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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re F.M., a Person Coming Under the  
Juvenile Court Law.

H048693  
(Santa Cruz County  
Super. Ct. No. 19JU00191A, B, C)

THE PEOPLE,

Plaintiff and Respondent,

v.

F.M.,

Defendant and Appellant.

While on probation for misdemeanor assault (Pen. Code, § 242),<sup>1</sup> the minor, F.M., admitted allegations in two separate juvenile petitions that he committed two assaults with force likely to produce great bodily injury (§ 245, subd. (a)(4)), was an active participant in a criminal street gang (§ 186.22, subd. (a)), and recklessly evaded police (Veh. Code, § 2800.2). The juvenile court continued F.M. as a ward of the court pursuant to Welfare and Institutions Code section 602 and found him suitable for placement at a ranch camp.

On appeal, F.M. argues the juvenile court failed to declare whether the two assaults and the reckless evasion allegations were considered felonies or misdemeanors as required by Welfare and Institutions Code section 702 and that the matter must be remanded so that the juvenile court can correct this error. In response, the Attorney

<sup>1</sup> Unspecified statutory references are to the Penal Code.

General contends that F.M. has forfeited this argument by failing to object below and, in the alternative, remand is unnecessary because the record shows the juvenile court exercised its discretion and considered the sustained allegations as felonies.

After reviewing the briefs and record, we requested supplemental briefing on the impact of a recent amendment to Welfare and Institutions Code section 726, subdivision (d)(1), which reduced the maximum term of confinement which could be imposed on a minor. The parties agree that F.M. is entitled to retroactive application of that amendment.

For the reasons explained below, we conclude that F.M. has not forfeited his claim of error. However, we further conclude the record demonstrates that the juvenile court was aware of and exercised its discretion to treat the sustained allegations as felonies. Finally, we also agree with the parties that F.M. is entitled to the ameliorative effect of the amendment to Welfare and Institutions Code section 726, subdivision (d)(1).

Accordingly, we will modify the dispositional order to reflect the maximum term of confinement under the amended version of Welfare and Institutions Code section 726, subdivision (d)(1) and, as so modified, we will affirm the dispositional order.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

### ***A. Procedural Background***

In October 2019, the juvenile court sustained an allegation in a juvenile wardship petition (Petition A) that F.M. had committed simple battery (§ 242). F.M. was placed on probation with various terms and conditions.

In May 2020, the Santa Cruz County District Attorney filed an amended juvenile wardship petition (Petition B) alleging that F.M., age 17, committed felony assault with a deadly weapon, a knife (§ 245, subd. (a)(1); count 1); felony assault with force likely to produce great bodily injury (§ 245, subd. (a)(4); count 2); two felony counts of participation in a criminal street gang (§ 186.22, subd. (a); counts 3 & 4); misdemeanor

brandishing of a deadly weapon (§ 417, subd. (a)(1); count 5); felony assault with a firearm (§ 245, subd. (a)(2); count 6); felony reckless evasion of a peace officer (Veh. Code, § 2800.2; count 7); and misdemeanor driving without a license (Veh. Code, § 12500, subd. (a); count 8). As to counts 1 and 2, it was further alleged that F.M. committed those offenses for the benefit of a criminal street gang pursuant to section 186.22, subdivision (b)(1)(A).

At a June 22, 2020 pretrial conference, F.M. admitted the allegations that he committed felony assault with force likely to produce great bodily injury (§ 245, subd. (a)(4); count 2), participated in a criminal street gang, amended to a misdemeanor (§ 186.22, subd. (a); count 3), and felony reckless evasion of a police officer (Veh. Code, § 2800.2; count 7). The juvenile court found F.M. had violated his probation in Petition A by operation of law.<sup>2</sup> The minute order from the hearing notes that “[t]he Court has considered whether the above offense(s) should be felonies or misdemeanors.”

Prior to the disposition hearing, on July 22, 2020, the district attorney filed a new wardship petition (Petition C) alleging that F.M. committed a felony assault with force likely to produce great bodily injury (§ 245, subd. (a)(4); count 1), with a gang enhancement (§ 186.22, subd. (b)(1)(A)), and felony active participation in a criminal street gang (§ 186.22, subd. (a); count 2). On that same date, the district attorney filed a Welfare and Institutions Code section 777 petition alleging that F.M. violated his probation in Petition A by failing “to obey all laws.”

On October 5, 2020, F.M. admitted the allegation that he committed felony assault with force likely to produce great bodily injury. The juvenile court found F.M. had violated his probation.

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<sup>2</sup> The probation department filed a Welfare and Institutions Code section 777 petition in March 2020 alleging that F.M. violated his probation by “fail[ing] to obey all laws in that he participated in an assault with a deadly weapon and participated in criminal street gang activity.”

At the November 3, 2020 dispositional hearing on Petitions B and C, as well as F.M.'s probation violations, the juvenile court continued F.M. as a ward of the court and found him eligible for placement at a ranch camp, with various terms and conditions. The juvenile court set F.M.'s maximum confinement time at six years two months.

F.M. timely appealed.

## ***B. Factual Background***<sup>3</sup>

### ***1. Petition B***

On March 3, 2020, a Watsonville police officer responded to a report of brandishing of a knife. The victim, E.M., told the officer that he was walking along the street when a vehicle pulled up next to him. Two people, one of whom the victim recognized as F.M., got out of the vehicle and approached him. Both F.M. and the other person were holding knives and walked toward E.M. They called out, “ ‘City Hall!’ ” and one of them said, “ ‘What’s up? Where you from?’ ” E.M. told the officer he did not know why F.M. and the other individual asked him that because “ ‘They know I don’t bang.’ ” E.M. ran away because he was afraid he would be stabbed.

On March 10, 2020, R.J. was walking home at 1:00 a.m. after being released from Elmwood Correctional Facility. A vehicle drove past him and one of the occupants whistled at him three times. R.J. saw the vehicle park in a nearby parking lot and the driver, subsequently identified as F.M., and the front passenger got out and walked toward R.J. The front passenger pointed a gun at R.J. and R.J. ran in the opposite direction toward a nearby gas station where he asked an attendant for help. F.M. and the other person got back into their car.

At approximately 1:37 a.m., a Milpitas police officer spotted a vehicle matching the description reported to police. The officer turned on his lights and siren, but the vehicle fled at a high speed. Officers pursued the vehicle, reaching speeds of over

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<sup>3</sup> Since F.M. admitted certain of the allegations in Petitions B and C, we derive the facts from the probation officer’s reports.

80 miles per hour. The pursuit ended when F.M. tried to make a sharp turn at approximately 50 miles per hour and drove over a median. The vehicle was launched into the air and crashed into a light pole and fence. Five occupants, including F.M., were taken into custody at the scene.

F.M. later told officers he saw the police lights behind him but was scared because he did not have a valid license and there was alcohol in the vehicle. F.M. said he “didn’t remember” anything about pointing a gun at anyone. During the interview, the officer noticed that F.M. had a tattoo of four dots on his left elbow, which the officer believed indicated affiliation with a Norteño gang.

On March 16, 2020, Watsonville Police Department officers responded to a report of a stabbing. The male victim said that he was walking along a train trestle when he was approached by two males, later identified as F.M. and A.G. F.M. and A.G. asked the victim about his gang affiliation. The victim stated he had no gang affiliation and began to walk in the opposite direction. F.M. and A.G. came up behind him and stabbed him. The victim had stab wounds on his right forearm and lower back.

Two witnesses reported they were driving by and saw two males chasing another male. One of the witnesses saw A.G. swing a knife at the victim’s back, but could not recall if F.M. was holding anything. Based on the witnesses’ statements, police located and apprehended F.M. and A.G. under the Pajaro Bridge. In an infield show up, one of the witnesses positively identified A.G. as the person who stabbed the victim and F.M. as the other person who chased after the victim. Video surveillance footage from near the scene showed F.M. holding a “gray/light colored slim object consistent with a knife.” The footage also showed F.M. and A.G. chasing the victim, with A.G. armed with a knife. Police did not find a knife on either F.M. or A.G. and did not recover any knives in the area. F.M. denied any involvement in the incident.

## **2. *Petition C***

On July 15, 2020, F.M. was involved in an altercation at the Santa Cruz County Juvenile Hall, which was captured by surveillance cameras. After two minors attacked the victim in a classroom, F.M. and a fourth minor joined in the attack. In the video, F.M. is seen kicking the victim after he falls to the ground. After the assault, staff observed that the victim sustained a black eye and scratches on his face, and also had blood on the side of his head. When interviewed by a Santa Cruz County Sheriff's deputy after the incident, F.M. would not acknowledge there was a fight and refused to answer any questions posed by the deputy.

## **II. DISCUSSION**

### **A. *Forfeiture***

Before addressing F.M.'s argument that the juvenile court erred by not expressly stating whether it considered the sustained allegations as felonies or misdemeanors, we turn to the Attorney General's contention that this claim is forfeited due to F.M.'s failure to raise it below.

The Attorney General cites *In re G.C.* (2020) 8 Cal.5th 1119 (*G.C.*) as holding that a juvenile court's " 'failure to properly *make* or articulate its discretionary sentencing choices' " (*id.* at p. 1130) under Welfare and Institutions Code section 702 constitutes "forfeitable legal error." (*G.C., supra*, at p. 1131.) The Attorney General misreads the decision.

In *G.C.*, the California Supreme Court examined "whether [the minor] may challenge the court's neglect of this mandatory duty [i.e., under Welfare and Institutions Code section 702] in an appeal from a *later* dispositional order after the time to appeal the *original* disposition expired." (*G.C., supra*, 8 Cal.5th at p. 1122, italics added.) After the minor in that case admitted the allegations of wobbler offenses in two separate wardship petitions (Petitions A and B) filed in Santa Clara County in 2014, the petitions

were transferred to Alameda County for disposition. (*Id.* at p. 1123.) At the dispositional hearing in 2015, the Alameda County juvenile court declared the minor a ward of the court, removed her from her mother’s custody, and set a maximum term of confinement. (*Ibid.*) The court failed to declare whether the offenses in Petitions A and B were felonies or misdemeanors, but the minor did not appeal from the dispositional order. (*Id.* at pp. 1123-1124.)

In October 2015, the minor admitted the allegations in a Welfare and Institutions Code section 777 petition that she had violated her probation by running away from home.<sup>4</sup> (*G.C., supra*, 8 Cal.5th at p. 1124.) Because the minor and her mother had relocated to Santa Clara County, the petition was transferred back to that county for disposition. (*Ibid.*) The Santa Clara County juvenile court’s 2016 dispositional order maintained the minor “in her mother’s custody under the supervision of the probation department, with various terms and conditions.” (*Ibid.*) The minor appealed from the 2016 dispositional order challenging certain of her terms of probation, but she also sought to argue that the Alameda County juvenile court erred in its 2015 dispositional order by failing to “expressly declare whether the offenses in petitions A and B were misdemeanors or felonies.” (*Ibid.*)

The California Supreme Court held that because the minor “did not timely appeal the dispositional order entered in Alameda for petitions A and B[,] [h]er claim of error is not cognizable in a later appeal from the . . . dispositional order from Santa Clara in the [Welfare and Institutions Code] section 777 proceeding.” (*G.C., supra*, 8 Cal.5th at p. 1125, fn. omitted.) In discussing forfeiture, the court expressly rejected the minor’s “argument that the failure to comply with the mandatory provisions of [Welfare and Institutions Code] section 702 creates an unauthorized sentence correctable at any time.” (*Id.* at p. 1129.) Instead, the failure to comply with that statute is an error that “must be

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<sup>4</sup> The minor had previously been returned to her mother’s custody. (*G.C., supra*, 8 Cal.5th at p. 1124.)

timely asserted.” (*Id.* at p. 1131.) “[U]pon timely appeal the proper course would have been to remand the case for the Alameda court to exercise its discretion.” (*Ibid.*)

*G.C.*’s forfeiture analysis does not apply to this case. There is no suggestion here that *F.M.*’s appeal from the dispositional order on Petitions B and C is not timely.

***B. Declaration Under Welfare and Institutions Code Section 702***

Welfare and Institutions Code section 702 provides, in pertinent part, as follows: “If 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.” Welfare and Institutions Code section 702 requires an explicit declaration by the juvenile court whether the offense would be a felony or misdemeanor. (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1204 (*Manzy W.*.) “The requirement is obligatory: ‘. . . [S]ection 702 means what it says and mandates the juvenile court to declare the offense a felony or misdemeanor.’ ” (*Ibid.*)

However, the rule is not ironclad and there is no “ ‘automatic’ ” right to remand “whenever the juvenile court fails to make a formal declaration under Welfare and Institutions Code section 702.” (*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. . . . 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.*)

We conclude that although the juvenile court did not strictly comply with the declarative requirement established in *Manzy W.*, the record in this case shows that the juvenile court was both aware of and exercised its discretion to treat the sustained



allegations as felonies. The court sustained allegations of three wobblers offenses—two assaults with force likely to produce great bodily injury (§ 245, subd. (a)(4)) and reckless evasion of police (Veh. Code, § 2800.2) in Petitions B and C. The minor admitted the offenses in both petitions as felonies. When F.M. admitted the offenses in Petition B as felonies, the court noted that the assault charge “is considered a serious violent felony” and thus “could be counted as a strike” offense in any adult court case brought against him in the future. In addition, the juvenile court rejected the probation department’s initial recommendation to return F.M. to his parents’ custody and reinstate probation. The court directed the probation department to “go back and reevaluate the situation, both for ranch camp and [Department of Juvenile Justice].” At the time of the dispositional hearing, a DJJ (Department of Juvenile Justice) commitment could be imposed only if the minor’s most recent offense fell under Welfare and Institutions Code section 707, subdivision (b), a statute that describes certain felony offenses. (Welf. & Inst. Code, § 733, subd. (c).)<sup>5</sup> Given these recitations on the record, we conclude that the juvenile court elected to designate the offenses as felonies. The minor’s admission of the offenses as felonies, as well as the court’s statements about the offenses, provided notice to defense counsel that the court was addressing the admitted charges as felonies. Under these circumstances, remanding the matter to the juvenile court for an explicit declaration of the felony status of the offenses F.M. admitted would be redundant.

***C. Amendment to Welfare and Institutions Code Section 726***

As set forth in the disposition report, F.M.’s maximum time of confinement was calculated at six years two months, consisting of: four years for felony assault (§ 245,

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<sup>5</sup> Effective July 1, 2021, a juvenile can only be committed to the DJJ—pending its final closure on June 30, 2023—if the juvenile is “otherwise eligible to be committed under existing law and . . . a motion to transfer the minor from juvenile court to a court of criminal jurisdiction was filed.” (Welf. & Inst. Code, § 736.5, subd. (c); *id.*, subd. (b).)

subd. (a)(4), Petition B; count 2);<sup>6</sup> two months (one-third the midterm of six months) for misdemeanor battery (§ 242, Petition A); four months (one-third the middle term of one year) for the misdemeanor gang offense (§ 186.22, subd. (a), Petition B; count 3); eight months (one-third the middle term of two years) for felony reckless evasion (Veh. Code, § 2800.2, Petition B; count 7); and one year (one-third the middle term of three years) for the second felony assault charge (§ 245, subd. (a)(4), Petition C; count 1).

At the time of F.M.'s November 3, 2020 dispositional hearing, Welfare and Institutions Code section 726, subdivision (d)(1) provided that the juvenile court could order physical confinement of a ward for a period not to exceed "the maximum term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court." (Former Welf. & Inst. Code, § 726, subd. (d)(1).) However, effective May 14, 2021, Senate Bill No. 92 amended that statute to limit the maximum term of confinement to the *middle* term of imprisonment which could be imposed upon an adult convicted of the same offense or offenses. (Stats. 2021, ch. 18, § 7.) As a result of the amendment, the maximum term that can be imposed on a minor for felony assault likely to produce great bodily injury is now three years, not four.

The parties agree, as do we, that F.M. is entitled to the ameliorative effect of this amendment as his disposition was not final on the amendment's operative date. (*In re Estrada* (1965) 63 Cal.2d 740, 744.) As a result, F.M.'s maximum term of confinement must be reduced by one year to comply with Welfare and Institutions Code section 726, subdivision (d)(1), as amended. We will therefore modify the dispositional order to set forth a maximum term of confinement of five years two months.

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<sup>6</sup> Section 245, subdivision (a)(4) states: "Any person who commits an assault upon the person of another by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment."

### **III. DISPOSITION**

The dispositional order is modified to reflect a maximum term of confinement of five years two months. As modified, the dispositional order is affirmed.

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Greenwood, P.J.

WE CONCUR:

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Grover, J.

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Danner, J.

People v. F.M.  
No. H048693