Filed 2/14/06 In re Roberto A. CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re ROBERTO A., a Person Coming Under the Juvenile Court Law.	B177872
THE PEOPLE, Plaintiff and Respondent, v. ROBERTO A., Defendant and Appellant.	(Los Angeles County Super. Ct. No. PJ34850)

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.

Gerald Peters, 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, Marc E. Turchin and Jack Newman, Deputy Attorneys General, for Plaintiff and Respondent.

The juvenile court sustained allegations of a Welfare and Institutions Code section 602 petition alleging the juvenile committed assault with a deadly weapon by means of force likely to produce great bodily injury, grand theft person and attempted second degree robbery. The juvenile appeals from the court's order of wardship, claiming the evidence was insufficient to establish the offenses of attempted second-degree robbery and grand theft person. In the event the evidence is sufficient to sustain the court's findings, the juvenile claims he nevertheless may not be punished for both offenses because both theft crimes were committed with the same intent and objective against the same person. Finally, he argues the juvenile court erred in setting his maximum theoretical term of confinement.

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 two to the misdemeanor offense of petty theft, a lesser included offense of grand theft person, and remand to the juvenile court to recalculate the juvenile's maximum term of confinement. 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, Roberto A., and his friend, Jesus O., sat at a table in the corner. Mario knew Jesus and recognized appellant from school. Mario and his friends sat at a table in the middle of the restaurant.

Appellant approached Mario and "claimed" "A. K." He announced "A. K." and "Assassin Kings." Mario responded by saying "Whatever." Appellant asked Mario, "What are you staring at?" Appellant 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. Jesus and appellant followed them out. Mario and his friends walked to an alley behind McDonald's to "lose" Jesus and appellant. However, when Jesus and appellant spotted them in the alley they yelled, "Hey, hold on." Jesus and appellant set their drink containers down and approached Mario and his friends.

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

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

In the meantime Mario and Jesus had been fighting and wrestling on the ground. When Juan and appellant joined them Mario had managed to immobilize Jesus by holding him in a sort of bear hug from behind. Mario kept telling Jesus to calm down. Appellant ordered Mario to let Jesus go. Appellant 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 Jesus 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 appellant and Jesus asked if he or Mario had any money.

Mario's cell phone lying on the ground in the alley. Then Juan saw appellant 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.

Appellant testified at the adjudication hearing. He testified Mario, Alex, George and Juan were making derogatory comments while he and Jesus were eating at the McDonald's. Mario and his friends made fun of his nose. They also made unpleasant comments about Jesus's disfigured eyelids. The boys called Jesus, "ve ciego" or "blind" and made fun of how he looked. Appellant asked, "What are you looking at?" Appellant 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. Appellant explained "Assassin Kings" was not a tagging crew but was a "regular crew."

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

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

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

A Welfare and Institutions Code section 602 petition charged appellant in count one with assault with a deadly weapon by means of force likely to produce great bodily injury,[2] in count two with grand theft person,[3] in counts three and four with attempted second-degree robbery,[4] and in count five with second-degree robbery.[5]

The juvenile court sustained the allegations of counts one, two and three of the petition and declared appellant a ward of the court. In its minute order for the day, the court indicated the assault, grand theft person and the attempted second-degree robbery offenses were felonies. The juvenile court dismissed counts four and five—one of the attempted second-degree robbery counts and the second-degree robbery charge. At disposition, and after a period in confinement, the court ordered appellant home on probation. The court set a theoretical maximum period of confinement of six years.

Appellant appeals from the order of wardship.

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[2] Penal Code section 245, subdivision (a)(1).

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

[4] Penal Code sections 664 and 211.

[5] Penal Code section 211.

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 Jesus began their course of intimidation inside the restaurant. Appellant 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." Appellant and Jesus then followed Mario and his companions out of the restaurant and into the alley. In

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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.

the alley appellant loudly announced "Assassin Kings" and then asked Mario if he had any money. Any reasonable person would recognize the request for money meant appellant intended to steal whatever money Mario admitted having. When Mario said he had no money, appellant's accomplice, Jesus, tried to intimidate Mario further by punching Alex in the lip. In essence, appellant supplied the words, and Jesus, his accomplice, applied the force in the robbery attempt. 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.

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. Appellant's co-defendant raised the same issue on identical facts. We held in a published decision the theft committed was only petty theft and not theft from the person.[11]

We will reduce the offense to the misdemeanor offense of petty theft pursuant to Penal Code section 1260.[12] We remand the matter to the juvenile court with directions to

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

[11] *In re Jesus O*. (2005) 135 Cal.App.4th 237, 245-250.

[12] 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

reduce the offense in count two to the misdemeanor offense of petty theft[13] and to recalculate appellant's theoretical maximum period of confinement.[14]

III. PENAL CODE SECTION 654 DOES NOT PRECLUDE SEPARATE PUNISHMENTS FOR BOTH THEFT OFFENSES.

Appellant contends Penal Code section 654 precludes separate terms of theoretical confinement for both the petty theft and the attempted robbery offenses.

Penal Code section 654 provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . . "[15] "Section 654 does not preclude multiple convictions but only multiple punishments for a single act or indivisible course of conduct. (See *People v. Beamon* (1973) 8 Cal.3d 625.) 'The proscription against double punishment . . . is applicable where there is a course of conduct which violates more than one statute and comprises an indivisible transaction punishable under more than one statute . . . . The divisibility of a course of conduct depends upon the intent and objective of the actor, and if all the offenses are incident to

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or all of the proceedings subsequent to, or dependent upon, such judgment or order, and 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."

[13] Penal Code section 488.

[14] 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. (Welf. & Inst. Code, § 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."]; Pen. Code, § 489, subdivision (b) [grand theft is punishable "by imprisonment in a county jail not exceeding one year or in the state prison."].)

[15] Penal Code section 654, subdivision (a).

one objective, the defendant may be punished for any one of them but not for more than one.' (*People v. Bauer* (1969) 1 Cal.3d 368, 376.) In *Beamon, supra*, 78 Cal.3d 625, [the Supreme Court] stated that section 654 is applicable to 'limit punishment for multiple convictions arising out of either an act or omission or a course of conduct deemed to be indivisible in time *in those instances wherein the accused entertained a principal objective to which other objectives, if any, were merely incidental*.' (*Id*. at p. 639, italics added.)"[16]

Appellant argues his acts of asking Mario if he had any money and then taking Mario's cell phone after the fight arose from the same intent and objective, namely, to take Mario's property. Accordingly, he argues he cannot be punished for both theft crimes because a robbery or theft crime constitutes a single theft crime or robbery regardless of the number of items stolen.[17]

In the present case the juvenile court could reasonably have found the offenses constituted separate offenses.[18] First, the two crimes were separated in time. The attempted robbery was complete, and the potential victims had fled, by the time appellant saw Mario's cell phone on the ground after the fight, and as an afterthought, decided to

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[16] *People v. Miller* (1977) 18 Cal.3d 873, 885.

[17] *People v. Ortega* (1998) 19 Cal.4th 686, 699 ["When a defendant steals multiple items during the course of an indivisible transaction involving a single victim, he commits only one robbery or theft notwithstanding the number of items he steals." Citing *People v. Brito* (1991) 232 Cal.App.3d 316, 326]; *People v. Marquez* (2000) 78 Cal.App.4th 1302, 1304 ["we hold . . . when a defendant steals by force or fear more than one item during the course of an indivisible transaction involving a single victim, he commits only one robbery notwithstanding the number and ownership of the items he steals."].

[18] *In re William S*. (1989) 208 Cal.App.3d 313, 318 ['"whether the acts of which a defendant has been convicted constituted an indivisible course of conduct is primarily a factual determination, made by the trial court, on the basis of its findings concerning the defendant's intent and objective in committing the acts. . . . This determination will not be reversed on appeal unless unsupported by the evidence presented at trial."' Quoting *People v. Ferguson* (1969) 1 Cal.App.3d 68, 74-75].

take this property for himself.[19] Secondly, his taking of the cell phone was not the "same conduct" as the attempted robbery or part of a continuous course of conduct in attempting to carry out the attempted robbery. If it had been part of the "same conduct," then his taking the cell phone would have made it a completed robbery instead. The facts of the present case show appellant's finding and then taking the cell phone was an inadvertent consequence of the confrontation which occurred only in the aftermath of the attempted robbery rather than as part of the attempted robbery itself. In these circumstances, where the facts show each theft crime was committed with a different intent and objective, the misdemeanor petty theft offense may be separately punished as a separate offense.

DISPOSITION

The cause is remanded with directions for the juvenile court to reduce the offense in count two 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.

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JOHNSON, J.

We concur:

PERLUSS, P. J. WOODS, J.

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[19] Offenses separated in time and/or space may be separately punished. (See, e.g., *In re William S., supra*, 208 Cal.App.3d 313, 317 [two burglaries of the same residence committed within an hour or hours of each other were separate crimes and separately punishable]; *People v. Felix* (2001) 92 Cal.App.4th 905, 915-916 [criminal threats made at different times and at different places could be separately punished].)