Filed 2/23/12 In re M.J. CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re M.J., a Person Coming Under the Juvenile Court Law.	B232776 (Los Angeles County Super. Ct. No. PJ46101)
THE PEOPLE, Plaintiff and Respondent, v. M.J., Defendant and Appellant.	

APPEAL from the judgment of the Superior Court of Los Angeles County. Fred J. Fujioka, Judge. Affirmed as modified.

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, Assistant Attorney General, Victoria B. Wilson and Steven D. Matthews, Deputy Attorneys General, for Plaintiff and Respondent.

The juvenile court sustained a petition filed pursuant to Welfare and Institutions Code section 602, and found minor M.J. (defendant) committed the offense of felony second degree robbery (Pen. Code, § 211) when he took a classmate's mobile phone under the pretense he wanted to borrow it, and threatened to shoot the victim when he asked for it back. Defendant was placed at home on probation. The dispositional minute order recited a maximum term of confinement of five years. On appeal, defendant contends insufficient evidence supports his conviction, reasoning the crime was not accomplished by force or fear, but was instead accomplished by false pretenses and therefore was theft instead of robbery. Defendant also contends the juvenile court erred in setting a maximum term of confinement. We modify the judgment and affirm.

FACTS

On February 9, 2010, defendant and victim M.G. were ninth graders at East Valley High School in the County of Los Angeles. Defendant and M.G. were in computer class, sitting next to each other. M.G. was texting on his mobile phone when defendant asked to borrow it. After M.G. handed the phone to defendant, defendant placed it in his pocket. When M.G. asked for the phone back, defendant told him "[n]o," and that he "just got jacked." Defendant told M.G. "he wasn't going to give it back, and if [M.G.] told someone, [M.G.] was going to get shot." M.G. let defendant keep his phone because he was scared. This happened while class was in session, and the teacher was in the classroom. After school, M.G. told his mother, and the phone was recovered by campus police the following day after a report was made.

The trial court sustained the petition, concluding the victim was afraid, and the "robbery would have stopped if he raised his hand and told the teacher. The fear kept him from retrieving his phone . . . . [¶] [T]he robbery doesn't complete until the perpetrator gets into a position of safety and the minor used fear in order to effectuate his getaway in order to get away from the victim when the class was over." Defendant was placed at home on probation. The dispositional minute order recited that the "maximum possible confinement is 5 years."

DISCUSSION

1. Sufficiency of the Evidence

When the sufficiency of the evidence is challenged on appeal, our role in reviewing the evidence is limited. "'The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. The court must view the entire record in the light most favorable to the judgment . . . to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the minor guilty beyond a reasonable doubt. In making such a determination we must view the evidence in a light most favorable to respondent and presume in support of the judgment . . . the existence of every fact the trier could reasonably deduce from the evidence. [Citations.]' [Citation.]" (*In re Paul C.* (1990) 221 Cal.App.3d 43, 52.)

"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." (Pen. Code, § 211.) It is a form of aggravated larceny. (Cf. § 484; *People v. Gomez* (2008) 43 Cal.4th 249, 254 (*Gomez*).) Similar to larceny, the "taking" element of robbery involves both the initial capture of the property, as well as its carrying away. (See, e.g., *People v. Khoury* (1980) 108 Cal.App.3d Supp. 1, 4 [discussing carrying away element of larceny]; *Gomez*, *supra*, at pp. 254-255.) The aggravating factors differentiating a robbery from a larceny include the use of force or fear and the taking of property from the victim's presence. (*Gomez*, at p. 255.)

Even if property is initially taken without use of force or fear, the crime may become a robbery if force or fear is used to retain the property while it is being carried away. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn. 8 ["mere theft becomes robbery if the perpetrator, having gained possession of the property without use of force or fear, resorts to force or fear while carrying away the loot"]; *People v. Estes* (1983) 147 Cal.App.3d 23, 27-28 [defendant who stole an item from a store, was confronted by store security outside the store and used force to retain possession, was properly found guilty of robbery even though use of force did not coincide with taking the property].) The

robbery continues "so long as the loot is being carried away to a place of temporary safety." (*Cooper*, *supra*, at p. 1165.) The "force or fear" element may occur at any point during which the property is being carried to a place of temporary safety, as the crime has not yet concluded. (*Gomez*, *supra*, 43 Cal.4th at p. 257.) The scene of the crime is not a place of temporary safety, especially when the victim remains present there. (*People v. Ramirez* (1995) 39 Cal.App.4th 1369, 1375.)

Defendant contends he did not commit a robbery when he took M.G.'s phone because "[o]nce appellant had received the cell phone, he had no ability to 'flee' or leave M.G.'s presence, even if he had wanted to do so. At the time that [defendant] had acquired the cell phone, it was clear that he had already decided that he was not going to give the cell phone back, and that as far as he was concerned, the offense was over and done with. . . . The subsequent threat, warning M.G. not to 'snitch' was not therefore part of the theft, but was a separate and distinct offense, relating back to, but not part of the taking." In essence, defendant argues a theft had been completed before any threats were made, because he reached a place of "temporary safety" (since he could not leave class while it was in session).

Defendant's argument is entirely without merit. Defendant forcefully retained the property of his classmate with threats of violence. He had not reached a place of temporary safety when the threats were made, as he was still seated in class, next to the victim, at the scene of the crime. Had M.G. not been threatened and scared, he could have raised his hand and asked his teacher for help. Therefore, sufficient evidence supports the trial court's conclusion the crime had not ended when defendant threatened M.G., preventing him from seeking help from his teacher and facilitating defendant's getaway.

2. Maximum Term of Confinement

Although the juvenile court placed defendant home on probation, a maximum term of confinement appears in the dispositional minute order. This term of confinement had no legal effect. Welfare and Institutions Code section 726, subdivision (c) generally requires the juvenile court to specify a maximum term of confinement not exceeding the time of confinement allowable for an adult convicted of the same offense. But when a

minor remains in the physical custody of his parents, section 726, subdivision (c) does not apply. (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 541 (*Matthew A.*); *In re Ali A.* (2006) 139 Cal.App.4th 569, 573-574 (*Ali A.*).) The order setting a maximum term of confinement is not authorized by statute. (*Matthew A.*, at p. 541.)

In *Matthew A.*, this court concluded juvenile courts that specify a term of confinement "may have the best of reasons, such as 'sending a message' to the juvenile that the transgression was serious. But if the Legislature thought that this should be done, it would have been easy to write the statute to permit this practice. We think it should cease." (*Matthew A.*, *supra*, 165 Cal.App.4th at p. 541.) We therefore concluded the improper term of confinement should be stricken. Respondent cites *Ali A.* for the proposition that an improper designation of a maximum confinement term does not prejudice a minor because it has no legal effect, and therefore need not be stricken. However, striking the confinement term avoids the possibility that it might be used as a benchmark in future proceedings, and provides defendant with a legally correct dispositional order. As explained in *Matthew A.*, we believe the better practice is to strike the statutorily unjustified order setting a maximum term of confinement.

DISPOSITION

The April 21, 2011 judgment is modified as follows: The maximum term of confinement is stricken. As modified, the judgment is affirmed.

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GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J. FLIER, J.