq.). These schemes are not unconstitutional on equal protection grounds because the classifications are based on accepted factual and medical differences between the mentally retarded and mentally ill.” (*Cramer v. Gillermina R.* (1981) 125 Cal.App.3d 380, 387-388, followed in *People v. Quinn* (2001) 86 Cal.App.4th 1290, 1294-1295.) Patients with mental retardation are subject to fundamental cognitive deficits which would prevent understanding of a rights advisement. Mentally ill patients, on the other hand, such as defendant here, are not presumptively intellectually impaired from understanding a rights advisement. As noted above, the history of this case shows that defendant was aware of his right to a jury trial in the MDO proceedings, and in fact disputed with his trial counsel in the past about whether that right should be exercised.

Bailie is not wholly apposite. It involved mentally retarded persons under Welfare and Institutions Code section 6500. Here, we are concerned with MDO proceedings under Penal Code section 2970. Also, *Bailie* did not adopt a “per se” standard of reversal for alleged “structural error.” Rather, it employed a “totality of the circumstances” balancing test to determine whether the error was prejudicial.

We also reject defendant's next suggestion, if per se reversal is not required, that any error in failing to advise him of his right to a jury trial in the context of an MDO hearing must be judged by the *Chapman* "beyond a reasonable doubt" test of prejudice. (*Chapman v. California, supra*, 386 U.S. 18, 24.) The right to a jury trial in MDO proceedings is granted by statute; where the right is derived from state statutes, any violation is reviewed under the harmless error standard of *People v. Watson, supra*, 46 Cal.2d 818, 836. (See *People v. Wrentmore* (2011) 196 Cal.App.4th 921, 928-929; *People v. Cosgrove* (2002) 100 Cal.App.4th 1266, 1275-1276 [Fourth Dist., Div. Two] [wrongly denying a jury trial to an MDO was held harmless under *Watson*].) Under that standard, it is not reasonably probable that defendant would have achieved a more favorable result in the absence of the error. Even if the trial court had properly advised defendant of his statutory right to a jury trial, defendant's attorney could have waived that right, even over defendant's objection. That was, indeed, the precise holding of the prior appeal in this case, a matter that defendant does not challenge further.

Defendant also makes no claim that the evidence was insufficient to support the finding that he was an MDO in need of treatment, whose mental disorder was not in remission. Dr. Nastasi, the forensic psychologist, diagnosed defendant's primary condition as paraphilia, noting that defendant was obsessed with having sex with nonconsenting persons. Defendant had had two relatively recent (February of 2010 and again in February of 2011) incidents of nonconsensual sodomy, although new charges had not been filed in either case. Defendant also engaged in numerous acts of public

masturbation, including recent incidents in July and August of 2011. Dr. Nastasi specifically testified that defendant's condition was not in remission. Defendant had little insight into his behavior. He had little commitment to changing his behaviors, and in fact continued to deny that he had any problems. Defendant still remained a danger to others. Defendant proffered no evidence to show otherwise.

It is not reasonably probable that defendant would have achieved a more favorable result in the absence of the error. The trial court's failure to advise defendant expressly of his statutory right to a jury trial on the MDO extension hearing was harmless. (*People v. Watson, supra*, 46 Cal.2d 818, 836.)

DISPOSITION

Any error in failing to advise defendant of his right to a jury trial was harmless. The MDO commitment extension order is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

CODRINGTON
J.