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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re R.E., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,
Plaintiff and Respondent,
v.
R.E.,
Defendant and Appellant.

A133620

(Solano County
Super. Ct. No. J38620)

In re R.E.,
on Habeas Corpus.

A134936

R.E. (appellant), born in February 1993, appeals from the juvenile court’s dispositional order continuing him as a ward of the court after finding he violated his probation. He contends his statutory and constitutional rights to an impartial judge were violated when the juvenile court judge failed to recuse himself after disclosing he had a prior professional relationship with a witness. Appellant has also filed a petition for a writ of habeas corpus in which he contends his trial counsel was ineffective because she did not request the judge’s recusal. We reject the contentions and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was on juvenile probation for battery with serious injury (§ 243, subd. (d)) when the Solano County District Attorney filed a petition on August 15, 2011,

alleging appellant had violated probation by stealing a bicycle (Pen. Code, § 487). The petition was based on an incident that occurred June 21, 2011. At approximately 8 p.m., W.M. and J.S. had ridden their bikes to a 99 Cent Store when an individual approached them outside the store and asked if he “could buy [them] alcohol or something like that.” W.M. replied, “No, thank you.” W.M. and J.S. went inside the store for about five minutes, leaving their bikes outside and unlocked. When they came out of the store, their bikes were gone. They walked around the store and looked around, then went to J.S.’s house up the street. W.M. called his stepfather, K.M. (Mr. M.) and told him his bike had been stolen. Mr. M. went to the 99 Cent Store to look for the bike. When he did not find it, he called the Vacaville police.

The next morning, Mr. M. went to “talk[] to all the businesses” in the area. As he was talking to someone at a liquor store, he happened to look out and saw an individual, who he identified in court as appellant, riding his stepson’s bike. He said, “That’s it,” at which point the person in the liquor store started chasing appellant. Mr. M. got in his stepson’s truck and chased after appellant, who was “really going fast on the sidewalk.” Mr. M. pulled up, made sure it was his stepson’s bike, and continued to pursue appellant. He recognized the bike because it was a special “one of a kind” bike for which he and his wife had spent over \$2,000, and which his stepson had custom built by putting together different parts from different vendors. When Mr. M. saw appellant “going up on the sidewalk,” he stopped the truck, got out, and yelled, “Hey. Come here.” Appellant looked right at Mr. M. and “took off even faster through the apartments.” Mr. M. tried to run after appellant but “pulled something in [his] lower leg and . . . couldn’t go.” He “jumped back in the truck” and called his stepson to tell him he had seen his bike and where it was. He drove around for about an hour but was unable to find appellant or the bike.

Approximately two days after their bikes were taken, W.M. and J.S. went to an apartment complex to look for their bikes. They did not find their bikes but W.M. saw the person who had walked up to them at the 99 Cent Store standing on an apartment balcony, smoking a cigarette. The person had a tattoo across his back. A few days after the bikes were taken, J.S. was on his way home from church when he saw two people riding his and

W.M.'s bikes "just down the street from the 99 Cent Store." The bikes had been painted different colors, but J.S. knew they were his and W.M.'s bikes because they had built the bikes themselves out of various "one-of-a-kind" parts, and he knew "everything" about the bikes.

The police showed J.S. a photo lineup from which he selected appellant's photo as the person he thought he saw at the 99 Cent Store the day the bikes were taken and the same person he later saw riding one of the bikes.¹ W.M. and Mr. M. did not identify appellant from the photo lineup. During a search of appellant's home, police did not find any bicycles, parts of a bicycle, or paint. Appellant's father testified that appellant was living with him in an apartment on June 21, 2011, and that he never saw appellant with a bicycle or bicycle parts. He also testified that appellant has a tattoo on his back.

The court found appellant violated his probation and continued him as a ward of the court. It stated, "[T]he factors in this case indicate that . . . [W.M.] identifies [appellant] as being the person who contacted him at the 99 Cent Store, was present at the store on the date that the bike went missing, and then later goes to an apartment complex and sees the same minor with something that is fairly distinctive, a tattoo on his back, which is acknowledged by his father. [¶] [Mr. M] then is the next witness in sequence who indicates that he sees [appellant] again as a person who he saw on the bike the day after the theft. Efforts were made by [him] and a store clerk to stop that individual. As he put it, the chase was on. [¶] And so the person riding the bike obviously was aware of their presence and aware of an effort to stop them. . . . [¶] And then the third witness, [J.S.], identifies [appellant] as the person who he saw at the 99 Cent Store and in the possession of [W.M.'s] bike. [¶] . . . [T]hat's a preponderance of the evidence, so the Court does find [appellant] in violation of his terms and conditions of his probation."

¹ In court, J.S. said he was "not sure" appellant was the individual he had identified from the photo lineup but also testified the photo he selected "was the person I [saw] before, and it kind of looked like the person I saw on the bike."

DISCUSSION

Recusal

Appellant contends the juvenile court judge erred in failing to recuse himself. Assuming, without deciding, that appellant did not forfeit the claim by failing to object below, we conclude the claim is without merit.

Before Mr. M. testified, the juvenile court judge (the Judge) stated, “Before we proceed much further, the record should reflect that [Mr. M.] is a former client of mine. I have known him for years. I represented him in connection with a number of matters, including helping his son out. [¶] I am not going to judge him by any different standard, but I’m disclosing to you all that [Mr. M.] is a person I know. [¶] If that is a concern, we will recess this matter, and it will have to be assigned to a different judge. I’ve known [Mr. M.] for about 30 years. Defense counsel stated, “Let me speak with my client. [¶] That’s fine, your Honor.” The court stated, “Again, like I said, I don’t feel any need to disqualify myself, but I want to disclose the fact that [Mr. M.] is someone I know.” There was no further discussion of the matter and Mr. M. was called to the stand and testified.

“A judge shall be disqualified if any one or more of the following are true: . . . [that] [f]or any reason . . . [a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.” (Code Civ. Proc. § 170.1, subd. (a)(6)(A)(iii).) “The standard for disqualification . . . is fundamentally an objective one.” (*United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 104 (*United Farm Workers*)).) Thus, “[d]isqualification is mandated if a reasonable person would entertain doubts concerning the judge’s impartiality.” (*Christie v. City of El Centro* (2006) 135 Cal.App.4th 767, 776.) “While this objective standard clearly indicates that the decision on disqualification not be based on the judge’s personal view of his own impartiality, it also suggests that the litigants’ necessarily partisan views not provide the applicable frame of reference.” (*United Farm Workers, supra*, 170 Cal.App.3d at p. 104 (fn. omitted).) “[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level.” (*Caperton v. A.T. Massey Coal Co.* (2009) 556 U.S. 868, 876.) “[T]he due process clause should not be routinely invoked as a ground for judicial disqualification. Rather, it is the

exceptional case presenting extreme facts where a due process violation will be found.” (*People v. Freeman* (2010) 47 Cal.4th 993, 1005.)

“The duty of a judge to sit where not disqualified is equally as strong as the duty not to sit when disqualified.” (*United Farm Workers, supra*, 170 Cal.App.3d at p. 100.) “Judicial responsibility does not require shrinking every time an advocate asserts the objective and fair judge *appears* to be biased.” (*Ibid.*) For example, in *People v. Carter* (2005) 36 Cal.4th 1215, 1241 (*Carter*), the trial judge in a criminal case and the prosecutor “had worked together in the San Diego County District Attorney’s Office,” “her family and his had gone camping with other families,” “her husband had purchased [the prosecutor’s] son’s dirt bike approximately 10 years prior to the hearing,” “there had been sporadic social contacts at parties,” “she had performed the wedding of [the prosecutor’s daughter],” the “daughter gave her a necklace similar to necklaces given to the bridesmaids,” and the “daughter had ‘house sat’ for her approximately one year earlier, for which his daughter had been paid a ‘minimal amount.’ ” The Supreme Court stated, “Because virtually all judges are drawn from the ranks of the legal profession, such prior relationships are neither unusual nor dispositive.” (*Id.* at p. 1243; see also *People v. Hernandez* (2003) 30 Cal.4th 835, 855-856 [rejected a criminal defendant’s argument that the trial judge, who had previously defended the defendant against felony charges, should have recused himself because, as prior counsel, he may have learned prejudicial information about the defendant during the earlier representation, and because there was a continuing duty of loyalty]), disapproved on another ground in *People v. Riccardi* (2012) 54 Cal.4th 758, 824, fn. 32.) Referring to the trial judge and prosecutor’s relationship as a “prior professional and casual social relationship,” the Supreme Court in *Carter* concluded the judge had no responsibility to recuse herself because a reasonable person aware of the relationship “would not entertain a doubt as to [the judge’s] impartiality.” (*Carter*, 36 Cal.4th at p. 1243.)

Here, the demonstrated relationship between the Judge and Mr. M. was more remote than the relationship at issue in *Carter*; thus, it was not the type of relationship that would cause a reasonable person to doubt the Judge’s ability to remain impartial in the

case. Although the Judge had known Mr. M. for 30 years and had represented him in “a number of matters,” there was nothing to suggest they ever had a personal or social relationship or that they had frequent contact. Their professional relationship had ended by the time appellant’s hearing took place and there was no indication they had kept in touch since the termination of their professional relationship.

Moreover, the Judge stated he was “not going to judge [Mr. M.] by any different standard,” and in summarizing the bases for his decision, referred to and relied on all of the evidence, without placing any more weight on Mr. M.’s testimony than on the testimony of the other witnesses. (See *United Farm Workers, supra*, 170 Cal.App.3d at p. 106, fn. omitted [the judge’s conduct during the trial or hearing “must be considered as evidence of his impartiality”].) Because the facts underlying the Judge’s relationship with Mr. M. did not suggest he would have difficulty fulfilling his obligations as a neutral and detached magistrate, the juvenile court did not violate appellant’s statutory and constitutional rights to an impartial judge.

Even assuming the Judge violated appellant’s statutory rights in not recusing himself, we conclude the error was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*)² because it is not reasonably probable that appellant would have received a more favorable decision. Although Mr. M. was the only witness who definitively identified appellant in court as the person he saw riding W.M.’s bike, there was other evidence linking appellant to the crime. Approximately two days after their bikes were taken, W.M. and J.S. went to an apartment complex to look for their bikes, presumably based on information that the bikes might be there. There, W.M. saw the person who had walked up to them at the 99 Cent Store the night the bikes were stolen. The person had a tattoo across his back; appellant’s father confirmed appellant had a tattoo on his back. Further, J.S. saw two people riding his and W.M.’s bikes “just down the

² Because the Judge’s decision not to recuse himself clearly did not rise to the level of a constitutional violation (*People v. Freeman, supra*, 47 Cal.4th at pp. 1005, 1006 [“heightened showing of a probability, rather than the mere appearance, of actual bias” is required to show a constitutional violation, and “it is the exceptional case presenting extreme facts where a due process violation will be found”]), we decline to conduct a harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24.

street from the 99 Cent Store,” and when the police showed him a photo lineup, he identified appellant, stating “that the eyes and facial features of [appellant] w[ere] similar to th[ose] of the person he saw out in front of the 99 Cent Store the night his bike got stolen as well as the individual that was on [W.M.’s] bike the next night.” J.S. even pointed out that appellant’s hair appeared different in the photo, and a police officer confirmed at the hearing that appellant’s hair was long and “in corn rows” in the photo, and “short and shaved like a buzz cut” at the time of the incident. Because there was other evidence from which the juvenile court could find, by a preponderance of the evidence, that appellant took the bikes, any error was harmless under *Watson*.

Ineffective Assistance of Counsel

Appellant contends in his habeas petition that his trial counsel was ineffective because she did not request the Judge’s recusal. In light of our conclusion that recusal was not necessary and that any error resulting in a violation of appellant’s statutory rights was harmless, we also conclude that appellant’s claim of ineffective assistance of counsel fails. (See *Strickland v. Washington* (1984) 466 U.S. 668, 694 [the defendant must show both a deficient performance and prejudice in order to prevail on a claim of ineffective assistance of counsel].)

DISPOSITION

The juvenile court’s order is affirmed.

McGuiness, P.J.

We concur:

Siggins, J.

Jenkins, J.