Filed 7/23/12 In re Noel O. CA2/7

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| In re NOEL O., a Person Coming Under the Juvenile Court Law. | B236674<br><br>(Los Angeles County Super. Ct. No. VJ38149) |
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>NOEL O.,<br><br>Defendant and Appellant. | |

APPEAL from an order of the Los Angeles County Superior Court, Heidi Shirley, Juvenile Court Referee. Affirmed in part and remanded for further proceedings.

Mary Bernstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Jonathan M. Krauss, Deputy Attorneys General, for Plaintiff and Respondent.

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Noel O. appeals from the juvenile court's order declarating him a continuing ward of the court and directing that he remain home on probation. He contends the evidence is insufficient to support the finding he committed a burglary and, alternatively, the court failed to determine whether the offense was a misdemeanor or a felony. We affirm in part and remand for further proceedings.

## FACTUAL AND PROCEDURAL BACKGROUND

In February 2011, while Noel was home on probation after being declared a ward of the juvenile court following a negotiated resolution of three prior petitions, the People filed a new petition under Welfare and Institutions Code section 602[1] alleging he had committed a burglary (Pen. Code, § 459) at Paramount High School between July 23, 2010 and July 26, 2010. Noel denied the allegation.

According to the evidence presented at the jurisdiction hearing, Paramount High School consists of two separate campuses; the West Campus is attended only by ninth grade students. A collection of trailers near the northeast end of the West Campus is known as "the math village." Each trailer serves as a separate classroom.

On July 26, 2009 the teacher assigned to classroom 60 in the math village for a summer school session discovered a laptop computer, a digital projector, an external hard drive and power cords were missing. Investigating the reported theft, Vice Principal Scott Law discovered the security screen of a window on the back of classroom 60 appeared to have been pried open and removed. Law also saw that the chain link fence separating the math village from the basketball courts had been cut open and two feet of fencing had been peeled back to gain access to the classrooms. In addition, a lock protecting the air conditioning vents for the classrooms had been damaged, and a padlock on a storage shed in the math village had been pried open.

Noel attended the West Campus of Paramount High School as a ninth grader two years before the burglary. During that time he lived across the street from the campus.

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[1] Statutory references are to the Welfare and Institutions Code unless otherwise indicated.

School records indicated Noel had "no course history in the math village" while a student at the school.

Latent fingerprints found on a window frame in classroom 60 and on the door of the storage shed matched Noel's. Specifically, prints of a right index finger lifted from the interior frame of the window and the right thumb lifted from the outside door of the storage shed were identified as Noel's.

After the People rested, Noel's motion to dismiss the petition for insufficient evidence was denied. Noel neither testified nor presented other evidence in his defense. Following closing argument, the court sustained the petition, finding the People had proved beyond a reasonable doubt Noel had committed the burglary. The court declared the minor a continuing ward of the court and ordered him to remain home on probation and to perform 80 hours of community service.[2]

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[2] The court also calculated a maximum term of physical confinement, based on the current petition and the earlier sustained petitions, of four years eight months. However, because Noel was placed home on probation, the court's calculation of that maximum term is of no legal effect. (See *In re Ali A.* (2006) 139 Cal.App.4th 569, 572-574 [when minor placed home on probation, juvenile court is not authorized to include maximum term of confinement in disposition order; maximum term of confinement contained in such an order is of no legal effect]; *In re Joseph G.* (1995) 32 Cal.App.4th 1735, 1744 ["[o]nly when a court orders a minor removed from the physical custody of his parent or guardian is the court required to specify the maximum term the minor can be held in physical confinement"].) Because, as will be discussed, we must return the matter to the juvenile court to declare on the record whether the burglary is a misdemeanor or a felony, rather than strike this portion of the disposition order as we normally would (see *In re Matthew A.* (2008) 165 Cal.App.4th 537, 541), we leave it to the juvenile court to modify its order on remand.

## DISCUSSION

1. *Standard of Review*

The same standard governs review of the sufficiency of evidence in juvenile cases as in adult criminal cases: "[W]e review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; see *In re Matthew A.* (2008) 165 Cal.App.4th 537, 540.)

2. *Substantial Evidence Supports the Finding Noel Committed the Burglary*

Noel does not dispute that a burglary occurred at the West Campus or that the fingerprints recovered at the criminal scene and admitted into evidence belonged to him. Rather, he contends this fingerprint evidence was insufficient to support the finding he committed the burglary because it is impossible to determine when he left the fingerprints at the school.

"Fingerprint evidence is . . . 'the strongest evidence of identity, and is ordinarily sufficient alone to identify the defendant.'" (*People v. Bailes* (1982) 129 Cal.App.3d 265, 282 (*Bailes*), quoting *People v. Gardner* (1969) 71 Cal.2d 843, 849.) "Generally

speaking whether fingerprints or palmprints of the accused are alone sufficient to identify the defendant as the criminal must depend on the particular circumstances of the case. [Citations.] Where such prints are found at the place of forced entry, particularly where such location is normally inaccessible to others, there is a reasonable basis for the inference that the prints were made there at the time of the commission of the offense and under such circumstances may alone be sufficient to identify the accused." (*People v. Atwood* (1963) 223 Cal.App.2d 316, 326, overruled on other grounds in *People v. Carter* (2003) 30 Cal.4th 1166, 1197-1198.) "The jury is entitled to draw its own inferences as to how the defendant's prints came to be on the [object] and when . . . and to weigh the evidence and opinion of the fingerprint experts." (*Gardner,* at p. 849.)

In *Bailes* the defendant was convicted of burglary based solely on the presence of his fingerprint on a bathroom window screen that had been bent away from the window to allow access to the burglarized residence. (*Bales, supra*, 129 Cal.App.3d at pp. 268-269.) The defendant's family members testified the defendant was with his father and brother on the morning of the burglary; the stolen items were never seen in the defendant's room or anywhere else in the family home; and the defendant "quite regularly" worked for his father, a plastering contractor, during which the defendant removed window screens as part of his job. (*Id.* at p. 269.) Relying on cases in which "a fingerprint, palm print, or footprint [was] left inside a structure or at a point of unusual access," the appellate court concluded the jury could reasonably infer the defendant had left his print on the screen in the process of burglarizing the residence. (*Id.* at p. 282.)

Similarly, in *People v. Preciado* (1991) 233 Cal.App.3d 1244, 1246, the sole evidence against a burglary defendant was a fingerprint left on a wristwatch box. The victim testified he did not know the defendant, and the box had remained in the victim's home since the victim acquired it 18 months before. (*Ibid.*) The appellate court held the fingerprint evidence alone was sufficient to prove defendant's identity.

Here, the evidence established the security screens on the windows of the math village classrooms were normally closed; they could be unlocked from inside the classrooms in the event of a fire. On the day the burglary was reported, a security screen

on a window of classroom 60 had been pried open. Noel's claim to the contrary notwithstanding, the juvenile court could have reasonably inferred this damaged window screen was the point of entry into classroom 60, where the laptop computer and other items had been stolen.[3]

To be sure, there was no evidence when the inside of the window had last been washed prior to the burglary. Accordingly, Noel argues his fingerprints could have been left two years earlier while he was attending school at the West Campus. (See, e.g., *People v. Trevino* (1985) 39 Cal.3d 667, 696-697 [Defendant's thumbprint was found on the victim's dresser drawer after he had been a guest in the victim's home prior to the victim's killing. Because the age of the thumbprint could not be ascertained, it was insufficient evidence of the defendant's guilt; the jury could only "'speculate as to how and when the print was made.'"] disapproved on other grounds in *People v. Johnson* (1989) 47 Cal.3d 1194, 1219-1222.) In support of this contention Noel argues (without any support in the record) the places where his fingerprints were found, classroom 60 and the storage shed, were accessible to him as a ninth grade student.

Relying on the Ninth Circuit's decision in *Mikes v. Borg* (9th Cir. 1991) 947 F.2d 353, Noel asserts this purported uncertainty as to the time of placement of his fingerprints requires a reversal. In *Mikes* the victim had been killed with one of the posts from a disassembled turnstyle the victim had purchased at a going-out-of-business sale. The only evidence linking defendant to the murder was his fingerprints on the post, found near the victim's body. (*Id.* at pp. 355-356.) In the absence of evidence the post was inaccessible to defendant prior to the murder, the Ninth Circuit held the fingerprint evidence was insufficient to prove his identity as the killer because the fingerprints could

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[3] Blossi Johnson, the fingerprint technician, testified she typically speaks to the investigating officer or the victim to ascertain the point of entry and any areas the perpetrator may have touched when she is summoned to a crime scene. To determine a window as the point of entry, Johnson testified she looks for damage to the window or to the window screen. Johnson then testified she lifted a fingerprint, subsequently certified as Noel's, from the interior window frame of classroom 60.

have been left on the post while it was publically accessible in the store before the victim purchased it. (*Id.* at pp. 358-359).)

Noel's quotations from *Mikes v. Borg*, *supra*, 947 F.2d 353, and his challenge to the sufficiency of the evidence are a thinly disguised invitation to reweigh the evidence, an invitation we decline. His unsupported assertion he could have touched the interior of the window frame in room 60 for "a variety of reasons" as a ninth grade student fails to counter the reasonable inference the print was made at the time of the crime since, unlike the defendant in *Trevino* who had been an invited guest in the victim's home, Noel had never taken a class at the math village and had not attended school at the West Campus for the preceding two years. (See *People v. Preciado, supra*, 233 Cal.App.3d at p. 1247.) That inference is reinforced by the presence of Noel's fingerprints on the storage shed, as well as on the classroom window, which had also been forced open during the burglary. (See, e.g., *People v. Bailes, supra*, 129 Cal.App.3d at p. 282.) Sufficient evidence supports the finding Noel committed the burglary.

3. *The Court Erred in Failing To Determine Whether the Burglary Is a Misdemeanor or a Felony*

Second degree burglary, the offense alleged here, may be either a misdemeanor or felony. (Pen. Code, §§ 460, 461, subd. (b).) When a juvenile is found to have committed an offense that in the case of an adult could be punished as a misdemeanor or felony, section 702 requires the juvenile court to declare the offense to be a misdemeanor or felony. (See Cal. Rules of Court, rules 5.780(e)(5) [requiring expressed declaration whether offense is misdemeanor or felony following a contested jurisdiction hearing], 5.795(a) [requiring declaration whether offense is misdemeanor or felony following disposition hearing if not previously determined].) The requirement "serves the purpose of ensuring that the juvenile court is aware of, and actually exercises, its discretion" under the statute. (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1207.) An express declaration is necessary. The court's failure to comply with this mandate requires a remand unless the record shows the juvenile court was aware of, and actually exercised, its discretion to determine the offense to be a misdemeanor or a felony. (*Id.* at p. 1209.)

In this case the juvenile court failed to declare whether the burglary committed by Noel is a misdemeanor or felony. Neither alleging the offense is a felony in the section 602 petition nor checking the felony box in the unsigned minute order is sufficient. Accordingly, as the Attorney General concedes, the matter must be remanded for the court to expressly declare on the record whether the burglary is a misdemeanor or felony.

**DISPOSITION**

The matter is remanded to the juvenile court to exercise its discretion to declare on the record whether the underlying offense is a misdemeanor or a felony and to correct its disposition order by eliminating any determination of the maximum term of confinement. In all other respects the order is affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.