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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

IN RE J.H., a Person Coming Under the
Juvenile Court Law.

H038096
(Santa Clara County
Super. Ct. No. JV35437D)

THE PEOPLE,

Plaintiff and Respondent,

v.

J.H.,

Defendant and Appellant.

The minor, J.H., admitted an allegation that he had committed misdemeanor battery (former Pen. Code, §§ 242, 243.6), and, after a contested hearing, the juvenile court found true the allegations that he had committed an unrelated felony assault and had personally inflicted great bodily injury (former Pen. Code, § 245, subd. (a)(1); Pen. Code, §§ 12022.7, subd. (a), 1203, subd. (e)(3)). The record does not reflect that the juvenile court orally declared the assault offense to be a felony or a misdemeanor. The minor was committed to the enhanced ranch program for six to eight months.

On appeal, the minor contends that remand is required because the juvenile court failed to specify whether the assault offense was a felony or a misdemeanor. The

Attorney General concedes the issue. We agree with the concession and remand the matter for the juvenile court to declare whether the assault offense is a felony or a misdemeanor.

BACKGROUND

The Prior Petition and Notice

In 2009, a petition was filed under Welfare and Institutions Code section 602¹ alleging that the minor, then age 14, committed felony vehicle theft (former Veh. Code, § 10851, subd. (a)). The petition was amended to add a second count for felony grand theft (Pen. Code, §§ 484, 487, subd. (a)). The minor admitted the allegation that he had committed grand theft. The juvenile court dismissed count 1, adjudged the minor to be a ward of the court, ordered him to serve 60 days on the electronic monitoring program, and returned him to the custody of his parents on probation with various terms and conditions.

The probation department subsequently filed a notice under section 777, alleging that the minor violated probation. The notice was amended, and the minor admitted violating his probation as alleged in the amended notice. The juvenile court continued the minor as a ward of the court, granted him permission to participate in the Alternative Placement Academy, placed him on the electronic monitoring program, and returned him to the custody of his parents on continued probation.

The Most Recent Petitions

In May 2011, a petition was filed under section 602 alleging that the minor, then age 17, committed misdemeanor battery on a school employee (former Pen. Code, §§ 242, 243.6) on or about April 28, 2011.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

In September 2011, another petition was filed under section 602 alleging that the minor committed felony assault with a deadly weapon or by means of force likely to produce great bodily injury (former Pen. Code, § 245, subd. (a)(1)) on Juan G. on or about September 15, 2011. The petition further alleged that the minor personally inflicted great bodily injury (Pen. Code, §§ 12022.7, subd. (a), 1203, subd. (e)(3)). The juvenile court ordered the two most recent petitions consolidated.

On January 30, 2012, the minor admitted the allegation that he had committed battery (former Pen. Code, §§ 242, 243.6). The juvenile court stated that the offense was a misdemeanor.

A contested jurisdiction hearing was held regarding the assault and enhancement allegations. On February 7, 2012, the juvenile court found that the minor assaulted the victim by means of force likely to produce great bodily injury, that the minor inflicted great bodily injury upon the victim, and that the allegations in the petition were true.

On March 6, 2012, the disposition hearing was held. The juvenile court continued the minor as a ward of the court and ordered him committed to the Santa Clara County Juvenile Rehabilitation Facilities' enhanced ranch program for six to eight months. Upon successful completion of the program, the minor was to return to the custody of his parents on probation. The court set the maximum time of confinement at seven years ten months, and gave the minor credit for time served of 206 days.

DISCUSSION

The minor contends that the juvenile court failed to specify whether the assault offense (former Pen. Code, § 245, subd. (a)(1)) was a felony or a misdemeanor pursuant to section 702, and that therefore the matter must be remanded for clarification.

The Attorney General concedes that the juvenile court's "statements and actions do not demonstrate that it was aware of and exercised its discretion to determine the felony or misdemeanor nature of the assault charge," and that remand is required. We find the concession appropriate.

Assault is punishable either as a misdemeanor or as a felony. (Pen. Code, § 245, subds. (a)(1) & (a)(4); see also Stats. 2004, ch. 494, § 1.) Section 702 provides that in a juvenile proceeding, “[i]f 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.” (Italics added.) The California Supreme Court has explained that section 702 “requires an explicit declaration by the juvenile court whether an offense would be a felony or misdemeanor in the case of an adult. [Citations.]” (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1204 (*Manzy W.*); see also Cal. Rules of Court, rules 5.780(e)(5), 5.790(a)(1), 5.795(a).) “[T]he requirement that the juvenile court declare whether a so-called ‘wobbler’ offense [is] a misdemeanor or felony . . . serves the purpose of ensuring that the juvenile court is aware of, and actually exercises, its discretion under Welfare and Institutions Code section 702.” (*Manzy W.*, *supra*, at p. 1207.)

If the juvenile court fails to make the express declaration mandated by section 702, the matter must be remanded for compliance with that section, unless the record shows that the 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.” (*Manzy W.*, *supra*, 14 Cal.4th at p. 1209; see also *id.* at p. 1204.) “[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.]” (*Id.* at p. 1208.)

In *Manzy W.*, the juvenile court imposed a felony-level term of physical confinement in the California Youth Authority² for an offense that would, in the case of an adult, be punishable either as a misdemeanor or as a felony (a so-called “wobbler”),

² The Youth Authority is now known as the Department of Corrections and Rehabilitation, Division of Juvenile Facilities. (§ 1710, subd. (a); Pen. Code, § 6001.)

but the court failed to expressly declare the offense a felony. (*Manzy W., supra*, 14 Cal.4th at p. 1201.) The California Supreme Court concluded that the matter should be remanded to the juvenile court for an express declaration pursuant to section 702 and possible recalculation of the maximum period of physical confinement. (*Manzy W., supra*, at p. 1211.) The California Supreme Court found “[n]othing in the record establish[ing] that the juvenile court was aware of its discretion to sentence the offense as a misdemeanor rather than a felony,” and “it would be mere speculation to conclude that the juvenile court was actually aware of its discretion in sentencing Manzy.” (*Id.* at p. 1210.)

In this case, as the Attorney General concedes, the record does not establish that the juvenile court exercised its discretion to determine the felony or misdemeanor nature of the assault offense. Remand is therefore required to permit the juvenile court to exercise its discretion to treat the assault offense as either a felony or a misdemeanor. (*Manzy W., supra*, 14 Cal.4th at pp. 1204, 1209-1211.)

DISPOSITION

The disposition order of March 6, 2012 is reversed, and the matter is remanded to the juvenile court for the court to exercise its discretion to declare the assault offense to be either a felony or a misdemeanor.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MÁRQUEZ, J.