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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES EDWARD GREENWOOD,

Defendant and Appellant.

H037815

(Santa Clara County

Super. Ct. No. 187301)

Charles Edward Greenwood appeals from an order entered pursuant to the Mentally Disordered Offender (MDO) Act (Pen. Code, § 2960 et seq.),¹ extending his commitment to Napa State Hospital. Greenwood contends that the evidence is insufficient to support the trial court’s finding that he represents a substantial danger of physical harm to others if released. He also argues that the court failed to advise him of the right to a jury trial as required by the MDO Act and failed to obtain his personal waiver of the right, errors he claims warrant reversal.

We conclude that the evidence is sufficient to support the trial court’s finding and, although the record does not show that the court gave the required advisement or that Greenwood expressly waived the right, the evidence is such that it is not reasonably probable that a jury would have reached a different result. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*)). Accordingly, we shall affirm.

¹ Further unspecified statutory references are to the Penal Code.

I. LEGAL FRAMEWORK

The MDO Act ensures that persons 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 disorders can be kept in remission. (*People v. Robinson* (1998) 63 Cal.App.4th 348, 351-352; §§ 2962, 2970.) If an offender's condition cannot be kept in remission without continued treatment, the offender can be subject to continued involuntary commitment even after a scheduled parole release date. (§ 2970.) Continued involuntary commitment "shall be for a period of one year from the date of termination of parole or a previous commitment or the scheduled date of release from prison as specified in Section 2970." (§ 2972, subd. (c).)

In order to recommit a person under section 2972, the trial court must find (1) the person continues to have "a severe mental disorder"; (2) the person's "mental disorder is not in remission or cannot be kept in remission without treatment"; and (3) the person continues to represent a "substantial danger of physical harm to others." (*People v. Beeson* (2002) 99 Cal.App.4th 1393, 1398-1399; § 2972, subds. (c), (e).) "[A]n MDO whose symptoms are controlled by medication and who is not dangerous while on medication is by definition 'in remission,' and represents no danger to others. Such a person does not meet the statutory criteria for an extension of his or her MDO commitment. (§§ 2962, 2972, subd. (c).)" (*People v. Noble* (2002) 100 Cal.App.4th 184, 190.) To warrant continued commitment in such a case, the People must prove, beyond a reasonable doubt, that the person will not take his medication if released and, in an unmedicated state, he represents a substantial danger of physical harm to others. (*Ibid.*)

II. FACTUAL AND PROCEDURAL BACKGROUND

Greenwood was convicted in 1996 of one count of violating section 288, subdivision (a), based upon evidence that he had attempted to orally copulate a young child in a public bathroom. He was sentenced to three years in prison and upon his

release was admitted to Atascadero State Hospital pursuant to the MDO Act. He was later transferred to Napa State Hospital where he still resides.

Greenwood's commitment was set to expire on February 17, 2012. On July 28, 2011, the district attorney filed a petition to extend the commitment another year. According to the petition, Greenwood continued to suffer a severe mental disorder that is not in remission and cannot be kept in remission without continued treatment, and that by reason of his mental disorder Greenwood represents a substantial danger of physical harm to others.

A total of six hearings were held in advance of the December 1, 2011 trial date. Greenwood was not present at any one of the six. He was present at trial. There is no mention of the right to or waiver of a jury trial anywhere in the record. Proceedings began on December 1, 2011, with the court's question: "Are both sides ready to proceed on the petition?" Whereupon a court trial commenced.

The only witness was Haesook Yuo, M.D., Greenwood's psychiatrist at Napa State Hospital. Yuo diagnosed the 62-year-old Greenwood as having chronic schizophrenia and vascular dementia. He has auditory hallucinations and delusions, difficulty learning new things, and difficulty recalling past and recent memory. He has psychogenic polydipsia, which is a psychological disorder that makes him drink water excessively. Staff nurses reported that Greenwood has engaged in sexual activity with another patient. He also became angry and cursed at a staff person when his demand was not met immediately. Greenwood is on medication for his mental disorder; the medication is given to him by hospital staff. Yuo believes that Greenwood would not take his medication on his own.

According to Yuo, Greenwood's dementia is degenerative, which means that it gets worse over time. Indeed, his IQ has dropped significantly since he was first admitted; he now tests in the range of 62, which is borderline between low-normal and "dementic." The condition obstructs blood vessels in multiple areas of the brain,

impairing the ability to think and learn. As a result of this condition, Greenwood “has a deficit in learning how to cope with his impulses, sexual impulses, and what is wrong and what is right. And what he did was wrong. And he’s not able to comprehend [the] significance of his act and also not able to learn how to cope with his impulses.” Although he attends symptom management and other skill learning groups, Greenwood is unable to benefit from the groups because he cannot absorb the information. He has shown no insight into his offense, does not take responsibility for it, and has shown no empathy for the child victim. Yuo believes that Greenwood “needs sex offender treatment before he’s released to the community, if he can benefit from it.” But Greenwood’s cognitive function is too low to benefit from the treatment. It is Yuo’s opinion that Greenwood’s schizophrenia, complicated by dementia, makes Greenwood a substantial risk of harm to others.

Yuo agreed that she has not diagnosed Greenwood with either a personality disorder or a substance abuse problem. She was asked on cross-examination whether Greenwood’s sexual desire would diminish with age. Yuo replied that Greenwood’s “dementic process” causes him to be disinhibited, which makes it difficult to say whether his sexual impulses would be reduced as he grows older.

Greenwood did not put on any evidence. His counsel argued that Yuo’s risk assessment was unreliable because she had not used a formal risk assessment tool but had relied upon her clinical judgment. The trial court rejected the argument, finding beyond a reasonable doubt that the allegations of the petition are true. This appeal followed.

III. DISCUSSION

A. Sufficiency of the Evidence

Greenwood first argues that the evidence is insufficient to support the finding that he presents a substantial danger of physical harm to others. “In considering the sufficiency of the evidence to support MDO findings, an appellate court must determine whether, on the whole record, a rational trier of fact could have found that defendant is an

MDO beyond a reasonable doubt, considering all the evidence in the light which is most favorable to the People, and drawing all inferences the trier could reasonably have made to support the finding.” (*People v. Clark* (2000) 82 Cal.App.4th 1072, 1082.)

Greenwood does not deny that he suffers a severe mental disorder. He argues that since there is no evidence that he has been physically violent toward staff or patients at the hospital the evidence is insufficient to support a finding that he represents a physical danger to others. Greenwood’s offense, attempting to orally copulate a small child, is an example of the type of physical danger that is of concern in this case. He need not engage in fist cuffs with hospital staff in order to show that he continues to represent that type of physical danger. Although he has had no opportunity to commit further lewd acts upon children in the controlled environment of the hospital, he has had a verbal altercation with a staff member and sex with another patient and his psychiatrist testified that Greenwood lacks the mental capacity to learn how to cope with his impulses or to distinguish between right and wrong. Given the nature of the conduct that led to Greenwood’s initial incarceration, his continued inability to recognize that the conduct was wrongful is substantial evidence to support the conclusion that Greenwood remains physically dangerous to others if released.

B. The Jury Trial Advisement

Greenwood also contends that he was not advised of his right to a jury trial and, therefore, was deprived of his right to a jury. The People acknowledge that the trial court did not give the advisement and that such an advisement is required by the statute. Indeed, as section 2972, subdivision (a), provides, in part, “The court shall conduct a hearing on the petition under Section 2970 for continued treatment. *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 trial shall be by jury unless waived by both the person and the district attorney.*” (Italics added.) According to Greenwood, depriving him of the right to a jury is structural error warranting reversal per se. We disagree.

Although the present matter was tried to the court without a jury, the record is devoid of any indication that the court adhered to the statutory requirement of advising Greenwood of his right to a jury or that Greenwood or his counsel expressly waived the right. The same problem has come to us repeatedly in the recent past.² While we are reluctant to affirm the results of such proceedings in the absence of some indication in the record that the court has taken its statutory duty seriously and provided the rights afforded by the law, “we are duty bound to affirm absent a miscarriage of justice. (Cal. Const., art. VI, § 13.) A miscarriage of justice arises from the violation of a state statutory right, like an MDO defendant’s right to counsel [or his right to a jury trial], only when a reasonable probability exists the defendant would have obtained a more favorable result had the error not occurred. (*Watson, supra*, 46 Cal.2d at p. 836.)” (*People v. Wrentmore* (2011) 196 Cal.App.4th 921, 931; see also, *People v. Cosgrove* (2002) 100 Cal.App.4th 1266, 1275-1276 [wrongly denying jury trial to MDO held harmless]; *People v. Williams* (2003) 110 Cal.App.4th 1577, 1592-1593 [right to counsel in MDO proceedings subject to *Watson* analysis].) “[A] ‘miscarriage of justice’ should be declared only when the court, ‘after an examination of the entire cause, including the evidence,’ is of the ‘opinion’ that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*Watson, supra*, at p. 836.) A more favorable result is not reasonably probable here.

People v. Cosgrove, supra, 100 Cal.App.4th at page 1276, held that the denial of a jury trial was harmless error when the expert testimony in support of an MDO finding was overwhelming and unshaken by cross-examination. Greenwood argues that the

² At oral argument the People conceded that it would be helpful in resolving similar disputes if the parties or the court would express on the record the status of the defendant’s mental acuity, his understanding of his jury trial right, and his ability to comprehend and cooperate with his attorney’s efforts. Such a brief discussion with the court would clarify issues which are frequently appearing in the Court of Appeal due to trial court records which often are silent on the subject.

evidence here is not overwhelming. He maintains that it is reasonably probable a jury would not have found beyond a reasonable doubt that he was physically dangerous because there was no evidence of his being physically violent with hospital staff or patients. But as we explained, the physical danger of concern is Greenwood's potential to inflict harm upon children or other vulnerable persons. There is, thankfully, no evidence of any recent attempts to copulate young children, but there is evidence of his sexual impulsiveness and of his inability to learn how to deal with his impulses. Most powerful is the evidence that he takes no responsibility for his prior conduct and cannot appreciate the difference between right and wrong. There was no conflicting evidence. And on cross-examination, Yuo clarified that even Greenwood's advancing age did not ensure that he would lose interest in sex since his progressive dementia was, itself, disinhibiting. In light of this, it is not reasonably probable that a jury would have reached a conclusion any different from that of the trial court.

IV. DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.