Filed 11/20/12 In re T.E. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re T.E., a Person Coming Under the Juvenile Court Law.	B235735 (Los Angeles County Super. Ct. No. YJ35232)
THE PEOPLE, Plaintiff and Respondent, v. T.E., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Irma J. Brown, Judge. Modified and affirmed with directions.

Nancy K. Undem, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Colleen M. Tiedemann, Supervising Deputy Attorney General, and William N. Frank, Deputy Attorney General, for Plaintiff and Respondent.

Minor T.E. appeals from the order of wardship entered following a finding that he committed extortion by means of force or threat (Pen. Code, § 520; undesignated references are to the Penal Code), battery inflicting serious bodily injury, and dissuading a victim from reporting a crime (§ 136.1, subd. (b)(1)). Minor contends that insufficient evidence established that he dissuaded a victim, the juvenile court failed to exercise its discretion to determine whether the battery and dissuading counts were felonies, and the trial court improperly declared a maximum term of confinement even though it placed him home on probation. We strike the maximum term of confinement and remand with directions for the juvenile court to declare whether minor's battery charge was a felony or a misdemeanor, but otherwise affirm.

BACKGROUND

In September and October of 2010, minor, who was 12 years old, bullied A.J., who was 11 years old and a grade behind minor in school. (Undesignated date references pertain to 2010.) Minor had picked on A.J. since A.J. was in the second or third grade, including pushing him up against the school bus and punching him in the stomach. A.J. had feared minor since that time.

A.J. started the sixth grade on September 13. During the second week of school, minor approached A.J. during a break between classes and called him names such as "punk bitch" and "scaredy ass." A.J. walked away, but on Thursday of that week, A.J. challenged minor to fight after school. Minor agreed, but A.J. did not show up to fight. Afterward, minor asked A.J. why he did not fight minor, then pushed A.J. and ripped A.J.'s shirt. During the third week of school, minor told A.J. that if he told anyone, he would regret it. A.J. thought this meant minor "would do something bad" to him or beat him up if he told.

During the first week of October, minor pushed A.J. to the ground, causing A.J.'s chest to hit the ground, which hurt. A.J. asked minor why he had done that, and minor said he did it because he wanted to. The next week, minor began asking A.J. for money. Minor raised his arms, as if he were ready to fight, and said, "'Where's my money?'"

A.J. was intimidated by the way minor came at him and his aggressive stance, and thought minor would attack him and hurt him if he did not give minor money. For six weeks thereafter, A.J. gave minor money in amounts ranging from $5 to $20. A.J. stole money from his aunt and uncle to pay minor because he feared minor would harm him if he did not pay. Every Wednesday, minor would approach A.J. and demand money. One day, A.J. gave minor $5, and minor said, "'That's not enough.'" The first time minor demanded money, A.J. told an adult at school, who acted like it was not a big deal, but said he would report it to the principal or vice principal. A.J. heard nothing more about it from school officials.

A.J. had no money the seventh week minor demanded money. During a break between classes the next day, minor and six or seven companions attacked A.J. in the restroom. Minor stood by while the other boys beat A.J., then minor punched A.J. in the eye, kicked him in the stomach, and "stomped on" his ankle, breaking it. A.J. went to class and finished the school day without reporting the attack, but told his mother that night. The next day, A.J.'s mother took him to the doctor and they reported the incident to the police. A.J. also had bruises and scratches on his face. The parties stipulated the incident was reported to police on October 29.

Minor's mother testified that, based on "incidents that were reported" during elementary and middle school, she had told minor to stay away from A.J. "to avoid all trouble."

Minor testified in his own defense. Minor denied threatening A.J., demanding or taking money from him; being present when other boys beat him in the bathroom; pushing, hitting, hurting, or intimidating him; or ever doing "anything mean" to him. Minor clarified that he was two grades ahead of A.J. When asked if he had any problems with A.J. in elementary school, minor replied, "Nothing that was reported."

The juvenile court sustained a Welfare and Institutions Code section 602 petition alleging extortion by means of force or threat, battery inflicting serious bodily injury, and dissuading a victim from reporting a crime. It declared minor to be a ward of the court

and ordered him placed home on probation with a maximum term of confinement of 5 years 8 months. The minute order reflects that the court found all three charges to be felonies, but the court did not make any statement on this point during the adjudication or disposition hearings.

DISCUSSION

1. Sufficiency of evidence

Minor contends that there was no evidence he attempted to prevent or dissuade A.J. from reporting either the extortion or the battery. He argues that A.J. in fact reported the extortion and the attack in the bathroom, and A.J. "testified he saw no reason to tell anyone" about the incident in which minor pushed A.J. and ripped his shirt. (We found no such testimony by A.J. in our review of the record.) Minor further argues there was insufficient evidence his acts or statements were intended to influence A.J.'s testimony or behavior.

To resolve this issue, we review the whole record in the light most favorable to the juvenile court's order to decide whether substantial evidence supports the court's finding, so that a reasonable fact finder could find the allegation true beyond a reasonable doubt. (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 540.) We also presume in support of the juvenile court's finding the existence of every fact the trier could reasonably deduce from the evidence and make all reasonable inferences that support the finding. (*In re Babak S.* (1993) 18 Cal.App.4th 1077, 1089.) There is rarely direct proof of intent, which "generally must be established by circumstantial evidence and the reasonable inferences to which it gives rise." (*People v. Buckley* (1986) 183 Cal.App.3d 489, 494–495.)

The petition alleged that minor violated section 136.1, subdivision (b)(1) between the dates of September 13 and October 28. The statute makes it a misdemeanor to "attempt[] to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from" reporting "that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or

prosecuting agency or to any judge." This is a specific intent offense. (*People v. Foster* (2007) 155 Cal.App.4th 331, 335.)

The express language of the statute defeats minor's argument that the evidence was insufficient because A.J. reported the extortion to an adult at school and the battery in the bathroom to his mother. Section 136, subdivision (b) applies to "every person who *attempts to prevent or dissuade* another person who has been the victim of a crime or who is witness to a crime from" reporting "that victimization." Subdivision (d) further emphasizes, "Every person attempting the commission of any act described in subdivisions (a), (b), and (c) is guilty of the offense attempted without regard to success or failure of the attempt. The fact that no person was injured physically, or in fact intimidated, shall be no defense against any prosecution under this section." Thus, A.J.'s reports of minor's behavior do not render the evidence insufficient.

A.J. testified that during the third week of school, that is, after minor had begun bullying A.J., A.J. had challenged minor to a fight but not shown up, and minor had asked A.J. why he had not shown up to fight and then pushed A.J. and ripped his shirt, minor threatened that if A.J. told anyone, he would regret it. A.J. thought this meant minor "would do something bad" to him if he told anyone. Minor's conduct in pushing A.J. and ripping his shirt constituted a battery. Although minor's warning not to tell did not specifically reference that battery, viewed in the light most favorable to the juvenile court's order sustaining the petition, the court could reasonably infer that minor intended his statement warning A.J. not to tell to prevent A.J. from reporting that battery to an appropriate authority.

2. Felony status of wobblers

Where the offense committed by a minor would be punishable as either a misdemeanor or a felony if committed by an adult, Welfare and Institutions Code section 702 requires the court to declare whether the offense is a misdemeanor or a felony. One of the purposes of this requirement is to ensure that the court is aware of its discretion to treat the offense as either a misdemeanor or a felony. (*In re Manzy W.* (1997) 14 Cal.4th

1199, 1207.) "[T]he 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. We reiterate, however, that setting of a felony-length maximum term period of confinement, by itself, does not eliminate the need for remand when the statute has been violated. 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." (*Id.* at p. 1209.)

Minor contends, and the Attorney General aptly concedes, that a remand is required for the juvenile court to exercise its discretion and declare whether the battery and dissuading charges were felonies. We agree, in part.

The petition pleaded the dissuading charge solely under section 136.1, subdivision (b), which establishes a misdemeanor. Although dissuading can be a felony under section 136.1, subdivision (c), where the act is in furtherance of a conspiracy or is "accompanied by force or by an express or implied threat of force or violence, upon a witness or victim or any third person or the property of any victim, witness, or any third person," the petition neither referred to section 136.1, subdivision (c), nor alleged that the dissuading was in furtherance of a conspiracy or accompanied by force or by an express or implied threat of force or violence. The prosecutor did not seek to amend the petition to plead section 136.1, subdivision (c), and the juvenile court made no express finding that the dissuading was in furtherance of a conspiracy or accompanied by force or by an express or implied threat of force or violence. Accordingly, the dissuading charge is necessarily a misdemeanor.

We have read the entire record and find nothing demonstrating that the court was aware of its discretion to treat the battery as a misdemeanor. We remand for the juvenile court to make an express oral declaration on the record regarding whether the battery is a misdemeanor or a felony.

3. Maximum term of confinement

Minor contends that the juvenile court erred by setting a maximum term of confinement, even though he was placed home on probation.

When a minor is removed from the physical custody of his parent or custodian as a result of criminal violations sustained under Welfare and Institutions Code section 602, the court must specify the maximum term of imprisonment that could be imposed upon an adult convicted of the same offense or offenses. (Welf. & Inst. Code, § 726, subd. (c).)

The juvenile court was not required to set a maximum confinement term because minor was not removed from his parents' physical custody. (*In re Ali A.* (2006) 139 Cal.App.4th 569, 573.) The declared maximum confinement term has no legal effect whatsoever (*id.* at p. 574), and, although it does not prejudice minor, we agree it should be stricken.

DISPOSITION

The maximum term of confinement declared by the juvenile court is stricken and the matter is remanded for an express, oral, on-the-record declaration as to whether minor's battery charge is a felony or a misdemeanor. When the juvenile court does so, it must also expressly note that count 3 (dissuading a victim) is a misdemeanor. The order under review is otherwise affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.