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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK HILL THOMAS,

Defendant and Appellant.

H036517

(Santa Clara County

Super. Ct. No. 78748)

Following the filing of a petition for an extended commitment under Penal Code section 1026.5, subdivision (b),¹ and a court trial, the court ordered Frank Hill Thomas's commitment extended for an additional two-year period. Thomas appeals.

In a nutshell, appellant's contention is that, since civil commitment constitutes a significant deprivation of liberty protected by due process, due process entitles him to a trial by jury under both federal and state law unless he has explicit notice of the right and there is an express waiver of that right, either by himself or through counsel.² He

¹ All further statutory references are to the Penal Code unless otherwise provided.

² At oral argument, appellant's counsel argued for the first time that the Public Defender (P.D.) was not formally appointed to represent appellant in the commitment proceedings below and, therefore, the P.D. lacked authority to waive a jury trial on his behalf. The record shows that the P.D. appeared on behalf of appellant throughout the proceedings. Appellant's belated claim was forfeited by failing to timely raise it. (See *Kinney v. Vaccari* (1980) 27 Cal.3d 348, 357; see also *Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11 ["Obvious reasons of fairness militate against

maintains that these due process "principles are embodied in Penal Code section 1026.5, subdivisions (b)(3) and (b)(7)" He asserts that "even if a personal waiver is not required, there was no waiver to a jury trial of any kind in the instant case." Appellant does not challenge the sufficiency of the evidence or raise any equal protection claim with respect to jury trial.

We affirm.

I

Procedural History

A petition to extend appellant's commitment pursuant to section 1026.5, subdivision (b), was filed on June 23, 2010. It stated that on January 24, 1981, appellant committed violations of section 288, subdivision (b), and (now former) section 12022.3, subdivision (a). Appellant was found not guilty by reason of insanity and committed to a state hospital. The petition indicated that appellant had been transferred to and remained at Napa State Hospital. It alleged that appellant, "by reason of mental disease, defect or disorder, continues to represent a substantial danger of physical harm to others, and continues to be a person described in paragraph (1) of section 1026.5(b) of the Penal Code."

Counsel for appellant appeared without appellant on July 30, 2010, August 26, 2010, October 1, 2010, October 22, 2010, November 19, 2010, December 10, 2010, and December 17, 2010. A settled statement of fact in this case states: "Beginning on July 30, 2010, respondent's counsel, Deputy Public Defender Thompson Sharkey, stated multiple times in chambers that [appellant] was not willing to submit to an extension of his commitment to the Department of Mental Health and wanted a trial. In multiple

consideration of an issue raised initially in the reply brief of an appellant"].) Moreover, appellant has not affirmatively shown error. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; see also Cal. Const., art. VI, § 13.)

calendar meetings held in chambers prior to trial, defense counsel stated that he, counsel, was requesting a court trial rather than a jury trial." Neither the deputy district attorney nor defense counsel had a recollection of "in-chambers or court discussions of whether and when [appellant] was advised of his right to a jury trial or if, when and how he waived that right."

On January 6, 2011, appellant appeared for trial. The People called two witnesses: Amrip Bal Saini, appellant's treating psychiatrist at Napa State Hospital, and appellant.

Dr. Saini testified that appellant, who was then 54 years old, had been diagnosed with schizophrenia, paranoid type, and pedophilia. Schizophrenia is an ongoing disorder that can affect a person's behavior, thoughts and actions. Dr. Saini considered it significant that appellant had denied having any mental disorder. As a consequence, appellant would not be aware of situations and triggers that might result in reoffending.

The 1981 commitment offense involved molestation of a 10-year-old female child using a knife. Records showed that appellant removed her pants, touched her genitals, and forced her to manually masturbate him. At various times, appellant had totally denied the offense or denied using a knife or weapon. Within the two years prior to trial, appellant had admitted to being there and drinking beer but he had claimed all he had been doing was urinating and the child had decided on her own to urinate as well. In May 2010, a Dr. Scilly conducted a three-hour interview of appellant and he had reported that appellant had ongoing fantasies and interest in young girls.

Appellant had not completed or made any significant progress on a "WRAP" plan. Dr. Saini thought appellant needed to do a lot of work to complete the "WRAP" plan. Dr. Saini also wanted appellant to complete a sex offender treatment program as recommended by CONREP but appellant had been unwilling. Appellant had said he was "done with his groups and his symptoms are in remission." Although Dr. Saini also

wanted and encouraged appellant to attend group therapy, appellant had not been "attending regular group therapy."

Appellant was taking psychotropic medication. His physical aggression had diminished as a result of the medication and appellant had not been physically aggressive in about three years. Dr. Saini thought it was possible that appellant would not comply with treatment if he was not committed to Napa State Hospital because at times in the past he had stopped taking his medication and he does not believe he has a mental disorder or needs medication. Appellant thought his medications were vitamins that gave him energy.

Dr. Saini disclosed that appellant was currently "manifesting delusions" that were "paranoid and persecutory." Appellant believed that he had been "set up" and "framed" for the offense and his doctors were conspiring against him. Other symptoms of his mental disorder include his apparent preoccupation and reaction to internal stimuli, as made evident by talking and mumbling to himself and smiling. He engaged in very limited social interaction and displayed anxiety and sometimes became aggressive without reason. When the offense or his pedophilia was discussed, appellant became stressed and his speech, his thought processes, and his behaviors sometimes became disorganized.

On a couple of occasions within the 12 months previous to trial, appellant had been rude to staff and used strong words. He had been "showing [a] threatening stance." For example, when a staff member went into a room to conduct a routine check of appellant and others, appellant stared, had a stiff body posture, and told the staff member to get out. In addition, at times, appellant mentioned killing if he had a gun. Dr. Saini indicated there was one instance when he made a shooting hand gesture toward staff. The previous February appellant had stated, "I would have a gun, and I would kill all of you and send you back to where you came from, you sons of bitches."

Dr. Saini indicated that they had discussed the requirements for being moved from the locked department into the open department at Napa State Hospital as well as the criteria for being discharged into the community. In Dr. Saini's opinion, appellant presented substantial risk of physical harm to others, specifically for the population of children less than 13 years of age. Symptoms of his mental disorders persisted and could lead to dangerous behavior.

Appellant testified that he was residing in Napa State Hospital and had been at that hospital since 1999. When asked about the commitment offense, he indicated that he was "supposedly in a schoolyard with a ten-year-old girl" He indicated that "there was no knife involved that was in a violent way on my behalf." He explained that he had lost his job and he was at the school to try to make some money by stealing bicycles and buying beer for minors. He denied pulling down the girl's pants or forcing her to manually masturbate him. Appellant claimed that all he did was ask her to take down her pants and she did. He indicated that he was hearing voices at the time.

Appellant acknowledged that he was sexually attracted to the girl but he asserted that he was no longer attracted to anyone who was not at or near his age. He indicated that the sexual offender treatment program was only available in an open unit, but he would be willing to do the program if he were in an open unit.

On cross-examination, appellant admitted that he suffered from a mental illness called paranoid schizophrenia and was taking Zyprexa, which controlled his symptoms. He stated that he would continue to seek psychiatric treatment if released from commitment and would continue to take Zyprexa in an unsupervised environment. He did not consider himself a danger to anyone. He agreed that he was remorseful for his actions in the 1980's and, that as long as he continued to take Zyprexa, he would not do anything like that.

The court found that appellant, "by reason of mental disease, defect or disorder, continues to represent a substantial danger of physical harm to others, and continues to be a person described in paragraph (1) of Section 1026.5(b) of the Penal Code." By order filed January 6, 2011, the court ordered appellant's commitment to be extended for an additional period of two years to January 23, 2013.

II

Discussion

A. Law of the Case Doctrine

Respondent maintains that the law of the case doctrine forecloses appellant's due process argument. In our unpublished opinion in the appeal from the prior order of extended commitment, we concluded that appellant did not have a statutory or a federal due process right to a jury trial unless personally waived by him (No. H034006). (See Evid. Code, §§ 452, subd. (d), 459.)

"The doctrine of the law of the case is this: That where, upon an appeal, the [reviewing court], in deciding the appeal, states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal . . . although in its subsequent consideration this court may be clearly of the opinion that the former decision is erroneous in that particular.'" (*People v. Shuey* (1975) 13 Cal.3d 835, 841, abrogated on another point by *Segura v. United States* (1984) 468 U.S. 796, 799, as noted in *People v. Bennett* (1998) 17 Cal.4th 373, 389, fn. 5.) "[T]he law-of-the-case doctrine governs only the *principles of law* laid down by an appellate court, as applicable to a retrial of fact, and it controls the outcome on retrial only to the extent the evidence is substantially the same. [Citation.] The doctrine does not limit the new evidence a party may introduce on retrial. [Citation.]" (*People v. Boyer* (2003) 38 Cal.4th 412, 442.)

"The doctrine of law of the case . . . governs later proceedings in the *same case* (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 701 . . .) with regard to the rights of the *same parties* who were before the court in the prior appeal. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 301 . . . ; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 895, p. 928.)" (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 668, fn. omitted.) "The doctrines of res judicata and collateral estoppel can give conclusive effect to a former judgment or to the determination of an issue in a different proceeding. (*Griset v. Fair Political Practices Com.*, *supra*, 25 Cal.4th at pp. 701–702 . . .)" (*Id.* at p. 668, fn. 15.) Although the parties are the same, the involuntary commitment proceeding presently under review is an entirely new proceeding, not a continuation of the prior involuntary commitment proceeding. The law of the case doctrine does not apply.

Moreover, our prior opinion did not address whether the right of due process under the California Constitution created a right to jury trial and required an explicit advisement and an express waiver.

B. *Due Process*

By statute, when a petition for extended commitment under section 1026.5, subdivision (b), is filed, the court must "advise the person named in the petition of the right to be represented by an attorney and of the right to a jury trial." (§ 1026.5, subd. (b)(3).) The trial on the petition must be "by jury unless waived by both the person and the prosecuting attorney." (§ 1026.5, subd. (b)(4).) Section 1026.5, subdivision (b)(7), further provides in pertinent part: "The person shall be entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings. All proceedings shall be in accordance with applicable constitutional guarantees."

A proceeding to extend a commitment pursuant to section 1026.5 is a special proceeding of a civil nature and not a civil action or a criminal proceeding. (See Code

Civ. Proc., §§ 21, 22, 23, 30; *Tide Water Assoc. Oil Co. v. Superior Court* (1955) 43 Cal.2d 815, 822; *People v. Dobson* (2008) 161 Cal.App.4th 1422, 1435; *People v. Givan* (2007) 156 Cal.App.4th 405, 409; *People v. Wilder* (1995) 33 Cal.App.4th 90, 99; *People v. Superior Court (Williams)* (1991) 233 Cal.App.3d 477, 485, 488; cf. *People v. Yartz* (2005) 37 Cal.4th 529, 532 [an SVPA civil commitment proceeding is a special proceeding of a civil nature, not a civil suit]; *People v. Succop* (1967) 67 Cal.2d 785, 789 [former Welf. & Inst. Code, § 5500 et seq. "establish special proceedings of a civil nature relating to mentally disordered sex offenders"].) There is no federal or state constitutional provision expressly providing for a jury trial in a special proceeding.³ Ordinarily, there is no right to a jury trial in a special proceeding unless provided by statute. (See *Corder v. Corder* (2007) 41 Cal.4th 644, 656.)

As to his due process claim, there is no question that extended civil commitment of a person found not guilty by reason of insanity (NGI) involves a significant

³ A criminal defendant is entitled to a trial by jury under federal and state Constitutions (U.S. Const. Amends. VI, XIV; Cal. Const., art. I, § 16; *Duncan v. State of La.* (1968) 391 U.S. 145, 149-150 [88 S.Ct. 1444] [Sixth Amendment right to trial by jury in serious criminal cases applicable to states through Fourteenth Amendment]). The Seventh Amendment to the U.S. Constitution provides in part: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved" But the Seventh Amendment does not directly apply to the states and has not been incorporated into the Fourteenth Amendment. (See *McDonald v. City of Chicago, Ill.* (2010) ___ U.S. ___, ___ [130 S.Ct. 3020, 3035, fn. 13, 3033]; *Gasperini v. Center for Humanities, Inc.* (1996) 518 U.S. 415, 432 [116 S.Ct. 2211]; *Curtis v. Loether* (1974) 415 U.S. 189, 192, fn. 6 [94 S.Ct. 1005]; *Minneapolis & St. Louis R. Co. v. Bombolis* (1916) 241 U.S. 211 [36 S.Ct. 595].) "Our state Constitution expressly guarantees the right to a jury trial in civil actions. (Cal. Const., art. I, § 16.) But the right guaranteed is that of a jury trial as it existed at common law, when the state Constitution was first adopted. (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 75–76) Consequently, the constitutional right to a jury trial does not apply . . . to special proceedings (*Cornette, supra*, 26 Cal.4th at p. 76 . . .), although the Legislature may provide for a jury trial in these situations by statute [citations]." (*Corder v. Corder, supra*, 41 Cal.4th at p. 656, fn. 7.)

deprivation of liberty and a person subject to such a proceeding is entitled to procedural due process protections. (*Foucha v. Louisiana* (1992) 504 U.S. 71, 79 [112 S.Ct. 1780].) But no U.S. Supreme Court case has held that a person subject to an involuntary civil commitment proceeding is entitled to a jury trial as a matter of federal due process. In fact, the U.S. Supreme Court has indicated that federal constitutional standards that apply to criminal proceedings do not automatically apply to involuntary commitment proceedings (*Allen v. Illinois* (1986) 478 U.S. 364, 371-372 [106 S.Ct. 2988] [a state's decision to provide procedural safeguards applicable in criminal trials, such as the right to counsel, the right to demand a jury trial, and the right to confront and cross-examine witnesses, the beyond-a-reasonable-doubt standard of proof, does not turn involuntary civil commitment "proceedings into criminal prosecutions requiring the full panoply of rights applicable there"]; *Addington v. Texas* (1979) 441 U.S. 418, 427-431 [99 S.Ct. 1804] [due process does not require states to use the "beyond a reasonable doubt" standard of proof, which applies in criminal prosecutions, in civil commitment proceedings], 428 ["a civil commitment proceeding can in no sense be equated to a criminal prosecution"]). The federal constitutional right to due process does not necessarily compel a jury trial. (*McKeiver v. Pennsylvania* (1971) 403 U.S. 528, 545 [91 S.Ct. 1976] (plur. opn. of Blackmun, J.) ["trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement"].)

In the past, the California Supreme Court has stated: "An involuntary civil commitment in a state hospital for the mentally ill is a commitment which requires the application of criminal due process standards. (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 224-225)" (*In re Hop* (1981) 29 Cal.3d 82, 89.) More recently, the California Supreme Court has recognized that "[i]t is well settled that rights available in criminal trials do not necessarily apply in civil commitment proceedings. [Citations.]" (*Moore v. Superior Court* (2010) 50 Cal.4th 802, 818; see *In re Conservatorship of Ben*

C. (2007) 40 Cal.4th 529, 538 ["the analogy between criminal proceedings and proceedings under the LPS Act is imperfect at best and . . . not all of the safeguards required in the former are appropriate to the latter"].) The court has also determined that a criminal defendant has no constitutional right to a jury trial in a competency hearing, which is a special proceeding. (See *People v. Masterson* (1994) 8 Cal.4th 965, 969; see also *People v. Lawley* (2002) 27 Cal.4th 102, 131.)

Nevertheless, we assume for purposes of this appeal that, at least as a matter of California constitutional law, appellant had a due process right to a jury trial in proceedings to extend a commitment pursuant to section 1026.5, subdivision (b). (Cf. *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 ["due process clause of the California Constitution requires that proof beyond a reasonable doubt and a unanimous jury verdict be applied to conservatorship proceedings under the LPS Act"]; cf. also *In re Gary W.* (1971) 5 Cal.3d 296, 307 ["in the absence of a compelling state purpose for the distinction between the class of persons subject to commitment pursuant to [former Welfare and Institutions Code] section 1800 and to other classes of persons subject to involuntary confinement, the right to jury trial is a requirement of both due process of law and equal protection of the law"]; but see *People v. Tilbury* (1991) 54 Cal.3d 56, 59 [appellant, who had been found not guilty by reason of insanity and committed to a state hospital, was not entitled to a jury trial on the issue of his eligibility for outpatient placement], 69 ["Juries have no more expertise in predicting future dangerousness than judges"].)

In this case, appellant's counsel requested a court trial. Thus, the issue becomes whether due process required the court to explicitly advise appellant of a right to a jury trial and obtain an express waiver of that right by appellant, either personally or through counsel.

Where an interest at stake is protected by due process, "the question remains what process is due." (*Morrissey v. Brewer* (1972) 408 U.S. 471, 481 [92 S.Ct. 2593].) "[D]ue process is flexible and calls for such procedural protections as the particular situation demands. '(C)onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961)." (*Ibid.*)

"[D]ue process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [Citation.]" (*Mathews v. Eldridge* (1976) 424 U.S. 319, 335 [96 S.Ct. 893]; see *In re Conservatorship of Person of John L.* (2010) 48 Cal.4th 131, 150.) Our consideration of these factors lead us to conclude that due process does not demand an explicit judicial advisement of the right to be tried by a jury and an express waiver where the NGI committee is represented by counsel.

"Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action. *Youngberg v. Romeo*, 457 U.S. 307, 316, 102 S.Ct. 2452, 2458, 73 L.Ed.2d 28 (1982). 'It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.' *Jones, supra*, 463 U.S., at 361, 103 S.Ct., at 3048 (internal quotation marks omitted)." (*Foucha v. Louisiana, supra*, 504 U.S. at p. 80; see *Vitek v. Jones* (1980) 445 U.S. 480, 491-492 [100 S.Ct. 1254].)

"The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." (*Addington v. Texas* (1979) 441 U.S. 418, 426 [99 S.Ct. 1804].) The fundamental purposes of the extended commitment proceedings are to ensure that needed treatment is provided and to protect the public. (*People v. Lara* (2010) 48 Cal.4th 216, 228.)

"At least to the extent protected by the Due Process Clause, the interest of a person subject to governmental action is in the accurate determination of the matters before the court, not in a result more favorable to him." (*Heller v. Doe by Doe* (1993) 509 U.S. 312, 332 [113 S.Ct. 2637].) Appellant does not explain how requiring an explicit advisement and express waiver of the jury trial right would decrease the risk of an erroneous determination where the NGI committee is represented by counsel. In fact, it is conceivable that in certain situations a person's liberty interests may be better protected by having a judge as the trier of fact.

In re Conservatorship of Person of John L., supra, 48 Cal.4th 131, concerned a statute pertaining to a proposed conservatee's production and attendance at the hearing to establish a conservatorship. The appellant argued that his statutory and state and federal constitutional due process rights were violated "when the superior court proceeded with the . . . conservatorship hearing in his absence and ordered the conservatorship without any admissible evidence that he knowingly and intelligently waived his right to appear at the hearing" (*id.* at pp. 141-142). The appellant maintained that the court had improperly relied on his attorney's unsworn statements that he did not want to attend the hearing or contest the conservatorship (*id.* at p. 149).

In rejecting those arguments, the California Supreme Court observed: "Like all lawyers, the court-appointed attorney is obligated to keep her client fully informed about

the proceedings at hand, to advise the client of his rights, and to vigorously advocate on his behalf. (Bus. & Prof. Code, § 6068, subd. (c); *Conservatorship of David L.* (2008) 164 Cal.App.4th 701, 710 . . . [a proposed LPS conservatee has a statutory right to effective assistance of counsel]; *Conservatorship of Benevenuto* (1986) 180 Cal.App.3d 1030, 1037, fn. 6 . . . [‘Implicit in the mandatory appointment of counsel is the duty of counsel to perform in an effective and professional manner’]; see *Mary K.*, *supra*, 234 Cal.App.3d at p. 272 . . . ; *Conservatorship of Ivey* (1986) 186 Cal.App.3d 1559, 1566) The attorney must also refrain from any act or representation that misleads the court. (Bus. & Prof. Code, § 6068, subd. (d); Rules Prof. Conduct, rule 5–200(B).) (*In re Conservatorship of Person of John L.*, *supra*, 48 Cal.4th at pp. 151-152.)

The Supreme Court determined that "a client who tells his appointed attorney he is unwilling to attend the hearing and does not wish to contest a proposed LPS conservatorship may reasonably expect his attorney to report such information to the court, with binding effect. (See *Conservatorship of Mary K.* (1991) 234 Cal.App.3d 265, 271 . . . (*Mary K.*); *Conservatorship of Maldonado*, *supra*, 173 Cal.App.3d at p. 148)" (*Id.* at p. 147, fn. omitted.) It concluded that "the superior court did not deprive [a person] of due process when it established the conservatorship of his person in his absence." (*Id.* at p. 156.) The court stated: "This conclusion is consistent with decisions generally recognizing that, even though certain rights implicated in civil proceedings are substantial, they may be waived by an attorney with the client's express consent. (*Mary K.*, *supra*, 234 Cal.App.3d at pp. 269–271 . . . [bench trial held after counsel reported client's wish to waive jury trial]; cf. *Linsk v. Linsk* (1969) 70 Cal.2d 272, 278 . . . [counsel cannot abdicate a substantial right of the client *contrary to express instructions*]; *Conservatorship of Christopher A.*, *supra*, 139 Cal.App.4th at p. 613 . . . [attorney may not, *without the client's express consent*, enter into a stipulated judgment regarding placement, disabilities, and conservator powers].) It also finds support in prior decisions

acknowledging that, in the absence of any contrary indication, the superior court may assume that an attorney is competent and fully communicates with the proposed conservatee about the entire proceeding. (E.g., *Mary K.*, *supra*, 234 Cal.App.3d at p. 272 . . . ; *Conservatorship of Ivey*, *supra*, 186 Cal.App.3d at p. 1566 . . . ; see also *People v. Ngo* (1996) 14 Cal.4th 30, 37 . . . [an attorney admitted to the California Bar is presumptively competent].)" (*Id.* at pp. 156-157, fn. omitted.)

The U.S. Supreme Court has determined that a jury trial is not necessarily a component of accurate fact finding even where a liberty interest is implicated. (See *McKeiver v. Pennsylvania*, *supra*, 403 U.S. 528, 543 (plur. opn. of Blackmun, J.) ["applicable due process standard in juvenile proceedings . . . is fundamental fairness" but "one cannot say that in our legal system the jury is a necessary component of accurate factfinding"], 547 (plur. opn. of Blackmun, J.) "[t]he imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function"], 551 (conc. opn. of White, J.) "[a]lthough the function of the jury is to find facts, that body is not necessarily or even probably better at the job than the conscientious judge".) This determination informs our analysis of whether due process requires an explicit advisement and express personal waiver as a corollary of any right to jury trial under the California Constitution.

Even in a criminal prosecution where a criminal defendant has an express constitutional right to a jury trial and the right must be voluntarily and knowingly waived by the defendant, there is no federal constitutional right to an explicit admonishment and express waiver when a defendant gives up the right to a jury trial by pleading guilty. (See *People v. Howard* (1992) 1 Cal.4th 1132, 1175-1178 [adopting federal standard in place of California rule requiring automatic reversal in the absence of express admonitions and waivers of constitutional rights given up by admission or guilty plea]; see also *Brady v. U.S.* (1970) 397 U.S. 742, 748 ["Waivers of constitutional rights not only must be

voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences"], 749 [voluntariness of a guilty plea is determined by considering all relevant circumstances].) "By adopting in *Howard* the federal constitutional test of whether under the totality of circumstances the defendant's admission is intelligent and voluntary, [the California Supreme Court] rejected the rule that 'the absence of express admonitions and waivers requires reversal regardless of prejudice.' (*Howard, supra*, 1 Cal.4th at p. 1178)" (*People v. Mosby* (2004) 33 Cal.4th 353, 361; see *People v. Marlow* (2004) 34 Cal.4th 131, 147.) A defendant's prior experience with the criminal justice system is relevant to the question of whether there was a knowing waiver. (*People v. Mosby, supra*, 33 Cal.4th at p. 365.)

In the criminal context, not every constitutional right enjoyed by a defendant is accompanied by a concomitant right to an explicit advisement and a personal waiver on the record. For example, criminal defendants have a constitutional right to testify in their own defense (*Rock v. Arkansas* (1987) 483 U.S. 44, 49 [107 S.Ct. 2704] ["it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense"]; *Harris v. New York* (1971) 401 U.S. 222, 225 [91 S.Ct. 643] ["Every criminal defendant is privileged to testify in his own defense, or to refuse to do so"]) but a trial court is not obligated to obtain an affirmative waiver on the record whenever a defendant fails to testify at trial. (*People v. Alcala* (1992) 4 Cal.4th 742, 805-806 ["When the record fails to disclose a timely and adequate demand to testify, 'a defendant may not await the outcome of the trial and then seek reversal based on his claim that despite expressing to counsel his desire to testify, he was deprived of that opportunity.' [Citations.]"]; *People v. Mosqueda* (1970) 5 Cal.App.3d 540, 545 ["[A] trial judge may safely assume that a defendant, who is ably represented and who does not testify is merely exercising his Fifth Amendment privilege against self-incrimination and is abiding by his counsel's trial strategy; otherwise, the judge would have to conduct a

law seminar prior to every criminal trial"], cited with approval in *People v. Cox* (1991) 53 Cal.3d 618, 671, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

In civil actions, a party's participation in a federal court trial without objection can constitute a "waiver" of a Seventh Amendment right to jury trial. (See e.g. *Palmer v. Valdez* (9th Cir. 2009) 560 F.3d 965, 968; *Venture Tape Corp. v. McGills Glass Warehouse* (1st Cir. 2008) 540 F.3d 56, 62-63; *In re City of Philadelphia Litigation* (3d Cir. 1998) 158 F.3d 723, 727; see also Fed. Rule Civ. Proc., § 38(d) ["A party waives a jury trial unless its demand is properly served and filed"].) The Seventh Amendment right to a jury trial can be "waived" by inaction or acquiescence. (*In re City of Philadelphia Litigation, supra*, 158 F.3d at p. 726.)

The California Constitution does not require a personal waiver of the constitutional right to jury trial in civil actions. The California Constitution provides that "[i]n a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute." (Cal. Const., art. I, § 16.) Code of Civil Procedure section 631, subdivision (d), describes the various means by which a right to jury trial may be "waived" (or forfeited).⁴ These means include "[b]y failing to announce that a jury is required, at the time the cause is first set for trial, if it is set upon notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation." (Code Civ. Proc., § 631, subd. (d)(4); see Code Civ. Proc., § 631, subd. (a).) The acts described

⁴ The terms "waiver" and "forfeiture" have often been used interchangeably. As stated by the California Supreme Court: "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" [Citations.]' (*United States v. Olano, supra*, 507 U.S. 725, —, 113 S.Ct. 1770, 1777.)" (*People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6.) Thus, it would be more accurate to say that the constitutional right to jury trial in civil actions, under both federal and state Constitutions, may be both waived and forfeited.

by Code of Civil Procedure section 631 will normally be performed by counsel. (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 411 (conc. opn. of Bird, C.J).)

In light of the foregoing, we do not think an explicit judicial advisement of the right to jury trial and an express waiver of a jury are necessary to ensure fundamental fairness or avoid an erroneous determination where an NGI committee is represented by counsel in extended commitment proceedings. In addition, assuming that appellant was constitutionally entitled to a jury trial as a matter of California due process, due process permits an NGI committee's counsel to act on his behalf and implicitly waive a jury trial by affirmatively requesting a court trial. Consequently, the court trial in this case did not violate due process under either federal or state law.

C. *Statutory Rights under Section 1026.5*

Under section 1026.5, an individual does enjoy a statutory right to a jury trial and a statutory right to be advised of that right by the court in extended commitment proceedings. (§ 1026.5, subs. (b)(3) and (b)(4).)

As to the statutory right to jury trial, the language of the statute does not require an express or personal waiver. Generally, in both civil and criminal matters, a party's attorney has the general authority to control the procedural aspects of litigation and make binding decisions. (See *People v. Masterson, supra*, 8 Cal.4th at p. 969.) In *In re Conservatorship of Person of John L., supra*, 48 Cal.4th 131, the California Supreme Court stated the general proposition that "[w]hen a statutory right in a civil commitment scheme is at issue, the proposed conservatee may waive the right through counsel if no statutory prohibition exists. (E.g., *People v. Rowell* (2005) 133 Cal.App.4th 447, 452–454 . . . [in sexually violent predator recommitment proceeding, trial court properly accepted counsel's representation that client wanted court trial instead of jury trial]; *Mary K., supra*, 234 Cal.App.3d at p. 271)" (*Id.* at p. 148.)

In *People v. Powell* (2004) 114 Cal.App.4th 1153, 1159, the appellate court rejected the appellant's contention that the language of section 1026.5, subdivision (b)(4), which provides that "[t]he trial shall be by jury unless waived by both the person and the prosecuting attorney," requires a personal waiver of the right to jury trial. (*People v. Powell, supra*, 114 Cal.App.4th at pp. 1157-1159.) It observed that "[t]he Legislature, in enacting section 1026.5, did not say that the jury waiver must be 'personally' made by the NGI committee. [Citations.]" (*Id.* at p. 1159.) Appellate courts considering similar arguments with respect to similar language have found that counsel may waive a statutory right to a jury trial on a client's behalf. (See *People v. Montoya* (2001) 86 Cal.App.4th 825, 830 [Mentally Disordered Offender (MDO) Act provision " '[t]he trial shall be by jury unless waived by both the person and the district attorney' in section 2972 mean[s] defense counsel may waive jury trial on behalf of his client"]; *People v. Otis* (1999) 70 Cal.App.4th 1174, 1175-1177 [MDO Act provision that "[t]he trial shall be by jury unless waived by both the person and the district attorney" in section 2966 allows counsel to waive a jury].)

In *People v. Givan* (2007) 156 Cal.App.4th 405, 411, the appellate court found that the record disclosed an implicit waiver of the right to a jury trial through counsel. In that case, both the appellant and his attorney representing him on pending charges in Napa County instructed the attorney representing him in extended commitment proceedings "in Fresno to obviate the need for his personal appearance in Fresno so he could 'remain' at NSH and not 'miss important dates' on his pending charges in Napa." (*Ibid.*) The latter attorney communicated those representations to the court and "also represented that [the appellant] 'personally' instructed him that he 'make sure that he doesn't come here.' " (*Ibid.*) The court observed: "Conspicuous by omission from section 1026.5 is the Legislature's imposition of any requirement of a personal appearance to waive one's rights." (*Id.* at p. 409.)

Insofar as appellant may be claiming that subdivision (7) of section 1026.5 statutorily incorporates the requirement that a criminal defendant personally waive his

right to a jury trial in open court (Cal. Const., art. I, § 16), we reject the contention. Our state's constitutional "requirement of an express waiver applies to [a criminal defendant's] constitutional right to a jury trial, but not to jury trial rights that are established only by statute. (*Vera, supra*, 15 Cal.4th at p. 278 . . . ; *Saunders, supra*, 5 Cal.4th at p. 589, fn. 5 . . .)" (*People v. French* (2008) 43 Cal.4th 36, 46-47.) Thus, for example, a criminal defendant's counsel may waive a defendant's statutory right to "a jury trial in a proceeding to determine whether the defendant is competent to stand trial on criminal charges, and may make other decisions regarding a jury trial, even over the defendant's objection." (*People v. Masterson, supra*, 8 Cal.4th at p. 974.)

Moreover, "[a] specific provision relating to a particular subject will govern a general provision, even though the general provision standing alone would be broad enough to include the subject to which the specific provision relates. [Citation.]" (*People v. Tanner* (1979) 24 Cal.3d 514, 521.) In this case, subdivision (b)(4) of section 1026.5 specifically addresses the right of jury trial and waiver of that right, and it does not require a personal or an express waiver. As stated in *People v. Montoya, supra*, 86 Cal.App.4th 825, "the fact that the California Constitution . . . 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." (*Id.* at p. 831.) The Legislature has also demonstrated in other provisions that it knows how to impose a personal waiver requirement. (See e.g. Welf. & Inst. Code, § 1801.5 ["If a trial is ordered pursuant to Section 1801, the trial shall be by jury unless the right to a jury trial is personally waived by the person"].) It is extremely doubtful that the generally worded subdivision (b)(7) of section 1026.5 impliedly requires what subdivision (b)(3) of section 1026.5 does not.

In the absence of a statutory prohibition, we conclude that an express or personal waiver of the statutory right to jury trial is not required by section 1026.5, subdivision (b). It is enough that appellant's counsel affirmatively requested a court trial, which implicitly waived a jury. Although counsel never conveyed to the court that appellant desired a court trial, we have no reason based on the record before us to believe counsel overrode appellant's wishes since appellant never demanded a jury trial or objected to the court trial at the time of trial. Consequently, it is unnecessary for us to decide in the present case whether an attorney representing an NGI committee may validly override an NGI committee's request to have a jury trial in extended commitment proceedings.

We agree, however, that the record reflects that the court did not advise appellant of his statutory right to a jury trial. Presumably, no advisement was given because appellant appeared through counsel until trial. Assuming such advisement was not forfeited by his failure to personally attend pretrial proceedings and, consequently, the court below erred by not advising appellant of his statutory right to a jury trial (§ 1026.5, subd. (b)(3)), the omission was state law error.

Appellant now argues that he had a "due process right to compel the state to comply with its own procedures when depriving him of liberty," citing *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347 [100 S.Ct. 2227]. We reject this argument. *Hicks* has not been cited by the U.S. Supreme Court for that proposition.

"[The U.S. Supreme Court has] long recognized that a 'mere error of state law' is not a denial of due process. [Citation.] If the contrary were true, then 'every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question.' [Citations.]" (*Engle v. Isaac* (1982) 456 U.S. 107, 121, fn. 21 [102 S.Ct. 1558].) Due process does not safeguard "the meticulous observance of state procedural prescriptions" (*Rivera v. Illinois* (2009) 556 U.S. 148, 158 [129 S.Ct.

1446] ["Because peremptory challenges are within the States' province to grant or withhold, the mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution"].) Further, there is no state-created liberty interest, protected by procedural due process, at stake in this case. (See *Swarthout v. Cooke* (2011) 131 S.Ct. 859, 862 ["When, however, a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication -- and federal courts will review the application of those constitutionally required procedures"].)

Appellant next argues that the record establishes that he was prejudiced under any standard. Since the only possible error we have found is the lack of advisement of appellant's right to a jury trial pursuant to section 1026.5, subdivision (b)(3), reversal is not required unless it is reasonably probable a result more favorable to appellant would have been reached if the court had advised him. (Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836.) We find any such error to be harmless.

The appellate record contains no evidence suggesting that appellant was unaware of his right to a jury trial or wished to have a jury trial at the time of trial. He was present at trial but he did not demand a jury or object to a court trial even though he had complained in his previous appeal that he was deprived of a jury trial. On this record, it is not reasonably probable that appellant would have demanded a jury trial if the court had advised him of that right. Moreover, no opposing expert or other witnesses were called to testify in appellant's behalf. Even assuming appellant would have demanded and received a jury trial if the court had advised him of the right to a jury, it is not reasonably probable that a jury would have evaluated the evidence any differently than did the trial judge.

DISPOSITION

The judgment is affirmed.

ELIA, J.

WE CONCUR:

PREMO, Acting P. J.

WALSH, J.*

* Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.