Filed 1/24/13 In re Anthony S. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re Anthony S., a Person Coming Under the Juvenile Court Law. _____ THE PEOPLE, Plaintiff and Respondent, v. ANTHONY S., Defendant and Appellant.	B235812 (Los Angeles County Super. Ct. No. FJ47647)

APPEAL from an order of the Superior Court of Los Angeles County, Robin Miller Sloan, Judge. Affirmed.

Laini Millar Melnick, 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, Assistant Attorney General, Steven D. Matthews, and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

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Minor Anthony S. appeals from an order declaring him a ward of the juvenile court under Welfare and Institutions Code section 602. He argues the trial court erred in finding he was competent and knew the wrongfulness of his conduct. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

On May 26, 2010, minor pointed a pocket knife at another boy, Thomas J., in a school bathroom. Minor was 11 years old at the time. Minor and Thomas were friends and attended fourth grade.

During the bathroom incident, minor pushed Thomas against the wall, and held the pocket knife with the blade showing about eight inches away from Thomas's face. Minor seemed angry and did not appear to be playing. Thomas believed minor was trying to scare him but did not know why. Thomas was afraid that someone would push minor, or minor would stab him on purpose, and he would get cut. He told minor to "take it easy." When minor turned to leave, Thomas pushed him because he did not like having a knife pointed at him. Minor then pointed the knife at Thomas again.

The next day, minor's teacher investigated after learning that minor had brought a knife to school. Minor was questioned by an administrator. When the teacher asked him to empty his pockets, he took out the folded pocket knife. He was crying.

A petition was filed alleging minor committed assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)). Minor's counsel declared a doubt about minor's competency, and the proceedings were suspended. Experts for minor and the People testified at the competency hearing. The court found minor competent and set the matter for adjudication. After hearing testimony from Thomas and minor's teacher, the court denied minor's motion to dismiss, found minor was aware of the wrongfulness of his conduct, and found the petition true as a misdemeanor. Minor was declared a ward of the court and placed home on probation. This appeal followed.

DISCUSSION

I

Minor argues the court erred in finding him competent to proceed. A mentally incompetent adult defendant cannot be tried, and a child subject to a juvenile delinquency proceeding has a similar due process right to a competency hearing. (*In re Christopher F.* (2011) 194 Cal.App.4th 462, 468.) The question at such a hearing is whether the individual has "sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding and a rational, as well as a factual understanding of the proceedings." (*Ibid.*, citing *Dusky v. United States* (1960) 362 U.S. 402 (*Dusky*).)

Under Welfare and Institutions Code section 709, proceedings must be suspended if the court finds that substantial evidence raises a doubt about the minor's competency. (*Id*., § 709, subd. (a).) "Upon suspension of proceedings, the court shall order that the question of the minor's competence be determined at a hearing. The court shall appoint an expert to evaluate whether the minor suffers from a mental disorder, developmental disability, developmental immaturity, or other condition and, if so, whether the condition or conditions impair the minor's competency. The expert shall have expertise in child and adolescent development, and training in the forensic evaluation of juveniles, and shall be familiar with competency standards and accepted criteria used in evaluating competence." (*Id*., § 709, subd. (b).)

Minor argues that the People's expert, Dr. Ronald Markman, was not qualified under Welfare and Institutions Code section 709, subdivision (b). This argument is problematic for several reasons. First, there was no objection to the admission of Dr. Markman's report in the juvenile court, and the failure to object forfeits the issue of the expert's qualifications on appeal. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 20–21.) Second, the trial court's determination that a witness was a qualified expert is reviewed under the deferential abuse of discretion standard and reversal is warranted only when the witness clearly lacked qualifications as an expert. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1062–1063.) On appeal, minor argues that Dr. Markman's testimony

and report should be disregarded under the substantial evidence test, not that the juvenile court abused its discretion in admitting Dr. Markman's report into evidence. This is yet another ground for finding the issue of the expert's qualifications forfeited on appeal. (See *People v. Spector* (2011) 194 Cal.App.4th 1335, 1372, fn. 12 [declining to address issue not properly raised in appellant's opening brief].)

Even were we to consider the issue of Dr. Markman's qualifications, we would not agree with minor's contention that they do not meet the requirements of Welfare and Institutions Code section 709, subdivision (b). Dr. Markman testified that he was a medical doctor with a specialty in forensic psychiatry. He had done thousands of competency evaluations, of which an estimated ten percent were in juvenile cases. The statute does not require that an expert focus on juvenile cases or have recent training in juvenile competency. Therefore, Dr. Markman's testimony that he did not focus on child evaluations and had not recently undergone competency training does not defeat his qualifications.

Minor emphasizes Dr. Markman's testimony that he was not a neurologist and had not recently reviewed the significance of frontal lobe development in adolescents with regard to competency. He contends Dr. Markman was unaware of recent research on the correlation between age and competency, cited in *Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847, 860 (*Timothy J.*). The court in *Timothy J.* held that a minor need not have a mental disorder or developmental disability to be found incompetent. (*Id*. at p. 861) It expressly limited this holding by stating that it did not hold "that age alone may be the basis for a finding of incompetency," because competence is affected by many factors. (*Ibid*.) Similarly, Dr. Markman acknowledged that an adolescent brain is "still maturing and growing," but he explained that age is not the sole determinative factor. Thus, whether Dr. Markman was up to date on the most recent research in adolescent brain development is not necessarily fatal to his competency evaluation.

Minor frames the issue on appeal as a challenge to the sufficiency of the evidence supporting the court's finding of competency. He acknowledges that we review such a finding for substantial evidence. Under this standard of review, we do not weigh the

strength of the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Rather, we examine the record in the light most favorable to the judgment and determine whether a rational trier of fact could have found minor competent to stand trial. (*In re Christopher F.*, *supra*, 194 Cal.App.4th at p. 471, fn. 6.)

Once an expert is found qualified to testify on an issue, his "degree of knowledge goes more to the weight of the evidence than its admissibility." (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 38.) Minor, in essence, argues that Dr. Markman was less qualified than his own expert, Dr. Catherine Scarf, whose primary focus was the evaluation of children and who attended competency trainings on a regular basis. But under the substantial evidence standard of review, we cannot reweigh the evidence based on the experts' relative qualifications.

Minor urges us to hold the People have the burden of proving a child's competence. The issue was presented in *In re Christopher F.*, *supra*, 194 Cal.App.4th 462, where the court suggested that in the absence of a statute or court rule applicable to juvenile proceedings, "it is not immediately obvious the burden of proving a child's competence . . . should not rest with the People, rather than requiring the child, like an adult defendant, to prove incompetence." (*Id.* at p. 472.) The court declined to resolve the issue because substantial evidence supported the juvenile court's finding even if the People bore the burden of proof. (*Ibid.*) The same is true here.

Dr. Markman testified that he conducted a face-to-face interview with minor to determine his competence under the standard set out in *Dusky*, *supra*, 362 U.S. 402: whether minor had "sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding and a rational, as well as a factual understanding of the proceedings[.]" (*In re Christopher F.*, *supra*, 194 Cal.App.4th at p. 468.) He testified that minor was cooperative and was able to answer questions about the alleged incident in the school bathroom, which indicated that he would be able to provide that information to his counsel. Dr. Markman had no problem communicating with minor during the interview and did not notice any language disorder. He pointed out that, while minor was not familiar with legal terminology, he was able to understand legal

concepts when they were rephrased in simpler terms, and he understood he could be held responsible for his actions as a result of the proceeding.

In contrast, Dr. Scarf testified she was under the impression minor would not understand legal terms if she rephrased them, and she did not try to do that, concluding he was incompetent because he did not know what a plea, a public defender, or a district attorney was. But '"the test for competency in a juvenile court proceeding does not require a minor to understand the juvenile delinquency process sufficiently to pass a civics class."' (*In re Alejandro G.* (2012) 205 Cal.App.4th 472, 479.) The minor's knowledge of the juvenile delinquency process is not a factor in determining competency. (*Ibid*.)

The experts agreed that minor was of average or below average intelligence, and Dr. Scarf testified he had no mental retardation. But Dr. Scarf concluded that minor had a language disorder, as well as comprehension and memory problems. She also found minor to be "immature because he was very afraid," noting in addition that he often responded to her questions with "I don't know," and seemed to have problems understanding what she said.

The experts appear to have taken different approaches to testing minor's competency and to have received different emotional responses, levels of cooperativeness, and test results. But Dr. Markman's testing conformed to the accepted *Dusky* standard of competency, and his conclusion is substantial evidence for the juvenile court's finding that minor was competent to stand trial.

II

Minor also contends no substantial evidence supports the finding that he knew his conduct was wrong. A minor under the age of 14 is presumed incapable of committing a crime. (Pen. Code, § 26, subd. One.) This presumption applies to proceedings under Welfare and Institutions Code section 602. (*In re Gladys R.* (1970) 1 Cal.3d 855, 862–867.) To overcome the presumption, the People must show by clear and convincing evidence that "the minor appreciated the wrongfulness of the charged conduct at the time

it was committed." (*In re Manuel L.* (1994) 7 Cal.4th 229, 232.) The court's determination may be based on circumstantial evidence, such as "the minor's age, experience and understanding, as well as the circumstances of the offense including its method of commission and concealment. [Citation.]" (*In re Jerry M.* (1997) 59 Cal.App.4th 289, 298.) We review the record in the light most favorable to the judgment and affirm the trial court's finding if supported by substantial evidence. (*In re James B.* (2003) 109 Cal.App.4th 862, 872.)

Minor argues that the only evidence the People presented on this issue was the testimony of minor's teacher. The teacher testified she had taught minor "the difference between right and wrong, . . . what is correct, what shouldn't be happening. If you're feeling aggravated, what you should and shouldn't be doing." Since minor had "gone through L.A. Unified School District," and he and his mother had signed the school's handbook, which stated a student may be expelled for bringing a weapon to school, the teacher believed minor knew he could be expelled for his conduct and knew it was wrong to assault someone with a weapon. The teacher stated minor had "gotten in trouble . . . before and has known the consequences." She also stated there had been incidents with other students at the school. She was not asked to elaborate on these statements.

Minor argues the teacher's testimony does not establish that minor understood the teacher's lessons or the school rules, or that he had prior experience with conduct similar to the alleged incident. We disagree. Minor considers each piece of evidence in isolation and draws inferences in his own favor. But the teacher's testimony, in combination with other evidence in the record, when properly viewed in the light most favorable to the judgment, amounts to substantial evidence that minor was aware his conduct was wrong.

Initially, the claim that his age places minor "at the younger end of the spectrum" is incorrect since at 11 years of age he was closer to the cut-off age of 14 than most younger children. (Cf., e.g., *Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1317 [a three-year-old pulling a trigger]; see also *In re Michael B.* (1983) 149 Cal.App.3d 1073, 1089–1090 (noting the significance of the two-year difference between minors charged with homicide offenses committed at ages nine and 11.) Minor notes he was

enrolled in special education classes with an Individual Education Plan. But the record indicates minor's school performance was satisfactory, and as we already discussed, he did not suffer from mental retardation. Thus, it is reasonable to infer that he was aware of the lessons his teacher taught him.

In addition, Dr. Markman testified minor demonstrated an understanding of right and wrong in relation to the alleged incident in the school bathroom. Minor argues that any evidence postdating that incident does not indicate that he understood his conduct was wrong when it happened. For instance, he claims he cried when he emptied his pockets on the day after the incident because at that point he realized he was in trouble, but it would be speculative to infer he was already aware that his conduct was wrong. The fact that he cried, coupled with the teacher's testimony, supports a reasonable inference that minor's realization was not instantaneous.

Minor argues that his pointing the pocket knife at a friend in a bathroom in front of some of his classmates indicates he did not understand his conduct was wrong. Minor minimizes the testimony that he seemed angry when he pointed the pocket knife at Thomas and argues that anger does not indicate awareness of wrongfulness. But Thomas testified he believed minor was trying to scare him. The sequence of events, particularly his second pointing of the pocket knife at Thomas after Thomas pushed him, supports a reasonable inference that minor used the knife purposefully and vindictively, rather than playfully.

The evidence supports the juvenile court's finding that minor was aware of the wrongfulness of his conduct when it happened.

DISPOSITION

The order is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.