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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re J.Y., a Person Coming Under the Juvenile Court Law.	B235399
THE PEOPLE, Plaintiff and Respondent, v. J. Y., Defendant and Appellant.	(Los Angeles County Juvenile Court No. JJ18980)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tamara Hall, Juvenile Court Referee. Affirmed in part, reversed in part and remanded.

Mary Bernstein, 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, Senior Assistant Attorney General, Linda C. Johnson and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant J.Y., a juvenile, appeals from the juvenile delinquency court's order of wardship based on a sustained Welfare and Institutions Code[1] section 602 petition with a true finding as to one count of assault by means of force likely to produce great bodily injury. In this direct appeal, appellant argues that his confrontation and due process rights were violated at trial and that the court failed to comply with section 702. Appellant failed to raise the confrontation and due process claims below. Appellant, however, claims he received ineffective assistance of counsel in regards to these issues. Based on our review of the record, we find appellant has failed to show any errors at trial were prejudicial and therefore his ineffective assistance of counsel claim is without merit. Nonetheless, we do agree that the lower court was required to make a declaration pursuant to section 702 and failed to do so, and therefore we remand.

FACTUAL AND PROCEDURAL BACKGROUND

The Prosecution's Case.

At trial the evidence against appellant was comprised in part of a series of surveillance videos[2] that depicted the charged events: On May 31, 2011, at approximately 9:00 p.m., Anacleto Covarrubias entered the Blue Line Metrolink train traveling north from Long Beach to Downtown Los Angeles. About eight minutes later, four youths entered the same train car: E.H., E.P., R.S., and appellant. At first, the youths talked amongst themselves and Covarrubias talked on his cell phone. At the next stop, another juvenile, M.B. got on the train.

After several minutes, Covarrubias began talking to E.H. and E.P. and appeared to be irritated by them. Appellant stood up and turned to look at Covarrubias, then sat

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

[2] The prosecution and defense counsel stipulated to the foundation for these videos and the videos were played on a laptop computer while a witness narrated the events occurring in the video for the record.

down. Covarrubias pointed at appellant and stood over him. Appellant clinched his fists at his side, stood up facing Covarrubias and began hopping from side to side. Two men stepped between appellant and Covarrubias, seemingly to defuse the situation. Appellant then moved next to the exit door of the train. Covarrubias walked past the youths to the front of the car.

The train arrived at the Willow station shortly thereafter. Covarrubias was the first person to get off the train through the car's front door. E.H., E.P., appellant, R.S., and M.B. exited the train through the middle door.

On the Willow station platform, Covarrubias began walking towards and then away from the youths while talking to them. The youths were south of Covarrubias and stood next to each other beside the tracks, blocking the southern part of the platform. E.H. confronted Covarrubias and pushed him on the train tracks.

E.H., E.P., and appellant ran down the platform away from the scene. M.B. and R.S. jumped on the tracks next to Covarrubias. R.S. kicked Covarrubias with his left foot and M.B. kicked Covarrubias twice.

In addition to the evidence on the surveillance videos, a civilian witness testified that he was on the platform and saw the youths running from the scene. He overheard one of them say, "You are stupid. You should have fucked him up" and, "Yeah man, we beat his ass." The witness saw Covarrubias lying motionless on the tracks. He pulled Covarrubias off the tracks so that a train would not hit him.

Appellant's Version of the Events.

Appellant testified on his own behalf. He testified that he knew M.B. and R.S. but had only just met E.H. and E.P. Appellant entered the train and sat next to Covarrubias. Covarrubias was drunk and got mad when E.H. or E.P. began speaking with the man in Spanish. Covarrubias hit the seat of the person sitting next to appellant several times and when appellant told him to calm down Covarrubias responded by saying "Shut up, you stupid little kid." After more confrontation, Covarrubias walked over to where appellant was sitting and pointed at him. Appellant stood up and made a fist to defend himself in

case Covarrubias wanted to fight. A man talked to appellant and calmed him down, so appellant moved away from Covarrubias.

Appellant got off the train first because he did not want to get into any more arguments with Covarrubias. The rest of the youths followed him off the train. Appellant thought that only M.B. and R.S. would follow him off the train and did not know why E.P. or E.H. did. E.H. asked appellant if he wanted to fight Covarrubias; appellant told him "no" because he did not want to be in trouble. Another man on the platform held appellant back and told him not to "get into another guy's matters" when the other youths approached Covarrubias. Once E.H. pushed Covarrubias on the tracks appellant ran away from the scene because he was afraid.

The Juvenile Court's Findings and Order.

On June 3, 2011, the Los Angeles County District Attorney filed an amended Welfare and Institutions Code, section 602 petition, alleging that the appellant, a 12-year-old minor, had committed attempted murder (Pen. Code, § 664/187(a)). The petition was later amended by interlineation, adding a second count of assault by means of force likely to produce great bodily injury (Pen. Code, § 245(a)(1)).

After a contested hearing, the juvenile court found the assault allegation true, and the attempted murder allegation was dismissed. The court declared the appellant to be a ward, ordered him placed in suitable placement and set the maximum confinement at four years.

Appellant filed a timely notice of appeal.

DISCUSSION

I. Appellant Failed To Preserve His Appellate Confrontation Clause Issue Because He Did Not Raise This Issue At Trial.

The majority of evidence presented at appellant's hearing involved the prosecution publishing a series of surveillance videos that documented the charged event. Appellant's counsel stipulated to the foundation for these videos and the content of the videos was presented to the court on the prosecutor's laptop. Detective Shaw testified and narrated the events that were shown in the video. According to the record, Detective

Shaw, the prosecutor, both defense counsel,[3] and the judge huddled around the laptop to watch the video during the direct and cross examination of Detective Shaw's narration. After the presentation of the video, appellant's counsel cross-examined Detective Shaw about the content of each video.

Appellant now claims that he was unable to see the video at trial and this inability to see the video violated his Sixth Amendment right to confront his witnesses. Appellant contends that any such error constituted a violation of his Sixth Amendment right to confrontation and of parallel rights under the California Constitution.

Appellant, however, failed to raise this issue in the trial court when the evidence was being presented, and thus his constitutional claim has not been preserved for appeal. (*People v. Waidla* (2000) 22 Cal.4th 690, 726; *People v. Catlin* (2001) 26 Cal.4th 81, 138, fn. 14; *People v. Rowland* (1992) 4 Cal.4th 238, 265, fn. 4.) A defendant's objections and claims must be initiated in the trial court so that the court can take steps to prevent error, which in this case may have merely been publishing the evidence in a slightly different manner. Recognizing this forfeiture, appellant maintains that his counsel was ineffective for failing to preserve his claim for appeal. Consequently, we turn our attention to his claim regarding his counsel's representation.

II. Appellant's Ineffective Assistance Of Counsel Claim.

Appellant argues that he was provided ineffective assistance of counsel at his hearing based on his counsel's failure to object to the admission of the surveillance videos and failure to object to appellant's inability to view the videos at the hearing. "'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.]'" (*People v. Foster* (2003) 111

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3 M.B. and appellant's hearing was combined.

Cal.App.4th 379, 383, original italics; *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *People v. Waidla*, *supra*, 22 Cal.4th at p. 718.)

Under *Strickland*, prejudice must be affirmatively proved. "'It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 217–218.) If the defendant fails to make a sufficient showing either of deficient performance or prejudice, the ineffective assistance claim fails. (*People v. Foster*, *supra*, 111 Cal.App.4th at p. 383.)

A court should proceed directly to the issue of prejudice if it is easier to dispose of an ineffectiveness claim on that basis. (*Strickland, supra,* 466 U.S. at p. 697; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1241; *People v. Holt* (1997) 15 Cal.4th 619, 703; *In re Fields* (1990) 51 Cal.3d 1063, 1079.)

As we shall explain, appellant has failed to demonstrate that he suffered prejudice as a result of his counsel's representation.[4]

(a) Counsel's Error In Failing To Object To The Court's Manner Of Presenting The Video Evidence.

Appellant first contends that if his attorney had objected to the manner in which the video was published at the hearing he would have seen the video, and thus, he might have been able to assist more effectively in his defense. Appellant argues that if he saw the video he may have been able to: (1) discredit the prosecution's argument that appellant followed the victim off the train in order to fight him by highlighting the

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4 Appellant filed a petition for a writ of habeas corpus asserting his counsel was ineffective. However, as explained in this opinion, because appellant has failed to demonstrate that he suffered prejudice as a result of his counsel's actions, we summarily deny the writ petition in a separate order.

discrepancy in the time signature shown on the videos, or (2) been reminded of events that he had since forgotten.

However, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding . . . . [¶] . . . [¶] The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland*, *supra*, 466 U.S. at pp. 693-694; *see*, *People v. Ledesma*, *supra*, 43 Cal.3d at pp. 217–218.)

Appellant's argument that he would have been able to counter the prosecutor's theory of intent by highlighting the camera timing discrepancies is unfounded. We agree with appellant that there were problems with the internal clocks on the surveillance videos, but fail to see how this deficiency was prejudicial. The record indicates the timing on the video segment in People's exhibit No. 5, which shows the incident at issue—the victim leaving the train first and appellant and other minors following—does not show any time discrepancy. The time signature discrepancy appears when the video segments in exhibit No. 5 are compared to the time signature in the video segments in exhibit No. 6.[5] However, to prove that appellant exited the train after the victim, the prosecutor used exhibit No. 5, and did not compare the timeline of exhibit No. 5 with exhibit No. 6. Consequently, pointing out the discrepancy in the time signature between the two exhibits would not have undermined the prosecutor's theory of the case.

Additionally, the prosecution's argument that the appellant and other minors in the incident got off the train in order to fight the victim was supported by evidence other than the surveillance videos. Here, there was other evidence to support the prosecution's theory that appellant and other minors got off the train to confront the victim. First, shortly before the attack on the platform, appellant engaged in a confrontation with the

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5 The record indicates that time signatures on the videos varied depending on whether the exhibit was No. 5 or No. 6 and that the videos internal clocks were off by around three minutes or more depending on the video. However, when the prosecution presented the evidence he did so in a linear fashion, which did not rely on the time signatures.

victim. In addition, appellant lived 12 miles from the station where he and the other minors exited the train to confront the victim, and the attack occurred three stations before his destination. This evidence gives rise to the inference that appellant got off the train specifically to confront the victim. And although appellant testified that he got off the train to avoid a fight with the victim, he did not avoid confrontation with the victim when he saw the victim on the platform. Lastly, a witness testified that he saw appellant and other minors running from the scene of the attack congratulating each other on "beat[ing] his ass." The record supports the intent theory of the prosecution; therefore, it is highly unlikely that had appellant seen the video he would have been able to change the result. (See, *Strickland, supra,* 466 U.S. at p. 696.)

Appellant's second contention, that his viewing the video during the hearing might have refreshed his memory, additionally does not demonstrate prejudice. At appellant's hearing, appellant testified in detail to his account of the events that led up to the victim being pushed onto the train tracks. Generally, appellant testified he had a confrontation with the victim on the train and then exited the train in order to avoid a fight. On the platform he was aware that E.H. and E.P. were planning on fighting the victim but stated that he told them that he did not want to fight the victim.

There is no evidence that if appellant had seen the video he would have been able to refresh his recollection as to the events or his intention on the night of this incident. He presented his account in a light favorable to himself, and we fail to see how if appellant had seen the video there would have been a reasonable possibility that the results of the proceedings would have been different. (*Strickland*, *supra*, 466 U.S. at pp. 693-694.)

(b) Counsel's Stipulation As To The Foundation Of The Surveillance Videos.

Appellant's next contention is that the he was prejudiced by his counsel's stipulation as to the foundation for the surveillance videos. At appellant's hearing, defense counsel stipulated to the foundation authenticating the Metro Transit Authority surveillance videos that recorded the charged events. Appellant now argues that the decision to enter into this stipulation amounts to ineffective assistance of counsel. According to appellant, had his counsel objected to the foundation and chain of custody

to the surveillance videos, the outcome of appellant's hearing would have been different. Even if we assume that his counsel's performance was deficient, we fail to see how, but for this error, the outcome of the proceeding would be different.

To be admissible in evidence, an audio or video recording must be authenticated. (Evid. Code, §§ 250 [defining "writing" to include recording], 1401 [requiring authentication of "writings"]; *People v. Rich* (1988) 45 Cal.3d 1036, 1086, fn. 12; *People v. Mayfield* (1997) 14 Cal.4th 668, 747.) A video recording is authenticated by testimony or other evidence "that it accurately depicts what it purports to show." (*People v. Bowley* (1963) 59 Cal.2d 855, 859.)

An authenticated video may be "a silent witness," and serve as evidence of the facts depicted independent of testimony to those facts by a witness. (See, *Bowley, supra,* 59 Cal.2d at p. 859; accord, *Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138, 1146 [holding that silent witness theory applies not only to pictures but also to videos].) "A court's main concern in admitting a videotape as substantive evidence of an event is making sure the tape accurately depicts what occurred." (*Ibid.*)

Appellant fails to show how he would have obtained a better result had his counsel not stipulated to the authenticity of the surveillance videos. As stated above, counsel's failure to highlight the timing discrepancies on the videos was not enough to defeat the prosecution's intent argument. Additionally, appellant has not provided any evidence that without the stipulation the prosecution would not have been able to establish chain of custody or the authentication for the surveillance videos. Appellant merely speculates as to the effect on the outcome of the proceeding, and has not been able to show that there is a reasonable probability that had appellant's counsel objected to the evidence the result of the proceeding would have been different. (*See, People v. Ledesma*, *supra*, 43 Cal.3d at pp. 217-218 ["[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding . . . ."].)

If trial counsel had refused to stipulate to the authentication of the surveillance videos, the outcome of the case would not have changed. The record shows that the

prosecution had Brian Rydall on call as a witness to testify as to the chain of custody and the authentication of the video. Mr. Rydall, a rail supervisor manager for the Blue Line Division 11, would have testified that the two videos were maintained by the MTA in the ordinary course of business and were trustworthy as to their contents. If appellant's counsel had questioned Mr. Rydall about the timing of the videos, he could have provided an explanation. Further, Detective Shaw actually testified that he presented still photographs from the video to appellant before the hearing, to which appellant admitted to him that he was the person depicted in the video. Accordingly, appellant's ineffective assistance of counsel claim is without merit.

III. The Trial Court Failed To Expressly Declare Whether The Offense Was A Felony Or Misdemeanor In Violation Of Section 702.

Section 702 provides that in a juvenile proceeding, "[i]f the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony." (§ 702.) The Supreme Court has recognized that a juvenile court's failure to explicitly declare whether an offense is a misdemeanor or felony requires a remand for a declaration and a possible recalculation of the term commitment. (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1201 (*Manzy*).)

The section 702 requirement in juvenile proceedings serves a dual administrative and discretionary purpose. Administratively, the requirement of a declaration was directed at "facilitating the determination of the limits on any present or future commitment to physical confinement for a so called 'wobbler' offense." (*Manzy*, *supra*, 14 Cal.4th at pp. 1206-1210 [recognizing that legislation such as Proposition 8 and the "Three Strikes" law are affected by whether any juvenile offense is a felony or misdemeanor].) However, the requirement also serves the purpose of "ensuring that the juvenile court is aware of, and actually exercises, its discretion under Welfare and Institutions Code section 702." (*Id*. at p. 1207.)

These dual purposes preclude an appellate review that infers an "implied" declaration under this section, and require that the record explicitly state that the offense is either a felony or a misdemeanor. (*Manzy*, *supra*, 14 Cal.4th at p. 1207; see also, *In re Curt W.* (1982) 131 Cal.App.3d 169, 186 [remanding "[t]o remove that nagging doubt that [the juvenile court] gave consideration to possible misdemeanor disposition"]; *In re Jeffery M.* (1980) 110 Cal.App.3d 983, 985 ["Nothing should be subject to surmise. To affirm these orders is to encourage sloppy performance of duty."].)

A remand is not automatic whenever the juvenile court fails to make a formal declaration under section 702. (*Manzy*, *supra*, 14 Cal.4th at. p. 1209.) "The key issue is whether the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit." (*Ibid.*)

Since appellant was found to have violated Penal Code section 245, subdivision (a)(1), a wobbler, the lower court was required to make an express declaration on the record as to whether this offense is a felony or a misdemeanor. In this case, the record does not show that the trial court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit and therefore the case is remanded.

The record indicates that the lower court was not aware that the charged offense was a wobbler. The court first incorrectly ruled,

> "The allegation of count one in the petition is not true and count two and the GBI allegations are true beyond a reasonable doubt . . . the petition is sustained with respect to [J.Y.] on count two and the GBI allegation . . . ."

The petition, however, reflects that there was no great bodily injury (GBI) allegation or enhancement to the amended complaint and defense counsel brought this to the attention of the court. Accordingly, the court changed its ruling:

> "So strike that with respect to the GBI allegation being found true for [J.Y.] So therefore count one for [J.Y.] is not true, count two is true beyond a reasonable doubt and the petition is sustained."

This part of the record shows the lower court believed the petition included a sentencing enhancement for great bodily injury pursuant to Penal Code section 12022.7. Such an enhancement would have made the second count a mandatory felony and therefore would not have required the court to make a section 702 declaration. Regardless of what the court was thinking or whether the court was aware of the specific charges against appellant, it is clear the record as a whole does not show the court was aware it had the discretion to treat the offense as a misdemeanor. (*Manzy, supra,* 14 Cal.4th at p. 1209.)

Respondents argue the minute order and the court ordered DNA testing and palm print sampling conditions are evidence the court was aware of its discretion to treat the offense as a misdemeanor. However, this evidence is not dispositive. In *Manzy* the Supreme Court recognized that committing an appellant for the maximum term in compliance with a felony is not persuasive. (*Manzy, supra*, 14 Cal.4th at p. 1208.) Here, the fact that appellant was committed for a period calculated as a felony still gives rise to the possibility that the court never considered the possibility of sentencing appellant as a misdemeanant. (*Ibid.*) Furthermore, the court recognized that "neither the pleading, the minute order, nor the setting of a felony-level period of physical confinement may substitute for a declaration by the juvenile court as to whether an offense is a misdemeanor or felony." (*Ibid; In re Kenneth H., supra,* 33 Cal.3d at pp. 619-620.) Therefore, respondent's argument is not persuasive.

Accordingly, this error requires that we reverse the judgment and remand the matter to the juvenile court to exercise its discretion pursuant to section 702 to determine whether the offense alleged and found true was a misdemeanor or a felony.

DISPOSITION

For the reasons stated, the judgment is reversed and the matter is remanded. The juvenile delinquency court is directed to conduct proceedings consistent with the views expressed in this opinion. In all other respects, the wardship order is affirmed.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.