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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>SONIA HERMOSILLO,<br>Defendant and Appellant. | G061378<br>(Super. Ct. No. 11CF2310)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, Kimberly Menninger, Judge. Affirmed in part, reversed in part and remanded.

Jason L. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Charles C. Ragland, Assistant Attorney General, A. Natasha Cortina and Christine Levingston Bergman, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

The grim and paradoxical reality of our system of justice is that it is sometimes unable to deliver a result which feels truly just to all involved. This case provides an especially heartbreaking illustration. Appellant Sonia Hermosillo was by all accounts a doting mother to her two young daughters and a wonderful wife and homemaker for her husband, Noe. When she became pregnant with a baby boy, the couple was excited, as they had been wanting a boy for some time. The baby, Noe, Jr., was born late term in January 2011 and due to his over-gestation, had several physical challenges which required medical care and therapy. Undaunted, appellant diligently took her son to his appointments and worked with his care team to ensure he was progressing in his treatments.

But when Noe was only a few months old, appellant's behavior completely changed. She began acting very strange. She would stare into space, and wouldn't respond to her husband's questions. He began taking her to mental health professionals, but because the family lacked sufficient resources or insurance, he was unable to ensure she received continuous care through one provider. She was thus seen by multiple providers at different clinics, all of whom saw her on isolated occasions and diagnosed her with one or another form of depression. She was once hospitalized on an involuntary hold for being gravely disabled and a danger to herself. (See Welf. & Inst. Code, § 5150, subd. (a).) But the burden and expense of inpatient treatment for his wife proved too much for Noe, Sr., and he obtained her release against medical advice. In stark contrast to the devoted mother she had once been, her mental condition had deteriorated to the point where Noe, Sr., did not feel comfortable leaving their children alone with her.

One day, after the family returned from one of baby Noe's therapy appointments at Childrens Hospital of Orange County (CHOC), appellant took the baby from their home while Noe, Sr., was in the bathroom. She drove the baby back to CHOC, up to the fourth floor of the hospital parking structure. Then she removed his

cranial helmet, required as part of his therapy. She placed him on the wall in a blanket, and pushed him to his death. Then, with a completely blank, emotionless demeanor, she peered over the edge to the sidewalk below, before getting in her vehicle, validating her parking, and driving away.

Infanticide is inherently disturbing, but this one is also perplexing. What mother in her right mind would stoically drop her baby from a height in a public manner, and then calmly leave? The answer is suggested by the question itself – appellant wasn't in her right mind.

But "right mind" is not a legal concept. Appellant was promptly charged with first degree murder. She pleaded not guilty and not guilty by reason of insanity. Trial was delayed for approximately *10 years* because appellant was repeatedly deemed not competent to stand for one. She was instead sent to Patton State Hospital for psychiatric treatment on several occasions. In 2022, having been restored to competency, a jury quickly convicted her of murdering her child all those years ago. The same jury found her legally sane in the second phase of her trial and she was sentenced to 25 years to life in prison.

On appeal, our job is not to render judgment in a moral sense, but only as to the legal issues raised. We find no error in the trial court's decision to allow a prominent forensic psychologist to testify for the prosecution, and consequently, we leave intact the jury's finding of legal sanity. However, we conclude the trial court failed to take some necessary factors into account during sentencing when considering whether appellant was eligible for probation. We therefore reverse only as to sentencing, and remand to allow the trial court to consider those factors.

## FACTS

On the evening of August 22, 2011, a woman and her son were waiting for a bus to take them home from the boy's speech therapy appointment. They were in front of CHOC, next to the hospital's parking garage. Suddenly, a white bundle fell to the ground nearby. The witness looked up and saw a woman, appellant, looking over the edge of the parking structure above. She seemed "normal" and "calm." When the witness went closer to the bundle, she could see it was a baby, with blood coming from its head. Horrified, she looked up again and saw the woman look to either side and then down to where the baby had dropped. Again, no emotion was shown. The witness described her as having a "lost look on her face."

Medical staff at the hospital attended to the infant, but he did not survive. Baby Noe's autopsy showed he died of severe blunt cranial cerebral trauma, and the manner of death was homicide.

Armed with eyewitness descriptions of appellant's vehicle, patrol officers with the City of Orange Police Department apprehended her a few hours later still driving in the vicinity of CHOC. Appellant yielded when officers initiated a felony car stop, and complied with instructions when they were spoken in Spanish, her native tongue. While awaiting detectives at the police department interview room, appellant repeatedly asked what had happened to the baby, and whether she could go home.

City of Orange Detectives Joey Ramirez and Philip McMullin proceeded to interview appellant. Because Detective McMullin was a fluent Spanish speaker, he took the lead. A transcript of the interview, with Spanish translation, is in our record. We find appellant's responses as transcribed inconsistent and often times, incoherent.

She knew she had been brought to the station because she had harmed her child, but immediately asked, "*No le paso nada*?" Or, "Nothing happened to him?" When asked how she harmed him, she gave a response she would repeat throughout the

interview to many of the detectives' questions: ". . . *no lo quiero*," or "I don't love him." She gave this response even where it didn't fit the question, as in this example:

"MCMULLIN: *Es difficil cuidarlo*?

"**Is it difficult to take care of him?**

"HERMOSILLO: *Si, no lo quiero*.

"**Yes, I don't love him.**

"MCMULLIN: *Llora mucho*?

"**Does he cry a lot?**

"HERMOSILLO: *No, no llora*.

"**No, no he doesn't cry.**

"MCMULLIN: *No llora y porque no lo quiere*?

"**He doesn't cry then why don't you love him?**

"HERMOSILLO: *No lo quiero*.

"**I don't love him.**"

She continued to say she wanted her baby to die, but she also asked whether she could go to Mexico and leave the baby at the police station. She told the detectives that Noe, Jr., was "sick" and that was why she didn't love him and wanted him to die. They asked for details on Noe, Jr.'s, medical condition, and she responded that he would be a baby all of his life, unable to walk or talk, and wearing diapers. She said she chose the CHOC parking structure because it was high enough that she thought he would die, but only a few seconds later, she asked whether she could leave the baby at the police station.

Two days later, a felony information was filed against appellant on one count of first degree murder and one count of assault of a child. At the arraignment on September 30, 2011, the court suspended criminal proceedings and ordered a competency

hearing under Penal Code section 1368[1] after doubts about appellant's competency were raised by her public defender. Appellant was found competent on March 12, 2012, and proceedings resumed. She entered pleas of not guilty and not guilty by reason of insanity on January 2, 2013.

Trial was set for May 30, 2014, but appellant's retained counsel, Jacqueline Goodman again raised concerns again about her competency. Competency proceedings began anew, and appellant was deemed a mentally incompetent person under section 1368 on August 29, 2014. By February 2015, she had been ordered committed to Patton State Hospital.

Competency was restored and proceedings resumed in late 2016. But in late January 2019, Attorney Goodman once again raised concerns about appellant's competency and criminal proceedings were suspended. In January 2020, criminal proceedings were reinstated, but the COVID-19 pandemic hit only two months later. The guilt phase of trial began in July 2021, and appellant was found guilty on August 11, 2021.

The sanity phase was primarily a battle of the experts[2] taking place before the same jury beginning on August 24, 2021. Appellant had the burden of proving her defense, and went first with her case-in-chief. She presented two experts. The first was Dr. Diana Barnes, a licensed marriage and family therapist who focuses on women's mental health, specifically mood disorders and mental illness around the reproductive years. The second was Dr. Merrill Sparago, a physician board-certified in psychiatry and neurology. He works at UCLA and his specialty is women's mental health. Both said appellant was not legally sane at the time of the crime. Rather, they diagnosed her

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

[2] The only lay witnesses were a clinician from the jail who worked with appellant during incarceration and two employees from appellant's daughters' school who testified about appellant's diligence and strong engagement as a mother prior to Noe, Jr.'s, birth.

condition as schizoaffective disorder, bipolar type, and concluded she was suffering a psychotic break with a postpartum onset at the time of the murder.

When the prosecution presented its case, it called two experts. The first was Dr. Roberto Flores de Apodaca, a forensic psychologist who conducted evaluations of appellant in 2011 and 2013. The 2011 evaluation was at the defense's request to determine competency. The 2013 evaluation was to assess appellant's insanity plea. Dr. Flores de Apodaca diagnosed appellant in 2011 with major depressive disorder, severe with psychotic features. But in the 2013 evaluation, he opined that appellant understood the nature and quality of her actions, and was very skeptical about appellant's claimed lack of memory.

The second expert was permitted to testify over a defense objection. Dr. Kris Mohandie is a clinical police and forensic psychologist who has a prominent media profile. Despite writing about psychosis and treating psychotic people in his clinical practice, including a few women with postpartum psychosis, he does not specialize in women's mental health. Dr. Mohandie also opined that appellant understood the nature and quality of her actions when she dropped her baby from the parking garage. He thought that she had major depression.

On September 13, 2021, the jury found appellant sane at the time of the crimes charged. The court ordered a probation and sentencing report prior to the sentencing hearing. At the hearing, the court determined appellant was presumptively ineligible for probation due to her convictions, and sentenced her to 25 years to life in prison.

## DISCUSSION

The issues appellant raises relate to the sanity phase of trial and sentencing only. During the sanity phase, she argues the trial court committed reversible error by permitting Dr. Mohandie to testify as an expert regarding postpartum psychosis when he was not qualified to do so. While we understand some of the concerns raised about Dr.

Mohandie's background and testimony, we find the trial court was right that the questions raised were matters of weight rather than admissibility. During sentencing, however, appellant contends the trial court failed to consider all the relevant legal factors when determining whether or not appellant could or should receive probation. We agree with her, and remand for resentencing.

**I. Sanity Phase: Testimony of Dr. Mohandie**

Expert witnesses may testify as to opinions regarding subjects sufficiently beyond common experience to assist the trier of fact, and based on matter, including special knowledge, skill, experience, training, and education known to the witness, which is of a type on which an expert may reasonably rely in forming his opinion. (See Evid. Code, § 801.) The trial court's decision to allow such testimony will not be disturbed on appeal unless it constitutes an abuse of discretion. (See *People v. Jackson* (2013) 221 Cal.App.4th 1222, 1237.) We find none here.

Appellant's counsel had understandable concerns about the discrepancy in expertise between her experts and the People's. Her experts work on a daily basis on the issue of women's mental health. Dr. Barnes' focus in her therapy practice and in her scholarly work is the mental health challenges of women during their childbearing years. She testified about the impact of childbirth on women's mental health, and the importance of properly recognizing symptoms of postpartum psychosis. Dr. Sparago corroborated Dr. Barnes' observation that many medical professionals mislabel psychotic symptoms as postpartum depression, and explained how antidepressants such as the one prescribed to appellant can exacerbate rather than ameliorate such symptoms.

Dr. Sparago also discussed his familiarity with obstetrics and neonatology as a part of his specialization in maternal mental health. This knowledge gave him insight into baby Noe's physical condition and how chronic or debilitating it would be. This allowed him to opine that appellant's belief about Noe, Jr., being in diapers all his life was a delusion, a hallmark of psychosis.

In contrast, the prosecution's experts were clinicians who had treated or seen female patients, but had not spent any significant time studying female or maternal mental health specifically. Dr. Flores de Apodaca is a generalist; a clinical psychologist who has conducted many evaluations for the court in criminal cases over the years. And Dr. Mohandie's specialization is in police psychology with particular expertise in suicide by cop.

Even so, the jury was not asked to determine whether appellant was suffering from postpartum psychosis or postpartum depression, or similar inquiries which might require more specialized knowledge of maternal mental health. It was being asked to determine whether appellant was "incapable of knowing or understanding the nature and quality of . . . her act and of distinguishing right from wrong at the time of the commission of the offense." (§ 25, subd. (b).) Dr. Mohandie's background and qualifications as a clinical and forensic psychologist were sufficient for him to assist them in making such a decision. It was up to them, not us or the trial court, to weigh the various opinions, and to judge the experts' demeanor and credibility as witnesses.

What *we* can do is register our concern that the current insanity defense, due to inconsistencies in how it may be applied in any given case, can have the unintended but very unfortunate consequence of criminalizing the mentally ill. In advocating for a gender-specific postpartum insanity defense, one commentator observes that postpartum women with severe mental illness are particularly vulnerable to prosecution and conviction for infanticide. "First, the illness is temporary in nature, which makes it difficult for a jury to gauge the degree of mental disturbance at the time the crime was committed. Additionally, during her psychotic period the defendant may quickly transition between delusional and lucid states, making her disturbance hard to identify by both medical professionals and potential witnesses. Another potential challenge is the public's complex notions of motherhood. While some women might benefit from the belief that only an insane women could be capable of harming her

children, others have their mental illness overlooked because the jury perceives the act of harming one's own child as so monstrous that the woman must deserve punishment. Finally, there remains substantial medical disagreement about postpartum psychosis reflected in dueling expert testimony, which confounds a jury's ability to conclusively find the mother insane, even though her mental illness should legally render her so." (Comment, Kahler v. Kansas*: How the Current Insanity Defense Regime Underserves Postpartum Psychosis Defendants, How the Supreme Court Failed to Act, and How Now is the Perfect Time to Implement a Gender-Specific Postpartum Defense* (2023) 54 St. Mary's L.J. 265, 304.) We have little doubt that all of these factors played some role in appellant's conviction. But as the law currently stands, we are in no position to disturb it.

## II. Sentencing: Eligibility and Suitability for Probation

At sentencing, the trial court had to choose between a prison term of 25 years to life or probation. It acknowledged appellant was presumptively ineligible for probation, then went on to consider aggravating factors and mitigating factors under California Rules of Court, rules 4.421(a), and 4.423[3]. One mitigating factor under rule 4.423 is that "[t]he defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime[.]" (Rule 4.423(b)(2).) The court declined to apply this mitigating factor because it believed the jury had found appellant's mental illness did not reduce her culpability. It then sentenced appellant to 25 years to life.

Appellant raises two problems with the trial court's analysis. First, she points out the trial court did not consider rules 4.413 and 4.414, both of which should be employed in determining whether probation is appropriate in cases such as this. Second, she argues the trial court should not have viewed the jury's sanity finding as dispositive on whether mental illness reduced her culpability. Both of these errors, she claims, constituted abuses of discretion. Appellant also argues the enactment of section 17.2,

[3] All further references to "rule" or "rules" are to the California Rules of Court.

effective on January 1, 2023, encourages probation, and the matter should be remanded so the trial court can consider it in its sentencing decision. All of these contentions have merit.

Preliminarily, the Attorney General argues appellant forfeited these arguments because her counsel failed to object to the trial court's analysis at the sentencing hearing, citing *People v. Scott* (1994) 9 Cal.4th 331, 353-354 (*Scott*)). In *Scott*, our Supreme Court held that a defendant waives any objection not raised at the time of sentencing to "the trial court's failure to properly make or articulate its discretionary sentencing choices," including any instance "in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons." (*Id.* at p. 353.) Because Attorney Goodman did not specifically object to the trial court's application of allegedly inapposite rules at the sentencing hearing, the Attorney General argues the objection cannot be raised for the first time on appeal.

But *Scott* does not require forfeiture of appellant's objection. First, the *Scott* court itself stated: "there must be a meaningful opportunity to object to the kinds of claims otherwise deemed waived by today's decision. This opportunity can occur only if, during the course of the sentencing hearing itself and before objections are made, the parties are clearly apprised of the sentence the court intends to impose and the reasons that support any discretionary choices." (*Scott, supra*, 9 Cal.4th at p. 356.) The trial court in this case did not apprise the parties of the sentence it intended to impose or provide any tentative reasoning. Rather, the court took statements from appellant and her family members and from counsel before announcing its decision. There was no meaningful opportunity for Attorney Goodman to object.

Second, appellant's sentencing brief clearly identified for the court the rule she thought it must apply in making its decision – rule 4.413. The court did not apply this rule, and we can thus review its failure to do so.

Section 1203, subdivision (e) states a defendant is presumptively ineligible for parole if she "willfully inflicted great bodily injury or torture in the perpetration of the crime of which that person has been convicted." (*Id.*, subd. (e)(3).) However, the presumption can be overcome in "unusual cases in which the interests of justice would best be served if the person is granted probation[.]" (*Id.*, subd. (e).) If a defendant is presumptively ineligible under section 1203, subdivision (e)(2), the trial court should apply the criteria in rule 4.413(b) "to evaluate whether the statutory limitation on probation is overcome[.]" If the presumption is overcome, "the court should then apply the criteria in rule 4.414 to decide whether to grant probation." (Rule 4.413(b).)

One of the factors in rule 4.413(c) which may "indicate the existence of an unusual case in which probation may be granted if otherwise appropriate" is if "[t]he crime was committed because of a mental condition not amounting to a defense, and there is a high likelihood that the defendant would respond favorably to mental health care and treatment that would be required as a condition of probation[.]" (Rule 4.413(20(B).) We cannot find an indication in the record that the trial court took this factor into account.

The trial court here considered appellant's mental illness only within the rubric of rule 4.423, which contains mitigating factors to be considered in connection with determinate sentencing. One of these factors is: "[t]he defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime[.]" (Rule 4.423(b)(2).) The court dismissed this factor because "the jury found [*sic*] did not reduce her culpability. And that was a jury finding, and the court adopts the jury finding at this time." This was error. The jury was not asked whether appellant's mental illness reduced her culpability. They were asked to determine whether she had established the

elements of an insanity defense – an entirely separate and different question. Even were it appropriate to "adopt" the jury's finding on sanity, this would not preclude the trial court from determining whether the mental illness in some way reduced appellant's culpability. In failing to make this determination, the trial court inaccurately applied the law.

But the overarching problem with the trial court's analysis was its focus on rules 4.421 and 4.423 in the first place. These rules are part of the implementation of California's Determinate Sentencing Law, and while they can properly factor into the court's decision (see *People v. Guinn* (1994) 28 Cal.App.4th 1130, 1149, disapproved on other grounds in *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1387), they are not the most relevant rules pertaining to the grant or denial of probation. Appellant is correct that rules 4.413 and 4.414 are more on point regarding the probation inquiry, and there is no evidence the trial court considered them.

Undoubtedly, appellant's mental illness was not, according to the trier of fact, a complete defense to her crime. But under rule 4.413, it need not be; it need only have been the reason she committed the crime. Moreover, there is evidence in the record that appellant's condition improved when she was administered proper treatment. The trial court should have taken this into account in making its decision.

Had the trial court done so, it may have then considered rule 4.414, which provides a list of factors relevant to a grant or denial of probation.[4] The first is whether the defendant has a prior record of criminal conduct, which the court openly admitted appellant did not. There is also the willingness to comply with probation, "[t]he likely effect of imprisonment on the defendant and . . . her dependents," whether or not defendant is remorseful, and the likelihood defendant could pose a danger to others if not

[4] For this reason, we disagree with the Attorney General's claim that the trial court would not have exercised its discretion in appellant's favor had it considered the proper factors. The mitigating factors in rule 4.423 are not the same as those in rules 4.413 and 4.414. This, combined with the trial court's misconstruction of the jury's sanity finding, leads us to think it may have reached a different result had it applied the law correctly.

imprisoned. (Rule 4.414(b)(5).) All of these factors would likely have weighed in appellant's favor had they been considered.

Appellant's own daughter gave a victim impact statement, imploring the court to have mercy on her mother, saying she did not want to be separated from her, and implying that her mother had "changed" around the time of Noe, Jr.'s, birth. It is particularly notable that no member of baby Noe's family asked the court to impose a prison term. Appellant expressed her sadness and remorse about her act of infanticide, and begged to be reunited with her daughters. And there was no evidence before the court to indicate appellant could be a danger to anyone if not imprisoned. In sum, there is simply too little in the record to indicate the trial court properly weighed probation as a punishment for appellant's crime.

This is especially important in light of enactment of section 17.2. This provision, enacted on January 1, 2023, declares the Legislature's intent that "the disposition of any criminal case use the least restrictive means available." (*Id.*, subd. (a).) Criminal courts are to consider alternatives to incarceration, including probation, but they retain discretion to determine appropriate sentencing based on applicable rules. (*Id.*, subds. (b) & (c).) This statute is applicable to appellant's case because her case is not yet final. (See *People v. Covarrubias* (2016) 1 Cal.5th 838, 935.)

## DISPOSITION

The judgment is affirmed as to appellant's conviction, but the matter is remanded for resentencing using factors outlined in this opinion.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P.J.

MOORE, J.