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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re JESUS O., a Person Coming Under the Juvenile Court Law.	B177869
THE PEOPLE, Plaintiff and Respondent, v. JESUS O., Defendant and Appellant.	(Los Angeles County Super. Ct. No. PJ34851)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gary A. Polinsky, Temporary Judge. (Pursuant to Cal. Const., art VI, § 21.) Affirmed in part, modified in part, and remanded with directions.

Kiana Sloan-Hillier, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Margaret E. Maxwell Stephanie Brenan and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part III.

The juvenile court sustained allegations of a Welfare and Institutions Code section 602 petition alleging the juvenile committed grand theft person and attempted second-degree robbery. The juvenile appeals from the court's order of wardship, claiming the evidence was insufficient to support a finding of either offense. He also claims a probation condition ordering him to stay away from areas where "users" congregate is unconstitutionally vague and overbroad. The juvenile further contends the court erred in failing to declare on the record whether the grand theft person "wobbler" offense would be a misdemeanor or felony for an adult convicted of the same offense. Finally, the juvenile argues the maximum term of commitment set by the court should be stricken as both erroneous and unnecessary in this case where the disposition the court ordered was home on probation.

We find the evidence does not support a finding the juvenile took the property "from the person" of the victim as is required for grand theft person. We will thus reduce the offense in count one to the misdemeanor offense of petty theft, a lesser included offense of grand theft person. We will also modify the court's order with respect to the challenged probation condition. We affirm the court's order in all other respects.

FACTS AND PROCEEDINGS BELOW

Prosecution Evidence:

Around 5:30 in the evening on July 5, 2004 Mario H. and his middle school companions, Alex S., Juan C. and George G., went to a McDonald's restaurant on Vose Street in Van Nuys. Appellant, Jesus O., and his friend, Roberto A., sat at a table in the corner. Mario knew appellant and recognized Roberto from school. Mario and his friends sat at a table in the middle of the restaurant.

Roberto approached Mario and "claimed" "A. K." He announced "A. K." and "Assassin Kings." Mario responded by saying "Whatever." Roberto asked Mario, "What are you staring at?" Roberto asked Mario whether he had a problem.

Mario believed "A. K." was a gang. After Mario and his friends finished eating they left the restaurant. Appellant and Roberto followed them out. Mario and his friends walked to an alley behind McDonald's to "lose" appellant and Roberto. However, when appellant and Roberto spotted them in the alley they yelled, "Hey, hold on." Appellant and Roberto set their drink containers down and approached Mario and his friends.

First Roberto and then appellant loudly announced "Assassin Kings." Roberto asked Mario if he had any money.[1] Mario replied, "I ain't got no money." A second later appellant "sucker punched" Alex in the mouth. Mario pulled Alex behind him to protect Alex from further assault. Appellant and Roberto began pushing Mario and a fight broke out.

Juan and Roberto began fighting. They punched and kicked each other. Juan grabbed Roberto's head and placed him in a headlock. George punched Roberto while in this position. Roberto wrestled out of Juan's headlock and grabbed Juan's head. Juan grabbed Roberto's throat to choke him and then threw Roberto against the wall. At some point during the struggle Juan's necklace broke and wound up in Roberto's hand. Juan grabbed his necklace from Roberto and walked over to Mario and appellant.

In the meantime Mario and appellant had been fighting and wrestling on the ground. When Juan and Roberto joined them Mario had managed to immobilize appellant by holding him in a sort of bear hug from behind. Mario kept telling appellant to calm down. Roberto ordered Mario to let appellant go. Roberto pulled out a knife and unfolded its three to four inch blade. He told Mario, "I'm going to shank you, I'm going to fucking shank you."

Mario and his friends got scared. Juan beseeched Mario to let appellant go and "just get out of here." The four boys ran down the alley and hopped a fence. Mario then checked his pants pocket and noticed his cell phone was missing. Mario did not want to go back to retrieve his cell phone, afraid they would get into another fight. Juan saw

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[1] At trial Juan testified both Roberto and appellant asked if he or Mario had any money.

Mario's cell phone lying on the ground in the alley. Then Juan saw Roberto pick up the phone and put it in his pocket.

Defense Evidence:

Juan Hernandez was working in Mendez Market on July 5, 2004. Around 5:30 p.m. he went into the alley behind the store to take out some trash. He saw six boys fighting in the alley 30 to 35 feet away. A minute later they all ran away. Hernandez did not see any boy with a knife. Hernandez did not hear any of the boys make any comment.

Co-defendant Roberto testified at the adjudication hearing. He testified Mario, Alex, George and Juan were making derogatory comments while he and appellant were eating at the McDonald's. Mario and his friends made fun of Roberto's nose. They also made unpleasant comments about appellant's disfigured eyelids. The boys called appellant, "ve ciego" or "blind" and made fun of how he looked. Roberto asked, "What are you looking at?" Roberto admitted he invoked the name of his "crew"—the "Assassin Kings"—because he was angry and wanted to scare the boys who were taunting them. Roberto explained "Assassin Kings" was not a tagging crew but was a "regular crew."

Roberto denied he and appellant followed the boys out of the McDonald's restaurant. However, he testified when they saw Mario and his friends in the alley, he and appellant dumped out their sodas and walked up to them.

Roberto denied either he or appellant ever asked Mario or his friends for money. He testified appellant got into an argument with one of the boys over an earlier slight and a fight broke out. Roberto agreed appellant had thrown the first punch. Roberto was about to help appellant when another one of the boys attacked him and they started fighting. When he saw Mario getting the better of appellant Roberto yelled, "Let him go, let him go." By this time appellant already had a black eye. Roberto tried to stop the fight by pretending to have a knife and threatening to "shank" them with his "pretend" knife. Roberto testified it was just a bluff he used to get Mario to release appellant.

After the fight ended and Mario and his friends ran away Roberto saw a cell phone lying on the ground. He picked the phone up because he wanted it. Roberto apparently changed his mind and threw the cell phone into the trash. When appellant said he wanted the phone, Roberto retrieved the cell phone from the trash and gave it to appellant. Later in the day appellant gave the phone back to Roberto, who gave it to a girl, and the girl in turn gave it to Roberto's father. Roberto's father turned the cell phone over to the police.

A Welfare and Institutions Code section 602 petition charged appellant in count one with grand theft person,[2] in counts two and three with attempted second-degree robbery,[3] and in count four with second-degree robbery.[4] In closing arguments following the contested adjudication hearing appellant's counsel argued the evidence was insufficient to sustain any of the allegations of the petition. In response, the prosecutor argued, "this is a classic case of aiding and abetting. Each of these minors was aiding. . . . " The juvenile court agreed with the prosecutor's theory, stating, "[e]ach of them was a principal. One made the demands, the other approached. I understand . . . ."

The juvenile court sustained the allegations of counts one and two of the petition and declared appellant a ward of the court. In its minute order for the day, the court indicated the grand theft person offense was a felony and the attempted second-degree robbery offense alleged in count two was a misdemeanor.[5] The juvenile court dismissed counts three and four—one of the attempted second-degree robbery counts and the second-degree robbery charge. At disposition, and after a period in juvenile hall, the court ordered appellant home on probation. The court set a theoretical maximum period of confinement of four years and four months.

Appellant appeals from the order of wardship.

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[2] Penal Code section 487, subdivision (c).

[3] Penal Code sections 664 and 211.

[4] Penal Code section 211.

[5] It is possible the court intended the reverse because the attempted second-degree robbery offense, unlike the grand theft person offense, is strictly punishable by imprisonment in state prison. (Pen. Code, § 213, subd. (b).)

DISCUSSION

I. SUBSTANTIAL EVIDENCE SUPPORTS THE JUVENILE COURT'S FINDING APPELLANT COMMITTED ATTEMPTED SECOND-DEGREE ROBBERY.

Appellant contends the evidence is insufficient to support the finding he committed an attempted robbery of Mario.

The standard of proof in juvenile proceedings involving criminal acts is the same as the standard in adult criminal trials.[6] The reviewing court must review the whole record in the light most favorable to the judgment to determine whether it discloses evidence which is reasonable, credible, and of solid value, such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.[7]

Robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."[8] To establish the offense of attempted robbery the prosecution was required to show appellant intended to commit each of these elements and took direct but ineffectual steps toward their commission.[9]

First appellant argues evidence of force or fear was lacking. We disagree. Appellant and Roberto began their course of intimidation inside the restaurant. Roberto approached Mario, asked him what he was staring at, asked him what his problem was, and tried to scare him by invoking his "crew" name "Assassin Kings." Roberto and appellant then followed Mario and his companions out of the restaurant and into the alley. In the alley Roberto loudly announced "Assassin Kings" and then asked Mario if

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[6] *In re Cheri T*. (1999) 70 Cal.App.4th 1400, 1404; *In re Babak S*. (1993) 18 Cal.App.4th 1077, 1088; *In re Jose R*. (1982) 137 Cal.App.3d 269, 275.

[7] *People v. Kraft* (2000) 23 Cal.4th 978, 1053; *People v. Johnson* (1980) 26 Cal.3d 557, 578; *In re Cheri T., supra*, 70 Cal.App.4th 1400, 1404.

[8] Penal Code section 211; see also, *People v. Kelley* (1990) 220 Cal.App.3d 1358, 1366.

[9] *People v. Vizcarra* (1980) 110 Cal.App.3d 858, 861.

he had any money. Any reasonable person would recognize the request for money meant appellant and Roberto intended to steal whatever money Mario admitted having. When Mario said he had no money, appellant tried to intimidate Mario further by punching Alex in the lip. Mario responded by trying to protect Alex from further assault by pulling Alex behind him. "Fear" for purposes of establishing the crime of robbery includes "[t]he fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery."[10]

These combined actions are more than sufficient to establish the force or fear element for robbery, notwithstanding the fact there were two potential robbers and four potential victims.

Even if the evidence is sufficient to establish an attempted robbery, appellant argues the evidence is nevertheless insufficient to show he aided and abetted the attempted robbery. Again, we disagree.

There was some evidence appellant personally demanded money from Mario. Juan testified first Roberto and then appellant asked Mario if he had any money. However, even if Juan's testimony is insufficient to establish appellant was the direct perpetrator, there was substantial evidence he aided and abetted the attempted robbery.

"'All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed.' (Pen. Code, § 31; see *People v. Mendoza* (1998) 18 Cal.4th 1114, 1122-1123; *People v. Prettyman* (1996) 14 Cal.4th 248, 259-260.) Thus, a person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts. (*Ibid*.) . . . ."[11]

"'To prove that a defendant is an accomplice . . . the prosecution must show that the defendant acted "with knowledge of the criminal purpose of the perpetrator *and* with

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[10] Penal Code section 212, subdivision (2).

[11] *People v. McCoy* (2001) 25 Cal.4th 1111, 1116-1117.

an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." ([*People v. Beeman* (1984) 35 Cal.3d 547,] 560, italics in original.) When the offense charged is a specific intent crime, the accomplice must "share the specific intent of the perpetrator"; this occurs when the accomplice "knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." (*Ibid*.)' (*People v. Prettyman, supra*, 14 Cal.4th at p. 259.)"[12]

The objective facts create the reasonable inference appellant knew of Roberto's criminal intent to rob Mario. Appellant and Roberto acted in a coordinated manner from the beginning. They followed the boys out of the restaurant and confronted them face to face together. If Roberto did all the talking appellant was nevertheless nearby showing his support. After Roberto loudly called out "A. K." "Assassin Kings" he asked Mario if he had any money. When appellant and Roberto did not receive the desired response appellant punched Mario's friend Alex in the lip. Appellant then started pushing Mario. Appellant's active involvement in assaulting the would-be robbery victims tends to show appellant was aware Roberto's purpose for confronting the boys in the alley was to rob them. Moreover, evidence of his own actions shows he gave aid with the intent or purpose of facilitating Roberto's commission of the robbery by attempting to force Mario's compliance through violence.

In short, the evidence of appellant's own acts in attempting to force Mario's compliance with Roberto's demand is sufficient to find appellant was a principal in the attempted robbery. In essence, while Roberto supplied the words, appellant applied the force in the robbery attempt.

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[12] *People v. McCoy, supra*, 25 Cal.4th 1111, 1118.

II. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE JUVENILE COURT'S FINDING APPELLANT COMMITTED GRAND THEFT PERSON.

Appellant contends the record evidence is insufficient to support the court's conclusion he committed grand theft person.

What otherwise would be petty theft because of the dollar value of the property taken is nevertheless grand theft if committed "[w]hen the property is taken from the person of another."[13] Over 100 years ago in *People v. McElroy*[14] our Supreme Court noted some "confusion in the authorities on the question as to whether the property must be actually on, or attached to, the person, or merely under the eye, or within the immediate reach, and so constructively within the control of the owner."[15] The *McElroy* court strictly construed the phrase "from the person," and explained this element as follows: "[W]e think its obvious purpose was to protect persons and property against the approach of the pick-pocket, the purse-snatcher, the jewel abstracter, and other thieves of like character who obtain property by similar means of stealth or fraud, and that it was in contemplation that the property shall at the time be in some way actually upon or attached to the person, or carried or held in actual physical possession—such as clothing, apparel, or ornaments, or things contained therein, or attached thereto, or property held or carried in the hands, or by other means, upon the person; that it was not intended to include property removed from the person and laid aside, however immediately it may be retained in the presence or constructive control or possession of the owner while so laid away from his person and out of his hands. . . . "[16]

The *McElroy* court emphasized the Legislature could not have intended the words "from the person" to have the same meaning as the phrase "immediate presence" in the definition of robbery. The court observed, "Had the legislature intended that the offense

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[13] Penal Code section 487, subdivision (c).

[14] *People v. McElroy* (1897) 116 Cal. 583.

[15] *People v. McElroy, supra*, 116 Cal. 583, 584-585.

[16] *People v. McElroy, supra*, 116 Cal. 583, 586.

should include instances of property merely in the immediate presence, but not in the manual possession about the person, it would doubtless have so provided, as it has in defining robbery. Robbery is defined as 'the felonious taking of personal property in the possession of another from his person *or immediate presence*,' etc. (Pen. Code, sec. 211), while the requirement of this offense is that it shall be 'taken *from the person.*'"[17]

The *McElroy* court explained the justifications for requiring a physical connection between the property stolen and the victim's body to sustain a felony conviction for grand theft person. "The stealing of property from the person has been from an early period under the English statutes treated as a much graver and more heinous offense than ordinary or common theft—partly by reason of the ease with which it can be perpetrated and the difficulty of guarding against it, and partly because of the greater liability of endangering the person or life of the victim. The same general reason and purpose animate the modern statutes, including our own, and, as in England, the offense is made punishable as a felony."[18]

In *McElroy*, the evidence showed the defendant had taken money from the victim's pants which were then rolled up and being used by the victim as a pillow. The *McElroy* court reversed the defendant's conviction for grand theft person because theft from the pants the victim laid aside, and which were not then literally on his person, did not constitute theft from his person.[19]

Most appellate decisions since *McElroy* strictly adhere to the *McElroy* directive of requiring a literal physical connection between the property taken and the victim's person to sustain a conviction for grand theft person. For example, *People v. DeVaughn*[20] involved the classic situation of a pickpocket. The court upheld a conviction for grand theft person although the victim was unaware his wallet was missing until he exited the streetcar. The evidence showed the defendant wore an overcoat with a slit in the outside

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[17] *People v. McElroy*, *supra*, 116 Cal. 583, 586.
[18] *People v. McElroy*, *supra*, 116 Cal. 583, 584.
[19] *People v. McElroy*, *supra*, 116 Cal. 583, 586.
[20] *People v. DeVaughn* (1923) 63 Cal.App. 513.

pocket "conveniently arranged" so it would appear he had his hand in his own pocket, but through which he could "easily insert his hand in [the victim's] trouser pocket."[21] The evidence showed the streetcar was full of passengers, the defendant had crowded against the victim, and then placed his hand in his overcoat pocket. Police officers who had the defendant under surveillance detained the defendant within minutes and discovered him in possession of the victim's wallet. The Court of Appeal held inferences from the circumstantial evidence were "irresistible" the defendant had taken the victim's wallet from his trouser pocket.[22]

Similarly, in *People v. Smith*[23] the court upheld a conviction for grand theft person where the property stolen was forcibly removed from the victim's person. In *Smith* the victim and the defendant got into an argument. The victim ran down the street with the defendant and his accomplice in pursuit. The defendant and his accomplice caught the victim and a struggle ensued with both men trying to get their hands into the victim's pocket. During the struggle, the victim's wallet fell to the street and his pants were torn off. The defendant's accomplice picked up both articles and carried them off.[24] The appellate court held the evidence showing forcible removal of the victim's property from his person was sufficient to support the defendant's conviction for grand theft person although the property was not taken until after it was off his body. "It cannot fairly be denied that both wallet and pants were taken from the person of [the victim], even though [the accomplice] picked them up from the street; clearly it was because of the conduct of defendant and [his accomplice] in scuffling with [the victim], getting into his pockets and pulling on his pants, that the wallet and the pants fell to the street where [the accomplice] immediately took possession of them, ending the struggle, and accompanied by defendant, ran away."[25]

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[21] *People v. DeVaughn, supra*, 63 Cal.App. 513.

[22] *People v. DeVaughn, supra*, 63 Cal.App. 513, 516.

[23] *People v. Smith* (1968) 268 Cal.App.2d 117.

[24] *People v. Smith, supra*, 268 Cal.App.2d 117, 118-119.

[25] *People v. Smith, supra*, 268 Cal.App.2d 117, 120.

In *People v. Huggins*[26] the court found the defendant took the victim's purse "from her person" when he grabbed it as it lay on the floor while the victim had her foot pressed against it. The Court of Appeal reasoned the crucial fact was "the purse was at all times in contact with the victim's foot. Moreover, the victim's purpose in placing the purse against her foot was to retain dominion and control over the purse, i.e., so she could know where the purse was at all times."[27] The court reasoned it would be anomalous to hold the "from the person" element would be satisfied if her purse had been touching her hand but not her foot.[28]

By contrast, in *People v. Williams*[29] the Court of Appeal held the evidence did not show a taking "from the person" and thus could not support a conviction for grand theft person. In *Williams* the victim placed her purse on the passenger seat of her car and sat down in the driver's seat. The defendant pushed the victim back into her seat and grabbed her purse from the passenger seat. The appellate court reversed the defendant's conviction for grand theft person because the undisputed evidence showed the purse was not on the victim's person, carried by her, or attached to her in any way when taken.[30]

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[26] *People v. Huggins* (1997) 51 Cal.App.4th 1654.

[27] *People v. Huggins*, *supra*, 51 Cal.App.4th 1654, 1657.

[28] *People v. Huggins*, *supra*, 51 Cal.App.4th 1654, 1658.

The court in *In re George B.* (1991) 228 Cal.App.3d 1088 expanded the "from the person" concept somewhat by affirming a conviction of grand theft person on evidence the defendant stole a bag of groceries from a shopping cart as the victim pushed the cart through the parking lot. The court reasoned the victim "had not laid the grocery bag aside or abandoned control of it. She was actively carrying the bag, not in her hands to be sure but, as described in *McElroy*, 'by other means,' i.e., through the medium of the shopping cart with which, at the time of the theft, she was both in physical contact and control. Just as the shopping cart was 'attached to [her] person' so also were its contents in precisely the same sense as are the contents of a purse which is stolen from the physical grasp of the victim." (*Id.* at p. 1092.)

[29] *People v. Williams* (1992) 9 Cal.App.4th 1465.

[30] *People v. Williams*, *supra*, 9 Cal.App.4th 1465, 1471.

The court noted under the directive of the Supreme Court's decision in *McElroy*, theft is not "from the person" unless the property is "physically attached to the victim in some manner."[31]

We note in each of these decisions the appellate courts required proof the property was in the actual physical possession of the victim at the time of the taking in order to affirm convictions for grand theft person. We also note this type of evidence is absent in the case at bar. Before Mario lost his cell phone he had been carrying it in his pants pocket and, accordingly, on his person. However, unlike the situation in *People v. DeVaughn* the evidence does not show appellant took Mario's cell phone from his pocket. Nor does the evidence show appellant tried to reach into Mario's pocket to steal his cell phone and his attempt precipitated the struggle which in turn caused the cell phone to fall to the ground permitting appellant's accomplice to pick it up as was the case in *People v. Smith*. Instead the evidence showed Mario's phone somehow fell out of his pocket at some point during the fight. Mario and his friends had already fled the scene when Roberto happened to discover Mario's cell phone lying on the ground. At this point the cell phone was far removed from Mario's person when first Roberto, and then appellant, decided to take Mario's property.[32] In these factual circumstances, and in

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[31] *People v. Williams, supra*, 9 Cal.App.4th 1465, 1472.

[32] Roberto's testimony was the only evidence presented regarding appellant's actual physical possession of Mario's cell phone. Although this evidence was presented as part of the defense case, the juvenile court was entitled to credit Roberto's testimony if it found his testimony credible on this point. (See Evid. Code, § 312 [it is for the trier of fact to determine the effect and value of the evidence presented, including the credibility of the witnesses]; Evid. Code, § 140 ["evidence" embraces many things, including testimony offered to either prove or disprove the existence or nonexistence of a fact]; see also, CALJIC No. 2.50.2 [trier of fact should consider all of the evidence bearing on every issue regardless of who produced it]; and see, *People ex rel. Dept. of Public Works v. Alexander* (1963) 212 Cal.App.2d 84, 98 [even inadmissible or otherwise incompetent evidence, if received without a proper objection or motion to strike, can be considered in support of a judgment].) Alternatively, the juvenile court could have found appellant liable as an aider and abettor. In this scenario evidence of appellant's physical possession of Mario's cell phone was unnecessary to sustain a finding he committed a theft crime in any event.

keeping with the Supreme Court's decision in *McElroy*,[33] the "from the person" element is thus lacking. Accordingly, the evidence is insufficient to support the finding of grand theft person in this case.

The People argue it was not necessary for appellant to have taken the cell phone directly from Mario's pocket to establish the "from the person" element for a conviction of grand theft person. The People rely on the decision in *In re Eduardo D.*[34] in support of their position. In *In re Eduardo D*. the victim was walking home from school when the juvenile approached and began threatening him because the victim did not want to join the juvenile's "crew." The juvenile punched the victim in the face and a fistfight ensued. When the victim tried to pull away, the juvenile hit him in the head with his boom box and then with a metal rod. The victim finally managed to free himself and ran away. During the fight the victim lost his baseball cap and backpack. While running away he turned around to see the juvenile pick up his baseball cap and backpack.[35]

The juvenile court sustained the allegation of grand theft person and declared the juvenile a ward of the juvenile court. On appeal, the juvenile argued there was insufficient evidence to sustain the finding he committed grand theft person. The appellate court disagreed. "Manuel G. [the victim] did not gladly and of his own free accord remove his backpack and cap, place them on the ground, or relinquish possession of these items. Rather, it was as the direct result of the minor's assault on Manuel G. that the cap and backpack were removed or fell to the ground. Nor did the fact that Manuel G. ran away from the assault amount to an abandonment of his possessions. The minor's initial actus reus or wrongful deed set the taking of Manuel G.'s possessions in motion. As a result, there was substantial evidence the theft was from the person of the victim."[36]

We believe *In re Eduardo D*. was wrongly decided. The flaw in the analysis of *In re Eduardo D*. is that it does not require a direct physical connection between the victim's

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[33] *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.

[34] *In re Eduardo D*. (2000) 81 Cal.App.4th 545.

[35] *In re Eduardo D., supra*, 81 Cal.App.4th 545, 547.

[36] *In re Eduardo D., supra*, 81 Cal.App.4th 545, 548.

person and the property taken at the time of the taking. The decision thus departs from the long-established rule of *McElroy* requiring the property taken be physically attached to, or at least connected in some fashion to, the victim in order to establish the "from the person" element of grand theft person. Notably, there was no evidence in *In re Eduardo D*. the juvenile even intended to commit a theft crime. The juvenile assaulted the victim because the victim did not want to join the juvenile's crew. The facts of *In re Eduardo D*. suggest the juvenile only formed the intent to take the victim's property when he found the property lying on the ground after the victim managed to extricate himself from the fight and run away. At this point the victim's cap and backpack were no longer on, attached to, or for that matter, anywhere near, the victim's person. In these circumstances the property was not taken "from the person" of the victim as *McElroy* requires.

The facts of *In re Eduardo D*. may well show an assault and a separate theft crime. However, the facts do not show a theft "from the victim's person" as this element has been defined by our state's highest court. Because we believe the decision in *In re Eduardo D*. extends the "from the person" element for a conviction of grand theft person too far, and even well beyond the "immediate presence" element for robbery, we decline to follow it.

Although we conclude appellant did not commit the offense of grand theft person, the evidence nevertheless shows his act of taking Mario's cell phone constitutes the crime of petty theft,[37] a lesser included offense of grand theft person.[38] We will therefore reduce the offense to the misdemeanor offense of petty theft pursuant to Penal Code section 1260.[39] We remand the matter to the juvenile court with directions to reduce the offense

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[37] Penal Code section 488.

[38] *People v. McElroy, supra*, 116 Cal. 583, 584, 587.

[39] Penal Code section 1260 authorizes an appellate court to reduce the degree of the offense in appropriate cases. This section provides: "The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and

in count one to the misdemeanor offense of petty theft and to recalculate appellant's theoretical maximum period of confinement. Moreover, because appellant is no longer subject to the "wobbler" offense of grand theft person, it is immaterial whether the juvenile court erred in failing to orally declare on the record whether the offense would have been punishable as a misdemeanor or felony for an adult convicted of the same offense.[40]

III. WE WILL MODIFY PROBATION CONDITION NUMBER 21 TO INCLUDE A KNOWLEDGE REQUIREMENT.

The court imposed numerous conditions of probation. Appellant challenges probation condition number 21 which directs "Do not use or possess narcotics, controlled substances, poisons, or related paraphernalia; stay away from places where users congregate." Appellant challenges the validity of this probation condition. He claims condition 21 is unreasonable, unconstitutionally vague, overbroad and impinges on his right of association. He urges this court to modify condition 21 to include a knowledge requirement.

"The Legislature has placed in trial judges a broad discretion in the sentencing process, including the determination as to whether probation is appropriate and, if so, the conditions thereof. (Pen. Code, § 1203 et seq.) A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, *and* (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' (*People v. Dominguez* (1967) 256 Cal.App.2d 623, 627.) Conversely, a condition of probation which requires or

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may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances."

[40] Welfare and Institutions Code section 702; *In re Manzy W.* (1997) 14 Cal.4th 1199, 1204 ["The language of the provision is unambiguous. It requires an explicit declaration by the juvenile court whether an offense would be a felony or misdemeanor in the case of an adult."]; Penal Code section 489, subdivision (b) [grand theft is punishable "by imprisonment in a county jail not exceeding one year or in the state prison."]

forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality."[41]

When imposing conditions of probation, the juvenile court must consider not only the circumstances of the crime, but also the minor's entire social history.[42] "'[J]uvenile probation is not, as with an adult, an act of leniency in lieu of statutory punishment; it is an ingredient of a final order for the minor's reformation and rehabilitation.' (*In re Ronnie P*. (1992) 10 Cal.App.4th 1079, 1089) . . . ." Because of this difference in treatment, "a condition of probation that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court. [Citations.]"[43]

The People argue appellant has waived or forfeited his right to object to the challenged probation condition on either reasonableness or constitutional grounds by his failure to object in the trial court.[44] The People defend the constitutionality of the probation condition as neither vague nor overbroad, claiming a knowledge requirement is implicit in the condition.[45]

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[41] *People v. Lent* (1975) 15 Cal.3d 481, 486, footnote omitted, italics added. The *Lent* court made clear a probation condition must fail all three tests before it will be declared invalid. (*Id*. at p. 486, fn. 1 [in prior cases "we inadvertently stated the test in the disjunctive rather than the conjunctive, . . ."].)

[42] *In re Tyrell J*. (1994) 8 Cal.4th 68, 81; *In re Todd L*. (1980) 113 Cal.App.3d 14, 20.

[43] *In re Tyrell J., supra*, 8 Cal.4th 68, 81.

[44] *People v. Welch* (1993) 5 Cal.4th 228, 237 ["We therefore hold that failure to timely challenge a probation condition on '*Bushman/Lent*' grounds in the trial court waives the claim on appeal."]; *In re Justin S*. (2001) 93 Cal.App.4th 811, 814 [constitutional claims are pure questions of law which may be reviewed for the first time on appeal; however, "to preserve for appeal the issue of the reasonableness of a condition of probation, a juvenile offender must object to it in the juvenile court. . . ."]; but see, *In re Josue S*. (1999) 72 Cal.App.4th 168 [contentions conditions of juvenile probation were either unreasonable or unconstitutional were waived or forfeited by failing to object in the trial court].

[45] See *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1117 [knowledge requirement was implicit in the decree, and to the extent it might not be, the trial court would impose such a limiting construction by inserting a knowledge requirement].

Without reaching the issue of waiver, forfeiture, or the constitutionality of the probation condition,[46] we agree that, reasonably read, the probation condition prohibiting appellant from using or possessing drugs and drug-related materials, and directing he stay away from places where such users congregate, necessarily includes the requirement he know the persons use illegal drugs or substances. To eliminate the possibility of any improper, overly broad interpretation of probation condition 21, however, we will modify the probation term to expressly include a knowledge requirement.[47]

DISPOSITION

Probation condition number 21 is modified to read, "Do not use or possess narcotics, controlled substances, poisons, or related paraphernalia; stay away from places where persons whom you know to use illegal drugs or substances congregate." The cause is remanded with directions for the juvenile court to reduce the offense in count one to the misdemeanor offense of petty theft and to recalculate the theoretical maximum period of confinement. In all other respects the juvenile court's order is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

JOHNSON, J.

We concur:

PERLUSS, P.J.

WOODS, J.

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[46] The Supreme Court has granted review in *In re Sheena K.* (rev. granted June 9, 2004 (S123980)) to address these very issues.

[47] See *People v. Garcia* (1993) 19 Cal.App.4th 97, 103; see also, *People v. Lopez* (1998) 66 Cal.App.4th 615, 628-629; *In re Justin S., supra*, 93 Cal.App.4th 811, 816.