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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MELVIN WARD, Defendant and Appellant.	F062557 (Super. Ct. No. 10CM8715) **OPINION**

APPEAL from a judgment of the Superior Court of Kings County. Steven D. Barnes, Judge.

Ron Boyer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Jeffrey Grant, Deputy Attorneys General, for Plaintiff and Respondent.

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During a psychotherapy session, Melvin Ward, an inmate with the California Department of Corrections, told his psychotherapist, Mary Crawley, that he was going to kill a correctional officer. Crawley determined that Ward posed a serious danger of violence to the potential victim, so she issued a warning as required by *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425 (*Tarasoff*). The prosecutor utilized the information disclosed by Crawley to prosecute Ward for making a criminal threat in violation of Penal Code section 422.[1]

Ward appeals from the ensuing conviction arguing there was insufficient evidence to support the conviction. He provides three grounds to support his argument, but primarily he argues the public policy encouraging individuals, and especially inmates, to seek therapy should prevent prosecution in these circumstances.

We conclude that when the Legislature enacted Evidence Code section 1024, it determined that public policy precluded application of the psychotherapist-patient privilege to statements that cause a psychotherapist to conclude a patient is a threat to another person. Accordingly, such statements are admissible in a criminal trial unless some other provision of law would preclude their admission.

We agree with Ward the trial court erred by imposing sentence enhancements pursuant to sections 667.5, subdivision (b), and 667, subdivision (a)(1), for the same prior conviction. Accordingly, we will affirm the conviction, but remand to permit the trial court to strike one of the one-year enhancements imposed pursuant to section 667.5.

FACTUAL AND PROCEDURAL SUMMARY

Crawley is a psychologist at Avenal State Prison, where she provides therapy to inmates. Ward was one of her patients. She was helping him with paranoia, coping skills and anger issues. A part of therapy includes allowing inmates to vent their anger, which often results in the use of vulgarity. Crawley attempts to bring out the things that upset

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

the inmate so that she can help him or her. Prior to the March 11, 2010 session, she had only met with Ward for one or two sessions.

On March 11, 2010, Ward was angry, agitated, and upset during his therapy session. Ward explained that he was upset because of prior experiences he had with correctional officers, specifically naming Sergeant Lucas.

Ward stated he had recently seen Lucas, and related an incident he had with Lucas in the past. As Ward talked about the past incident, he became more angry and upset. Ward made a general statement about taking out a correctional officer. Crawley then stopped the session, and verbally warned Ward that if he made specific threats the statements would not be confidential and would be reported to custody.[2] Despite the warning, Ward again referred to the past incident with Lucas and then stated "I will kill the fucking bastard if I get my chance—get my hands on him." Crawley believed Ward was serious when he made the threat. Ward never asked Crawley to communicate his statement to Lucas.

Crawley ended the session at this point and asked the correctional officers to take him out of the office.

The next morning, Crawley arrived at work at the same time as Sergeant Lucas. As they walked into the prison, she told Lucas she needed to speak to him regarding a possible threat. Later that morning, she completed a form that went into her notes and into Ward's therapy file. That afternoon she met with Lucas and told him about the threat, and told him she would be issuing a "Tarasoff Warning" later that day. She

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[2] The exact testimony was "I gave him a verbal warning that if he went further or made specific threats that those were reportable and that the confidentiality would not hold." Crawley added "I don't believe I gave specific names. I did say that it had to be reported to custody," and she "believe[d she] mentioned the captain." On cross-examination, when counsel attempted to confirm that Crawley did not tell Ward she would tell Lucas of the threat, Crawley testified "In thinking it through, I believe I did when I stopped the therapy."

prepared the document, and a copy was sent to the captain and Lucas, and one was placed in Ward's health record. The original was filed in records.

The prison system uses an Informed Consent for Mental Health Care form (form No. 7448). The form clarifies the psychotherapist-patient confidentiality principles. Doctor Wilkinson, a clinical psychologist who contracted with the state to provide services for a short time, filled out the form with Ward, apparently in August 2009. Crawley did not fill out another form with Ward, but she did verbally review the principles with him. On the form filled out by Wilkinson, a box was checked which stated that "It is my opinion that although the inmate meets criteria for inclusion in the mental health services delivery system, he may have difficulty understanding the risks and benefits of participation. Physicians treating this inmate patient should continue to clarify the limits of confidentiality."

At the time of trial, Correctional Sergeant Jeffery Lucas had been employed by the Department of Corrections for 24 years. Lucas encountered Ward in May 2005. Lucas was a yard sergeant when two correctional officers he supervised brought Ward to him because he was acting bizarre and very violent. Lucas brought Ward into a hallway and asked him to sit down in an attempt to calm him. Ward was handcuffed at the time. After Ward sat down, he attempted to lunge out of the chair at Lucas. Lucas put his hands straight out on Ward's chest to prevent him from assaulting him.

Lucas saw Ward approximately 20 times after this incident and before March 11, 2010. Like most of the other inmates, Ward was not restrained on any of these occasions.

On March 11, 2010, Lucas again saw Ward. This time Ward was about 30 feet away and apparently heading towards Crawley's office. No conversation occurred. Lucas gathered the officers he was supervising, as well as Crawley, and warned them to be careful with Ward because he had a violent behavior history.

The following day, Lucas walked through the gate with Crawley as they headed to work. Crawley said she needed to talk with Lucas that day. Later, Crawley told Lucas

that Ward said he would kill Lucas if Ward got the chance. Lucas was concerned that Ward might carry out the threat.

Ward testified in his defense. Ward was seeing Crawley because he was diagnosed as bipolar with aggressive tendencies and anger problems. His involvement with Crawley was voluntary because he usually needed someone to whom he could talk, and he did not feel he could talk with anyone else.

He denied threatening Lucas during the March 11, 2010 session with Crawley. He also denied that Crawley warned him that the psychiatrist-patient privilege would not apply under certain circumstances. Ward was agitated during the session because his parole date had been changed and he did not know why. That was the only reason he was agitated. Crawley did not terminate the session or tell him she was notifying authorities. The session ended when Crawley refused Ward's request to be moved to administrative segregation.

Ward had seen Lucas on the yard after the 2005 incident, but had not spoken to him nor given him any thought.

The seconded amended information charged Ward with one count of making a criminal threat in violation of section 422. Ward also allegedly suffered (1) a prior "strike" conviction within the meaning of sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d), (2) a serious felony conviction within the meaning of section 667, subdivision (a)(1), and (3) seven prior convictions for which he served a prison term within the meaning of section 667.5, subdivision (b).

The jury found Ward guilty of the charged crime, and found all enhancements to be true. The trial court sentenced Ward to a total term of 18 years, which consisted of the aggravated term for the crime, plus five years for the section 667, subdivision (a)(1) prior conviction, and seven years for the section 667.5, subdivision (b) prior convictions.

DISCUSSION

Ward was charged with violating section 422, which punishes those who make criminal threats. The People were required to prove: (1) Ward willfully threatened to unlawfully kill Lucas or cause him great bodily injury, (2) Ward made the threat orally, (3) Ward understood that his statement was to be understood as a threat and intended that it be communicated to Lucas, (4) the threat was so clear, immediate, unconditional, and specific that it communicated to Lucas a serious intention and the immediate prospect that the threat would be carried out, (5) the threat actually caused Lucas to be in sustained fear for his own safety, and (6) Lucas's fear was reasonable under the circumstances. (CALCRIM No. 1300.)

The statement Ward made was communicated during a psychotherapy session, thus implicating two additional statutes. The first is Evidence Code section 1014, which grants a psychotherapy patient a privilege to refuse to disclose, and prevent others from disclosing, confidential communications between a patient and a psychotherapist. This privilege is subject to a few exceptions. The exception relevant in this case is found in Evidence Code section 1024, which provides there is no privilege "if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger."

Both parties rely on *Tarasoff*, wherein the Supreme Court imposed a duty on psychotherapists to warn a potential victim when the psychotherapist concludes, or should conclude under the standards of the profession, that a patient presents a serious danger of violence to the potential victim. (*Tarasoff*, *supra*, 17 Cal.3d at p. 450.) Violation of this duty exposes the therapist to civil liability. (*Ibid*.)

Here, Crawley concluded, pursuant to the standards of the profession, that *Tarasoff* imposed on her a duty to warn Lucas of Ward's statement. The correctness of Crawley's conclusion is not challenged. Crawley, however, was not sued in a civil action

for damages for violating the duty imposed by *Tarasoff*. Instead, the People successfully prosecuted Ward for violating section 422 based on the statement Crawley communicated to Lucas.

We now turn to Ward's arguments, keeping these concepts in mind.

I. The Statement Constituted a Violation of Section 422

Ward argues the evidence was insufficient to support the judgment because the People failed to provide evidence to support the fourth element; i.e., the evidence did not prove that Ward's statement was "so clear, immediate, unconditional, and specific that it communicated to … LUCAS a serious intention and the immediate prospect that the threat would be carried out." (CALCRIM No. 1300.) Ward makes three distinct arguments to support this assertion.

First, Ward argues the warning Crawley gave to Lucas could not constitute a violation of section 422 because the purpose of the communication was to warn Lucas of possible danger. According to Ward, when he made the statement to Crawley, he had the expectation that steps would be taken to protect Lucas, so the risk of harm was negligible. Accordingly, Ward argues that his statement cannot constitute a violation of section 422 because it was not the type of communication the Legislature sought to criminalize.

We disagree for two reasons. First, Ward did not testify that he had any such expectation. Instead, he testified that he never threatened Lucas.

Second, the words of section 422 do not support the argument. As we understand Ward's argument, since he anticipated Lucas would take precautions, there was no realistic possibility that Ward would actually attempt to harm Lucas. Ward concludes that since he would never actually attempt to harm Lucas, there could not be a violation of section 422.

Section 422 provides, however, that a criminal threat occurs when the defendant has the specific intent that the statement be taken as a threat, *even if there is no intent of actually carrying out the threat*. Ward's argument is, essentially, an assertion that he

could not be convicted because he did not have the intent to carry out the threat. But the Legislature has provided the intent to carry out the threat is not an element of the crime.

The case cited by Ward, *People v. Felix* (2001) 92 Cal.App.4th 905 (*Felix*), does not support his argument. Felix was convicted of several crimes, including violating section 422, related to his actions involving a former girlfriend. The evidence relevant to the criminal threat conviction consisted of testimony by a psychologist that Felix made several comments during a therapy session indicating that Felix intended to kill his former girlfriend. The psychologist testified that he called the former girlfriend, but the trial court sustained an objection when the prosecutor attempted to elicit evidence of what was said in the conversation. The former girlfriend was precluded from testifying about what the psychologist said to her in the phone conversation.

The appellate court concluded the conviction was not supported by substantial evidence because the trial court "inexplicably … sustained Felix's objections to the content of the telephone call between" the psychologist and the former girlfriend. (*Felix, supra*, 92 Cal.App.4th at p. 912.) Because of the trial court's rulings, "there was no evidence that [the psychologist told the former girlfriend] the content of Felix's statements" (*ibid*), thus precluding the People from presenting evidence that Felix's statement was communicated to the former girlfriend.

The appellate court also found there was insufficient evidence that Felix intended his statement be communicated to the former girlfriend. The prosecution argued the statement was admissible pursuant to the rule in *Tarasoff*, but it failed to present any evidence that Felix was aware of *Tarasoff*, or was aware the psychologist was obligated to convey his threats to his former girlfriend. (*Felix, supra*, 92 Cal.App.4th at p. 913.)

Ward's reliance on this case is misplaced because Crawley testified that she warned Ward before he threatened Lucas that if he made a specific threat the communication would not be privileged and she would have to warn the threatened

individual. The jury could reasonably infer from this testimony that Ward knew, and intended, his threat would be communicated to Lucas.

The second argument asserted by Ward is similarly meritless. Ward asserts that public policy prohibits a statement communicated through a therapist from being used to establish a violation of section 422. Effective therapy, Ward argues, is impossible if a patient cannot honestly communicate with his therapist because statements made during the session may be used to prosecute him for a crime.

We disagree for two reasons. First, the Legislature expressed its public policy determination in 1965 when it passed Evidence Code section 1024. By creating an exception to the psychotherapist-patient privilege when the psychotherapist concludes the patient is a danger to the person or property of another, the Legislature determined that, as a matter of public policy, the privilege must yield under such circumstances.

Second, in *Tarasoff* the Supreme Court considered the issue of the patient's right to privacy when it imposed a duty on psychotherapists to warn of a patient's danger to another.

> "We recognize the public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy [citation], and the consequent public importance of safeguarding the confidential character of psychotherapeutic communication. Against this interest, however, we must weigh the public interest in safety from violent assault. The Legislature has undertaken the difficult task of balancing the countervailing concerns. In Evidence Code section 1014, it established a broad rule of privilege to protect confidential communications between patient and psychotherapist. In Evidence Code section 1024, the Legislature created a specific and limited exception to the psychotherapist-patient privilege: 'There is no privilege ... if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.'
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> "We realize that the open and confidential character of psychotherapeutic dialogue encourages patients to express threats of

> violence, few of which are ever executed. Certainly a therapist should not be encouraged routinely to reveal such threats; such disclosures could seriously disrupt the patient's relationship with his therapist and with the persons threatened. To the contrary, the therapist's obligations to his patient require that he not disclose a confidence unless such disclosure is necessary to avert danger to others, and even then that he do so discreetly, and in a fashion that would preserve the privacy of his patient to the fullest extent compatible with the prevention of the threatened danger. [Citation.]
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> "The revelation of a communication under the above circumstances is not a breach of trust or a violation of professional ethics; as stated in the Principles of Medical Ethics of the American Medical Association (1957), section 9: 'A physician may not reveal the confidence entrusted to him in the course of medical attendance ... *unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community*.' (Italics added.) We conclude that the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins.
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> "Our current crowded and computerized society compels the interdependence of its members. In this risk-infested society we can hardly tolerate the further exposure to danger that would result from a concealed knowledge of the therapist that his patient was lethal. If the exercise of reasonable care to protect the threatened victim requires the therapist to warn the endangered party or those who can reasonably be expected to notify him, we see no sufficient societal interest that would protect and justify concealment. The containment of such risks lies in the public interest." (*Tarasoff*, *supra*, 17 Cal.3d at pp. 441-442, fns. omitted.)

While we are not here concerned with a psychotherapist's duty to warn a potential victim of the dangers posed by a patient, both the Legislature and the Supreme Court have concluded the patient's right to the confidentiality of his therapy sessions does not extend to situations where the patient poses a danger to others. Ward has not identified any public policy that would prohibit the use of such statements in a criminal prosecution, nor are we aware of any. Indeed, Evidence Code section 1024 eliminates any confidentiality of such statements, and the absence of privilege eliminates any possible objection to the information. If there is no privilege, then the information can be

used in any prosecution subject to the other rules of evidence. This conclusion is consistent with the numerous cases in which statements made by a defendant in therapy have been used as evidence against the patient in a subsequent criminal prosecution. (See, e.g., *Menendez v. Superior Court* (1992) 3 Cal.4th 435, 449-453; *People v. Wharton* (1991) 53 Cal.3d 522, 548-563; *People v. Gomez* (1982) 134 Cal.App.3d 874, 880-882.)

The third argument asserted by Ward is that section 422 violates his right to due process if communications between a patient and therapist form the ground for a criminal prosecution. His right to due process is violated, Ward asserts, when a therapist has a duty to communicate a statement he made during a confidential therapy session.

We are uncertain of the point Ward is attempting to make, but believe he is pleading with this court to hold that while a threat made during a therapy session can be disclosed to protect others, it cannot be used to form the basis of a criminal prosecution. The merit of this request is best addressed to the Legislature. We do not make decisions based on our view of what public policy should be when that view is directly contrary to established law.[3] Accordingly, we find no violation of Ward's right to due process.

II. The Psychotherapist-Patient Privilege was Waived

Ward acknowledges that under *Tarasoff, supra*, 17 Cal.3d 425, Crawley had a duty to warn Lucas that Ward had threatened to kill him. However, he asserts that every other statement made during the therapy session remained privileged, including Crawley's testimony that she told Ward that if he threatened a specific person, she would have to warn that person of the potential danger.

When faced with this issue, the trial court concluded that Ward had waived the psychotherapist-patient privilege, thus allowing admission of the statements.

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[3] We are not suggesting that we agree with Ward's argument, but instead are merely pointing out that this court is not the proper forum for determination of public policy.

The basis for the trial court's ruling is clear. During a period when Ward represented himself, he filed two motions. The first was labeled "Motion for Dismissal," and the second "Demurrer."

The merit of the motions is not relevant. What is relevant is that Ward attached as an exhibit to the "Demurrer" the chronological notes prepared by Crawley for the therapy session wherein Ward threatened Lucas. In these notes, Crawley wrote (1) that she completed a "Duty to Warn" chrono, (2) that Ward stated he would kill Lucas if he got the chance, and (3) Ward was informed during the therapy session that direct threats must be reported.

While the statements identified by Ward in his brief may have been subject to the psychotherapist-patient privilege, "the right of any person to claim a privilege provided by Section … 1014 (psychotherapist-patient privilege) … is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication …." (Evid. Code, § 912, subd. (a).) Ward was the holder of the privilege. (Evid. Code, § 1013, subd. (a).) When Ward attached the chronological notes to his motion, he disclosed a significant part of his confidential communications with Crawley. There is no evidence, and Ward has not argued, that he was coerced into attaching the document to his motion. Therefore, each element of Evidence Code section 912 has been met, and the privilege was waived.

Ward argues there was no waiver because he was seeking in his motion to establish that his communications with Crawley were confidential. The purpose for which the documents were filed, however, does not change the fact that Ward voluntarily disclosed a substantial portion of the confidential communication he had with Crawley. Ward could have filed the documents under seal if they were necessary to support the motions. His failure to do so resulted in a waiver of the privilege.

III. Use of the Same Prior Conviction for Two Enhancements

The verdict found true the allegation that Ward had suffered a prior conviction for violation of section 211 on August 7, 1985, within the meaning of sections 667, subdivisions (b) through (i), 1170.12, subdivisions (a) through (d), and 667, subdivision (a)(1). In addition, the jury found true that Ward had served a prior prison term on seven occasions within the meaning of section 667.5, subdivision (b). One of those prior prison terms was served as a result of the 1985 violation of section 211.

Ward was sentenced to the upper term of three years for the section 422 conviction. This sentence was doubled pursuant to the three strikes law because of the 1985 robbery conviction. (§ 667, subdivision (e)(1).) The trial court next imposed an additional consecutive year for each of the prior prison terms pursuant to section 667.5. Finally, the trial court imposed a consecutive five-year term for the 1985 robbery conviction pursuant to section 667, subdivision (a)(1).

Ward argues, and the People agree, the trial court erred when it relied on the 1985 robbery conviction to impose a five-year enhancement pursuant to section 667, and a one-year enhancement pursuant to section 667.5. (*People v. Jones* (1993) 5 Cal.4th 1142, 1150.) Only the greater of the two enhancements may be imposed. (*Ibid*.) Accordingly, the one-year enhancement imposed pursuant to section 667.5 for the prison term served as a result of the 1985 robbery conviction must be stricken.

DISPOSITION

The trial court is directed to strike the one-year enhancement imposed pursuant to section 667.5 for the prison term served as a result of the 1985 conviction for violation of section 211, and to issue a corrected abstract of judgment. In all other respects, the judgment is affirmed.

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Kane, J.

WE CONCUR:

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Cornell, Acting P.J.

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Detjen, J.