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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re Damon M., a Person Coming Under  
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

DAMON M.,

Defendant and Appellant.

A133867

(Alameda County  
Super. Ct. No. C-169679-07)

Damon M. appeals after the juvenile court made true findings on a Welfare and Institutions Code section 602 petition charging him with robbery and a battery committed on school property. (Pen. Code, §§ 211, 243.2.)<sup>1</sup> Damon contends that the juvenile court violated section 654 by including time for both offenses in its calculation of the maximum term of confinement. We disagree and affirm, although we remand for correction of a sentencing miscalculation.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

Damon was first declared a dependent of the juvenile court, pursuant to Welfare and Institutions Code section 300, in 1997, when he was two years old. Over the years, he was moved between numerous different foster homes.

<sup>1</sup> Unless otherwise indicated, all further statutory references are to the Penal Code.

In May 2010, a wardship petition under Welfare and Institutions Code section 602 was filed against Damon, alleging misdemeanor counts of assault on a school official (§ 243.6), battery on school grounds (§ 243.2), battery (§ 242), and public fighting (§ 415, subd. (1)). Damon was placed on informal probation. In September 2010, Damon violated his home supervision contract, admitted the misdemeanor public fighting allegation, and was again placed on probation. In November 2010, a second Welfare and Institutions Code section 602 petition was sustained, after Damon admitted felony grand theft (§ 487, subd. (c)). The dependency case was dismissed and Damon was adjudged a ward of the court. He was placed at the Boy's Republic.

On September 13, 2011, a third Welfare and Institutions Code section 602 petition was filed against Damon, alleging one count of robbery (count 1; § 211), one count of assault by means of force likely to cause great bodily injury (count 2; former § 245, subd. (a)(1), as amended by Stats. 2004, ch. 494, § 1), and one count of battery committed on school grounds (count 3; § 243.2).

At the contested jurisdiction hearing, Alfonso G. testified that, at lunch on September 12, 2011, he was in the parking lot at Castlemont High School. Alfonso had opened the passenger door of his friend's car to retrieve his backpack when he felt someone yank his gold necklace from behind. Alfonso turned around and saw Damon walking away with the chain in his hands. Alfonso walked towards Damon, who then punched Alfonso in the face nine or 10 times. Alfonso recalled that Damon hit him approximately twice before dropping the chain and hitting him another seven or eight times. Alfonso tried to block his face and walk away from Damon. Alfonso did not strike back or grab onto Damon's clothing. Eventually, one of Alfonso's friends pulled him away and Damon kicked or kneed Alfonso in the right eye.<sup>2</sup> Damon walked away,

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<sup>2</sup> Alfonso's written statement to police, given the same day as the incident, did not mention anything about being kicked or kneed in the eye. Alfonso explained that his friend told him Damon had kneed him.

but was stopped by a school security officer. A bystander handed Alfonso his broken necklace.

The school security officer, Derrick Clayton, saw Alfonso and Damon struggling, from a distance of about 600 to 700 feet. Clayton initially thought they were playing. Clayton said that Damon and Alfonso were grabbing at each other's clothing and then Damon began punching Alfonso in the face. Damon hit Alfonso approximately eight to 10 times. Alfonso did not hit or push back. Clayton did not see Damon kick or knee Alfonso. Eventually the two separated and Clayton detained Damon until police arrived.

Damon testified that, on September 12, 2011, at around 1:15 p.m., he was in the parking lot at Castlemont. Damon saw Alfonso walking towards a car. Damon looked at Alfonso, Alfonso looked at Damon, and Damon said "What the fuck you looking at?" Alfonso did not respond. Damon walked up to Alfonso and pushed Alfonso on the chest. Alfonso walked towards Damon with a raised hand and then Damon hit him in the face, approximately six times. Damon explained: "I hit him because I don't know if when he lifted his right arm, I don't know if he was trying to swing at me or not, but I felt like he was so that's why I really started hitting him in his face." Alfonso did not hit back, but he did grab onto Damon's sweater. Damon saw Alfonso's gold chain when he initially pushed him, but then did not notice what happened to it. Alfonso's friend grabbed Alfonso. When Damon saw Clayton, he began walking away. Damon denied taking Alfonso's chain.

At the conclusion of the jurisdictional hearing, Damon's counsel argued: "I don't actually think that you can make a finding for the 211 and for the 245(a)(1). I believe that the 211, the force that is used in the 211 would be the same force that is used in the 245." The court responded: "No. If I were to make that finding, one is the pulling of the chain by force and breaking it. The other is the striking. Two different events." The juvenile court ultimately sustained counts 1 and 3, but made no finding on count 2. The court noted that "[t]he maximum time the child may be confined in secure custody for the offenses . . . is 6 years, 5 months."

On October 19, 2011, the juvenile court conducted a disposition hearing and ordered Damon continued as a ward of the court and detained at the Juvenile Justice Center.<sup>3</sup> In its dispositional order, the juvenile court did not declare a maximum time of confinement. This timely appeal followed.<sup>4</sup>

## II. DISCUSSION

Damon contends the juvenile court erred by failing to stay the punishment for battery, pursuant to section 654. Damon asserts that both the battery and the robbery were based on the same act of force—the punches Damon threw after he ripped the gold chain from Alfonso’s neck. He argues that he is “not [properly] subject to any additional confinement based on the sustained battery count, since punishment for that offense should have been stayed pursuant to section 654. Thus, the maximum custody time that was authorized was five years, nine months, not the six years, five months as declared by the juvenile court.” We disagree.

“When a juvenile court sustains criminal violations resulting in an order of wardship (Welf. & Inst. Code, § 602), and removes a youth from the physical custody of his parent or custodian, it must specify the maximum confinement term, i.e., the maximum term of imprisonment an adult would receive for the same offense. (Welf. & Inst. Code, § 726.)<sup>[5]</sup> Welfare and Institutions Code section 726 permits the juvenile

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<sup>3</sup> Subsequently, Damon was placed at the Rite of Passage–Silver State Academy in Nevada.

<sup>4</sup> We note that Damon’s notice of appeal designates the order appealed from as the “Dispositional Order of October 4, 2011.” The jurisdiction hearing took place on October 4, 2011, while the dispositional hearing occurred on October 19, 2011. However, we construe the notice of appeal to present an appeal from the dispositional order of October 19, 2011. (See *In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1138 [“[a] juvenile court’s jurisdictional findings are not immediately appealable and the appeal is taken from the order made after the disposition hearing”]; Cal. Rules of Court, rule 8.100(a)(2) [“notice of appeal must be liberally construed”].)

<sup>5</sup> Welfare and Institutions Code section 726, subdivision (c), provides, in 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

court, in its discretion, to aggregate terms, both on the basis of multiple counts, and on previously sustained section 602 petitions in computing the maximum confinement term. [Citation.] When aggregating multiple counts and previously sustained petitions, the maximum confinement term is calculated by adding the upper term for the principal offense, plus one-third of the middle term for each of the remaining subordinate felonies or misdemeanors. (Welf. & Inst. Code, § 726; § 1170.1, subd. (a); *In re Deborah C.* (1981) 30 Cal.3d 125, 140.)” (*In re David H.* (2003) 106 Cal.App.4th 1131, 1133–1134, parallel citation omitted.)

Section 654, subdivision (a), provides, in relevant part: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” Under section 654, double punishment for the commission of a single act is proscribed even though such act violates two or more sections of the Penal Code. (*People v. Smith* (1950) 36 Cal.2d 444, 448.) A section 654 claim is applicable in juvenile court proceedings when the court aggregates terms of confinement (*In re Asean D.* (1993) 14 Cal.App.4th

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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, but without the need to follow the provisions of subdivision (b) of Section 1170 of the Penal Code or to consider time for good behavior or participation pursuant to Sections 2930, 2931, and 2932 of the Penal Code, plus enhancements which must be proven if pled. [¶] If the court elects to aggregate the period of physical confinement on multiple counts or multiple petitions, including previously sustained petitions adjudging the minor a ward within Section 602, the ‘maximum term of imprisonment’ shall be the aggregate term of imprisonment specified in subdivision (a) of Section 1170.1 of the Penal Code, which includes any additional term imposed pursuant to Section 667, 667.5, 667.6, or 12022.1 of the Penal Code, and Section 11370.2 of the Health and Safety Code.” (Italics added.)

467, 474; *In re Billy M.* (1983) 139 Cal.App.3d 973, 978), and is not waived by failing to object below. (*People v. Hester* (2000) 22 Cal.4th 290, 295.)

Preliminarily, we observe that the juvenile court did not declare a maximum term of confinement in its dispositional order. However, at the jurisdictional hearing, the court announced a maximum time of confinement as six years, five months—which is more than the sum of the maximum term applicable to robbery, plus one-third of the term for each of Damon’s 2010 offenses. (Former § 489, subd. (b), as amended by Stats. 1989, ch. 1167, § 1.1, p. 4527; §§ 18, subd. (a), 213, subd. (a)(2), 415, subd. (1), 1170.1; Welf. & Inst. Code, § 726, subd. (c).) The trial court’s implicit factual determination, that Damon’s robbery and battery offenses were not subject to section 654, is reviewed on appeal for substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730–731; *People v. Martin* (2005) 133 Cal.App.4th 776, 781.)

“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.” (§ 211; accord, *People v. Harris* (1994) 9 Cal.4th 407, 415.) Thus, “[t]he elements of robbery are: (1) a taking (2) of personal property (3) in the possession of another (4) from her person or immediate presence (5) against her will (6) accomplished by means of force or fear (7) with an intent to permanently deprive.” (*People v. Prieto* (1993) 15 Cal.App.4th 210, 213, fn. omitted.) “Where the elements of force or fear are absent, a taking from the person is grand theft, a lesser included offense of robbery.” (*People v. Jones* (1992) 2 Cal.App.4th 867, 869.)

Damon argues that there was only one act of force which underlies both the robbery and the battery—the punches Damon inflicted on Alfonso after the chain was taken. Damon relies on a line of cases “holding that 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. (See, e.g., *People v. Estes* (1983) 147 Cal.App.3d 23, 27–28; *People v. Kent* (1981) 125 Cal.App.3d 207, 213; *People v. Perhab* [(1949)] 92 Cal.App.2d 430, 434–436.) In order to support a robbery conviction, the taking, either the gaining possession or the carrying away, must be accomplished by

force or fear. [Citation.]” (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn. 8, parallel citations omitted; accord, *People v. Torres* (1996) 43 Cal.App.4th 1073, 1079, disapproved on other grounds by *People v. Mosby* (2004) 33 Cal.4th 353, 365, fn. 3; *People v. Pham* (1993) 15 Cal.App.4th 61, 65.)

But, here the trial court found that Damon had committed robbery by ripping the chain from Alfonso’s neck. Damon argues: “There may have been some ‘force’ used to actually take the chain from [Alfonso’s] neck, but the use of force that would satisfy the force or fear element of robbery occurred only after the taking.” We disagree.<sup>6</sup> “The force required for robbery is more than ‘just the quantum of force which is necessary to accomplish the mere seizing of the property.’ [Citation.]” (*People v. Garcia* (1996) 45 Cal.App.4th 1242, 1246, disapproved on other grounds by *People v. Mosby, supra*, 33 Cal.4th at p. 365, fn. 2; accord, *People v. Morales* (1975) 49 Cal.App.3d 134, 139.) Here, Damon did not simply lift the chain over Alfonso’s head or undo the clasp. Instead, Damon broke the chain in ripping it from Alfonso’s neck.

In *People v. Roberts* (1976) 57 Cal.App.3d 782 (*Roberts*), disapproved on other grounds by *People v. Rollo* (1977) 20 Cal.3d 109, 120, fn. 4, a robbery conviction was upheld on similar facts. The victim testified that she was at her car, attempting to remove her car keys from her purse, when she heard a “ ‘shuffle of steps to my left and somebody come right under my left arm, grabbed my handbag jerked it right down and snapped it off the handle.’ ” (*Roberts*, at p. 785.) On appeal, the defendant argued that the requisite force could not be established. The court disagreed, stating: “Certainly, the evidence that the purse was grabbed with such force that the handle broke supports the jury’s implied finding that such force existed. [Citations.]” (*Id.* at p. 787.) Similarly, here, the

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<sup>6</sup> Contrary to Damon’s suggestion, “[t]here is no requirement a victim be aware that someone was taking his or her property.” (*People v. Abilez* (2007) 41 Cal.4th 472, 507.) In fact, “a victim of robbery may be unconscious or even dead when the property is taken, so long as the defendant used force against the victim to take the property.” (*People v. Jackson* (2005) 128 Cal.App.4th 1326, 1330.) But, in any event, Alfonso said he felt the chain being yanked from his neck.

evidence that Alfonso's chain was pulled from his neck and broken is sufficient to support the juvenile court's true finding for robbery. Contrary to Damon's suggestion, the same act of force does not underlie both the robbery and battery offenses. Substantial evidence supports the trial court's finding of "[t]wo different events."

But, our section 654 analysis does not end here. "The prohibition against double punishment found in . . . section 654 [also] applies where a course of conduct which violates more than one statute comprises an indivisible transaction. The divisibility of the transaction depends upon the intent and objective of the actor, and if all the offenses are incident to one objective, the defendant may be punished for only one offense. [Citation.]" (*People v. Bailey* (1974) 38 Cal.App.3d 693, 701; accord, *People v. Latimer* (1993) 5 Cal.4th 1203, 1208–1209, 1216.) " '[I]f all the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once.' (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)" (*People v. Evers* (1992) 10 Cal.App.4th 588, 602, parallel citation omitted.) " 'The defendant's intent and objective are factual questions for the trial court; [to permit multiple punishments,] there must be evidence to support a finding the defendant formed a separate intent and objective for each offense for which he was sentenced. [Citation.]' [Citation.]" (*People v. Coleman* (1989) 48 Cal.3d 112, 162.)

Substantial evidence supports the trial court's implicit finding that Damon's intent and objective in punching Alfonso was separate from, rather than incidental to, his intent and objective in committing the robbery. With respect to the first act—ripping the chain from Alfonso's neck—the trial court could reasonably infer that Damon acted to compel Alfonso to give up his property. Damon suggests that this was the sole objective for all of his actions. He contends that the robbery was not complete at the time he punched Alfonso and that the only possible inference is that Damon punched Alfonso in an attempt to retain the chain. "The crime of robbery is a continuing offense that begins from the time of the original taking until the robber reaches a place of relative safety." (*People v. Estes, supra*, 147 Cal.App.3d at p. 28.) "Whether a robbery is 'over' is a

determination for the trier of fact unless the court determines, as a matter of law, that the infliction of great bodily injury is so far removed in terms of time or distance that the robbery is ‘over’ as a matter of law.” (*People v. Ramirez* (1995) 39 Cal.App.4th 1369, 1375.)

We think the evidence supports the implicit inference drawn by the trial court—that Damon acted with a different objective when he punched Alfonso. Not all punishment for violence occurring in close proximity to a robbery is precluded by section 654. (See *People v. Coleman, supra*, 48 Cal.3d at pp. 162–163 [substantial evidence supports finding of separate objectives when defendant had essentially completed robbery, killed another victim, and only then committed assault by stabbing victim in back]; *People v. Sandoval* (1994) 30 Cal.App.4th 1288, 1296, 1299–1300 [substantial evidence supports finding of separate objectives when attempted robbery was complete when victim refused to hand over money and defendant went on to shoot victim without making any further attempt to obtain money]; *People v. Cleveland* (2001) 87 Cal.App.4th 263, 271–272 [substantial evidence supports finding of separate objectives when “the amount of force used in taking the Walkman was far more than necessary to achieve one objective”].) Here, Alfonso testified that Damon obtained the necklace and then took several steps away. Alfonso walked towards Damon, without saying anything, and then Damon began punching him. Damon struck Alfonso approximately twice, then dropped the chain, and then continued to hit Alfonso seven or eight times. From the timing and severity of the attack on Alfonso, who was not resisting the taking, the trial court could reasonably infer that Damon acted not to prevent Alfonso from retaking the chain, but out of an independent desire to do violence. “ ‘[S]ection [654] cannot, and should not, be stretched to cover gratuitous violence or other criminal acts far beyond those reasonably necessary to accomplish the original offense.’ ” (*People v. Cleveland*, at p. 272.)

Damon is properly subject to additional confinement based on the sustained battery count, consistent with section 654. Nonetheless, we agree, and the People

concede, that the matter must be remanded to the juvenile court with directions to specify, in the dispositional order, a corrected maximum term of confinement.

At the jurisdictional hearing, the court announced the maximum time of confinement as six years, five months. However, this was error, correctable even though Damon’s trial counsel did not object. (*People v. Smith* (2001) 24 Cal.4th 849, 852 [“obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings are not waivable”].) When, as here, “the juvenile court chooses to ‘sentence’ consecutively on multiple counts or multiple petitions, the maximum term must be specified in accordance with the formula set forth in subdivision (a) of . . . section 1170.1, i.e., the sum of the ‘principal term’ (the longest term imposed for any of the offenses) and ‘subordinate terms’ (one-third of the middle term imposed for each other offense).”<sup>7</sup> (*In re Eric J.* (1979) 25 Cal.3d 522, 536; accord, Welf. & Inst. Code, § 726, subd. (c).)

Second degree robbery is punishable by a maximum of five years imprisonment. (§ 213, subd. (a)(2).) According to section 1170.1, subdivision (a), Damon was also subject to: (1) four months confinement for the battery (§ 243.2); (2) one month for the 2010 public fighting offense (§ 415, subd. (1)); and (3) eight months confinement for his 2010 felony grand theft offense (former § 489, subd. (b) as amended by Stats. 1989,

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<sup>7</sup> Section 1170.1, subdivision (a), provides, in relevant part: “Except as otherwise provided by law, and subject to Section 654, when any person is convicted of two or more felonies, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same or by a different court, and a consecutive term of imprisonment is imposed under Sections 669 and 1170, the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1. The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed . . . .”

ch. 1167, § 1.1, p. 4527; § 18, subd. (a)). The maximum term of confinement should therefore be a total of six years, one month.

**III. DISPOSITION**

We remand the matter to the juvenile court with directions to specify, in the dispositional order, that the maximum term of confinement is six years, one month.

In all other respects, the judgment is affirmed.

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Bruiniers, J.

We concur:

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Jones, P. J.

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Simons, J.