Filed 3/18/14 In re M.O. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re M.O., A Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. M.O., Defendant and Appellant.	B250168 (Los Angeles County Super. Ct. No. KJ37774)

APPEAL from an order of the Superior Court of Los Angeles County, Fred Fujioka, Judge. Reversed in part, affirmed in part, and remanded with directions.

Gerald Peters, 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 Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant M.O. appeals the juvenile court's dispositional order in which the court found true the allegations that he committed certain criminal offenses, including robbery and assault, set a maximum confinement period based on the robbery, and imposed a probation condition restricting him from being on or within a block of school grounds under certain circumstances. Appellant contends, and respondent concedes, that the evidence was insufficient to support the court's true finding that he committed a robbery. Both parties agree that the offense must be reduced to petty theft. Appellant further contends that the evidence was insufficient to support the court's true finding that he committed an assault by means of force likely to produce great bodily injury (GBI). In addition, he contends that the probation condition unnecessarily restricts his freedom to travel and is vague. We conclude substantial evidence supports the true finding with respect to the GBI assault, and that appellant forfeited the contention that the probation condition was unnecessarily restrictive. We agree, however, that the condition is vague. Accordingly, we reverse the robbery finding and remand for the court to set a new maximum confinement period and to modify the probation condition by adding an explicit knowledge requirement.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Petition*

In a petition filed June 4, 2013 under section 602 of the Welfare and Institutions Code, it was alleged that appellant committed second degree robbery (Pen. Code, § 211), second degree commercial burglary (Pen. Code, § 459), and assault by means of force likely to produce GBI (Pen. Code, § 245, subd. (a)(4)). The petition further alleged that the charge range for the robbery allegation was two, three or five years, and that the charge range for the burglary allegation was 16 months, two years or three years.

B. *Evidence at Hearing*

Jason Alba, a service manager for Stater Brothers, testified that on May 31, 2013, at approximately 8:00 p.m., appellant walked into his store carrying a skateboard and a backpack. Alba subsequently observed appellant walking out with two bottles of Jack Daniel's whiskey having a retail value of approximately $40.[1] Alba followed appellant into the parking lot, yelling at him to stop. When Alba got within a few feet of appellant, appellant turned and threw the bottles at Alba. The bottles hit Alba in the chest and fell to the ground. Appellant continued on and Alba proceeded after him. Appellant stopped near the boundary of the store's property. Alba convinced him to sit down so they could talk. Within a few moments, however, appellant got up and ran at Alba. Alba grabbed appellant, attempting to get him down on the ground. Appellant then bit Alba on the right bicep. A bystander came to Alba's assistance and the two men were able to get appellant down and keep him there until police arrived.

Paramedics came to the scene and cleaned and dressed the bite wound on Alba's arm. Alba did not seek further medical attention. Although Alba was wearing a shirt and undershirt over his upper arm, the bite caused pain and left a visible mark, which at the time of the hearing was resolving into a scar.[2]

The court found the robbery allegation true, reasoning that because a robbery is not complete until the perpetrator reaches a position of safety, appellant's act of throwing the bottles at Alba established the force element of the

---

[1] The prosecution introduced into evidence a 750 milliliter bottle of Jack Daniel's whiskey, which the witness identified as corresponding to the size, weight and shape of the whiskey bottles he saw appellant take from the store.

[2] Alba displayed the wound in court. The court noted on the record that as of the date of the hearing, approximately one month after the incident, there was a visible bite-shaped mark, bruising, and a scar on Alba's bicep. The prosecution also introduced into evidence a picture of the wound taken on the day of the incident.

crime. The court also found true the burglary and assault allegations, reducing the assault charge to a misdemeanor. The court stated that the force likely to cause GBI was established by the evidence that appellant threw two heavy bottles at Alba, hitting him in the torso, and the evidence that he subsequently bit Alba. Based on its findings, the court concluded that appellant was a person described by section 602 of the Welfare and Institutions Code. The court placed appellant in the care, custody, and control of a probation officer and ordered appellant into a six-month camp community placement program.[3] The court set a maximum confinement term of six years based on the robbery.[4] The court also imposed a number of probation conditions, including the following, identified as probation condition No. 12: "Do not be within one block of a school ground unless enrolled, attending classes, on approved school business, or with [a] school official, parent or guardian." Appellant noticed an appeal.

---

[3] Under Welfare and Institutions Code section 727, subdivision (a)(1), when a minor is adjudged a section 602 ward of the court, "the court may make any reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the minor," including ordering "the care, custody, and control of the minor . . . to be under the supervision of the probation officer . . . ." (Welf. & Inst. Code, subd. (a)(3).) Section 730, subdivision (a), provides that the court may order any of the types of treatment referred to in section 727 (see § 727, subd. (a)(3)(B) [minor may be place in a "suitable licensed community care facility"]) or commit the minor to a "juvenile home, ranch, camp, or forestry camp." (§ 730, subd. (a).)

[4] Under Welfare and Institutions Code section 726, subdivision (d), "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." The court stated that it considered establishing a maximum confinement period less than the prison term for an adult convicted of the same offenses and, in the exercise of its discretion, decided against a shorter confinement period.

DISCUSSION

A. *Robbery*

Robbery is defined as 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; *People v. Gomez* (2008) 43 Cal.4th 249, 254.) Where the defendant did not use force when taking the stolen property, evidence that prior to reaching a place of safety, the defendant used force to maintain possession of it against the lawful efforts of the owner to regain it will support the offense. (*People v. Hodges* (2013) 213 Cal.App.4th 531, 543, fn. 5.) For the crime of robbery to occur, the defendant must have intended to permanently deprive the owner of the property at the time the force or resistance occurred. (*Id*. at p. 543.) Here, the evidence was clear that appellant did not use force in an effort to retain the stolen property, but was abandoning the whiskey when he threw it at Alba. Appellant contends, and respondent agrees, that the elements of robbery were not established, and that the offense must be reduced to petty theft. (See *id.* at pp. 536, 543 [force element of robbery not present where defendant tossed stolen items at security officer before hitting him with open car door while trying to drive away].) The matter must be remanded for entry of a new finding that appellant committed petty theft; as the juvenile court based appellant's maximum confinement period on the robbery charge, determination of a new maximum confinement period is also required.

B. *GBI Assault*

Penal Code section 245, subdivision (a)(4) prohibits "assault[s] upon the person of another . . . by any means of force likely to produce [GBI]." GBI is defined as "bodily injury which is significant or substantial, not insignificant, trivial or moderate." (*People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1066.) An

assailant's use of teeth as a weapon can sustain a GBI finding. (See, e.g., *People v. Heard* (2003) 31 Cal.4th 946, 975; *People v. Pullins* (1950) 95 Cal.App.2d 902, 903-904.) Appellant contends that the finding cannot be sustained here because the injury inflicted was "trivial or moderate" and resulted in no significant or lasting pain to Alba. For the reasons discussed, we disagree.

Penal Code section 245 "'prohibits an assault by means of force *likely* to produce great bodily injury, not the use of force which does *in fact* produce such injury.'" (*People v. Armstrong*, *supra*, 8 Cal.App.4th at p. 1065, quoting *People v. Muir* (1966) 244 Cal.App.2d 598, 604.) The results of an assault are "'highly probative of the amount of force used,'" but not "'conclusive.'" (*People v. Armstrong, supra*, at p. 1065.) "'[T]he question . . . whether . . . the force used was such as to have been likely to produce great bodily injury, is one of fact for the determination of the [trier of fact] based on all the evidence, including but not limited to the injury inflicted. [Citations.]'" (*Id.* at p. 1066, quoting *People v. Muir*, *supra*, at p. 604.) "[The] extent of the [victim's] injury" is also a "question[] of fact for consideration by the [trier of fact]." (*People v. Wells* (1971) 14 Cal.App.3d 348, 358.) """If there is sufficient evidence to sustain the . . . finding of great bodily injury, we are bound to accept it, even though the circumstances might reasonably be reconciled with a contrary finding."""" (*People v. Escobar* (1992) 3 Cal.4th 740, 750, quoting *People v. Wolcott* (1983) 34 Cal.3d 92, 107.) "Substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom." (*People v. Dooley* (2010) 189 Cal.App.4th 322, 326.)

California courts have routinely upheld GBI findings where the assault did not result in permanent injury. (See *People v. Escobar*, *supra*, 3 Cal.4th at p. 750 ["Clearly, the ["'significant or substantial physical injury'"] standard contains no specific requirement that the victim suffer "'permanent,' 'prolonged' or

'protracted' disfigurement, impairment, or loss of bodily function."].) In *People v. Armstrong*, for example, the defendant reached down the victim's throat to stop her from screaming, causing bleeding and a one-day loss of her ability to speak. The victim treated the wound herself with peroxide and water. (*People v. Armstrong*, *supra*, 8 Cal.App.4th at p. 1064.) The court concluded that a reasonable jury could find that the force used constituted force likely to produce GBI. (*Id*. at p. 1066; see also *People v. Escobar*, *supra*, 3 Cal.4th at p. 750 [victim suffered bruises and abrasions to legs, knees and elbows, injury to neck, and vaginal soreness temporarily impairing her ability to walk]; *People v. Jaramillo* (1979) 98 Cal.App.3d 830, 836 [victim suffered contusions over various parts of her body, which caused swelling, pain and discoloration visible to witnesses the next day].)

The evidence here indicated that appellant was attempting to inflict serious bodily harm in his attempt to get away from Alba, and that the bite he inflicted was not insignificant. The injuries caused by appellant's teeth were clearly visible a month later, and Alba was developing a permanent scar at the site of the wound. Appellant erroneously contends there was no evidence of bleeding or that Alba required medical care. The fact that Alba had a visible scar at the time of the hearing supports an inference that the bite broke the skin. Paramedics were called to treat Alba, and although they did not transport him to the hospital, they cleaned and dressed the wound at the scene. The court, having examined a photograph of Alba's arm taken on the day of the attack and having personally observed Alba's arm at the time of the hearing, had sufficient data to evaluate the degree of force used. Moreover, the court did not base its true finding on the assault allegation on the bite alone. The court also relied on the evidence that appellant, without warning, threw two heavy liquor bottles at Alba's chest -- in itself a dangerous act that could have led to serious injury. (See *People v. Fagalilo* (1981) 123 Cal.App.3d 524, 532 [wine bottle thrown at one victim which glanced off his

shoulder and struck two others standing nearby supported conviction of assault by means of force likely to produce GBI]; *People v. Martinez* (1977) 75 Cal.App.3d 859, 862 [evidence sufficient to sustain charge under Penal Code section 245, subdivision (b), where defendant threw bottle which shattered, spattering beer and glass over police officer]; *People v. Cordero* (1949) 92 Cal.App.2d 196, 199 [beer bottle used as "club or a missile" constituted deadly weapon].) In short, substantial evidence supported the court's conclusion that appellant committed an assault by means of force likely to produce GBI.

C. *Probation Condition*

Under Welfare and Institutions Code section 730, subdivision (b), when the juvenile court places a section 602 ward under a probation officer's supervision or commits the ward to a probation officer's care, custody, and control, the court "may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." (§ 730, subd. (b).) "[S]ection 730 grants courts broad discretion in establishing conditions of probation in juvenile cases." (*In re Antonio R.* (2000) 78 Cal.App.4th 937, 940.) Appellant raises two issues with respect to parole condition No. 12, which prohibits him from being within one block of a school ground unless enrolled, attending classes, on approved school business, or accompanied by a school official, parent or guardian. First, he contends that it unnecessarily infringes his right to travel -- in other words, that it is overbroad. Second, he contends that it is impermissibly vague because it does not include an express knowledge requirement. With respect to both contentions, he asserts that he did not waive or forfeit his right to raise issues relating to this probation condition by failing to object below when it was imposed. We conclude that any contention parole condition No. 12 was overbroad and unnecessarily

infringed on appellant's right to travel was forfeited. We agree, however, that the condition is vague and must be re-written to include a knowledge element.

1. *Impingement on Right to Travel/Overbreadth*

A probation condition or restriction is unconstitutionally overbroad if it "(1) 'impinge[s] on constitutional rights,' and (2) is not 'tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation.'" (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153, quoting *In re Victor L.* (2010) 182 Cal.App.4th 902, 910.) The validity of juvenile probation conditions is judged under the same three-part standard applicable to adult probation conditions: "'A condition of probation will not be held invalid unless it "(1) has no relationship to the crime of which the offender 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 . . . ." [Citation.] Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality.'" (*In re D.G.* (2010) 187 Cal.App.4th 47, 52-53, quoting *People v. Lent* (1975) 15 Cal.3d 481, 486.) "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.*, *supra*, 188 Cal.App.4th at p. 1153.) The claim that a probation condition is unconstitutionally overbroad cannot be raised for the first time on appeal unless the issues presented raise """pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court."""" (*In re Sheena K.* (2007) 40 Cal.4th 875, 889.)

Here, the record indicates that although appellant's most recent criminal activity took place in and around a grocery store, in the past he has committed criminal offenses on school grounds, including coming to school intoxicated, furnishing a fellow student with alcohol, and entering school grounds while possessing a knife. Whether a condition prohibiting him from being on or around school grounds should have been imposed thus required a fact-based analysis to determine whether the condition was reasonably related to prevention of future criminality. Accordingly, the failure to raise it below resulted in a forfeiture of this claim. (See *In re Curtis S.* (2013) 215 Cal.App.4th 758, 761-762; *In re Luis F.* (2009) 177 Cal.App.4th 176, 181-182.)

2. *Vagueness*

A probation condition or restriction is unconstitutionally vague if "it is not '"sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated."'" (*In re E.O.*, *supra*, 188 Cal.App.4th at p. 1153, quoting *In re Sheena K.*, *supra*, 40 Cal.4th at p. 890.) Probation conditions are generally deemed void if they lack an explicit knowledge requirement and prohibit the probationer from "associating with certain categories of persons," "frequenting . . . certain areas," or "possessing certain items." (*People v. Moore* (2012) 211 Cal.App.4th 1179, 1184.)

The probation condition at issue prohibits appellant from being within one block of any school ground unless enrolled, attending classes, on approved school business, or with a school official, parent or guardian. It does not explicitly state that the violation must be knowing. As explained in *In re E.O.*, a probationer could violate such a condition "if a car or bus in which he [or she] is a passenger *passes by* [a restricted] building." (*In re E.O.*, *supra*, 188 Cal.App.4th at p. 1155.) Accordingly, probation condition No. 12 must be modified to include a knowledge

element.[5] (See *People v. Moore*, *supra*, 211 Cal.App.4th at p. 1185, quoting *People v. Kim* (2011) 193 Cal.App.4th 836, 845 ["Where a probation condition prohibits association with certain categories of persons, presence in certain types of areas, or possession of items that are not easily amenable to precise definition, 'an express knowledge requirement is reasonable and necessary.'"].)

---

[5] Although appellant did not object to the challenged condition below, his contention concerning vagueness is cognizable on appeal because it presents a pure question of law that may be resolved without reference to the sentencing record. (See *In re Sheena K.*, *supra*, 40 Cal.4th at pp. 887-888; *People v. Moore*, *supra*, 211 Cal.App.4th at pp. 1183-1184.)

DISPOSITION

The juvenile court's finding that appellant committed the offense of second degree commercial robbery is reversed. The matter is remanded to allow the court to enter a new finding that appellant committed petty theft, and to set a new maximum confinement term. On remand, the court is to modify probation condition No. 12 to include a knowledge element. In all other respects the dispositional order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

EDMON, J.*

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