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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. MARK STEVENS, Defendant and Appellant.	2d Crim. No. B241356 (Super. Ct. No. F471357) (San Luis Obispo County)

In mentally disordered offender (MDO) law, the familiar rule of *People v. Miller* (1994) 25 Cal.App.4th 913 has well served the interests of prisoners and the people for close to 20 years. A qualified mental health professional may rely on a probation report to render an opinion whether a defendant is an MDO. Here we respectfully disagree with the dicta expressed by our colleagues in *People v. Baker* (2012) 204 Cal.App.4th 1234, 1246.

Mark Stevens appeals from the judgment entered after the trial court determined he was an MDO. (Pen. Code, § 2960 et seq.)[1] He contends that 1. the People's expert was erroneously allowed to give an opinion on "force or violence," and 2. there is no substantial evidence to support the finding that the commitment offense, petty theft with a prior, is a qualifying offense. We affirm.

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

Facts

Doctor Kevin Perry, a clinical psychologist at Atascadero State Hospital, opined that appellant suffered from a severe mental disorder, schizophrenia undifferentiated type, and met all the MDO criteria.

Relying on the probation report, Doctor Perry described the circumstances of the 2009 commitment offense as follows: "Mr. Stevens was observed placing items at a drug store into his waistband and pockets and then walking out of the store without paying. When loss prevention officers then confronted him about that, Mr. Stevens threatened to assault and to kill the loss prevention agents. [¶] He, also, tried to push a shopping cart into one of them."

Although petty theft with a prior is not a crime of force or violence, the trial court found that appellant's threats and violent acts in the commission of the offense came within the "force or violence" provision of the MDO law.

Reliable Hearsay and Expert Opinion

Appellant argues that Doctor Perry's testimony was based upon hearsay. When asked whether appellant represented a danger of physical harm to others, Doctor Perry testified, without objection: "Mr. Stevens has a history of aggressive and threatening behaviors during periods of psychiatric instability. As I already testified, during the MDO qualifying offense he threatened to kill los[s] prevention agents."

At the conclusion of the trial, appellant argued that Doctor Perry's testimony was hearsay and there was no substantive evidence of force or violence. The trial court ruled: "The testimony, though, about the commission of the crime came in without objection." We agree. Appellant is precluded from arguing for the first time on appeal that the testimony was hearsay or violated the confrontation clause. (*People v. Miller*, *supra*, 25 Cal.App.4th at p. 917; *People v. Tafoya* (2007) 42 Cal.4th 147, 166.)

On the merits, it is settled law in this appellate district that a mental health expert may rely on reliable hearsay in a probation report in rendering an opinion at an MDO trial. (*People v. Valdez* (2001) 89 Cal.App.4th 1013, 1017; *People v. Campos*

(1995) 32 Cal.App.4th 304, 310; *People v. Miller, supra*, 25 Cal.App.4th at pp. 917-918.) Doctor Perry's testimony concerning the probation report was not offered for the truth of the facts stated but as the basis for the doctor's expert opinion. (*People v. Cooper* (2007) 148 Cal.App.4th 731, 747.) "The hearsay relied upon by an expert in forming his or her opinion is 'examined to assess the weight of the expert's opinion,' not the validity of [its] contents. [Citation.]" (*Ibid.*)

Sufficiency of the Evidence

Appellant contends that the evidence is insufficient because a trial court may not rely on hearsay, i.e., the probation report, as independent proof of the facts asserted in the hearsay statement. The contention is based on the theory that force or violence is a matter for the trier of fact to resolve. From this premise, appellant argues that Evidence Code section 801, subdivision (a) bars expert testimony on matters within the common experience of the trier of fact. But "[t]here is no hard and fast rule that the expert cannot be asked a question that coincides with the ultimate issue in the case." (*People v. Wilson* (1944) 25 Cal.2d 341, 349.) Evidence Code section 801, subdivision (a) "does not flatly limit expert opinion testimony to subjects 'beyond common experience'; rather, it limits such testimony to such subjects *'sufficiently* beyond common experience *that the opinion of an expert would assist the trier of fact'* (italics added) . . . . The jury [or trial court] need not be wholly ignorant of the subject matter of the opinion in order to justify its admission; if that were the test, little expert opinion testimony would ever be heard. Instead, the statute declares that even if the jury has some knowledge of the matter, expert opinion may be admitted wherever it would 'assist' the jury." (*People v. McDonald* (1984) 37 Cal.3d 351, 367; see also *People v. Stoll* (1989) 49 Cal.3d 1136, 1153-1154.)

Relying on the Fourth Appellate District opinion in *People v. Baker, supra,* 204 Cal.App.4th at page 1246, appellant argues that a witness's on-the-record-recitations of sources relied on for an expert opinion does not transform inadmissible matter into independent proof of a disputed fact. The discussion in *Baker* is dicta because defendant

did not object on hearsay grounds or object that it was "beyond the scope of expert opinion testimony . . . . Because there was no objection, the [trial] court could properly rely on [it]." (*Ibid.*)

Like the defendant in *Baker*, appellant did not timely object when Doctor Perry testified that appellant threatened to kill the loss prevention officers and charged an officer with a shopping cart. Doctor Perry explained it was "only about $27 worth of merchandise. So to threaten someone's life and attempt to assault them over such minor items, to me suggests an irrational thought process. [¶] And, according to the probation officer's report, Mr. Stevens, also made a statement consistent with delusional ideation. He stated to the arresting officers that he watches the backs of the employees at the drug store."

"[I]n the context of an MDO proceeding, . . . a qualified mental health professional may refer to and consider the underlying probation report in expressing an opinion that the prisoner is an MDO. This includes the criterion or element that the underlying offense is one involving 'force or violence.' " (*People v. Miller, supra,* 25 Cal.App.4th at p. 917.)

Explication of People v. Miller

This division is tasked with appellate review of a great many California MDO cases. Since the inception of the MDO law, we have reviewed hundreds of these cases. In the early 1990s, there was a spate of appeals where appellants were protesting the district attorney's policy of producing the victim or victims of the underlying crime or crimes to show the crime involved force or violence. The basic theory of these appeals was that it was "unfair" and "prejudicial" because the victims, in relating what had happened, were so sympathetic that the prisoner was incapable of receiving a fair jury trial on the MDO issue. This, coupled with a common sense view that such victims should not be "revictimized" by having to testify again and relive their unpleasant experience, we articulated the *Miller* rule. In a sexually violent predator case, the Legislature and California Supreme Court recognized that a person should not be

revictimized in a post-conviction proceeding by being recalled to again testify. (*People v. Otto* (2001) 26 Cal.4th 200, 208.)

Baker (204 Cal.App.4th at p. 1245, fn. 9) disagrees with the *Miller* rule: "[An] expert opinion is not necessary -- or admissible -- with respect to the facts underlying the offense or whether the offense posed a risk of harm to others, or the factual inquiry as to whether the prisoner received 90 days of treatment." If one asks, in the abstract, whether a psychiatrist or psychologist can render an opinion on the question of whether a crime involves force or violence, we agree it is not within the expertise of the witness. We reach an opposite conclusion in the specific context of an MDO proceeding. (*People v. Miller, supra,* 25 Cal.App.4th at p. 917.)

In our view, the dicta in *Baker, supra,* 204 Cal.App.4th 1234, take an unrealistic view of the law of evidence in an MDO case. To be sure, the Evidence Code applies to MDO trials. But *Baker's* dicta dramatically reduce the sweep of Evidence Code section 801 and violate the spirit of the *McDonald* rule. (See *ante* at p. 3.) *Baker's* dicta fail to take into account the practical implications and fair administration of the MDO law. Its dicta tell the People how not to proceed, but fail to tell the People how to proceed. Absent a stipulation, the People must prove each and every element of the MDO criteria. Following *Baker*, the People would be required to produce eyewitness testimony on the nature of the offense to determine whether or not it involved the use of force or violence. This, of course, is the very procedure that we sought to avoid when we decided *Miller*.

The *Miller* rule is firmly rooted and it works. When we articulated it, we considered the elements of a prima facie MDO case, statutory and decisional law regarding expert opinion evidence, and policy considerations of how the law should be applied. Relying on common sense, we came to a reasoned procedural rule. When stripped of verbiage and adjectives, the basic inquiry centers on the prisoner's mental health and potential threat to the public. Who better than a psychiatrist or a psychologist should opine, one way or another, on this ultimate issue?

"An offender is eligible for commitment under the MDO Act if all of the following six factors are met: (l) the prisoner has a severe mental disorder; (2) the prisoner used force or violence in committing the underlying offense; (3) the prisoner had a disorder which caused or was an aggravating factor in committing the offense; (4) the disorder is not in remission or capable of being kept in remission in the absence of treatment; (5) the prisoner was treated for the disorder for at least 90 days in the year before being paroled; and (6) because of the disorder, the prisoner poses a serious threat of physical harm to other people. [Citations.]" (*People v. Sheek* (2004) 122 Cal.App.4th 1606, 1610; compare *People v. Merfield* (2007) 147 Cal.App.4th 1071, 1075, fn. 2.)

We believe there is a mental health component to each of these factors. These factors must be interpreted in the particular context of an MDO case. There can be no doubt or room for debate on factors (l), (3), and (4), and *Baker* does not indicate to the contrary. As to factor (2), the very facts of this case illustrate just why there is a mental health component with respect to the use of force or violence, or the threat thereof. (*People v. Pretzer* (1992) 9 Cal.App.4th 1078, 1082-1083.) It is the mental health expert who can bring the raw facts together with a mental health explanation into perspective for the jury. (See *ante,* at p. 4)

As to factor (5), whether an expert can testify that a prisoner has received 90 days of treatment, we ask, why not? Surely a treating or testifying doctor is capable of deciphering medical records and counting days on a Gregorian calendar. Are the People required to produce the custodian of records to say that the prisoner received the 90 days of treatment? Such records are not kept merely for the 90 day rule, doctors rely on them in administering a course of treatment. They are "reliable" and a doctor's interpretation of these records will "assist" the trier of fact in making its determination. (Evid. Code § 801 subd. (a).) Most jurors do not have "common experience" to read or interpret such records. (*Ibid*.) Any requirement that the custodian of records be called as a witness to testify concerning the treatment provided and the mathematical computation of days of treatment would accomplish nothing. In addition, there is a mental health component

here as well. A doctor can relate to the jury the nature of the treatment, what it was to accomplish, and why it either succeeded in part, failed in part, or failed all together.

As to factor (6), whether the prisoner poses a threat of physical harm to other people, it is well established that such an opinion is the nature of forensic mental health opinion evidence. For example, such an expert is allowed, in some circumstances, to so opine in the context of the penalty phase in a capital murder case (*People v. Murtishaw* (1981) 29 Cal.3d 733, 774; *Barefoot v. Estelle* (1983) 463 U.S. 880, 896 [77 L.Ed.2d 1090, 1106]) and a sexually violent predator proceeding. (*People v. Therrian* (2003) 113 Cal.App.4th 609, 613; see also *People v. Williams* (2003) 31 Cal.4th 757, 761, 778.) Preclusion of expert testimony on this issue "is somewhat like asking us to disinvent the wheel." (*Barefoot*, at p. 896 [77 L.Ed.2d at p. 1106.)

Finally, the prisoner has a panoply of constitutional and statutory rights which are adequate to protect him. In addition, there is a perfectly good Superior Court Judge presiding over the trial whose job it is to safeguard those rights and who, pursuant to the Evidence Code, has considerable discretion in determining the admissibility of expert opinion evidence. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617-619.)

We explained in *Miller* that a doctor can rely on reliable hearsay contained in a probation report in forming an expert opinion as to "force or violence," or a threat thereof. If the opinion is too speculative, we are confident that the trial court will not allow such opinion. We have explicated *Miller* and have shown, legally and logically, why there is a "mental health" component to each of the MDO factors. In our view, the MDO procedures that we adopted in *Miller* have served the prisoners and the People well for almost 20 years. To quote Justice Oliver Wendell Holmes: "The life of the law has not been logic; it has been experience." (Holmes, The Common Law (l881) reprinted in Leflar, Appellate Judicial Opinions (l974) p. 217; see also *New York Trust Co. v. Eisner* (1921) 256 U.S. 345, 349 [65 L.Ed. 963, 983].) "[A] page of history is worth a volume of logic." (*New York Trust Co. v. Eisner* (1921) 256 U.S. 345, 349 [65 L.Ed. 963, 983].)

For these reasons, we reject the *Baker* dicta concerning the scope of expert opinion. Instead, we rely on the rationale of our *Miller* case.

The judgment is affirmed.

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YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Barry T. LaBarbara, Judge

Superior Court County of San Luis Obispo

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