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THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re V.J., a Person Coming under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. V.J., Defendant and Appellant.	A128624 (Contra Costa County Super. Ct. No. J0900603)

Appellant V.J. pleaded no contest to charges of grand theft and battery. On appeal, he contends the juvenile court erred by failing to declare his grand theft offense a felony or misdemeanor. We conclude the matter must be remanded for the juvenile court to exercise its discretion to declare the offense a misdemeanor or felony as required by Welfare and Institutions Code section 702.[1] We affirm the juvenile court's orders in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

On April 24, 2010, appellant and an unidentified male juvenile confronted 15-year-old L.E. and his nine-year-old brother as they were walking home from the library. Appellant put his hands on L.E.'s chest and demanded his iPod.[2] L.E. responded that he did not have his iPod with him. Appellant threatened to hit L.E. if he would not give up

[1] Unless otherwise specified, all further statutory references are to the Welfare and Institutions Code, and all rule references are to the California Rules of Court.

[2] Because the disposition resulted from a plea of no contest, the statement of facts is derived from the probation report.

his iPod. Appellant then started going through L.E.'s pockets and asked if L.E. had a wallet, which L.E. gave him. When appellant opened the wallet and found no money inside, he punched L.E. in the stomach and threw the wallet on the ground. Appellant continued to physically threaten L.E. before leaving with his companion. Appellant admitted confronting L.E. and asking for his iPod and wallet but denied hitting L.E.

In a supplemental section 602 juvenile delinquency petition filed April 27, 2010, appellant was charged with second degree robbery. (Pen. Code, §§ 211, 212.5.) On May 4, 2010, the petition was amended to add allegations of felony grand theft from a person (Pen. Code, § 487, subd. (c)) and misdemeanor battery (Pen. Code, §§ 242, 243, subd. (a)). As part of a negotiated disposition, appellant entered a plea of no contest to the grand theft and battery charges in exchange for dismissal of the second degree robbery charge. The juvenile court found the grand theft and battery allegations true as alleged in the petition and adjudged appellant a ward of the court.

At the dispositional hearing on May 18, 2010, the court ordered appellant removed from his home and placed in a court-approved home or institution. The court set the maximum confinement time at three years and ten months[3] and imposed standard conditions of probation. Appellant filed a timely notice of appeal.

DISCUSSION

Section 702 provides that when a "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." In part, the statute serves an administrative purpose, providing a record from which the maximum term of physical confinement may be determined in the event of future adjudications. (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1205.) The statute also serves the key 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.)

[3] The juvenile court subsequently issued a minute order correcting the calculation of the maximum confinement time so that it is three years and eight months.

By its plain terms, section 702 requires an express declaration of whether a so-called "wobbler" offense is a misdemeanor or felony. (*In re Manzy W., supra,* 14 Cal.4th at p. 1204.) "[N]either 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. [Citation.]" (*Id.* at p. 1208.) It is also not enough that a petition describes an offense as a felony and the juvenile court finds the allegations of the petition to be true. (*In re Kenneth H.* (1983) 33 Cal.3d 616, 619-620.) When a juvenile court fails to comply with section 702, the cause may be remanded with directions to determine the character of a sustained offense. (See *In re Kenneth H., supra,* 33 Cal.3d at p. 620.)

Rule 5.778(f) sets forth the findings that must be made by the court following an admission or plea of no contest. As relevant here, the rule provides as follows: "If any offense may be found to be either a felony or a misdemeanor, the court must consider which description applies and expressly declare on the record that it has made such consideration and must state its determination as to whether the offense is a misdemeanor or a felony. These determinations may be deferred until the disposition hearing." (Rule 5.778(f)(9).) Thus, the applicable rule imposes two requirements: (1) the court must state its determination whether a wobbler is a misdemeanor or a felony, and (2) the court must expressly declare on the record that it has considered which description applies.

Here, the grand theft offense to which appellant pleaded no contest is a wobbler punishable as either a felony or a misdemeanor. (See Pen. Code, § 489, subd. (b).) In the supplemental section 602 petition, the offense was charged as a felony. In describing the offense at the time the court took appellant's plea, the court reiterated that the offense was charged as a felony. The offense was also described as a felony in the probation officer's report and in the minute order from the jurisdictional hearing.[4] At the dispositional hearing, the court confirmed that the maximum custodial time associated with the sustained charges was three years ten months, which is consistent with treating the grand

[4] The minute order included the letter "f" after the grand theft offense and the letters "mis" after the battery offense.

theft offense as a felony. Without more, these facts do not satisfy the requirement that a court expressly declare whether a sustained offense is a misdemeanor or felony. (*See In re Manzy W., supra,* 15 Cal.4th at p. 1208; *In re Kenneth H., supra,* 33 Cal.3d at pp. 619-620.)

The People concede that the juvenile court failed to comply with section 702 by failing to make an express declaration as to the felony or misdemeanor nature of the sustained offense. We would go further and point out that the court failed to comply with rule 5.778(f)(9), which also requires the court to make an express declaration on the record that it has considered whether a wobbler offense should be classified as a misdemeanor or felony. Instead, at the time it made findings following appellant's plea, the court simply stated its finding "that the allegations in Counts 2 and 3 of the petition are true as alleged."

Remand is not automatic when a juvenile court fails to comply with section 702. (*In re Manzy W., supra,* 14 Cal.4th at p. 1209.) "[S]peaking generally, the record in a given case may show that the juvenile court, despite its failure to comply with the statute, was aware of, and exercised its discretion to determine the felony or misdemeanor nature of a wobbler. In such case, when remand would be merely redundant, failure to comply with the statute would amount to harmless error." (*Ibid.*) In *Manzy W.*, the Supreme Court determined that the failure to comply with section 702 was not harmless where nothing in the record established the juvenile court was aware of its discretion to sentence an offense as a misdemeanor rather than a felony. (*Id.* at p. 1210.)

Notwithstanding the concession that the court failed to comply with section 702, the People contend any error was harmless. The People claim the juvenile court's description of the offense as a felony during the plea colloquy establishes that the court intended to treat it as a felony. The People attempt to distinguish this case from *In re Manzy W.*, pointing out that in that case the court made no express statement describing the charged offense as a felony.

Contrary to the People's contention, the court's statements and actions do not demonstrate that it was aware of and exercised its discretion to determine the felony or misdemeanor nature of the grand theft charge. The court's statements support the

conclusion that it was aware appellant was charged with a felony offense.[5] However, the court's reiteration of the felony charge contained in the juvenile delinquency petition does not necessarily reflect that the court was aware of and consciously exercised its discretion to declare the grand theft offense a felony instead of a misdemeanor. Further, simply because a juvenile defendant admits an offense charged as a felony does not mean the court is bound to treat is as a felony. In short, we are aware of no evidence in the record indicating the court was aware of its discretion to treat the grand theft charge as a misdemeanor. As appellant points out, "there is not a single reference [in the record] to the fact that the offense is a wobbler."

Under the circumstances, we are compelled to remand the matter to the juvenile court so that it may determine the character of the grand theft offense and declare that it considered whether to treat the offense as a misdemeanor or felony, as required by rule 5.778(f)(9). We do so somewhat reluctantly, cognizant of the general rule of appellate review that we presume the trial court was aware of and exercised its discretion to act, absent evidence to the contrary. (Cf. *People v. Mosley* (1997) 53 Cal.App.4th 489, 496-497.) In a case such as this one, however, the California Rules of Court appear to turn that presumption on its head, specifying that a juvenile court must expressly acknowledge its discretion by declaring that it considered whether to treat a wobbler as either a misdemeanor or a felony. (See rule 5.778(f)(9); see also rules 5.780(e)(5), 5.790(a)(1), 5.795(a).) Further, the Supreme Court in *Manzy W.* expressly rejected the People's contention that we may presume the juvenile court regularly performed its duty, stating that "[w]e are unpersuaded that such a presumption is appropriately applied when the juvenile court *violated* its clearly stated duty under Welfare and Institutions Code section 702 . . . ." (*In re Manzy W.*, *supra*, 14 Cal.4th at p. 1209.)

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[5] The People could make the claim the court was aware of the felony character of an offense in almost any case in which a wobbler is charged as a felony because rule 5.778(a) requires that the section 602 petition be read at the beginning of the jurisdictional hearing. Merely reading the petition at the outset of the jurisdictional hearing or reciting the charges during the plea colloquy does not constitute the declaration required by rule 5.778(f)(9).

We have no choice but to conclude the juvenile court erred by failing to make the required declaration. We suspect the court was fully aware of its discretion to treat appellant's grand theft offense as a misdemeanor, but the record is too equivocal for us to reach such a conclusion. (See *In re Manzy W., supra,* 14 Cal.4th at p. 1210 [absent indication that court considered lesser alternative to felony punishment, it would be "mere speculation to conclude that the juvenile court was actually aware of its discretion"].)

DISPOSITION

The matter is remanded to the juvenile court to declare whether appellant's grand theft offense (Pen. Code, § 487, subd. (c)) is a misdemeanor or felony, as required by section 702 and rule 5.778(f)(9). If, upon remand, the court declares the offense to be a misdemeanor, then it shall recalculate the maximum term of confinement under section 726, subdivision (c). In all other respects, the jurisdictional and dispositional orders are affirmed.

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McGuiness, P.J.

We concur:

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Pollak, J.

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Siggins, J.