Filed 2/3/14 In re A.G. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re A.G., A Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. A.G., Defendant and Appellant.	B247576 (Los Angeles County Super. Ct. No. TJ19690)

APPEAL from orders of the Superior Court of Los Angeles County, Kevin L. Brown, Judge. Affirmed.

Kirt J. Hopson for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael R. Johnsen and Toni R. Johns Estaville, Deputy Attorneys General, for Plaintiff and Respondent.

The juvenile court sustained a petition alleging that appellant A.G. engaged in forcible lewd acts upon two children, and ordered appellant committed to the Division of Juvenile Justice (DJJ).[1] Appellant contends that there is insufficient evidence to support those rulings, and that a continuance he requested was improperly denied. We reject his contentions, and affirm.

RELEVANT PROCEDURAL BACKGROUND

On January 22, 2013, a petition was filed under Welfare and Institutions Code section 602, charging appellant with two counts of a forcible lewd act upon a child (Pen. Code, § 288, subd. (b)(1)).[2] The petition alleged that appellant was 15 or 16 years old when the offenses occurred. Accompanying each count was an allegation that there were multiple victims (§ 667.61, subds. (b), (e)). Following a contested adjudication hearing, the juvenile court sustained the petition, and declared appellant to be a ward of the court. The court ordered appellant committed to the DJJ, and set his maximum term of confinement at fifteen years to life. This appeal followed.

FACTS

A. *Prosecution Evidence*

R.G., born in February 2003, and M.G., born in October 2001, lived with their grandmother and father. R.G. and M.G. often visited appellant's house,

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1 "The Division of Juvenile Justice is the statutory successor to the California Youth Authority. (Gov. Code, § 12838.5.)" (*Brown v. Superior Court* (2011) 199 Cal.App.4th 971, 978.)

2 All further statutory citations are to the Penal Code unless otherwise indicated.

which was located near their residence. Also living at appellant's house was his family, including appellant's sister, the mother of R.G.'s and M.G.'s half-sister.

R.G. testified that when he was seven years old, he visited appellant's house. While R.G. played in appellant's room, appellant told him to go into the bathroom. After they entered the bathroom, appellant closed the door, pulled down his pants, and sat on the toilet. As appellant pulled down his pants, he told R.G. to kneel in front of him. R.G. became scared because he did not understand what was happening.

R.G. further testified that while he knelt, appellant made him "suck [appellant's] middle part." Appellant placed his hands on R.G.'s head and moved it forwards and backwards while R.G.'s mouth was on his penis. R.G. experienced no pain, and appellant neither pulled his hair nor injured his head. R.G. believed that if he tried to leave the bathroom, appellant would pull him back in, and that if he did not comply, he would not be allowed to visit appellant's house in the future. After the incident, R.G. went home. He reported the incident to no one because he wanted to forget it.

M.G. testified that at some point before October 2011, during a visit to appellant's house, she used the bathroom. She closed the bathroom door, which did not lock. While she was sitting on the toilet, appellant entered the bathroom and pulled down his pants and underwear, exposing his penis. M.G. was scared and did not know what to do.

M.G. further testified that appellant grabbed her waist with his hands and bent her over the sink, where he put "a little bit of his penis into [her] butt." When she felt pain, she tried to push appellant away. As she did so, appellant began to fall toward the toilet. M.G. then pulled up her pants and fled. She went home and spoke to no one regarding the incident because she was scared.

At some point, R.G.'s and M.G.'s grandmother learned that appellant had been accused of an unrelated rape, and told the children that they could no longer visit his house.[3] In 2012, M.G. discussed appellant's misconduct with her aunt, B.G. After M.G. told R.G. that appellant had raped her, R.G. disclosed appellant's misconduct regarding him.

B. *Defense Evidence*

Appellant's grandmother testified that during R.G's and M.G.'s visits, she never saw appellant with them in the bathroom, and never observed him doing anything inappropriate. According to the grandmother, the bathroom door had a functioning lock.[4]

B.G. testified that she sometimes visited appellant's house when the children were there. She never saw appellant engage in misconduct with them. In July 2012, after R.G. and M.G. stopped visiting appellant's house, M.G. told B.G. that appellant had raped her.[5]

Appellant's sister testified that R.G. and M.G. appeared to be on friendly terms with appellant approximately three or four months before the adjudication hearing.

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[3] The children's grandmother testified that she ended their visits approximately three years before the adjudication hearing.

[4] Appellant's mother also testified that the lock on the bathroom door was not broken.

[5] Los Angeles County Sheriff's Department Detective Jonathan Bailey testified that B.G. told him that M.G. disclosed appellant's misconduct to her in September 2011.

DISCUSSION

Appellant contends (1) that there was insufficient evidence to support the findings that he engaged in forcible lewd conduct with a child, (2) that the trial court erred in denying his request for a continuance, and (3) that there was insufficient evidence to support his commitment to the DJJ. As explained below, we reject his contentions.

A. *Sufficiency of the Evidence Regarding Appellant' Offenses*

Appellant challenges the sufficiency of the evidence regarding his offenses under section 288, subdivision (b)(1). Subdivision (a) of section 288, prohibits the commission of a "lewd or lascivious act" on a child under the age of 14 years "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires" of the perpetrator or the victim. Subdivision (b)(1) of section 288 defines an aggravated form of that offense committed "by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury . . . ." (*People v. Soto* (2011) 51 Cal.4th 229, 237 (*Soto*).) Appellant contends there was insufficient evidence that he acted with that level of force.[6]

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[6] "'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]' [Citation.]" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

The force required under section 288, subdivision (b), must be "'substantially different from or substantially greater than that necessary to accomplish the lewd act itself.'" (*Soto, supra*, 51 Cal.4th at p. 242, quoting *People v. Cicero* (1984) 157 Cal.App.3d 465, 474, disapproved on another ground in *Soto, supra*, 51 Cal.4th at p. 248, fn. 12.) Nonetheless, demonstrating that level of force ordinarily "is not a heavy burden." (*People v. Mom* (2000) 80 Cal.App.4th 1217, 1224-1225, disapproved on another ground in *People v. Griffin* (2004) 33 Cal.4th 1015, 1028.) As our Supreme Court has explained, the prosecution need not show that the lewd act was committed against the victim's will or without the victim's consent. (*Soto, supra*, at pp. 238, 248.)

Nor need the prosecution show that the defendant used vigorous force during the lewd act. In *People v. Pitmon* (1985) 170 Cal.App.3d 38, 44-45 (*Pitmon*), disapproved on another ground in *Soto, supra*, 51 Cal.4th at p. 248, fn. 12, the defendant took a boy's hand, placed it on his own genitals, and rubbed himself with the boy's hand. Later, he pushed the boy's back slightly as the boy orally copulated him. (*Pitmon, supra,* 170 Cal.App.3d at p. 48.) The appellate court concluded that the defendant's use of the boy's hand as a tool and his pushes to the boy's back constituted acts of force, for purposes of section 288, subdivision (b)(1). (*Pitmon, supra,* at p. 48.)

In *People v. Babcock* (1993) 14 Cal.App.4th 383, 385 (*Babcock*), the defendant took the hand of his first victim and made her touch his genitals. He also grabbed the hand of his second victim and placed it on his genitals. (*Ibid*.) When she tried to pull her hand away, he pulled it back. (*Ibid*.) The appellate court held that the defendant's conduct displayed the requisite level of force with respect to both victims, even though the first victim had not resisted him. (*Id*. at

pp. 386-387.) In so concluding, the court remarked that "resistance is not required to prove forcible sexual assault . . . ." (*Id.* at p. 387.)

In *People v. Bolander* (1994) 23 Cal.App.4th 155, 158 (*Bolander*), disapproved on another ground in *Soto, supra*, 51 Cal.4th at p. 248, fn. 12, the defendant pulled down his victim's pants. When the victim tried to pull them back up, the defendant bent him over, placed his hand on the victim's waist, pulled the victim toward him, and put his penis in the victim's anus. (*Ibid*.) The appellate court held that the defendant's conduct manifested the requisite force. (See also *People v. Neel* (1993) 19 Cal.App.4th 1784, 1786, 1790 (*Neel*), disapproved on another ground in *Soto, supra*, 51 Cal.4th at p. 248, fn. 12 [defendant used requisite force by moving victim's head onto penis and pushing it down when she tried to pull away].

Here, appellant's misconduct demonstrated force sufficient to support his convictions. As in *Pitmon* and *Babcock*, appellant used his hands to move R.G.'s head forwards and backwards while R.G.'s mouth was on his penis. Furthermore, much like the defendant in *Bolander*, appellant grabbed M.G. by the waist, pushed her to the sink, bent her over, and put his penis in her anus. Although M.G. did not actively resist until she felt pain, resistance is not needed to establish the requisite force.

Pointing to *People v. Schulz* (1992) 2 Cal.App.4th 999 (*Schulz*) and *People v. Senior* (1992) 3 Cal.App.4th 765 (*Senior*), appellant contends that the force he applied was insufficient for forcible lewd conduct upon a child. We disagree. As explained below, *Schulz* and *Senior* contain erroneous analyses of the level of force required for that offense.

In *Schulz*, the defendant tried to get his victim off her bed by grabbing her arm. (*Schulz, supra*, 2 Cal.App.4th at pp. 1003-1004.) When she ran to a corner

of her room, he grabbed her, held her arm, and touched her breasts and vaginal area. (*Ibid*.) The appellate court determined that the defendant did not display the requisite force, stating: "Since ordinary lewd touching often involves some additional physical contact, a modicum of holding and even restraining cannot be regarded as substantially different or excessive 'force.'" (*Id*. at p. 1004.) In so concluding, the court acknowledged that it was departing from *Pitmon*. (*Ibid*.) The court nonetheless affirmed the defendant's conviction under subdivision (b)(1) of section 288 on another ground, reasoning that the defendant's familial relationship with his victim established the presence of duress. (*Schulz, supra*, at p. 1005.)

Senior was decided by the same panel of justices. There, the victim unsuccessfully tried to pull away or escape from the defendant while he touched her breast and vagina. (*Senior, supra*, 3 Cal.App.4th at pp. 772-773.) Relying on the discussion in *Schulz*, the court found insufficient evidence of force under the standard applicable to a forcible lewd act upon a child, but affirmed the defendant's convictions for various sex offenses on other grounds. (*Id*. at pp. 774-776.)

Subsequently, numerous appellate courts have rejected *Schulz* and *Senior*, insofar as they address the requisite level of force. In *Babcock*, the court stated: "In our view, the fatal flaw in . . . the analyses in *Schulz* and *Senior*[] is in their improper attempt to merge the lewd acts and the force by which they were accomplished *as a matter of law*. Unlike the court in *Schulz*, we do not believe that holding a victim who was trying to escape in a corner is necessarily an element of the lewd act of touching her vagina and breasts. Unlike the court in *Senior*, we do not believe that pulling a victim back as she tried to get away is necessarily an element of oral copulation." (*Babcock, supra*, 14 Cal.App.4th at

p. 388.) Turning to the facts in the underlying case, the court in *Babcock* stated that the defendant's conduct displayed the required level of force. (*Ibid*.) The court observed that the defendant's conduct with respect to his first victim, which consisted of grabbing her hands and applying them to his genitals, was *not* a necessary element of the lewd act of touching his "crotch." (*Ibid*.)

Many appellate courts have followed *Babcock*'s reasoning on this matter. (E.g., *Neel*, *supra*, 19 Cal.App.4th at pp. 1789-1790; *Bolander*, *supra*, 23 Cal.App.4th at pp. 160-161; *People v. Alvarez* (2009) 178 Cal.App.4th 999, 1005.) Indeed, our research has identified no published decision adopting the analyses of force in *Schulz* and *Senior*. As we find *Babcock* persuasive, we decline to apply those analyses. Under *Babcock*, appellant engaged in aggravated misconduct regarding R.G. and M.G. because he applied force that was not a necessary element of his lewd acts. In sum, there is sufficient evidence to support the juvenile court's findings that appellant committed forcible lewd conduct upon a child.

B. *Continuance*

Appellant contends the juvenile court erred in denying a continuance of the disposition hearing. He argues that the continuance was necessary to facilitate an assessment of his mental health and the availability of treatment services.

1. *Governing Principles*

In juvenile court proceedings, a continuance is properly granted "only upon a showing of good cause and only for that period of time shown to be necessary by the moving party at the hearing on the motion. Neither stipulation of the parties nor convenience of the parties is, in and of itself, good cause." (Welf. & Inst. Code, § 682, subd. (b).) When the juvenile court denies a continuance of the

disposition hearing, we review the ruling for an abuse of discretion under the standards applicable in criminal proceedings. (*In re Ernesto H.* (2004) 125 Cal.App.4th 298, 315.) Under those standards, "the trial court has broad discretion to determine whether good cause exists to grant a continuance of the trial. [Citations.] A showing of good cause requires a demonstration that counsel and the defendant have prepared for trial with due diligence. [Citations.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.)

2. *Underlying Proceedings*

At the February 1, 2013 adjudication hearing, the juvenile court announced its findings, and asked the parties how much time they needed to prepare for the dispositional hearing. Appellant's private counsel, Juan Dotson, asked for a month. The prosecutor objected to the request, arguing that under the probation report, the only possible disposition was appellant's commitment to the DJJ. At Dotson's request, the court set the disposition hearing for March 5, 2013. Dotson then asked the court to direct the preparation of a supplemental probation report. The court rejected the request, stating: "You certainly have a month to bring in whatever is relevant. [¶] . . . [¶] I will hear whatever you have to say at the disposition. [¶] If you want to bring in further information, biographical, whatever you think is lacking in the probation report, you may certainly do that."

On February 27, 2013, appellant filed motions for a continuance and for the appointment of two psychologists. Appellant sought a three-week continuance of the dispositional hearing in order to facilitate his evaluation by the psychologists. Pointing to section 987.2 and Evidence Code 730, appellant asked the court to appoint the psychologists, arguing that his parents and family lacked the funds to

pay for their services.[7] Accompanying the requests for the appointment of the psychologists were declarations from Dotson, who stated that appellant's parents had exhausted their funds in paying for his legal services.

On March 5, 2013, at the dispositional hearing, appellant appeared with Dotson. Also present was private attorney Kirt Hopson, who requested leave to substitute in as appellant's counsel. Hopson explained that appellant's parents had asked him to replace Dotson.

Dotson urged the court to grant appellant's requests, arguing that the probation report provided insufficient evidence regarding the appropriate disposition for appellant. When the court asked why Dotson had waited so long to request a continuance and the appointment of psychologists, Dotson replied: "Most of the delay was [my] examining whether or not there would be reasonable grounds to put forth [a] motion for a new trial. [¶] . . . [¶] [T]he other consideration was [that] I was [going to] consider filing a motion to be withdrawn as counsel as well for . . . breach of [the] retainer agreement . . . ."

In rejecting appellant's requests, the court stated: "I don't believe [appellant] has a right to have a psychiatrist or psychologist appointed. He does not have the right to have it a month after the adjudication ended . . . . [¶] I feel badly Mr. Dotson hasn't been paid, but that is between him and the family. [¶] The victims have the right to closure as well. And the mother of the victim[s] is here. She is ready. We're go[ing to] do the disposition today." The court also denied Hopson's request to substitute in as appellant's counsel.

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[7] We recognize that appellant's motions refer to Evidence Code section 952, rather than section 730 of that code. Because that provision concerns the attorney-client privilege, we conclude that the motions intended to cite Evidence Code section 730, which concerns the trial court's authority to appoint experts (see fn. 8, *post*).

3. *Analysis*

On appeal, appellant challenges the denial of his request for a continuance. He argues that the ruling contravened his rights to due process and to effective counsel because "it prevented [him] from presenting . . . a meaningful alternative to the recommendation of the Probation Department." We disagree.

In our view, the trial court did not err in concluding that appellant failed to show good cause for the continuance. The juvenile court afforded appellant approximately five weeks to prepare for the dispositional hearing. Only shortly before the date set for the hearing did appellant seek a continuance. Although Dotson's declarations stated that appellant's parents lacked the funds to pay for psychological evaluations, when asked to explain the belated request for a continuance, Dotson did not attribute the delay to a lack of funds, but to other matters. Indeed, appellant sought to have another retained attorney, Hopson, substitute in as his counsel at the disposition hearing, and he otherwise offered no declaration from himself or his parents establishing indigence. On this record, the juvenile court did not abuse its discretion in denying the continuance.[8] (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 1037.)

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[8] Because appellant does not challenge the juvenile court's other rulings, he has forfeited any contention of error regarding them. Moreover, we would affirm the rulings had appellant contested them on appeal.

We see no error in the denial of appellant's requests for the appointment of psychologists under section 987.2 and Evidence Code 730. Because section 987.2 provides for the appointment of attorneys and investigators only for indigent defendants, it is inapplicable to appellant, who was represented by retained counsel. Although Evidence Code section 730 authorizes the appointment of expert witnesses and the allocation of their compensation to a specific party, for the reasons noted above the juvenile court did not abuse its discretion in denying appellant's untimely requests for court-appointed psychologists.

(Fn. continued on next page.)

C. *Commitment to the DJJ*

Appellant contends the juvenile court erred in rejecting a less restrictive alternative to commitment to the DJJ, namely, probation at home, coupled with electronic monitoring and a non-custodial treatment program. He argues that there is insufficient evidence to support the court's selection of commitment to the DJJ over his proposed alternative. As discussed below, we reject his contention.

The juvenile court's decisions regarding confinement are reviewed for abuse of discretion. (*In re Michael D.* (1987) 188 Cal.App.3d 1392, 1395.) Moreover, a reviewing court "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. [Citations.]" (*Ibid*.) To determine the existence of substantial evidence, we examine the record in light of the purposes of the juvenile law. (*In re Todd W.* (1979) 96 Cal.App.3d 408, 417.)

"One of the primary objectives of juvenile court law is rehabilitation, and the statutory scheme contemplates a progressively more restrictive and punitive series of dispositions starting with home placement under supervision, and progressing to foster home placement, placement in a local treatment facility, and finally placement at the DJJ. [Citation.] Although the DJJ is normally a placement of last resort, there is no absolute rule that a DJJ commitment cannot be ordered unless less restrictive placements have been attempted. [Citations.] A

We also see no error in the denial of Hopson's request to substitute in as appellant's retained counsel. Although defendants have the right to replace retained counsel, a court may properly deny a request to substitute counsel when the substitution will unduly delay the proceedings. (*People v. Lau* (1986) 177 Cal.App.3d 473, 478-479.) Because Hopson acknowledged that he was not prepared to represent appellant at the dispositional hearing, the juvenile court did not abuse its discretion in denying Hopson's request.

DJJ commitment is not an abuse of discretion where the evidence demonstrates a probable benefit to the minor from the commitment and less restrictive alternatives would be ineffective or inappropriate. [Citation.]"[9] (*In re M.S.* (2009) 174 Cal.App.4th 1241, 1250.)

Here, the probation report states: "[Appellant] is in desperate need of treatment in order for [his] type of behavior not to be repeated. [Appellant's] behavior in the instant offense[s] poses a threat to the community. At age . . . 19[,] the most viable option for [appellant] is the [DJJ]. While in [the] DJJ, [appellant] will be able to obtain a sexual offender treatment program for an uninterrupted period of time and in a well structured environment . . . ."

During the disposition hearing, the court observed that because appellant was 19, he was too old for certain placement programs, including camp and juvenile hall. When the court asked Dotson to suggest an alternative to commitment to the DJJ, Dotson proposed that appellant be released with electronic monitoring or placed at home on probation, with orders to participate in treatment programs offered through the county jail.

In committing appellant to the DJJ, the juvenile court stated: "The mental and physical condition . . . of [appellant is] such as to render it probable he . . . will benefit from either reformatory education or discipline or other treatment provided by [the DJJ]. [¶] . . . [¶] [Appellant] needs counseling. [Appellant] also needs structure. . . . I feel that it is necessary to send him to [the DJJ] because there is

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9 Section 202 of the Welfare and Institutions Code provides: "Minors under the jurisdiction of the juvenile court as a consequence of delinquent conduct shall, in conformity with the interests of public safety and protection, receive care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances. This guidance may include punishment that is consistent with the rehabilitative objectives of this chapter." (Wel. & Inst. Code, § 202, subd. (b).)

much less chance he will prey on someone else there than if he was home on probation. [¶] And despite . . . orders [that] he stay away from . . . people under a certain age, that could be violated."

In view of this record, we find no abuse of discretion. The probation report constituted substantial evidence that appellant would benefit from commitment to the DJJ. (*In re Clarence B.* (1974) 37 Cal.App.3d 676, 682-683.) Appellant does not dispute the juvenile court's determination that appellant, at age 19, was ineligible for placement in a camp or juvenile hall. Rather, appellant contends there was insufficient evidence to support the court's decision not to place him on probation at home, with electronic monitoring and directions to participate in a noncustodial treatment program. We disagree. The record shows that appellant twice sexually abused young children in the bathroom of his family home. As the trial court observed, neither electronic monitoring nor treatment programs could ensure he would not engage in similar conduct if placed on probation at home. In sum, the juvenile court did not err in ordering appellant committed to the DJJ.[10]

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10 Appellant also suggests there was insufficient evidence to support the juvenile court's finding regarding his mental and physical condition, for purposes of commitment to the DJJ. However, the finding tracks the language of Welfare and Institutions Code section 734, which provides: "No ward of the juvenile court shall be committed to the [DJJ] unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by the [DJJ]." That provision is intended to ensure that commitment to the DJJ will benefit the minor. (*In re Eddie M.* (2003) 31 Cal.4th 480, 487; *In re Aline D.* (1975) 14 Cal.3d 557, 562.) As explained above, there is sufficient evidence to support the finding of benefit.

DISPOSITION

The orders of the juvenile court are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

EDMON, J.*

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