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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re K.G., a Person Coming Under
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

K.G.,

Defendant and Appellant.

A139789

(Contra Costa County
Super. Ct. No. J13-00877)

INTRODUCTION

Defendant K.G. appeals after a contested jurisdictional hearing sustaining a Welfare and Institutions Code section 602¹ petition alleging he committed second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c)) and an adjudication that he is a ward of the court, subject to confinement and probation. He claims: (1) the juvenile court’s jurisdictional findings are not supported by substantial evidence, (2) probation conditions prohibiting use and possession of illegal drugs and weapons are unconstitutionally vague and overbroad, and (3) the court failed to calculate the maximum term of confinement and to specify his confinement credits. The Attorney General has no objection to modification of the probation conditions and agrees the final contention should be addressed on remand. We affirm the sustaining of the petition, modify the probation conditions, and remand as to the term of confinement and credits.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

PROCEDURAL AND FACTUAL BACKGROUND

We set forth only those facts pertinent to the issues raised on appeal. At about 10:00 p.m. on July 21, 2013, Kevin Nguyen was delivering pizzas to an apartment complex in San Pablo. As he entered the second floor, he saw three young, thin, and light-skinned African-American men wearing dark-colored sweaters, with hoods. Sensing danger, Nguyen turned around, but the smallest of the three men pointed a silver gun at his chest. The other two were carrying what appeared to be black guns. One of them blocked the front door, while the other reached into Nguyen's pocket and removed \$30 to \$40, composed of about three to four, \$5 bills, and 15 to 20, \$1 bills. Not finding a cell phone, this assailant reached into another pocket and took Nguyen's white cell phone. The three men then let Nguyen go, threatening to shoot him if he "look[ed] back." After returning to the Pizza Hut, Nguyen told his manager, who called the police.

Twenty-two minutes after the robbery, a Richmond police officer drove by the apartment complex. The officer spotted three African-American males, including K.G. who was wearing a white t-shirt with a dark hooded GAP sweatshirt on his shoulder. As the officer exited his car, one of the men began to run away and K.G. walked quickly behind him. While the officer grabbed K.G., the other man escaped. The officer later found a black hooded sweatshirt and a black replica handgun in a bush near where the other man had run.

Police searched K.G. who was carrying his own black cell phone. The cell phone's call log showed it was used to call Pizza Hut at 9:07 p.m. An officer later confirmed, by calling the phone number on the Pizza Hut receipt, that K.G.'s phone had been used to request the pizza delivery. K.G. also had \$24, composed of 14, \$1 bills, and two, \$5 bills, on his person. The police did not find a gun or replica gun, or Nguyen's cell phone, when they searched K.G.

The Contra Costa District Attorney filed a section 602 petition alleging K.G. committed second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c)).

Following a contested jurisdictional hearing, the juvenile court sustained the petition. The court then declared K.G. a ward of the court, ordered him removed from his

home, and placed him in the custody of the probation department pending placement in an appropriate institution or home. Among other terms and conditions of probation, the court prohibited K.G. from using or possessing “any illegal drugs, drug paraphernalia, alcohol and/or prescription drugs unless you have a current and valid prescription for the prescription drugs” and using or possessing “any weapons, ammunition and/or replica guns.”

DISCUSSION

Substantial Evidence

In reviewing an attack on the sufficiency of the evidence, we “ “ “ ‘examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] . . . We do not reweigh evidence or reevaluate a witness’s credibility.” ’ [Citation.]” (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1182–1183.)

In this case, “we need only determine whether a reasonable trier of fact, *considering the circumstantial evidence cumulatively*, could have found the defendant guilty.” (*People v. Daya* (1994) 29 Cal.App.4th 697, 709, italics added.) If “ ‘the circumstances reasonably justify the trial court’s findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding.’ ” (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1372.)

K.G. posits six deficits in the evidence. First, the victim described the robbers as wearing sweatshirts with no writing on them, whereas his sweatshirt had a four- to six-inch “GAP logo.” Second, it is not unusual for a teenager like him to carry money in a similar amount and in similar denominations as the victim’s stolen money. Third, there was no evidence he personally called Pizza Hut from his cell phone. Fourth, when he

was searched, the officers did not find a black replica or silver gun, or the victim's cell phone. Fifth, it is unlikely he would have stayed in the area for over half an hour had he participated in the robbery. Sixth, the victim could not identify him in a photographic lineup or in court. K.G. thus contends the juvenile court's jurisdictional findings were not based on inferences drawn from substantial evidence, but from "suspicion alone," citing *People v. Morris* (1988) 46 Cal.3d 1 (*Morris*), disapproved on another ground as stated in *In re Sassounian* (1995) 9 Cal.4th 535, 543, footnote 5.

In *Morris*, the defendant was convicted based on circumstantial evidence of murder and robbery, and the special circumstance allegation that the murder was committed during the commission or attempted commission of a robbery. (*Morris*, *supra*, 46 Cal.3d at pp. 9–10, 19–21.) However, "[t]he evidence merely show[ed] that the assailant shot the victim, who was nude, and shortly thereafter a man who resembled the assailant was observed running from the scene to a waiting car." (*Id.* at p. 20.) There was no evidence, either direct or circumstantial, the victim's personal property was taken at the time of the murder. (*Id.* at p. 20.) There were no witnesses to the shooting, and the only evidence of motive came from a former friend of the defendant who claimed the defendant stated he " 'had to kill.' " (*Id.* at pp. 11–12, 20.) The only evidence linking the defendant to the robbery was a store clerk's belief the defendant looked like a man who tried to fraudulently use a credit card previously borrowed by the victim. (*Ibid.*) The California Supreme Court stated at best one could "speculate" about the defendant's involvement, but, based on the totality of the evidence, "[t]here [was] obviously nothing here from which the jury could reasonably infer" the defendant committed the robbery. (*Id.* at p. 20, italics omitted.)

Here, in contrast, there was ample circumstantial evidence from which the juvenile court could reasonably infer K.G.'s participation in the robbery. While the court acknowledged the victim could not provide "specific facial features" of the robbers because it was dark, he was able to "identify some facts relating to the identity of this minor that are not inconsistent with this minor." The "eyewitness identified an African-American male, 18 to 20, who was light-skinned, wearing a dark sweater which had a

hoodie attached, whose height description and body build, all of which matches the minor's." In addition, the amount of money and denominations of the cash taken from the victim and found in K.G.'s possession was very similar. K.G.'s cell phone was used to order the pizza delivery at 9:07 p.m. When the responding officer arrived, he observed three males who immediately dispersed. K.G. and another of the men began walking away, and when the officer got out of his car and told the two to sit on the curb, the other man began running away and K.G. began walking quickly in the same direction. A black replica gun like the one used in the robbery and a black hooded sweatshirt were found in the bushes where the other man had run.

K.G. contends his walking away is not evidence of guilt, citing *People v. Perrusquia* (2007) 150 Cal.App.4th 228 (*Perrusquia*). In *Perrusquia*, police spotted the defendant in a high-crime area after a string of convenience store robberies. (*Id.* at p. 238, dsn. opn. of Bedsworth, J.) Nothing in the record indicated he matched the description of the previous robbers. (*Id.* at p. 234.) He tried to avoid the officers and objected to a patdown search. (*Id.* at pp. 230–232.) As the defendant “started to walk away,” the officers detained him and found a loaded firearm and drugs. (*Id.* at p. 231.) The Court of Appeal affirmed the order suppressing the evidence and subsequently dismissing the case because the officer did not have “ ‘specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity.’ ” (*Id.* at p. 234.)

Perrusquia is inapposite. The case merely holds walking away from police officers after being asked to stop, *without more*, is insufficient grounds for a detention. That is not the case, here. As discussed above, the evidence of K.G.'s attempted flight was one piece of evidence, among many, showing he was a participant in the robbery.

In sum, the juvenile court's jurisdictional finding is supported by substantial evidence.

The Probation Conditions

The juvenile court ordered K.G. “not to use or possess any illegal drugs, drug paraphernalia, alcohol and/or prescription drugs unless you have a current and valid prescription for the prescription drugs” and “not to use or possess any weapons, ammunition and/or replica guns.” K.G. contends these conditions are unconstitutional because both lack a knowledge requirement and the weapons condition does “not specify possession of a deadly or dangerous weapon or an intent to use an item as a deadly or dangerous weapon.” The Attorney General has no objection to the addition of a “knowledge” requirement and a “deadly or dangerous” descriptor.

“[T]he law has no legitimate interest in punishing an innocent citizen who has no knowledge of the presence of a [prohibited item].” (*People v. Freitas* (2009) 179 Cal.App.4th 747, 752 [modifying probation condition to prohibit knowing possession of a firearm or ammunition].) Accordingly, courts routinely order modification of probation conditions to incorporate a scienter requirement where a probationer could unknowingly engage in the prohibited activity. (E.g., *In re Victor L.* (2010) 182 Cal.App.4th 902, 912–913, [modifying probation condition to prohibit knowing presence of weapons or ammunition]; *In re Justin S.* (2001) 93 Cal.App.4th 811, 816, [modifying probation condition to prohibit association with known gang members].)

Here, it is possible K.G. could unknowingly violate the drug and weapon prohibitions by, for instance, driving a car with, unbeknownst to him, prohibited drugs or weapons in the trunk. Accordingly, we agree the drug and weapons conditions should be modified to include a knowledge requirement.²

² We note there is debate over whether probation conditions must contain an express knowledge requirement. (Compare *People v. Patel* (2011) 196 Cal.App.4th 956, 960 (*Patel*) [holding scienter requirement will be deemed present in all probation conditions restricting presence, possession, or association] with *People v. Piralì* (2013) 217 Cal.App.4th 1341, 1351 [declining to follow *Patel* and choosing to modify probation conditions on case-by-case basis to include knowledge requirement]; *People v. Moses* (2011) 199 Cal.App.4th 374, 380–381 [same]; *People v. Freitas, supra*, 179 Cal.App.4th at p. 752 [probation condition prohibiting possession of firearms requires modification to make knowledge requirement explicit].) We will continue to follow the Supreme Court’s

A probation condition must also not be overbroad. “A probation condition that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.” (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) “A term of probation is invalid if 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.’ ” (*People v. Lopez* (1998) 66 Cal.App.4th 615, 624.)

As to the weapons prohibition, there is no question a prohibition against the use and possession of any “dangerous or deadly weapon” passes constitutional muster. (*In re R.P.* (2009) 176 Cal.App.4th 562, 567–568.) We will therefore order the weapons prohibition to be further modified to prohibit the use or possession of any dangerous or deadly weapon.

Maximum Term of Confinement

K.G. contends “the juvenile court failed to calculate [his] maximum term of confinement” and therefore remand is required. The Attorney General agrees, observing the juvenile court neither orally, nor in the minutes, specified the maximum term of confinement.

Welfare and Institutions Code section 726 provides: “If the minor is removed from 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” (§ 726, subd. (d), italics added.) The Rules of Court specifically

approach in *In re Sheena K.* (2007) 40 Cal.4th 875, 892 (*Sheena K.*), that “modification to impose an explicit knowledge requirement is necessary to render the condition constitutional.” (See *People v. Pirali*, *supra*, 217 Cal.App.4th at p. 1351; *In re Victor L.*, *supra*, 182 Cal.App.4th at p. 913 [“Due process requires . . . that the probationer be informed *in advance* whether his conduct comports with or violates a condition of probation. For this reason we will modify the condition of probation to make that requirement explicit.”].)

direct the juvenile court to “ ‘specify and note in the minutes the maximum period of confinement under section 726.’ ” (*In re Julian R.* (2009) 47 Cal.4th 487, 497, quoting Cal. Rules of Court, rule 5.795(b).) We therefore agree remand is required for the juvenile court to specify the maximum term of confinement.

K.G. also claims the juvenile court must “calculate actual time credits for time served in juvenile hall pending disposition” and “additional days [defendant] spent in detention while awaiting placement after the disposition hearing.” The Attorney General makes no response to this assertion, presumably because of the acknowledgment that remand is required.

A minor is entitled to credit against his term of commitment for all days spent in physical confinement on the charges that resulted in his commitment. (*In re Antwon R.* (2001) 87 Cal.App.4th 348, 352.) This includes time he or she spends in a secure facility between the dispositional hearing and the date he is transported to the commitment facility. (*In re J.M.* (2009) 170 Cal.App.4th 1253, 1256.) Accordingly, on remand, the juvenile court must also calculate K.G.’s confinement credits.

DISPOSITION

The juvenile court’s jurisdictional findings are affirmed. As to the dispositional ruling, the drug probation condition is modified to state: “You are not to knowingly use or possess any illegal drugs, drug paraphernalia, alcohol, and/or prescription drugs unless you have a current and valid prescription for the prescription drugs.” The weapons condition is modified to state: “You are not to knowingly use or possess any dangerous or deadly weapons, ammunition and/or replica guns.” A limited remand is ordered for the juvenile court to determine and state the maximum term of confinement and to determined and state confinement credits. In all other respects, the judgment is affirmed.

Banke, J.

We concur:

Margulies, Acting P. J.

Dondero, J.