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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re D.F., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

D.F.,

Defendant and Appellant.

F062789

(Super. Ct. No. 07CEJ600899-3)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Brian M. Arax, Judge.

Erik R. Beauchamp, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Max Feinstat, Deputy Attorneys General, for Plaintiff and Respondent.

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*Before Levy, Acting P.J., Gomes, J., and Detjen, J.

Appellant, D.F., a minor, was initially adjudged a ward of the court and placed on probation in 2007, for possession of a concealed firearm by a minor, in violation of former Penal Code section 12101, subdivision (a)(1) (section 12101(a)(1)).¹ In 2010, he was readjudged a ward and continued on probation, following a second adjudication of the same offense. In the instant case, following a contested jurisdiction hearing in February 2011, the juvenile court found true an allegation that appellant committed a third section 12101(a)(1) violation, and, following the subsequent disposition hearing in June 2011, again readjudged appellant a ward of the court, continued him on probation, ordered him removed from the physical custody of his mother, placed him on the electronic monitoring program for 90 days, and declared his maximum term of confinement (Welf. & Inst. Code, § 726, subd. (c)) to be three years eight months.

On appeal, appellant's sole contention is that the juvenile court erred in failing to declare on the record, at either the jurisdiction hearing or the disposition hearing, the instant offense to be a felony or a misdemeanor. We affirm.

DISCUSSION

Governing Legal Principles

Welfare and Institutions Code section 702 (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." An offense which, in the discretion of the court, may be punished as either a felony or a misdemeanor is commonly called a "wobbler."

¹ Former Penal Code section 12101, which was in effect at all times relevant here, was repealed effective January 1, 2012. The provisions of the statute were continued without substantive change in Penal Code section 25400, subdivision (a)(2). All references to Penal Code section 12101, including its subdivisions and smaller component parts, are to the repealed statute.

(*In re Manzy W.* (1997) 14 Cal.4th 1199, 1201 (*Manzy W.*)). As the parties agree, section 12101(a)(1) is a wobbler. (Pen. Code, § 12101, subd. (c)(1)(C)).

The purpose of section 702 is two-fold: (1) to “provid[e] a record from which the maximum term of physical confinement for an offense can be determined, particularly in the event of future adjudications” (*Manzy W.*, *supra*, 14 Cal.4th at p. 1205), and (2) to “ensur[e] that the juvenile court is aware of, and actually exercises, its discretion under ... section 702” (*id.* at p. 1207).

“The language of [section 702] is unambiguous. It requires an *explicit* declaration by the juvenile court whether an offense would be a felony or misdemeanor in the case of an adult.” (*Manzy W.*, *supra*, 14 Cal.4th at p. 1204, italics added; accord, *In re Kenneth H.* (1983) 33 Cal.3d 616, 619 [“section 702 means what it says and mandates the juvenile court to declare the offense a felony or misdemeanor”].) “[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.” (*Manzy W.*, at p. 1208.)

In addition, California Rules of Court, rule 5.778(f),² provides that if the juvenile court finds the allegation of a wardship petition true, it “must make [certain enumerated] findings,” including the following: “(9) In a [Welfare and Institutions Code] section 602 matter, the degree of the offense and whether it would be a misdemeanor or felony had the offense been committed by an adult. If an offense may be found to be either a felony or 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. These determinations may be deferred until the disposition hearing.” And, rule 5.790(a) provides, in relevant part: “At the

² All rule references are to the California Rules of Court.

disposition hearing: [¶] (1) If the court has not previously considered whether any offense is a misdemeanor or felony, the court must do so at this time and state its finding on the record. If the offense may be found to be either a felony or a misdemeanor, the court must consider which description applies and must expressly declare on the record that it has made such consideration and must state its finding as to whether the offense is a misdemeanor or a felony.”

A juvenile court’s failure to comply with section 702 does not invariably necessitate remand. (*Manzy W., supra*, 14 Cal.4th at p. 1209.) “[S]peaking generally, the record in a given case may show that the juvenile court, despite its failure to comply with the statute, was aware of, and exercised its discretion to determine the felony or misdemeanor nature of a wobbler. In such case, when remand would be merely redundant, failure to comply with the statute would amount to harmless error.... 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.” (*Ibid.*)

Analysis

As appellant argues, and the People do not dispute, at no time, at either the jurisdiction hearing or the disposition hearing, did the court declare the instant offense to be a felony or a misdemeanor. In addition, there is no dispute that the court failed to comply with the mandate of rule 5.790(a) that where, as here, the court does not make the statutorily required declaration at the jurisdiction hearing, it must, at the disposition hearing, in addition to complying with the statutory directive, “expressly declare on the record” that it has considered whether the offense in question should be punished as a felony or a misdemeanor. (Rule 5.790(a).)

The People argue, however, that the court complied with section 702, based on the written disposition order, signed by the court and dated June 20, 2011. This order is on a

pre-printed form, consisting in large part of a series of statements, most of which are preceded by a box in which it can be indicated by an “x” or some other notation that the statement is part of the order. There is an “x” in the box preceding the statement, “The following counts may be considered a misdemeanor or a felony The court finds the child’s violation:” There follows the notation, “PC 12101(a)(1),” indicating the instant offense. This notation is followed by two boxes, one labeled “Misdemeanor” and the other labeled “Felony.” There is an “x” in the box labeled “Felony” and no mark in the box labeled “Misdemeanor.” This portion of the written order, the People argue, constitutes the explicit declaration required by section 702. Appellant counters that this finding set forth in the written order does not comply with section 702 because the statutorily mandated declaration must be made on the record, during the hearing, at the time the court sets the maximum term of confinement, which will vary depending on whether the offense is a felony or misdemeanor. However, we need not resolve this dispute. Assuming for the sake of argument that the section 702 declaration must be made on the record no later than the disposition hearing, and that the court does not comply with the statute by declaring the offense to be felony or misdemeanor in its written disposition order, which, presumably is prepared and signed *after* the court has orally announced its disposition, any error, as we explain below, was harmless.

As indicated above, for purposes of determining whether *Manzy W.* error is prejudicial, “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.” (*Manzy W., supra*, 14 Cal.4th at p. 1209.) We recognize that the juvenile court did not at any time, during either the jurisdiction hearing or the disposition hearing, refer to its discretion to declare the offense a misdemeanor; neither the prosecution, defense counsel nor the probation officer pointed out to the court

that it had such discretion; and the report of the probation officer, although it referred to the instant offense as a felony, did not indicate that it could be a misdemeanor.

However, the written disposition order, explicitly states appellant's section 12101(a)(1) violation "may be considered a misdemeanor or felony," and immediately after that statement, indicates that the court determined the offense to be a felony. Appellant argues that this order was presumably signed after the disposition hearing and the judicial officer "may not have been aware of his discretion until he read the language on the form." The record admits of this possibility, but in our view, the express acknowledgment of the wobbler status of the instant offense and the finding that the offense was a felony, in a written court order signed by the judicial officer on the day of the hearing, is sufficient to establish that, at the disposition hearing, the court was aware it could treat the instant offense as a misdemeanor and set a misdemeanor length of confinement. Therefore, any violation of section 702 and/or rule 5.790(a) was harmless.

DISPOSITION

The judgment is affirmed.