Filed 6/6/12 In re K.D. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re K.D., a Person Coming Under the Juvenile Court Law.	B233627 (Los Angeles County Super. Ct. No. PJ40477)
THE PEOPLE, Plaintiff and Respondent, v. K.D., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court for Los Angeles County, Benjamin R. Campos, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed in part, reversed in part and remanded.

Bruce G. Finebaum, 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, Paul M. Roadarmel, Jr., and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

Minor K.D. appeals from a dispositional order placing him in the custody the Probation Department for suitable placement, with a maximum term of confinement of four years, after the juvenile court sustained a petition charging him with second degree burglary of a vehicle (Pen. Code,[1] § 459) and alleging that he committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(A)). He contends there was insufficient evidence to support the true finding on the burglary or on the gang allegation. The Attorney General concedes there was no evidence presented to support the gang allegation. We reverse the true finding as to the gang allegation and direct the juvenile court on remand to modify the dispositional order to reflect a maximum term of confinement of three years. In all other respects, we affirm the order.

BACKGROUND

In the week before April 1, 2011, there had been a rise in automobile burglaries in the area of Seward Street and Lexington Avenue in Hollywood.[2] A task force was assigned to look for burglars in that neighborhood. Los Angeles Police Officer Joseph Stevenson was part of that task force. At around 10:30 p.m. on April 1, he was in his parked patrol car with two other officers, facing southbound, when he saw a young man, identified as the minor, walking eastbound on Lexington. The minor stopped at the corner, and looked around in all directions. Officer Stevenson observed him for a few minutes, and noticed that he appeared to be ducking behind objects when cars passed by, as though he was

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[1] Further undesignated statutory references are to the Penal Code.

[2] The reporter's transcript misspells Seward as "Stewart." The probation report uses the correct spelling.

trying to evade detection. Based upon his training, it appeared to Officer Stevenson that the minor was acting as a lookout for someone.

Officer Stevenson and the other two officers got out of the patrol car and started walking toward the minor. The minor did not see them immediately, but when he did, he seemed surprised. The minor walked toward the officers and started to talk very loudly, as though he were 50 yards away even though he was only a few feet from them. Almost immediately, Officer Stevenson heard the sound of a window breaking nearby. He went to investigate while the other officers stayed with the minor. He found a car on Lexington, about 50 to 75 feet from the corner where the minor was standing. The car had a broken passenger window and a person was by the car. When he got there, the person threw some articles up in the air, got down on the ground, and started crying.

The minor, the person found by the car, and another person were arrested in connection with the incident. A petition against the minor was filed under Welfare and Institutions Code section 602, alleging one count of second degree burglary of a vehicle in violation of section 459, and further alleging that the crime was committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(A). At the adjudication hearing before Commissioner Robert Totten, Officer Stevenson testified about his observations of the minor and burglary,[3] and another officer testified that two other people, twin brothers, were arrested with the minor.

Commissioner Totten found the burglary count to be true based upon the fact that the minor spoke in an unusually raised voice when he was contacted by Officer Stevenson, which the court believed was for the purpose of warning the

[3] Officer Stevenson's testimony was given in connection with a suppression motion, but the parties stipulated that the testimony would also be used for the adjudication.

others, and because of the minor's evasive conduct whenever a car drove by. The court sent the matter to a different department for disposition before the judge who was hearing another matter involving the minor. The disposition hearing was continued twice, and ultimately was held before Commissioner Benjamin Campos, along with two other matters.[4] The court ordered that the minor be suitably placed, and that the maximum period of confinement was four years.

DISCUSSION

A. *Sufficiency of the Evidence to Support the Burglary Count*

The minor contends there was insufficient evidence to support the burglary allegation because there was no evidence that he was connected to the two other suspects who were arrested. He argues that the fact that he spoke in a loud voice when contacted by Officer Stevenson does not support an implication that he was acting as a lookout because the car window was smashed after he spoke, and the fact that he was present at the scene and was looking around is not sufficient to show that he intended to aid or abet in the burglary. We disagree.

"In considering the sufficiency of the evidence in a juvenile proceeding, the appellate court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. We must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence . . . and we must make all reasonable inferences that support the finding of the juvenile court. [Citation.]' [Citations.]" (*In re Babak S.* (1993) 18 Cal.App.4th 1077, 1088-1089.)

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[4] At the first of the continued disposition hearings, the juvenile referee presiding over the matter noted that the adjudication "was a sustained petition for a charge of burglary and with a gang enhancement."

The minor is correct that evidence that a defendant's mere presence at the scene of a crime is insufficient to establish that the defendant aided or abetted the crime; there must be evidence that the defendant acted with knowledge of the perpetrator's criminal purpose and with the intent to commit, encourage, or facilitate the commission of the offense. (Citing *People v. McCoy* (2001) 25 Cal.4th 1111, 1118.) In this case, however, there *was* evidence from which a reasonable trier of fact could infer that the minor intended to facilitate the commission of the burglary. Officer Stevenson's observation that the minor appeared to be looking in all directions and hiding from passing cars, and that his speech was unusually loud when the officers were within a few feet away from him, support the juvenile court's inference that the minor acted as a lookout and attempted to warn the perpetrators. This conduct is sufficient for a reasonable trier of fact to conclude that the minor aided and abetted in the commission of the burglary. (See *People v. Bishop* (1988) 202 Cal.App.3d 273, 281, fn. 6 ["'It has been consistently held that one who was present for the purpose of diverting suspicion, or to serve as a lookout, or to give warning of approach of anyone seeking to interfere . . . is a principal in the crime committed. Any one of the above purposes mentioned would be sufficient upon which to base . . . aiding and abetting'"].)

B. *Sufficiency of the Evidence to Support the Gang Enhancement*

As noted, there were only two witnesses who testified at the adjudication hearing, Officer Stevenson and another officer, neither of whom provided any testimony related to the gang allegation. Although the juvenile court made no express finding on the allegation at that hearing, the four-year maximum term of confinement imposed at the disposition hearing appears to include time for the gang enhancement, i.e., the upper term of three years for the burglary (§ 459) plus

one year for the gang enhancement (§ 186.22, subd. (b)(1)(A)). The minor challenges the sufficiency of the evidence to support the implied true finding on the gang allegation, and the Attorney General properly concedes there is insufficient evidence to support the finding. Accordingly, we reverse the true finding on the gang enhancement.[5]

DISPOSITION

The true finding on the section 186.22, subdivision (b)(1)(A) gang allegation is reversed, and the juvenile court is directed on remand to modify the disposition order to reflect a maximum term of confinement of three years. In all other respects, the judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J. MANELLA, J.

[5] We note that the minor's appellate counsel submitted more than *nine* pages of argument on this issue, most of which addressed general law on gang enhancements, none of which was necessary for the purposes of this case. Given the complete absence of evidence on the gang allegation, a short discussion should have sufficed. In the future, counsel would do well to avoid such excessive briefing on such a straightforward issue.