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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD RODRIGUEZ ADAMS,

Defendant and Appellant.

G044662

(Super. Ct. No. C88958)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. 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, Barry J.T. Carlton, Lynne McGinnis and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, the trial court extended appellant's involuntary commitment as a person who has been found not guilty by reason of insanity. Appellant contends constitutional and instructional errors compel reversal, but we disagree and affirm the judgment.

FACTS

Appellant was born in 1960. While growing up in the Philippines, he began using drugs and alcohol and was physically abusive to one of his family's house servants. He also experienced hallucinations, and at one point was committed to a mental health facility, where he received electroconvulsive therapy.

In 1983, at the age of 23, appellant and his family moved to the United States. While here appellant struck his father in the back of the head with a tire jack for no apparent reason. The attack left his father hospitalized, but it was not reported to authorities. On another occasion, while the family was at a market, appellant tried to hit his sister in the head with a hammer. His mother grabbed his arm and thwarted the attack.

In 1991, appellant beat up his 10-year-old nephew for going into his room without his permission. Although appellant claimed he merely pushed his nephew, the boy was rendered unconscious and sustained a black eye as a result of the attack.

On the heels of that incident, appellant assaulted his mother during a violent episode that led to his current commitment. The assault stemmed from appellant's strong, but false, belief his mother was giving away his money to his brother-in-law, whom he greatly disliked. In conjunction with this perception, appellant began hearing voices in his head that were telling him to hurt his mother. One night when the voices came to him, he picked up a knife and walked into the bathroom, where his mother was cleaning. Without provocation or warning, he cut his mother's throat and stabbed her repeatedly before eventually fleeing the house. An hour later, he called the police and surrendered to authorities.

Appellant's mother was seriously injured as a result of the attack.

Although appellant was charged with attempted murder, he was found not guilty by reason of insanity and committed to Patton State Mental Hospital (Patton). Appellant resisted treatment early on, but over the course of the past two decades at Patton, he has made good progress on his treatment program, which includes group therapy, psychological counseling and psychotropic medication. In fact, at one point, his treatment team recommended that he be placed in a conditional release program known as CONREP. However, CONREP apparently did not have the resources to supervise appellant, so the placement did not go through at that time.

Although appellant has been compliant with his treatment program in recent years and has never engaged in any violent behavior at Patton, it is undisputed he suffers from two distinct mental illnesses, schizophrenia and polysubstance dependence disorder. Schizophrenia is a chronic, life-long illness that involves hallucinations and delusions. It can be "managed" by treatment, but never really goes away. Polysubstance dependence disorder is the label used to describe a person's substance abuse problem when they don't have a drug of choice, but will use any drug at their disposal to get high. Prior to coming to Patton, appellant used a long list of substances, including cocaine, heroin, PCP, marijuana and even cough syrup, to satisfy his addiction. He was also known to go on extended drinking binges.

At trial, psychologist David Harp testified he evaluated appellant on several occasions between 2006 and 2010, which is when the trial occurred. He said appellant lacks insight into the commitment offense and has offered different stories over the years as to how it occurred. In addition, he continues to suffer from hallucinations and delusional thinking, particularly in regard to members of his family. Consistent with his past beliefs, appellant still has thoughts his family is arrayed against him and cannot be trusted. He also has a tendency to blame others for his own shortcomings.

Despite the fact appellant has been able to cope well in the highly-structured confines of Patton, Harp opined appellant would have considerable difficulty transitioning into the community, where he would be responsible for managing his mental illness and dealing with the rigors and stresses of everyday life. Appellant told Harp that if he were released from Patton, he would like to go to college so he could find a “virgin” and make her his wife. He said he was not interested in the woman at Patton because they were “used.” These statements troubled Harp, who described appellant’s future ambitions as highly unrealistic.

Although appellant’s family has indicated they would be willing to help take care of him if he were released from Patton, Harp did not think that would be a good idea, because appellant has always had issues with his family. Indeed, history shows that his mental illness symptoms tend to increase when he gets mixed up with his family. All things considered, Harp was of the opinion that appellant’s mental illness makes him a substantial danger to the physical well-being of others, and therefore he should not be released from Patton.

Psychologist Veronica Thomas shares that opinion. She testified if appellant were released from Patton, his prognosis for success would be low. Even though he told her he was not experiencing any symptoms of his mental illness, he admitted he sometimes hears voices in his head, telling him to do things. And as recently as 2009, he became visibly upset when describing a decade-old incident during which his brother-in-law refused to share his lunch with him. According to Thomas, this indicates appellant lacks understanding and insight into his mental illness. It also shows his delusions about his family have not been adequately remedied.

Furthermore, while appellant understands he needs to take his medication to stay healthy, and he has said he would continue to do so if he were released, Thomas testified that when patients leave Patton, they are often overwhelmed by societal demands and are unable to manage their mental illness on their own. Given appellant’s limited life

experience, Thomas believed his plan to go to college and marry a virgin was rather bizarre. She did not think it would be safe for him to be released into the community, in light of his lengthy history of mental illness.

Dr. Mark Lo is a staff psychiatrist at Patton who has treated appellant on numerous occasions over the years. Called as a witness by the defense, he said he was proud of the progress appellant had made at Patton over the years. However, he admitted appellant's progress has been largely attributable to the fact he receives close supervision at Patton and does not have a lot of close contact with his family. Lo also conceded that despite following his medication regiment, appellant still hears voices in his head and experiences paranoia from time to time, which shows his schizophrenia is not in full remission. When asked about a particular visit appellant had with his mother in 1997, Lo said appellant got extremely angry at the time. Although Lo speculated appellant may have taken "some kind of aggressive action" toward his mother during the visit, that suspicion has never been confirmed. However, in the wake of the visit, appellant did admit he was so mad at his mother that he wanted to kill her. Like Harp and Thomas, Lo opined appellant met the criteria for extending his commitment at Patton, in that his mental disorder makes him a substantial danger to the physical safety of others, and he has serious difficulty controlling his dangerous behavior.

Appellant's mother and two of his sisters also testified at the trial. While recognizing appellant has had some issues in the past, they believe he is no longer a danger to others and could be safely released into the community. They also pledged to seek continued treatment for appellant should he be released, although they had not made any specific arrangements in that regard.

In closing argument, defense counsel argued the prosecution failed to prove appellant is a danger to others. He also proffered what is known as a "medication defense" in involuntary commitment proceedings. Specifically, counsel argued appellant has learned to control his mental illness with medication and would continue to take his

medication if he were to be released from Patton. Given that appellant has been compliant with his treatment plan and well behaved at Patton for many years, counsel argued he had earned the right to be released into the community.

The jury did not see it that way. As alleged by the prosecution, the jury found appellant has a mental illness that makes him a substantial danger to the physical well-being of others and he has serious difficulty controlling his dangerous behavior. Therefore, on November 17, 2010, the court extended appellant's involuntary commitment for two more years.

I

Appellant raises two equal protection arguments, the first of which pertains to the availability of outpatient treatment for people like himself who have been found not guilty by reason of insanity (NGI's), as compared to other people who have been involuntary committed, such as mentally disordered offenders (MDO's) and sexually violent predators (SVP's). However, the issue is moot because since the time appellant's commitment was extended, he has been placed in CONREP for outpatient treatment.

At trial, the court spent a great deal of time discussing with counsel whether appellant was eligible for outpatient treatment and, if so, whether that was relevant to the proceedings. Outside the presence of the jury, the parties informed the court that, because appellant had already been committed longer than the maximum amount of time he could have been imprisoned due to his commitment offense, CONREP was not a placement option for him in these proceedings. If the jury found he met the criteria for involuntary commitment, the court would have to extend his stay at Patton, and if the jury found he did not meet the criteria, the court would have to release him outright into the community. Given these choices, the court determined appellant's eligibility for CONREP was irrelevant, and that ruling is not being challenged on appeal.

However, over the course of the trial, appellant's attorney made clear to the court that if appellant's commitment at Patton were extended, his "first and primary goal"

would be to get into CONREP. And as it turned out, appellant has achieved that goal, insofar as his request for outpatient treatment was granted in June 2011. Therefore, his complaint about being treated differently from other types of involuntary committees in terms of access to outpatient treatment is moot.

Despite this, appellant contends we should consider his equal protection argument “because it presents an important issue that is likely to reoccur.” However, courts have a duty to refrain from passing judgment on issues that are moot, unless they are capable of repetition, yet evading review. (*Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 122; *In re Raymond G.* (1991) 230 Cal.App.3d 964, 967.) Since, as appellant admits, his equal protection claim regarding the availability of outpatient treatment for NGI’s is likely to present itself in future cases, and since we see no bar to review, we decline his invitation to consider it at this time.

II

Appellant also contends the trial court violated his equal protection rights by allocating to him the burden of proof on his medication defense. The claim has been forfeited.

Pursuant to CALCRIM No. 3453, the trial court instructed the jury that to prevail on his medication defense, appellant had to prove by a preponderance of the evidence 1) he no longer poses a substantial danger of physical harm to others because he is taking medication that controls his mental condition, and 2) he will continue to take that medication in an unsupervised environment. Appellant did not object to the instruction, and on appeal he concedes it is a correct statement of the law. (See *People v. Bolden* (1990) 217 Cal.App.3d 1591.)

By comparison, when the state seeks to extend the commitment of an MDO, it must prove beyond a reasonable doubt that the medication defense does not exist. (*People v. Noble* (2002) 100 Cal.App.4th 184, 190.) That’s because the statutory framework for extending the commitment of MDO’s differs from that required to extend

the commitment of NGI's. (*Ibid.*) Appellant argues this differential treatment violates equal protection, but he did not raise this argument in the trial court. Therefore it has been forfeited. (*People v. Alexander* (2010) 49 Cal.4th 846, 880, fn. 14; *People v. Burgener* (2003) 29 Cal.4th 833, 860-861, fn. 3; *Neil S. v. Mary L.* (2011) 199 Cal.App.4th 240, 254.)

Although we are reluctant to decide an issue on the basis of lack of an objection in the trial court, it makes particular sense to apply the forfeiture rule in this case because the adjudication of appellant's equal protection claim may require the presentation of additional evidence, including expert testimony, as the case of *People v. McKee* (2010) 47 Cal.4th 1172, 1207-1211 makes clear. Appellant requests that we take a cue from *McKee* and remand the matter to the trial court for further proceedings. (See *ibid.*) However, whereas the defendant in *McKee* preserved his constitutional challenges for appeal by raising them in the trial court (*id.* at pp. 1184-1185), appellant did no such thing. Under these circumstances, the forfeiture rule applies, and we see no reason to depart from it. (See generally *In re Seaton* (2004) 34 Cal.4th 193, 198-199 [explaining reasons for the forfeiture rule and noting it applies even when the complained of error is based on an alleged violation of the defendant's fundamental constitutional rights].)¹

III

Lastly, appellant contends the trial court prejudicially erred in refusing his request to instruct the jury on how to consider circumstantial evidence. We disagree.

¹ Although appellant does not assert his attorney was ineffective for failing to challenge the allocation of the burden of proof on his medication defense on equal protection grounds, it bears repeating that the law currently requires that burden to be allocated to the defense. (*People v. Bolden, supra*, 217 Cal.App.3d 1591.) That rule of law has never been challenged, let alone questioned in any published opinion. Thus, trial counsel's failure to challenge it below would not be likely to provide grounds for reversal. "While the Constitution guarantees criminal defendants a competent attorney, it 'does not insure that defense counsel will recognize and raise every conceivable constitutional claim.' [Citation.]" (*Anderson v. United States* (8th Cir. 2005) 393 F.3d 749, 754; see also *State v. Brown* (2011) 159 Wash.App. 366, 371, 245 P.3d 776, 778 ["Many state and federal cases have . . . concluded that an attorney's failure to raise novel legal theories or arguments is not ineffective assistance."].)

When, as here, the prosecution’s case relies substantially on circumstantial evidence, the trial court is required to give CALCRIM Nos. 223 and 224. CALCRIM No. 223 explains what circumstantial evidence is, and CALCRIM No. 224 informs jurors that “before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.”

Although, as respondent concedes, the court should have given CALCRIM Nos. 223 and 224 in this case, the omission of these instructions warrants reversal only when it is reasonably probable the defendant would have obtained a more favorable result had they been given. (*People v. Rogers* (2006) 39 Cal.4th 826, 886; *People v. Burch* (2007) 148 Cal.App.4th 862, 872-873.) Here, we are not convinced that probability exists.

Appellant argues that, because he has been well behaved at Patton and has said he would continue to take his medication if he were released, the jury could reasonably infer he would not pose a substantial danger to others in an unsupervised setting. He also notes that during deliberations, the jury asked the court for a definition of the term “substantial danger,” which he takes as a sign that the case was close.² However, the evidence was undisputed that appellant still experiences symptoms of mental illness in the form of delusions and hallucinations, he still lacks insight into his condition, and he does not have a specific plan in place for continuing his treatment plan if he were to be released from Patton.

² The court told the jury the term means a serious and well-founded risk of physical harm to others.

Furthermore, it is readily apparent appellant's compliance with his medication regiment at Patton has been largely due to the fact Patton is a highly-structured environment which is designed and staffed to cater to his particular mental problems. While appellant has stuck to his medication plan in this setting, the medical experts all agreed he would have tremendous difficulty transitioning to an unsupervised setting, where the stresses and strains of everyday life would severely tax his ability to cope with his mental illness. Even appellant's own expert, Dr. Lo, conceded this point. Like Drs. Harp and Thomas, Lo believed that if appellant were placed in an unsupervised setting, he would have serious difficulty controlling his behavior and constitute a substantial danger to the safety of others, because of his mental illness. In light of this confluence of opinion, it is not reasonably probable the jury would have reached a contrary conclusion, had it been instructed on the rules respecting circumstantial evidence. Therefore, the court's err in failing to give CALCRIM Nos. 223 and 224 is not cause for reversal.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.