Filed 3/29/17 In re K.M. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re K.M., a Person Coming Under the Juvenile Court Law.	B269902 (Los Angeles County Super. Ct. No. MJ22881)
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. K.M., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, J. Christopher Smith, Commissioner. Affirmed as modified with directions.

Torres & Torres and Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler and Lance E. Winters, Assistant Attorneys General, Shawn McGahey Webb and Nathan Guttman, Deputy Attorneys General, for Plaintiff and Respondent.

K.M. (minor) appeals from the judgment entered after the juvenile court adjudicated minor a ward of the court. He contends that his attorney rendered ineffective assistance in failing to advocate for a lower maximum period of confinement, that the juvenile court improperly imposed conditions of probation, and that he is entitled to an additional day of predisposition custody credit. We strike the conditions of probation and correct the disposition to reflect 380 days of custody credit, but finding no merit to minor's claim of ineffective assistance of counsel, we otherwise affirm the judgment.

BACKGROUND

Allegations of the 602 petition

An amended petition filed pursuant to Welfare and Institutions Code section 602[1] (section 602 petition) alleged in count 1 that minor had committed assault with a deadly weapon in violation of Penal Code section 245, subdivision (a)(1), in count 2, that he committed aggravated mayhem in violation of Penal Code section 205, and in count 3, that minor committed mayhem in violation of Penal Code section 203. The petition specially alleged that minor personally inflicted great bodily injury upon the victim within the meaning of Penal Code section 12022.7, subdivision (a).

Adjudication and disposition

Following a contested adjudication hearing, the juvenile court found true counts 1 and 3, as well as the great bodily injury allegation, but found not true count 2. In addition, the court declared both crimes to be felonies, found that count 1 qualified as a "strike" offense, and that count 1 only, came within the meaning of section 707, subdivision (b). The court sustained the 602 petition, declared minor a ward of the juvenile court, and

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

committed minor to the California Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF). The court calculated the maximum period of confinement for count 3 at eight years, the high term for simple mayhem, and for count 1 at seven years. The court stayed the maximum of seven years for count 1 pursuant to Penal Code section 654, and awarded 379 days of predisposition custody credit.

Minor filed a timely notice of appeal from the judgment.

The juvenile court's findings and conclusions

Prior to giving a summary of the evidence and inferences relied upon, the court stated it had heard the testimony and the arguments of counsel, and had reviewed all of the exhibits, including video footage, and medical records. The parties do not contend that the findings were not supported by substantial evidence or were contradicted by any of the evidence. As the facts appear to be undisputed, our summary is taken from the court's findings. However, we refer to the evidence when necessary to our discussion.

Carlos Beltran testified that his daughter's boyfriend, Ramon, alerted him to a commotion outside his house. When he went to the front of his house, he found approximately 17 screaming teenagers. Beltran then realized they were there to fight with his daughter, so he told the teens to leave his property. They did not leave. When Beltran saw two teenage girls attacking his daughter, he picked up a bat in order to protect his family, and tried to knock away some rocks that were being thrown. The teens then left, and Beltran and his family went inside the house. The teens returned with more people and bigger rocks. As Beltran was again trying to protect his family, he felt a very sharp pain to his head, and went down to the ground. His right eye popped out of its socket, and he ran into the house to try to push it back in, but passed out in the

bathroom. Beltran suffered substantial damage to his right orbital eye socket and a fractured skull, resulting in permanent paralysis of the right side of his face as well as memory loss. As a result, he was unable to tend to his livestock or work as he did in the past, and needed continuing medical care.

Beltran's wife, Barbara Russo, testified similarly. After Ramon reported a commotion out front, she followed her husband and Ramon outside, bringing her camera. She took photographs of the teenage participants in the fight. One photograph depicted a girl named Yesenia in a fighting stance, and another depicted Robert, who was about to throw his backpack. Other photographs showed other teens who appeared to be surrounding the Beltran property.

Russo testified that during the second incident, minor said, "I am going to fuckin' kill your dad, Athena," referring to Beltran, and "Let's fuck up the dad." Deputy Sheriff Francisco testified that he interviewed an emotional Russo about what had happened. It was not until Beltran was airlifted from the scene that Deputy Francisco was able to obtain a statement from her, which did not include minor's threats to kill Beltran or attack him with two other minors. Russo's description of how minor used the rock against Beltran differed from what Deputy Francisco recalled her saying. She testified that minor approached Beltran from the side with a very large rock, about a foot or a foot and a half wide, and bashed it over Beltran's head. Deputy Francisco testified however, that Russo told him that minor threw the rock. Deputy Francisco did not recall Russo saying that minor had levied threats against Russo's family, but instead that the threats came from Sunday and Diante, who said that they were going to come back with guns and harm the family. The juvenile court noted that although a search of

minor's backpack turned up two replica firearms, there was no the evidence that they were produced at the time of the incident.

The juvenile court took note of the testimony of defense witness, Tanya S., who was present during the incident with about 11 other teens. She claimed they all went there to watch her friend Yesenia fight Athena, the daughter of Beltran and Russo. Yesenia and Athena started fighting in the driveway, and after Russo tried to break it up or assist her daughter, the fight broke up and the teens left. Tanya testified that she and others, including minor, went to a store where minor became "hyper" upon learning for the first time that Tanya's sister Sunday had been hit with a bat. The court construed Tanya's testimony to mean that minor was upset, and the court did not believe minor's testimony that he went back to the location because he wanted to see what Sunday and Tanya's mother was going to say to Beltran about what happened. The court inferred that he and others went back in order to seek some sort of revenge. Sunday testified that Beltran hit her with a bat.

The juvenile court rejected the defense argument that during the second incident, minor was defending himself from Beltran. The court concluded: "I think in the first incident, . . . Mr. Beltran was concerned about the safety of his daughter and his family and had every right to defend himself and his family. In the second incident, clearly [minor] knew that things were escalating on that first incident, and I don't believe . . . his testimony that he went over there to have a conversation with Mr. Beltran and Ms. Russo about why Sunday was hit with the bat. I believe that they went over there knowing that things could escalate. So I don't think he gets the benefit, even if Mr. Beltran was swinging his bat, . . . of self-defense at all." The court noted that minor had admitted he was the one who threw or used a rock to cause the damage, and the court found that act

was willful, as minor acted with the present ability to apply the force, knowing that it probably would result in the application of force on Beltran. Based on these findings, the juvenile court found true count 1, assault with a deadly weapon, as well as the allegation that minor personally inflicted great bodily injury on Beltran.

The court found not true, however, the allegation in count 2 of aggravated mayhem. The court explained: "[A]ggravated mayhem requires a specific intent to cause the maiming injury, and in this case, [although] the injuries to Mr. Beltran were permanent and substantial, [the evidence] shows no more than an indiscriminate attack [which] is insufficient to prove the required specific intent." The court considered all the circumstances of what occurred that day, and found Russo's testimony that there was a targeted and specific attack not credible. The court concluded that the specific intent requirement for aggravated mayhem was not established beyond a reasonable doubt. However, as simple mayhem was a general intent crime, and the necessary intent was inferable from the type of injuries resulting from minor's acts, the court found that simple mayhem was proven beyond a reasonable doubt. The court thus found count 3 to be true.

DISCUSSION

I. Assistance of counsel

Minor contends that he was denied effective assistance of counsel as guaranteed by the United States and California Constitutions, because his counsel failed to advocate for a lower maximum period of confinement. In particular, minor argues that in setting the maximum period of confinement, the juvenile court did not demonstrate an understanding that it had discretion to adjust the maximum downward, and defense counsel therefore should have asked for a reduced period.

Section 726, subdivision (d), provides in relevant part: "(1) If the minor is removed from the physical custody of his or her parent or guardian as the result of an order of wardship made pursuant to Section 602, the order shall specify that the minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court. [¶] (2) As used in this section and in Section 731, 'maximum term of imprisonment' means the longest of the three time periods set forth in paragraph (2) of subdivision (a) of Section 1170 of the Penal Code."

Under section 731, subdivision (c), when the minor is committed to DJF, the length of confinement is restricted by both the maximum period of imprisonment that could be imposed upon an adult and the maximum term of physical confinement set by the court based upon the facts and circumstances that brought or continued the minor under the jurisdiction of the juvenile court. Nevertheless, in setting a maximum term of confinement, the juvenile court retains discretion, based on the facts and circumstances of the case, to set the maximum period of confinement lower than the maximum time an adult could serve in prison for the same offenses. (*In re Julian R.* (2009) 47 Cal.4th 487, 498.)

The Sixth Amendment right to assistance of counsel includes the right to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-674; see also Cal. Const., art. I, § 15.) "Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes *both* of the following: (1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability

that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

"Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' [Citation.] Defendant's burden is difficult to carry on direct appeal, as we have observed: '"Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission."' [Citation.]" (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.)

Minor tacitly acknowledges that the record does not disclose counsel's reason for not advocating for a lower maximum, but contends that there could be no tactical reason for his counsel's failure to so argue. Before examining that contention, however, we address some misconceptions about the record expressed in minor's arguments. After discussing the difference between simple and aggravated mayhem and acknowledging that the court did *not* find true the allegation of aggravated mayhem, minor argues that the "aggravated maximum" was unwarranted. He reasons that although the court found that minor intended to throw the rock, it also found that he did not have a "malicious intent," as required for "aggravated assault." First, the juvenile court made no finding that minor did not have a malicious intent, as required for aggravated assault, and we have found no similar language in the record. Rather, the court found that minor lacked the specific intent to cause a maiming injury, an element

of aggravated mayhem. Second, minor's argument suggests that the juvenile court set the maximum period of confinement as though it was aggravated mayhem. It did not. The court used the high term of eight years for simple mayhem. (Pen. Code, § 204.) The punishment for aggravated mayhem is life in prison with the possibility of parole. (Pen. Code, § 205.)

Minor's arguments also suggest that the juvenile court did not understand that it had discretion to adjust the maximum downward since it did not consider mitigating facts and circumstances. The court did consider the facts and circumstances presented. The court heard the testimony and argument of counsel, and just prior to disposition, the court stated that it had read and considered the social study reports and the probation file. Paragraph 8 of the Judicial Council commitment form (JV-732) states the maximum period of confinement in item (a), and by checking item (b) in the paragraph, the court has expressly noted the following: "The court has considered the individual facts and circumstances of the case in determining the maximum period of confinement." Under such circumstances, we must presume that the court exercised its discretion in setting the maximum period of confinement, considered a possibly lower ceiling, and did so by considering the relevant facts and circumstances as required by section 731, subdivision (c). (*In re Julian R., supra,* 47 Cal.4th at p. 499.)

We turn now to minor's contention that counsel could not have had a tactical reason for not advocating for a reduced maximum period of confinement. Minor argues that there were numerous factors in his favor, and thus counsel had nothing to lose and everything to gain. Minor has cited no authority for the idea that defense counsel must engage in all conceivable tactics on that ground. We observe that the United States Supreme

Court has rejected "nothing to lose" as a basis for finding ineffective assistance of counsel, as it found no precedent for such a standard. (*Knowles v. Mirzayance* (2009) 556 U.S. 111, 122.) Minor has thus failed to carry his burden to demonstrate inadequate assistance of counsel on this record. (See *People v. Lucas*, *supra*, 12 Cal.4th at pp. 436-437.)

Moreover, minor has failed to show prejudice. He summarizes various facts and circumstances that might have caused the court to exercise discretion in minor's favor had counsel so advocated, such as minor's testimony that he expected to hit Beltran in the leg, not in the head, and was shocked by the result. Minor also notes that the juvenile court did not believe that minor had made threats to the family or that he sneaked up to Beltran to strike him directly in the head. In addition, minor points to evidence that he was doing well in custody, and that information in the probation reports confirmed that he had previously successfully completed probation, that many of his prior alleged offenses were dismissed, that there was minimal evidence of gang involvement, and minimal drug or alcohol use other than marijuana. Finally minor notes that despite suffering from ADHD, bi-polar disorder, and depression, he was passing all his classes.

We have already found that the juvenile court did consider the facts and circumstances as required by section 731, subdivision (c), and was thus presumably aware of such mitigating circumstances. Indeed, minor's summary is taken primarily from social study reports and the probation file, which the court expressly stated it had considered. The court was thus also aware of minor's extensive record of contact with law enforcement, prior juvenile detentions, and the Probation Department's assessment that "minor's prior record is reflected in his current behavior as he continues to victimize others. His

negative behavior has escalated to include severe injury to his victims, with callous disregard for the safety of others." With regard to the charges in the current petition, the juvenile court expressly found that minor had willfully thrown a rock knowing that it probably would result in the application of force on Beltran. Beltran testified that he suffered brain damage, memory loss, and partial facial paralysis.

We discern no reasonable probability that, but for the alleged error by defense counsel, there would have been a more favorable determination by the juvenile court. Minor's claim thus fails on this ground as well. (See *Strickland v. Washington*, *supra*, 466 U.S. at p. 694.)

II. Probation conditions

Minor contends that because he was committed to DJF, the juvenile court had no authority to impose probation conditions, and that the six conditions imposed orally at disposition must therefore be stricken. (See *In re Allen N.* (2000) 84 Cal.App.4th 513, 516.) Respondent agrees. The conditions were not included in the written minute order but it does not appear that the court otherwise corrected the error. We thus strike them from the disposition order.

III. Custody credit

The juvenile court awarded minor 379 days of predisposition custody credit. He contends that he is entitled to one more day, and respondent agrees. As minor was detained on November 17, 2014, and held until disposition on December 1, 2015, he was entitled to 380 days. We correct the disposition accordingly.

DISPOSITION

The judgment of the juvenile court is modified to strike the six conditions orally pronounced by the court at the December 1, 2015 disposition, and to correct the calculation of custody credit

by the addition of one day, for a total of 380 days of predisposition credit. The juvenile court is directed to issue an amended commitment form and forward it to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities. As amended and in all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
CHAVEZ

We concur:

_____, J.
HOFFSTADT

_____, J.*
GOODMAN

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* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.