Filed 2/21/12 In re Deon B. CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re DEON B., a Person Coming Under the Juvenile Court Law.	B229247 (Los Angeles County Super. Ct. No. YJ34044)
THE PEOPLE, Plaintiff and Respondent, v. DEON B., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Irma Brown, Judge. Affirmed.

Center for Juvenile Law and Policy, Loyola Law School, Maureen Pacheco, Mark Sanborn and Kabira Chopra for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey, and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

Deon B. was declared a ward of the juvenile court after the court sustained a petition alleging he had committed misdemeanor battery against a fellow middle school student. On appeal Deon B. contends the juvenile court erred in denying his motion to dismiss the petition at the close of the People's case-in-chief and there is insufficient evidence he had the requisite understanding of wrongfulness necessary to find a child under the age of 14 capable of committing a criminal offense. (Pen. Code, § 26; see *In re Gladys R.* (1970) 1 Cal.3d 855 (*Gladys R.*).) We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Incident*

Deon, age 13, transferred to the eighth grade at Emerson Middle School in December 2010.[1] On March 2, 2010, during the lunchtime break, Deon approached a sixth grade student, William T., who was much smaller than Deon, grabbed the skin under William's chin and twisted it hard. Officer Michael Ryan, a probation officer assigned to Emerson Middle School, saw Deon grab William's throat and intervened. Asked why he had grabbed William's throat, Deon claimed he had been "playing." When Officer Ryan told Deon it was not acceptable to play that way with a student who was so much younger, Deon answered, "I thought he was in eighth grade." Officer Ryan asked William, who looked afraid, if Deon had been playing with him; William answered, "No." Officer Ryan reported the incident to the school principal but did not file a report.

2. *Proceedings in the Juvenile Court*

A petition regarding the incident was filed on June 25, 2010 pursuant to Welfare and Institutions Code section 602 alleging Deon had committed misdemeanor battery

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[1] Deon had previously been enrolled at Orville Wright Middle School. His parents transferred him to Emerson Middle School after he was found in possession of a knife on campus. A petition concerning that incident was filed on January 22, 2010 under Welfare and Institutions Code section 602 charging Deon with felony possession of a weapon on school grounds (Pen. Code, § 626.10, subd. (a)). On April 6, 2010 Deon admitted the allegation, which was reduced to a misdemeanor. Deon was placed on six months of probation pursuant to Welfare and Institutions Code section 725, subdivision (a).

(Pen. Code, § 242). The petition was heard on September 20 and 21, 2010. Officer Ryan testified about the incident and said he did not observe any injuries or red marks on William's neck. Because William did not complain of any injury, Officer Ryan did not take him to the infirmary, photograph his neck or file a report. He completed a report three weeks later when asked to do so. Officer Ryan acknowledged he had seen many students engaging in horseplay, but Deon's action did not look like horseplay.

William testified his neck stung after the incident for about five minutes and he had red marks for at least a day. He was not friends with Deon, although they had attended the same study hall. William initially denied any interaction with Deon before the incident but later stated he had been pinched in the throat by Deon on three earlier occasions. The juvenile court sustained objections to the defense counsel's attempt to elicit testimony from William about any previous episodes of horseplay at school.

Deon's mother testified she had taught him it was wrong to hurt others but could not say whether she had specifically instructed him not to touch people when they did not consent. She and her husband had taught Deon to avoid fighting except when he was defending himself or his younger brother. In December 2009, when Deon transferred to Emerson Middle School, he and his mother signed a contract stating Deon would, among other things, "[a]void fights and situations which will lead to fighting" and "[k]eep [his] hands to [him]self and in no way endanger and cause a danger to others."

At the close of the People's evidence, Deon's counsel moved to dismiss the petition pursuant to Welfare and Institutions Code section 701.1 based on the failure of the People to establish Deon's capacity by clear and convincing evidence. The court denied the motion, finding Deon had understood the wrongfulness of his conduct at the time of the incident.

Following that ruling, the defense called Dr. Nadim Karim, a licensed clinical psychologist, to provide an opinion on Deon's ability to appreciate the wrongfulness of his action. The People objected on the ground the court had already ruled on Deon's capacity. The court agreed it had already determined the issue but permitted Dr. Karim

to testify. However, the court stated the testimony would not be considered on the issue of Deon's capacity.

After evaluating Deon, Dr. Karim diagnosed him with Attention Deficit Hyperactivity Disorder (ADHD). Dr. Karim testified Deon's impulsive tendencies impaired his ability to control his behavior and to appreciate the difference between consensual horseplay and inappropriate aggressive behavior. Those impulses had been further compromised by mixed messages from his parents regarding physical confrontations with other students. In addition, Deon exhibited poor recall and would not have interpreted the contract from the school handbook to constitute a warning about specific behavior.

Deon testified he and William had not been friends but claimed William had shot rubber bands at Deon in class, behavior Deon viewed as a challenge. Deon had pinched William that time—in front of the teacher—and had not been disciplined. The same behavior had occurred on two other occasions, but Deon had never been disciplined. Deon had been playing and had not meant to hurt William.

3. *Disposition*

The juvenile court found the allegations of the petition to be true. On October 5, 2010 the court declared Deon to be a ward of the court and placed him home on probation. The court also ordered Deon to perform 40 hours of community service, pay restitution, complete counseling and write a letter of apology to William. Deon's parents were ordered to attend a parent education program.

CONTENTIONS

Deon contends the juvenile court erred as a matter of law in ruling on his capacity under Penal Code section 26 without first allowing him to present evidence on the issue and applied an incorrect standard in denying his motion to dismiss under Welfare and Institutions Code section 701.1. He additionally contends the court's finding of capacity was not supported by substantial evidence.[2]

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[2] In his opening brief Deon also challenged the juvenile court's disposition order of probation. In a letter dated January 11, 2012 Deon withdrew that challenge based on a

DISCUSSION

1. *The Standard Governing Review of a Minor's Capacity*

A child under the age of 14 is deemed incapable of committing crimes unless there is clear proof he or she knew the wrongfulness of the conduct at the time it was committed. (Pen. Code, § 26.)[3] To declare a child a ward of the juvenile court under Welfare and Institutions Code section 602 based on a criminal offense committed when the child was under 14, the court must find, by clear and convincing evidence, the child knew the wrongfulness of his or her act. (*Gladys R., supra*, 1 Cal.3d at p. 867; *In re Manuel L.* (1994) 7 Cal.4th 229, 232.)

Knowledge of wrongfulness may not be inferred from the offense itself, but the court may consider the circumstances of the crime, including preparation, commission and concealment. (*In re Tony C.* (1978) 21 Cal.3d 888, 900; *In re Jerry M.* (1997) 59 Cal.App.4th 289, 298.) The child's age and experience is also a significant factor in assessing his or her knowledge of wrongfulness: The closer a child is to the age of 14, the more likely it is he or she appreciates the wrongfulness of the acts. (*People v. Lewis* (2001) 26 Cal.4th 334, 378; *In re Cindy E.* (1978) 83 Cal.App.3d 393, 399; *In re Nirran W.* (1989) 207 Cal.App.3d 1157, 1161.)

The standard of appellate review applicable in considering the sufficiency of the evidence in a juvenile proceeding is the same applied in reviewing the sufficiency of the evidence to support a criminal conviction. (*In re Cheri T.* (1999) 70 Cal.App.4th 1400, 1404; *In re Rocco M.* (1991) 1 Cal.App.4th 814, 820; *In re Jose R.* (1982) 137 Cal.App.3d 269, 275.) In either case we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—to support the conclusions of the

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subsequent finding he had violated the terms of his probation and had also been charged in a new delinquency petition.

[3] Penal Code section 26 provides: "All persons are capable of committing crimes except those belonging to the following classes: [¶] . . . Children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness."

trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314; *Rocco M.,* at p. 820.) "This standard of review applies with equal force to claims that the evidence does not support the determination that a juvenile understood the wrongfulness of his conduct." (*In re Jerry M., supra,* 59 Cal.App.4th at p. 298.)

2. *The Juvenile Court Did Not Err in Denying the Motion To Dismiss*

Deon contends the court failed to apply the correct legal standard in ruling on his motion to dismiss pursuant to Welfare and Institutions Code section 701.1. The court stated, "[T]he People have met their burden with regard to the minor's appreciating the difference between right and wrong . . . ." According to Deon, the proper test to determine capacity is subjective, not objective. In other words, the People were required to prove the minor, at the time of committing the act charged against him, knew its wrongfulness. (See Pen. Code, § 26, *Gladys R., supra,* 1 Cal.3d 855; *In re Michael B.* (1975) 44 Cal.App.3d 443, 445-446.)

We do not read the juvenile court's statements as narrowly as Deon. In stating its ruling the court cited the testimony of Deon's mother about his upbringing and the contract he and his mother signed at the time of enrolling at Emerson Middle School. This evidence supports a finding Deon subjectively understood the wrongfulness of his actions at the time of the incident, whether or not he subsequently denied such an understanding. Indulging all inferences in support of the ruling, as we must, the court's statements reflected an appropriate understanding of the relevant legal standard. (See *In re Carl N.* (2008) 160 Cal.App.4th 423, 432, quoting *In re Michael D.* (1987) 188 Cal.App.3d 1392, 1395 ["'[A]n appellate court will not lightly substitute its decision for that rendered by the juvenile court. We must indulge all reasonable inferences to support the decision of the juvenile court and will not disturb its findings when there is substantial evidence to support them.'"]

3. *Substantial Evidence Supports the Court's Finding of Capacity*

For the same reasons, substantial evidence supports the juvenile court's finding of capacity, notwithstanding the testimony of Dr. Karim and Deon in his defense.[4]

In support of his contention he lacked subjective appreciation for the wrongfulness of his conduct, Deon stresses the minor nature of his offense, the routine occurrence of horseplay between students in middle school and at home with his brother, the mixed signals he had received from his parents about physical horseplay and fighting, the failure of teachers to discipline him for similar infractions, his candid admission of the conduct and his lack of defensiveness when reprimanded by Officer Ryan, his belief he and William were engaged in acceptable horseplay and his diagnosis of ADHD.

Weighing heavily against these factors, however, is Deon's age at the time of the incident. Deon was 13 years old, substantially larger than William and had previously been disciplined for inappropriate conduct at school.[5] In light of the circumstances, we defer to the juvenile court's broad experience in assessing the capacity of teenage offenders.

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[4] As Deon points out, there is a split of authority over *how* the substantial evidence standard of appellate review should be applied to a juvenile dependency finding made by clear and convincing evidence. The Fourth District Court of Appeal has held, "'[O]n appeal from a judgment required to be based upon clear and convincing evidence, "the clear and convincing test disappears . . . [and] the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong."'" (*In re Mark L.* (2001) 94 Cal.App.4th 573, 580-581; accord, *In re A.S.* (2011) 202 Cal.App.4th 237, 247; but see *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654 ["[o]n review, we employ the substantial evidence test, however bearing in mind the heightened burden of proof"]; *In re Henry V.* (2004) 119 Cal.App.4th 522, 529-530; *In re Isayah C.* (2004) 118 Cal.App.4th 684, 694-695.) Even assuming the more demanding standard of review applies, there was sufficient evidence to support the juvenile court's order.

[5] Deon notes the previous petition alleging felony possession of a weapon on school grounds had not yet been adjudicated at the time of the incident between him and William. Nonetheless, the petition had been filed and the jurisdiction of the juvenile justice system invoked at the time of the incident.

California case law supports the juvenile court's assessment. In *Michael B., supra,* 44 Cal.App.3d 443, one of the cases cited by Deon, the only evidence presented on the issue of appreciation of wrongfulness was that the child had said "yes" when asked by a police officer if he knew the difference between right and wrong. (*Id*. at p. 446.) The Court of Appeal held this one word answer fell far short of the "clear proof" demanded by Penal Code section 26. (*Michael B.,* at p. 446.) Michael B., however, was only nine years old at the time he committed the offense at issue ("no more than a third-grade pupil"); and the circumstances of his crime (breaking into an unoccupied automobile) did not furnish any additional proof he understood the wrongfulness of his actions. (*Ibid*.) Similarly, *Gladys R., supra*, 1 Cal.3d 855 involved a 12-year-old child with the mental and social capacity of a seven-year old. (*Id*. at p. 867.) Unlike *Michael B.* and *Gladys R.*, Deon, at age 13, possessed the requisite age and experience to understand the wrongfulness of his act.

4. *To the Extent the Juvenile Court Declined To Consider Dr. Karim's Testimony on the Question of Capacity, the Error Was Harmless*

Deon contends the court's finding on capacity should be reversed because the court failed to consider Dr. Karim's testimony regarding the effect of Deon's ADHD and other deficits on his capacity to appreciate the wrongfulness of his actions at the time of the incident. The People assert there was no error because the court allowed Dr. Karim to testify and allowed counsel to argue, after which the court adhered to its earlier ruling.

To the extent Deon argues the trial court erred by ruling on his capacity at the close of the People's case-in-chief, he is wrong. As described above, section 26 creates a rebuttable presumption that a child under the age of 14 is not capable of appreciating the wrongfulness of his conduct. (See *In re Manuel L., supra,* 7 Cal.4th at p. 232.) To rebut this presumption, the People must prove by clear and convincing evidence the child did appreciate the wrongfulness of the charged conduct at the time it was committed. (*Ibid.*) In denying the motion to dismiss, the court ruled the presumption had been adequately rebutted by the People's evidence. Thus, there was no error in so finding at the close of the People's case-in-chief.

This, of course, does not mean the defense lost the opportunity to address the subject of capacity in its own case. Although the record does not clearly indicate whether the court considered the testimony of Dr. Karim on the specific issue of capacity,[6] any error by the court was cured by its decision to allow Dr. Karim to testify and to entertain argument on that testimony. It is evident neither Dr. Karim's testimony nor the argument of counsel convinced the court it had erred in its previous ruling. While it may have been helpful for the court to address capacity in its final ruling, we decline to find prejudicial error on this point when the ruling was supported by substantial evidence.

DISPOSITION

The findings and order of the juvenile court are affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.

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[6] Asked at the close of evidence whether the prosecutor should address the *Gladys R.* issue first, the court responded: "I already addressed the *Gladys R.* issue, so it would be with regard to rebuttal. Counsel can argue—we sort of procedurally talked about this as a defense, whether or not—my position earlier was that it shouldn't proceed at the adjudication because counsel chose to do it as a part of its case-in-chief. So you may argue with regard to Dr. Karim's testimony." After argument by both counsel on the issue of capacity, the court stated, "I've heard the arguments of counsel and the evidence." The court did not subsequently address the issue of capacity but referred to Dr. Karim's testimony as helpful in assessing Deon's ongoing needs.