Filed 9/10/18 In re J.S. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re J.S., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B285480 (Super. Ct. No. VJ44640) (Los Angeles County)
THE PEOPLE, Plaintiff and Respondent, v. J.S., Defendant and Appellant.	

Appellant was prosecuted as a juvenile (Welf. & Inst. Code, § 602)[1] for inflicting corporal injury on his girlfriend (Pen. Code, § 273.5, subd. (a)). In the course of testifying at appellant's contested adjudication hearing, the victim, B.N., made self-

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

incriminating statements concerning an incident involving appellant that had occurred at a later date. On motion of the prosecution, the juvenile court struck and sealed that portion of her testimony.

The juvenile court sustained the section 602 petition and committed appellant to long-term camp. Appellant's maximum confinement period was set at four years, two months, and he was awarded 97 days of predisposition credits.

Appellant contends the juvenile court abused its discretion by not striking all of B.N.'s testimony. This contention fails because the court struck collateral testimony relating to B.N.'s credibility, and appellant's ability to effectively cross-examine B.N. was not compromised. The issue also was forfeited because appellant did not request that all of the testimony be stricken. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Appellant is B.N.'s former boyfriend. The couple started dating in 2014 when B.N. was 14 or 15 years old. By November 13, 2016, the date of the underlying incident, appellant and B.N. had been dating for two years and were living in appellant's mother's home.

The night before the altercation between appellant and B.N., they partied with ten friends in appellant's room. Upset that the friends were staying so late, B.N. left the room and went to sleep on the living room sofa.

After the friends had left, appellant asked B.N. to come back to the bedroom. When she got into bed, appellant tried to kiss her. Still upset with appellant, B.N. told him to leave her alone. He responded by choking her, which left welts on her neck. He then punched B.N.'s face and bit her on the face,

arms, wrist, left thumb and shoulders. The bites left scars. When B.N. tried to get to the door, appellant grabbed her and threw her back onto the bed. She screamed for help as appellant choked her again. Appellant's brother came in and broke up the fight. He then drove B.N. to her mother's home, and her mother took her to the police station.

Appellant's mother, Maria S. (Maria), did not witness that altercation. On December 7, 2016, however, Maria heard a girl screaming at 2:30 a.m. When she rushed into appellant's room, she saw appellant, B.N. and another girl "scuffling together." Appellant looked like he was trying to protect the other girl while B.N. was trying to punch her.

Maria threatened to call the police, but the three kept fighting. Ultimately, the other girl left, but appellant and B.N. continued to argue. Maria left the room for a few minutes. When she returned, both appellant and B.N. were gone.

Maria went to work, but returned home after 45 minutes. She saw that appellant had stab wounds to his arm and chest and was bleeding profusely. Maria discovered B.N. hiding in the shower. Maria told B.N. to leave, and a couple hours later, Maria went to B.N.'s grandparents' house. Maria told B.N.'s grandmother what she had seen. Appellant went to the hospital to have his wounds treated.

B.N.'s grandfather, Joe N. (Joe), testified that he was not home when Maria came to his house, but he later called Maria after hearing what had happened. Joe was told that B.N. had stabbed appellant.

B.N. made self-incriminating statements during her testimony. On defense counsel's advice, the juvenile court appointed an attorney to represent B.N. Thereafter, B.N.

asserted her Fifth Amendment right against self-incrimination regarding the stabbing incident.

The prosecution moved to strike the self-incriminating portions of B.N.'s statements under Evidence Code sections 352 and 787. B.N.'s attorney requested that additional portions of B.N.'s testimony be stricken and sealed. The prosecution joined this motion. Appellant's counsel argued that the motions were untimely and that the testimony was vital to B.N.'s credibility. The trial court disagreed and granted the motion to strike and seal the incriminating portions of B.N.'s testimony.

DISCUSSION

Forfeiture

Appellant argues that the juvenile court abused its discretion when it struck and sealed a portion, rather than all, of B.N.'s testimony. As appellant concedes, his defense counsel did not request that all of B.N.'s testimony be stricken. Consequently, the issue is forfeited. (*People v. Frank* (1990) 51 Cal.3d 718, 733 [defendant's failure to move to strike testimony constitutes waiver/forfeiture].)

Appellant maintains that defense counsel's failure to move to strike all of B.N.'s testimony constitutes ineffective assistance of counsel. As we shall explain, the juvenile court properly exercised its discretion to strike and seal just the incriminating portions of B.N.'s testimony. It is well established that "[c]ounsel's failure to make a futile or unmeritorious motion or request is not ineffective assistance. [Citation.]" (*People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 836.)

The Juvenile Court Did Not Abuse Its Discretion by Striking and Sealing Portions of B.N.'s Testimony

The Fifth Amendment provides, in part, that no person shall be compelled in any criminal case to be a witness against himself. (U.S. Const., 5th Amend.) There are two Fifth Amendment privileges: (a) the defendant's (or accused's) privilege, and (b) the witness's privilege. Under the witness's privilege, any person has a privilege to refuse to disclose any matter that may tend to incriminate him or her. (Evid. Code, § 940.)

A criminal defendant has a constitutionally guaranteed right to confront and cross-examine witnesses against him or her. (U.S. Const., 6th & 14th Amends.; *Pointer v. Texas* (1965) 380 U.S. 400, 403-405; *People v. Carter* (2005) 36 Cal.4th 1114, 1172.) The federal constitution guarantees an opportunity for effective cross-examination, though not a cross-examination as effective as a defendant might prefer. (See *People v. Homick* (2012) 55 Cal.4th 816, 861.)

The witness's privilege is properly invoked whenever the witness's answers would furnish a link in the chain of evidence needed to prosecute the witness for a criminal offense. (*People v. Cudjo* (1993) 6 Cal.4th 585, 617.) Thus, a defendant's Sixth Amendment rights must yield to a witness's legitimate claim that his or her testimony might lead to self-incrimination. (*People v. Hill* (1992) 3 Cal.4th 959, 993, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

"Where a witness refuses to submit to proper cross-examination regarding material issues, the striking out or partial striking out of direct testimony is common." (*Fost v. Superior*

Court (2000) 80 Cal.App.4th 724, 736.) But the striking of the testimony of a witness who asserts the privilege against self-incrimination is required only where invocation of the privilege blocks inquiry into matters which are direct, rather than merely collateral. (*Board of Trustees v. Hartman* (1966) 246 Cal.App.2d 756, 764.) As one court explained, "At one end of the spectrum are cases when [a] party . . . unjustifiably refuses to answer questions necessary to complete the cross-examination," and "in such cases the consensus is that the direct testimony must be stricken. . . . [¶] At the other end of the spectrum are cases where a nonparty witness has testified on direct examination and where he or she is asked a question on cross-examination that relates only to the witness's credibility and the witness refuses to answer. Here, . . . the direct testimony should not be stricken, 'or at least the judge ought to have a measure of discretion in ruling on that matter.' [Citation.]" (*People v. Sanders* (2010) 189 Cal.App.4th 543, 554; see *People v. Reynolds* (1984) 152 Cal.App.3d 42, 47 [the decision whether to strike a witness's testimony is reviewed for abuse of discretion].)

This case falls within the latter end of the spectrum. Although B.N.'s credibility was at issue, the juvenile court's ruling did not prejudicially impact its ability to evaluate B.N.'s credibility. B.N. was cross-examined at length about the events preceding the assault, the assault itself and her conduct after the assault. She was fully cross-examined about the events of November 13, 2016, and did not unjustifiably refuse to answer questions necessary to complete the cross-examination. (*People v. Sanders*, *supra*, 189 Cal.App.4th at p. 554.)

B.N. only refused to answer questions regarding the stabbing incident. Given appellant's ability to thoroughly cross-

examine B.N. on all other matters, striking B.N.'s entire testimony would have been a too "'drastic solution.'" (*People v. Seminoff* (2008) 159 Cal.App.4th 518, 525-526 ["The court should also consider if less severe remedies are available before employing the 'drastic solution' of striking the witness's entire testimony"].) The court appropriately adopted the less severe remedy of striking just the collateral incriminating testimony. (*Ibid.*)

As the People point out, striking a portion of B.N.'s testimony did not prevent appellant from questioning her credibility. Defense counsel elicited testimony that B.N. and appellant often fought, that she would instigate some fights, and that she was drinking and using drugs the night before the assault. Also, testimony that was received into evidence suggested that B.N. had stabbed appellant. Maria testified that she saw appellant and B.N. alone in appellant's room and that the next time she saw appellant he had stab wounds and B.N. was hiding in the shower. Joe also testified that he heard that B.N. had stabbed appellant. Thus, although the juvenile court struck B.N.'s testimony regarding the stabbing incident, appellant had the opportunity for effective cross-examination. We conclude the court did not abuse its discretion by striking and sealing the incriminating testimony.

Predisposition Credit

Appellant contends that the minute order reflecting 97 days of predisposition credit must be amended because it conflicts with the juvenile court's oral pronouncement that appellant has 107 days of credit. The record confirms, however, that the court made a mathematical error when it issued its oral pronouncement. After being informed that appellant was

entitled to 46 days of actual credit, the court stated: "And 51 for 107 days credit." The sum of 46 and 51 is 97, not 107.

The minute order prevails over the reporter's transcript when the court makes a mathematical error during sentencing. (*People v. Thompson* (2009) 180 Cal.App.4th 974, 977-978; *People v. Cleveland* (2004) 32 Cal.4th 704, 768.) Because that is what occurred here, an amendment is not necessary.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Fumiko Wasserman, Judge
Superior Court County of Los Angeles

Steven A. Torres, 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, Stacy S. Schwartz, Deputy Attorney General, and Christopher G. Sanchez, Deputy Attorney General, for Plaintiff and Respondent.