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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

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

THE PEOPLE,

Plaintiff and Respondent,

v.

H.E.,

Defendant and Appellant.

F070021

(Super. Ct. No. JJD067421)

OPINION

APPEAL from an order of the Superior Court of Tulare County. Juliet L. Boccone, Judge.

Hassan Gorguinpoor, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Lewis A. Martinez and Amanda D. Cary, Deputy Attorneys General, for Plaintiff and Respondent.

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Minor H.E. appeals a dispositional order committing him to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice (also Division

of Juvenile Facilities; hereafter DJJ).¹ He contends the juvenile court violated juvenile court law and thereby his due process rights when it held a partial combined hearing in two unrelated juvenile cases. He asks that we reverse and remand for the purpose of a new disposition hearing. We find no prejudicial error and affirm.

STATEMENT OF THE CASE

A November 2013 juvenile wardship petition filed against then 16-year-old H.E. pursuant to Welfare and Institutions Code² section 602, alleged nine counts of forcible lewd acts upon a minor under 14 (Pen. Code, § 288, subd. (b)(1)), and five counts of lewd acts upon a minor under 14 (Pen. Code, § 288, subd. (a)). Each count included an enhancement under Penal Code section 667.61, subdivisions (a)-(c), alleging there were multiple victims. The juvenile court subsequently dismissed each of the enhancements on the People's motion.

In March 2014, H.E. entered into an agreement with the prosecutor in which he admitted five forcible lewd conduct allegations³ and two lewd conduct allegations.⁴ The remaining allegations were dismissed on the People's motion. H.E. was declared a ward of the court pursuant to section 602.

¹ In 2005, the powers of the Department of the Youth Authority (or California Youth Authority, or CYA) were transferred to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF). (Gov. Code, § 12838.5; Welf. & Inst. Code, § 1710.) DJF is part of the DJJ. (*In re D.J.* (2010) 185 Cal.App.4th 278, 280, fn. 1.) The record below refers to the authority to which H.E. was committed as either DJF or DJJ. For consistency, we will refer to the authority as the DJJ.

² All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

³ Counts 2, 3, 7, 8, and 10.

⁴ Counts 12 and 14.

In July 2014, following a contested disposition hearing, H.E. was committed to the DJJ. The juvenile court found the maximum term of confinement to be the mitigated term of 19 years and 8 months, with credit for 254 days served.

STATEMENT OF FACTS

Because the facts are not at issue, we briefly set out the allegations which H.E. admitted. In 2012, while in foster care, H.E. attempted on two occasions to forcibly put his penis into the anus of another foster child, A.V., age 10. H.E. also committed several forcible lewd acts against 7-year-old B.R., H.E.'s foster parents' biological son. H.E. touched B.R.'s penis with his hand and forced B.R. to do the same to him. H.E. also touched B.R.'s buttocks with his penis and penetrated his anus.

In 2013, while in another foster home, H.E. molested 8-year-old M.S., the granddaughter of his then foster parents. On one occasion, he touched M.S.'s vagina over her clothes; on another, he lay on top of M.S.

DISCUSSION

H.E. argues on appeal that the juvenile court's decision to hold a combined disposition hearing for the limited purpose of allowing one witness, a psychologist with the DJJ, to testify in two separate unrelated cases at the same time was error, as it violated sections 675 and 676, which, in turn, precluded him from conducting a full and complete cross-examination of that witness. He further contends the error was structural, requiring reversal and remand for a new disposition hearing. We find no prejudicial error and affirm.

Proceedings Below

At the contested disposition hearing July 11, 2014, H.E. presented two psychologists, one who interviewed him and then conducted a number of assessments; the other who reviewed the conclusions of the first. Based on these assessments, the two psychologists recommended that H.E. be placed in a "highly-structured environment with enforced boundaries and with rules, and rules which would not allow him further access

to his victims.” One psychologist described such an environment as “supervised, heavily supervised, heavily regulated, and ... no access to adolescents.” The other psychologist described a highly structured environment with enforced boundaries, “not necessarily” a prison-type setting, but “[b]asically somewhere that is not where he previously was. Like the group home, there [were] still inciden[ts] there. So somewhere that it would be more structured with more boundaries, not a lot of access to the victims such as he had.”

After a break in the proceedings, without H.E. or his counsel present, the prosecutor returned to the courtroom and was joined by another minor in a separate unidentified case, R.M., and R.M.’s attorney, R.M.’s parents, and the parents of R.M.’s victim. The prosecutor, who was appearing for the People in both H.E.’s and R.M.’s case, noted that Dr. Heather Bowlds, her witness from DJJ, reported that she needed to get back to Sacramento “as soon as possible.”⁵ The prosecutor suggested that, because Dr. Bowlds would not testify to anything specific as to either minor, but only to “information regarding DJJ,” that she testify for both R.M.’s case and H.E.’s case at the same time and that both counsel have an opportunity to cross-examine her.

The juvenile court reiterated that Dr. Bowlds’ testimony would be “just a matter of informing the Court of DJJ and their program.” When asked if R.M.’s counsel had any objection, counsel stated he had “never done that before.” The court stated it had not either, but was asking if R.M.’s counsel wanted to incorporate Dr. Bowlds’ testimony into his case, as it would be duplicative, or if he wanted it to remain separate. R.M.’s counsel stated that he did not object as long as he had an opportunity to cross-examine the witness.

H.E. then returned to the courtroom with his counsel. The juvenile court explained:

⁵ The record shows that Dr. Bowlds was to testify at H.E.’s scheduled disposition hearing May 7, 2014, but was unable to attend and was not available until early June. As such, the disposition hearing was rescheduled.

“We have kind of a unique situation here. We have a representative from the [DJJ] ... who is going to be testifying as to the program and what the program involves. And because both minors are in the same situation, both pending a disposition, it didn’t make a lot of sense to do it twice. [¶] So what we’re going to do is have the witness testify as to the program and what it entails. And then [counsel for H.E.], you have an opportunity to cross-examine the witness, and [counsel for R.M.], you will have an opportunity to cross-examine the witness. [¶] The witness will not be testifying to anything that is particularized to either of the minors. It is just generally how the program is.... [¶] ... What the program consists of, what the parameters are, and how it works. So I don’t see how that would interfere with either parties getting adequate representation in this hearing.”

When asked by H.E.’s counsel for clarity, the juvenile court assured counsel that it was not a matter of joinder. Rather, this portion of the testimony would be part of the record in both R.M. and H.E.’s hearings, but after the testimony, R.M. would leave and H.E.’s counsel would be able to continue with his contested disposition.

H.E.’s counsel objected to the “unusual procedure,” stating his concern was that there might “somehow be factual elements from each case introduced into the testimony or to the discussion somehow.” He was concerned “about some sort of cross-pollination with hypotheticals based on facts in this other minor’s case and hypotheticals based on my client’s case. I don’t even anticipate making those type of questions. I obviously don’t know what [R.M.’s counsel] is going to ask. I’m worried about the slight risk of cross-pollination of facts.”

The juvenile court suggested that, in order to remedy H.E.’s counsel’s concern, R.M.’s counsel could remain outside the courtroom during H.E.’s counsel’s cross-examination and vice versa. H.E.’s counsel stated, “I see what you are saying. [¶] I’ve made the objection. You’ve overruled it, and I think we are good.” When asked by the juvenile court if H.E.’s counsel wanted to proceed as the court had suggested, H.E.’s counsel stated he would like to see what questions R.M.’s counsel asked.

The juvenile court then noted that R.M.’s victim’s parents were present in the courtroom. H.E.’s counsel objected to their presence, as they “don’t need to watch

[H.E.'s] stuff.” The juvenile court reiterated that the testimony did not pertain to H.E. but “generally to DJJ.” After the prosecutor noted that this was a public proceeding for both minors “because they are discretionary direct files,”⁶ the juvenile court allowed everyone to remain.

Dr. Bowlds, a senior psychologist with the DJJ, then testified about the DJJ’s sex offender treatment program, particularly as it related to adolescent sex offenders. Her testimony did not refer to either minor’s individual situation. Both H.E.’s counsel and R.M.’s counsel cross-examined Dr. Bowlds. Neither of them posed any hypotheticals or asked any other type of question based on the specific facts of either minor’s case.

R.M. and those connected to his case were then excused and H.E.’s disposition hearing continued. Following closing arguments by H.E.’s counsel and the prosecutor, the juvenile court placed H.E. with the DJJ.

DISCUSSION

H.E. contends that the juvenile court violated sections 675 and 676 when it combined his case with the case of another unrelated minor in order to allow Dr. Bowlds to testify, thereby violating his due process rights to cross-examine Dr. Bowlds without losing his confidentiality. H.E. contends the violation requires reversal of the disposition order.

“It is well-established that ‘the essentials of due process and fair treatment’ apply to a juvenile delinquency adjudication.” (*In re Kevin S.* (2003) 113 Cal.App.4th 97, 107 (*Kevin S.*)) But “under California law juveniles do not have the same panoply of rights as adult criminal defendants.” (*Tiffany A. v. Superior Court* (2007) 150 Cal.App.4th 1344, 1361.) “Although the dispositional hearing is technically civil in nature [citations], and not all the requirements of criminal proceedings apply, ‘... the hearing must measure

⁶ H.E. is suggesting that the prosecutor was referring to section 707, subdivision (d), which gives the prosecutor discretion to file certain juvenile cases directly in adult court, where such proceedings would be public.

up to the essentials of due process and fair treatment.’ [Citations.] The standard is ‘fundamental fairness.’” (*In re Shannon B.* (1994) 22 Cal.App.4th 1235, 1246, disapproved on other grounds in *People v. Evans* (2008) 44 Cal.4th 590, 592-593, 598, fn. 5.) The law strikes “‘a balance – to respect the “informality” and “flexibility” that characterize juvenile proceedings, [citation], and yet to ensure that such proceedings comport with the “fundamental fairness” demanded by the Due Process Clause.’” (*Kevin S., supra*, at p. 108.)

Section 675, which H.E. claims the juvenile court violated, states:

“(a) All cases under the provisions of this chapter shall be heard at a special or separate session of the court, and no other matter shall be heard at that session. Except as provided in subdivision (b), no person on trial, awaiting trial, or under accusation of crime, other than a parent, guardian, or relative of the minor, shall be permitted to be present at any such session, except as a witness.

“(b) Hearings for two or more minors may be heard upon the same rules of joinder, consolidation, and severance as apply to trials in a court of criminal jurisdiction.”

Respondent acknowledges that, read in isolation, this section appears to confirm H.E.’s assertion that the juvenile court’s decision to combine cases without formal joinder to allow Dr. Bowlds’ testimony violates the face of the statute. But respondent argues that section 675, when read in conjunction with section 680, allows the juvenile court to exercise its discretion to control the proceedings as it did here. Section 680 reads:

“The judge of the juvenile court shall control all proceedings during the hearings with a view to the expeditious and effective ascertainment of the jurisdictional facts and the ascertainment of all information relative to the present condition and future welfare of the person upon whose behalf the petition is brought. Except where there is a contested issue of fact or law, the proceedings shall be conducted in an informal nonadversary atmosphere with a view to obtaining the maximum cooperation of the minor upon whose behalf the petition is brought and all persons interested in his welfare

with such provisions as the court may make for the disposition and care of such minor.”

Section 680 was enacted in order to attain a ““working balance between two essential objectives”” of ““preserving the guarantee of due process to the minor”” and ““establishing an informal court atmosphere so that potentially harmful effects of the proceedings are minimized and the minor’s receptivity to treatment is encouraged”” (*People v. Superior Court (Carl W.)* (1975) 15 Cal.3d 271, 279.) As argued by respondent, while this was a contested disposition hearing, there were no contested issues of fact or law with regard to Dr. Bowlds’ testimony on the type of treatment programs the DJJ offered. Instead, she was there simply to inform the juvenile court about the various facilities and programs, not as to what would be the most appropriate placement for either minor.

H.E. also contends the juvenile court violated section 676 by admitting unrelated people into his hearing, thereby preventing him from fully cross-examining Dr. Bowlds without giving up confidentiality. Section 676 states, in relevant part: “the public shall not be admitted to a juvenile court hearing.” (§ 676, subd. (a).) There are, however, exceptions. The court may admit persons that it deems to have a “direct and legitimate interest in the particular case or the work of the court.” (§ 676, subd. (a).) The court may also admit “up to two family members of a prosecuting witness.” (§ 676, subd. (a).) And the public may attend when the minor is accused of any of the 28 offenses listed in the statute. (§ 676, subd. (a).) If none of these exceptions applies, the hearing must be held in a closed courtroom.

Some of the exemptions in section 676, subdivision (a)(1)-(28) refer to a specific code; others describe certain types of conduct. While sections 288, subdivision (a) and/or subdivision (b)(1) are not specifically listed, sodomy by force is listed as an exception in section 676, subdivision (a)(5), “Sodomy by force, violence, duress, menace, threat of great bodily harm” Count 8 of the wardship petition, which H.E. admitted, alleged he

committed a forcible lewd act upon a child, specifically anal penetration. Thus, as argued by respondent, the juvenile court did not violate section 676 by holding the combined proceedings and allowing people unrelated to H.E. to be present.

In any event, even if we find that the juvenile court violated section 675 and/or 676 by combining the disposition hearing for purposes of Dr. Bowlds' testimony, we find H.E. was not denied due process because he was unable to fully cross-examine Dr. Bowlds without a breach in confidentiality. Even if H.E.'s counsel was not allowed to fully cross-examine Dr. Bowlds, there is no Sixth Amendment right of confrontation at a dispositional hearing such as the one held below. (See *People v. Arbuckle* (1978) 22 Cal.3d 749, 754 [criminal defendants have no Sixth Amendment right to confrontation in sentencing hearings].) While section 702.5 expressly grants a minor right of confrontation and cross-examination of witnesses at a jurisdictional hearing, no such corollary statutory right exists with regard to a dispositional hearing. Rather, section 706 provides: "After finding that a minor is a person described in Section 601 or 602, the court shall hear evidence on the question of the proper disposition to be made of the minor. The court shall receive in evidence the social study of the minor made by the probation officer and such other relevant and material evidence as may be offered" (See, e.g., *In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1842-1843 (*Romeo C.*) [section 706 does not require court to grant minor right to cross-examine probation officer on request].)

As explained in *Romeo C.*, *supra*, 33 Cal.App.4th at page 1848:

"[T]he evidentiary rules applicable to jurisdictional hearings in juvenile cases differ substantially from those applicable to dispositional hearings. By the same token, due process requirements for the two types of hearings also differ. They are necessarily most stringent at the jurisdictional phase of a juvenile proceedings, whether under section 300 or ... 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 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."

Even were we to assume H.E.'s right to due process was violated by his inability to further cross-examine Dr. Bowlldt without loss of confidentiality, any such error was harmless beyond a reasonable doubt under either the state or federal standard of review. (See *People v. Watson* (1956) 46 Cal.2d 818, 836 [question is whether it is "reasonably probable that a result more favorable to [defendant] would have been reached in the absence of the error"]; *Chapman v. California* (1967) 386 U.S. 18, 24 ["Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"].).

H.E.'s theory on appeal is that it was crucial for counsel to be able to fully cross-examine Dr. Bowlds without risking a loss of confidentiality in order to determine if the treatment provided at the DJJ would be in his best interest, taking into consideration his difficult past as "both a child victim and a child perpetrator of abuse." It is not clear whether these questions even would have been allowed if asked, as they were outside the scope of direct examination (Evid. Code, §§ 761, 773, subd. (a)) and it is not clear from the record whether information regarding specific treatment for a particular minor was within Dr. Bowlds' personal knowledge, precluding her testimony on the subject (Evid. Code, § 702).

Moreover, H.E. has not established that, even if these questions had been posed to Dr. Bowlds, it would have affected the ultimate outcome of his disposition. H.E.'s own psychologist testified that he needed to be in a "highly structured, highly supervised, and highly regulated" environment and that he have no access to adolescent children, which was exactly what Dr. Bowlds testified the DJJ offered. Any error was harmless beyond a reasonable doubt.

DISPOSITION

The findings and order of the juvenile court are affirmed.

GOMES, J.

WE CONCUR:

HILL, P. J.

FRANSON, J.