Filed 4/25/12 In re Monica R. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re MONICA R., a Person Coming Under the Juvenile Court Law.	B233636 (Los Angeles County Super. Ct. No. VJ39930)
THE PEOPLE, Plaintiff and Respondent, v. MONICA R., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Fumiko Wasserman, Judge. Affirmed as modified.

Zoe Rawson, 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, Scott A. Taryle and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

Monica R., a minor, appeals from an order declaring her a ward of the juvenile court pursuant to Welfare and Institutions Code section 602[1] by reason of her having committed the crime of misdemeanor battery (Pen. Code, § 242). The juvenile court placed appellant home on probation and set a maximum term of confinement of six months. Appellant contends that (1) there is insufficient evidence to support the finding that she committed battery on her mother, and (2) the juvenile court abused its discretion by setting a maximum term of confinement because appellant was not removed from the custody of her parents.

We modify and affirm.

FACTUAL BACKGROUND

On July 12, 2010, near 3:00 p.m., appellant got into a screaming argument with her mother at their home. During the argument, appellant walked out of her house to go to her grandmother's house. Her mother followed and grabbed appellant to stop her from leaving. Appellant told her mother to "get away" two or three times. Appellant's mother held appellant in a bear hug. In an effort to free herself, appellant pushed her mother in the chest and then kicked her in the leg or thigh. The two remained tangled in a hold, turning and pivoting, finally falling to the ground. Appellant's sister separated them, and appellant walked away from the house.

In defense, appellant testified that she left the house to prevent the argument from escalating. She told her mother that she was going to her grandmother's house to cool off, but her mother grabbed her in a bear hug from behind to stop her. Appellant attempted to squirm out of the hold and ended up facing her mother with her hands against her mother, while appellant was tightly in her mother's grasp. She did not push her hands out to push her mother because her hands were held close to her mother. She and her mother began moving around, appellant flailing her legs as her

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicate.

mother tried to carry her inside. Appellant inadvertently kicked her mother. She did not intend to do so. It was an accident.

DISCUSSION

I. Sufficiency of the evidence

A. Standard of review

"The same standard governs review of the sufficiency of evidence in adult criminal cases and juvenile cases: we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable fact finder could find guilt beyond a reasonable doubt. [Citations.]" (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 540 (*Matthew A.*).) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) Reversal on this ground is unwarranted unless '"upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]."' (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) This standard applies whether direct or circumstantial evidence is involved. (*People v. Catlin* (2001) 26 Cal.4th 81, 139.)

B. Contention

Appellant contends that the evidence is insufficient to support the finding that she intended to commit a battery against her mother. This contention lacks merit.

C. Parent's right to discipline child

Parents have a legal duty "to exercise reasonable care, supervision, protection, and control over their minor child." (*Brekke v. Wills* (2005) 125 Cal.App.4th 1400, 1410–1411.) To fulfill this duty, parents have a right to reasonably discipline their children and may administer reasonable punishment without being criminally liable. (*People v. Clark* (2011) 201 Cal.App.4th 235, 249; 10 Witkin, Summary of Cal. Law (10th ed. 2005) Parent and Child, § 289, p. 387 ["A parent has the right to chastise his or her children moderately . . ."]; *Emery v. Emery* (1955) 45 Cal.2d 421, 429–430; *People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1050 (*Whitehurst*).)

The right to discipline a child includes the right to inflict reasonable corporal punishment. (*Whitehurst, supra,* 9 Cal.App.4th at p. 1050.) "[T]he difference between legitimate discipline of a child and battery or child abuse is one of degree, that whether corporal punishment falls within parameters of parent's right to discipline involves consideration of necessity for the punishment and whether amount of punishment was reasonable or excessive: . . ." (*People v. Smith* (2002) 98 Cal.App.4th 1182, 1195.)

Here, where mother was dealing with a recalcitrant child, who refused to obey her proper and reasonable order, mother was allowed to impose reasonable discipline. (*Whitehurst, supra,* 9 Cal.App.4th at p. 1050.) Mother first told appellant not to leave the house and was ignored. She then utilized only reasonable force to effectuate her instruction. She grabbed appellant in a bear hug and endeavored to force appellant back into the house. Appellant's mother did not use any weapon or other object to stop appellant, did not injure or hurt appellant and made no threats. This degree of force was both necessary and reasonable.

Because her mother's conduct was lawful, appellant cannot justify her battery as a reasonable response in self-defense. Furthermore, appellant had no honest *and reasonable* belief that bodily injury was imminent. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064–1065.) Consequently, if appellant committed a battery, it was not justified.

D. Evidence of battery

Battery is the willful and unlawful use of force or violence on the person of another. (*People v. Duchon* (1958) 165 Cal.App.2d 690, 693.) Both in tort and in criminal law, the least touching may constitute battery. (*People v. Page* (2004) 123 Cal.App.4th 1466, 1473–1474, fn. 1.) Only a slight and unprivileged touching is needed to satisfy the force requirement of a criminal battery. (*People v. Ausbie* (2004) 123 Cal.App.4th 855, 860, fn. 2, disapproved on other grounds in *People v. Reed* (2006) 38 Cal.4th 1224.)

Battery is a general intent crime. (*People v. Colantuono* (1994) 7 Cal.4th 206, 217; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 (*Lara*).) As a result, it necessarily excludes culpability for use of force or violence accomplished with a lesser state of mind, such as criminal negligence. (*Lara, supra,* at p. 107.) 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.'" (*Lara, supra,* at p. 107.)

Despite appellant's self-serving claim that she only accidentally kicked her mother, there was sufficient other evidence to support the juvenile court's true finding on the battery allegation. Appellant had asserted her right to go to her grandmother's despite her mother's wishes that she not go. Appellant admitted that when grabbed by her mother, she told her mother to "get away" multiple times, and hence her actions were geared to freeing herself. She pushed her mother (also a battery) and flailed her legs. Appellant would have had to have known that flailing her legs would likely strike her mother, as they were in such close proximity. Appellant cannot reasonably claim that the likely consequences of her actions were not intended. Additionally, appellant's brother testified that she kicked their mother in the leg, without suggesting that he believed it to be accidental. The juvenile court could reasonably conclude from these facts that appellant was doing everything in her power to escape her mother's grasp and go to her grandmother's house, including kicking her mother to free herself.

We agree with the People that appellant's reliance on *Lara* is unavailing. In that case, the defendant was walking away from his girlfriend when she grabbed his shirt with such force that the buttons popped off. (*Lara, supra,* 44 Cal.App.4th at p. 106.) When he turned to free himself, the side of his right hand hit her in the nose "by accident." (*Id.* at pp. 105–106.) He was convicted of battery. The issue on appeal was not, as it is here, whether there was sufficient evidence to support the verdict, but rather whether the jury had been incorrectly instructed that it could find him guilty based on criminal negligence rather than general intent. The Court of Appeal

concluded that the jury was wrongly instructed. Because there was no way to tell if the jury found the defendant guilty based upon the lesser intent, it reversed for a new trial. (*Id.* at p. 111.) *Lara* has no application to the facts before us.

II. Maximum term of confinement

A. Background

At the disposition hearing, the juvenile court ordered appellant home on probation. It set a maximum term of confinement of six months.

B. Contention

Appellant contends that the minute order should be corrected to delete any reference to the maximum term of confinement. She argues that that term is only appropriate when appellant is removed from parental custody as set forth in section 726, subdivision (c).[2]

The People, relying on *In re Ali A.* (2006) 139 Cal.App.4th 569 (*Ali A.*), contend that while the juvenile court was not required to set a maximum term of confinement, such a term does not prejudice appellant because it has no legal effect and does not require reversal or remand.

C. No maximum term where custody remains with parents

In *Ali A.*, the minor was placed in the custody of his parents under the supervision of a probation officer, and the juvenile court set the maximum confinement term at three years, the upper term for the offense. The minor contended that the juvenile court failed to exercise its discretion in setting the maximum term of

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[2] Section 726, subdivision (c) provides, in pertinent part, "If the minor is removed from the physical custody of his or her parent or guardian as the result of an order of wardship made pursuant to Section 602, the order shall specify that the minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court. [¶] As used in this section and in Section 731, 'maximum term of imprisonment' means the longest of the three time periods set forth in paragraph (2) of subdivision (a) of Section 1170 of the Penal Code . . . ."

physical confinement pursuant to former section 731, subdivision (b), (now section 731, subd. (c)) because that section permits the juvenile court to set the maximum term of confinement at less than the highest of the three statutory terms for the offense.[3] The reviewing court rejected the minor's contention, observing that this provision of former section 731, subdivision (b) applies only to commitments to the California Youth Authority. (*Ali A.*, *supra*, 139 Cal.App.4th at pp. 572–573.)

The Court of Appeal continued, "Given that the juvenile court did not commit the minor to the CYA, one may well ask why the [juvenile] court's dispositional order included a maximum term of confinement." (*Ali A.*, *supra*, 139 Cal.App.4th at p. 573.) The court concluded that since the minor had not been committed to the California Youth Authority or removed from the custody of his parents, and therefore neither former section 731, subdivision (b) nor section 726, subdivision (c) was applicable, the juvenile court had no discretion—or was not required—to set a maximum term of confinement. (*Ali A.*, *supra*, at pp. 571, 573.)

The *Ali A.* court nonetheless affirmed the order of probation, finding that the maximum term of confinement contained in the dispositional order was "of no legal effect" until such time as the minor violated probation, a section 777 hearing was held, and the court modified the current disposition and removed him from his parents' custody, at which time the juvenile court would have to set and/or declare a maximum

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[3] Former section 731, subdivision (b), as modified effective January 1, 2004, provided: "[a] minor committed to the Department of the Youth Authority may not be held in physical confinement for a period of time in excess of the maximum period of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court. A minor committed to the Department of the Youth Authority also may not be held in physical confinement for a period of time in excess of the maximum term of physical confinement set by the court based upon the facts and circumstances of the matter or matters which brought or continued the minor under the jurisdiction of the juvenile court, which may not exceed the maximum period of adult confinement as determined pursuant to this section. This section does not limit the power of the Youth Authority Board to retain the minor on parole status for the period permitted by Section 1769."

term of confinement in accordance with section 726, subdivision (c) and, if applicable, former section 731, subdivision (b). (*Ali A.*, *supra*, 139 Cal.App.4th at pp. 573–574.) Concluding that the minor was "not prejudiced by the presence of [the maximum confinement] term," the court held that there was "no basis for reversal or remand in this case." (*Id*. at p. 574.) In this regard, the court noted, "The minor suggests that if this maximum term of confinement is not stricken and he is later committed to the CYA, the judge responsible for that disposition may believe he or she is required to impose the three-year maximum term contained in the present order. We trust that will not occur, as this opinion will be part of the file in this proceeding, and we have made it clear that the maximum term of confinement in the present order is of no legal effect." (*Id*. at p. 574, fn. 2.)

We agree with appellant that the maximum term of confinement must be stricken. While, as the *Ali A.* court observed, no remand or reversal is required, appellant is entitled to a dispositional order that accurately reflects the punishment imposed upon her at the time of the dispositional hearing. Not only is the setting of a maximum term of confinement not required where, as here, a minor is not removed from the physical custody of his or her parents, but, should future proceedings result in a commitment to the Division of Juvenile Facilities, the maximum term of confinement gratuitously set at the time probation is granted may not be the term ultimately imposed.

Rather than trusting or assuming that a future court will refer to an appellate opinion contained in the file if further proceedings occur upon violation of probation, we believe the better practice is to strike the order setting a maximum term of confinement. (See *Matthew A.*, *supra*, 165 Cal.App.4th at p. 541 ["Appellant was not removed from his mother's physical custody. This means that the necessary predicate for specifying a term of imprisonment does not exist. The sentencing authority of a court in almost all instances is prescribed by statutory law, as it is in this case. The statute did not empower the court to specify a term of imprisonment and that should have been the end of the matter. Yet, as others courts have done, this court

nonetheless specified a term, namely the maximum term. Courts utilizing this technique 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. The criticism of this practice in prior opinions without actually ordering a correction of the disposition seems to have had little effect. Thus, our order is to strike the specification of a term of imprisonment"].)

DISPOSITION

The order of wardship is modified by striking the order setting a six-month maximum term of confinement. In all other respects, the order of wardship is affirmed. On remand, the juvenile court is directed to correct the minute order of the disposition hearing accordingly.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD