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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.

SON KIM TRAN,

Defendant and Appellant.

G045302

(Super. Ct. No. 09CF2429)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Carla M. Singer and Lance Jensen, Judges. Affirmed.

Lizabeth Weis, 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, James D. Dutton and Alana Cohen Butler, Deputy Attorneys General, for Plaintiff and Respondent.

Upon being convicted of kidnapping and assault with the intent to rape, appellant Son Kim Tran was sentenced to 55 years to life in prison. He contends he was incompetent to stand trial and there is insufficient evidence to support his kidnapping conviction, but we disagree and affirm the judgment.

FACTS

In September 2009, Patricia H. was 57 years old and destitute. Like many homeless people in Santa Ana, including appellant, she spent much of her time around the Civic Center Plaza. Patricia had seen appellant in that area from time to time, but until the night of September 29, 2009 she had never talked to him.

That evening, Patricia was eating on the grass near Ross Street when appellant came over to her with his dinner and said, "Are we having a meal? Yes, we're having a meal." He then asked Patricia for a cigarette and sat down next to her. Although Patricia wasn't expecting appellant's company, she gave him some cigarette butts and they ate together.

When it began getting dark, Patricia walked over to a nearby bench to get her cart and gather her belongings. She then sat down on the bench and appellant joined her there. To her surprise and dismay, appellant suddenly started rubbing up to her and talking "nasty." He told her he wanted to have sex, but she said she did not want to. She then got up from the bench and began walking with her cart toward Broadway. She was moving quickly, trying to get away from appellant, but he followed her and kept putting his hands on her neck and shoulder. He also kept telling her, as well as other people in the area, that he wanted to have sex with her.

Patricia made her way from Broadway to Civic Center Drive. When she reached the Old Orange County Courthouse, appellant grabbed her by the shoulders and pulled her away from her cart. He took her from the sidewalk on Civic Center to a more secluded grassy area that is bordered by a parking lot on one side and some bushes and a three-foot retaining wall on the other. Then he threw her to the ground, jumped on her

and told her he was going to rape and kill her. As he was holding her down, he started tugging at her pants and thrusting his pelvis against her body. He also tried to unhitch his own belt, but he wasn't able to lower his pants more than a few inches before a Good Samaritan came to Patricia's aid.

Refugio Hernandez had been talking with some friends in the area when he saw appellant pull Patricia away from her cart. When he biked over to see what was going on, he saw appellant holding Patricia on the ground. He asked what was going on, and after getting to his feet and pulling up his pants, appellant insisted everything was fine. However, Patricia said she needed help because appellant was trying to rape her. At that point, appellant took a step toward Hernandez, but Hernandez unfurled a bike chain he was holding, and appellant turned and walked away. Hernandez then called 911 and followed appellant across the street. When appellant noticed Hernandez was tailing him, he turned to him and said, "You better leave or you're going to die."

Within minutes, Santa Ana Police Officer Adam Aloyian was on the scene. When appellant saw him, he took off running, but Aloyian cornered him in a stairway, and he eventually surrendered. Appellant was cooperative when Aloyian initially handcuffed him. However, as he was being led away to a police car, he began ranting and raving about how he was going to "break [Aloyian's] fucking back" and "fucking kill" him.

After appellant was taken away, Aloyian turned his attention to Patricia, who, according to Aloyian, looked battered, fearful and "utterly broken." She told Aloyian that as she and appellant were walking near the Old Orange County Courthouse, he pulled her away from her cart and tried to rape her in a grassy area near some bushes. Aloyian walked out the distance from Patricia's cart to the grassy area, and it turned out to be about 18 to 20 feet. He did not believe the grassy area would have been visible to the drivers on Civic Center or most of the pedestrians in the area.

At the police station, Aloyian interviewed appellant about the incident. When Aloyian asked him if he knew why he was in custody, appellant said, “Because I threw that bitch on the ground.” Asked why he did it, appellant said it was because Patricia wouldn’t give him a cigarette. He also suggested the incident was related to the fact he was a registered sex offender. Appellant told Aloyian he had recently gone to the Sheriff’s Department to register, and they made him wear an orange jumpsuit when they photographed him. Appellant told Aloyian that this violated his civil rights and that ever since then, he had begun doing “weird things.” He admitted, as well, that he had a long history of mental illness and that he couldn’t control himself around women. When Aloyian asked him what he would have done to Patricia if he hadn’t been stopped, he said “the worst.” Asked if that meant raping and killing her, he replied “yes.”

Appellant was charged with kidnapping with the intent to rape, assault with the intent to rape and making a criminal threat. (Pen. Code, §§ 209, subd. (b)(1), 220, subd. (a), 422.)¹ It was also alleged he was a habitual offender under the One Strike law and had suffered two prior serious felony convictions within the meaning of the Three Strikes law. (§§ 667.71, subd. (a), 667, subs. (d) & (e)(1).)

Before trial, defense counsel expressed concern about appellant’s ability to assist him in presenting a defense. The court conducted a hearing on the issue and determined appellant was competent to stand trial.

At trial, the sole defense witness was psychiatrist Ernest Klatte. Dr. Klatte opined appellant suffers from schizoaffective disorder, which interferes with his sense of reality and perception of events. Dr. Klatte said the disorder is also known to cause impulsive behavior, and considering his condition, appellant probably did not fully understand what he was doing when he attacked Patricia.

¹ All further statutory references are to the Penal Code.

The jury found appellant guilty of the kidnapping and assault charges but was unable to reach a verdict on the criminal threats charge, and that charge was later dismissed. After finding the One Strike and Three Strike allegations true, the court sentenced appellant to 55 years to life in prison.

I

Appellant argues there is insufficient evidence to support the trial court's finding he was competent to stand trial. In so arguing, appellant references not only the evidence that was generated in connection with the competency hearing, but other evidence and events that transpired during the course of the pretrial proceedings. He submits that even if the trial court's initial competency finding was correct, the court should have revisited the issue and found him incompetent based on all of the information it had. We find appellant's arguments unavailing.

Appellant's mental state was an issue throughout the case. During pretrial proceedings, defense counsel informed the court he wanted appellant to plead not guilty by reason of insanity, but appellant did not want to go to a mental hospital, so he insisted on pleading not guilty. However, in light of defense counsel's concerns about appellant's competency, the court suspended proceedings and appointed Drs. Veronica Thomas and Ted Greenzang to evaluate appellant. They both concluded that, although appellant has a long history of mental illness, he was competent to stand trial.

Their reports revealed that appellant was born in Vietnam in 1970 and was adopted by an Orange County family when he was five years old. After dropping out of high school, he became involved with drugs and alcohol and became increasingly paranoid and delusional. In 1996, at the age of 25, he began receiving treatment for schizophrenia. And in 2000, he was sentenced to prison for committing rape. While incarcerated, he was diagnosed as a mentally disordered offender, and when his prison term expired in 2006, he was committed to Atascadero State Mental Hospital. He was released from Atascadero in August 2009, a month before the present case arose.

Dr. Thomas reported that when she interviewed appellant in jail, he was alert and oriented to person, place and date. He appeared to understand the purpose of the interview and the seriousness of his case. He also said he trusted his attorney, would listen to him in court and could remember what happened on the night of the charged offenses. Explaining his conduct, he said he was sensing vibrations and hearing voices that were telling him to act. He also said it is not uncommon for him to hear voices and have visions, which he described as a “spiritual problem.” However, appellant said he had been taking Depakote and Risperdal while in jail. And even though he still hears voices in his head, he is not troubled by them. In fact, he reported that when he is taking his medication, his symptoms are much more in the background and do not interfere with his understanding of what is going on around him. Although appellant exhibited some “bizarre logic and loose associations” during the interview, Dr. Thomas believed he was “psychiatrically stable” and “presently able to engage in a rational and meaningful relationship with his attorney for purposes of his defense.”

Dr. Greenzang reached the same conclusion after interviewing appellant. He diagnosed appellant with psychotic disorder not otherwise specified, as well as alcohol abuse by history and paranoid and schizoid personality traits. However, during the interview, appellant exhibited reasonably good attention and concentration and was able to express himself verbally. He appeared to have a general understanding of the litigation process and said he could cooperate with his attorney. Regarding the night in question, he said he drank a gallon of gin and was hearing voices in his head that were telling him to attack Patricia; he admitted hitting her but denied trying to rape her. It was Dr. Greenzang’s opinion that appellant still displayed some signs of residual paranoia, delusional thinking and mood fluctuations. But he was confident appellant understood the need to take his medication and was motivated to do so. He did not think appellant was incompetent to stand trial.

Appellant's competency hearing took place in July 2010, six months after Drs. Thomas and Greenzang interviewed him and prepared their reports. At the hearing, Dr. Greenzang, the sole witness, testified that appellant's mental health record was "suggestive of schizophrenia, paranoia type, or schizoaffective disorder." He said these conditions are characterized by hallucinations and delusional thinking but that those symptoms can be kept at bay through the use of antipsychotic medications such as Risperdal. On cross-examination, defense counsel told Dr. Greenzang that appellant had written him some "really bizarre" letters, which he believed were indicative of delusional thinking. However, Dr. Greenzang remained confident that appellant was competent to stand trial. Reaffirming the opinion he rendered in his report, Dr. Greenzang concluded that despite appellant's lengthy history of psychiatric treatment, significant emotional problems and continued need for treatment, he "had enough intact mental capacity to work appropriately" with his attorney in presenting a defense.

The trial court agreed. Based on the reports and testimony offered on the issue, the court determined appellant had the present ability to understand the charges against him and rationally consult with his attorney. Accordingly, the court adjudged him legally competent.

Nevertheless, appellant's trial did not commence for several more months, not until March 2011. On the eve of trial, appellant unsuccessfully moved to suppress the statements he made to Officer Aloyian on the grounds he did not voluntarily waive his right to remain silent. At the hearing on the issue, Aloyian admitted appellant acted strangely and made some bizarre statements when he took him into custody and interviewed him on the night in question. However, when asked if it appeared that appellant was mentally ill, Aloyian answered, "I'm hard-pressed to use those words 'mentally ill' because there could have been other reason[s] for some of the stuff he said that didn't . . . seem logical. It could have been drug abuse. It could have been alcohol. He could have been intoxicated. So I can't say he seemed mentally ill."

After the court denied appellant's motion to suppress the statements he made to Officer Aloyian, it held another hearing to address the parameters of Dr. Klatte's testimony for the defense. At the hearing, Dr. Klatte testified about how schizophrenia affects a person's thought processes. Although he was convinced appellant suffered from that disorder, he still believed, just as Drs. Thomas and Greenzang did, that appellant was legally competent to stand trial. Upon hearing that, defense counsel moaned, "I can't get any of you people to tell me [appellant's] incompetent. You're number three. But we'll move on."

Before the trial commenced, however, the court took up one other issue that surfaced unexpectedly, that being appellant's request for a new attorney. (See *People v. Marsden* (1970) 2 Cal.3d 118.) Appellant told the court he wasn't happy with his appointed attorney and he wanted a "state attorney" to represent him. Appellant said, "[I] want[] a state attorney because my case is so serious that I feel that a state attorney can really look into my options and give me a better perspective of things." When asked if there was anything in particular that he didn't like about his present attorney, appellant said, "For one, I have issues that may concern that. It may be a civil/legal matter instead of a legal/civil matter because of my status under liberal rights." He then said that while his attorney had spent a lot of time with him, he never responded to the letters he had sent him. Specifically, his attorney never responded to his concerns about "the reports of [Wasco] having the age identity confirmed in their way that makes it look like I was the one that confirmed it."

Appellant also expressed displeasure over the fact his attorney believed he was mentally ill. In the course of doing so, appellant stated, "I'm in the status that now the presidency is democratic and that is a public situation and it's under a democratic rule. And myself, I have a name that bears a California logo. And I need to be a republican for the state in order for them to understand that I need a situation in a court where they're going to say, okay, there's something in value that is not making sense."

In response to appellant's comments, defense counsel told the court he had done everything he could to represent appellant effectively, and if anything, appellant's remarks only served to bolster his claim that he was incompetent to stand trial. Defense counsel also showed the judge one of the letters that appellant had sent him, describing it as "complete gibberish." Borrowing a phrase that Dr. Klatte had used in reference to appellant's writings, the judge said the letter was "neologistic," meaning it was characterized by novel words and phrases that are not in standard usage. Nonetheless, the court was satisfied that defense counsel was representing appellant competently and that there was no conflict of interest between them. Therefore, it denied appellant's request for a new attorney.

The law is clear: "A person cannot be tried or adjudged to punishment while mentally incompetent. [Citation.] A defendant is mentally incompetent if, as a result of a mental disorder or developmental disability, he or she is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner. [Citation.]" (*People v. Lawley* (2002) 27 Cal.4th 102, 131.) However, all criminal defendants are presumed to be competent. (*Ibid.*) The burden rests on the defense to prove by a preponderance of the evidence that the defendant is mentally unfit to stand trial. (*Ibid.*) On appeal, we indulge all reasonable inferences in favor of the trial court's ruling. (*Ibid.*) Will not disturb the court's competency finding if there is any substantial evidence, contradicted or not, to support it. (*Ibid.*; *People v. Frye* (1998) 18 Cal.4th 894, 1004, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Castro* (2000) 78 Cal.App.4th 1402, 1418, disapproved on other grounds in *People v. Leonard* (2007) 40 Cal.4th 1370, 1389.)

Here, it is undisputed that, although appellant suffers from a mental disorder, he understood the nature of the proceedings. The only point of contention is whether the record supports the trial court's finding he was able to rationally assist his attorney in presenting a defense. In arguing it doesn't, appellant emphasizes the fact Drs.

Thomas and Greenzang examined him only one time each, in January 2010. Given that the competency hearing did not take place until July 2010, appellant contends their opinions were “not probative” of whether he was competent at that time. Appellant also argues that Dr. Klatte’s pretrial testimony, coupled with his own remarks at the *Marsden* hearing, should have raised sufficient questions in the court’s mind about his competence to warrant further examination of the issue.

Drs. Thomas and Greenzang may have only examined appellant once, but they were also aware of his extensive history of psychiatric treatment, which dates back to 1996. They also knew about appellant’s criminal background, his status as a mentally disordered offender and the circumstances of the present offenses. And while their evaluations of appellant predated the competency hearing by six months, defense counsel never objected to their opinions on that basis. Even now, appellant fails to cite any authority for his claim that the six-month time lag rendered their opinions irrelevant. Contrary to appellant’s assertions, we believe the opinions of Drs. Thomas and Greenzang had a logical bearing on the issue of his competency to stand trial. The timing of their evaluations in relation to the competency hearing is obviously a relevant consideration, but to our minds, it goes to the weight, not the admissibility of their opinions.

As for appellant’s contention that events following the competency hearing should have caused the trial court to revisit the issue, we hasten to note that appellant’s own expert, Dr. Klatte, testified on the eve of trial that appellant was competent to stand trial. As defense counsel noted at that time, that made it unanimous among the experts that appellant had the mental capacity to rationally assist in his defense.

Later on, during the *Marsden* hearing, appellant did make some very strange remarks in stating his case against his attorney. However, “[w]hen, as here, a competency hearing has already been held and the defendant was found to be competent to stand trial, a trial court is not required to conduct a second competency hearing unless

‘it “is presented with a substantial change of circumstances or with new evidence”’ that gives rise to a ‘serious doubt’ about the validity of the competency finding. [Citation.] More is required than just bizarre actions or statements by the defendant to raise a doubt of competency. [Citation.]” (*People v. Marshall* (1997) 15 Cal.4th 1, 33.)

We do not believe the circumstances were such as to warrant a second competency hearing in this case. Appellant’s confused statements do reflect a certain amount of paranoia and confusion on his part, which is consistent with the experts’ diagnosis of him, but they can hardly be characterized as a change in circumstances. Appellant had been this way throughout the proceedings against him. And it was up to the trial court to appraise appellant’s conduct in light of all of the circumstances presented. We give great deference to the court’s assessment of the situation and decline appellant’s invitation to second-guess its decision to hold but one competency hearing in this case. (*People v. Marshall, supra*, 15 Cal.4th at p. 33; *People v. Kaplan* (2007) 149 Cal.App.4th 372, 383.)

In challenging the trial court’s competency finding, appellant also argues there is no specific and credible evidence that he was capable of the sort of rational decision making that is necessary to meaningfully assist in his defense. While the record shows appellant continues to suffer the effects of his mental illness, there was evidence that he was compliant with his medications and that they were effective for him. As Dr. Thomas noted, “When [appellant] is taking his medicine, the psychotic symptoms are more in the background and do not interfere with [his] understanding [of] what is going on in the courtroom.” During his interviews, appellant also exhibited an understanding of his predicament and the court process, as well as the need to work with counsel. He told Dr. Greenzang he could cooperate with his attorney, and Dr. Greenzang was confident appellant “had enough intact mental capacity to work appropriately with counsel.”

Given all of the evidence that was adduced on the issue, and particularly considering the complete consensus of expert opinion on this issue, we are convinced

there is substantial evidence to support the trial court's determination that appellant was legally competent to stand trial. There is no basis to disturb the court's finding in that regard.

II

Tran also contends there is insufficient evidence of asportation to support his kidnapping conviction. Again, we disagree.

In reviewing the sufficiency of the evidence to support a criminal conviction, we review the entire record “to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citation.]” (*People v. Stuedemann* (2007) 156 Cal.App.4th 1, 5.) In so doing, we presume in support of the judgment the existence of every fact the trier could reasonably deduce from evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) “If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.” (*People v. Albillar* (2010) 51 Cal.4th 47, 60.)

Tran was convicted of violating section 209, which provides that any person who kidnaps or carries away any individual with the intent to commit rape shall be punished by imprisonment in the state prison for life with the possibility of parole. (§ 209.) With respect to the asportation requirement, the statute states, “This subdivision shall only apply if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in” the intended rape. (*Ibid.*)

Factors bearing on the asportation element include the scope and nature of the movement and whether it decreased the likelihood of detection, increased the danger inherent in a victim's foreseeable attempts to escape, or enhanced the defendant's opportunity to commit additional crimes. (*People v. Dominguez* (2006) 39 Cal.4th 1141,

1151.) Although the actual distance of the movement must also be considered, no minimum distance is required: “Measured distance . . . is a relevant factor, but one that must be considered in context, including the nature of the crime and its environment.” (*Id.* at p. 1152) “Application of these factors in any given case will necessarily depend on the particular facts and context of the case.” (*Id.* at p. 1153.)

In this case, appellant moved Patricia only about 18 to 20 feet. But “[w]here movement changes the victim’s environment, it does not have to be great in distance to be substantial.” (*People v. Shadden* (2001) 93 Cal.App.4th 164, 169 [asportation element satisfied where defendant dragged a store clerk nine feet from the front counter to a back room of the store where she worked].) The record shows appellant pulled Patricia from the sidewalk on Civic Center to a grassy area adjacent to the parking lot of the Old Orange County Courthouse. According to photographic exhibits that were admitted into evidence, the area is below street level and is separated from the sidewalk by a retaining wall and a row of thick bushes. The area is visible from the parking lot, but it is secluded from Civic Center Drive, which is where most of the activity in that area would have been occurring at that hour of the night. As our Supreme Court has observed, the movement need not be to an area that is totally enclosed to increase the risk of harm to the victim. (*People v. Dominguez, supra*, 39 Cal.4th at p. 1153.)

The testimony confirmed that appellant moved Patricia to an area where she was unlikely to be seen and where appellant could further pursue his criminal ambitions. Hernandez testified he saw appellant take Patricia from the sidewalk, around the retaining wall, and then behind the bushes to the grassy area where the attempted rape occurred. Patricia would have been highly visible when she was on the sidewalk. But, as Officer Aloyian explained, once she was down in the grassy area behind the bushes, she would have been largely out sight. Aloyian was sure that drivers on Civic Center and pedestrians on the far sidewalk would not have been able to see her. And although he

thought it might have been “possible” for pedestrians on the sidewalk by the bushes to see her, Aloyian said that even if there had been people in that area, he did not think they would have been able to see her.

It is thus clear that, in moving Patricia from the sidewalk to the bushes before attempting to rape her, appellant changed her environment “from a relatively open area alongside the road to a place significantly more secluded, substantially decreasing the possibility of detection, escape or rescue.” (*People v. Dominguez, supra*, 34 Cal.4th at p. 1153.) Under these circumstances, a reasonable jury could find the asportation element was satisfied. (*Ibid.*) Therefore, we have no occasion to disturb the jury’s finding in that regard. There is substantial evidence in the record to support appellant’s conviction for aggravated kidnapping.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.