Filed 12/17/18 In re T.M. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 T.M., a Person Coming Under the Juvenile Court Law.	2d Crim. No. B282765 (Super. Ct. No. FJ53897) (Los Angeles County)
THE PEOPLE, Plaintiff and Respondent, v. T.M., Defendant and Appellant.	

T.M., a minor, appeals the juvenile court's order sustaining a wardship petition on allegations that appellant committed two attempted murders (Pen. Code,[1] §§ 187, subd. (a), 664; counts 3 & 5), an assault with a deadly weapon (§ 245, subd. (a)(1); count 2), two second degree robberies (§§ 211, 212.5, subd. (c); counts 7 &

[1] All statutory references are to the Penal Code unless otherwise stated.

8), and an attempted second degree robbery (§§ 213, subd. (b), 664; count 9). (Welf. & Inst. Code, § 602.) The court also found true allegations that appellant personally inflicted great bodily injuries in committing the attempted murders and the assault (§ 12022.7, subd. (a)). Appellant was declared a ward and committed to the Division of Juvenile Facilities (DJF) for a 20-year maximum period of confinement. Appellant contends (1) he was subjected to an unduly suggestive identification procedure; (2) the evidence is insufficient to support the finding he committed two attempted murders; (3) the court erred in ordering a DJF commitment; and (4) the minute orders should be corrected to accurately reflect the court's disposition. We agree with the last contention and shall order the minute orders corrected accordingly. Otherwise, we affirm.

STATEMENT OF FACTS

On the night of July 30, 2016, Ruben Hernandez, Antonio Hernandez, Juan Hernandez, and Manuel Vasquez were drinking beer in the area of Westlake Avenue and Olympic Boulevard in Los Angeles. As the men stood near their car, appellant approached Ruben,[2] held a knife to his stomach, and told him to give him whatever he had. Appellant said, "Kneel or you die."

As Ruben began to kneel, Antonio grabbed him by the shirt and pulled him toward the street. Appellant said "if you run, I will kill you anyway." Appellant initially followed Ruben and Antonio into the street, then came up behind Vasquez and stabbed him in the back. Appellant ran away and Antonio and Juan gave chase. The two men caught up with appellant and

[2] Because Ruben, Antonio and Juan have the same last name, we refer to them by their first names only.

fought with him. Appellant inflicted knife wounds to Juan's stomach and Antonio's arm and stomach before running away.

Approximately 15 minutes later, appellant accosted David Ortiz and Manuel Chavac as they were waiting at a nearby bus stop. Appellant told Ortiz and Chavac to give him their belongings. After they refused, appellant pulled out a knife and held it to Chavac's chest. Appellant took Chavac's cellphone and forced him to enter the code to unlock it. Appellant also took Chavac's messenger bag and flung it over his shoulder.

Appellant again demanded Ortiz's belongings, but Ortiz refused to comply. Appellant pointed his knife at Ortiz, pressed the blade against his throat, and threatened to kill him. Appellant also said he had a gun and motioned toward his back. Appellant took Ortiz's backpack, which contained Ortiz's cellphone, headphones, and cash.

Kevin Garcia was walking by while the robbery was occurring and recorded part of the incident on his cellphone. While Garcia was calling the police, appellant approached him and demanded his belongings. Garcia told appellant he was on the phone with the police and appellant ran away.

A police officer responding to the reported robberies spotted appellant about three blocks away from where the crimes occurred. Appellant matched the description of the perpetrator, so the officer detained him. The officer patted appellant down and found a folding knife in his pocket. Appellant was also found in possession of two cellphones, cash, and a pair of headphones. Appellant, who appeared to be under the influence of alcohol, told the officer he "became intoxicated to cope with his father's recent death" and "might have stolen some property from someone." He

also said that three men with metal poles had hit him over the head and that he may have stabbed the men in self-defense.

Appellant was arrested and transported to the hospital for treatment of a cut on his head. After appellant was taken to jail, Ortiz, Chavac, and Ruben each separately viewed him during a single-person showup and identified him as the perpetrator. Juan, Antonio, and Vasquez, who were all in the hospital, were each shown a six-pack photographic lineup that included a photograph of appellant. None of them, however, were able to identify their attacker. During the adjudication hearing, Ruben positively identified appellant and Antonio said appellant looked like the individual who had attacked him.

DISCUSSION

Ruben's Identifications of Appellant

Appellant contends that the pretrial and in-court identifications of him by Ruben (the named victim in count 2) should have been excluded as the fruits of an unduly suggestive identification procedure. We conclude otherwise.

A due process violation occurs when a defendant is identified as the result of an unduly suggestive procedure, and the identification is not otherwise reliable under the totality of the circumstances. (*People v. Clark* (2016) 63 Cal.4th 522, 556.) In deciding whether such a violation has occurred, courts must first determine whether law enforcement employed a procedure that suggested the identity of the person suspected in advance of the witness's identification. (*People v. Ochoa* (1998) 19 Cal.4th 353, 413 (*Ochoa*).) If the court concludes that the identification procedure was unduly suggestive, it must then determine whether the identification was nonetheless reliable under the totality of the circumstances. (*Id.* at p. 412.) Factors relevant to

this determination include the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification. (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.)

The defendant bears the burden of demonstrating an identification procedure was unduly suggestive or unreliable. (*People v. Avila* (2009) 46 Cal.4th 680, 700.) On appeal, we independently review a trial court's conclusion whether or not an identification procedure is unduly suggestive or unreliable under the totality of the circumstances. (*Id.* at pp. 698-699.) "A claim that an identification procedure was unduly suggestive raises a mixed question of law and fact to which we apply a standard of independent review, although we review the determination of historical facts regarding the procedure under a deferential standard." (*People v. Clark* (2016) 63 Cal.4th 522, 556–557.) If an identification procedure was not unduly suggestive, there is no violation of a defendant's due process rights. (*Ochoa*, *supra*, 19 Cal.4th at p. 412.) If a due process violation is established, reversal is required unless the People show the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).)

At the adjudication hearing, Ruben testified that the police picked him up from the hospital a few hours after the assault and drove him to a police station. Appellant was brought out wearing handcuffs and Ruben was asked if he was the person who had assaulted him. Ruben applied in the affirmative. He also rejected defense counsel's assertion that the police had told him

"[t]his is the man." Ruben reiterated that "[the officer] asked me if it was the man, and I responded, 'Yes.'" Ruben went on to make an in-court identification of appellant.

Later in the hearing, appellant moved to strike Ruben's identifications of him as the fruits of an unduly suggestive identification procedure. The court denied the motion.

Appellant asserts that the identification procedure employed here was unduly suggestive because Ruben viewed him as he stood alone in the police station wearing handcuffs. Our Supreme Court has recognized, however, that such a procedure is not inherently unfair or suggestive. (*Ochoa*, *supra*, 19 Cal.4th at p. 413.)[3] The element of suggestiveness in a single-person showup is offset by the reliability of an identification made while the events are fresh in the witness's mind. (*People v. Garcia* (2016) 244 Cal.App.4th 1349, 1359.)

Appellant also complains there is no indication in the record that Ruben was given the standard admonition that the individual presented in the showup may or may not be the perpetrator. As the People correctly note, appellant offers nothing to establish that such an admonition is constitutionally compelled. Moreover, Ruben made clear that he understood the individual being presented to him may or may not be the individual who assaulted him.

Because appellant fails to meet his burden of establishing that the identification procedure employed here was unduly suggestive, his arguments regarding the reliability of Ruben's identifications of him are moot. (See *People v. Johnson* (2010)

---

[3] Appellant urges us to reject the controlling authority on this point, yet we have no authority to do so. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

183 Cal.App.4th 253, 272.) In any event, the identifications were reliable under the totality of the circumstances. Ruben was sober when the assault took place and had ample opportunity to view the perpetrator. Moreover, the showup was conducted within hours of the assault and Ruben's identification of appellant was unequivocal. These circumstances all weigh in favor of a finding that the identifications were reliable. (See *People v. Kennedy* (2005) 36 Cal.4th 595, 611, disapproved on another point by *People v. Williams* (2010) 49 Cal.4th 405, 459 [defendant identified three weeks after crime by witness who had observed the assailant from five to ten feet away as the crime was being committed]; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 990 [the fact that witness's identification was unequivocal supported finding of reliability].) Because Ruben's identifications of appellant were reliable, appellant's due process claim fails. (*Ochoa*, *supra*, 19 Cal.4th at p. 412.)

Sufficiency of the Evidence - Attempted Murders

Appellant contends the evidence was insufficient to support the juvenile court's finding that he committed the attempted murders of Antonio (count 3) and Vasquez (count 5). In analyzing this claim, "'we review the whole record to determine whether . . . [there was] substantial evidence to support the verdict . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the [factfinder] could reasonably have deduced from the evidence.'" (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

To sustain a finding of attempted murder, there must be substantial evidence of "'the specific intent to kill and the

commission of a direct but ineffectual act toward accomplishing the intended killing.'" (*People v. Houston* (2012) 54 Cal.4th 1186, 1217.) Attempted murder requires a showing of express malice, a mind state that requires a defendant to have "a deliberate intention unlawfully to kill a fellow human being." (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.) Express malice may be proven by direct evidence of an intent to kill, or may be "inferred from the defendant's acts and the circumstances of the crime. [Citation.]" (*People v. Smith* (2005) 37 Cal.4th 733, 741.) If the trier of fact finds that a defendant's use of a lethal weapon with lethal force was purposeful, an intent to kill may be inferred. (*Ibid.*)

Appellant claims the evidence is insufficient to prove he acted with an intent to kill when he stabbed Antonio and Vasquez. In making this claim, he downplays the facts and circumstances relating to his attacks on both men as well as the severity of the injuries he inflicted upon them. Shortly after appellant said "if you run, I will kill you anyway," he ran up behind Vasquez and stabbed him in the back with a three and a half-inch blade. Moments later, appellant used the same knife to inflict significant wounds to Antonio's stomach and arm. Vasquez's wounds required surgery and Antonio's stomach wounds had to be stapled shut. By using a knife to attack the victims in vital areas of their bodies, appellant manifested an intent to kill. (See *People v. Bolden* (2002) 29 Cal.4th 515, 561; *People v. Moore* (2002) 96 Cal.App.4th 1105, 1114.) This, coupled with appellant's statement "if you run, I will kill you anyway," is sufficient to prove he intended to kill and had thus committed the attempted murders of Antonio and Vasquez.

DJF Commitment

Appellant asserts that the court abused its discretion in ordering a DJF commitment. We disagree.

Welfare and Institutions Code section 202, subdivision (b), provides that "[m]inors 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." In this context, "'punishment' means the imposition of sanctions" but "[i]t does not include retribution." (*Id*., subd. (e).) Under section 202, permissible sanctions include a commitment to the DJF. (*Id*., subd. (e)(5).)

"If a minor is adjudged a ward of the court on the ground that he or she is a person described by Section 602," the juvenile court may, in addition to other authorized orders, "[c]ommit the ward to the [DJF] if the ward has committed an offense described in subdivision (b) of Section 707 or subdivision (c) of Section 290.008 of the Penal Code, and is not otherwise ineligible for commitment to the division under Section 733." (Welf. & Inst. Code, § 731, subd. (a)(4).) "The most restrictive placement [for a ward] is the [DJF]. (See Welf. & Inst. Code, §§ 731, 734.)" (*In re Eddie M.* (2003) 31 Cal.4th 480, 488.)

"No ward of the juvenile court shall be committed to the [DJF] 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 [DJF]." (Welf. & Inst. Code, § 734.) "[A] commitment to [the DJF] must be supported by a determination, based upon substantial evidence in the record, of probable benefit to the minor." (*In re Aline D.* (1975) 14 Cal.3d 557, 567 (*Aline D.*).)

"[T]here is no absolute rule that a [DJF] commitment should never be ordered unless less restrictive placements have been attempted. [Citations.]" (*In re Ricky H.* (1981) 30 Cal.3d 176, 183; see *In re Asean D.* (1993) 14 Cal.App.4th 467, 473 ["a commitment to the [DJF] may be made in the first instance, without previous resort to less restrictive placements"].) On the other hand, "[t]he unavailability of suitable alternatives, standing alone, does not justify the commitment of a nondelinquent or marginally delinquent child to an institution primarily designed for the incarceration and discipline of serious offenders." (*Aline D.*, *supra*, 14 Cal.3d at p. 567.) "In order to commit a minor to the [DJF], the record must show that less restrictive alternatives would be ineffective or inappropriate. [Citation.]" (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 306.)

"The juvenile court may in its discretion commit persons subject to its jurisdiction to the [DJF], and the [DJF] may in its discretion accept such commitments." (Welf. & Inst. Code, § 1736, see Cal. Code of Regs., tit. 15, rule 4170.5.) "The decision of the juvenile court may be reversed on appeal only upon a showing that the court abused its discretion in committing a minor to [the DJF]. [Citations.] An 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. [Citations.]

In determining whether there was substantial evidence to support the commitment, we must examine the record presented at the disposition hearing in light of the purposes of the Juvenile Court Law. [Citations.]" (*In re Michael D.* (1987) 188 Cal.App.3d 1392, 1395.)

The court did not abuse its discretion in committing appellant to DJF. The record reflects that the court considered all relevant evidence and arguments before issuing its order. At the disposition hearing, appellant presented testimony from a psychiatric social worker recommending that he be placed in a 12 to 18-month residential treatment program in Wyoming that offered education and therapy in a structured environment.

Appellant's probation officer, who testified on behalf of the prosecution, recommended that appellant be committed to the DJF. The officer made the recommendation based largely on the severity of appellant's crimes, but she considered all relevant factors. The officer acknowledged that appellant's behavior while in custody had been good, but did not believe this good behavior warranted a less restrictive placement.

Prior to ruling, the court stated, "I do not defer my authority to make a determination as to what's both in the best interests of the minor, considering the least restrictive alternative, balancing that against the statutory requirement as set forth in section 202 of the code which says I also have to consider the safety and security of the community." The court also acknowledged that a DJF commitment was the most restrictive alternative and that no less restrictive placements had been tried. The court nevertheless ordered a DJF commitment. The court concluded that public safety concerns would not be met if appellant were placed in a less restrictive environment. The

court also made the "painful decision" that the programs available at DJF would "most adequately address [appellant's] needs."

In seeking to establish that the court abused its discretion in committing him to DJF, appellant essentially asks us to view the evidence in the light most favorable to his position, which we cannot do. (*In re Michael D.*, *supra*, 188 Cal.App.3d at p. 1395.) He also complains that the court declined to order the out-of-state placement recommended by his expert witness. The court reasonably found, however, that a less restrictive placement would neither be in the interests of community safety nor provide appellant with sufficient structure and supervision. The court also reasonably found that appellant was likely to benefit from the programs offered by DJF, which include alcohol abuse treatment. Accordingly, the court did not abuse its discretion in ordering a DJF commitment. (*In re M.S.* (2009) 174 Cal.App.4th 1241, 1250.)

Clerical Error

Appellant contends the juvenile court's minute orders should be corrected to accurately reflect the court's disposition. The People concede the error and agree it should be corrected. In adjudicating the section 602 petition filed on August 2, 2016,[4] the court found count 1, which alleged the attempted murder of Juan, to be not true. The court's minute orders indicate, however, that count 1 of the petition was found to be true. Because the court's oral pronouncement prevails over its minute orders (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186), we shall order the latter corrected accordingly.

---

[4] An earlier petition filed on July 20, 2016, was dismissed with prejudice.

DISPOSITION

The juvenile court's May 1, 2017 and May 12, 2017 minute orders are modified to reflect that count 1 (attempted murder of Juan Hernandez) of the August 2, 2016 delinquency petition was found not to be true. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Benjamin R. Campos, 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, Steven D. Matthews, Supervising Deputy Attorney General, and Analee J. Brodie, Deputy Attorney General, for Plaintiff and Respondent.