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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re LUIS C., a Person Coming Under the Juvenile Court Law.	2d Crim. No. B268126 (Super. Ct. No. PJ51339) (Los Angeles County)
THE PEOPLE, Plaintiff and Respondent, v. LUIS C., Defendant and Appellant.	

Over the course of several months, appellant Luis C. grabbed the buttocks and/or vagina of four different teenage girls and grabbed an adult woman's inner thigh. In appealing the juvenile court's orders sustaining three counts of misdemeanor sexual battery (Pen. Code,[1] § 243.4, subd. (e)(1)), two counts of

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

child molestation (§ 647.6, subd. (a)(1)), and other charges, appellant contends (1) the sexual battery count involving his adult victim must be reversed because the inner thigh is not an "intimate part" of the body, as that term is statutorily defined; (2) the probation condition that he "must not engage in any sexual touching of any person" is vague and overbroad; and (3) a clerical transposition of the number "21" must be corrected to "12."

We reverse the true finding on the challenged sexual battery count, remand for further proceedings, and order correction of the identified clerical error. We also order that the challenged probation condition be modified to state that appellant "must not touch any person without his or her prior consent." In so modifying the condition, we urge appellant to consider the oft-cited declaration on the limits of individual liberty: Your freedom ends where my nose begins.[2]

FACTS AND PROCEDURAL HISTORY

The assaults on appellant's four teenage victims are remarkably similar and reflect the behavior of a "serial groper." In each instance, he surreptitiously approached the victim on his bicycle as she was walking to or from school and grabbed her buttocks and/or vagina. He also used his fingers to "penetrate" one victim's vagina through her jeans.

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[2] The expression is a variant of "'[y]our right to swing your arms ends just where the other man's nose begins.'" (Chafee, *Freedom of Speech in War Time*, 32 Harvard L.Rev. 932, 957 (1919); see *Burwell v. Hobby Lobby Stores, Inc.* (2014) __ U.S. __, 134 S.Ct. 2751, 2790 (dis. opn. of Ginsburg, J. [quoting same].) Although the expression generally refers to the freedom of speech, it is equally apropos here.

Appellant's adult victim (M.G.) was walking toward a mall parking lot when appellant ran up and grabbed her "inner thigh . . . just below her buttocks." He simultaneously grabbed her purse with his other hand. M.G. screamed and appellant ran away without taking her purse.

Appellant was subsequently charged with three counts of sexual battery, two counts of child molestation, and one count each of sexual penetration with a foreign object of a minor over the age of 14 (§ 289, subd. (a)(1)), attempted robbery (§§ 211, 664), and driving without a license (Veh. Code, § 12500, subd. (a)). The charges were brought in three separate dependency petitions, which were consolidated for trial. The juvenile court sustained all three petitions and their attendant counts and declared appellant a ward of the court. (Welf. & Inst. Code, § 602.) The court placed appellant on probation with terms and conditions, set his maximum term of confinement at 11 years 8 months, and ordered him into suitable placement.

DISCUSSION

Insufficient Evidence - Sexual Battery (Count 2)

Appellant contends the evidence is insufficient to support the finding that he committed sexual battery against M.G. (§ 243.4, subd. (e)(1)) as charged in count 2 of the May 12, 2015 petition. He claims the evidence is insufficient to prove he touched an "intimate part" of another person, as defined in subdivision (g)(1) of section 243.4. The People concede the point.

As relevant here, a person is guilty of sexual battery if he or she "touches an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse[.]" (§ 243.4, subd. (e)(1).) "Intimate part" is defined as "the

sexual organ, anus, groin, or buttocks of any person, and the breast of a female." (*Id.*, subd. (g)(1).) Section 243.4 "describe[s] the precise manner in which [the] prohibited sex act[] must occur[.]" (*People v. Martinez* (1995) 11 Cal.4th 434, 451.)

The juvenile court's true finding on the allegation that appellant committed sexual battery against M.G. is based on M.G.'s testimony that appellant touched her "inner thigh . . . just below her buttocks." Because the inner thigh is not defined as an "intimate part" for purposes of section 243.4, the true finding as to that charge cannot stand.

"However, where the evidence is insufficient to sustain the offense charged but shows that the defendant is guilty of a lesser included offense, or an attempt to commit the offense, or a lesser degree of the offense, the court may reduce the crime rather than reverse outright. [Citations.]" (*People v. Yonko* (1987) 196 Cal.App.3d 1005, 1010.) Here, the evidence is sufficient to support a finding that appellant committed either (1) an attempted sexual battery; or (2) a simple battery, i.e., a "willful and unlawful use of force or violence upon the person of another" (§ 242). Because the juvenile court should make this determination, we shall reverse the true finding on count 2 and remand for further proceedings.

Probation Condition

One of the conditions of appellant's probation provides that he "must not engage in any sexual touching of any person." Although appellant did not object when the condition was imposed, he now claims the condition is unconstitutionally vague and overbroad to the extent it includes a prohibition on consensual (i.e., lawful) sexual behavior.

The People respond that the claim is forfeited because it was not raised below. (See *In re Antonio C.* (2000) 83 Cal.App.4th 1029, 1033.) In general, a defendant who fails to object to the reasonableness of a probation condition in the trial court forfeits the claim on appeal. (*People v. Welch* (1993) 5 Cal.4th 228, 230, 237.) However, "[a]n obvious legal error at sentencing that is 'correctable without referring to factual findings in the record or remanding for further findings' is not subject to forfeiture. [Citations.]" (*In re Sheena K.* (2007) 40 Cal.4th 875, 887 (*Sheena K.*).) With respect to constitutional claims, the California Supreme Court has stated, "[W]e do not conclude that 'all constitutional defects in conditions of probation may be raised for the first time on appeal, since there may be circumstances that do not present "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court." [Citation.] In those circumstances, "[t]raditional objection and waiver principles encourage development of the record and a proper exercise of discretion in the trial court." [Citation.]' [Citation.]" (*Id.* at p. 889.)

Although appellant purports to make a facial constitutional challenge, he claims that the condition is invalid because it "'(1) has no relationship to the crime of which [he] was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality[.]'" (*People v. Lent* (1975) 15 Cal.3d 481, 486.) Resolution of this claim requires an analysis of the facts and circumstances of his individual case, rather than a "review of abstract and generalized legal concepts." (*Sheena K.*, *supra*, 40 Cal.4th at p. 885.) As our Supreme Court has explained, "Applying the [forfeiture] rule to appellate claims

involving discretionary sentencing choices or unreasonable probation conditions is appropriate, because characteristically the trial court is in a considerably better position than the Court of Appeal to review and modify a sentence option or probation condition that is premised upon the facts and circumstances of the individual case. Generally, application of the forfeiture rule to such claims promotes greater procedural efficiency because of the likelihood that the case would have to be remanded to the trial court for resentencing or reconsideration of probation conditions." (*Ibid.*)

As appellant correctly notes, the latter consideration does not apply here because the matter is already being remanded to the juvenile court on another ground. It is also unclear from the record whether the court actually intended to prohibit appellant from engaging in consensual sexual activity. Moreover, the challenged condition can be easily corrected to pass constitutional muster. Accordingly, we exercise our discretion to review the claim. (*Sheena K.*, *supra*, 40 Cal.4th at p. 887, fn. 7.)

The juvenile court exercises broad discretion in setting conditions of probation. (*In re Daniel R.* (2006) 144 Cal.App.4th 1, 6.) "'[J]uvenile conditions may be broader than those pertaining to adult offenders. This is because juveniles are deemed to be more in need of guidance and supervision than adults, and because a minor's constitutional rights are more circumscribed. The state, when it asserts jurisdiction over a minor, stands in the shoes of the parents. And a parent may 'curtail a child's exercise of the constitutional rights . . . [because a] parent's own constitutionally protected "liberty" includes the right to "bring up children" [citation,] and to "direct the upbringing and education of children." [Citation.]' [Citations.]"

. . . [E]ven conditions infringing on constitutional rights may not be invalid if they are specifically tailored to fit the needs of the juvenile. [Citation.] In planning the conditions of a juvenile probationer's supervision, the juvenile court must consider both the circumstances of the crime and the juvenile's entire social history. [Citation.]' [Citation.]" (*Id.* at pp. 7-8.)

"A probation condition, whether in an adult or juvenile case, may be challenged as unconstitutionally vague or overbroad. [Citation.]" (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.) A probation restriction is unconstitutionally overbroad if it impinges on constitutional rights, and is not tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation. (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.*, at p. 1153.) "'If available alternative means exist which are less violative of the constitutional right and are narrowly drawn so as to correlate more closely with the purposes contemplated, those alternatives should be used.' [Citation.]" (*In re Luis F.* (2009) 177 Cal.App.4th 176, 189.)

The probation condition at issue here provides that appellant "must not engage in any sexual touching of any person." We agree with appellant that this condition is overbroad to the extent it prohibits him from engaging in *consensual* sexual touchings. The state constitutional right to privacy "applies to sexual relations outside of marriage . . . and to minors as well as

adults." (*Rider v. Superior Court* (1988) 199 Cal.App.3d 278, 282, citations omitted.) The prohibition on "any sexual touching" unnecessarily impinges upon this constitutional right. The obvious purpose of the condition is to prohibit appellant from touching any more women or girls *without their consent*. That purpose can be fully served by prohibiting appellant from engaging in any *nonconsensual* touching. Contrary to the People's assertion, nothing in the record suggests that appellant is incapable of distinguishing between consensual and nonconsensual behavior. Moreover, a condition prohibiting consensual sexual behavior would be difficult if not impossible to enforce.

In addition to being overbroad, the condition is also vague to the extent it purports to prohibit "sexual" touchings. "A restriction is unconstitutionally vague if it is not '"sufficiently precise for the probationer to know what is required of him [or her], and for the court to determine whether the condition has been violated."' [Citations.]" (*In re E.O.*, *supra*, 188 Cal.App.4th at p. 1153.) The assault on M.G. does not qualify as a "sexual" touching, yet the condition is plainly intended to prohibit such touchings as well. To make this clear, the condition should thus provide that appellant "must not engage in any touching of any person without his or her prior consent." This condition comports with appellant's constitutional rights and gives him adequate and fair notice of what is expected of him. (*In re Luis F.*, *supra*, 177 Cal.App.4th at p. 189.)

Correction of Minute Order

Appellant asks us to order the correction of a clerical error in the October 5, 2015 minute order. Specifically, the order should be corrected to reflect that the allegations in a May 12,

2015 petition were found true, rather than the allegations in a petition filed on May 21, 2015. The People concede the error, and we shall order the record corrected accordingly.

DISPOSITION

The true finding on count 2 of the May 12, 2015 petition (sexual battery against victim M.G.) is reversed. The matter is remanded to the juvenile court with instructions to sustain the count as either a simple battery or an attempted sexual battery, and to thereafter recompute the new maximum term of confinement.

Probation condition 6A is modified to state that appellant "must not touch any person without his or her prior consent."

We also order that the October 5, 2015 minute order be corrected to reflect that the allegations in the May 12, 2015 petition were found true, rather than the allegations in a petition filed on May 21, 2015.

In all other respects, as so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Morton Rochman, Judge
Superior Court County of Los Angeles

James M. Crawford, 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, Idan Ivri, Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.