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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

In re K.S., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

K. S.,

Defendant and Appellant.

C068774

(Super. Ct. No.
JV126522)

In October 2010, minor K.S., age 17, admitted that he was described by Welfare and Institutions Code section 602 in that he committed felony assault by means likely to produce great

bodily injury (Pen. Code,¹ § 245, former subd. (a)(1), now subd. (a)(4); count one) and misdemeanor participation in a criminal street gang (§ 186.22, subd. (a); count four).² In exchange, counts of robbery (§ 211; count two) and assault by force likely to produce great bodily injury (count three) were dismissed along with allegations that the minor personally inflicted great bodily injury (§ 12022.7) in the commission of counts one and two. The court continued the minor as a ward, committed him to juvenile hall for time already served, ordered him into out-of-state placement, and imposed probation conditions including that he obey all laws and not associate with J.C.

In June 2011, the minor admitted an allegation that he had violated his probation by associating with J.C. An allegation that he had failed to obey all laws, in that he had committed burglary and had received stolen property, was dismissed in the interest of justice. The court revoked probation and committed the minor to the California Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF), for a maximum period of three years.

¹ Further undesignated statutory references are to the Penal Code.

² The minor had admitted allegations in four previously filed petitions: receiving stolen property (§ 496; November 2007), first degree burglary (§ 459; February 2008), accessory to robbery (§ 32; September 2008), and possession of ecstasy (Health & Saf. Code, § 11377, subd. (a); June 2010).

On appeal, the minor contends the juvenile court erred when it (1) committed him to DJF on the basis of "unproven" probation violations, specifically, the dismissed allegations of burglary and receiving stolen property and the admitted allegation that the minor had associated with J.C., and (2) failed to determine whether the count one offense of assault was a felony or a misdemeanor. We shall remand for the requisite determination.

FACTS

April 2010 Assault

When the victim and a witness walked out of a store, the minor and two other individuals began "mugging" them while stating "This is the STAR country."³ A group of 15 people, including the minor, cornered the duo on a dead end street and encircled them. The duo stood back to back as all 15 suspects began punching and kicking them. The victim positively identified the minor as one who had kicked and punched him.

April 2011 Probation violation

The minor and J.C. were observed walking together approximately 50 yards from a residence that had just been burglarized.⁴ J.C. was carrying a black bag. When an officer observed them and made a u-turn to approach them, both suspects

³ Because the commitment offense was resolved by plea, our statement of facts is taken from the probation department's social study report.

⁴ Because the probation violation was resolved by plea, our statement of facts is taken from a police detective's probable cause declaration for juvenile hall detainees.

immediately fled and jumped over fences in an effort to elude apprehension. They were caught while running through Executive Airport. The bag carried by J.C. contained a laptop computer that had just been stolen.

DISCUSSION

I

The minor contends the juvenile court abused its discretion when it committed him to DJF based on the "unproven" probation violations (the 2011 burglary and receiving stolen property). The minor further claims his admitted association with J.C. was insufficient to support the commitment. Neither argument has merit.

Burglary and Receiving Stolen Property

Welfare and Institutions Code section 706 provides that at the disposition hearing, the juvenile "court shall receive in evidence the social study of the minor made by the probation officer and *any other relevant and material evidence* that may be offered" (Italics added.)⁵

The minor claims the evidence of burglary and receiving stolen property, consisting of a Sacramento Probation Department

⁵ California Rules of Court, rule 5.785(b) provides: "The court must receive in evidence and consider the social study and any relevant evidence offered by the petitioner, the child, or the parent or guardian. The court may require production of other relevant evidence on its own motion. In the order of disposition the court must state that the social study has been read and considered by the court."

Further references to "rules" are to the California Rules of Court.

Intake Report and a Sacramento Police Department General Offense Hardcopy, was not made admissible by Welfare and Institutions Code section 706 because the "evidence of [J.C.'s] possession of stolen property and commission of a burglary was not relevant to [the minor's] disposition."

The minor has forfeited this claim by failing to raise it at disposition. (Evid. Code, § 353; *People v. Holt* (1997) 15 Cal.4th 619, 666-667.) Moreover, his trial counsel conceded the evidence was relevant within the meaning of rule 5.785(b), even though it was not sufficient to prove criminal conduct.

In any event, the fact the minor was in the company of J.C., fled with J.C., and was apprehended with J.C. while he was in possession of stolen property from a burglary that had just occurred, was relevant to show that the minor's previous commitments had been unsuccessful in effecting his rehabilitation.

The minor contends the burglary and receiving stolen property allegations, as well as their surrounding circumstances, should have been excluded under Evidence Code 352 because they had a "substantial, and undue, influence on" the juvenile court's decision. This claim, too, has been forfeited for failure to assert it at disposition. (Evid. Code, § 353; *People v. Holt, supra*, 15 Cal.4th at pp. 666-667.)

In any event, the contention lacks merit. The minor relies on *In re Romeo C.* (1995) 33 Cal.App.4th 1838 (*Romeo C.*), in which this court concluded Welfare and Institutions Code section 706 impliedly incorporates Evidence Code section 352. (*Romeo*

C., *supra*, 33 Cal.App.4th at p. 1844.) But Evidence Code section 352 is designed to exclude evidence that is unduly prejudicial, that is, evidence that uniquely tends to evoke an emotional bias against the minor as an individual and which has very little effect on the issues. (*People v. Padilla* (1995) 11 Cal.4th 891, 925, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) Against the backdrop of his numerous sustained allegations (fn. 2, *ante*), neither the burglary nor the receiving stolen property tends uniquely to evoke an emotional bias against the minor.

This court explained in *Romeo C.* that the evidentiary rules and due process requirements for jurisdiction and disposition hearings "differ substantially." (*In re Romeo C.*, *supra*, 33 Cal.App.4th at p. 1848.) "They are necessarily most stringent at the jurisdictional phase of a juvenile proceeding, whether under [Welfare and Institutions Code] section 300 or Welfare and Institutions Code section 602, because the liberty interests of the minor (and of the minor's parent or guardian) are strongest in this phase of the proceeding. Once the juvenile court has determined that the minor comes within [Welfare and Institutions Code] section 300 or section 602, the minor no longer has a protectable interest in being free from the court's jurisdiction; due process then requires only that the court properly consider all factors relevant to its dispositional choice." (*Ibid.*)

The minor relies in part on cases that considered the jurisdictional phase of juvenile proceedings. (E.g., *In re*

Kentron D. (2002) 101 Cal.App.4th 1381, 1393.) For the reasons stated, his reliance on these authorities is misplaced.

The minor notes that, unlike the social study at issue in *Romeo C.*, the police reports of the burglary and receiving offenses cannot be deemed "inherently reliable" (*Romeo C.*, *supra*, 33 Cal.App.4th at p. 1847.) He argues that, because the reports were not neutral or reliable, they should not have been considered. However, as we noted in *Romeo C.*, the minor in a Welfare and Institutions Code section 602 disposition proceeding has the right to challenge factual statements in a report by presenting his own witnesses. (*Ibid.*) The minor did not do so.

In any event, the minor was not prejudiced because the juvenile court expressly declined to make any finding whether the minor was guilty of, or had participated in, the burglary and receiving offenses. The court found only that the minor "was voluntarily present with someone who it appears was engaged in burglaries at the same time and same place, and it was a person whom he had been specifically by name prohibited from associating with, and is a person with whom he had been associated in prior offenses where he had been adjudicated a delinquent in concert with another person. [¶] . . . [¶] Whether [the minor] was actually in the house engaging in the burglary or not, I don't think I need to reach that issue. I think it seems clear to me that he was -- because he was out on the street associating with the person who you recognize was, frankly, a career criminal at that point in time in clear

violation of his terms and conditions of release that that's a very egregious violation in and of itself in terms of probation.

[¶] So I should be clear that I'm not entering any findings with regard to whether he is guilty or not guilty of the burglary, but I do find that the surrounding circumstances around that are extremely serious."

The minor does not contend the police reports were so unreliable that they misidentified J.C. as the perpetrator of the burglary and receiving offenses, or that they misperceived the nature of the conduct in which J.C. had been engaged. Thus, no prejudice to the minor appears.

The minor argues he was prejudiced because the probation department's juvenile intake report recommended, as a sanction for the alleged violations, a mere 15-day commitment to county jail, whereas the juvenile court selected the far more drastic sanction of a DJF commitment. In the minor's view, the court's rejection of probation's recommendation was based on J.C.'s possession of stolen property and commission of a burglary. We disagree.

Nothing in the record suggests that, before recommending the 15-day commitment, the probation department had considered the "staggering amount of criminality" that preceded the minor's probation violation. In contrast, the juvenile court reviewed and considered that history before it opted for a DJF commitment. Thus, it was the minor's own offenses, not J.C.'s conduct, which led the court to reject the probation department's recommendation.

Sufficiency of Evidence for DJF Commitment

"The decision of the juvenile court may be reversed on appeal only upon a showing that the court abused its discretion in committing a minor to [DJF]. [Citations.] An appellate court will not lightly substitute its decision for that rendered by the juvenile court. We must indulge all reasonable inferences to support the decision of the juvenile court and will not disturb its findings when there is substantial evidence to support them. [Citations.] In determining whether there was substantial evidence to support the commitment, we must examine the record presented at the disposition hearing in light of the purposes of the Juvenile Court Law. [Citations.]" (*In re Michael D.* (1987) 188 Cal.App.3d 1392, 1395; see *In re Asean D.* (1993) 14 Cal.App.4th 467, 473.) Those purposes include the "protection and safety of the public;" to that end, punishment is now recognized as a rehabilitative tool. (Welf. & Inst., Code, § 202, subds. (a), (b); *In re Asean D.*, *supra*, at p. 473; *In re Michael D.*, *supra*, at p. 1396.)

Welfare and Institutions Code section 734 provides: "No ward of the juvenile court shall be committed to [DJF] unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by [DJF]."

Thus, "[t]o support a [DJF] commitment, it is required that there be evidence in the record demonstrating probable benefit to the minor, and evidence supporting a determination that less

restrictive alternatives are ineffective or inappropriate." (*In re Teofilio A.* (1989) 210 Cal.App.3d 571, 576.)

The minor claims the juvenile court abused its discretion because the only evidence that he had violated his probation was his admitted association with J.C., and that violation was insufficient to support a commitment to DJF. The claim has no merit.

The juvenile court stated it had reviewed the minor's "entire file" in advance of the disposition hearing. The court "was struck by the extensive interaction that [the minor] has had with the juvenile justice system over the years." The court then reviewed the minor's history, beginning in 2007. The court reviewed the several social study reports on the minor, noting that he seemed to have done well in structured environments, including a school setting, but he "gets himself in trouble" within two or three weeks of being released from such an environment.

The juvenile court reviewed the minor's past programs and commitments ranging from home supervision to electronic monitoring, the juvenile center, the Boys Ranch, and a placement in Nevada. The court reflected that "The services are all there. They have all been provided, and they've been provided in a series of escalating steps, . . . to try to get his attention, but they've all been unsuccessful, and he has continued to offend in ways that are not insignificant." Thus, the minor had committed "at least seven separate instances of felonious conduct," which the court termed "a staggering amount

of criminality" The court found that the minor had received "a progressively increasing level of services and increasingly sophisticated intervention steps, all of which have failed," and there was nothing left except "on the one hand, going to DJF or, on the other hand, because he's now 18 simply being placed in the county jail to serve a sentence." The court found that DJF "does have counseling, treatment, and education programs which are available and should be of assistance to [the minor]."

Nothing in the record supports the minor's claim that the juvenile court based its dispositional decision on his commission of the dismissed allegations of burglary and receiving stolen property. The record amply supports the court's conclusion that DJF was the appropriate commitment for the minor. There was no abuse of discretion.

II

The minor contends the matter must be remanded to the juvenile court with directions to consider in its discretion whether the commitment offense was a felony or a misdemeanor. This claim has merit.

Welfare and Institutions Code section 702 provides in relevant part: "If the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony."

Rule 5.795(a), in Article 4 on "Disposition," provides: "Unless determined previously, the court must find and note in

the minutes the degree of the offense committed by the youth, and whether it would be a felony or a misdemeanor had it been committed by an adult. If any offense may be found to be either a felony or a misdemeanor, the court must consider which description applies and expressly declare on the record that it has made such consideration and must state its determination as to whether the offense is a misdemeanor or a felony."

In this case, the minor admitted an April 2010, violation of section 245, former subdivision (a)(1), which, had it been committed by an adult, would be punishable by imprisonment in state prison for two, three, or four years or in a county jail for not exceeding one year. (Stats. 2004, ch. 494 (Assem. Bill No. 50).) Nothing in the recitation of the negotiated plea indicated that the minor was pleading to this wobbler offense "as a felony." When the court took the plea to the wobbler, it merely read the charge. At the disposition hearing, the juvenile court did not expressly declare the offense either a felony or a misdemeanor.

In re Manzy W. (1997) 14 Cal.4th 1199 (*Manzy W.*) explains that the "key issue is whether the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit." (*Id.* at p. 1209.) As in *Manzy W.*, the "juvenile court was required, under Welfare and Institutions Code section 702, to declare whether the [assault] offense was a misdemeanor or felony. In failing to do so, it erred. Nothing in the record establishes that the juvenile court was aware of

its discretion to sentence the offense as a misdemeanor rather than a felony." (*Id.* at p. 1210.)

"[N]either the pleading, the minute order, nor the setting of a felony-level period of physical confinement may substitute for a declaration by the juvenile court as to whether an offense is a misdemeanor or felony. [Citation.]" (*Manzy W., supra*, 14 Cal.4th at p. 1208.) Because nothing in the record suggests the court exercised its discretion in this case, a remand under these circumstances would not be "redundant" of an exercise that has not occurred. (*Id.* at p. 1209.)

The Attorney General disagrees, noting the parties had reached a negotiated settlement that called for an admission to a wobbler offense that was stipulated to be a felony in exchange for dismissal of two other counts. The Attorney General claims this was "obviously the reason that no one spoke up when the court asked at the dispositional hearing whether any additional findings were required by the court. It was understood by everyone that the offense would be considered a felony." As we have noted, this understanding is not specifically set forth in the record. Nowhere is it clear that minor was pleading to Count 1 "as a felony" despite the Attorney General's representations to the contrary.

Welfare and Institutions Code section 702 and rule 5.795(a) require the juvenile court to make an explicit record and do not allow the court, or an appellate court, to rely on the parties' unexpressed understanding. Because the needed record has not

been made, a remand would not be "redundant" as the Attorney General claims.

DISPOSITION

The dispositional order is reversed, and the matter is remanded to the juvenile court for the court to exercise its discretion to declare the commitment offense to be a felony or a misdemeanor, and for further proceedings consistent with this opinion.

BLEASE, Acting P. J.

We concur:

ROBIE, J.

DUARTE, J.