Filed 8/15/12 In re Pedro R. 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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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

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| In re PEDRO R., a Person Coming Under the Juvenile Court Law. | B235426<br>(Los Angeles County<br>Super. Ct. No. FJ47597) |
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>PEDRO R.,<br><br>Defendant and Appellant. | |

APPEAL from orders of the Superior Court of Los Angeles County, Robert J. Totten, Commissioner. Affirmed.

Holly Jackson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Mary Sanchez and Robert M. Snider, Deputies Attorney General, for Plaintiff and Respondent.

Pedro R. challenges a juvenile court's finding that he committed a felonious assault. He contends that: (1) the court improperly considered evidence not presented at the adjudication hearing in violation of California Rules of Court, rule 5.780(c) (rule 5.780(c)), and (2) there is insufficient evidence to support the court's finding that he committed a felony assault. We conclude that appellant has forfeited his first assertion of error and his second lacks merit.

## PROCEDURAL BACKGROUND

On June 7, 2011, a petition was filed pursuant to Welfare and Institutions Code section 602 alleging that appellant committed two felonies: (1) assault by means likely to cause great bodily injury (Pen. Code, § 245, former subd. (a)(1) now subd. (a)(4)); and (2) criminal threats (Pen. Code, § 422).

Appellant denied the allegations. After an adjudication hearing, the court sustained both counts, declared appellant a ward and placed him in a camp-community placement program for six months, with predisposition credit for 45 days and possible early release for good behavior after 120 days. The maximum term of confinement was set at four years eight months. This appeal followed.

## FACTUAL BACKGROUND

Jason Park owns a grocery store on Virgil Avenue in Los Angeles. Park was working at his market around noon on June 3, 2011 when he saw appellant's codefendant, Devin S., eating cherries taken from a table behind a cashier. Park asked Devin to stop eating the cherries, to which Devin responded, "shut up, motherfucker." Park told Devin to leave the store, to which Devin loudly and angrily responded, "shut up, motherfucker before I kill you." Park feared for his safety.

Meanwhile, appellant was standing behind several customers in line at a check stand when the cashier asked him to "put [his] bag down." Appellant slammed his backpack onto a closed check stand counter. Park told appellant "don't slam your backpack on the counter." Appellant cursed at Park and repeatedly said he would kill Park and his family. Park felt threatened and was afraid.

Park told appellant to leave the store and grabbed his backpack and threw it out the door. Appellant swung at Park, striking him in the jaw while Devin approached Park and hit him in the ribs with his fist. Appellant continued to punch Park in the face. Park tried to restrain appellant by grabbing him and throwing him against a steel framed meat case, and pinned him on top of a table. Even as he was being restrained, appellant continued to threaten Park and Park's family. He told Park he would send people after him who would harm Park and his family, and told him to watch his back. Park, who has young twins, and who had never before experienced an incident of this nature at his store, took appellant's threats seriously and was afraid. One of Park's employees held appellant down and called 911. Devin ran from the store. While appellant was restrained, Devin returned to the store with appellant's backpack. Park grabbed him, pulling him further into the store where he was held until police arrived.

LAPD officers Cadzillas and Kim responded to the 911 call. Park testified that when he spoke to the police he felt nervous and very scared as though he was having an out-of-body experience. Park told Officer Kim that Devin (not appellant) hit him and threatened to kill him and his family. Officer Kim advised appellant and Devin of their constitutional rights, which both minors waived. Appellant told Officer Cadzillas he drank three bottles of beer before coming to Park's store. He admitting striking Park in the face, after which he claimed Park "beat him up." In early June 2011, appellant weighed 140 pounds and was 5'2" tall. Park is 5'10" tall, and weighs 175 pounds. Park, who has martial arts expertise (he is a fourth degree black belt and a third degree Jujitsu), testified at the adjudication hearing that he could have seriously hurt appellant if had he wished to do so.

As a result of this incident, Park suffered swelling in his face and significant pain in his jaw, back and ribs. A chiropractor treated Park for a pulled hamstring muscle and back pain.

## DISCUSSION

Appellant challenges the court's finding on the felony assault contending it was based on the court's consideration of improper information in violation of rule 5.780(c).

He also insists that the record contains insufficient evidence to support the finding that he committed a felony rather than a misdemeanor assault. We find appellant forfeited his first assertion of error, and that his second has no merit.[1]

*1. Judicial consideration of information contained in a probation report*

*a. Background*

At the close of the prosecution's case, the trial court indicated that it intended to exercise its discretion, pursuant to Superior Court of Los Angeles County, Local Rules, former rule 17 (now rule 17.1), to reduce the felony assault charge (Pen. Code, § 245, former subd. (a)(1) now subd. (a)(4)) to a misdemeanor battery (Pen. Code, § 243, subd. (d)). The prosecutor took issue with the court's tentative, arguing that appellant's conduct was extreme and that this was an improper case in which to reduce the charge to a misdemeanor. The trial court agreed that appellant's conduct had been "atrocious," but stated that the evidence demonstrated the conduct at issue was more like that of "a [Pen. Code, §] 243 [subd.] (d) as opposed to a [Pen. Code, §] 245 [former subd.] (a)(1) [now (a)(4)]."

Later, in his closing argument, the prosecutor reiterated his view that it would be inappropriate in this case to reduce the charge to a misdemeanor, and urged the court to consider the fact that appellant was a repeat offender. The prosecutor noted, for the first time, that he had "reviewed [appellant's] record," and found that he had a prior sustained petition for a misdemeanor battery committed in September 2010. The prosecutor observed that appellant "caught a break" on that misdemeanor battery charge: he was

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[1] By letter (Gov. Code, § 68081), we invited the parties to file supplemental briefs addressing the following issues: (1) was there a source of information, other than the probation report, on which the trial court may properly have relied to reach its conclusion that appellant committed a felonious assault; (2) if the trial court did improperly consider information in the probation report in violation of rule 5.780(c) in making its determination that appellant committed a felonious assault, does appellant's failure to object constitute forfeiture of any claim of error as to that issue on appeal; and (3) if the trial court erred by considering improper information at the adjudication hearing, may that error be deemed harmless? We have received the parties' responses.

placed in a supervision program (Welf. & Inst. Code, § 654 (§ 654)), and had "failed on 654. He has reoffended."

The trial court invited appellant's counsel to respond to the prosecutor's "very aggressive" argument against reduction of the assault charge to a misdemeanor, "particularly in light of the previous battery . . . which [the court] had not considered." Appellant's counsel did not object to the court's consideration of appellant's prior conviction. Instead, he argued that, based on case law, the conduct at issue did not rise to the level of a felony assault.

In rebuttal, the prosecutor again urged the court to consider the "nature and circumstances of [appellant's] offense," and the fact that he threatened to harm Park and his family. The prosecutor reminded the court that its decision as to whether to reduce the charge: "cannot be [based on] sympathy or compassion for a minor or concern that the minor will be exposed to a much enhanced sentence. If [appellant] reoffends, the court has to look at the crime and the elements of the crime and [appellant's] conduct. Look at his history, look at his prior record. The fact is that less than a year, nine months prior to this incident [appellant] committed a misdemeanor battery. [¶] Again, appellant got 654. He failed on 654. . . . He has been on actual notice about what it means to attack somebody, to hit somebody. He has been given his chance. At this point he needs to own his actions, and he needs to take responsibility and he needs to know that if he does it again, and if he commits any kind of crime as an adult there are going to be serious consequences."

By the time the parties concluded their closing arguments, the court was no longer inclined to reduce the charge. It stated: "The court viewed the video. I agree the behavior of the minors was appalling coming into a store, acting as they did. I think it rises to the level of the crimes that were committed. With regard to [appellant] I believe count one and count two as plead [sic] is true as a felony." The court's explanation of its decision did not mention appellant's record or statements made by the prosecutor during closing argument.

*b. Appellant forfeited his objection to the court's consideration of material in the probation report*

It has long been the rule that a juvenile court may not read or consider any portion of a probation report until after it makes its jurisdictional findings. (See *In re Gladys R.* (1970) 1 Cal.3d 855, 860 (*Gladys R.*); rule 5.780(c).) The purpose of this rule "is to prevent the making of jurisdictional findings based on irrelevant negative information contained in the probation report." (*In re Christopher S.* (1992) 10 Cal.App.4th 1337, 1345 (*Christopher S.*).)

After the prosecution presented its evidence, after considering the testimony and the statements appellant made to police at the scene, and after reviewing video footage of the altercation, the court advised the parties it was inclined to reduce the felony assault charge to a misdemeanor. The court at first appeared unswayed by the prosecution's assertion that such a reduction was not warranted here. Appellant insists that it was only after the prosecutor urged the court to consider the fact that he had "failed" in a supervised program under section 654 following an earlier conviction for misdemeanor battery—about which no evidence was introduced at the hearing—that the court altered its position. Appellant maintains that this chain of events shows the court committed misconduct and considered information contained in a probation report before ruling on his guilt.

We assume, for the purpose of discussion, that appellant is correct and the court considered information contained in his appellant's probation report when it made its jurisdictional findings.

Appellant failed to object to the court's improper consideration of that information. There is a split of authority as to whether appellant forfeited any claim of error by failing to object in the trial court. (Compare *Gladys R.*, *supra*, 1 Cal.3d at pp. 861–862 [failure to object to premature consideration of social study did not waive issue on appeal]; *In re D.J.B.* (1971) 18 Cal.App.3d 782, 784–785 (*D.J.B.*) [following *Gladys R.*, holding that the "review by the juvenile court of a probation report or social study prior to or during the jurisdictional hearing constitutes prejudicial error even though

no objection is made at the juvenile court hearing to the court's premature use of such report or social study"]; with *Christopher S.*, *supra*, 10 Cal.App.4th at pp. 1344–1345 [court erred in prematurely reading probation report, but error waived by failing to object].)

We agree with *Christopher S.* that the holding in *Gladys R.* was based on circumstances wholly inapplicable in subsequent cases, and that *D.J.B.* was poorly reasoned. (See *Christopher S.*, *supra*, 10 Cal.App.4th at pp. 1344–1345.) In *Gladys R.*, the sole reason the minor's failure to object was excused was that the law regarding what constituted admissible evidence at an adjudicatory hearing had recently changed. The Supreme Court found that it would have been unfair to expect the minor's attorney to "anticipate that an appellate court will later interpret the controlling sections in a manner contrary to the apparently prevalent contemporaneous interpretation." (*Gladys R.*, *supra*, 1 Cal.3d at p. 861; *Christopher S.*, *supra*, 10 Cal.App.4th at pp. 1344–1345.) *D.J.B.* posited a blanket exemption to the objection requirement and extrapolated the fact-specific holding of *Gladys R.* to every action in which a juvenile court prematurely considers a probation report. (*D.J.B.*, *supra*, 18 Cal.App.3d at pp. 784–785.)

We conclude the better reasoned view is that the error must be raised to the juvenile court or the issue is forfeited on appeal. (*Christopher S.*, *supra*, 10 Cal.App.4th at p. 1345.) In light of the fact that *Gladys R.* was decided in 1970, appellant's counsel was certainly on notice that the court's premature consideration of the probation report was prohibited by rule 5.780(c), and his silence in the face of such judicial consideration would likely constitute waiver of any future claim of error. Accordingly, by failing timely to object, appellant has forfeited his contention that the trial court erred by prematurely considering information in the probation report. (*Christopher S.*, *supra*, 10 Cal.App.4th at p. 1345.)

*2. Appellant has not shown reversible error*[2]

Appellant contends reversal is mandated because the juvenile court's consideration of prohibited information constitutes "structural error" which requires reversal without any showing of prejudice. (*People v. Cahill* (1993) 5 Cal.4th 478, 501–502.) Structural error occurs when a defect affects "'the framework within which the trial proceeds, rather than simply [being] an error in the trial process itself . . . .' [Citation.]" (*Johnson v. United States* (1997) 520 U.S. 461, 468 [117 S.Ct. 1544, 137 L.Ed.2d 718].) Structural error occurs only in a "very limited class of cases." (*Id*. at pp. 468–469 [listing narrow range of cases in which structural error was found].) We see nothing about the juvenile court's error which affected the framework within which the adjudication hearing proceeded or which rendered that hearing fundamentally unfair. (*Ibid*.)

Since the error is not structural, we evaluate it to determine if reversal is required. We find the error was harmless under either the state or federal standard of review. (See *People v. Watson* (1956) 46 Cal.2d 818, 836 [appellate court reviews entire record to determine if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error"]; *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] [federal constitutional error is reviewed to determine whether it is harmless beyond a reasonable doubt].) The evidence against appellant here was sufficiently strong.

In the first instance, we are not convinced that the juvenile court necessarily was swayed by information in the probation report. An attachment to the June 3, 2011 detention report—which predates the June 22, 2011 probation report—refers to appellant's 2010 conviction for misdemeanor battery and the conditions of his probation. Presumably, the juvenile court considered that detention report and its attachments on

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[2] Although appellant has forfeited further consideration of the substantive issues, we address his claim of error in anticipation of a claim of ineffective assistance of counsel.

June 8, 2011, when it ordered appellant detained and ordered that "[t]he previous order for 654 WIC PF:7/6/10 made 9/7/10 [was to] remain[] in full force and effect." So, information from a reliable source independent of and prior in time to the probation report was available to the court regarding appellant's prior conviction and probation at the time the court determined it was inappropriate to reduce the charge against appellant from a felony to a misdemeanor.[3] It is not unreasonable to conclude that the juvenile court considered *that* information, together with the evidence from trial, in making its determination, whether it independently recalled the detention report, or whether its memory of those facts was triggered by the prosecutor's closing argument.[4]

Further, appellant does not actually assert that the juvenile court *read* the probation report, only that it inappropriately relied upon the type of information likely to be contained in that report, when it made its jurisdictional finding. A similar contention was rejected in *In re James B.* (2003) 109 Cal.App.4th 862. There, in closing argument, the prosecutor asked the trial court to "take judicial notice of the alleged fact that the minor was on informal probation and had two prior encounters with law enforcement." The minor objected, arguing that the information "'was similar to that which would have been contained in the minor's social study [probation] report . . . .'" (*Id*. at p. 874.) The

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[3] We acknowledge that the detention report does not state that appellant "failed" his probationary program. Nevertheless, the juvenile court could readily draw that inference from the fact that appellant was alleged to have committed a felony assault within a year of his prior conviction.

Appellant asserts that the detention report does not identify when appellant was placed in the section 654 program. He is mistaken. The heading "Conditions of Probation *in Effect 090710*" is contained in three places in the attachment to that report. (Italics added.)

[4] Indeed, at the disposition hearing, the court observed that "the facts of the occurrence had they stood alone probably would have been misdemeanors." But, the thing that had "pushed [the court] over the edge" and persuaded the judge "that it was a felony as opposed to a misdemeanor," "was the fact that [appellant] had the prior incident which caused [the court] to look at his other offense."

trial court did not rule on the objection, did not take judicial notice of the minor's record and did not mention the prosecutor's statements when it explained its decision. (*Ibid*.)

The court noted that the prosecutor had mentioned only prior police encounters, which are not as prejudicial as evidence of prior convictions. (*James B.*, *supra*, 109 Cal.App.4th at p. 874.) But, "'even when improper evidence of a prior conviction is admitted by misconduct, the misconduct is not reversible in the face of convincing evidence of guilt: "Improper evidence of prior offense results in reversal *only* where the appellate court's review of the trial record reveals a closely balanced state of the evidence. [Citations.]"'" (*Id*. at pp. 874–875.) In *James B.*, the minor's age, answers to the officer's questions regarding understanding of wrongfulness, and behavior as described in testimony all weighed heavily in favor of the court's jurisdictional findings. Thus, any error relating to the prosecutor's reference to improper material was harmless. (*Id*. at p. 875.)

Similarly here, even if the court improperly considered information contained in the probation report and the issue had not been forfeited, the court's errors would not require reversal. We have reviewed the record, including the videotape of the confrontation between appellant, his codefendant and Park. That evidence shows that appellant violently and repeatedly struck Park in the face without legal justification and with a degree of force which, as the juvenile court observed, was not "light force" and "could have resulted in a broken jaw." An assault may be considered a felony if the degree of force applied was likely to cause great bodily injury. Whether the victim actually suffers any harm is immaterial, although we note that Park did suffer significant pain in his jaw as a result of appellant's assault. In the juvenile context, as elsewhere, hands or fists alone may supply the requisite degree of force. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028; *People v. Wingo* (1975) 14 Cal.3d 169, 176–177; *In re Nirran W.* (1989) 207 Cal.App.3d 1157, 1161–1162.) Accordingly, even if the trial court erred by considering information contained in the probation report, there is sufficient evidence to support its decision not to reduce the felony assault to a misdemeanor, and any error was necessarily harmless.

## DISPOSITION

The orders issued on July 12 and 21, 2011 sustaining the petition, declaring both counts to be felonies and declaring appellant a ward are affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.