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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re SAMUEL M., a Person Coming
Under the Juvenile Court Law.

B258825

(Los Angeles County
Super. Ct. No. PJ49239)

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMUEL M.,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County,
Robert J. Schuit, Judge. Affirmed in part, reversed in part and remanded with directions.

Steven A. Torres, 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, Senior Assistant Attorney General, Steven D. Matthews and
Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

The juvenile court sustained a petition pursuant to Welfare and Institutions Code section 602 alleging Samuel M. had committed two felonies, carrying a loaded firearm as a member of a criminal street gang and possessing a loaded firearm as a minor, and two misdemeanors, resisting, obstructing or delaying a peace officer and possessing live ammunition. On appeal, Samuel contends the evidence is insufficient to support the finding he carried a loaded firearm as a gang member and the two misdemeanor findings. He also argues the court failed to declare the “wobbler” offense, possession of a firearm as a minor, a felony or a misdemeanor. We reverse and dismiss the challenged felony finding and one of the misdemeanor findings. We remand for the court to make an appropriate declaration under Welfare and Institutions Code section 702, to determine the predisposition custody credit and to recalculate the maximum term of confinement.

PROCEDURAL BACKGROUND

1. The Delinquency Petitions

On July 5, 2012, the People filed a petition pursuant to Welfare and Institutions Code section 602 alleging Samuel, then 13 years old, had committed assault on a school district police officer (Pen. Code, § 241.4)¹ and battery on school grounds (§ 243.3).

On November 14, 2012, the People filed a second Welfare and Institutions section 602 petition, this one alleging Samuel had possessed a knife with a locking blade on school grounds (§ 626.10, subd. (a)(1)) and had committed an assault on a school employee (§ 241.6) and battery on a school employee (§ 243.6).

On June 27, 2013, Samuel admitted he had assaulted a school district police officer as alleged in the July 5, 2012 petition and had possessed a knife with a locking blade on school grounds as alleged in the November 14, 2012 petition. The juvenile court found the two alleged offenses true, declared them felonies and dismissed the remaining allegations in both petitions. The court declared Samuel a ward of the juvenile court, ordered him suitably placed and calculated the maximum term of confinement as three years eight months.

¹ Statutory references are to the Penal Code, unless otherwise indicated.

On March 25, 2014, the People filed a third Welfare and Institutions Code section 602 petition, which, as amended on August 14, 2014, alleged Samuel had committed attempted second degree robbery (§§ 211, 664). Samuel was detained. On August 1, 2014, Samuel admitted the amended attempted robbery allegation. The court found the allegation true, sustained the petition, ordered Samuel to remain a ward of the juvenile court and continued the disposition hearing pending the adjudication of a fourth delinquency petition.

On July 8, 2014, the People filed the fourth Welfare and Institutions Code section 602 petition alleging Samuel, then 16 years old, had committed two felonies, carrying a loaded firearm as a member of a criminal street gang (Pen. Code, § 25850, subds. (a) & (c)(3)) and possessing a firearm as a minor (§ 29620), and two misdemeanors, resisting or delaying a peace officer (§ 148, subd. (a)(1) and possessing live ammunition (§ 29650). Samuel denied the allegations.

2. The Jurisdiction and Disposition Hearings Regarding the Fourth Petition

Los Angeles Police Officer Airam Potter testified that at 5:50 a.m. on July 5, 2014, she and her partner officer were patrolling a “gang-infested” area of Pacoima, when she noticed Samuel and three young females walking about one and half blocks ahead of her patrol car. Because the companions were juveniles, and thus violating curfew laws, Potter wanted to question them. Potter drove around the corner, hoping to reach them from the front. When she rounded the corner, Potter saw that Samuel was now walking ahead of the three females. As Potter drove closer, Samuel looked in her direction and started running while clutching the right side of his waistband. Potter testified that it appeared Samuel was holding the grip of a handgun.

Officer Potter stopped the patrol car and she and her partner gave chase on foot. Believing Samuel would attempt to escape through a nearby tunnel, Potter ran around a parked car to intercept Samuel as he ran towards her and blocked his access to the tunnel. Upon seeing Potter, Samuel looked towards a house; a large pit bull was off-leash in the front yard. Samuel stopped running and knelt on the ground, saying, “I fucked up. I

fucked up. Shit.” Potter immediately removed a .22 caliber revolver from Samuel’s waistband. Samuel waived his rights (*Miranda v. Arizona* (1966) 384 U.S. 436, 444-445 [16 L.Ed.2d 694, 86 S.Ct. 1602]) and told Potter, “I had the gun, and it was stupid, and that’s all.”

Samuel wore baggy clothing, a black and red Michael Jordan jersey, and a baseball cap with a “P” on it. Samuel told Officer Potter that he was a member of the Latin Times Pacoima gang and showed her his gang-related tattoos.

Los Angeles Police Officer Steve Smith testified as the People’s gang expert. According to Smith, Samuel was a self-admitted, active member of the Latin Times Pacoima gang.

Samuel neither testified nor presented other evidence in his defense.

At the conclusion of the hearing, the juvenile court found the allegations true, sustained the delinquency petition, and declared the offense of carrying a loaded firearm as a member of a criminal street gang a felony.

At the disposition hearing immediately following, the court ordered Samuel to remain a ward of the juvenile court and to be suitably placed. Based on Samuel’s multiple petitions, the court calculated the maximum term of confinement as six years two months.

DISCUSSION

1. Substantial Evidence Supports a Violation of section 148, subdivision (a)(1)

a. The standard of review

The same standard governs our 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.)

b. *The evidence is sufficient that Samuels delayed Officer Potter in the lawful performance of her duties*

Samuel contends there is insufficient evidence to support the finding he resisted, obstructed or delayed a peace officer within the meaning of section 148, subdivision (a)(1). To prove a violation of that statute, the People must establish that “(1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties.” (*In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329.) “The offense is a general intent crime, proscribing only the particular act (resist, delay, obstruct) without reference to an intent to do a further act or achieve a future consequence.” (*Ibid.*)

In *People v. Allen* (1980) 109 Cal.App.3d 981, the police saw the defendant with a group of people standing around an open car trunk filled with jackets and suspected the defendant of receiving and selling stolen property. (*Id.* at pp. 983-985.) The appellate court noted the defendant “knew full well . . . that the officer’s attention was centered on him and that the officer wanted to talk with him. When [the defendant] saw the police car he slammed the trunk lid down and took off at a high step. As he left the scene he

continued to look back nervously toward the officers as he hurried away. Finally, as the officers closed in, he broke into a run and eventually attempted to hide from the officers. Bystanders knew [the defendant] was aware of the officers' desire and that [he] was attempting to escape from [them]. . . . Under the ambient circumstances here involved and the totality of facts of this case, we believe that it was unequivocally clear to [the defendant] that [he was] the object of the police's attention." (*Id.* at p. 987.) The appellate court concluded there was a lawful attempt to detain the defendant and that, accordingly, his flight from the police was a violation of section 148, subdivision (a)(1). (*Ibid.*)

Samuel does not claim that he did not know Potter was a police officer or that she was not engaged in the lawful performance of her duties in attempting to detain him. He also does not assert that Potter did not have a reasonable basis to suspect a curfew violation when she approached. Rather, Samuel asserts Potter failed to order him to stop or otherwise to make known her desire to talk to him. Samuel thereby suggests he did not know or reasonably should have known of the officer's intention to detain him. According to Samuel, because Potter never commanded him to stop, his actions did not amount to criminal conduct.

Here the record shows that, similar to the actions of the defendant in *Allen*, Samuel fled as soon as he saw Officer Potter approaching in her patrol car. Unlike the situation where an individual chooses simply to walk away in the context of a request for a consensual stop, this was flight, in which Samuel continued to run, with his hand on the grip of a gun, as Potter and her partner left the car and chased Samuel on foot. Samuel only stopped when he was hemmed in by Potter and her partner. At that point, Samuel surrendered, exclaiming he had "fucked up." From this record the juvenile court could reasonably infer that it was unequivocally clear to Samuel that he was the object of the police's attention. Fully aware of the pursuing officers, Samuel elected to flee to avoid being searched and arrested for unlawfully possessing a firearm. This is sufficient evidence that Samuel delayed a peace officer in violation of section 148, subdivision (a)(1).

2. *The Evidence Is Insufficient to Support One Felony Finding and One Misdemeanor Finding*

Samuel contends, the People acknowledge, and we agree the evidence is insufficient to support (1) the felony finding he was carrying the loaded firearm as an active participant in a criminal street gang because there was no proof that he possessed the gun in concert with another gang member (see *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1137); and (2) the misdemeanor finding he was in possession of live ammunition because there was no proof that the ammunition in the recovered revolver was live (see *In re Khamphouy* (1993) 12 Cal.App.4th 1130, 1135). Those findings are reversed.

3. *The Court Erred in Failing To Declare on the Record Whether Possessing a Firearm as a Minor Is a Felony or a Misdemeanor*

Possessing a firearm as a minor may be either a felony or misdemeanor. (§ 29700, subd. (a).) When a minor is found to have committed an offense that in the case of an adult could be punished as a felony or misdemeanor, Welfare and Institutions Code section 702 requires the juvenile court expressly to declare the offense to be a misdemeanor or felony. (See also Cal. Rules of Court, rules 5.780(e)(5) [requiring express 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.) The court’s failure to comply with this mandate requires remand unless the record shows the juvenile court was aware of, and actually exercised, its discretion to determine the offense to be a felony or a misdemeanor. (*Id.* at p. 1209.)

In this case, the juvenile court failed to declare at the disposition hearing whether the offense of possessing a firearm as a minor committed by Samuel is a felony or misdemeanor. That the unsigned minute order indicates the court found the offense to be a felony is insufficient. Accordingly, as the People concede, the matter must be

remanded for the court to expressly declare on the record whether the offense of possessing a firearm as a minor is a felony or a misdemeanor.

4. The Juvenile Court Shall Determine the Predisposition Credit and Recalculate the Maximum Term of Confinement

A minor is entitled to credit against a maximum confinement time for all days of actual predisposition confinement. (*In re Eric J.* (1979) 25 Cal.3d 522, 533-536; *In re Emilio C.* (2004) 116 Cal.App.4th 1058, 1067.) “It is the juvenile court’s duty to calculate the number of days earned, and the court may not delegate that duty.” (*Ibid.*) When the court elects to aggregate the maximum period of confinement based on multiple petitions, the predisposition custody credits attributable to those petitions must be aggregated as well. (*In re Eric J., supra*, 25 Cal.3d at pp. 533-536, *In re Emilio C., supra*, 116 Cal.App.4th at pp. 1067-1068.)

The record shows that after sustaining the petition, the juvenile court ordered Samuel suitably placed and set a maximum term of confinement, but failed to award the predisposition custody credit; and the 46 days reflected on the minute order is inaccurate. While we could correct this unauthorized disposition on appeal (*In re Ricky H.* (1981) 30 Cal.3d 176, 191), on this record we are unable to determine the amount of time Samuel spent in actual custody. Accordingly, we remand for the juvenile court (1) to determine the correct predisposition credit, taking into account predisposition credit that Samuel had accrued pursuant to the previously sustained petitions. (*In re Antwone R.* (2001) 87 Cal.App.4th 348, 353), and (2) to recalculate the maximum term of confinement in light of our reversal of the findings Samuel was carrying a loaded firearm as a gang member and possessed live ammunition, as well as if the court determines the possession of the firearm to be a misdemeanor offense.

DISPOSITION

The true findings that Samuel was carrying a firearm as an active participant in a criminal street gang and was in possession of live ammunition are reversed and dismissed. The order of disposition is vacated and the cause remanded for the juvenile court to declare whether the offense of possession of a firearm as a minor is a felony or a misdemeanor and to properly calculate the predisposition custody credit and maximum term of confinement. In all other respects, the orders under review are affirmed.

ZELON, J.

We concur:

PERLUSS, P.J.

STROBEL, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.