Filed 4/28/17 In re Hugo A. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re HUGO A., a Person Coming Under the Juvenile Court Law.	B271686 (Los Angeles County Super. Ct. No. TJ22337)
THE PEOPLE, Plaintiff and Respondent, v. HUGO A., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Arthur M. Lew, Judge. Affirmed.

Esther R. Sorkin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Joseph Lee and Arlene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Hugo A. (Hugo) appeals from the juvenile court's order declaring him to be a ward of the court pursuant to Welfare and Institutions Code section 602.[1] The court entered its order following a finding that Hugo committed felony vandalism and was in possession of aerosol paint with intent to deface. On appeal, Hugo argues that the order must be reversed because the juvenile court violated (1) his right to a speedy trial when it granted the People a five-day continuance over his objection due to the unavailability of their damages expert and (2) his right of confrontation when it allowed the People's damages expert to rely on testimonial hearsay for his opinion. We disagree with both contentions and, accordingly, affirm.

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

BACKGROUND

I. The Crime

On August 9, 2015, around 7:30 p.m., while on patrol in the City of Lynwood, Los Angeles County Deputy Sheriff Keegan McInnis (McInnis) saw Hugo and A.R., another minor. As McInnis drove southbound on Long Beach Boulevard, he saw A.R. remove a can of spray paint from a backpack that Hugo was wearing. As A.R. sprayed graffiti on a wall—the letters "DTK"—Hugo acted as a lookout, watching in both directions along the street.

McInnis subsequently detained Hugo. The deputy found a can of blue spray paint in Hugo's backpack; it was the same color as the fresh blue paint on the wall and on a nearby dumpster. After McInnis read Hugo his *Miranda*[2] rights, Hugo stated that "DTK" meant "don't trust no one." Hugo also admitted that he sprayed the graffiti on the dumpster.

On November 9, 2015, the People filed a petition pursuant to section 602 charging Hugo with vandalism with over $400 in damages (Pen. Code, § 594, subd. (a); count 1), and possession of etching cream/aerosol paint with intent to deface (Pen. Code, § 594.1, subd. (e)(1); count 2). On December 4, 2015, Hugo denied the allegations.

II. The adjudication hearing

On Wednesday, March 30, 2016, Hugo appeared before the juvenile court regarding the allegations against him. At

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

the outset of the hearing, the People asked the court to allow McInnis, who was present, to testify and then continue the hearing until the court was back in session the following Wednesday because a second witness, Debra Jackson (Jackson), was not present. The People explained that Jackson, an employee of the City of Lynwood who had prepared "a statement for loss" resulting from Hugo's vandalism, had been subpoenaed but "for whatever reason" had failed to appear. In support of their request, the People showed the subpoena's proof of service to the court. While Hugo's counsel was willing to agree to a two-day continuance, she objected to the People's request for a five-day continuance on grounds that such a continuance would constitute a "violation of [her] client's speedy trial rights." The juvenile court granted the requested continuance.[3]

On Wednesday, April 6, 2016, Raul Ortega (Ortega), not Jackson, testified for the People about the estimated costs of cleaning up the graffiti. Ortega, an employee of the City of Lynwood, testified that for the past 15 years, he has been the city's supervisor for graffiti removal—"all job orders or requests" for graffiti removal "come to [him]." On a daily basis, he supervises work on 25 to 100 graffiti clean-up sites.

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[3] The amount of damage caused by the vandalism is a critical factor. (See Pen. Code, § 594, subd. (b)(1) [defining felony vandalism as destruction of property worth over $400]; see also *Sangha v. La Barbera* (2006) 146 Cal.App.4th 79, 87, fn. 6 [distinguishing felony from misdemeanor vandalism].)

As a result, Ortega testified that he is familiar with the "various tools and resources required to remove graffiti" and the "various costs in terms of . . . labor, and renting of equipment to remove graffiti." Ortega testified further that he had previously estimated from photographs the cost of graffiti removal.

After establishing Ortega's credentials as an expert on the cost of graffiti removal, the People showed Ortega the cost estimate prepared by Jackson and asked his opinion of that estimate. Jackson's cost estimate was a two-page document dated August 31, 2015—the first page was a letter addressed to the court stating that the total estimated cost of removal was $576; the second page was an itemized breakdown of that total estimated cost. Hugo's counsel objected on the ground that the question violated Hugo right of confrontation because Ortega was not the author of that estimate and Jackson was not present. The court overruled the objection, noting that the question asked for Ortega's opinion of Jackson's estimate.

Although Hugo's objection was overruled, the People did not return, at least not immediately to Ortega's opinion of Jackson's cost estimate. Instead, the People showed Ortega photographs of the graffiti at issue and asked him to estimate the clean-up costs based on the photographs and his experience. Ortega estimated the total removal cost to be between $460-$560. Specifically, he testified that as to the graffiti on the wall, the removal would require approximately $150 in materials and between $200-$250 in

labor; for the graffiti on the dumpster, Ortega estimated $35 in materials and between $75-$125 in labor.

After developing Ortega's independent opinion of the damage caused by the vandalism, the People returned to Jackson's cost estimate. The People asked Ortega, based on his experience in graffiti removal, if Jackson's estimated total cost of $576 was "an accurate amount." Hugo did not object to this question[4] and Ortega opined that the estimate was accurate.

Hugo did not testify or offer the testimony of any other witness, including an expert who could challenge the cost estimate offered by Ortega.

After the presentation of evidence, Hugo argued against the admission of the second page of Jackson's cost estimate (the itemized breakdown) on the ground that it lacked foundation and was hearsay; Hugo's counsel,

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[4] Although his counsel did not object once more on confrontation grounds to this question, Hugo did not forfeit his argument on appeal. Traditionally, reviewing courts will excuse a defendant's failure to object where an objection would be futile. (See *People v. Hill* (1998) 17 Cal.4th 800, 820, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; *People v. Welch* (1993) 5 Cal.4th 228, 237–238.) Here, another objection would likely have been pointless. The juvenile court previously overruled defense counsel's objection to an almost identical question and did so in a quick and decisive manner. (*People v. Anderson* (2001) 25 Cal.4th 543, 587 ["[c]ounsel is not required to proffer futile objections"].)

however, did not object to the letter portion of the document stating just the estimated total cost. In making the objection, Hugo's counsel conceded that while there were admissibility problems with Jackson's itemized cost estimates, Ortega's testimony based on his "personal experience" was "in" and that his "own testimony would suffice." The juvenile court agreed and excluded Jackson's itemized cost estimate.

At the conclusion of the hearing, the juvenile court sustained the petition, declaring Hugo to be a ward of the court and releasing him to his parents on probation with specified terms and conditions. In sustaining the petition, the juvenile court explained, "Ortega has a very extensive background with these matters, and the court certainly can accept his estimate, which the court does."

DISCUSSION

I. The continuance was not an abuse of discretion and did not violate Hugo's right to a speedy trial

Hugo contends that the juvenile court violated his right to a speedy trial when it granted the People's request for continuance due to Jackson's failure to appear. We are unpersuaded.

A. Guiding principles and standard of review

"The right to a speedy trial is a fundamental right . . . guaranteed by the state and federal Constitutions." (*Rhinehart v. Municipal Court* (1984) 35 Cal.3d 772, 776.) Although 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), "[i]t 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.) The juvenile's hearing, in other words, "must measure 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 another point by *People v. Evans* (2008) 44 Cal.4th 590, 598.) 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.' " (*In re Kevin S.*, at p. 108.)

To attain the " '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,' " section 680 provides: " '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.' " (*People v. Superior Court* (*Carl W.*) (1975) 15 Cal.3d 271, 279, 275.)

As in other proceedings, the necessary predicate to obtain a continuance under section 682 and the corresponding rule of court (Cal. Rules of Court, rule 5.776) is a showing of good cause, and the decision " 'rests in the sound discretion of the trial court.' " (*In re Chuong D.* (2006) 135 Cal.App.4th 1303, 1312; see *In re Maurice E.* (2005) 132 Cal.App.4th 474, 480 [same]; *In re Lawanda L.* (1986) 178 Cal.App.3d 423, 428 [same].) Our Supreme Court has explained that "[w]hether good cause exists depends upon the circumstances of the case" (*Rhinehart v. Municipal Court*, *supra*, 35 Cal.3d at p. 781), and "[w]hat constitutes good cause for the delay of a criminal trial is a matter that lies within the discretion of the trial court." (*People v. Johnson* (1980) 26 Cal.3d 557, 570.)

A trial court abuses its discretion as to a request for a continuance "where the ruling is arbitrary, capricious, and contrary to the interests of justice under all the circumstances." (*Vann v. Shilleh* (1975) 54 Cal.App.3d 192, 196.) According to our Supreme Court: " 'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.' " (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318–319.)

B. No abuse of discretion or prejudice

Here, the juvenile court did not abuse its discretion in finding good cause to continue the hearing for a short period

due to the unavailability of a witness. It is well established that "delay arising from unforeseen circumstances, such as the unexpected illness or unavailability of counsel or witnesses constitutes good cause to avoid dismissal." (*People v. Johnson*, *supra*, 26 Cal.3d at p. 570 & fn. 15.) The People used due diligence to procure Jackson's attendances—it subpoenaed her—but Jackson failed to appear. Consistent with its obligation under section 680 to obtain all relevant facts in an expeditious *and* effective manner, and consistent with the goal of balancing flexibility and fairness, the juvenile reasonably and properly granted a short continuance until the court was next in session.

Assuming arguendo that the continuance was an abuse of discretion and violated Hugo's right to a speedy trial, Hugo has failed to show that he was prejudiced in any way by that delay. "Because [Hugo] waited until after the jurisdictional hearing had been completed, and the court had found against him, before bringing his speedy trial claim to the appellate court, he must affirmatively demonstrate he was *prejudiced* by the delay." (*In re Chuong D.*, *supra*, 135 Cal.App.4th at p. 1311.) Hugo however, presented no evidence or argument even suggesting prejudice of any kind. He does not contend, for example, that the delay made it impossible for him to call witnesses on his behalf. Nor does he contend that Ortega's opinion, based on the photographs and his personal experience in graffiti removal, was inadmissible, irrelevant or insufficient to sustain the juvenile court's order—indeed, at the hearing, his counsel

conceded that such evidence would "suffice." Hugo merely argues that relevant and admissible evidence, which was not available to be presented earlier, was introduced against him after the court recessed the hearing for five days. However, the mere fact that evidence sufficient to establish the People's case was introduced against Hugo only after his speedy trial rights were purportedly violated can "never be considered the requisite prejudice to justify reversal of the judgment. Such a rule would nullify the requirement of 'prejudice' as a separate element, since in the usual case, *all* the evidence against the defendant would be introduced only after the speedy trial violation had occurred." (*In re Chuong D.*, *supra*, 135 Cal.App.4th at p. 1312.)

In short, Hugo's claim of error fails because he has not established that the continuance exceeded the bounds of reason or prejudiced him.[5]

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[5] In his opening brief, Hugo asserts that "the prosecutor[] obtained the continuance on the grounds that that only witness Jackson could establish the amount of loss." Hugo misconstrues the record and does so in a troubling manner. There is nothing in the record—no express or implied representation by the People—supporting the assertion that the People obtained the continuance by falsely telling the court that Jackson was the only witness who could establish the amount of the clean-up costs. The People did not promise that Jackson would be their damages expert when the hearing resumed or that Jackson was the only witness from the city who could provide a reliable estimate of the damages. The People merely requested a

II. Admission of Ortega's opinion on Jackson's estimate was harmless error

Relying principally on *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), Hugo argues that his right to confrontation was impermissibly abridged by Ortega's testimony about the accuracy of the total cost of the clean-up as estimated by Jackson; he "was never able to test the accuracy of the estimate because he never had the opportunity to cross-examine witness Jackson." We agree, but hold that the confrontational error was harmless beyond a reasonable doubt.

A. Expert testimony after Sanchez

Prior to *Sanchez*, *supra*, 63 Cal.4th 665, the general rule was that "out-of-court statements offered to support an expert's opinion are not hearsay because they are not offered

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continuance because the witness they had expected to use as their damages expert failed to appear.

We disregard factual assertions that are not supported by the record. (*Banning v. Newdow* (2004) 119 Cal.App.4th 438, 453, fn. 6; see *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1523, fn. 10 [discussing risks of misstating the record].) Moreover, at the hearing, while Hugo objected to Ortega testifying about Jackson's cost estimate, he did not object in any way to Ortega, and not Jackson, testifying as the People's damage's expert, thereby forfeiting an appellate challenge on that ground. (See generally *Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 488 [" 'Failure to raise specific challenges in the trial court forfeits the claim on appeal' "].)

for the truth of the matter asserted, rather for the purpose of assessing the value of the expert's opinion." (*People v. Dean* (2009) 174 Cal.App.4th 186, 197.) In *Sanchez*, our Supreme Court updated the general rule. Although *Sanchez* was a criminal case—the case involved testimony by a gang expert—the court stated its intention to "clarify the proper application of Evidence Code sections 801 and 802, relating to the scope of expert testimony," generally. (*Sanchez*, at p. 670.) It concluded that the long-standing paradigm that testimony as to the basis for an expert's opinion is not hearsay "is no longer tenable because an expert's testimony regarding the basis for an opinion *must* be considered for its truth by the jury." (*Id.* at p. 679.)

The court began its analysis by recognizing that "[t]he hearsay rule has traditionally not barred an expert's testimony regarding his general knowledge in his field of expertise." (*Sanchez*, *supra*, 63 Cal.4th at p. 676.) "This latitude is a matter of practicality. A physician is not required to personally replicate all medical experiments dating back to the time of Galen in order to relate generally accepted medical knowledge that will assist the jury in deciding the case at hand. An expert's testimony as to information generally accepted in the expert's area, or supported by his own experience, may usually be admitted to provide specialized context the jury will need to resolve an issue." (*Id.* at p. 675.) The court contrasted this sort of testimony about general matters with expert testimony pertaining to "*case-specific facts*," which it noted "has

traditionally been precluded" under hearsay rules. (*Id.* at p. 676.) "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Ibid.*) Experts generally are not permitted to offer case-specific facts about which they have no personal knowledge. (*Ibid.*)

When an expert relies on hearsay statements regarding case-specific facts, the court explained, there is a "flaw in the not-for-the-truth limitation." (*Sanchez*, *supra*, 63 Cal.4th at p. 682.) That flaw was outlined by the United States Supreme Court in *Williams v. Illinois* (2012) 567 U.S. 50 (*Williams*), and described by the our Supreme Court as follows: "When an expert relies on hearsay to provide case-specific facts, considers the statements as true, and relates them to the jury as a reliable basis for the expert's opinion, it cannot logically be asserted that the hearsay content is not offered for its truth. In such a case, 'the validity of [the expert's] opinion ultimately turn[s] on the truth' (*Williams*, *supra*, 567 U.S. at p. 54 [conc. opn. of Thomas, J.].) of the hearsay statement. If the hearsay that the expert relies on and treats as true is *not* true, an important basis for the opinion is lacking." (*Sanchez*, *supra*, 63 Cal.4th at pp. 682–683.) Thus, "[*w*]*hen an expert is not testifying in the form of a proper hypothetical question and no other evidence of the case-specific facts presented has or will be admitted, there is no denying that such facts are being considered by the expert, and offered to the jury, as true*." (*Id.* at p. 684, italics added.)

"If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception. Alternatively, the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner." (*Sanchez*, *supra*, 63 Cal.4th at p. 684, fn. omitted.)

The court emphasized that an expert "may still *rely* on hearsay in forming an opinion, and may tell the jury in *general terms* that he did so." (*Sanchez*, *supra*, 63 Cal.4th at p. 685.) "There is a distinction to be made between allowing an expert to describe the type or source of the matter relied upon as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception." (*Id*. at p. 686.) That distinction means that "[w]hat an expert cannot do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Ibid.*) In other words, the court determined under *Crawford v. Washington* (2004) 541 U.S. 36, that if the hearsay relied upon by an expert witness was testimonial and an exception did not apply, the defendant should be given the opportunity to cross-examine the declarant or the evidence should be excluded. (*Sanchez*, at p. 685.)

B. Jackson's total cost estimate was testimonial hearsay

Canvassing confrontation clause cases, the *Sanchez*, *supra*, 63 Cal.4th 665 court concluded that hearsay statements are testimonial if they are made "primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*Id.* at p. 689.)

Here, the primary purpose of Jackson's cost estimate document was not to deal with an ongoing emergency. Rather, the Jackson document was made—and self evidently so, given that it was addressed to the "L.A. County Superior Court"—" 'with a primary purpose of creating an out-of-court substitute for trial testimony.' " (*Sanchez*, *supra*, 63 Cal.4th at p. 688.)

C. Jackson's total cost estimate was not independently proven or covered by a hearsay exception

Evidence Code section 1280 provides an "official records" exception to the hearsay rule (Evid. Code, § 1200): "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition, or event. [¶] (c) The sources of

information and method and time of preparation were such as to indicate its trustworthiness."

In contrast to the business records exception (Evid. Code, § 1271), section 1280 " ' "permits the court to admit an official record or report without necessarily requiring a witness to testify as to its identity and mode of preparation *if the court takes judicial notice or if sufficient independent evidence shows that the record or report was prepared in such a manner as to assure its trustworthiness*." ' " (*Bhatt v. State Dept. of Health Services* (2005) 133 Cal.App.4th 923, 929.)

Here, there was evidence arguably establishing the first two requirements under Evidence Code section 1280: (1) although Jackson's letter states that she is the city's "Public Relations Director," a title not normally associated with the preparation of graffiti repair costs, there was testimony that Jackson was Ortega's supervisor, suggesting that her cost estimate was in fact made by and within the scope of her duties as a public employee; and (2) the document is dated August 31, 2015, 22 days after Hugo was detained, suggesting that the estimate was made somewhat near the time of the crime. However, no evidence whatsoever was offered by the People to establish the trustworthiness of Jackson's estimates. There was, for example, no evidence of who actually prepared the cost estimate—was it Jackson herself or someone else and, if the latter, what were the qualifications of that person and upon what did he or she rely to make those estimates? In addition, assuming Jackson did in fact prepare the estimate

herself, there is no evidence of what information she relied upon to assess the damage—did she inspect the graffiti in person, review photographs of the wall and dumpster, or rely on written or oral descriptions of the graffiti by other city employees? Nor was any evidence offered on how she determined the cost of removal.

D. Admission of Ortega's opinion about the accuracy of Jackson's total cost estimate was harmless

Hugo's confrontation rights were violated because the Jackson cost estimate document was testimonial hearsay, no obvious exception applied, the estimate was not excluded and he was not allowed to cross-examine Jackson. (See *Sanchez*, *supra*, 63 Cal.4th at p. 685.) However, the juvenile court's error was harmless beyond a reasonable doubt.

In *Sanchez*, *supra*, 63 Cal.4th 665, our Supreme Court explained that the standard for harmless error review after an expert has improperly related hearsay evidence that was not independently proven at trial depends upon whether the error violated only state evidence law or the confrontation clause. Where the hearsay evidence was not "testimonial" in nature, and therefore violated only state evidence law, relief is required only if the record shows it is reasonably probable appellant would have obtained a more favorable result absent the alleged error. (*Id.* at p. 698.) Where the hearsay evidence was "testimonial," the violation of the confrontation clause warrants relief unless the error was harmless beyond a reasonable doubt. (*Ibid.*)

Here, the error was harmless beyond all reasonable doubt because Ortega's opinion about the cost to remove the graffiti was not based on Jackson's estimate. To borrow from the language used in *Sanchez*, *supra*, 63 Cal.4th 665, while Ortega may have "related" Jackson's cost estimate to the court through brief questioning by the People, he did not "rely" upon it in forming his opinion. Instead, Ortega's opinion was based on his own independent review of the graffiti, a review that was informed by his 15 years of experience supervising the removal of graffiti at 25 to 100 sites per day, experience which the juvenile court quite reasonably found to be "extensive."

Given the strength of Ortega's independent assessment of the damage—which, in fact, varied only slightly from Jackson's estimate—and in the absence of any countervailing expert testimony, the admission of a portion of Jackson's cost estimate document and Ortega's very limited testimony about Jackson's estimated total cost was harmless beyond reasonable doubt.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J.

LUI, J.