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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re ANDREW S., a Person Coming Under the Juvenile Court Law.	B260267
THE PEOPLE, Plaintiff and Respondent, v. ANDREW S., Defendant and Appellant.	(Los Angeles County Super. Ct. No. KJ38949)

APPEAL from an order of the Superior Court of Los Angeles County. Phyllis Shabata, Temporary Judge. (Cal. Const., art. VI, § 21.) Affirmed.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

Andrew S. appeals from a juvenile court's order declaring him a ward of the court under Welfare and Institutions Code section 602. Andrew was ordered suitably placed with a maximum period of confinement of five years and four months. Andrew contends the juvenile court committed various sentencing errors. We affirm.

FACTS

On October 7, 2014, 15-year-old Andrew was home with his great-grandmother, S.G., his 13-year-old half-brother, Ashton C., and his uncle, John C. He argued with S.G. and broke her computer monitor in a fit of rage. The police were called and Andrew spent a few hours in detention before S.G. brought him home. Once home, Andrew began to download something on to S.G.'s computer. She told him to stop and they argued in the living room. He smashed another computer, including the screen and the mainframe.

John C. had been in his room during the argument. S.G. called out to him to help calm Andrew down. When John C. emerged from his room, Andrew retreated to the kitchen and took a knife out of a drawer. He brandished it at John C. in an attempt to keep him away. John C. grabbed a kitchen chair and held it between himself and Andrew. At one point, it appeared to John C. that Andrew intended to throw the knife at him. Both Ashton and S.G. attempted to intervene. S.G. told Andrew to leave the house and put down the knife. As Andrew walked through John C.'s room, which had a door leading to the backyard, he stuck the knife into John C.'s bed.

Andrew picked up an aluminum baseball bat while in the backyard. John C. followed Andrew outside. He restrained Andrew by holding him around the waist with one arm and trying to get him in a headlock with the other. John C. and Andrew wrestled for the bat. Ashton thought John C. would hurt Andrew if he got the bat. Andrew told Ashton to hit John C. with the bat. Otherwise, John C. would kill him. When John C. refused to release Andrew, Ashton hit John C. on the head with the bat, causing him to suffer a laceration which required eight stitches. John C. fell to the ground and passed out for a few seconds. While he was incapacitated, Andrew used the bat to break the

window to John C.'s room, which cost approximately $494 to repair, as well as another computer.

A petition under Welfare and Institutions Code section 602 was filed against Andrew on October 9, 2014,[1] alleging two counts of assault with a deadly weapon, involving the bat and the knife, and one count of vandalism and destruction of property, including a window, computer monitor, hard drive, and bed.

At trial, S.G., John C., Andrew, and Ashton testified, with little variation, to the events as described above. The prosecution argued that Andrew aided and abetted Ashton's assault against S.G. by handing him the bat and exhorting him to hit John C. Andrew's defense focused on his fear of John C. and John C.'s history of violence against family members. John C. admitted he was schizophrenic and had memory issues. S.G. testified John C. had a bad temper and sometimes became angry and mean. Andrew and Ashton witnessed these episodes.

Andrew testified John C. threatened "over and over" to "beat the shit out" of him in the kitchen. Andrew recalled John C. previously punching him, pushing him around, grabbing him by his neck, and hitting him. Andrew was afraid of John C. when he was angry. Ashton confirmed John C. threatened to "beat the living shit out of [Andrew.]" Ashton believed John C. would hurt Andrew because he had witnessed past violence by John C.

Tracy B, John C.'s half-sister, testified John C. hit her in the side of the head about two years prior to the incident in question. She was arguing with her mother and John C. poked his finger in her face. She told him to stop sticking his finger in her face and he hit her. He also hit her 19-year old daughter in the head twice when she attempted to intervene. Although the police were called, Tracy B. decided not to press charges because it would hurt their mother. Tracy B. admitted she was scared of John C. because he threatened her outside of the courtroom the day before she was to testify. He threatened to slap her if she did not shut her mouth.

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[1] A petition was also filed against Ashton and the boys were tried together. Ashton's case is not the subject of this appeal.

At the adjudication hearing, the juvenile court sustained the petition and declared Andrew a ward of the court pursuant to Welfare and Institutions Code section 602. It found true the allegations relating to all three counts, with the vandalism count reduced to a misdemeanor. It ordered Andrew to be suitably placed, with a maximum term of confinement of five years, four months. Andrew timely appealed.

DISCUSSION

On appeal, Andrew claims the trial court erred in sentencing him without regard to the prohibition under Penal Code section 654 against multiple punishment for the same act or course of conduct. He also contends the juvenile court failed to declare whether count 2 was a felony or misdemeanor in violation of Welfare and Institutions Code section 702. Finally, he takes issue with the juvenile court's order imposing a probation condition requiring him to attend school "every day" and "on time." We conclude none of these issues warrant reversal.

I. Multiple Punishment For Indivisible Course of Conduct

Andrew contends his maximum term of confinement was computed in violation of Penal Code section 654, because "[a]ll three offenses took place sequentially during a protracted family altercation at appellant's home." Thus, they were all part of a single course of conduct and subject to the prohibition under Penal Code section 654 against multiple punishment for the same act or omission. We disagree.

Penal Code section 654, which applies equally to juvenile cases, provides, "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." (§ 654, subd. (a); *People v. Harrison* (1989) 48 Cal.3d 321, 335 (*Harrison)*; *In re Billy M.* (1983) 139 Cal.App.3d 973, 978.) Section 654 extends to situations in which several offenses are committed during "'a course of conduct deemed to be indivisible in time.'" (*Harrison, supra,* at p. 335.) However, "a course of conduct

divisible in time, although directed to one objective, may give rise to multiple violations and punishment." (*People v. Beamon* (1973) 8 Cal.3d 625, 639, fn. 11.)

The California Supreme Court explained, "If the defendant had only a single intent and all of the offenses were incidental to that one objective, he may be punished only once. If, on the other hand, he harbored multiple criminal objectives, he may be punished for each statutory violation "'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.'" (*Harrison, supra*, 48 Cal.3d at p. 335.) Whether the defendant had an opportunity to reflect upon and renew his intent before committing the next offense and whether each offense created a new risk of harm are factors courts often consider in determining whether a course of conduct is divisible. (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935; *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1255.)

A trial court is vested with broad latitude to decide if Penal Code section 654 applies in a given case. Its findings will not be reversed on appeal if there is substantial evidence to support them. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) We view the evidence in the light most favorable to a respondent and presume in support of the sentence the existence of every fact the trial court reasonably could have deduced from the evidence. (*People v. Tarris* (2009) 180 Cal.App.4th 612, 627.)

Here, substantial evidence supports a finding that the offenses consisted of separate acts to which separate punishment applies. (See *People v. Cleveland* (2001) 87 Cal.App.4th 263, 267-268.) First, Andrew brandished a knife at John C. to keep him at bay. Second, Andrew picked up an aluminum bat and convinced Ashton to hit John C. with it. Third, Andrew took the bat and used it to destroy a window and another computer. Although the three incidents occurred in rapid succession, temporal proximity of the offenses does not mean they were part of one indivisible course of conduct. (*Harrison, supra,* 48 Cal.3d at p. 335.) Each of the assaults and the vandalism involved a different weapon and occurred in a different part of the house. Moreover, each offense created a new risk of harm.

We are not persuaded by Andrew's contention that the three offenses constituted an indivisible course of events because he harbored a single objective—"to rebel against [S.G]'s attempts to restrict his behavior . . . ." There is no evidence in the record to show that was his sole objective in assaulting John C. Instead, Andrew testified he brandished the knife at John C. to keep him away and persuaded Ashton to hit him with the bat because he was afraid John C. would hurt him. This testimony shows Andrew harbored at least two objectives. Even if we accept Andrew harbored a single objective, however, he had the opportunity at each juncture to reflect upon and renew his intent. There is substantial evidence to demonstrate a divisible course of conduct.

The cases relied upon by Andrew are distinguishable. In each, violence was used as a means to accomplish a primary criminal objective. Thus, the assaults were merely incidental to the primary offense. (*See People v. Flowers* (1982) 132 Cal.App.3d 584 [struck victim with intent to rob]; *People v. Chacon* (1995) 37 Cal.App.4th 52 [stabbed and choked librarian and extorted truck from guard to escape from a juvenile facility]; *People v. Le* (2006) 136 Cal.App.4th 925 [used force to steal goods from drugstore].) In this case, Andrew did not assault John C. so he could destroy the computer and the window. Neither did he destroy property in order to assault John C. One offense was not a means to accomplish the others. The juvenile court was entitled to conclude that each act was separate for purposes of Penal Code section 654.

II. Failure to Declare "Wobbler" To Be A Felony Or Misdemeanor

Andrew contends the trial court failed to declare the wobblers with which he was charged to be felonies or misdemeanors. We disagree.

Welfare and Institutions Code section 702 requires, in pertinent part: "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." Likewise, rule 5.795(a) of the Rules of Court requires the court to "expressly declare on the record that it has made such consideration and must state its determination as to whether the offense is a misdemeanor or a felony." "[T]he requirement that the juvenile court declare whether a so-called 'wobbler' offense was a

misdemeanor or felony also serves the purpose of ensuring that the juvenile court is aware of, and actually exercises, its discretion under Welfare and Institutions Code section 702." (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1207.) Failure to abide by these mandates compels a return of the matter to the juvenile court for clarification. (*In re Kenneth H.* (1983) 33 Cal.3d 616, 620; *In re Curt W.* (1982) 131 Cal.App.3d 169.)

Here, the juvenile court expressly found count 1 (assault with the bat) to be a felony and count 3 (vandalism) to be a misdemeanor, but failed to specify whether count 2 (assault with the knife) would be a felony or misdemeanor. As to count 1, Andrew argues the juvenile court failed to comply with California Rules of Court, rule 5.795(a) because even though it declared the offense to be a felony, it failed to acknowledge the count was a "wobbler." We find no merit to this argument. Welfare and Institutions Code section 702 and California Rules of Court, rule 5.795 merely require an express declaration as to whether a wobbler offense is a felony or a misdemeanor and nothing more.

As to count 2, we find the trial court's failure to declare whether it was a misdemeanor or felony to be harmless error. The Supreme Court has noted, "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. 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." (*In re Manzy W., supra*, 14 Cal.4th at p. 1209.)

The record in this case shows the juvenile court was aware count 2 was a wobbler and did exercise its discretion to determine count 2 to be a felony. Thus, remand would be futile and redundant. The juvenile court was faced with two counts of assault with a deadly weapon, a bat in count 1 and a knife in count 2. After it found count 1 to be a

felony, the juvenile court reasoned, "Count 2 is a situation where the minor brought out the knife. He wasn't having a problem or a dispute with Mr. [C.]. Mr. [C.] was called out to help when clearly Andrew was out of control at that time. I don't see self-defense. I see he had the weapon. He was within striking distance of Mr. [C.] and he was waving it or wielding it in such a manner that the assault could have resulted in Mr. [C.]'s severe injury. [¶] The indications also are that this is not a butter knife. Having looked at the knife the court finds it to be a deadly weapon . . ." The court then declared count 3 to be a misdemeanor, explaining to defense counsel that it was a wobbler. Clearly, the juvenile court understood each of the three counts were wobblers and was making a record about its reasons in declaring the assaults to be felonies and the vandalism a misdemeanor.

III. Probation Condition Regarding School Attendance

Among the numerous conditions of probation issued by the juvenile court was a requirement that Andrew "go to school every day [and] [b]e on time to each class." Andrew challenges this probation condition on the ground it is unconstitutionally overbroad and violates his due process rights. According to Andrew, the condition should have applied only to unexcused absences or tardiness. Otherwise, "the condition potentially impinges on legitimate activities, such as school field trips, or family events or emergencies. This also impacts appellant's right to privacy." We are not persuaded.

Although Andrew failed to object to this condition at sentencing, the forfeiture rule does not apply when a probation condition is challenged as unconstitutionally vague or overbroad on its face and the claim can be resolved on appeal as a pure question of law without reference to the sentencing record. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887-889.) Thus, we review constitutional challenges to a probation condition de novo. (*In re J.H.* (2007) 158 Cal.App.4th 174, 183.)

As an initial matter, we reject Andrew's contention the probation condition is unconstitutionally vague. The condition clearly informs Andrew whether his conduct comports with or violates his probation. We similarly reject Andrew's contention that his right to privacy, which includes informational privacy and autonomy privacy, has been improperly invaded. Andrew's status as a ward of the court necessarily means he no

longer enjoys the same privacy rights as someone who is not. Welfare and Institutions Code section 730, subdivision (b) provides that when a minor who is adjudged a ward of the court "is placed under the supervision of the probation officer . . . , the court may make any and all reasonable orders for the conduct of the ward . . . . The court may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." These conditions may include ones which intrude on his right to keep certain information confidential, such as drug testing, and to conduct personal activities, such as live in a place of his choosing. So long as the "reformation and rehabilitation" of the probationer is promoted, juvenile courts have broad discretion to impose conditions of probation. (Pen. Code, § 1203.1, subd. (j); *In re Luis F.* (2009) 177 Cal.App.4th 176, 188.)

There is no dispute that requiring Andrew's attendance at school promotes his reformation and rehabilitation. "School attendance has regularly been upheld as a condition of probation reasonably related to rehabilitation and prevention of future criminality." (*In re Robert M.* (1985) 163 Cal.App.3d 812, 815). The only question is whether the school attendance condition is overbroad and must be qualified to only prohibit unexcused absences and tardiness. We conclude no such modification is necessary. Probation conditions must be given a ""'reasonable and practical construction.'"" (See *People v. Lopez* (1998) 66 Cal.App.4th 615, 630.) Here, the condition that Andrew attend school every day and be on time to class is reasonably interpreted to include excusable absences such as emergencies and summer vacations. It is unlikely Andrew will be found in violation of probation, for example, if he is in the hospital rather than at school. Or, if he fails to go to school on a Saturday. (*See In re Sheena K., supra*, 40 Cal.4th at p. 890.)

Andrew compares the school attendance condition here to the ones declared constitutionally infirm in *People v. Lopez, supra*, 66 Cal.App.4th 615, *In re Shaun R.* (2010) 188 Cal.App.4th 1129, and *In re Victor L.* (2010) 182 Cal.App.4th 902. In each of those cases, the challenged probation condition failed to provide fair notice of what

conduct was prohibited. The school attendance probation condition here suffers from no such infirmity.

DISPOSITION

The challenged dispositional order is affirmed.

BIGELOW, P.J.

We concur:

FLIER, J.

GRIMES, J.