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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re MATTHEW L., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,
Plaintiff and Respondent,

v.

MATTHEW L.,
Defendant and Appellant.

A107049

(Contra Costa County
Super. Ct. No. J0300828)

Matthew L. appeals from juvenile court orders sustaining allegations that he brandished a knife (a misdemeanor) and made a criminal threat (a felony), and placing him on probation in his mother's home. Matthew contends: (1) there was insufficient evidence that he appreciated the wrongfulness of his conduct; (2) the evidence also failed to support the finding that he made a criminal threat; (3) he raised a reasonable doubt on the issue of self-defense; (4) the court improperly restricted the examination of a defense witness; (5) the court erred by refusing to allow another witness to testify; and (6) the court's failure to expressly declare whether the criminal threat offense was a misdemeanor or a felony requires remand.

We agree the evidence did not support the court's finding on the criminal threat allegation. Otherwise, we affirm.

BACKGROUND

The incident from which this case arose occurred on a school bus for special education students. Matthew, who consistently tested in the borderline range of intellectual functioning, has been diagnosed with a genetic disorder that may cause cognitive deficits and behavioral problems. However, he had no previous problems with the juvenile authorities.

Matthew was 13 years old on the day in question. The victim, Christian A., was 11. It was well established that Christian had engaged in a pattern of bullying behavior toward Matthew. Aside from the testimony of Matthew's family members, Tamara Torkette-Orosco, a neighbor in the apartment complex where Matthew lived, testified that she had heard Christian threaten to shoot Matthew on at least two occasions. Ms. Torkette-Orosco said her nephew had had to "step in" to stop Christian from "go[ing] after" Matthew. Daniel Burke, a retired police chief who was dating Matthew's mother at the time of the incident (but not at the time of the jurisdictional hearing), testified that he had seen Christian use violence against Matthew many times. Three days before the incident on the school bus, Christian opened the door to Matthew's apartment without knocking or being invited in, and without provocation slapped Matthew twice in the face. The next day, Christian again entered the apartment and pushed Matthew to the floor. Burke said he physically removed Christian from the residence, during which time Christian repeatedly said he was going to have his cousin kill Matthew.

The events on the bus were related by Dashawn D., an 11-year-old student, and by the bus driver. Dashawn testified she was on the bus before Matthew and Christian got on. She was seated in the front row, Christian was a row behind her on the other side of the aisle, and Matthew was seated behind Christian. Christian was "playing around with Matthew," hitting him in a playful way. The boys were "fighting, like punching and stuff, but they were really playing." However, they were not laughing. Dashawn had seen Christian hit Matthew many times before. Then, as Dashawn and Christian were talking, Matthew took "a little flip knife" out of his jacket pocket, "was swinging it

around,” and threatened to kill Christian.¹ Christian said, “Bus driver, Matthew has a knife on the bus.” Dashawn thought Christian sounded frightened. Matthew put the knife away and neither boy said anything for the rest of the bus trip.

The bus driver testified that the bus had three rows of seats for 12 passengers, plus room for two wheelchairs. She did not see Matthew or Christian hitting each other or notice any altercation before Christian told her “Matt has a knife.” Christian sounded “serious.” The driver looked in her mirror and saw Christian and Matthew, neither of whom moved from their seats. Since she was not far from school, she waited until Matthew came up to get off the bus, and asked him if he had a knife. He said he did not, and tried to leave the bus, but the driver kept the doors shut. Matthew tried to push the doors open, but could not, and finally he gave the knife to the driver. She turned the knife over to her supervisor and explained what had happened. The driver said she was familiar with Dashawn and Christian due to behavioral issues during the two to four weeks she had been driving that route, but Matthew was quiet, and not a troublemaker.

We will discuss further facts as they are relevant to the parties’ contentions.

DISCUSSION

1. The Evidence of Criminal Capacity Was Sufficient

“All persons are capable of committing crimes except those belonging to the following classes:

“One — Children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness.” (Pen. Code, § 26.) Under this statute, “the prosecution must present clear and convincing evidence that the minor knows the wrongfulness of his conduct in order to sustain a finding that he is a person falling within [Welfare and Institutions Code] section 602.” (*In re Manuel L.* (1994) 7 Cal.4th 229, 234.) The relevant factors are “the age, experience, knowledge,

¹ The District Attorney described the knife as “a locking blade knife, with about a 3-inch blade, and about a 4-inch handle.”

and conduct of the child.” (*In re Gladys R.* (1970) 1 Cal.3d 855, 867; *In re Manuel L.*, *supra*, 7 Cal.4th at p. 232.)

Matthew contends the prosecutor failed to prove that he understood the wrongfulness of his conduct. He emphasizes the two psychological evaluations establishing his cognitive limitations.

Dr. Nancy Van Couvering acknowledged that despite his limitations, Matthew understood he was in trouble for the incident on the bus. Dr. Van Couvering was asked to address Matthew’s understanding of the wrongfulness of his conduct, and concluded “it [could] not be assumed that he had an understanding of the wrongfulness of his actions.” She found it “doubtful whether the concepts of right and wrong were operating at the time of the offense,” and that Matthew “appeared to be focused on defending himself from persistent ‘bugging’ by the victim.” Dr. Van Couvering believed Matthew did “know the difference between right and wrong, but probably [had] difficulty applying these concepts in actual situations, especially when a compelling motivation (self-defense) [was] involved.”

Dr. David O’Grady performed a neuropsychological assessment of Matthew, and concluded “the incident involving his carrying the knife should be understood in terms of his significant limitations in social judgment and problem solving and his tendency toward fearfulness.”

The trial court addressed the issue as follows: “I will preface my decision by stating that whatever Dr. Van Couvering’s opinions [were] . . . of course she did not hear the evidence, did not see the witnesses testify, did not see the knife, and, therefore, could not evaluate the effect of the testimony, and I’m now addressing the issue of knowledge of wrongfulness. The effect of the testimony of the witness, first [Dashawn], who . . . testified that the minor did put — put the knife away when he heard Christian yell to the driver.

“And then the testimony of Jennifer Perez, the bus driver, who stated that she asked the minor if he had a knife and he denied it, and then he said he would not show her what was in his pants pocket.

“And although the Court did rule . . . that the Court did not believe this minor had knowingly and intelligently waived his Miranda rights, that is not the same thing as whether the minor could understand the wrongfulness of his conduct, does not require the same level of knowledge, ability, or analysis, and the Court does believe that the evidence supports that the minor did know the wrongfulness of his conduct on the occasions in issue.”

Reviewing the record in the light most favorable to the trial court’s judgment, we cannot say the court’s finding on this point was not supported by clear, convincing, and substantial evidence. (See *In re Jerry M.* (1997) 59 Cal.App.4th 289, 297-298.) Matthew’s conduct on the bus was quite consistent with the conclusion he knew he had acted wrongfully. The acts in question were very simple in nature. Matthew’s suggestion that he knew it was wrong to possess the knife, but not to threaten someone with it, is implausible. The trial court was not bound to accept Dr. Van Couvering’s assessment, which itself was not stated in definitive terms.

2. The Evidence Did Not Support the Criminal Threat Allegation

An essential element of the crime of making a criminal threat is that the threat caused the victim “reasonably to be in sustained fear for his or her own safety.” (Pen. Code, § 422.) “A victim must actually be in sustained fear, and the sustained fear must also be reasonable under the circumstances.” (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1140.) Matthew argues the evidence in his case did not establish this element. We agree. Viewed in the light most favorable to the judgment, the evidence was insufficient to show that Christian sustained any actual fear upon being threatened by Matthew.

Christian did not testify. Dashawn’s testimony that she thought Christian seemed to be frightened, and the bus driver’s testimony that Christian sounded “serious,” are hardly enough to establish the requisite state of mind beyond a reasonable doubt. The circumstantial evidence strongly tended to show a lack of fear. Christian did not move from his seat in the bus after Matthew uttered the threat, although Matthew was seated directly behind him. The next day, Ms. Torkette-Orosco overheard Christian and his

cousin talking about the incident at the apartment complex. Christian was “laughing about Matthew possibly going to juvie.” When Torkette-Orosco asked what he meant, Christian told her it was “ ‘[b]ecause I stated that he pulled a knife out on me.’ ” Torkette-Orosco asked whether that was true, and Christian said Matthew was “too much of a pussy to.”

Matthew did spend three days in juvenile hall. The day he returned home, Mr. Burke was in Matthew’s apartment when Christian again walked in, pushed Matthew in the chest with both hands, and told Matthew he was going to kill him. Burke again removed Christian from the residence.

Because there was no evidence proving Christian was in actual, sustained fear, the finding that Matthew committed the offense of making a criminal threat against Christian must be reversed. Our conclusion on this point moots Matthew’s claim that the court erred by failing to expressly declare the offense a misdemeanor or a felony.

3. The Court Properly Rejected Matthew’s Claim of Self-Defense

Matthew contends his evidence was sufficient to raise a reasonable doubt as to whether he was acting in self-defense when he threatened Christian with the knife. We disagree. Matthew was legally entitled to respond to a battery or assault by Christian with such force as was reasonable under the circumstances. (*People v. Myers* (1998) 61 Cal.App.4th 328, 335.) However, viewed in the light most favorable to the trial court’s judgment, the evidence showed neither a continuing assault or battery nor a reasonably proportionate response by Matthew. According to Dashawn, the only eye-witness, the play-fighting between the two boys had ceased by the time Matthew pulled out the knife, and Dashawn and Christian were talking to each other. The trial court properly rejected the claim of self-defense.

4. The Court Did Not Improperly Restrict Counsel’s Examination of Matthew’s Sister

Matthew complains the court improperly prevented his counsel from questioning his sister regarding Christian’s comments after Matthew got in trouble for the knife incident. Matthew argues his sister’s testimony would have supported the claim that

Christian was not in sustained fear. Not only is this contention moot in light of our reversal of the criminal threat finding, but the Attorney General correctly notes that the court did allow the witness to testify on this point.

5. The Court Did Not Prevent Matthew's Former Teacher From Testifying

Matthew claims the court infringed his right to due process by preventing his attorney from asking a former teacher about Matthew's ability to learn. The court told counsel she could question the witness about the factors relevant to the question of whether Matthew understood the wrongfulness of his conduct — his age, experience, knowledge, and conduct. However, the court indicated that general learning ability was not a relevant consideration. Counsel then abandoned any effort to question the witness.

While the court's approach may have been unduly restrictive, any restriction was insubstantial. Counsel was free to pursue questions on the four factors specified in *In re Manuel L.*, *supra*, 7 Cal.4th at p. 232, but for her own reasons chose not to. In the course of questioning the witness about Matthew's "knowledge," the teacher's opinion of his learning ability could have been approached indirectly without violating the court's ruling. We find no error on this point.

DISPOSITION

The juvenile court's order sustaining the allegation that Matthew made a criminal threat is reversed. The finding that he brandished a knife is affirmed. The matter is

remanded with directions to vacate the disposition, dismiss the criminal threat charge, and enter a new disposition on the brandishing offense.

Parrilli, J.

We concur:

McGuinness, P. J.

Pollak, J.