Filed 8/2/12 In re Nicholas S. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re NICHOLAS S., a Person Coming Under the Juvenile Court Law.	B234892 (Los Angeles County Super. Ct. No. YJ33853)
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. NICHOLAS S., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Irma J. Brown, Judge. Affirmed.

Courtney M. Selan, 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, Senior Assistant Attorney General, Eric E. Reynolds and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

The juvenile court sustained a petition under Welfare and Institutions Code section 602 alleging that minor Nicholas S. (appellant) committed attempted second degree robbery, a felony in violation of Penal Code sections 664 and 211,[1] and misdemeanor battery in violation of section 242, on minor Brandon T. Appellant contends the evidence was insufficient to support the juvenile court's findings. Appellant further contends that if the juvenile court's true finding for attempted robbery is upheld, then the finding for battery must be reversed, because as alleged in the petition, battery is a lesser included offense.

Appellant failed to establish any error on the part of the juvenile court. As alleged in the petition, battery is not a lesser included offense of attempted robbery under the accusatory pleading test, and substantial evidence supports the juvenile court's findings as to both offenses. We therefore affirm the judgment.

BACKGROUND

On March 20, 2011, appellant and a group of minors, including Brandon, T., Walter G., and Ryan (also known as "Minky"), were at the Redondo Beach Pier. Brandon and Walter were previously acquainted with one other, as were Walter and appellant; but Brandon, appellant, and Ryan met each other for the first time that day. Appellant left the group at 7:00 p.m. but rejoined them at the bike path adjacent to the pier two hours later. The minors were consuming alcohol and smoking marijuana at the time.

At some point later that night, appellant lost his wallet and became upset. He told the other minors that he was conducting a "pocket check" and asked each of them to empty their pockets. Walter and Ryan complied, but Brandon refused. Appellant told Brandon "I'm gonna beat your ass" and began punching him with closed fists. Brandon fell to the ground and bit appellant's hand in an effort to defend himself. Appellant got on top of Brandon and continued to hit him. While doing so, appellant told Brandon "I'm gonna jack you." Brandon felt hands going through his pants pockets but could not

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

identify whose hands they were. Police officers arrived at the scene, and Brandon and appellant both fled but were subsequently apprehended.

Brandon, Walter, appellant, and Redondo Beach Police Officer La Toya Felix testified at the trial. Appellant denied consuming alcohol or marijuana that night and denied initiating the physical altercation with Brandon. Appellant and Walter both testified that Brandon had been the aggressor during the altercation and punched appellant after being asked to empty his pockets. Appellant testified that after Brandon attacked him, he grabbed Brandon by the shirt and threw him to the ground. Brandon then bit appellant's hand and would not release the bite. In an effort to dislodge Brandon, appellant punched Brandon a couple of times and then elbowed him in the chest. At that point Brandon released the bite and fled.

During his testimony at trial, Brandon admitted that he had told the responding police officers that appellant had said "I'm gonna Jack you." He testified, however, that he had lied to the officers when he made that statement, because although he initially believed appellant was the person going through his pants pockets, he now believed it was Ryan. Brandon further testified that he was afraid of appellant.

The juvenile court found that appellant's version of the incident was not credible, and noted that appellant had an obvious size advantage over Brandon. The court further found that both a battery and an attempted robbery had occurred, and that appellant was attempting to take personal property from Brandon during their struggle. The juvenile court ordered that appellant remain a ward of the court, and that a previous order of home probation remain in full force and effect. This appeal followed.

DISCUSSION

I. Standard of review

We review appellant's challenge to the sufficiency of the evidence supporting the juvenile court's findings for substantial evidence. Under this standard, we "review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that it is reasonable, credible, and of solid value such that a reasonable trier of

fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *In re Babak S.* (1993) 18 Cal.App.4th 1077, 1088.)

II. Substantial evidence supports the juvenile court's findings

A. Attempted robbery

"Robbery is 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." (§ 211.) "Robbery, like other theft crimes in California, requires the specific intent to deprive the victim of his or her property. [Citations.]" (*People v. Mumm* (2002) 98 Cal.App.4th 812, 817.) The two elements of attempted robbery are "a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (§ 21a; *People v. Medina* (2007) 41 Cal.4th 685, 694.) The intent to commit robbery must usually be inferred from the circumstances. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.)

Appellant contends the fact that he was searching for his own wallet during his struggle with Brandon cannot be used to establish the requisite intent to take personal property from another to sustain the attempted robbery finding. He argues that his good faith claim of right to ownership of the wallet he was seeking to recover negates the element of felonious taking required for robbery. (See *People v. Tufunga* (1999) 21 Cal.4th 935, 954-955.) There was evidence, however, that appellant intended to take Brandon's property and not merely reclaim his own wallet. Brandon told the responding police officers that appellant had said "I'm gonna jack you," and then tried to reach inside Brandon's pants pocket. Although Brandon repudiated his out-of-court statement by testifying at trial that he had lied to the police, he also admitted that he was afraid of appellant. In light of Brandon's expressed fear of appellant, the trial court was entitled to assign greater weight to his out-of-court statement when assessing his credibility. (See *People v. Burgener* (2003) 29 Cal.4th 833, 869.)

Brandon's out-of-court statement was sufficient to establish appellant's felonious intent. The testimony of a single witness is sufficient to uphold a judgment, even if it is contradicted by other evidence. (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 366.)

"Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Substantial evidence supports the juvenile court's finding that appellant had the requisite felonious intent for robbery and that appellant made a direct but ineffectual act toward its commission.

B. Battery

Battery is "any willful and unlawful use of force or violence upon the person of another." (§ 242.) Battery is a general intent crime. (*People v. Colantuono* (1994) 7 Cal.4th 206, 217.) The intent required for a general intent crime is simply the intent to do the act or omission in question. (*People v. Johnson* (1998) 67 Cal.App.4th 67, 72.) "Thus, the crime of battery requires that the defendant actually intend to commit a 'willful and unlawful use of force or violence upon the person of another.' [Citations.]" (*People v. Lara* (1996) 44 Cal.App.4th 102, 107.)

Appellant contends there was insufficient evidence to support the juvenile court's finding that he committed a battery upon Brandon. Appellant claims that Brandon was the aggressor, that appellant acted in self-defense, and that he used no more force than was necessary to defend against Brandon's attack. Appellant maintains that under these circumstances, he cannot be held culpable for battery.

Appellant concedes the evidence was conflicting as to who started the fight. Under the substantial evidence standard all conflicts in the evidence and issues concerning the credibility of witnesses must be resolved in favor of the juvenile court's determination. (*People v. Leyba* (1981) 29 Cal.3d 591, 596-597.) Here, Brandon testified that appellant was the aggressor and that he punched Brandon, knocked him to the ground, got on top of him, and beat him up. Substantial evidence supports the juvenile court's finding that appellant committed battery.

III. Battery is not a lesser included offense of robbery

A crime is a lesser included offense of another crime if either of two tests is satisfied -- the statutory elements test or the accusatory pleading test. (*People v. Birks*

(1998) 19 Cal.4th 108, 118.) Under the statutory elements test, an offense is included in the charged offense if all of its elements are among those in the statutory definition of the charged offense. (*Ibid*.) "Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former. [Citation.]" (*People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228.)

Appellant does not contend battery is a lesser included offense of robbery or attempted robbery under the statutory elements test. A defendant may commit attempted robbery by harboring a specific intent to commit robbery and by performing a direct and unequivocal act toward its commission, but without a physical touching that would constitute battery. (*People v. Romero* (1943) 62 Cal.App.2d 116, 121.)

Appellant claims, however, that battery is a lesser included offense of attempted robbery under the accusatory pleading test, because the petition here alleged attempted robbery as a taking by force *and* fear. He argues that battery (requiring force) is a lesser included offense of attempted robbery as pled here (referring to both fear and force). Appellant's failure to raise this argument in the juvenile court proceedings below arguably precludes him from establishing any error by the juvenile court in this regard. No error occurred, in any event.

The argument appellant raises was advanced and rejected in *People v. Wright* (1996) 52 Cal.App.4th 203 (*Wright*), in which the court held that assault was not a lesser included offense of robbery under the accusatory pleading test. (See *id*. at p. 211.) As in the instant case, the accusatory pleading in *Wright* alleged that an attempted robbery resulted from the defendant's application of "force *and* fear." (*Id*. at p. 210.) The court in *Wright* considered whether the force required to commit a robbery necessarily includes the force required to commit an assault. (*Ibid*.) The court concluded that the force necessary to commit robbery could be merely "constructive" force, defined as "'force, not actual or direct, exerted upon the person robbed, by operating upon [a] fear of injury . . . .' [Citation.]" (*Ibid*.) Included within the meaning of "force," therefore, is "'such *threat* or *display* of physical aggression toward a person as *reasonably inspires fear* of

pain, bodily harm, or death.'" (*Id*. at pp. 210-211, original italics, quoting Webster's New Internat. Dict. (3d ed. 1981) p. 887.) The court concluded: "Since the element of force can be satisfied by evidence of fear, it is possible to commit a robbery by force without necessarily committing an assault. Consequently, under the 'accusatory pleading' test, assault is not necessarily included when the pleading alleges a robbery by force." (*Wright*, at p. 211.)

The same analysis applies to the instant case. For appellant to be found to have committed attempted robbery, it was not necessary that an actual battery was committed. All that is required to sustain a charge of attempted robbery is proof of "specific intent to commit robbery and a direct unequivocal overt act toward its commission" beyond mere preparation. (*People v. Vizcarra* (1980) 110 Cal.App.3d 858, 861.) An attempted robbery may be found to have occurred even without proof of either force or fear being used. Accordingly, as alleged here, battery is not a lesser included offense of attempted robbery under the accusatory pleading test.

In addition, the allegation that the attempted robbery was perpetrated by means of "force and fear," rather than "force or fear," appears merely to have been a function of conjunctive pleading. Conjunctive pleading is employed to avoid uncertainty. (*In re Bushman* (1970) 1 Cal.3d 767, 775 (*Bushman*), disapproved on another ground by *People v. Lent* (1975) 15 Cal.3d 481, 486, fn. 1; *People v. Tuggle* (1991) 232 Cal.App.3d 147, 154, overruled on another ground by *People v. Jenkins* (1995) 10 Cal.4th 234, 252; *People v. Fritz* (1970) 11 Cal.App.3d 523, 526.) In *Bushman*, for example, the complaint had charged malicious disturbance of the peace by "'tumultuous and offensive conduct.'" (*Bushman, supra*, at p. 774.) The Supreme Court held it was nevertheless proper to instruct the jury that the defendant could be found guilty if, in accordance with the statute, he committed tumultuous *or* offensive conduct. (*Ibid*.) The court explained: "When a statute such as Penal Code section 415 lists several acts in the disjunctive, any one of which constitutes an offense, the complaint, in alleging more than one of such acts, *should do so in the conjunctive to avoid uncertainty*. [Citations.] Merely because the complaint is phrased in the conjunctive, however, does not prevent a trier of fact from

convicting a defendant if the evidence proves only one of the alleged acts. [Citation.]" (*Bushman, supra*, at p. 775, italics added.) We question whether the accusatory pleading test was intended to be met by allegations asserted merely to satisfy our Supreme Court's directive to plead in the conjunctive.

DISPOSITION

The judgment is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD