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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

SERGIO MADRIZ SOTO,

Defendant and Appellant.

H037041

(Santa Clara County
Super. Ct. No. 211383)

I. INTRODUCTION

Appellant Sergio Madriz Soto was convicted of lewdly touching a child under the age of 14 (Pen. Code, § 288, subd. (a)) and kidnapping (Pen. Code, § 207) and sentenced to state prison.¹ The victim was a three-year-old boy. Before Soto was released on parole, the People filed a petition to commit him as a sexually violent predator under the Sexually Violent Predators Act (SVPA). (Welf. & Inst. Code, § 6600 et seq.)²

The SVPA provides for the involuntary civil commitment for treatment and confinement of an individual who is found, by a unanimous jury verdict (§ 6603,

¹ In a prior appeal, this court upheld the convictions. (*People v. Soto* (Jun. 27, 2003, H024153) [nonpub. opn.])

² All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

subds. (e) & (f)), and beyond a reasonable doubt (§ 6604), to be a “sexually violent predator” (*ibid*). The criteria for a finding that a person is a sexually violent predator are set forth in section 6600, subdivision (a)(1): “ ‘Sexually violent predator’ means a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.”

A jury found the allegation that Soto was a sexually violent predator to be true. By order filed on May 16, 2011, the trial court committed Soto to the state Department of Mental Health for an indeterminate term. On appeal, Soto raises the following issues: (1) the evidence was not sufficient to support the trial court’s May 11, 2011 order authorizing the involuntary administration of antipsychotic medication ; (2) allowing the prosecutor to call Soto as a witness at trial violated his constitutional right to equal protection; (3) the indeterminate commitment under the SVPA violates his constitutional right to equal protection; and (4) the SVPA violates the due process, ex post facto, and double jeopardy clauses of the state and federal constitutions.

Pursuant to the ruling of the California Supreme Court in *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee*) that the equal protection challenge to the indeterminate term under the SVPA has potential merit, we will reverse the judgment and remand the matter for further proceedings consistent with *McKee*. We find no merit in the remaining issues raised by Soto, for the reasons stated below.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Commitment Petition

Before Soto’s scheduled parole release date of February 6, 2009, the People filed, on February 3, 2009, a petition to commit him as a sexually violent predator under the SVPA. The petition stated that the state Department of Mental Health had requested that

Soto be civilly committed as a sexually violent predator based upon the evaluations of two psychologists whose reports were attached to the petition.

After a probable cause hearing was held, the trial court issued its May 29, 2009 order finding that there was probable cause to believe that (1) Soto had been convicted of a qualifying sexually violent offense against at least one victim; and (2) he has a diagnosable mental disorder; and (3) the disorder makes it likely that he will engage in sexually violent predatory criminal conduct if released. The trial court also ordered the matter to be set for trial.

B. The Jury Trial

1. In Limine Motions

The parties each filed several motions in limine. Relevant here, the People filed a motion in limine for an order allowing Soto to be called as a witness by the People and questioned “as if under cross-examination.” During argument on pretrial motions, Soto objected that allowing the People to call him as witness would violate his constitutional right to equal protection. The trial court ruled as follows: “The court agrees the People may call [Soto] and examine him.”

2. Trial Evidence

Testimony of Dr. Zinik

Gary Zinik, Ph.D. is a member of the sexually violent predator evaluation panel for the state Department of Mental Health. He performed a sexually violent predator evaluation of Soto dated January 21, 2009, that included review of Soto’s criminal records, prison records, and mental health records. He also performed an updated evaluation at the request of the Department of Mental Health. In his first evaluation, Dr. Zinik diagnosed Soto’s mental disorders as schizophrenia, undifferentiated type, and alcohol dependence. In his updated evaluation, Dr. Zinik added the provisional diagnosis of pedophilia. Dr. Zinik believes that schizophrenia is the underlying mental disorder that predisposes Soto to “sexually acting out in a violent manner.”

Regarding the commitment offense, Dr. Zinik stated that Soto was in a “florid psychotic state” in which he heard “the voice of God telling him that he should kidnap a child. He did that. He kept the child for ten hours . . . really not understanding . . . that he was doing anything wrong. . . . [¶] And then suddenly he heard the word of God tell him that he should have sexual contact with the child, and this made perfect sense to Mr. Soto. . . . He molested this boy. He put his penis in the boy’s mouth on two occasions. He touched his erect penis to the boy’s anus [H]e’s continued to have these hallucinations of God talking to him.”

Based on his review of the records (including the records of Soto’s other sexual misconduct), the commitment offense, the risk assessment test scores showing Soto to have the highest risk of sexual reoffense, and Soto’s mental disorders, Dr. Zinik concluded that Soto met the statutory definition of a sexually violent predator because “he presents a substantial danger and a serious and well founded risk of . . . committing a future sexually violent predatory crime.”

Testimony of Dr. Damon

William Damon, Ph.D. performed a sexually violent predator evaluation in 2008 on assignment from the state Department of Mental Health. In addition to reviewing Soto’s records, Dr. Damon interviewed Soto. Dr. Damon’s diagnoses were schizophrenia, undifferentiated type; alcohol dependence; and “antisocial features,” which includes “failure to conform to social norms, impulsivity, aggressiveness, and disregard for the safety of others.”

Dr. Damon concluded that Soto met the statutory criteria for a sexually violent predator, based on the interview, Soto’s records (including the records of Soto’s history of sexual misconduct and his commitment offense), his sexual preoccupation, his denial of his mental illness, and the risk assessment test scores showing that Soto has a “moderate-high to high risk to re-offend.”

Testimony of Dr. Odom

Joan Odom, M.D. is employed at Atascadero State Hospital, where she was Soto's treating psychiatrist in 2011. She determined that Soto's diagnoses include schizophrenia, undifferentiated type, and alcohol dependence. When Soto was admitted to the hospital on March 17, 2011, Dr. Odom was told that Soto had exposed himself and was behaving erratically in the reception area. During her psychiatric evaluation on Soto's admission, Dr. Odom found "clear and convincing evidence" that Soto had schizophrenia. He was also demonstrating symptoms of psychosis.

When Dr. Odom informed Soto at the end of her evaluation that he needed treatment with medication, he denied that he had schizophrenia and became agitated. Dr. Odom ordered emergency medication because Soto had refused to take medication and she was concerned that he would be dangerous in the hospital. Dr. Odom also utilized an internal hospital procedure that allowed her to involuntarily medicate Soto. In Dr. Odom's opinion, the hospital staff would have been at risk of sexual assault by Soto if he were not medicated.

Testimony of Dr. Abbott

Soto's expert witness, Brian Abbott, Ph.D., is a licensed clinical psychologist who has treated and evaluated sexual predators since 2002. Dr. Abbott is not a member of the state Department of Mental Health's sexually violent predator evaluation panel because he "had some fundamental problems with the lack of scientific methods that are used by the state evaluators"

Soto's trial counsel asked Dr. Abbott to "review the reports by Dr. Zinik and Dr. Damon to look specifically at the risk assessment methods that they used with Mr. Soto and then to testify about the application of those risk assessment methods." In his testimony, Dr. Abbott questioned the accuracy and reliability of the risk assessment tests used by Dr. Zinik and Dr. Damon. However, Dr. Abbott did not have an opinion as to whether Soto would reoffend.

Testimony of Soto

When Soto was called as a witness on behalf of the People, the examination included questions about the commitment offense. Among other things, Soto stated that “since my wife left me and I was upset, well, I took the child thinking to myself, well, if I couldn’t bring up my own child, I’ll go ahead and bring up this one.” Soto also admitted that he had touched the three-year-old victim’s penis with his lips. When asked whether he thought “about sex all the time,” Soto responded, “Until I tear up the woman’s ass.” However, his answers to many questions were nonresponsive.

3. Jury Verdict and Commitment Order

On May 16, 2011, the jury rendered its verdict finding the petition alleging that Soto was a sexually violent predator within the meaning of section 6600 to be true. Also on May 16, 2011, the trial court issued its order committing Soto to the custody of the state Department of Mental Health for an indeterminate term for appropriate treatment and confinement in a secure facility, pursuant to section 6604. The order further states: “Said order is subject to the ultimate decision in *People vs McKee*, (2010) 47 Cal.4th 1172. [Soto] is to remain in custody until further order of this court.” Soto subsequently filed a timely notice of appeal.

C. Involuntary Medication Hearing

The People filed a petition for an order authorizing the involuntary administration of psychotropic medication on April 20, 2011. They asserted that Soto had refused to take medication voluntarily, it was the opinion of the treating psychiatrist that medication was medically appropriate, and the administration of psychotropic medication was required to render Soto “non-dangerous.”

During the course of the jury trial, on May 10, 2011, a hearing was held pursuant to *In re Qawi* (2004) 32 Cal.4th 1 (*Qawi*). Dr. Odom was the sole witness. She testified that Soto did not believe that he had schizophrenia and had refused to take medications for the treatment of schizophrenia. Further, Dr. Odom stated that Soto had “demonstrated

dangerous behaviors” because he was not medicated. On his arrival at Atascadero State Hospital on March 17, 2011, Soto was in an unmedicated state and was psychotic. While Dr. Odom was interviewing Soto, he became angry and lunged across the table at her “in a forceful, rapid, sudden and unexpected manner. . . .” In her opinion, Soto “absolutely requires treatment with medication in order to be safe and stable.”

At the conclusion of the hearing, the trial court found clear and convincing evidence that the criteria for involuntary medication under section 5300 had been met and granted the petition. The written order filed on May 11, 2011, states: “[Soto] is incompetent to refuse medical treatment, has been hospitalized under [Penal Code section] 2962, and is found by this court to be a danger to others within the meaning of [sections] 5300/5500.” Soto filed a notice of appeal on July 8, 2011.

III. DISCUSSION

A. Order Authorizing Involuntary Antipsychotic Medication

On appeal, Soto contends that the evidence was not sufficient to support the trial court’s May 11, 2011 order authorizing the involuntary administration of antipsychotic medication. We will begin our analysis of Soto’s contention with a brief overview of the rules governing nonemergency involuntary treatment with antipsychotic medication.

1. Nonemergency Involuntary Treatment with Antipsychotic Medication

In *Qawi*, the California Supreme Court ruled that “an MDO³ can be compelled to be treated with antipsychotic medication under the following nonemergency circumstances: (1) he [or she] is determined by a court to be incompetent to refuse

³ “The Mentally Disordered Offender Act (MDO Act), . . . requires that offenders who have been convicted of violent crimes related to their mental disorders, and who continue to pose a danger to society, receive mental health treatment during and after the termination of their parole until their mental disorder can be kept in remission. (Pen. Code, § 2960 et seq.)” (*Qawi, supra*, 32 Cal.4th at p. 9.)

medical treatment; (2) the MDO is determined by a court to be a danger to others within the meaning of [section] 5300.”⁴ (*Qawi, supra*, 32 Cal.4th at p. 27.) Under section 5300, “there must be a generalized finding of ‘demonstrated danger’ to others.” (*Id.* at p. 20.) Under section 5300.5, the danger must be demonstrated by “ ‘attempted, inflicted, or threatened physical harm upon another, and other relevant evidence.’ [Citation.]” (*Ibid.*)

The *Qawi* standard for nonemergency involuntary treatment with antipsychotic medication of MDOs was applied to the involuntary medication of sexually violent predators (SVPs) in *In re Calhoun* (2004) 121 Cal.App.4th 1315 (*Calhoun*). The *Calhoun* court ruled that “in conformity with the *Qawi* holding concerning MDO’s, we hold ‘that an [SVP] can be compelled to be treated with antipsychotic medication under the following nonemergency circumstances: (1) he [or she] is determined by a court to be incompetent to refuse medical treatment; (2) [he] [or she] is determined by a court to be a danger to others within the meaning of . . . section 5300.’ ” (*Calhoun, supra*, at p. 1354.) The court also ruled, in accordance with *Qawi*, that “ ‘[a] determination that a patient is incompetent to refuse medical treatment, or is dangerous within the meaning of

⁴ Section 5300 provides in part, “At the expiration of the 14-day period of intensive treatment, a person may be confined for further treatment pursuant to the provisions of this article for an additional period, not to exceed 180 days if one of the following exists: [¶] (a) The person has attempted, inflicted, or made a serious threat of substantial physical harm upon the person of another after having been taken into custody, and while in custody, for evaluation and treatment, and who, as a result of mental disorder or mental defect, presents a demonstrated danger of inflicting substantial physical harm upon others. [¶] (b) The person had attempted, or inflicted physical harm upon the person of another, that act having resulted in his or her being taken into custody and who presents, as a result of mental disorder or mental defect, a demonstrated danger of inflicting substantial physical harm upon others. [¶] (c) The person had made a serious threat of substantial physical harm upon the person of another within seven days of being taken into custody, that threat having at least in part resulted in his or her being taken into custody, and the person presents, as a result of mental disorder or mental defect, a demonstrated danger of inflicting substantial physical harm upon others.”

section 5300, may be adjudicated at the time at which he or she is committed or recommitted as an [SVP], or within the commitment period.’ [Citation.]” (*Ibid.*)

The standard of review for an order authorizing the involuntary administration of antipsychotic medication is substantial evidence. (*People v. Fisher* (2009) 172 Cal.App.4th 1006, 1016 (*Fisher*).

2. The Parties’ Contentions

Soto contends that the May 11, 2011 order granting the People’s petition for an order authorizing the involuntary administration of a psychotropic medication must be reversed because the evidence was not sufficient to show that he is dangerous within the meaning of section 5300. In Soto’s view, the only evidence that could support the trial court’s finding of dangerousness was the incident described by Dr. Odom in her *Qawi* hearing testimony, in which Soto lunged at her after being told that he was schizophrenic and needed medication. That incident did not show that he was dangerous within the meaning of section 5300, according to Soto, because he did not physically assault Dr. Odom or attempt to physically assault her. Soto also argues that the other evidence regarding his prior misconduct and inappropriate behavior was not sufficient because it constituted multiple hearsay, was irrelevant, or occurred more than a year prior to the involuntary medication hearing.

The People argue that the May 11, 2011⁵ involuntary medication order cannot be addressed on appeal for two reasons: (1) Soto failed to include the involuntary medication order in his notice of appeal from the judgment finding him to be a sexually violent predator; and (2) the appeal is moot because the involuntary medication order expired by operation of law 180 days later, on November 6, 2011. Alternatively, the People argue that the order is supported by sufficient evidence since it may be inferred

⁵ Although the parties state that the date of the involuntary medication order is May 10, 2011, we will refer to the order by its filed date, May 11, 2011.

from Dr. Odom’s hearing testimony that Soto was attempting to inflict physical harm on her when he lunged forcefully across the table and stopped only because hospital staff were summoned.

3. Analysis

As a threshold matter, we observe that Soto filed a notice of appeal from the involuntary medication order on July 8, 2011. It has been held that an order authorizing involuntary administration of antipsychotic drugs is appealable where the order was made after a judgment in a special proceeding. (*People v. Christiana* (2010) 190 Cal.App.4th 1040, 1046-1047.)

Next, we observe that the People have not provided any direct authority for the proposition that an order authorizing the nonemergency involuntary administration of antipsychotic medication to an SVP expires by operation of law in 180 days. They rely on non-SVPA authorities, including the Lanterman–Petris–Short Act, under which the authorization for involuntary treatment of an MDO may last no more than 180 days following an initial two-week treatment regimen. (§ 5300; see also *Qawi, supra*, 32 Cal.4th at p. 22.) Similarly, the involuntary medication of a state prisoner may not continue for more than 180 days unless a renewal petition is granted. (*Department of Corrections v. Office of Admin. Hearings* (1998) 66 Cal.App.4th 1100, 1104.)

However, we need not determine whether the 180-day limit applicable to the involuntary medication of MDOs and state prisoners also applies to an order authorizing the nonemergency involuntary administration of antipsychotic medication to a SVP. As we will explain, we find that under the substantial evidence standard of review (*Fisher, supra*, 172 Cal.App.4th at p. 1016) the trial court’s May 11, 2011 involuntary medication order may be upheld because it is supported by sufficient evidence.

We are mindful that “[i]n considering a challenge to the sufficiency of the evidence . . . we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable,

credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] 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. [Citation.] ‘A reviewing court neither reweighs evidence nor reevaluates a witness’s credibility.’ [Citation.]” (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.)

On appeal, Soto challenges only the sufficiency of the evidence for the court’s finding that he is a danger to others within the meaning of section 5300. The People argue that Dr. Odom’s testimony at the May 10, 2011 hearing on the petition for an order authorizing the administration of involuntary antipsychotic medication constitutes sufficient evidence of Soto’s dangerousness within the meaning of section 5300. Having reviewed Dr. Odom’s testimony, as set forth in part below, we agree.

“[THE PROSECUTOR:] What are the types of risk that in your opinion [Soto] would pose if he were not on this medication regime[n]?”

“[DR. ODOM:] He arrived to our institution on March 17th, 2011, in an unmedicated state, having not taken medications while here in the Santa Clara County Jail. This gave me the opportunity to observe his behaviors in an unmedicated state. He was psychotic on arrival to the institution. He was speaking to himself, which is behavioral suggestion of perceptual disturbance. He was not able to speak in an organized fashion. He was agitated. All of these are symptoms of psychosis that is not well controlled. [¶] In addition to that, we named [*sic*] a number of sexualized behaviors that were dangerous in nature and could have led to worse assaults. He also demonstrated physically aggressive behavior which had staff not been summoned to help him to calm during the interview process I believe he would have physically assaulted me. [¶] So I was able to observe him without medications and that was additional

evidence for me that led me to the conclusion that he absolutely requires treatment with medication in order to be safe and stable. [¶] . . . [¶]

“[DEFENSE COUNSEL:] So you indicated to [Soto] that you believed he suffered from schizophrenia and should take medication; is that right?

“[DR. ODOM:] Yes.

“[DEFENSE COUNSEL:] And is that when he gripped the chair?

“[DR. ODOM:] Yes.

“[DEFENSE COUNSEL:] And you said he leaned forward; is that right?

“[DR. ODOM:] Yes. [¶] . . . [¶]

“[DEFENSE COUNSEL:] And so he leaned forward over the table?

“[DR. ODOM:] Yes.

“[DEFENSE COUNSEL:] And what did he say to you at that point?

“[DR. ODOM:] I don't recall that he necessarily said anything, but he had a very angry expression on his face and was clearly demonstrating rageful disinhibited behaviors. [¶] . . . [¶]

“[DEFENSE COUNSEL:] And after that did you summon other staff?

“[DR. ODOM:] Yes. As he was leaning in I was feeling fearful. Both I and the nurse that was with me summoned staff to come forward.

“[DEFENSE COUNSEL:] And then Mr. Soto calmed down?

“[DR. ODOM:] As staff came in and stood next to him, he then pushed back in his chair and remained pushed back in his chair, but he was still gripping it very tightly and was still obviously very agitated. And it was my interpretation, based upon his mental state and those behaviors, that he was unsafe and at imminent risk of assaulting others. [¶] I also believe that sexual assault had already occurred given his behaviors on admission. [¶] . . . [¶]

“[THE PROSECUTOR:] You stated in cross[-examination] that Mr. Soto leaned across the table. You’ve written that he lunged across the table. Can you describe what he actually did? Those are different words.

“[DR. ODOM:] Yes. He actually did lunge, meaning that it was in a forceful, rapid, sudden and unexpected manner that he was leaning forward into my space.

[¶] . . . [¶]

“[THE PROSECUTOR:] Also in regards to his dangerousness in a hospital environment . . . do you have an opinion as to whether or not if not medicated Mr. Soto poses a risk to patients and to staff of violent physical assault?

“[DR. ODOM:] Yes. And, again, my reasoning is twofold. One, he has a history of physical violence within the walls of Atascadero State Hospital. I reviewed old charts and . . . there was evidence of physical violence. In addition to that, in my opinion, he demonstrated physical precursors to violence during [his] interview with me. And I do believe that had I not summoned staff he would have continued to come across the table and would have physically assaulted me.”

Dr. Odom’s testimony constitutes sufficient evidence to support the trial court’s finding of “a generalized finding of ‘demonstrated danger’ to others” within the meaning of section 5300. (*Qawi, supra*, 32 Cal.4th at p. 20.) Her testimony shows that Soto became angry when she informed him that he had schizophrenia and needed medication, and it may be reasonably inferred that he attempted or threatened to physically assault her at that time and the assault was prevented only by the presence of a table between them and the assistance of hospital staff. Thus, Soto’s danger to others was demonstrated by his attempt or threat of physical harm upon Dr. Odom, as required by section 5300.5. (*Id.* at p. 20.)

For these reasons, we find no merit in Soto’s sufficiency of the evidence challenge to the May 11, 2011 involuntary medication order.

B. Order Compelling Soto to Testify as a Prosecution Witness

Soto next contends that the trial court violated his constitutional right to equal protection by allowing the People to call him as a witness at trial and cross-examine him over his objection. We will begin our analysis by reviewing the decisions of the United States Supreme Court and the California Supreme Court concerning the application of the Fifth Amendment guarantee against compulsory self-incrimination in civil commitment proceedings.

1. The Fifth Amendment Guarantee Against Compulsory Self-Incrimination

In *Cramer v. Tyars* (1979) 23 Cal.3d 131, 134 (*Cramer*), the California Supreme Court addressed the issue of whether a person who was the subject of a petition for civil commitment under former section 6502 [commitment of a mentally retarded person who has been found incompetent to stand trial] could be called, over his objection, as a witness at the commitment hearing. The court began its analysis by stressing the two “separate and distinct testimonial privileges.” (*Cramer, supra*, at p. 137.)

“In a *criminal* matter a defendant has an absolute right not to be called as a witness and not to testify. (Amend. V of the U.S. Const. and art. I, § 15, of the Cal. Const. as codified in Evid. Code, § 930.) Further, in any proceeding, *civil or criminal*, a witness has the right to decline to answer questions which may tend to incriminate him in criminal activity (Evid. Code, § 940). However, . . . notwithstanding these privileges, no witness has a privilege to refuse to reveal to the trier of fact his [or her] physical or mental characteristics where they are relevant to the issues under consideration.” (*Cramer, supra*, 23 Cal.3d at p. 137.)

Determining that the commitment proceedings under former section 6502 were “predominantly civil,” our Supreme Court ruled that the “appellant did not have an absolute right, as does a defendant in a criminal action, not to be called as a witness and not to testify. [Citations.] As expressed by the highest authority, the historic purpose of

the privilege against being called as a witness has been to assure that the *criminal* justice system remains accusatorial, not inquisitorial. [Citations.] The extension of the privilege to an area outside the criminal justice system . . . would contravene both the language and purpose of the privilege.” (*Cramer, supra*, 23 Cal.3d at pp. 137-138.)

The court further stated: “Reason and common sense suggest that it is appropriate under such circumstances that a jury be permitted fully to observe the person sought to be committed, and to hear him [or her] speak and respond in order that it may make an informed judgment as to the level of his [or her] mental and intellectual functioning. The receipt of such evidence may be analogized to the disclosure of physical as opposed to testimonial evidence and may in fact be the most reliable proof and probative indicator of the person’s present mental condition.” (*Cramer, supra*, 23 Cal.3d at p. 139.)

Accordingly, the court in *Cramer* held that “while appellant could properly be called as a witness at his commitment proceeding, like any other individual in any proceeding, civil or criminal, he could not be required to give evidence which would tend to incriminate him in any criminal activity and which could subject him to criminal prosecution.” (*Cramer, supra*, 23 Cal.3d at p. 138.)

Subsequently, in *Allen v. Illinois* (1986) 478 U.S. 364, the United States Supreme Court considered whether “the proceedings under the Illinois Sexually Dangerous Persons Act . . . [Il.Rev.Stat., ch. 38, ¶ 105-1.01 et seq.] are ‘criminal’ within the meaning of the Fifth Amendment’s guarantee against compulsory self-incrimination.” (*Allen v. Illinois, supra*, at p. 365.) The issue arose in the context of the examining psychiatrists’ testimony in the commitment proceeding regarding the appellant’s statements during their interviews. The appellant argued that “because the sexually-dangerous-person proceeding is itself ‘criminal,’ he was entitled to refuse to answer any questions at all.” (*Id.* at p. 368.)

Reviewing the privilege against self-incrimination, the Supreme Court stated: “The Self-Incrimination Clause of the Fifth Amendment, which applies to the States

through the Fourteenth Amendment, [citation], provides that no person ‘shall be compelled in any criminal case to be a witness against himself.’ This Court has long held that the privilege against self-incrimination ‘not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also “privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.”’ [Citations.]” (*Allen v. Illinois, supra*, 478 U.S. at p. 368.)

After finding that Illinois intended its commitment proceedings for sexually dangerous persons to be civil in nature, the Supreme Court ruled that “[t]his Court has never held that the Due Process Clause of its own force requires application of the privilege against self-incrimination in a noncriminal proceeding, where the privilege claimant is protected against his compelled answers in any subsequent criminal case. We decline to do so today.” (*Allen v. Illinois, supra*, 478 U.S. at p. 374.)

More recently, the California Supreme Court in *People v. Allen* (2008) 44 Cal.4th 843 (*Allen*) addressed the Fifth Amendment’s guarantee against compulsory self-incrimination in a proceeding under the SVPA. The issue in *Allen* was whether the defendant had a constitutional due process right to testify in a SVPA proceeding over the objection of counsel. (*Id.* at p. 870.) In determining that the defendant had the right, the court stated, among other things, that “[p]roceedings to commit an individual as a sexually violent predator in order to protect the public are civil in nature. [Citations.] Therefore, the Fifth Amendment’s guarantee against compulsory self-incrimination does not apply in proceedings under the SVPA. [Citations.]” (*Id.* at p. 860; see also *In re Scott* (2003) 29 Cal.4th 783, 815 [constitutional right not to be called as a witness does not extend to proceedings essentially civil in nature]; *People v. Leonard* (2000) 78 Cal.App.4th 776, 793 (*Leonard*) [*Allen v. Illinois, supra*, 478 U.S. 364 defeats defendant’s claim that district attorney could not call him as a witness in SVPA proceedings].)

Thus, it is well established that a person subject to a petition for civil commitment under the SVPA does not have a constitutional due process right not to be called as a witness and not to testify. (*Allen v. Illinois, supra*, 478 U.S. at p. 374; *Allen, supra*, 44 Cal.4th at p. 860; *Leonard, supra*, 78 Cal.App.4th at p. 793.) However, as in any civil proceeding, when called as a witness the person has the right to decline to answer questions which may tend to incriminate him or her in criminal activity. (*Cramer, supra*, 23 Cal.3d at p. 138.)

2. The Parties' Contentions

Although Soto acknowledges the ruling in *Leonard, supra*, 78 Cal.App.4th at page 792 that the Fifth Amendment guarantee against compulsory self-incrimination does not bar the district attorney from calling the defendant as witness in SVPA proceedings, he maintains that *Leonard* is not dispositive because no equal protection claim was considered in that case.

According to Soto, he is similarly situated to a person subject to other civil commitment proceedings where it has been held the Fifth Amendment guarantee against compulsory self-incrimination bars the person from being called as a witness, including persons subject to extended commitment in a juvenile detention facility (§ 1801.5; *Joshua D. v. Superior Court* (2007) 157 Cal.App.4th 549, 558 (*Joshua D.*)) or a person subject to commitment for treatment after being found not guilty of a felony by reason of insanity (NGI; Pen. Code, § 1026.5; *People v. Haynie* (2004) 116 Cal.App.4th 1224, 1228 (*Haynie*)). He therefore contends that the disparate treatment of persons subject to commitment under the SVPA, who may be called to testify in their commitment proceedings despite being similarly situated to juveniles subject to detention or persons found not guilty by reason of insanity, violates the constitutional right to equal protection. Soto also argues that he was prejudiced by the trial court's error in allowing him to be called as witness by the prosecution because the error was not harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).

The People disagree. In their view, there was no equal protection violation because, properly construed, neither Penal Code section 1026.5 nor section 1801.5 bar the prosecution from calling as a witness the person subject to civil commitment proceedings under those provisions. Alternatively, the People argue that a juvenile offender subject to commitment under section 1801.5 is not similarly situated to a person facing commitment under the SVPA.

3. Analysis

Elements of an Equal Protection Claim

The California Supreme Court outlined the elements of an equal protection claim in *McKee*: “ ‘ “The first prerequisite to a meritorious claim under the equal protection clause [U.S. Const., 14th Amend.] is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.” [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but “whether they are similarly situated for purposes of the law challenged.” ’ [Citation.] In other words, we ask at the threshold whether two classes that are different in some respects are sufficiently similar with respect to the laws in question to require the government to justify its differential treatment of these classes under those laws.” (*McKee, supra*, 47 Cal.4th at p. 1202.)

The *McKee* court also instructed that “[d]ue process and equal protection protect different constitutional interests: due process affords individuals a baseline of substantive and procedural rights, whereas equal protection safeguards against the arbitrary denial of benefits to a certain defined class of individuals, even when the due process clause does not require that such benefits be offered. [Citation.] . . . [W]hen certain due process protections for those civilly committed are guaranteed by statute, even if not constitutionally required, the denial of those protections to one group must be reasonably justified in order to pass muster under the equal protection clause.” (*McKee, supra*, 47 Cal.4th at p. 1207.)

Turning to the merits of Soto’s contentions, we first observe, as we will discuss, that the California appellate courts are not in agreement with respect to the constitutional rights afforded in proceedings under section 1801.5 for the extended commitment of juvenile offenders or the constitutional rights afforded in proceedings under Penal Code section 1026.5, subdivision (b)(7) for the extended commitment of NGIs.⁶

Section 1801.5

“Section 1801.5 provides for a trial on a district attorney’s petition (see §§ 1800, 1800.5) to extend a juvenile offender’s commitment to the Division of Juvenile Facilities because he or she poses a danger arising from a mental or physical disorder. The purpose of the trial is to answer the question: ‘Is the person physically dangerous to the public because of his or her mental or physical deficiency, disorder, or abnormality which causes the person to have serious difficulty controlling his or her dangerous behavior[?]’ (§ 1801.5).” (*Joshua D.*, *supra*, 157 Cal.App.4th at pp. 555-556.)

Regarding a juvenile offender’s constitutional rights in an extended commitment proceeding under section 1800 et seq., section 1801.5 provides in part: “The person shall be entitled to all rights guaranteed under the federal and state constitutions in criminal proceedings.” The appellate courts are in conflict as to whether section 1801.5 should be construed to provide the same constitutional rights as those afforded in criminal proceedings. (See *Joshua D.*, *supra*, 157 Cal.App.4th at p. 558 [§ 1801.5 includes the constitutional right not to testify]; *In re Anthony C.* (2006) 138 Cal.App.4th 1493, 1510-1511 [constitutional rights under § 1801.5 include prohibition against double jeopardy]; *In re Luis C.* (2004) 116 Cal.App.4th 1397, 1402 (*Luis C.*) [constitutional rights under section 1801.5 include right not to testify at extended commitment trial]; but see *People v. Lopez* (2006) 137 Cal.App.4th 1099, 1115-1116 (*Lopez*) [interpretation of § 1801.5 in

⁶ We note that SVPA does not include a constitutional rights provision similar to section 1801.5 or Penal Code section 1026.5, subdivision (b)(7).

Luis C. inconsistent with rulings in *Allen v. Illinois* and *Cramer* that the right not to testify does not apply in civil commitment proceedings].)

We need not resolve the conflict because, as an intermediate appellate court, we are bound by the California Supreme Court's ruling in *In re Lemanuel C.* (2007) 41 Cal.4th 33 (*Lemanuel*). In that case, the appellant argued that the extended commitment proceedings under section 1800 violated the equal protection clause because it was “ ‘easier to civilly commit juvenile offenders than their adult counterparts subjected to the SVPA . . . ’ ” (*Id.* at p. 47.)

In *Lemanuel*, our Supreme Court rejected the appellant's equal protection claim, as follows: “The fact that Youth Authority wards committed under section 1800 and adults committed as SVP's . . . are considered dangerous due to mental disorders and therefore are subject to commitment for treatment and the protection of the public does not lead to the conclusion that ‘persons committed under California's various civil commitment statutes are similarly situated in all respects. They are not.’ [Citation.] Although section 1800 is a civil commitment statute, as [is] the SVPA . . . the Legislature enacted the adult civil commitment statutes with different purposes in mind than the purpose of the section 1800 extended detention scheme challenged here. [¶] . . . Therefore, adults civilly committed under the SVPA . . . are labeled ‘sexually violent predators’ . . . based, in part, upon the nature of their prior convictions in addition to their potential for future dangerousness to others. [¶] In contrast to the SVPA . . . , section 1800 broadly encompasses all youthful offenders committed to the Youth Authority who, if discharged from that facility, ‘would be physically dangerous to the public’ because of their mental deficiency, disorder, or abnormality. (§ 1800).” (*Lemanuel, supra*, 41 Cal.4th at p. 48.)

Since the California Supreme Court has established that a person subject to civil commitment under the SVPA is not similarly situated, for equal protection purposes, with a juvenile offender subject to commitment under the section 1800 et seq. extended

detention scheme, we are bound by that ruling (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455). We therefore find no merit in Soto's claim that his constitutional right to equal protection was violated because he was treated differently than similarly situated juvenile offenders.

Penal Code Section 1026.5

"NGI's . . . are those who have committed criminal acts but have been civilly committed rather than criminally penalized because of their severe mental disorder." (*McKee, supra*, 47 Cal.4th at p. 1207.) "[T]hey may not be in civil custody longer than the maximum state prison term to which they could have been sentenced for the underlying offense (Pen. Code, § 1026.5, subd. (a); [citation]) unless at the end of that period the district attorney extends the commitment for two years by proving in a jury trial beyond a reasonable doubt that the person presents a substantial danger of physical harm to others because of a mental disease, defect, or disorder. (Pen. Code, § 1026.5, subd. (b)(1); [citations].)" (*McKee, supra*, 47 Cal.4th at p. 1207.)

As to the constitutional rights afforded an NGI in extended commitment proceedings, Penal Code section 1026.5, subdivision (b)(7) provides: "The person shall be entitled to the rights guaranteed under the federal and State Constitution for criminal proceedings. All proceeding shall be in accordance with applicable constitutional guarantees." The appellate courts are in conflict as to whether Penal Code section 1026.5, subdivision (b)(7) should be construed to provide the same constitutional rights to NGIs in civil commitment proceedings as those afforded to defendants in criminal proceedings.

The *Haynie* court ruled that under Penal Code section 1026.5, an NGI is entitled to the same rights as a criminal defendant and therefore he or she cannot be compelled to testify in the prosecution's case during the extended commitment trial. (*Haynie, supra*, 116 Cal.App.4th at p. 1228.) The *Lopez* court disagreed with *Haynie*, stating: "we conclude the interpretations of Penal Code section 1026.5(b)(7) . . . adopted in

Haynie . . . [is] unsupported.” (*Lopez, supra*, 137 Cal.App.4th at p. 1110.) An earlier decision, *People v. Superior Court (Williams)* (1991) 233 Cal.App.3d 477, concluded that the constitutional provisions barring double jeopardy did not apply in proceedings under section 1026.5. (*Id.* at p. 488.) The court reasoned that “although many constitutional protections relating to criminal proceedings are available in extension proceedings, the application of all such protections is not mandated by section 1026.5. The statutory language merely codifies the application of constitutional protections to extension hearings mandated by judicial decision. It does not extend the protection of constitutional provisions which bear no relevant relationship to the proceedings.” (*Ibid.*)

Relying on *Haynie*, Soto contends that as an SVP, he is similarly situated to an NGI and therefore, under the equal protection clause, he cannot be compelled to testify in the prosecution’s case during the extended commitment trial. (*Haynie, supra*, 116 Cal.App.4th at p. 1228.) The decision in *McKee* provides some support for Soto’s contention that he is similarly situated to an NGI, since the California Supreme Court determined that SVPs and NGIs are similarly situated for equal protection purposes with respect to the commitment term, and stated: “[T]he People have not yet carried their burden of justifying the differences between the SVP and NGI commitment statutes.” (*McKee, supra*, 47 Cal.4th at p. 1207.)

However, our Supreme Court has not addressed the issues of whether a NGI subject to extended civil commitment under section 1026.5 can be compelled to testify in the prosecution’s case during the extended commitment trial, nor determined whether an SVP and an NGI are similarly situated with regard to the Fifth Amendment guarantee against compulsory self-incrimination. We need not resolve these issues in the present case. As we will discuss, we conclude that even assuming that compelling Soto to testify in the prosecution’s case in his civil commitment proceeding under the SVPA violated his constitutional right to equal protection, the error was not prejudicial.

Prejudice

Assuming that constitutional error has been found, “[t]he final question is whether this constitutional error was prejudicial.” (*People v. Carlin* (2007) 150 Cal.App.4th 322, 344.) The California Supreme Court has ruled that in SVPA cases, the reviewing court applies the *Chapman* test (*Chapman, supra*, 386 U.S. at p. 24) to determine whether a constitutional error was prejudicial: “Because the *Chapman* test . . .—that federal constitutional error is reversible unless shown to be harmless beyond a reasonable doubt—is used for the review of federal constitutional error in civil commitment cases in California generally, that test necessarily governs review under the SVPA.” (*People v. Hurtado* (2002) 28 Cal.4th 1179, 1194.)

Soto argues that the equal protection error in compelling him to testify was prejudicial under the *Chapman* test, and therefore constitutes reversible error, because his “testimony was, admittedly, devastating to his case. [He] gave inconsistent answers and, generally speaking, testified in a way that could not help but persuade the jury that he was mentally ill. Further, [his] testimony, in no way, increased the likelihood that the jury might find that he was unlikely to reoffend or not dangerous. In other words, his testimony destroyed his case.” Soto also explains that his “entire strategy was to create a reasonable doubt as to the adequacy and validity of the State’s expert witnesses’ opinions,” and his testimony had the “unfortunate effect of bolstering those opinions.”

Having reviewed the entire record, including Soto’s testimony, we determine that the asserted equal protection error was harmless beyond a reasonable doubt under *Chapman, supra*, 386 U.S. at page 24. It was undisputed that Soto was convicted of “a sexually violent offense against one or more victims.” (§ 6600, subd. (a)(1).) Further, Soto failed to offer any evidence that contradicted the opinions of the People’s experts, Dr. Zinik and Dr. Damon, that Soto had “a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he . . . will engage in sexually violent criminal behavior” (§ 6600, subd. (a)(1)). The testimony given by

Soto's expert, Dr. Abbott, was limited. Dr. Abbott challenged only the accuracy and reliability of the risk assessment tests used by Dr. Zinik and Dr. Damon, had not interviewed Soto, did not provide any opinions specific to Soto, and admitted that he had no opinion as to whether Soto would reoffend.

Moreover, the testimony of Soto's treating psychiatrist, Dr. Odom, informed the jury that Soto was schizophrenic and had demonstrated symptoms of psychosis upon his admission to Atascadero State Hospital. Soto's conduct caused Dr. Odom to believe that if he were not medicated, he would be dangerous and might sexually assault someone in the hospital.

Given the overwhelming evidence presented by the People that Soto met the statutory criteria for commitment as an SVP (§ 6600, subd. (a)(1)), we conclude that even assuming the trial court's order compelling Soto to testify violated the equal protection clause, the constitutional error was harmless beyond a reasonable doubt.

C. Other Constitutional Claims

1. Equal Protection

According to Soto, the SVPA violates the state and federal equal protection clause because it treats persons committed as SVPs differently than persons treated as NGIs and mentally disordered offenders (MDOs; Pen. Code, § 2960 et seq.)

The *McKee* court determined that SVPs and MDOs are similarly situated for equal protection purposes because their commitments have common features: they have been found to suffer from mental disorders that render them dangerous to others; they have been convicted of a serious or violent felony; and at the end of their prison terms, they are committed to the Department of Mental Health for treatment. (*McKee, supra*, 47 Cal.4th at p. 1203.)

The court also determined that SVPs have "different and less favorable procedural protections" than MDOs because, under the amended SVPA, SVPs "are given indeterminate commitments and thereafter have the burden to prove they should be

released (unless the [Department of Mental Health] authorizes a petition for release). In contrast, an MDO is committed for a one-year period and thereafter has the right to be released unless the People prove beyond a reasonable doubt that he or she should be recommitted for another year.” (*McKee*, *supra*, 47 Cal.4th at p. 1202.)

And, as we have noted, the *McKee* court also found that SVPs and NGIs are similarly situated and “a comparison of the two commitment regimes raises similar equal protection problems.” (*McKee*, *supra*, 47 Cal.4th at p. 1207.) Consequently, the court found that as with MDOs, “the People have not yet carried their burden of justifying the differences between the SVP and NGI commitment statutes.” (*Ibid.*)

However, the *McKee* court did not conclude that the People could not meet their burden of showing the differential treatment of SVPs is justified. The court concluded only that the People had not yet done so. (*McKee*, *supra*, 47 Cal.4th at p. 1207.) Accordingly, the court remanded the case to the trial court to allow the People an opportunity to “demonstrate the constitutional justification for imposing on SVP’s a greater burden than is imposed on MDO’s and NGI’s in order to obtain release from commitment.” (*Id.* at pp. 1208-1209, fn. omitted.)⁷

Soto contends that he is entitled to the same remedy as the appellant in *McKee*: a remand to the trial court for further proceedings. We agree. However, we are not convinced by Soto’s argument against staying the case. To avoid an unnecessary multiplicity of proceedings, resolution of the equal protection issue here should await resolution of the proceedings on remand in *McKee*, including any resulting proceedings in the Court of Appeal or Supreme Court. We will therefore direct the trial court to suspend further proceedings in this case pending finality of the proceedings on remand in *McKee*.

⁷ In *People v. McKee* (2012) 207 Cal.App.4th 1325, petn. for review pending, petn. filed August 24, 2012, the appellate court upheld the trial court’s finding that the People met their burden to justify the disparate treatment of SVPs.

2. Due Process, Ex Post Facto, and Double Jeopardy

Soto also contends that (1) SVPA violates his due process rights by permitting him to be committed indefinitely and by placing the burden on him to prove that he no longer qualifies as an SVP; and (2) the SVPA violates his constitutional rights under the ex post facto and double jeopardy clauses because the SVPA is punitive in nature.

Soto acknowledges that the *McKee* court rejected similar arguments, finding in part that the amended SVPA is not punitive. (*McKee, supra*, 47 Cal.4th at pp. 1188-1195.) We are bound by our Supreme Court's decision. (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455.) Soto states that he raises these issues simply to preserve his federal claims, and for that reason, we decline to address them.

IV. DISPOSITION

The May 11, 2011 order committing Soto to the custody of the state Department of Mental Health is reversed, and the case is remanded to the trial court for the limited purpose of reconsidering Soto's equal protection argument in light of *People v. McKee* (2010) 47 Cal.4th 1172, and the resolution of the proceedings on remand in that case (*id.* at pp. 1208-1211). The trial court is directed to suspend further proceedings in this case pending finality of the proceedings on remand in *McKee*. "Finality of the

proceedings” shall include the finality of any subsequent appeal and any proceedings in the California Supreme Court.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

GROVER, J.*

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