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

THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL GARCIA,

Defendant and Appellant.

H037734

(Santa Clara County

Super. Ct. No. 153966)

I. INTRODUCTION

After a court trial, defendant Manuel Garcia¹ was found to be a mentally disordered offender (MDO) and was ordered committed for continued involuntary treatment for one year. (See Pen. Code, §§ 2970, 2972.)² Defendant was not present at the pretrial hearing when his counsel waived a jury trial. On appeal, defendant contends that the trial court erred by failing to obtain a waiver from him personally, and by failing to advise him of his right to a jury trial. Defendant argues that the errors violated his statutory and constitutional rights and that reversal is required.

For reasons that we will explain, we will affirm the judgment.

¹ The record on appeal contains documents that also refer to defendant as “Manuel Ronald Garcia” and “Manuel Ruano Garcia.”

² All further statutory references are to the Penal Code unless otherwise indicated.

II. BACKGROUND

In April 2011, the district attorney filed a petition to extend defendant's involuntary treatment as an MDO for one year. According to the petition, defendant had been convicted of violating sections 245, subdivision (a)(1), and 288, subdivision (a). In 1992, defendant was sentenced to a total of four years in prison. In November 1993, he was admitted to Atascadero State Hospital as an MDO. Defendant was later discharged to a conditional release program (CONREP) but was recommitted to Atascadero a short time later, following a violation of both parole and CONREP conditions. Defendant's commitment for involuntary treatment was periodically extended by the court and, according to the district attorney's petition, defendant was currently at Napa State Hospital. In the April 2011 petition, the district attorney sought defendant's continued involuntary treatment for one year, until November 25, 2012.

Defense counsel appeared without defendant for all court hearings prior to trial on the petition. In particular, on August 19, 2011, defense counsel appeared in court, waived defendant's appearance, and confirmed that a jury trial was waived.

On October 27, 2011, a court trial was held on the petition. The sole witness who testified was Dr. Eric Khoury, a staff psychiatrist at Napa State Hospital. He testified as an expert in the diagnosis and treatment of mental disorders and risk assessment. Dr. Khoury explained that defendant had recently transferred to Dr. Khoury's unit at the hospital, and that defendant had been assigned to him for approximately five weeks by the time of trial. In connection with this transfer, Dr. Khoury had reviewed various records regarding defendant, including those indicating his progress at the hospital, and had talked to other members of defendant's treatment team. Dr. Khoury also had daily contact with defendant, had conducted defendant's monthly psychiatric interview, and had participated in defendant's monthly treatment conferences.

Dr. Khoury testified that defendant has a severe mental disorder and has been diagnosed with schizophrenia. In this regard, defendant has a history of hearing voices or

experiencing delusions, and has exhibited disorganized thinking, disorganized behaviors, and inappropriate affect. As an example of disorganized thinking, Dr. Khoury testified that defendant had been upset about one month ago when a peer on the ward was not being friendly to him. The peer wanted space and to be left alone, and defendant took offense. Dr. Khoury had a long discussion with defendant about it. Defendant had difficulty understanding that a person may choose who to associate with and that it is not necessarily an insult to defendant. He also had difficulty understanding the idea of boundaries. The experience with the peer had distressed or agitated defendant, and Dr. Khoury's "big concern" was that such a reaction in defendant "might lead to violent acting out if he's not able to process those feelings or grasp that concept." Regarding disorganized behaviors, Dr. Khoury explained that defendant has exhibited sexually inappropriate behavior, such as touching the buttocks of a female staff member and publicly masturbating and exposing himself to female staff as recently as March 2011. Since that time, defendant's behavior had been "good," and he had progressed to the point of being moved to an "open unit."

In addition to schizophrenia, defendant had been diagnosed with exhibitionism and with pedophilia. When asked how these diagnoses "interact" with defendant's schizophrenia, Dr. Khoury explained that if defendant is having a psychotic episode or experiencing disorganized thinking, it places him at greater risk for committing sexually inappropriate or offensive acts. In other words, "the schizophrenia might impair his ability to refrain from exposing himself or molesting a child."

It was Dr. Khoury's understanding that defendant's underlying crimes involved sexual offenses and also an attack on someone in a vehicle. Regarding sexual offenses, Dr. Khoury testified that defendant had shown "a history of being attracted to young female children and he ha[d] sexually offended against that population."

Dr. Khoury believed that defendant's schizophrenia impaired his ability to control his behavior. Although defendant had been "doing better over the past six months," the

improvement had occurred “in the context of a very controlled setting.” Dr. Khoury still had a “serious concern” based on defendant’s “current state that he wouldn’t be able to control his impulses and would be at risk of harming someone” if he were free in the community.

Defendant receives medication for his schizophrenia. However, the schizophrenia is not in complete remission, as defendant continues to exhibit disorganized thinking. Defendant’s records contain a notation regarding frequent requests for “as needed” medications for unprovoked agitation in the latter part of 2010 and in 2011. Using “as needed” medications is “a sign that someone isn’t using their coping skills to deal with the issue.” Dr. Khoury testified that the matter was “of concern,” although over the past six months, defendant had “done better.”

Defendant does not consistently acknowledge that he has a mental illness. Further, Dr. Khoury believed that defendant did not really understand what his mental illness is and how it affected him.

Within the past several months, defendant had been attending sex offender treatment groups. The group facilitators reported to Dr. Khoury that, although defendant had been “doing his best to be in active treatment,” he had not made very much progress. According to Dr. Khoury, the facilitators had reported that defendant’s progress was “minimal to none.”

Dr. Khoury believed the “big thing” that defendant needed to work on was an understanding of the connection between his mental illness and his crimes. According to Dr. Khoury, defendant “doesn’t see the connections. He doesn’t understand what the warning signs are, what the triggers might be, . . . what the boundaries are and the things and the people and the places to stay away from.” In this regard, defendant did not have a “good” relapse prevention plan, which related to his sex offender treatment, his mental illness, and his substance abuse.

Dr. Khoury believed that defendant was not ready for unconditional release in the community. He believed that if defendant was untreated in the community, he would represent a substantial danger of physical harm to others. Specifically, Dr. Khoury believed that defendant “could get sexually aggressive and commit further sex crimes.” Dr. Khoury explained that defendant’s behavior even in a very structured setting was sexually offensive and that he showed no self-control. Further, “it would be quite hard for [defendant] to get along given . . . the severity of his mental illness, his sexual predilections, and his cognitive dysfunction. For him to be out in the community without supervision . . . would be a really, really hard thing to manage.”

At the conclusion of the trial, the court found the allegations of the petition true and ordered defendant’s term of commitment extended for one year, until November 25, 2012.³

III. DISCUSSION

A. *The MDO Act*

Before addressing the substance of defendant’s contentions, we will briefly review the statutory scheme that governs the commitment of a person as an MDO. “ ‘The Mentally Disordered Offender Act (MDO Act), enacted in 1985, 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 . . . until their mental disorder can be kept in remission. [Citation.]’ [Citation.] The MDO Act is not penal or punitive, but is instead designed to ‘protect the public’ from offenders with

³ Upon our request for supplemental briefing, the parties indicate that defendant’s term of commitment has since been extended. In this regard, the Attorney General has provided a copy of an October 18, 2012 order by the trial court extending defendant’s commitment for one year until November 25, 2013. An appeal from a commitment order following an MDO extension hearing is moot once the commitment period has expired. (*People v. Merfield* (2007) 147 Cal.App.4th 1071, 1074.) The merits of such an appeal are reviewed, nevertheless, as long as the defendant is subject to recommitment. (*Id.* at p. 1075.)

severe mental illness and ‘provide mental health treatment until the severe mental disorder which was one of the causes of or was an aggravating factor in the person’s prior criminal behavior is in remission and can be kept in remission.’ (§ 2960.) The MDO Act has the dual purpose of protecting the public while treating severely mentally ill offenders. [Citation.]” (*Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1061 (*Lopez*).

“The MDO Act provides for treatment of certified MDO’s at three stages of commitment: as a condition of parole, in conjunction with the extension of parole, and following release from parole.” (*Lopez, supra*, 50 Cal.4th at p. 1061.) “Section 2962 governs the first of the three commitment phases, setting forth the six criteria necessary to establish MDO status; these criteria must be present at the time of the State Department of [State Hospitals’s] and Department of Correction and Rehabilitation’s determination that an offender, as a condition of parole, must be treated by the State Department of [State Hospitals].” (*Lopez, supra*, at pp. 1061-1062; see § 2962, subd. (a).) Among the criteria is a requirement of “proof that an offender suffers from a severe mental disorder, that the illness is not or cannot be kept in remission, and that the offender poses a risk of danger to others. [Citation.]” (*Lopez, supra*, at p. 1062.) Relevant to this appeal, “[s]ections 2970 and 2972 govern the third and final commitment phase, once parole is terminated. If continued treatment is sought, the district attorney must file a petition in the superior court alleging that the individual suffers from a severe mental disorder that is not in remission, and that he or she poses a substantial risk of harm. (§ 2970.) Commitment as an MDO is not indefinite; instead, ‘[a]n MDO is committed for . . . one-year period[s] 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.’ [Citation.]” (*Lopez, supra*, at p. 1063; see § 2972, subds. (a), (c) & (e).)

Relevant to this appeal, section 2972, subdivision (a) states the following regarding the hearing on a petition for continued treatment or recommitment: “*The court shall advise the person of his or her right to be represented by an attorney and of the right*

to a jury trial. . . . The hearing shall be a civil hearing [¶] The standard of proof under this section shall be proof beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. *The trial shall be by jury unless waived by both the person and the district attorney. . . .*” (Italics added.)

B. Waiver of Right to a Jury Trial

Prior to trial, defense counsel waived a jury trial. On appeal, defendant contends that section 2972, subdivision (a) requires a trial court to obtain a defendant’s personal waiver of a jury. Defendant argues that the court’s failure to do so in this case violated the statute, his state constitutional right to a jury trial, and his right under the due process clause of the Fourteenth Amendment to a jury trial.

The Attorney General contends that the right to a jury trial in an MDO proceeding is statutory only, and that the right may be waived by counsel.

We first address defendant’s claim of a constitutional right to a jury trial before considering his statutory claim. The legal issues raised by defendant are subject to de novo review. (See *Conservatorship of John L.* (2010) 48 Cal.4th 131, 142; *Amdahl Corp. v. County of Santa Clara* (2004) 116 Cal.App.4th 604, 611.)

1. Claimed Constitutional Jury Right

Federal Authority

The Sixth Amendment right to a jury trial in all criminal prosecutions is extended to proceedings in state courts under the Fourteenth Amendment. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149-150.) It does not, however, apply to proceedings that are not criminal prosecutions. (See *McKeiver v. Pennsylvania* (1971) 403 U.S. 528, 541, 545, 550 (plur. opn. of Blackmun, J.); *id.*, at pp. 553-554 (conc. & dis. opn. of Brennan, J).) Although the United States Supreme Court has not directly considered whether the right to a jury trial applies to civil commitments based on a person’s dangerousness due to a mental disorder, federal appellate courts have considered this question and concluded that the Sixth Amendment right to a jury trial does not apply. (See, e.g., *U.S. v. Sahhar*

(9th Cir. 1990) 917 F.2d 1197, 1205-1206 [Sixth Amendment jury trial right does not apply to a federal hospital commitment for a person adjudged incompetent to stand trial because the commitment “serves a regulatory, rather than punitive, purpose”].) Further, although the Seventh Amendment provides for the right to a jury trial for civil suits at common law, this is not one of the amendments selectively incorporated as part of the process due in state courts under the Fourteenth Amendment. (*McDonald v. City of Chicago* (2010) 561 U.S. ___, 130 S.Ct. 3020, 3034-3035, fn. 13.) In addition, the due process clause of the Fifth Amendment has not been interpreted to require a jury trial in federal civil commitment proceedings based on a person’s dangerousness due to a mental disorder (*U.S. v. Sahhar, supra*, at p. 1207 [“due process does not require a jury trial” for a federal hospital commitment of a person adjudged incompetent to stand trial]; *U.S. v. Carta* (1st Cir. 2010) 592 F.3d 34, 43 [no due process right to jury trial in federal civil commitment as sexually dangerous person]), although other attributes of due process may apply (see *Specht v. Patterson* (1967) 386 U.S. 605, 610; *Foucha v. Louisiana* (1992) 504 U.S. 71, 75-76, 79).

State Authority

The California Constitution affords an “an inviolate right” to a jury trial in civil cases to the extent the jury right existed at common law when the state Constitution was adopted. (Cal. Const., art. I, § 16; see *Corder v. Corder* (2007) 41 Cal.4th 644, 656, fn. 7 (*Corder*); *People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 286-287 [citing former Cal. Const., art. I, § 7].) “Consequently, the constitutional right to a jury trial does not apply . . . to special proceedings [citation], although the Legislature may provide for a jury trial in these situations by statute [citations].” (*Corder, supra*, at p. 656, fn. 7.) In this case, defendant has not argued that there was any common law analog to proceedings to extend the treatment of an MDO. (Cf. *People v. Fuller* (1964) 226 Cal.App.2d 331, 335 [sexual psychopathy proceedings were “civil in nature and of a

character unknown at common law” and therefore, “the use of a jury is a matter of legislative grant and not of constitutional right”).)

The California Constitution also affords a right to a jury trial in criminal actions in which a felony or a misdemeanor is charged. (Cal. Const., art. 1, § 16.) The state Constitution does not, however, expressly address the jury right with respect to California statutory proceedings for involuntary commitment and treatment of a person incompetent to stand trial or otherwise dangerous due to mental illness. These proceedings are generally recognized to be essentially civil, not criminal, although their subjects are afforded by statute some of the same rights constitutionally due criminal defendants. (E.g., *In re De La O* (1963) 59 Cal.2d 128, 150 [narcotics addict commitment proceedings “are in the nature of special civil proceedings unknown to the common law, and hence there is no right to jury trial unless it is given by the statute”]; *In re Beville* (1968) 68 Cal.2d 854, 858 [commitments under the since repealed mentally disordered sex offender statutes “are civil in nature and are collateral to the criminal proceedings”]; *In re Gary W.* (1971) 5 Cal.3d 296, 309 [extensions of commitment to former California Youth Authority under Welfare and Institutions Code section 1800 “are not juvenile proceedings, and are not criminal,” but “are ‘special proceedings of a civil nature’”].)

For example, in *People v. Masterson* (1994) 8 Cal.4th 965 (*Masterson*), the California Supreme Court concluded that, although in a criminal case a jury may be waived only by the defendant, the “related” proceeding to determine a criminal defendant’s competency to stand trial “is not itself a criminal action.” (*Id.* at p. 969.) Such a competency proceeding “ ‘is neither a criminal action nor a civil action; rather, it is a special proceeding. [Citations.]’ [Citation.]” (*Ibid.*) The court further observed that, although there is a state constitutional right to a jury trial in both criminal and civil actions, the right to a jury trial in a competency proceeding is purely statutory. (*Ibid.*) The court ultimately concluded that defense counsel may waive the statutory right to a

jury trial in a mental competency hearing pursuant to sections 1368 and 1369, even over the defendant's objection. (See *id.* at p. 974.)

Relevant here, the Court of Appeal in *People v. Montoya* (2001) 86 Cal.App.4th 825 (*Montoya*) relied on *Masterson*, among other authorities, to conclude that defense counsel may waive a jury trial on behalf of a defendant in an MDO proceeding. (*Montoya, supra*, at pp. 828-830.) In *Montoya*, defense counsel waived a jury and, following a court trial, the defendant was recommitted as an MDO. (*Id.* at pp. 827-828.) On appeal, the defendant argued "at length, citing to numerous federal cases dealing with the Sixth Amendment jury trial rights of criminal defendants, that because he did not *personally* waive his right to a jury trial, his federal and state constitutional rights were infringed." (*Montoya, supra*, at pp. 828-829.)

The *Montoya* court explained that "in proceedings that are neither civil nor criminal, but 'special proceedings,' such as a competency hearing, the right to a jury trial may be waived by counsel, even over defendant's express objection. (*Masterson, supra*, [8 Cal.4th] at p. 969.) [¶] Although [an MDO] hearing, like a competency hearing, is something of a hybrid, a civil hearing with criminal procedural protections, it is nonetheless, as the statute clearly states and California courts have consistently agreed, a civil hearing. [Citations.] As a civil hearing, jury trial may thus be waived 'as prescribed by statute.' [Citation.]" (*Montoya, supra*, 86 Cal.App.4th at pp. 829-830, fn. omitted.) The court further concluded that the defendant's jury trial interest in an MDO proceeding is " 'merely a matter of state procedural law' and does not implicate the Fourteenth Amendment. [Citation.]" (*Montoya, supra*, at p. 832; see *People v. Cosgrove* (2002) 100 Cal.App 4th 1266, 1273-1274 (*Cosgrove*) [following *Montoya* and concluding that the right to a jury trial in an MDO proceeding is statutory and not constitutional].)

Based on the foregoing authorities, we conclude that defendant's claim of a right to a jury trial in the proceeding to extend his commitment term under the MDO Act is not

of a constitutional dimension. We therefore turn to the issue of whether his statutory right to a jury trial had to be personally waived.

2. Claimed Statutory Right to a Jury Unless Personally Waived

As we stated above, section 2972, subdivision (a) provides that “[t]he trial shall be by jury unless waived by both the person and the district attorney.” On appeal, defendant contends that section 2972, subdivision (a) requires a trial court to obtain a defendant’s personal waiver of a jury.

***People v. Otis* (1999) 70 Cal.App.4th 1174**

The appellate courts have concluded that the reference to “person” in the context of a jury waiver under the MDO Act permits defense counsel to waive a jury on behalf of the defendant. For example, in *People v. Otis* (1999) 70 Cal.App.4th 1174 (*Otis*), the Court of Appeal addressed whether identical language in section 2966, subdivision (b),⁴ which sets forth the procedure for challenging the initial commitment as an MDO, requires the defendant to personally waive a jury. (*Otis, supra*, at pp. 1176-1177.) The trial court had accepted the defense counsel’s waiver of a jury over the defendant’s objection. The Court of Appeal concluded that the defendant need not personally waive a jury and that counsel may act on behalf of the defendant. (*Id.* at p. 1175.)

In reaching this conclusion, the Court of Appeal observed that “[g]enerally in civil cases, an attorney has ‘complete charge and supervision’ to waive a jury. [Citations.]” (*Otis, supra*, 70 Cal.App.4th at p. 1176.) Although the defendant did not dispute that an MDO proceeding is a civil matter, he argued that the reference to “person” in section 2966, subdivision (b) required that a jury waiver be by “the person himself.” (*Otis, supra*, at p. 1176.) The Court of Appeal pointed out, however, that “nothing in the requirement that the waiver must be by ‘the person’ precludes the person’s attorney from

⁴ Section 2966, subdivision (b) states, “The trial shall be by jury unless waived by both the person and the district attorney.”

acting on his [or her] behalf. The Legislature did not say the waiver had to be made ‘personally.’ [¶] Had the Legislature intended that waiver could only be made personally by the [defendant], the Legislature would have made its intent clear. For example, the California Constitution, article I, section 16 states that waiver of a jury in a criminal case must be by ‘the defendant and the defendant’s counsel.’ No similar language appears in section 2966, subdivision (b).” (*Ibid.*)

The Court of Appeal was not persuaded by the defendant’s attempt to rely on other language in section 2966, subdivision (b) to support his argument that the reference to a waiver of a jury by a “person” means by the person himself or herself. For example, section 2966, subdivision (b) refers to a waiver of time by “petitioner or his or her counsel.” The defendant contended that “construing the word ‘person’ to include counsel makes the words ‘or his or her counsel’ surplus.” (*Otis, supra*, 70 Cal.App.4th at p. 1176.) The Court of Appeal explained that the rules of statutory construction, including the rule that surplusage should be avoided, cannot be “mechanically appl[ied] . . . to reach a result that is at odds with the intention of the Legislature.” (*Id.* at p. 1177.) In considering the “context and purpose” of section 2966, the Court of Appeal reasoned: “Section 2966 concerns persons who have been found by the Board of Prison Terms⁵ to be mentally disordered. The Legislature must have contemplated that many persons, such as *Otis*, might not be sufficiently competent to determine their own best interests. There is no reason to believe the Legislature intended to leave the decision on whether trial should be before the court or a jury in the hands of such a person.” (*Otis, supra*, at p. 1177; see *People v. Fisher* (2006) 136 Cal.App.4th 76, 81 [“We decline the invitation to overrule *Otis* and continue to believe that it was correctly decided”].)

⁵ As of July 1, 2005, the Board of Prison Terms was abolished, the Board of Parole Hearings was created, and any reference to the former in the California codes was deemed a reference to the latter. (§ 5075, subd. (a).)

***People v. Montoya* (2001) 86 Cal.App.4th 825**

In *Montoya*, the Court of Appeal reached a similar conclusion that defense counsel may waive jury trial on behalf of the defendant under the same statute at issue in the present case. (*Montoya, supra*, 86 Cal.App.4th at p. 830.) In *Montoya*, similar to the instant case, the defense counsel waived a jury and the defendant did not protest the waiver in court. (*Id.* at pp. 827-828, 831, fn. 4.) The defendant was recommitted as an MDO following a court trial. (*Id.* at pp. 827-828.) On appeal, the defendant contended that his constitutional rights were violated because he did not personally waive his right to a jury trial.

As we discussed above, the Court of Appeal in *Montoya* rejected defendant's constitutional claim. (*Montoya, supra*, 86 Cal.App.4th at pp. 828-830, 831-832.) The Court of Appeal also determined that the words in section 2972, subdivision (a) that “ ‘[t]he trial shall be by jury unless waived by both the person and the district attorney’ ” “mean defense counsel may waive jury trial on behalf of his [or her] client” (*Montoya, supra*, at p. 830). In making this determination, the *Montoya* court rejected the defendant's argument that, “since the word ‘person’ as used in other parts of section 2972 refers to the defendant personally, it must do the same in this sentence of subdivision (a).” (*Montoya, supra*, at p. 830.) The *Montoya* court relied on the reasoning of *Otis* that the rules of statutory construction may not be applied to reach a conclusion that conflicts with legislative intent, and that there is no reason to believe the Legislature intended to leave the decision about a jury trial in the hands of a defendant who might not be sufficiently competent to determine what is in the defendant's best interest. (*Montoya, supra*, at pp. 830-831.) The *Montoya* court observed that the defendant in the case before it “did not contest that he was an MDO not in remission,” and “[t]he fact that the Legislature gave him other personal rights within the statute [did] not lead [the court] to conclude that he had to personally waive his right to a jury trial in a civil proceeding.” (*Id.* at p. 831.) Moreover, “the Legislature knows how to make clear when a personal

jury waiver is required,” and “[n]o such language is present in the disputed sentence of section 2972.” (*Ibid.*)

In the present case, defendant acknowledges that *Otis* and *Montoya* are adverse to his position, but he nevertheless argues that the language of section 2972 supports his position and that *Otis* and *Montoya* “were wrongly decided.” We disagree.

For example, we are not persuaded, based on the reasoning of *Montoya* and *Otis*, by defendant’s contention that, because the word “person” as used in other parts of section 2972, subdivision (a) refers to defendant personally, the reference in that subdivision to a jury waiver by the “person” must be similarly construed. (*Montoya, supra*, 86 Cal.App.4th at pp. 830-831; *Otis, supra*, 70 Cal.App.4th at pp. 1176-1177.)

We also disagree with defendant’s contention that, if the jury right may be waived by counsel, there is no reason for the statutory requirement that the court advise the person of the jury right (§ 2972, subd. (a)). Although there is no reason to believe that the Legislature intended to leave the decision about a jury trial in the hands of a defendant who might not be sufficiently competent to determine what is in the defendant’s best interest (*Montoya, supra*, 86 Cal.App.4th at pp. 830-831; *Otis, supra*, 70 Cal.App.4th at p. 1177), an advisement about the right to a jury trial would not be meaningless to the extent the person is able to understand that right or confer with counsel about the issue. (See *In re Qawi* (2004) 32 Cal.4th 1, 24 [“commitment for a mental disorder does not by itself mean that individuals are incompetent to participate in their own medical decisions”]; *Montoya, supra*, at p. 831 [although “it is certainly conceivable . . . that a patient might be mentally disordered for some purposes and not for others, it is particularly difficult to sort those categories out in a case of schizophrenia”].) Indeed, as defendant acknowledges in his reply brief, “a lack of competency to make the decision himself [regarding a jury trial] does not mean that he lacks any ability to discuss the matter with his attorney and provide input as to the decision.”

Defendant also argues that the MDO Act “leaves other decisions to the individual” regarding whether the person should bring challenges to the first phase of commitment as an MDO where the person is required to accept treatment as a condition of parole. The decisions include whether to request a hearing before the Board of Parole Hearings if the person disagrees with the initial MDO certification decision (§§ 2964, subd. (a), 2966, subd. (a)), whether to request a hearing before the board if outpatient treatment has not been granted (§ 2964, subd. (b)), whether to challenge in court the determination by the board that the person meets the criteria of an MDO (§ 2966, subd. (b)), and whether to appeal the trial court judgment. (See *Lopez, supra*, 50 Cal.4th at p. 1062.) Defendant argues that, with respect to the issue of jury waiver, if “the Legislature was concerned that alleged MDOs were not capable of making the decisions necessary to protect their own interests, the Legislature would not have allowed such persons to make all these [other] important decisions.”

We are not persuaded by defendant’s argument. The decisions identified by defendant arguably involve substantial rights, such as whether to challenge a determination by the board or the court that a person is an MDO. To the extent that these decisions are, as argued by defendant, left by the MDO Act to the determination of the person, we do not believe this compels the conclusion that the Legislature intended other rights, such as the statutory jury right, to be waived personally by the person instead of by counsel. Case law has recognized that an attorney’s authority is limited to certain matters. (See *Masterson, supra*, 8 Cal.4th at p. 969 [in civil and criminal cases, the attorney “has general authority to control the procedural aspects of the litigation” and to bind the client in these matters, but the attorney may not bind the party “as to certain fundamental matters”]; *People v. Fisher* (2009) 172 Cal.App.4th 1006, 1013-1014 [an attorney’s authority to control procedural matters in a civil case, such as the statutory right to jury, does not include the authority to relinquish substantial rights, such as the right to be present, without the client’s consent].) The MDO Act is consistent with such

case law to the extent it allows counsel to waive the statutory right to jury and leaves other decisions to the defendant.

In sum, we conclude that the reference to “person” in section 2972, subdivision (a) permitted defense counsel in this case to waive a jury on behalf of defendant.

C. Advisement of Right to Jury Trial

As stated above, section 2972, subdivision (a) also provides that the “court shall advise the person . . . of the right to a jury trial.” On appeal, defendant contends that the trial court was required to comply with section 2972, that the court’s failure to comply with the statute violated his due process rights, and that the judgment must be reversed.

The Attorney General contends that a trial court’s failure to provide “the statutory advisement [is] moot, rather than an error of omission” when, as in this case, defense counsel “is present at the first appearance.” The Attorney General also argues that the failure to advise does not constitute a due process violation. Further, the Attorney General contends that the error, if any, in failing to advise was harmless under *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).

There is no indication in the record that the trial court gave the jury trial advisement as required by section 2972, subdivision (a). Assuming that the trial court’s failure to provide the jury trial advisement was error, we determine that the error did not constitute a denial of due process.

“[The United States 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.) Due process does not safeguard “the meticulous observance of state procedural prescriptions . . .” (*Rivera v. Illinois* (2009) 556 U.S. 148, 158 [“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”].) Under the MDO Act, “[a] jury sitting in a civil hearing pursuant to sections 2970 and 2972 does not impose criminal punishment and has no power to determine the extent to which the defendant will be deprived of his liberty. Defendant’s jury trial interest thus is, in this case, ‘merely a matter of state procedural law’ and does not implicate the Fourteenth Amendment. [Citations.]” (*Montoya, supra*, 86 Cal.App.4th at p. 832; see *id.* at pp. 831-832 [rejecting the defendant’s reliance on *Hicks v. Oklahoma* (1980) 447 U.S. 343 to support a federal due process claim].)

We also understand defendant to contend, based primarily on *People v. Alvas* (1990) 221 Cal.App.3d 1459 (*Alvas*), that equal protection principles require the court to advise the person of the right to a jury trial. In *Alvas*, the appellate court determined that a person subject to civil commitment proceedings under Welfare and Institutions Code section 6500 had an equal protection right to a jury trial advisement because there was no compelling reason for the disparate statutory treatment between such a person and someone else subject to civil commitment extension proceedings under the Lanterman-Petris-Short Act (Welf. & Inst. Code, § 5000 et seq.), which expressly requires a jury trial advisement (*id.*, § 5302). (*Alvas, supra*, at pp. 1463-1464.)

We are not persuaded by defendant’s equal protection argument. Defendant acknowledges in his reply brief that *Alvas* has since been disapproved by the California Supreme Court in *People v. Barrett* (2012) 54 Cal.4th 1081 (*Barrett*). In *Barrett*, the court concluded that neither due process nor equal protection requires a jury trial advisement or a personal waiver of the right to a jury in a proceeding under Welfare and Institutions Code section 6500. (*Id.* at pp. 1105-1106, 1109.) Further, unlike the statutory scheme at issue in *Alvas* (Welf. & Inst. Code, § 6500), which does not expressly provide for the right to jury or require that the person be advised of such a right, the MDO Act expressly provides for both the jury right and a jury trial advisement (§ 2972, subd. (a)). As defendant fails to articulate how a person subject to the MDO Act is treated unfairly in comparison to a similarly situated person under a different statutory

scheme, we determine that defendant fails to establish a meritorious equal protection claim. (See *Barrett, supra*, at p. 1107 [a “prerequisite to a meritorious claim is that individuals ‘ “similarly situated with respect to the legitimate purpose of the law receive like treatment” ’ ”].)

Since the only possible error we have found is the lack of advisement of defendant’s right to a jury pursuant to section 2972, subdivision (a), reversal is not required unless it is reasonably probable a result more favorable to defendant would have been reached if the court had advised him. (*Cosgrove, supra*, 100 Cal.App.4th at pp. 1268, 1275-1276 [determining that the trial court’s error in an MDO proceeding in granting the People’s motion for a directed verdict was harmless under *Watson*]; see Cal. Const., art. VI, § 13; *Watson, supra*, 46 Cal.2d at p. 836.) We find any such error to be harmless in this case.

In *Cosgrove*, the appellate court found the denial of a jury trial harmless, where the expert testimony in support of an MDO finding was “overwhelming” and the attempt to discredit the experts on cross-examination had “minimal” effect. (*Cosgrove, supra*, 100 Cal.App.4th at p. 1276.) In this case, without deciding whether the testimony by Dr. Khoury, who was the sole witness to testify at trial, may be characterized as overwhelming, we believe his testimony certainly can be described as significant, reliable, and uncontradicted in demonstrating defendant’s need for continued involuntary treatment. Dr. Khoury testified that defendant has a severe mental disorder, schizophrenia; that the schizophrenia is not in remission; and that by reason of the disorder, defendant poses a substantial danger of physical harm to others. (See § 2972, subd. (c).) Among other testimony, Dr. Khoury explained the risk posed by defendant’s diagnoses of schizophrenia, exhibitionism, and pedophilia. Dr. Khoury also testified that defendant did not consistently acknowledge he had a mental illness, and that defendant did not understand the mental illness, how it affected him, and its connection to his crimes. Further, defendant’s progress in sex offender treatment groups was “minimal to

none.” Defendant presented no evidence at trial, let alone any evidence that contradicted Dr. Khoury’s opinions. We conclude that it is not reasonably probable that a jury would have evaluated the trial testimony any differently than did the trial judge. (*Cosgrove, supra*, at pp. 1275-1276; see Cal. Const., art. VI, § 13; *Watson, supra*, 46 Cal.2d at p. 836.) We therefore determine that defendant was not prejudiced by the trial court’s failure to advise him of his right to a jury trial.

IV. DISPOSITION

The October 27, 2011 order extending defendant’s commitment under the MDO Act is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

PREMO, ACTING P.J.

GROVER, J.