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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.

ASHLEY GRAHAM,

Defendant and Appellant.

E055366

(Super.Ct.No. FELSS1103082)

OPINION

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

Rudy Kraft, 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, Melissa Mandel and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

Following a determination by the Board of Prison Terms that she fit the criteria of a mentally disordered offender, defendant, Ashley Graham, petitioned the superior court

in the county where she was being treated and that court determined, beyond a reasonable doubt, that the finding of the Board was correct. Defendant appeals from the trial court's order, contending that the failure of the trial court to inform her on the record of her right to a hearing before a jury and the waiver of that right by her counsel and not personally by her constitutes error requiring reversal of the order. We disagree and affirm the order.

### **PROCEEDINGS BELOW AND DISCUSSION**

In September 2007, defendant pled guilty in San Francisco Superior Court to assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))<sup>1</sup> and she was granted probation. Her probation was revoked and in June 2010, she was sentenced to prison for three years, with a release date calculated to be November 8, 2010. On November 19, 2010, she was sent to Patton State Hospital, where she remained until the time of the hearing at issue. On December 28, 2010, the Board of Prison Terms (hereinafter, the Board) determined that defendant met the criteria of section 2962,<sup>2</sup> which required her to be treated by the State Department of Mental Health. On July 11, 2011, defendant filed a petition, pursuant to section 2966, subdivision (b), for appointment of counsel and a

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> Those criteria are as follows, “The [defendant] has a severe mental disorder that is not in remission or cannot be kept in remission without treatment. . . . [¶] . . . [¶] The severe mental disorder was one of the causes of or was an aggravating factor in the commission of the crime for which the [defendant] was sentenced to prison. [¶] . . . The [defendant] has been in treatment for the severe mental disorder for 90 days or more within the year prior to the [defendant]’s parole or release. [¶] . . . Prior to release on parole, [it had been certified to the Board of Prison Terms that the defendant had met the foregoing criteria] and that by reason of his or her severe mental disorder the [defendant] represents a substantial danger of physical harm to others.” (§ 2962, subds. (a)-(d).)

hearing in San Bernardino Superior Court to contest the finding of the Board. That subdivision provides that a defendant who disagrees with the finding of the Board that the defendant meets the criteria of section 2962 may file in superior court a petition for a hearing on whether, as of the date of the Board's finding, the defendant met the criteria. (§ 2966, subd. (b).) The subdivision goes on to provide that the court is to advise the defendant of the right, inter alia, to a hearing before a jury. (*Ibid.*) The subdivision further provides that the hearing is civil, but to reduce costs, the rules of both criminal and civil discovery apply. (*Ibid.*) The standard of proof is beyond a reasonable doubt. (*Ibid.*) If the hearing is before a jury, its decision must be unanimous. (*Ibid.*) "The [hearing] shall be by jury unless waived by both the person and the district attorney." (*Ibid.*)

Counsel was appointed for defendant and defendant's appearance was waived for all proceedings until the hearing, including proceedings six days before the hearing took place, during which counsel for defendant requested a hearing by the court (and not a jury). Before the hearing, during which defendant was present, began, the court stated that a discussion in chambers had occurred regarding "procedural issues" and that it and both counsel had discussed with one of the experts who evaluated defendant her opinion of defendant's condition at the time of the Board's finding and currently. The parties stipulated that on December 28, 2010, defendant met all the criteria of section 2962, except the requirement that she suffered from a severe mental disorder and that she represented a substantial danger of physical harm to others as a result of her severe mental disorder. After considering the reports of three experts, the trial court found that

both of the contested criteria had been established beyond a reasonable doubt. The court added, “However, . . . my findings are only as of December 28th, 2010; they say nothing about [defendant’s] current condition. And it’s my understanding that as of today, the psychologist believed that her . . . status is quite stable and that . . . her mental illness is in full remission, and that there are plans to release her. [¶] . . . [M]y findings with regard to the [§ 2966(b)] petition did not consider the fact that she’s expected to be released. . . . [¶] So it’s my expectation that [defendant] will probably be released in the next few weeks . . . and she’ll still be on parole . . . .”

Defendant here asserts that both a constitution and a statute require that she be advised of her right to a hearing before a jury and to personally waive that right, neither of which occurred here. Therefore, she asserts, we must reverse the order of the trial court affirming the Board’s finding that she met the criteria of section 2962.

Defendant first asserts that since her right under article 1, section 16 of the California Constitution to waive a jury trial by consent must be in the manner prescribed by statute, and since section 2966 requires both *personal* waiver by the defendant and that defendant be advised of the right to a hearing by a jury, her constitutional right was violated. We disagree with defendant’s premise that section 2966 requires the defendant personally waive a hearing before a jury.

Defendant concedes that *People v. Otis* (1999) 70 Cal.App.4th 1174 (*Otis*) and this court’s opinion in *People v. Montoya* (2001) 86 Cal.App.4th 825 (*Montoya*) both hold that waiver by counsel is sufficient, the former holding that this is the case *even over the objection of the defendant*. However, defendant seeks to distinguish both of these cases

from this one on the basis that she was not even told here that she had a right to a hearing before a jury. This is not a valid basis to distinguish those holdings.

In *Montoya*, we held, “In situations ancillary to criminal proceedings, where a jury trial right is merely statutory, the federal Constitution is generally not implicated, and the right may be waived by counsel. (. . . *People v. Masterson* (1994) 8 Cal.4th 965, 972 . . . [counsel may waive a client’s right to a jury trial in a competency proceeding, even over a client’s objection] . . .) [¶] . . . Generally, [California Constitution, article 1, §16] means an attorney *or* the client may waive jury trial in a civil case. [Citations.] [I]n proceedings that are neither civil nor criminal, but ‘special proceedings,’ such as a competency hearing, the right to a jury trial may be waived by counsel, even over defendant’s express objection. [Citation.] [¶] A section 2970 hearing,<sup>3</sup> . . . is . . . , as the statute clearly states and California courts have consistently agreed, a civil hearing. [Citations.] As a civil hearing, jury trial may thus be waived ‘as prescribed by statute.’ [Citation.] The question then is whether the words, ‘[t]he [hearing] shall be by jury unless waived by both the person and the district attorney’ . . . mean defense counsel may waive jury trial on behalf of his client, as happened in the instant case. We think they do. [¶] . . . The . . . court [in *People v. Otis* (1999) 70 Cal.App.4th 1174] held that, in a [section 2966, subdivision (b)] hearing . . . , identical words in that provision . . . mean that defense counsel may waive his client’s right to trial by jury, even over the client’s objection. ‘[N]othing in the requirement that the waiver must be made by “the person”

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<sup>3</sup> Section 2970 governs the extension of section 2962 commitments.

precludes the person's attorney from acting on his behalf. The Legislature did not say the waiver had to be made "personally." [Citation.] [¶] The [*Otis*] court noted that the rules of statutory construction cannot be applied to reach a conclusion 'that is at odds with the intention of the Legislature.' [Citation.] Thus, in light of the legislative purpose of a statute dealing with mentally disordered individuals, the [*Otis*] court concluded: 'The Legislature must have contemplated that many persons, such as Otis, might not be sufficiently competent to determine their own best interests. There is no reason to believe the Legislature intended to leave the decision on whether [the hearing] should be before the court or a jury in the hands of such a person. That the Legislature specified [in section 2966, subdivision (b) that] a waiver of time could be by the petitioner "or his or her counsel" does not lead us to conclude in the context of this statute that the petitioner must personally waive a jury.' (*Ibid.*) [¶] The fact that the Legislature gave [the defendant here] other personal rights within the statute does not lead us to conclude that he had to personally waive his right to a jury trial in a civil proceeding. Moreover, the fact that the California Constitution, also in article I, section 16, says that a jury trial in a criminal proceeding must be waived by 'defendant and defendant's counsel' shows that the Legislature knows how to make clear when a personal jury waiver is required. No such language is present in the disputed sentence of section 2972. [Citation.] [¶] . . . [¶] A jury sitting in a civil hearing pursuant to sections 2970 and 2972 does not impose criminal punishment and has no power to determine the extent to which the defendant will be deprived of his liberty. Defendant's jury trial interest thus is, in this case, 'merely a matter of state procedural law' and does not implicate the Fourteenth Amendment."

(*Montoya*, at pp. 829-832, fns. omitted.) This court further noted, “[T]he record is devoid of evidence that his attorney did *not* discuss the question with defendant sometime between . . . when the jury trial was set, and . . . when a court trial was set, even if defendant was not present then.” (*Id.* at p. 831, fn. 4.)

Distinguishing the holdings in *Otis* and *Montoya* from this case on the basis that defendant here was not told on the record by the trial court that she had a right to a hearing before a jury, as we said, is meritless. The California Constitutional provision invoked by defendant requires only a determination whether the waiver of a jury was “as prescribed by the statute.” Both *Otis* and *Montoya* hold that the statute does not require a personal waiver. We see no reason to disagree with either. Moreover, as in *Montoya*, the record here is silent as to whether defendant was aware of her right to a hearing before a jury. Particularly, we have no idea what took place in the chambers discussion that preceded the hearing, which, the trial court noted, concerned “procedural issues.”

Assuming that defendant was never advised of her right to a hearing before a jury, that right is statutory only, and not constitutionally mandated. (*People v. Fisher* (2009) 172 Cal.App.4th 1006, 1014; *People v. Cosgrove* (2002) 100 Cal.App.4th 1266, 1275, 1276, [Fourth Dist, Div. Two].) When a right is purely statutory, the erroneous denial of that right triggers harmless error analysis. (*Fisher* at p. 1014; *Cosgrove* at p. 1275; *People v. Epps* (2001) 25 Cal.4th 19, 29.) However, since a hearing before a jury may be waived by counsel, even over a defendant’s objection (*Otis, supra*, 70 Cal.App.4th at p. 1176) it is not reasonably probable that a different result would have occurred had defendant been advised, on the record, of her right to such a hearing. (See *People v.*

*Watson* (1956) 46 Cal.2d 818, 836.)<sup>4</sup> If her attorney felt that it was in her best interests to have a hearing before the court, that's what would have occurred, even over her objection.

Defendant then asserts that *Otis* and *Montoya* were wrongly decided. As to *Otis*, defendant calls our attention to other wording in section 2966 suggesting that the waiver must be done personally by the defendant.<sup>5</sup> However, both *Otis* and this court in *Montoya* rejected this argument and defendant offers no reason, other than those advanced in those cases, for a contrary conclusion. Defendant attacks the reasoning in *Otis* and *Montoya* that people subject to confinement in both cases due to severe mental illness may not be in the best position to decide whether to waive a jury, therefore, it makes sense to allow counsel to do so. Defendant's suggestion that the right to

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<sup>4</sup> The same standard applies to any error that might have occurred in defendant either waiving or not waiving her right to a hearing before a jury because that right is statutory only. Of course, defendant does not even want to discuss this standard, as she concedes that even under the more taxing standard of harmless beyond a reasonable doubt, she cannot credibly argue that a jury would not have reached the same conclusion the court did. Moreover, that is not an appropriate inquiry. The inquiry should be whether, assuming defendant did not waive a hearing before a jury, she would be able to assert her desire over her attorney's to have a hearing before the judge. In light of the clear case law that counsel may waive a hearing before a jury even over the defendant's objection, defendant cannot possibly show prejudice.

<sup>5</sup> Defendant also asserts that if the Legislature believed that defendants subject to section 2966 were incapable of making the decision whether to waive a hearing before a jury, the statute would not have required them to be advised of their right to counsel and to a hearing before a jury and to make the decision whether to challenge the determination of the Board of Prison Terms. As to the latter, demanding an "appeal" of a decision takes no particular mental acuity and results in no possible jeopardy to defendant, while making the tactical decision whether to waive a jury trial does. As to the former, it was rejected in *Montoya*, and defendant offers no reason for us to conclude otherwise.

personally waive a hearing before a jury “can be made on an individual case-by-case basis” because not all persons subject to section 2966 are necessarily incapable of deciding between a hearing before a court and one before a jury is absurd. Either the right exists or it does not. It cannot exist for some and not for others, depending on the degree of their mental incapacity.

Defendant’s assertion that her liberty interest is at stake and, therefore, she has a due process right to personally waive a hearing by a jury was rejected in *Montoya*, as we have already stated. The purpose of section 2966 is to provide treatment for mentally disordered defendants and to protect the public, not to punish the former. (*People v. Superior Court (Myers)* (1996) 50 Cal.App.4th 826, 834, 838-839.) It does not follow from the fact that the United States Supreme Court has held that due process requires civil commitments be based on clear and convincing evidence, rather than a preponderance of the evidence (*Foucha v. Louisiana* (1992) 504 U.S. 71), that a defendant engaged in proceedings under section 2966 is entitled to all the rights of a criminal defendant.

**DISPOSITION**

The order is affirmed.

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RAMIREZ  
P. J.

We concur:

HOLLENHORST  
J.

MILLER  
J.