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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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

THE PEOPLE,

Plaintiff and Respondent,

v.

B.E.,

Defendant and Appellant.

D060828

(Super. Ct. No. J224393)

APPEAL from a judgment of the Superior Court of San Diego County, Lawrence Kapiloff, Judge. Affirmed.

The juvenile ward in this case pepper sprayed another juvenile. At the time the juvenile was sentenced on the pepper spray adjudication, his record included prior weapon possession and assault adjudications. At sentencing, with some reluctance, but relying on the recommendation of the probation department, the juvenile court did not commit the juvenile to Camp Barrett, but elected to continue the juvenile's commitment

in the probation department's Breaking Cycles program. The juvenile court did treat the juvenile's assault and tear gas adjudications as felonies.

On appeal the juvenile argues the juvenile court abused its discretion in failing to find his adjudications were misdemeanors. In light of the unprovoked nature of the attack here and the juvenile's record, no abuse of discretion occurred.

#### FACTUAL AND PROCEDURAL BACKGROUND

On May 1, 2011, the 16-year-old juvenile in this case, B.E., attacked a 17-year-old juvenile, Kyle O., with pepper spray as Kyle was walking down a street toward a location where the two juveniles had agreed to fight. The attack can be best described as an ambush: B.E. was in a car which drove by Kyle, and as it passed Kyle, B.E. reached out the passenger side window and put the spray directly in Kyle's face. The attack grew out of an earlier incident in which Kyle and a friend had allegedly roughed up a 14-year-old friend of B.E., Gary, who had stolen video games from Kyle.

As a result of the attack on Kyle, the juvenile court found B.E. committed assault with force likely to inflict great bodily injury and used tear gas and a tear gas weapon. (Pen. Code,<sup>1</sup> §§ 245, subd. (a)(1), 12403.7.) At the time the juvenile court adjudicated the offenses, it determined both offenses were felonies.

Several months before the attack on Kyle took place, B.E. had been found to be in possession of a deadly weapon, a misdemeanor. Two days after the attack on Kyle, B.E. engaged in a second street fight which resulted in an assault adjudication. The second

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

assault was adjudicated before B.E. was charged in the attack on Kyle and at the time of sentencing on the Kyle assault B.E. was serving a 240-day Breaking Cycles commitment on that assault adjudication. According to the probation officer's report, B.E. was performing well in the Breaking Cycles program and had the support of his mother.

Although the probation officer seriously considered recommending a Camp Barrett commitment on the two Kyle related offenses, in light of B.E.'s performance in Breaking Cycles, he recommended continuing B.E. in Breaking Cycles for an additional 90 days. With some real reluctance, the juvenile court adopted the probation officer's recommendation. The juvenile court stated: "[Y]ou're a teenager of pretty good size, and you've been in two fights in the streets. Both fights would have landed you in county jail if you were an adult. Both fights could have landed you in prison as an adult. In the juvenile world you get one bite at the apple, sometimes two. And depending on the circumstances, you get to eat the whole apple slowly, meaning you don't end up in custody.

"I don't know what you're buying into out there on the streets, but whatever it is, it's the wrong thing. But if you have ounce of sense and you hear one thing, you better hear this, if you ever walk through that door again with a violent offense, you're done. . . . There is no way that you are going to walk around with two-plus offenses related to violence and not get locked up. You need to understand that. [¶] . . . [¶]

"You are going to end up locked up. And one day out in the streets, you're going to bump into somebody who doesn't play and get killed. And it happens every day. . . .

"Probation department took into consideration a commitment to Camp Barrett for one year. . . . I don't think you know how close you are to getting locked up. . . .

"I'm going to extend your Breaking Cycles commitment for an additional 90 days. . . . Next time you walk through that door with a crime of violence. I'll guarantee we'll not have any more discussions, you will go to Camp Barrett. [¶] . . . [¶]

"You understand truly how close to getting locked up you are?"

"THE MINOR: Yes, sir.

"THE COURT: I hope so. We're not going through this again. You had your bite at the apple."

#### DISCUSSION

Section 17, subdivision (b)(3) provides that when, as here, a crime is punishable either by imprisonment in the state prison or imprisonment in a county jail, it is a misdemeanor for all purposes if the court grants probation "and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor." On appeal B.E. argues that at the time of sentencing the juvenile court should have declared the assault and tear gas offenses misdemeanors. We reject this contention.

First, as the Attorney General notes, B.E. did not ask for a section 17, subdivision (b)(3) declaration at the time of sentencing. Thus, B.E. forfeited any argument the juvenile court abused its discretion in failing to alter its earlier determination the offenses were felonies. (See *People v. Smith* (2001) 24 Cal.4th 849, 852; *People v. Scott* (1994) 9 Cal.4th 331, 353.) In this regard we note the trial court fulfilled its obligation under

Welfare & Institutions Code section 702 in expressly determining the offenses were felonies. Thus, the sentence was authorized and not subject to any exception to the forfeiture rule. (See *People v. Scott, supra*, 9 Cal.4th at p. 355.)

In any event, the trial court did not abuse its discretion in determining the offenses were felonies. Discretion under section 17, subdivision (b) is contextual and thus "those factors that direct similar sentencing decisions are relevant, including 'the nature and circumstances of the offense, the defendant's appreciation of an attitude toward the offense, or his traits of character evidenced by his behavior and demeanor at trial.' " (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978.) The court must also consider the defendant's criminal history. (*Id.* at p. 979.) Here, both the manner in which the attack on Kyle took place—by ambush—and B.E.'s criminal history, fully support the juvenile court's decision to treat the offenses as felonies. As the Attorney General points out, the juvenile court was confronted with a juvenile who had committed an escalating series of violent offenses. In particular, with respect to the attack on Kyle, the juvenile court expressly rejected B.E.'s defense that in some manner Kyle had provoked the attack by virtue of the year-old incident with Gary or had in any manner acted aggressively on the day of the pepper spray attack. Given this record, the trial court did not abuse its discretion in treating the offenses as felonies.

DISPOSITION

The judgment adjudicating B.E. a ward is affirmed.

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BENKE, Acting P. J.

WE CONCUR:

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NARES, J.

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McDONALD, J.