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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. VERA NELSON, Defendant and Appellant.	D059930 (Super. Ct. No. SCD167943)

APPEAL from an order of the Superior Court of San Diego County, William H. Kronberger, Jr., Judge. Affirmed.

Vera Nelson appeals an order recommitting her to the Department of Mental Health for one year as a mentally disordered offender (MDO). (Pen. Code, § 2960 et seq.) Nelson contends the trial court erred by (1) admitting the details of hearsay evidence in medical reports on which expert witnesses relied in forming their opinions that by reason of her severe mental disorder she continued to pose a physical threat to

others; (2) allowing expert witnesses to instruct the jury on MDO law and usurp the jury's factfinding role; and (3) inadequately instructing the jury. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

In 2002 Nelson was living in a care facility for the mentally ill. Nelson and her roommate had been drinking in their room and an argument erupted. Nelson grabbed her roommate and flung her across the room, causing her to hit a dresser and fall. While she was lying on the floor, Nelson beat her and kicked her in the head, yelling "get up bitch." Several days later the roommate died from a brain injury.

In 2004 the People filed an information charging Nelson with voluntary manslaughter (Pen. Code, § 192, subd. (a); count 1) and battery with serious bodily injury (Pen. Code, § 243, subd. (d); count 2). As to count 2, the information alleged Nelson personally inflicted great bodily injury within the meaning of Penal Code section 1192.7, subdivision (c)(8).

Nelson pleaded guilty to count 1 in exchange for a stipulated three-year prison term and the dismissal of count 2 and the personal infliction allegation. In March 2005 she was committed to Patton State Hospital (Patton) as an MDO, and in 2008, 2009, and 2010 the court issued orders granting the People's petitions for one-year extensions of her commitment.

In November 2010 the People petitioned for an additional one-year extension of Nelson's commitment. A jury trial was held in June 2011. In a motion in limine, the prosecution sought an order allowing it to submit all reliable evidence on which its experts reasonably relied.

The People sought to introduce "Interdisciplinary Notes" made by Patton staff members recording three incidents of Nelson's aggression against other persons during the preceding year. One of the incidents began about 8:50 p.m. on January 2, 2011, and continued to about 1:00 a.m. the next day. Nelson complained to staff that her roommate was playing her radio too loudly. Staff told the roommate to turn the radio down and she complied. Staff left the room, and a few minutes later they heard yells for help. Staff returned and found Nelson choking her roommate. Staff was required to separate Nelson from her roommate. Nelson stated, "that bitch won[']t let me sleep, she turned her radio up again." Nelson was given medications.

Before long, Nelson attempted to return to her room. When staff attempted to redirect her, she picked up a trash can and threw it at staff, requiring them to activate a safety alarm. When reinforcements arrived, Nelson began swinging at staff with a closed fist. She continued "to fight and struggle," and she was placed in "5 point restraints for protection of others." From that point until the incident ended, Nelson continued to "mistreat" staff and spit at staff. She told staff, "I'm going to fuck you all up, I am going to one by one," and, "I'm going to get all of you one by one. I'll kill you."

On the evening of January 4, 2011, Nelson grabbed another patient by her upper arms and threw her to the floor. Approximately 10 minutes later, when staff was counseling Nelson, she ran toward the patient as if to attack her again. Staff grabbed Nelson's shirt to hold her back, but the shirt tore and she grabbed the patient and would not let go. Nelson "began hissing, spitting and kicking at staff." Staff wrestled Nelson to the floor and placed her in restraints, as she yelled, "I'm going to kill all you bitches," "I'll

let you burn," "I'll blow your heads off with a shotgun," and "Keep me in seclusion and I'm going to show you all what's going to happen tomorrow night." Again, Nelson was medicated.

The third incident occurred on October 12, 2010. A staff member named Dean heard yelling coming from a bathroom. Dean opened the door of the bathroom as Nelson was starting to leave. Dean went to a stall and found a patient sitting on the toilet screaming, "She hit me. Look at my eye." Dean noted "slight redness and abrasion to right eye of patient." After some discussion Dean learned the altercation was over a cigarette.

The People argued the Interdisciplinary Notes were admissible under the business records and public records exceptions to the hearsay rule (Evid. Code, §§ 1271, 1280).[1] The People also argued the threats by Nelson to harm or kill staff members were admissible under section 1220, the party admission exception.

Nelson also filed a motion in limine. The motion acknowledged the hearsay in the Incident Notes was "clearly relevant" to the experts' opinions on continued risk of harm. Nelson sought a limiting instruction that the hearsay was not admissible to prove the truth of stated matters.

The court determined a limiting instruction was unwarranted because the Interdisciplinary Notes had a dual purpose. In addition to assisting the experts in forming

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1 Further statutory references are also to the Evidence Code unless otherwise specified.

their opinions, the hearsay was independently admissible to show the truth of the stated matters under section 1280. As to the multiple hearsay in the note on the bathroom incident, the court also found admissibility under section 1240, the spontaneous statement exception to the hearsay rule, and section 1250, the physical condition component of the state-of-mind exception. The court determined the hearsay was trustworthy and reliable because the recording of the bathroom incident was "close enough in time" to its occurrence.

The prosecution presented two expert witnesses, Richard G. Rappaport, M.D., a forensic psychiatrist, and Randy Stotland, Ph.D., a psychologist. Before Dr. Rappaport's testimony, the court admitted the Interdisciplinary Notes into evidence. Dr. Rappaport testified he reviewed the notes and interviewed Nelson to determine whether she met MDO criteria. He explained she continued to suffer from schizophrenia, a psychotic disorder in which the patient is out of touch with reality and characteristically has hallucinations and delusions.

The prosecution had Dr. Rappaport read the Interdisciplinary Notes to the jury. In addition, he testified Nelson volunteered to him during the interview that she "had assaulted two women in recent months." Dr. Rappaport's report states: "She did acknowledge that she had several episodes of anger, two fights in the past year, one with . . . a patient, who she told to get out of her room when the patient was talking to her roommate." Nelson admitted she hit the patient and knocked her to the floor, and nurses wrote her up for the conduct. She also admitted she "had a fight with another patient . . . ,

a roommate, and accused her of being noisy and talking loud at night, which is the reason for her hitting her."

Dr. Rappaport testified that while Nelson had improved as to "the symptoms of hallucinations and delusions," and she was asymptomatic during the interview, she was not in remission as evidenced by "repeated episodes of aggressiveness and violence with other people." He added that "her behavior is not controllable on her part."

Dr. Stotland testified he met with Nelson, but she declined an interview. He considered her lack of cooperation a red flag because "when somebody has committed the type of crime she has, . . . they need to demonstrate that they are being cooperative, that they are no longer a danger. And by being cooperative with staff and evaluating physicians that's the way you show that you no longer are a danger."

Dr. Stotland testified he had evaluated Nelson in previous years, and she continued to suffer from paranoid schizophrenia. Based on the Interdisciplinary Notes he believed her conduct was attributable to schizophrenia. Dr. Stotland testified that the January 4, 2011 incident was most distressing because it "is so similar to the original manslaughter. She takes this woman and grabs her and throws her down to the floor, very similar to the original offense, same type of behavior." Dr. Stotland believed Nelson's illness was not in remission because "she continue[d] to show this instability and the agitation and getting into fights with people and assaulting people." Thus, in his view Nelson continued to pose a danger of physical harm to others.

Nelson presented no evidence. The parties had stipulated that exhibits may go into the jury room during deliberations, and the court allowed the jury to have exhibits 1

through 7, which are the Interdisciplinary Notes. The jury returned a verdict finding Nelson was an MDO, and the court ordered a one-year extension of her commitment.

DISCUSSION

I

MDO Law

"An MDO proceeding is civil, rather than criminal, in nature." (*People v. Fisher* (2009) 172 Cal.App.4th 1006, 1013.) "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 during and after the termination of their parole until their mental disorder can be kept in remission. [Citation.] Although the nature of an offender's past criminal conduct is one of the criteria for treatment as [an MDO], the MDO Act itself is not punitive or penal in nature. [Citation.] Rather, the purpose of the scheme is to provide MDO's with treatment while at the same time protecting the general public from the danger to society posed by an offender with a mental disorder." (*In re Qawi* (2004) 32 Cal.4th 1, 9.)

"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.' " (*Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1063.) A recommitment "requires proof beyond a reasonable doubt that (1) the patient has a severe mental disorder; (2) the disorder 'is not in remission or cannot be kept in remission without treatment'; and (3) by

reason of that disorder, the patient represents a substantial danger of physical harm to others." (*People v. Burroughs* (2005) 131 Cal.App.4th 1401, 1404; Pen. Code, §§ 2970, 2962.) The phrase " 'cannot be kept in remission without treatment' " means "that one of four specified acts have occurred during the previous year—a violent act except in self-defense, a serious threat, intentional property damage or failure to follow the treatment plan." (*People v. Burroughs*, at p. 1407.)

II

Admissibility of Interdisciplinary Notes

A

Nelson acknowledges the expert witnesses properly relied on the Interdisciplinary Notes in forming their opinions. She asserts, however, that because they contain hearsay and multiple hearsay, the trial court erred by allowing the experts to discuss them in detail, providing the jury with them during deliberations, and refusing her request for a limiting instruction. We disagree with Nelson's analysis.

Hearsay is evidence of an out-of-court statement offered to prove the truth of its contents. (*People v. Ortiz* (1995) 38 Cal.App.4th 377, 389.) Hearsay is inadmissible unless it comes within an exception to the hearsay rule. (§ 1200.) Multiple hearsay is admissible if each layer falls within an exception to the hearsay rule. (§ 1201.)

"An expert witness may express an opinion based on information without regard to the information's admissibility in evidence." (*People v. Chapman* (1968) 261 Cal.App.2d 149, 178; § 801, subd. (b).) Mental health experts routinely rely on interview reports and observations of nontestifying experts. (*People v. Cooper* (2007) 148

Cal.App.4th 731, 746-747; *People v. Dodd* (2005) 133 Cal.App.4th 1564, 1569.) "A qualified expert is entitled to render an opinion on the criteria necessary for an MDO commitment, and may base that opinion on information that is itself inadmissible hearsay if the information is reliable and of the type reasonably relied upon by experts on the subject. [Citations.] A trial court, however, may not admit an expert opinion based on information furnished by others that is speculative, conjectural, or otherwise fails to meet a threshold requirement of reliability." (*People v. Dodd, supra,* 133 Cal.App.4th at p. 1569.)

"Hearsay relied upon by experts in formulating their opinions is not testimonial because it is not offered for the truth of the facts stated but merely as the basis for the expert's opinion." (*People v. Cooper, supra,* 148 Cal.App.4th at p. 747.) "The reason is clear; if hearsay is admitted for a nonhearsay purpose, it does not turn upon the credibility of the hearsay declarant, making cross-examination of that person less important. 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 their contents." (*Ibid.*)

Nelson relies on this general rule: " 'While an expert may state on direct examination the matters on which he relied in forming his opinion, he may not testify as to the *details* of such matters if they are *otherwise inadmissible*." (*People v. Coleman* (1985) 38 Cal.3d 69, 92, italics added, disapproved of on another point in *People v. Riccardi* (2012) 54 Cal.4th 758; *People v. Price* (1991) 1 Cal.4th 324, 416 ["expert may not under the guise of stating reasons for an opinion bring before the jury incompetent hearsay evidence"].) "The trial court has considerable authority and discretion to prevent

the wholesale admission of incompetent hearsay, such as by resort to its discretion provided in . . . section 352 and by its use of instructions to the jury." (*People v. Cooper*, *supra*, 148 Cal.App.4th at p. 747.)

Here, however, the trial court determined the Interdisciplinary Notes the experts relied on were not "otherwise inadmissible." (*People v. Coleman*, *supra*, 38 Cal.3d at p. 92.) Rather, the court ruled the notes were independently admissible for the truth of their contents under statutory exceptions to the hearsay rule. When hearsay is admitted from other sources, expert witnesses are "not precluded from reiterating the same facts during their direct examinations." (*People v. Dean* (2009) 174 Cal.App.4th 186, 193 (*Dean*).)

The court admitted the Interdisciplinary Notes under section 1280, the public records exception to the hearsay rule.[2] " 'The object of this hearsay exception "is to eliminate the calling of each witness involved in preparation of the record and substitute the record of the transaction instead." ' " (*Bhatt v. State Dept. of Health Services* (2005) 133 Cal.App.4th 923, 929 (*Bhatt*).)

Additionally, on the patient's report to a hospital staff member that Nelson struck her in the eye the court relied on the spontaneous statement exception under section

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2 Section 1280 provides: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition, or event. [¶] (c) The source of information and method and time of preparation were such as to indicate its trustworthiness."

1240,[3] and the physical sensation component of the state-of-mind exception under section 1250.[4] " ' "To render [statements] admissible [under section 1240] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it." ' " (*People v. Thomas* (2011) 51 Cal.4th 449, 495.) A declaration of then existing pain is admissible under section 1250 (*In re Tanya P.* (1981) 120 Cal.App.3d 66, 70), because it has essentially the same indicia of reliability as a spontaneous statement.

The People also argued the incident notes were admissible under section 1271, the business records exception to the hearsay rule.[5] As with section 1280, the object of the

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3 Section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

4 Section 1250 provides: "(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of . . . pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at the time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant." Under section 1252, "Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness."

5 Section 1271 provides: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: [¶] (a) The writing was made in the regular course of a

business records exception is "to eliminate the necessity of calling each witness, and to substitute the record of the transaction or event." (*Loper v. Morrison* (1944) 23 Cal.2d 600, 608-609.) Additionally, for Nelson's threats to harm or kill staff members the People cited section 1220, the exception for party admissions.[6] "The rationale underlying this exception is that the party cannot object to the lack of the right to cross-examine the declarant since the party himself [or herself] made the statement." (Cal. Law Revision Com. com., 29B pt. 4 West's Ann. Evid. Code (1995 ed.) foll. § 1220, p. 71.)

While the court did not address sections 1271 and 1220, "if a judgment is correct on any theory, the appellate court will affirm it regardless of the trial court's reasoning. [Citations.] All intendments and presumptions are made to support the judgment on matters as to which the record is silent." (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.)

"Hospital . . . records, if properly authenticated, fall within the umbrella of the business record exception." (*Dean*, *supra*, 174 Cal.App.4th at p. 198, fn. 5; accord, *In re R.R.* (2010) 187 Cal.App.4th 1264, 1280; *In re Troy D.* (1989) 215 Cal.App.3d 889, 902-903; *Loper v. Morrison*, *supra*, 23 Cal.2d at p. 608 ["There is no reason to believe that a

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business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

6 Section 1220 provides: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity."

hospital record is not as truthful as a record kept by a commercial firm. It is a record upon which treatment of the patient is based, and experience has shown it to be reliable and trustworthy."].)[7] Hospital records may also qualify as public records under section 1280 if properly authenticated. (*Bhatt*, *supra*, 133 Cal.App.4th at pp. 929-930.)

Nelson asserts the Incident Notes were inadmissible under sections 1271 or 1280 because the People did not call a witness to lay a proper foundation. The People claim the foundation was adequate because Patton produced the notes pursuant to a subpoena duces tecum. " 'Although similar to the business records exception [§ 1271], the official records exception differs in one important respect. . . . [S]ection 1271 "requires a witness to testify as to the identity of the record and its mode of preparation in every instance. In contrast, . . . [s]ection 1280 . . . permits the court to admit an official record or report without necessarily requiring a witness to testify as to its identity and mode of preparation *if the court takes judicial notice or if sufficient independent evidence shows*

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[7] Citing *People v. Reyes* (1974) 12 Cal.3d 486 (*Reyes*), Nelson asserts that "according to Supreme Court authority, psychiatric records are inadmissible under the business records exception of . . . section 1271." *Reyes* made no such blanket ruling. Rather, it upheld the exclusion of an opinion a psychiatrist made 20 years earlier that the defendant's victim suffered from "sexual psychopathy." (*Reyes*, *supra*, at p. 502.) The court concluded the opinion was too remote to be reliable, and it was "not an act, condition or event within the meaning of [section 1271]." (*Id.* at p. 503.) Nelson also claims that in *Dean*, *supra*, 174 Cal.App.4th 186, the court held "institutional records from state mental hospitals are generally 'inadmissible hearsay.' " In *Dean*, however, the court noted the hospital records were not admitted under section 1271. The question there was whether expert witnesses who relied on hearsay in the records could recite the details of the hearsay at trial. (*Dean*, at pp. 197-198, & fn. 5.)

that the record or report was prepared in such a manner as to assure its trustworthiness." ' " (*Bhatt, supra*, 133 Cal.App.4th at p. 929.)

Nelson, however, failed to preserve appellate review by raising a foundational objection at trial. Her in limine motion was directed solely to the expert witnesses' reliance on hearsay to the extent it was otherwise inadmissible. The motion does not address statutory exceptions to the hearsay rule. At the hearing, the court had no inkling of any foundational problem because Nelson agreed "the People do not have to lay an additional foundation to say that these documents are the documents from the record." When the court later admitted into evidence the incident notes for the truth of stated matters, Nelson's counsel stated that "other than the previous objection made, we have no objection to that."

" ' "[Q]uestions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court *on the ground sought to be urged on appeal*." ' " (*People v. Williams* (2008) 43 Cal.4th 584, 620, italics added; § 353, subd. (a).) " 'Specificity is required both to enable the court to make an informed ruling on the motion or objection and to enable the party proffering the evidence to cure the defect in the evidence.' " (*People v. Boyette* (2002) 29 Cal.4th 381, 424.) The failure to raise a specific objection to the admission of evidence results in forfeiture of appellate review. (*People v. Doolin* (2009) 45 Cal.4th 390, 434.) Nelson could not sit idly by and expect relief on appeal. Had she brought foundational problems to the court's attention, the People presumably could have rectified them.

In addition to forfeiting review of the admission of hearsay under sections 1271 and 1280, Nelson raised no objection to the court's reliance on sections 1240 and 1250 insofar as the bathroom incident is concerned. On appeal, she mentions sections 1240 and 1250, and the party admission exception on section 1220, only in passing. She does not claim the statutes were inapplicable.

In any event, any arguable error in admitting the Interdisciplinary Notes was harmless under both the state "reasonable probabilities" standard (*People v. Watson* (1956) 46 Cal.2d 818, 837) and the federal "beyond a reasonable doubt" standard (*Chapman v. California* (1967) 386 U.S. 18, 24) because there was other competent evidence of Nelson's continued violence. Nelson forthrightly admitted to Dr. Rappaport during her interview that she was recently violent toward other patients in two incidents. Nelson conceded that in one incident she struck a patient and knocked her to the floor, a scenario reminiscent of the voluntary manslaughter charge that resulted in her original commitment. Nelson ignores the admissions she made to Dr. Rappaport.

B

Nelson did object to the admission of the Interdisciplinary Notes under sections 1271 and 1280 on the ground they were "testimonial" in nature, and thus violated her right of confrontation and cross-examination. Nelson cited *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), in which the United States Supreme Court held that in a criminal case the Sixth Amendment's confrontation clause prohibits the "admission of testimonial statements of a witness who did not appear at trial unless [the witness] was

unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Id.* at pp. 53-54.)

An MDO proceeding, however, is a civil proceeding. "There is no right to confrontation under the state and federal confrontation clause in civil proceedings, but such a right does exist under the due process clause." (*People v.Otto* (2001) 26 Cal.4th 200, 214.) The Sixth Amendment and due process confrontation rights are not coextensive. (*Id. at* p. 209.) Due process in a civil proceeding "is not measured by the rights accorded a defendant in criminal proceedings, but by the standard applicable to civil proceedings." (*People v. Superior Court (Howard)* (1999) 70 Cal.App.4th 136, 154.)

In civil proceedings " '[d]ue process requires only that the procedure adopted comport with fundamental principles of fairness and decency. The due process clause of the Fourteenth Amendment does not guarantee to the citizen of a state any particular form or method of procedure.' " (*In re Parker* (1998) 60 Cal.App.4th 1453, 1462.) In *Otto*, our high court explained that the due process rights of a sexually violent predator (Welf. & Inst. Code, § 6604) depend on several factors, including "the government's interest, . . . the function involved, and the fiscal and administrative burdens that the additional or substitute procedural requirement[s] would entail." (*People v. Otto, supra,* 26 Cal.4th at p. 214.)

Although the Sixth Amendment is inapplicable, "Sixth Amendment cases . . . may provide helpful examples in determining the scope of the more limited right of confrontation held by probationers under the due process clause." (*People v. Johnson*

(2004) 121 Cal.App.4th 1409, 1412.) *Crawford* explained the Sixth Amendment is concerned with a "specific type of out-of-court statement." (*Crawford, supra,* 541 U.S. at p. 51.) *Crawford* notes, however, that the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Id*. at p. 68.)

Nelson contends the Interdisciplinary Notes were "testimonial" because the "prosecutor's use of these reports, as well as the experts' reliance on them, indicates they were prepared, at least in part, for use at trial, leading an objective person to reasonably believe they would be used in that manner." In *People v. Cage* (2007) 40 Cal.4th 965 (*Cage*), however, the California Supreme Court noted that *Crawford, supra*, 541 U.S. 36 mentioned, but did not expressly endorse, an objective test for determining whether hearsay was testimonial. (*Cage, supra,* at p. 984, fn. 14.) *Cage* explains that *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*), "now confirms that the proper focus is not on the mere reasonable chance that an out-of-court statement might later be used in a criminal trial. Instead, we are concerned with statements, made with some formality, which, *viewed objectively,* are for the *primary purpose* of establishing or proving facts for possible use in a criminal trial." (*Cage,* at p. 984, fn. 14; *Davis, supra,* at pp. 822, 828, 830.) Nelson ignores *Davis* and *Cage.*

We conclude the Interdisciplinary Notes are not testimonial in nature, and thus the due process right of confrontation does not arise. The notes were recorded by hospital staff members for purposes of discipline and safety of other patients and staff, and treatment of Nelson required by her conduct. The notes do not suggest staff was

concerned with possible future litigation. " 'Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law.' " (*People v. Johnson, supra,* 121 Cal.App.4th at p. 1413.)[8]

Moreover, there is no ground for reversal because any possible error of federal constitutional dimension was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Again, Nelson admitted to Dr. Rappaport that her violence toward others had continued, and one incident was remarkably similar to the underlying crime leading to the original commitment.

III

Scope of Expert Witness Testimony

Additionally, Nelson contends the court erred by allowing the expert witnesses to usurp the jury's role. She complains that the experts testified on MDO law, which is not within their area of expertise, and their testimony may have confused the jury because "there is the danger that [the experts'] definitions may be incorrect."

"As a general rule, the opinion of an expert is admissible when it is '[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . .' [Citation.] Additionally, in California: 'Testimony in the form of an opinion that is otherwise admissible is not objectionable because it

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8 Contrary to Nelson's argument, *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 is unhelpful. There, the United States Supreme Court held that certificates of analysis showing the results of forensic tests performed on a drug sample were testimonial in nature, and thus there was a right of confrontation. (*Id.* at p. 311.) Unlike the situation here, the sole purpose of the drug testing was litigation-based.

embraces the ultimate issue to be decided by the trier of fact.' [Citation.] However, the admissibility of opinion evidence that embraces an ultimate issue in a case does not bestow upon an expert carte blanche to express any opinion he or she wishes. [Citation.] There are limits to expert testimony, not the least of which is the prohibition against admission of an expert's opinion on a question of law." (*Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178.)

Before the experts testified, the court instructed the jury as follows: "The petition alleges that [Nelson] is a mentally disordered offender. To prove this allegation the People must prove beyond a reasonable doubt that: [¶] One, she has a severe mental disorder. [¶] Two, the severe mental disorder is not in remission or could not be kept in remission without continued treatment. [¶] And three, because of her severe mental disorder she presently represents a substantial danger of physical harm to others." The instruction correctly sets forth the People's burden under Penal Code section 2972. The court also instructed the jury on the definitions of severe mental disorder and remission, and the instructions correctly set forth the definitions stated in Penal Code section 2962, subdivision (a).

Dr. Rappaport's testimony followed. He was asked to give the jury "an idea" of what an MDO is, and he enumerated the criteria of "a severe mental disorder such as psychosis," the lack of remission, and a causal relationship between the severe mental disorder and aggressive, violent, or dangerous behavior. Nelson asserts the testimony was misleading because "the causal connection was not explained." Nelson, however, forfeited the matter by not objecting to the testimony. In any event, Dr. Rappaport

explained that in making an MDO assessment, he must determine whether the person is a danger to someone else "*as a result of that mental disorder*." (Italics added.)

When Dr. Rappaport was asked later to again give the jury an understanding of MDO criteria, Nelson objected on the ground the area was "outside the scope of expertise." The court overruled the objection, and we find no error. Dr. Rappaport and Dr. Stotland were retained to give their opinions on whether Nelson met MDO criteria, thus MDO criteria were necessarily within their area of expertise. Indeed, they could not give their opinions without addressing whether Nelson had a serious mental disorder, the disorder was in remission, and the disorder placed other persons in danger of physical harm. Further, the testimony did not run afoul of the rule against expert testimony on a question of law. The question of whether a person is an MDO is a factual matter, and there was no dispute as to the applicable law.

Nelson also asserts Dr. Stotland's definition of an MDO was unclear. She cites his testimony that "[i]f they have a severe mental disorder and if the mental disorder's not in remission and if by reason of that mental disorder they constitute a danger to others." Nelson, however, forfeited review of the matter by not raising an objection to the testimony. Further, the experts' testimony was not confusing or misleading. Both experts essentially parroted the jury instruction on MDO criteria, which the court repeated shortly before jury deliberations began.

Contrary to Nelson's position, the expert's testimony did not tell the jury how to vote or give the experts an added aura of expertise "likely to lead the jurors to accept their conclusions without full and critical assessment of the bases for those opinions." The

court instructed the jury, "Witnesses were allowed to testify as experts and to give opinions. You must consider the opinions, but you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide. . . . [C]onsider the expert's knowledge, skill, experience, training and education, the reasons the expert gives for his opinion, and facts or information on which the expert relied in reaching that opinion. . . . You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence." This is a correct statement of the law (see, e.g., *In re Scott* (2003) 29 Cal.4th 783, 823), and " '[a]bsent some contrary indication in the record, we presume the jury follows its instructions [citations] "and that its verdict reflects the legal limitations those instructions imposed." ' " (*Garcia v. ConMed Corp.* (2012) 204 Cal.App.4th 144, 162.)

IV

Jury Instructions

Nelson also claims instructional errors, to which a de novo standard of review applies. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "A court must instruct on the general principles of law that are relevant to the issues in a given case. Instructions, therefore, must disclose the principles that are closely and openly connected with the facts and are necessary for the jury's understanding and deliberation of the case." (*People v. Beeson* (2002) 99 Cal.App.4th 1393, 1401.)

Nelson asserts the court erred by denying her request for a limiting instruction on the expert witnesses' use of the details of the hearsay in the Interdisciplinary Notes. As discussed, however, the notes were independently admitted under statutory exceptions to

the hearsay rule, without any foundational objection by Nelson, and thus the experts could properly discuss and rely on the details of the hearsay. (*Dean*, *supra*, 174 Cal.App.4th at p. 193.)

Additionally, Nelson asserts the court erred by not repeating an instruction at the end of trial that she was presumed not to be an MDO. At the beginning of trial, the court instructed the jury that Nelson "is presumed not to be a mentally disordered offender. She does not have to prove that she is not a mentally disordered offender." At the end of trial, the court instructed the jury as follows: "The fact that a petition to declare [Nelson] a mentally disordered offender has been filed is not evidence that the petition's true. You must not be biased against [her] just because the petition has been filed and this matter has been brought to trial. The [People are] required to prove the allegations of the petition are true beyond a reasonable doubt." The court went on to instruct on reasonable doubt.

Nelson cites no authority suggesting the court was required to instruct the jury she was presumed not to be an MDO. In *People v. Beeson*, *supra*, 99 Cal.App.4th 1393, 1410, another division of this court held: "In a civil proceeding under the MDO law, while the court must instruct [the jury] on the burden of proof, there is no basis for an additional instruction on the presumption of non-MDO status. The statute [Pen. Code, § 2972] does not suggest such a requirement. A state's decision 'to provide some of the safeguards applicable in criminal trials cannot itself turn these proceedings into criminal prosecutions requiring the full panoply of rights applicable there.' " (Fns. omitted.) We agree with this analysis.

Lastly, Nelson asserts the court had a sua sponte duty to instruct the jury that an element of her recommitment was a finding she suffered from a volitional impairment that caused her serious difficulty in controlling her violent behavior. Nelson acknowledges that in *People v. Putnam* (2004) 115 Cal.App.4th 575 (*Putnam*), an MDO proceeding, the court rejected the same argument. Nelson asserts *Putnam* was wrongly decided because it was based on *People v. Williams* (2003) 31 Cal.4th 757 (*Williams*), which pertains to a different statutory scheme.

"[T]he safeguards of personal liberty embodied in the due process guaranty of the federal Constitution prohibit the involuntary confinement of persons on the basis that they are dangerously disordered without 'proof [that they have] serious difficulty in controlling [their dangerous] behavior.' " (*Williams, supra*, 31 Cal.4th at p. 759, quoting *Kansas v. Crane* (2002) 534 U.S. 407, 413 (*Crane*).) In *Williams,* our Supreme Court applied the due process standard established in *Crane* to a civil commitment scheme under the Sexually Violent Predators Act (SVPA) (Welf. & Inst. Code, § 6600 et seq.). The defendant in *Williams* contended reversal of his commitment was required because the statutory language of the SVPA did not include the federal constitutional requirement of proof of a mental disorder that causes serious difficulty in controlling behavior, and the court did not instruct the jury on the requirement of volitional impairment. (*Williams*, *supra*, at p. 764.)

The Supreme Court rejected the defendant's position, explaining that "[b]y its express terms, the SVPA limits persons eligible for commitment to those few who have already been convicted of violent sexual offenses against multiple victims [citation], and

who have 'diagnosed mental disorder[s]' [citation] 'affecting the emotional or volitional capacity' [citation] that 'predispose[] [them] to the commission of criminal sexual acts in a degree constituting [them] menace[s] to the health and safety of others' [citation], such that they are 'likely [to] engage in sexually violent criminal behavior' [citation]. This language inherently encompasses and conveys to a fact finder the requirement of a mental disorder that causes serious difficulty in controlling one's criminal sexual behavior." (*Williams, supra*, 31 Cal.4th at p. 759.) The court concluded that because the jury instructions tracked the statutory language, no additional instruction was necessary. (*Ibid.*)

In *Putnam*, the court acknowledged *William, supra*, 31 Cal.4th 757 pertains to a different statutory scheme, but concluded its rationale likewise applies to an MDO proceeding. *Putnam* explains that "[i]n the MDO context, just as in the SVPA context, instructing the jury with the applicable statutory language adequately informs the jury of the kind and degree of risk it must find to be present in order to extend an MDO commitment. The instructions here informed the jury that in order to find that appellant had a severe mental disorder, it had to find that he had 'an illness or disease or condition that substantially impair[ed] [his] thoughts, perception of reality, emotional process, or judgment, or which grossly impair[ed] [his] behavior.' Moreover, in order to find that the disorder was not in remission, the jury had to find that 'the overt signs and symptoms of the severe mental disorder' were not under control. Finally, the jury was instructed that it had to find that '*by reason of* such severe mental disorder, [appellant] represents a

substantial danger [of] physical harm to others.' " (*Putnam, supra,* 115 Cal.App.4th at pp. 581-582.)

Putman adds: "Given these instructions, taken as a whole, we conclude beyond a reasonable doubt [citation] that the jury could not have sustained the section 2970 petition in this case without having found that, as a result of appellant's mental disorder, he suffered from a seriously and substantially impaired capacity to control his behavior, and that, for this reason, he represented a substantial danger of physical harm to others. In other words, the instructions given here, which tracked the language of the MDO statute, necessarily encompassed a determination that appellant had serious difficulty in controlling his violent criminal behavior, and thus . . . separate instructions on that issue were not constitutionally required." (*Putnam, supra,* 115 Cal.App.4th at p. 582.)

Here, as in *Putnam, supra,* 115 Cal.appl.4th 575 the jury was instructed that to find Nelson an MDO, it must find "she has a severe mental disorder"; "the severe mental disorder's not in remission or can't be kept in remission without continued treatment"; and "because of her severe mental disorder, she presently represents a substantial danger of physical harm to others." The jury was also instructed that a "severe mental disorder is an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process or judgment; or that grossly impairs his or her behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission in the absence of treatment is unlikely. It doesn't include a personality or adjustment disorder or mental retardation or other developmental disabilities or addiction to or abuse of intoxicating substances." Further, the jury was instructed that "[r]emission

means that the external signs and symptoms of the severe mental disorder are controlled by either psychotropic medication or psychosocial support."

We agree with the court in *Putnam*, *supra*, 115 Cal.App.4th 575 that these instructions, which comport with MDO law, are sufficient, and that in making the MDO finding the jury implicitly determined Nelson's mental disorder caused serious difficulty in controlling her violent behavior. Thus, her recommitment as an MDO met federal due process standards.

DISPOSITION

The order is affirmed.

MCCONNELL, P. J.

WE CONCUR:

HALLER, J.

IRION, J.

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CERTIFIED FOR PARTIAL PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. VERA NELSON Defendant and Appellant.	D059930 (Super. Ct. No. SCD167943) ORDER CERTIFYING OPINION FOR PARTIAL PUBLICATION

THE COURT:

The opinion filed August 30, 2012, is ordered certified for publication with the exception of parts III and IV.

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MCCONNELL, P. J.

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