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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re DEAN M., a Person Coming Under
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

DEAN M.,

Defendant and Appellant.

A132994

(Contra Costa County
Super. Ct. No. J10-01669)

Minor Dean M. was declared a ward under Welfare and Institutions Code section 602¹ in Contra Costa County based on auto theft (Veh. Code, § 10851, subd. (a)) and cruelty to animals (Pen. Code, § 597, subd. (a)). He appeals on grounds that there was no substantial evidence to support the juvenile court’s commitment to an out-of-county ranch, that the court considered improper matter and failed to consider necessary information when it sent him to Bar-O Ranch in Del Norte County, resulting in a denial of due process. Specifically he claims the case plan was deficient and the court improperly based its decision on a purportedly racist remark made by Dean during a *Marsden* motion and on his father’s disruptive conduct in court.² Alternatively, Dean

¹ Undesignated statutory references are to the Welfare and Institutions Code.

² *People v. Marsden* (1970) 2 Cal.3d 118.

claims he received ineffective assistance of counsel when newly retained counsel failed to obtain a transcript of the jurisdictional hearing and failed to request a continuance to fully familiarize himself with the background of the case before appearing at the disposition hearing, thereby rendering himself unable to address both the use of the racist remark as a grounds for the ranch commitment and unable to respond to the court's concerns about prior obstreperous behavior of Dean's father at prior hearings. We affirm.

BACKGROUND

On June 24, 2010, Dean and his fourteen-year-old brother Mario were stopped while driving a Lincoln Towncar because the car had been weaving over the double yellow line. Both boys were wearing latex gloves. The police asked where they got the car and Mario, who was driving, said, "We stole it." Mario also told the police they were wearing gloves "so we don't leave fingerprints." When Dean was later questioned separately from his brother, he admitted he knew the car was stolen but denied participating in the theft. When the police called Dean's father about the incident, he told the officer he thought his sons were both home in bed.

Mario testified at Dean's jurisdictional hearing, claiming that a friend he met at a party had given him the keys to the Towncar and given him permission to drive it. He testified he was drunk at the time and that he got the car while Dean was still at the party. He then saw Dean and picked him up. When they had driven about half way home, they found the gloves in the back seat and Mario put on a pair for a joke (Dean did not put on any gloves). Mario admitted telling the officer they were "going for a joy ride," but denied telling him they had stolen the car. He could not recall telling the officer they used the latex gloves to avoid leaving fingerprints.

On December 1, 2010, Dean was arrested after six caged chickens at his school were turned loose and two were killed. The chickens were discovered by a school custodian on the morning of November 24, 2010. Someone had broken the lock on the chicken coop to get the chickens out of their cage. One of the dead chickens had a string

tied around its neck and was hanging from the chicken coop, about four or five feet off the ground.

The high school resource police officer conducted an investigation. Dean eventually admitted he had been involved in the incident but claimed he did not kill the chickens. He did admit kicking a chicken and said he did not feel bad about it because “it was a chicken.” He also admitted he tied the knots in the shoe lace from which the dead chicken was suspended, but claimed that another unnamed boy slammed the chicken down and broke its neck.

On December 30, 2010, a petition was filed alleging the car theft as count one (Veh. Code, § 10851, subd. (a)), misdemeanor vandalism as count two (Pen. Code, § 594, subd. (b)(2)(A)), and misdemeanor cruelty to animals as count three (Pen. Code, § 597, subd. (a)). On June 27, 2011, after a contested hearing on counts two and three, the juvenile court sustained the cruelty to animals charge and dismissed the vandalism count. The contested jurisdictional hearing on count one was held on July 21 and 22, 2011. The court sustained the vehicle theft as a felony.

On August 4, 2011, Dean appeared for disposition with a newly retained attorney who substituted in for the public defender. The hearing was continued at defense request to allow new counsel to prepare.

On August 11, 2011, the attorney admitted he had not reviewed the transcripts, but the disposition hearing went forward. The court adjudged Dean a ward and ordered him detained in juvenile hall pending placement by the probation officer. The court recommended placement in an out-of-county facility, such as Bar-O Ranch in Del Norte County.

DISCUSSION

As noted above, Dean raises basically two issues on appeal: (1) insufficient evidence to support an out-of-county placement at a boys’ ranch, resulting in a due process violation; and (2) ineffective assistance of counsel.

Sufficiency of the evidence for disposition

We review the juvenile court's disposition for abuse of discretion. (*In re Robert H.* (2002) 96 Cal.App.4th 1317, 1329-1330.)

Dean's appellate brief discusses at some length the requirement of a social study in juvenile cases and the particular requirement of a case plan. To the extent he claims there was reversible error because of omissions in the social study, his failure to raise any such objection in the juvenile court forfeits the issue on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 351-352.) But even if we considered the issue the missing elements would not merit reversal.

Dean complains first that the court did not properly assess whether the probation department had made "reasonable efforts" to avoid removal of Dean from his family home. Specifically, he complains that the probation officer did not speak to his father in preparing the report, much less offer services to the family. But there is ample evidence the father was uncooperative in the probation officer's efforts. He had neither returned the probation officer's phone calls nor informed her of a change of address when he moved out of the county.

The second major basis for Dean's argument is that the court relied on "racist" statements made by Dean during a *Marsden* hearing in deciding that Dean needed to be removed from the parental home and placed in an out-of-county facility. The "racist" remarks were made on June 27, 2011, after the contest on counts two and three, when Dean's father declared that he wanted a new attorney for his son.³

³ Dean had also made a *Marsden* motion on May 9, 2011, which was denied. Dean's father did much of the talking. We have reviewed the transcript of that hearing and see nothing that could fairly be called a racist remark. The Attorney General questions whether the June 27 hearing is even the same *Marsden* motion that the court characterized as having involved "racist" discussion. We are confident the June 27 transcript is the one referenced by the judge.

During the ensuing *Marsden* motion, heard in a confidential setting,⁴ Dean complained that his trial counsel had done minimal preparation for the jurisdictional hearing and that the two of them could not get along. When pressed by the court to give examples of ways in which they did not get along, Dean finally said, “Racist. I don’t know.” The court asked, “You’re saying you’re racist?” and Dean said “I don’t know. I just don’t get along with her [¶] . . . [¶] She doesn’t do anything for me. She tells me to be quiet.” The court explained that Dean had a tendency to speak out during proceedings and that his attorney was telling him to be quiet “to avoid the wrath of the court.” During the same hearing the judge reprimanded Dean for “glaring” at him and reprimanded the father for speaking out of turn.

Trial counsel then explained that she had prepared adequately for the hearing and was “more than happy to continue representing” Dean. The *Marsden* motion was denied.

The court evidently interpreted the interchange as an indication that Dean had a problem with his public defender because she was of a different race: “In other words, his defender was not of his race, and that was something he disapproved of.” That was a plausible interpretation of the words spoken.

There was no error in the court’s consideration of this factor. Section 725.5 and other relevant policies of juvenile court law require that the court consider “ ‘the broadest range of information’ ” in determining how best to rehabilitate a minor. (*In re Robert H.*, *supra*, 96 Cal.App.4th at p. 1329.) This would include a minor’s admissions. (Evid. Code, § 1220.) Even hearsay that would be inadmissible at a jurisdictional hearing is admissible at a disposition hearing. (*In re Vincent G.* (2008) 162 Cal.App.4th 238, 243; *In re Michael V.* (1986) 178 Cal.App.3d 159, 170, fn. 18.)

The judge who heard the dispositional issue had also conducted the *Marsden* hearing on June 27, 2012. Having witnessed Dean’s demeanor when he made the

⁴ Dean’s opening brief suggests that he “did not have the benefit of counsel” at the June 27 *Marsden* motion and “was not represented by counsel in the ex parte *Marsden* proceeding.” This is an erroneous construction of the record, as it appears that counsel was present during the confidential *Marsden* motion and addressed the court after Dean had finished explaining his reasons for wanting a new attorney.

statement, he was in a superior position to evaluate its meaning. The judge believed it was a racially intolerant statement, and it is certainly susceptible of that interpretation. We also note that the court's reference to Dean's "glaring" suggests he exhibited hostility to the court which may not come through in the words on the page. We will defer to the court's judgment when it comes to divining the meaning of Dean's remarks from the manner in which they were uttered.

In addition, Dean appears to complain that the juvenile court punished him in part for his father's disrespectful behavior in court. On June 13, 2011, the court found it necessary to chastise Dean's father: "Mr. [M.], you'll need to conduct yourself appropriately or my deputy will escort you out. You can't be reacting or shaking the head or whatever. We're not at a baseball game."

At the same hearing the following transpired: "[Prosecutor]: We have statements that . . . [Dean] stated that he kicked one [chicken] and it ran. He didn't feel bad because it was a chicken. [¶] The Minor: That was a lie, your Honor. [¶] The Court: Excuse me. Um, somebody—I think it might have been you before as well—made a comment. No one can make a comment while closing. [¶] The Minor: If I don't no one is, your Honor. She won't say anything. [¶] The Court: I'm just saying, sir, you are not permitted to make comments. If you do that that can be a contempt of court, get you into even more trouble. I'm sure you want to avoid that. So you can't do interruptions during closing statements. Only a trained professional will know when to object. You can't just object because you don't like what you're hearing. . . . [¶] . . . So that applies to everybody in the courtroom. No speaking out of turn [¶] Sorry, Ms. [Prosecutor]. Go ahead."

When the prosecutor resumed describing Dean's admissions regarding the pet chickens' deaths, the following occurred: "The Minor: What are you here for? [¶] The Court: Excuse me, sir. I can't have you waving around your arms in the courtroom. I've already admonished everybody, and my deputy will remove you next. All right. Please do not do that in the courtroom. It's not a way to communicate with a lawyer. It's not a way. [¶] Father: I'm sorry. I'm hearing her describe my son saying something he didn't

say. Same time like he saying he's a rapist. . . . [E]verybody just being fine with it. I'm sorry. I'm trying to sit here and listen to this. I've been here through the whole thing and one person's version is somebody dreaming, and now it's being turned over to his words.

[¶] The Court: Sir—Sir, if I hear from you one more word during the course of this proceeding you will be evicted from the courtroom. I'd prefer to have you—as the father I would like you have the privilege—[¶] Father: I'll do my best, your Honor. [¶] The Court: —of being here in the courtroom, but you're going to get an eviction here if you keep this up. So, please, you need to listen to what I say. I understand it's very emotional for you. I understand you don't agree with what's being said. But you need to keep your place and sit where you are without doing—[¶] Father: I apologize, your Honor. I've just never been in here in a courtroom and seeing a scenario like this before in my life. [¶] The Court: Go ahead, Ms. [Prosecutor].”

Again, on June 27, 2011, after the court sustained the animal cruelty count, Dean's father initiated a request for a *Marsden* motion: “Your Honor, could we request a different public defender at this point or will you deny it again?” After a hearing the court denied the second *Marsden* motion.

At the conclusion of that hearing, the prosecutor asked the court to remand Dean to juvenile hall in part due to “his behavior here in court today.” The prosecutor argued that Dean required a more restrictive environment. Although the prosecutor had initially planned to ask that Dean be placed on electronic monitoring, “given his outburst during the course [of the trial]” and “continuing . . . outbursts,” she was concerned that Dean would not follow the court's orders if left in the community—“he's displaying impulse behavior controls and anger management issues to the point of concern for public safety.” The prosecutor said Dean had exhibited “aggression and anger management issues” by ignoring the court's orders to stop his “outbursts” in court.

Defense counsel admitted Dean's father's conduct was “not appropriate, not respectful,” but pointed out that Dean had made all appearances and otherwise complied with the terms of probation. The court said, “[M]y concern is that the father has demonstrated an inability to follow the court's instructions . . . and [Dean] is clearly

influenced by that. I'm concerned about releasing him to the supervision of his father." The court then said: "[E]ven though there has been a very poor judgment displayed both by [Dean's father] and [Dean] in the courtroom, it seems to me that standing alone is insufficient to result in a remand. [¶] It is, however, a basis for the court to impose JEM home supervision ankle monitoring . . . pending disposition of the case. But I do want [Dean's father] to be aware that I am concerned about the demeanor that he's displayed here in the court, the hostility that he's demonstrated to both the court and to his counsel and to opposing counsel is something that does not bode well in my mind."

On July 21, 2011, during the jurisdictional hearing on the auto theft charge, the court again addressed Dean's father: "Mr. [M.], I don't want to admonish you again. Now, I'm going to instruct you to please move along there and sit right next to my deputy, please. Right there. And next time you make hand gestures or do things like that you'll be removed from the courtroom." Shortly thereafter, during an officer's testimony about Mario's prior statements about the car theft, Dean blurted out: "He was on drugs. He didn't know what he was talking about." The prosecutor appealed to the judge: "Your Honor, if the minor wishes to testify he could take the [stand], but I would ask that he not have any more outbursts. [¶] The court: Well, I've already—[¶] The minor: Yeah. [¶] The Court: —I've already admonished him not to do that. Apparently admonishments are not being observed."

On August 4, 2011, the first date scheduled for disposition, Dean's father reportedly told the bailiff, "you can just put handcuffs on me if you want" when he was told where to sit in the courtroom. In continuing the hearing, the court commented, "There's been a lot of those kinds of things going on." The judge recommended that new counsel review the previous transcripts so that he could understand "what has happened during the course of these proceedings."

As the foregoing excerpts show, the juvenile court did not abuse its discretion in removing Dean from his father's custody and placing him under the care and guidance of the probation department. The father's conduct in court throughout the proceedings contributes to the conclusion that he was "incapable of providing proper maintenance,

training and education for this minor and it was essential for his rehabilitation that he be removed from [his father's] custody and committed [to a juvenile facility]." (*In re Samuel B.* (1986) 184 Cal.App.3d 1100, 1104.) Dean's father failed to cooperate with the probation officer's attempted communications, downplayed Dean's criminal conduct in killing the pet chickens and continued to express belief in Mario's patently incredible testimony about the events. The poor example he set for his son in court only compounds the concern that he did not even know his sons were missing from home on the night of the car theft. (*Id.* at pp. 1104-1105.)

Moreover, the Attorney General points out that Dean was not, in fact, committed to the Bar-O Ranch on August 11, 2011. The court found the case plan submitted by the probation officer to be "inadequate" and said it needed to be "updated with updated placement recommendations." Specifically, the court found fault with the report because it did not give adequate weight to Dean's misconduct "in the courtroom." When the probation officer replied that a new case plan would be presented in two weeks, the court ordered: "*At that time I will make a finding* about whether or not probation has complied with a case plan by making reasonable efforts to make it possible for the child to return safely to the home and to complete whatever steps are necessary *to finalize a permanent placement* of the child." He ordered the parties to return in two weeks. Neither an updated case plan nor a transcript of the subsequent hearing has been provided on appeal. Thus, it is not even clear from the record whether Dean was ever sent to Bar-O Ranch.

For all of the foregoing reasons, we find there was no abuse of discretion, the court's orders were supported by substantial evidence, and Dean was not deprived of due process in the dispositional hearing and orders.

Ineffective assistance of counsel

We review a claim of ineffective assistance of counsel using the two-prong test of *Strickland v. Washington* (1984) 466 U.S.668. Neither prong has been satisfied in this case.

First, it is rare that a claim of ineffective assistance of counsel will be sustained on appeal. Ordinarily such claims must be raised by way of a petition for writ of habeas

corpus, which allows for evidentiary development of the facts underlying the claim. (E.g. *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) No such petition has been filed.

More fundamentally, no deficient performance is apparent. Although newly retained counsel did not obtain and review transcripts of the prior proceedings, that is not the only way he could have informed himself of the prior difficulties the client and his father had experienced in conforming their behavior to appropriate standards in the courtroom. Presumably he had conversations with Dean and his father about the prior proceedings. We are naturally hesitant to reverse on grounds of ineffective assistance of counsel where counsel has not had an opportunity to explain his conduct and the reasons for his choices.

Dean's new attorney appears to have actively participated on his behalf at disposition. He produced a supportive letter from Dean's mother and photographs of Dean with his family. He tried to convince the court that Dean was an animal lover because he loved his dog and cared for it. Counsel tried to excuse Dean's behavior because he had a learning disability which forced him to attend continuation school where he fell in with the wrong group of kids—until the court pointed out he had stolen the car with his own brother.

Counsel appropriately asked his client and his father to apologize to the court for their past misconduct, and he tried to explain it. He said Dean was frustrated by his former attorney's advice not to testify. According to new counsel, Dean had simply wanted to tell "his side of the story," which resulted in his "outbursts in court." Dean confirmed that explanation in his own statement to the court, which suggests he and his attorney had discussed the matter.

And even assuming there was deficient performance, it is not likely the result would have been different had the attorney read the prior transcripts. The judge was clearly disturbed by the multiple interruptions and outbursts by both father and son. That the father provided a poor example for his son, and backed up his son's obstreperous behavior even as the court was attempting to correct him, fully supports the judge's

decision that the father was not providing appropriate guidance. Dean's acting out behavior—and his brother's—likely was influenced by the father's defiance of authority and neglectful practices. Dean was not being punished for his father's belligerence; he was being rescued from its influence.

It is not reasonably likely that a different approach or more perfectly informed lawyer would have altered the result. Dean offers no suggestions on appeal as to what his counsel should have done differently at disposition. Dean was not prejudiced by his lawyer's failure to read word-for-word his and his father's past courtroom outbursts or the court's rebukes.

DISPOSITION

The jurisdictional and dispositional orders are affirmed.

Richman, J.

We concur:

Haerle, Acting P.J.

Lambden, J.