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

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS MOLINA RUIZ,

Defendant and Appellant.

H038054

(Santa Clara County

Super. Ct. No. 129586)

In 1996, defendant Carlos Molina Ruiz was certified as a mentally disordered offender (MDO) pursuant to section 2962 of the Penal Code.¹ This appeal arises out of the granting in March 2012 of the People's petition to extend defendant's involuntary treatment as an MDO pursuant to section 2972. Defendant argues that the court erred in allowing the matter to proceed as a court trial without defendant having personally waived a jury. He also argues that the court erred in failing to advise him under section 2972, subdivision (a) (section 2972(a)) of his jury trial rights.

We conclude that the court was not required to obtain the personal waiver of a jury from defendant and that defense counsel's waiver here was legally sufficient under section 2972(a). We also hold that the court erred in failing to give the jury trial

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

advisement under that statute but that the error was harmless. We will therefore affirm the order extending the commitment.

PROCEDURAL AND FACTUAL BACKGROUND

On September 6, 2011, the People filed a petition to extend defendant's involuntary commitment for a period of one year pursuant to section 2972 et seq. It was alleged in the petition that in 1988, defendant committed and was charged with rape (§ 261, subd. (2)) and assault with intent to commit rape (§ 220).² Defendant was thereafter convicted of the two charged offenses and was sentenced to prison after violating the terms of his probation. On April 17, 1996, defendant was certified as an MDO pursuant to section 2962 and was admitted to Atascadero State Hospital. He was released to outpatient status under the care of the South Bay Conditional Release Program (CONREP), but that outpatient status was later revoked and he was admitted to Napa State Hospital (Hospital). Defendant's commitment was periodically extended thereafter. As of September 2011, he remained at the Hospital. It was further alleged in the petition that defendant's commitment was scheduled to expire on April 17, 2012, and that he continued to suffer from a severe mental disorder which was neither in remission nor subject to being kept in remission without continued treatment.

A hearing took place on January 27, 2012, in which the deputy district attorney and defendant's attorney were present; defendant was not present because he was in the Hospital. Defendant's attorney waived his client's appearance and waived his right to a jury. In response to the court's inquiry as to whether defendant would waive a jury, defense counsel responded: "He is. I've spoken with him, and we would waive his right to a jury trial for a court trial." The People also waived a jury.

² We will refer in this paragraph to the allegations in the People's September 6, 2011 petition without sometimes using the prefatory "the People alleged," in order to avoid undue repetition of the phrase.

A hearing on the petition occurred on March 1, 2012. The People presented two witnesses, Dr. William Cirimele and Dr. Robert Picker. Defendant did not present any witnesses.

Dr. Cirimele, a staff psychologist at the Hospital since October 2011, testified that he had treated defendant four days a week from November 29, 2011, until shortly before the hearing. He last saw defendant on February 27, 2012. Dr. Cirimele diagnosed defendant as “[s]chizoaffective disorder bipolar type. Polysubstance dependence, and pedophilia, along with antisocial personality disorder on axis two.” He testified that he understood that the underlying 1988 crimes of which defendant was convicted were the rape of a 17-year-old girl and an assault with intent to commit rape on a 13-year-old girl three days later. Dr. Cirimele also related that defendant was arrested at age 12 for use of inhalants, and his criminal history included subsequent charges of assault, battery, and robbery. Defendant was dependent upon alcohol, marijuana, PCP, LSD, and cocaine; his substance abuse was regarded as being in full remission as a result of his being in a controlled environment and his attending weekly substance abuse programs.

Dr. Cirimele opined that defendant’s involuntary treatment should be extended because his mental disorder was not in remission. Dr. Cirimele explained that defendant’s “current symptoms include irritability and delusions of persecution, aggressiveness, and some depression, anhedonia, which refers to the inability to find pleasure in things you normally find pleasure in.” He also testified that defendant posed a substantial risk to the community (i.e., the potential of physical danger to others). He explained that this risk assessment was based upon “[p]ast behavior as recent as his inability to control actions due to very low tolerance of frustration and irritability; and without being in a controlled environment, . . . [there was a concern] about his ability to control his actions in the community.”

Dr. Cirimele provided anecdotal information in support of his opinions. There was one instance of verbal aggression displayed by defendant: In March 2011, defendant

banged on the nursing station window and threatened to spit on the staff. Dr. Cirimele indicated that there were also four incidents of physical aggression exhibited by defendant within a year. On April 13, 2011, defendant became “aggressive towards a peer and had to be restrained and placed in a side room.” In a second incident, defendant banged his head against the nursing station, and Hospital police were required to place him in seclusion after acting aggressively toward them. In a third occurrence, defendant had “[a]n altercation with a peer where he took a fighting stance.” The fourth event took place on September 20, 2011, and consisted of defendant’s “throwing clenched fists, spitting, and kicking staff after being told that he had to wait a few hours for PRM medication.” There were also two occasions (in August 2011 and February 2012) in which defendant committed property damage. And in the year prior to the hearing, there were four instances in which defendant violated rules with respect to possession of contraband.

Dr. Picker has been a staff psychiatrist at the Hospital since October 2008. Defendant has been one of his patients since November 2011. Dr. Picker echoed Dr. Cirimele’s diagnosis of defendant’s psychological condition, including the “primary diagnosis [of] . . . schizoaffective disorder bipolar type, current episode depressed.” Dr. Picker was of the opinion that defendant’s involuntary treatment should be extended for an additional year. His psychological symptoms include delusions, most often paranoid delusions, auditory hallucinations (which had resolved through treatment), and depression. Defendant’s psychological condition has manifested itself through a series of episodes of verbal and physical aggression in the past year. Dr. Picker also described defendant as having a feeling that he is being persecuted due to his Mexican ethnicity. Dr. Picker opined that defendant currently posed a substantial risk to others were he released into the community. This opinion was based upon defendant’s “[c]ontinuing episodes of difficulty controlling his impulses with anger episodes” including a September 2011 incident of assaulting staff.

Dr. Cirimele testified that defendant accepted that he had a severe mental disorder and understood the nature of the disorder. Defendant was in compliance with his prescriptive medicine regimen. Before November 2011, defendant had refused to attend group sessions. (See *People v. Beeson* (2002) 99 Cal.App.4th 1393, 1400 (*Beeson*) [under section 2962, MDO committee's refusal to voluntarily follow "treatment plan is essentially an exception to the finding that the illness is in remission"].) Both Dr. Cirimele and Dr. Picker testified that despite his various psychological problems, defendant had been making progress over the past several months and had been very involved in the group sessions led by the psychologist.

After hearing evidence, the court found the petition true and ordered defendant's involuntary treatment under the MDO Act extended for one year from April 17, 2012, to April 17, 2013.

Defendant filed a timely notice of appeal.

DISCUSSION

I. *The Mentally Disordered Offender Act*

The Legislature enacted the Mentally Disordered Offender Act (§ 2960 et seq; MDO Act) in 1985. Under the MDO Act, persons convicted of violent crimes which are related to their mental disorders and who continue to pose a danger to society are required to receive mental health treatment during and after the termination of their parole until their mental disorder can be kept in remission. (See *In re Qawi* (2004) 32 Cal.4th 1, 9 (*Qawi*)). "The MDO Act is not penal or punitive, but is instead designed to 'protect the public' from offenders with 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. (*Ibid.*)" (*Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1061 (*Lopez*)).

The criteria for the commitment of a person under the MDO Act include “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.” (*Lopez, supra*, 50 Cal.4th at p. 1062, citing § 2962, subd. (a).) For those certified as MDO’s, the MDO Act specifies treatment “at three stages of commitment: as a condition of parole, in conjunction with the extension of parole, and following release from parole.” (*Lopez*, at p. 1061.) After termination of parole, sections 2970 and 2972 govern commitment. “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*, at p. 1063; see also *Beeson, supra*, 99 Cal.App.4th 1393 at pp. 1398-1399.) If the committing court finds that there is “reasonable cause to believe that the committed person can be safely and effectively treated on an outpatient basis,” section 2972, subdivision (d) requires the court to order the person released as an outpatient.

Section 2972(a) is at the heart of this appeal. The statute provides (with emphasis for the provisions at issue here): “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 attorney for the person shall be given a copy of the petition, and any supporting documents. The hearing shall be a civil hearing, however, in order to reduce costs the rules of criminal discovery, as well as civil discovery, shall be applicable. [¶] 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*. The trial shall commence no later than 30 calendar days prior to

the time the person would otherwise have been released, unless the time is waived by the person or good cause is shown.” (Italics added.)

The interpretation and application of statutes, such as section 2972 here, are questions of law. (See *Amdahl Corp. v. County of Santa Clara* (2004) 116 Cal.App.4th 604, 611.) Questions of law are reviewed under the de novo standard of review. (*Ibid.*)

II. *Personal Waiver of Right to Jury Trial*

A. *Contentions of the Parties*

Defendant claims that the order must be reversed because he did not personally waive his right to a jury trial. Although he acknowledges that his attorney waived a jury on his behalf, he contends that this purported waiver was legally ineffective. He argues that under section 2972(a), he “was entitled to personally waive his right to a jury. . . . The court erred in committing him without obtaining a personal waiver of [defendant’s] jury trial right from him.” He argues further that this error was of federal constitutional dimension: it “violated [defendant’s] right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.”

The Attorney General responds that there is no merit to defendant’s statutory and constitutional claims. She asserts that *People v. Otis* (1999) 70 Cal.App.4th 1174 (*Otis*) and *People v. Montoya* (2001) 86 Cal.App.4th 825 (*Montoya*), are directly contrary to defendant’s position and are dispositive.

B. *No Personal Jury Waiver Requirement*

1. *Claimed Constitutional Jury Right*

We begin with the fundamental proposition, central to our analysis of defendant’s claim, that an MDO commitment proceeding is not a criminal one; rather, it is essentially a civil hearing. (§ 2972(a) [hearing for continued MDO treatment “shall be a civil hearing”]; *Montoya, supra*, 86 Cal.App.4th at p. 829 [hearing under section 2970 “is something of a hybrid, a civil hearing with criminal procedural safeguards”].) Although under the Fourteenth Amendment, the Sixth Amendment right to a jury trial in all

criminal prosecutions is extended to proceedings in state courts (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149-150), that right does not extend to proceedings that are not criminal prosecutions. (*McKeiver v. Pennsylvania* (1971) 403 U.S. 528, 541, 550, 553-554.) And while the Seventh Amendment also provides for the right to a jury trial for civil suits at common law, this amendment was not one which was 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].) Furthermore, although the United States Supreme Court has not directly considered whether the jury trial right applies to civil commitment proceedings based upon the person's dangerousness due to mental disorder, the Ninth Circuit Court of Appeals, among other federal appellate courts, has concluded that a federal hospital commitment for a person adjudged incompetent to stand trial "serves a regulatory, rather than punitive purpose," and thus the Sixth Amendment right to a jury trial does not apply. (*United States v. Sahhar* (9th Cir. 1990) 917 F.2d 1197, 1205-1206.)³

The California Constitution affords "an inviolate right" to a jury trial involving the criminal prosecution of felonies and misdemeanors. (Cal. Const., art. I, § 16.)⁴ The state

³ Similarly, courts have interpreted the Fifth Amendment's due process clause as not requiring a jury trial in federal civil commitment proceedings based on a person's dangerousness or mental incompetence. (*United States v. Sahhar, supra*, 917 F.2d at page 1207 ["due process does not require a jury trial" in a federal criminal proceeding determining a defendant's competence to stand trial]; *United States 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].)

⁴ A jury trial right is afforded under the California Constitution in civil cases when such a right existed at common law in 1850 when the Constitution was adopted. (*People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 286-287.) Defendant has not suggested there was any pre-1850 common law analog to proceedings to extend the outpatient 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."].)

Constitution does not directly address the rights (including jury rights) of persons subjected to California statutory proceedings concerning their potential involuntary commitment and treatment due to their incompetence to stand trial or their being 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. (See, e.g., *In re Gary W.* (1971) 5 Cal.3d 296, 309 [extensions of commitment to the California Youth Authority under Welf. & Inst. Code, former § 1800 “are not juvenile proceedings, and are not criminal,” but “are ‘special proceedings of a civil nature’ ”]; *In re Bevill* (1968) 68 Cal.2d 854, 858 [commitments under since-repealed mentally disordered sex offender statutes “are civil in nature and are collateral to the criminal proceedings”] *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.”].)

Thus, for instance, in *People v. Masterson* (1994) 8 Cal.4th 965 (*Masterson*), the Supreme Court concluded that although only the defendant himself or herself may waive a jury in a criminal case, a proceeding to determine a criminal defendant’s competency to stand trial is “not itself a criminal action.” (*Id.* at p. 969.) It “ ‘is neither a criminal action nor a civil action; rather, it is a special proceeding. [Citations.]’ [Citation.]” (*Ibid.*) The court observed further that although there is a constitutional right to a jury trial in both criminal matters and civil cases as specified under the California Constitution, the right to a jury trial in a competency proceeding is purely statutory. (*Ibid.*) As such, the defendant’s statutory jury trial right could be waived by counsel. (*Id.* at pp. 971-972.)

The Court of Appeal in *Montoya, supra*, 86 Cal.App.4th 825 extended *Masterson*’s rationale to MDO proceedings. There, a jury trial concerning a petition for the continued involuntary treatment of the defendant pursuant to section 2970 was

waived by his counsel. (*Montoya, supra*, at pp. 827-828.) The defendant on appeal 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.” (*Id.* at pp. 828-829.) The *Montoya* court explained that although the federal and state constitutional right to a jury must be waived personally by a criminal defendant (*id.* at p. 829), in civil cases “ ‘a jury may be waived by the consent of the parties expressed as prescribed by statute.’ ” (*Id.* at p. 829, quoting Cal. Const., art. I, § 16.) It noted that in the case of “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 a section 2970 hearing, like a competency hearing, is something of a hybrid, a civil hearing with criminal procedural safeguards, it is nonetheless, as the statute clearly states and California courts have consistently agreed, a civil hearing.” (*Montoya* at pp. 829-830, fn. omitted.) Because in “a civil hearing, jury trial may thus be waived ‘as prescribed by statute’ ” (*id.* at p. 830, quoting Cal. Const., art. I, § 16), the court concluded that the defendant’s interest in a jury trial was “ ‘merely a matter of state procedural law’ and [did] not implicate the Fourteenth Amendment. [Citation.]” (*Montoya* at p. 832.)

Defendant also cites *People v. Alvas* (1990) 221 Cal.App.3d 1459 (*Alvas*) in support of his due process claim. In *Alvas*, the court decided, inter alia, that a defendant against whom involuntary commitment proceedings are instituted under Welfare and Institutions Code section 6500 based upon the allegation that he or she is mentally retarded and a danger to him or herself or others has a due process right to be advised of his or her right to a jury trial. (*Alvas*, at pp. 1464-1465.) Recently, however, the Supreme Court in *People v. Barrett* (2012) 54 Cal.4th 1081, 1105-1106 (*Barrett*) disapproved *Alvas* on this point.

We conclude that defendant’s claim of a right to a jury trial in the proceeding to extend the term of his commitment under the MDO Act is not of a constitutional dimension. We therefore address next whether his statutory right to a jury included, as he contends, a right to a trial by jury unless he personally waived that right.

2. *Claimed Statutory Right to Jury Unless Personally Waived*

Section 2972(a) provides that “[t]he trial shall be by jury unless waived by both the person and the district attorney.” Defendant contends that this reference to “person” means that the jury waiver must be made personally by the party. He acknowledges that *Otis* and *Montoya* are adverse to his position; he nonetheless claims that the “cases were decided wrongly” and that the language of section 2972 supports his position. We disagree.

In *Otis, supra*, 70 Cal.App.4th at pages 1176 to 1177, the Court of Appeal addressed whether under section 2966, subdivision (b), identifying the procedure for challenging the initial commitment as an MDO⁵—containing language identical to section 2972(a) at issue here—required that the defendant personally waive a jury. The court concluded that the defendant need not personally waive a jury and that counsel may act on behalf of the defendant. (*Id.* at pp. 1175, 1177.) It observed that “[g]enerally in civil cases, an attorney has ‘complete charge and supervision’ to waive a jury. [Citations.]” (*Id.* 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” or herself. (*Otis, supra*, at p. 1176.) The court rejected this claim, holding that “nothing in the requirement that the waiver must be by ‘the person’ precludes the person’s attorney from acting on his [or her] behalf. The Legislature did not say the waiver had to be made ‘personally.’ . . .

⁵ Section 2966, subdivision (b) states, “The trial shall be by jury unless waived by both the person and the district attorney.”

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.*) Additionally, the court observed that in light of the fact that many of the persons involved in MDO proceedings may in fact be mentally disordered, “[t]he 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.” (*Id.* at p. 1177; see *People v. Fisher* (2006) 136 Cal.App.4th 76, 81 [declining the invitation to overrule *Otis*].)⁶

In *Montoya, supra*, 86 Cal.App.4th 825, the court addressed the identical issue presented here: Whether defense counsel, pursuant to section 2972(a), may waive a jury on behalf of the defendant in proceedings to extend the involuntary treatment of an MDO. (*Id.* at p. 830.) In *Montoya*, as was the case here, defense counsel waived a jury, the defendant did not protest the waiver in court (*id.* at pp. 827-828, 831, fn. 4), and on appeal, he argued that his constitutional rights were violated because he did not personally waive his right to a jury (*id.* at pp. 828-829). After disposing (as we discussed in pt. II.B.1, *ante*) of the defendant’s constitutional claim (*id.* at pp. 829-830), the Court

⁶ The *Otis* court also rejected the defendant’s reliance 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.)

of Appeal rejected the defendant's claim that the statute required that the defendant personally waive a jury. It held that the language of section 2972(a) that " '[t]he trial shall be by jury unless waived by both the person and the district attorney' " "mean[s] defense counsel may waive jury trial on behalf of his [or her] client . . ." (*Montoya, supra*, 86 Cal.App.4th at p. 830.) In making this determination, the 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)." (*Ibid.*) The Court of Appeal adopted the reasoning of *Otis, supra*, 70 Cal.App.4th at page 1177, that the rules of statutory construction may not be applied to reach a conclusion that conflicts with legislative intent, and 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 his or her best interests. (*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 [it] to conclude that he had to personally waive his right to a jury trial in a civil proceeding." (*Id.* at p. 831.) Moreover, the court reasoned that "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.*)

Based on the reasoning of *Montoya* and *Otis*, we reject defendant's contention that because the word "person" as used in other parts of section 2972(a) means the 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; cf. *People v. Powell* (2004) 114 Cal.App.4th 1153, 1157-1159 [language in section 1026.5 concerning waiver of jury trial by both prosecutor and person pleading not guilty by reason of insanity construed as not requiring personal waiver of such defendant].) We agree further with prior precedent that 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 his or her best interests. (*Montoya, supra*, at pp. 830-831; *Otis, supra*, at p. 1177.)

Defendant, however, argues that the *Otis* and *Montoya* courts' "conclusion that MDO defendants are not capable of making a reasoned decision regarding a jury trial" is unsound and contrary to the Supreme Court's holding in *Qawi, supra*, 32 Cal.4th 1. We disagree both with defendant's characterization of the courts' holdings in *Otis* and *Montoya*, and with his assertion that *Qawi* is authority for rejecting those two prior decisions.

In *Qawi*, the California Supreme Court addressed an MDO defendant's right to refuse antipsychotic medication. Under the MDO Act, "MDO's who have been civilly committed after their parole period has expired are granted the same rights that are afforded involuntary mental patients" under certain provisions of the Lanterman-Petris-Short Act (LPS Act; Welf. & Inst. Code, § 5000 et seq.). (*Qawi, supra*, 32 Cal.4th at p. 9, fn. omitted; see § 2972, subd. (g).) The high court held that "in order to give MDO's the same rights as LPS patients, an MDO can be compelled to take antipsychotic medication in a nonemergency situation only if a court . . . makes one of two findings: (1) that the MDO is incompetent or incapable of making decisions about his medical treatment; or (2) that the MDO is dangerous within the meaning of Welfare and Institutions Code section 5300." (*Qawi*, at pp. 9-10.) In making this determination, the *Qawi* court observed that "someone committed or recommitted as an MDO may not necessarily fit in either of these categories" and that "such MDO's would have the right to refuse medication in nonemergency circumstances." (*Id.* at p. 10.)

Qawi is distinguishable. That case concerned an MDO defendant's right to refuse antipsychotic medication, not whether a jury must be personally waived by the defendant. (See *Qawi, supra*, 32 Cal.4th at p. 15, fn. 4.) Different rights implicate different legal

considerations. For example, the forced administration of medication implicates “[t]he basic constitutional and common law right to privacy and bodily integrity.” (*Id.* at p. 15.)

Furthermore, neither the *Otis* court nor the *Montoya* court held that an MDO defendant should have no power to waive a jury because of his or her potential status as a mentally disordered offender. Those decisions were not based on the assumption that *all* individuals subject to the MDO Act are incompetent to determine whether a jury trial or a court trial should be had. Rather, *Otis* and *Montoya* relied on the premise that the Legislature presumably recognized that many MDO defendants might not be sufficiently competent to determine their own best interests, and there is no reason to believe the Legislature intended to leave the decision of a jury trial in the hands of such a defendant and require that a jury be waived personally by the defendant. (*Otis, supra*, 70 Cal.App.4th at p. 1177; *Montoya, supra*, 86 Cal.App.4th at p. 831.) This legislative intent, combined with the civil nature of an MDO hearing and the absence of an explicit requirement in section 2972(a) that the defendant must personally waive a jury, led the appellate courts in *Otis* and *Montoya* to conclude that defense counsel may act on the defendant’s behalf.

We interpret section 2972(a) as containing no requirement that the right to a jury be personally waived by an MDO defendant. We find the reasoning and holdings in *Otis* and *Montoya* to be dispositive and we reject defendant’s assertion that those “cases were decided wrongly.” (See *People v. Cosgrove* (2002) 100 Cal.App.4th 1266, 1274 (*Cosgrove*) [following *Montoya*]; *Beeson, supra*, 99 Cal.App.4th at p. 1407 [same].) We conclude that defense counsel may waive a jury on behalf of the defendant under section

2972(a) and that defendant's claim of error based upon the assertion that he did not personally waive a jury fails.⁷

C. *Court's Advisement of Right to Jury Trial*

Defendant also contends that the court erred by failing to advise him of his right to a jury on the petition to extend his involuntary MDO treatment. He contends that the court was required under section 2972(a) to advise him of his jury trial right and that such omission constituted a violation of his federal due process rights.

The Attorney General responds by admitting that the record does not reflect that the trial court advised defendant of his right to a jury. But she argues that any error by the court is harmless under the *Watson* standard (*People v. Watson* (1956) 46 Cal.2d 818 (*Watson*)) because it is not reasonably probable defendant would have achieved a more favorable result had he been properly advised.

As noted, section 2972(a) provides that the "court shall advise the person . . . of the right to a jury trial." Since there is no indication in the record that the trial court gave this advisement, we agree with defendant that the court erred.

The trial court's failure to provide the statutory advisement in this case did not constitute a denial of federal 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 [error in "denial of a state-provided peremptory challenge does not, without

⁷ In light of this conclusion, we need not resolve the Attorney General's contention that defendant has forfeited his appellate challenge by failing to request a jury trial or by failing to object to a court trial.

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.)

Defendant also asserts that the failure to advise defendant of his right to a jury trial under section 2972(a) violated his equal protection rights under the Fourteenth Amendment of the United States Constitution. As we understand this argument, defendant claims that, assuming there were no statutory jury trial right in MDO proceedings, the deprivation of a jury trial right to an MDO defendant would violate equal protection because MDO patients are similarly situated with other persons facing civil commitment who are guaranteed by statute the right to a jury, such as potential LPS committees (i.e., those facing long-term commitment under the Lanterman-Petris-Short Act, Welf. & Inst. Code, § 5350, subd. (d)), and alleged sexually violent predators (Welf. & Inst. Code, § 6604). But this argument is based upon a theoretical—and in fact false—construct: namely, that MDO defendants do *not* have a statutory right to a jury trial. Since there plainly *is* such a statutory right (see §§ 2966, subd. (b), 2972(a)), defendant’s equal protection argument is based upon an assumption which is contrary to the state of existing law. We will not decide theoretical constitutional questions which are based upon faulty premises. (*People v. Moore* (2011) 51 Cal.4th 1104, 1123 [rejecting equal protection argument based on faulty premise]; *People v. Low* (2010) 49 Cal.4th 372, 393, fn. 11 [due process claim challenging state’s actions rejected where argument based upon faulty premise that defendant committed no unlawful act]; *Berardi v. Superior Court* (2008) 160 Cal.App.4th 210, 228 [court will not decide “hypothetical or other questions

of constitutional law unnecessary to our disposition of the case”].) We therefore reject defendant’s equal protection argument.⁸

Defendant further contends that reversal per se is required because the purported constitutional error is structural. We disagree.

Since the only possible error we have found is the lack of advisement of defendant’s statutory right to a jury under section 2972(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 [error in granting People’s motion for a directed verdict in MDO proceeding was harmless under *Watson* standard]; 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, there were two professional witnesses who testified without contradiction that an extension of defendant’s involuntary MDO treatment was appropriate and necessary because his disorder was not in remission. Both the psychologist, Dr. Cirimele, and the psychiatrist, Dr. Picker, testified that defendant suffers from schizoaffective disorder, bipolar type, and antisocial personality disorder on axis two. Both experts testified without contradiction that defendant posed a current substantial risk to others were he released into the community. (See § 2972, subd. (c).) And there was unrefuted testimony that defendant had engaged in one act of verbal and

⁸ In addition to the flawed nature of defendant’s argument, it fails because it is based substantially on the equal protection analyses found in two decisions, *People v. Bailie* (2006) 144 Cal.App.4th 841, 847 and *Alvas, supra*, 221 Cal.App.3d at pages 1463 to 1464. Both cases, however, were recently disapproved by the Supreme Court on the equal protection analyses found in them. (*Barrett, supra*, 54 Cal.4th at page 1109.)

four acts of physical aggression within the past year which were manifestations of his disorder. Although we need not decide whether the evidence supporting the petition, as the court found in *Cosgrove*, was “overwhelming” (*Cosgrove*, at p. 1276), the testimony certainly can be described as significant, reliable, and uncontradicted in demonstrating defendant’s need for continued involuntary treatment.⁹

We conclude therefore 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.) Any error in the court’s failure to advise defendant of his right to a jury trial is harmless.

⁹ We acknowledge that the evidence in support of one of the diagnoses to which the experts testified—that defendant suffered from pedophilia—was subject to some doubt. In fact, Dr. Picker testified that it was “a borderline call.” But the trial court did not rely upon that particular diagnosis in finding the allegations of the petition true; rather, it concluded there was “ample evidence” supporting “the schizoaffective diagnosis.” Any lack of evidence in support of the diagnosis of pedophilia is of no consequence to our harmless error analysis.

DISPOSITION

The order extending defendant's involuntary treatment under the MDO act is affirmed.

Márquez, J.

WE CONCUR:

Elia, Acting P.J.

Bamattre-Manoukian, J.