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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re G.T., a Person Coming Under the
Juvenile Court Law.

H037097
(Monterey County
Super. Ct. No. J41778)

THE PEOPLE,

Plaintiff and Respondent,

v.

G.T.,

Defendant and Appellant.

The juvenile court found G.T. (minor) to be a person described by Welfare and Institutions Code section 602 (wardship for violation of law) in that he had committed robbery in concert of an inhabited dwelling (Pen. Code, §§ 211, 213, subd. (a)(1)(A))¹ armed with a handgun (§ 12022, subd. (a)(1)). On appeal, the minor contends that his attorney provided ineffective assistance by failing to object to two statements made by the juvenile court. We find no ineffective assistance of counsel and affirm the order.

I. FACTS

The facts as revealed at the contested jurisdictional hearing are as follows.

In or around May 2009, Witness 1 was living with her mother, sister, and brother in a house in Chualar. On the morning of May 27, 2009, she was still in bed when a man

¹ Hereafter all unspecified statutory references are to the Penal Code.

came into her room. The intruder directed Witness 1 to the living room where she saw two other strangers and her sister sitting on the couch. Witness 1 then noticed that the man who had entered her room was holding a gun. She recognized his face, which he had not covered as the other two had, having seen him twice before at her house. Once he had knocked on their door asking for her mother. He had wanted to buy jewelry or, as Witness 1 described it, “three chains.” Another time she saw him in her backyard. On the day of the robbery she saw that he had a “J” tattooed on his neck.

The man with the gun stayed in the living room while the other two went through the house. Before leaving with the other two men, the man with the gun told Witness 1 not to call the police “because he had a radio” and they “already know what’s going to happen if they call the police.” Witness 1 believed that to mean he would return and kill them.

Notwithstanding the threat, Witness 1 did call the police, who responded and found that jewelry and cash were missing from the home. Witness 1 was 22 years old at trial, making her about 20 years old at the time of the robbery. She was very frightened to testify and was worried that something would happen to her or her family when she left.

Witness 2 is the sister of Witness 1. Witness 2 was 12 at the time of the robbery. She testified that on May 27, 2009, a man knocked on her bedroom door and directed her to go to the living room. He asked where to find gold and money. He held a gun and told her not to move. She saw a tattoo on his neck. She could not tell what it said but saw that it was written in black cursive. Witness 2 identified the minor in court as the man with the gun.

On August 27, 2010, a little over a year after the robbery, Witness 1 saw the minor on the street in Salinas. She recognized him as the man with the gun who had been to her house the year before. She recognized the “J” tattoo on his neck. She was frightened and

called her mother and the police. The minor was still in sight by the time the police arrived and he was taken into custody.

Jasmine Hernandez is the minor's girlfriend and the mother of his two children. The eldest child is Joshua who was born on April 4, 2009. Hernandez testified that the minor got a tattoo on his neck, "like in the middle of May, or the end of May the beginning of June" that says "Joshua" and "4-4-09." Undated photos taken of the minor during a trip "before his graduation" around the "end of May" in 2009 do not show the tattoo so Hernandez assumed he did not have the tattoo at that time. A photograph of the minor that Hernandez identified as having been taken on Mother's Day 2009 does not show a tattoo on the left side of his neck. Hernandez was sure the minor had the tattoo when he graduated, which was "like the first week of June." The minor's mother and father both recalled having first seen the minor's tattoo on the day of his graduation, June 8, 2009, and not before that.

Sheriff's Deputy Jorge Perez had responded to the call from Witness 1 on the day of the robbery. After a preliminary investigation, the case was suspended pending receipt of further information. Perez was called back into the case after Witness 1 recognized the minor on the street in Salinas. When Perez interviewed the minor, the minor denied ever having been in Chualar. He claimed he got his neck tattoo just the month before, which would have been July 2010. A photograph of the minor that is time-stamped June 11, 2009, shows him with a tattoo on the left side of his neck. The tattoo is unreadable except for the first initial "J." Perez conducted a probation search of the minor's residence and spoke with Hernandez at that time. Perez asked her about the minor's tattoo and she stated that the minor had received it in April 2009 when their child was born.

At trial the minor denied having ever seen the victims or having ever visited Chualar. He stated that he got his tattoo, "Like before I graduated, because I remember-- yeah, right before I graduated." Counsel asked him if it could have been sooner than that

and the minor replied, “No. No, I don’t think so.” Counsel asked, “You don’t know exactly?” to which the minor responded, “No.” On cross examination he admitted telling the officer that he got the tattoo in July, stating “Yeah, well, I couldn’t remember. I had June and July mixed up.”

II. THE JUVENILE COURT’S RULING

The juvenile court found the two eyewitnesses to be credible. The court observed that the defense was “primarily the defense of no tattoo,” which, the court also observed, “could be true if the evidence was firm and consistent rather than everyone wavering in terms of when this tattoo occurred.” The court noted that the minor’s father was certain he had not seen the neck tattoo prior to the day of the minor’s graduation and he did not know if the minor had any other tattoos. “But I think if you just look at the minor, he’s got a tattoo on his arm, something that I can see just hanging out of his clothing. So that would be something that one would be cognizant of if you can see and be aware of what’s going on, you would understand and know. He’s confident it’s June 8th, the day of graduation.

“Compare that with the minor’s own testimony. He doesn’t know. He thinks it was the day of graduation. But one would think if you’re going to be as confident as the other witnesses who are not wavering in terms of what they saw, the day of graduation-- the day of High School graduation is only something which you do once in a lifetime. I believe all of us who have graduated from High School can sit down and recall our day. . . . Nothing by way of testimony in terms of on the day of my graduation I remember being with family. I immediately walked out and I went down and got a tattoo because I was so happy to graduate, I wanted everybody else to know I had a son so I got the tattoo on the day of my graduation, put it on the side of my neck to be proud. Unfortunately, my father was not proud. That was not the testimony today. [¶] The testimony today was I think it was graduation, maybe, I’m not sure. Could have been a couple of days before. And the person who was living with you said the tattoo was towards the end of May, first

part of June, but she knew it was around graduation. [¶] Now, no one could be as confident as the two witnesses, [Witness 1] and [Witness 2], in terms of the presence of this tattoo, that it was there around this time--not maybe around this time--with clarity and certainty.”

The court found the allegations of the petition to be true. At the dispositional hearing the court committed the minor to the Division of Juvenile Justice stating: “And I believe the Court can elect one of the triad with respect to the term of Juvenile Justice. I believe the maximum period of confinement is ten years, nine years on the 211, plus an additional one for the arming. The Court will choose to select the middle term of six years, plus one for the arming, that’s a total fixed time of seven years.” This timely appeal followed.

III. DISCUSSION

The minor argues that his attorney provided constitutionally ineffective assistance by failing to object to the trial court’s erroneous recollection that the minor “got his tattoo on his graduation day” and the court’s “erroneous view that it was bound to choose a term based on the adult determinate sentencing scheme.”

“Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel.” (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) That right “entitles the defendant not to some bare assistance but rather to *effective* assistance.” (*Ibid.*) A claim of ineffective assistance of counsel requires a showing that counsel’s performance was deficient and resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 692.) “The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” (*Id.* at p. 688.)

As to the juvenile court’s statements about the tattoo, it appears the minor has misinterpreted the statements. The minor argues that the court mischaracterized his testimony as stating that he got his tattoo on the day he graduated rather than “right

before I graduated,” which is what he actually said. But as set forth at length above, the court was commenting upon the reasons for finding the defense to be not credible. The court noted that the minor’s father was certain that he had first seen the tattoo on the day of the graduation and not before but that the minor, who ought to have remembered what happened on his graduation day, could not recall if he had got the tattoo that day or not. The court was commenting upon the minor’s uncertainty. The court’s recitation of the evidence was not inconsistent with the testimony that appears in the transcript before us. It was thus reasonable for counsel to remain silent.

The minor also argues that in choosing the term of confinement the juvenile court erroneously believed that it was bound to choose one of the three terms specified for a robbery conviction and that his trial counsel was ineffective for failing to bring this error to the court’s attention. The maximum term of confinement for a juvenile committed to the division of juvenile facilities may not exceed the maximum period of adult confinement imposed for conviction of the same offense. (Welf. & Inst. Code, § 731, subd. (c).) The minor is correct that the juvenile court’s discretion is not limited to the selection of one of the three terms for a given offense under the Penal Code. (*In re H.D.* (2009) 174 Cal.App.4th 768, 776-778.) But we do not find support for the argument that the trial court was unaware of that. The court stated that “the Court *can* elect one of the triad with respect to the term of Juvenile Justice” (italics added) and noted that the maximum period of confinement would be 10 years. The court chose, instead, to make the minor’s maximum period equal to what the midterm would have been for an adult offender plus one year for the arming enhancement. The court did not state that she was bound by the options presented in the adult setting. She stated simply that the court “can” choose from those terms. This is undoubtedly true. The fact that the court chose a term for the minor that was within the range for an adult offender does not establish that the court believed she was *bound* by the adult guidelines. Because there is no indication

that the court did not understand the extent of her discretion, we cannot find the minor's counsel to have been ineffective for failing to object.

IV. DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.