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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re DERRICK N., a Person Coming
Under the Juvenile Court Law.

B239374

THE PEOPLE,

(Los Angeles County
Super. Ct. No. GJ29329)

Plaintiff and Respondent,

v.

DERRICK N.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County. Robert Leventer, Juvenile Court Referee. Affirmed in part, reversed in part and remanded with directions.

Esther R. Sorkin, 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, Kenneth C. Byrne and Colleen M. Tiedemann, Deputy Attorneys General, for Plaintiff and Respondent.

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The juvenile court referee found that Derrick N. committed one count of petty theft, one count of assault with a deadly weapon, and two counts of assault by means of force likely to produce great bodily injury. Because the referee's statements regarding whether Derrick used a deadly weapon or force likely to produce great bodily injury were conflicting, we conditionally reverse the findings as to the assault offenses and remand the cause to the referee to clarify these factual issues. If the same referee is no longer available to make the clarifications, then as to the assault offenses, the order is reversed and the court is directed to enter a new order finding Derrick committed three counts of assault under Penal Code section 240.

FACTS AND PROCEEDINGS BELOW

This case arose in October 2011 from a m el e between two groups of teenagers over an X-box that a member of one group sold to a member of the other group. In the course of the fight Derrick struck Cameron C. with an object that drew blood from scratches and left red marks on Cameron's back. Derrick also swung the object at Nigel C. but didn't strike him. Raymond M. grabbed the object to try to prevent Derrick from striking Nigel and sustained a cut on his elbow which required three or four stitches and cuts on his hand.

Whatever the object Derrick used in his assault on Cameron, Raymond and Nigel, neither that object nor a picture of the object was introduced into evidence. Cameron testified that the instrument was "silver and shiny" with a metal blade about three inches wide and five to nine inches long with a four-inch black plastic handle. The blade was dull on one side and sharp on the other. Cameron referred to the object as a "machete." Raymond referred to the instrument as a "blade" having a "sharp side" which reflected the sun.

The referee sustained a petition under Welfare and Institutions Code section 602, alleging that Derrick committed an assault with a deadly weapon on Raymond and assaults by means likely to produce great bodily injury on Cameron and his brother

Nigel.¹ In announcing the findings, the referee stated that the object “was clearly being used as a deadly weapon” but that “[t]here is no great bodily injury in this case.” The referee found that the instrument was a “seven to nine inch metal object with a handle [and] had some weight to it.” The referee further stated that the unidentified object “was wielded like a deadly weapon” and “it was being used by [sic] force likely to cause great bodily injury.” At the disposition hearing six weeks later, however, the referee stated: “I’m not able to determine from the evidence the nature of the weapon that was used. It seems to be something short of a sharp knife. It was not a sharp knife or an instrument that could easily inflict great bodily harm, although it was a deadly weapon.”

The referee declared the offenses to be felonies and placed Derrick on home probation.

DISCUSSION

At the time Derrick committed the offenses, Penal Code section 245, subdivision (a)(1) stated in relevant part: “Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished” In order to prove the defendant guilty of assault with a deadly weapon or with force likely to produce great bodily harm, the prosecution must prove that when the defendant acted he had the present ability to apply force likely to produce great bodily injury or the ability to apply force with a deadly weapon. (*People v. Golde* (2008) 163 Cal.App.4th 101, 121.)

At the adjudication hearing the referee stated that the weapon “was clearly being used as a deadly weapon;” that it “was wielded like a deadly weapon;” and that “it was being used by force likely to cause great bodily injury.” At the disposition hearing, however, the referee stated: “I’m not able to determine from the evidence the nature of the weapon that was used. . . . It was not a sharp knife or an instrument that could easily inflict great bodily harm, although it was a deadly weapon.”

¹ The referee dismissed count 1 charging Derrick with second degree robbery and found that he committed the lesser offense of petty theft. This finding is not at issue in this appeal.

A “deadly weapon” is a weapon that is inherently deadly (a dirk, a blackjack) or one which is used in such a way that it is capable of causing and likely to cause death or great bodily injury (a bottle, a pencil). (*People v. Brown* (2012) 210 Cal.App.4th 1, 6-7.) If the instrument in this case was neither a sharp knife nor an instrument that could easily inflict great bodily harm, the instrument was not a deadly weapon and the finding that Derrick committed assault with a deadly weapon would have to be reversed. Similarly, if the weapon Derrick used could not easily inflict great bodily injury the finding that Derrick committed the crime of assault by means of force likely to produce great bodily injury would also have to be reversed.

Because we cannot determine which set of statements the referee intended as his true findings, the cause must be remanded for clarification.

DISPOSITION

The order is affirmed as to the offense of petty theft. The order is conditionally reversed and the cause is remanded to the juvenile court referee with directions to clarify whether he finds that the instrument Derrick used was a deadly weapon and if Derrick used force likely to produce great bodily injury. If the referee finds that the instrument was a deadly weapon then he shall so state on the record and reinstate the order as to that offense. If the referee finds that the instrument was likely to produce great bodily injury he shall so state on the record and reinstate the order as to those offenses. If the referee is no longer available then, as to the assault offenses, the order is reversed and the court is directed to enter a new order finding Derrick committed three counts of assault under Penal Code section 240.

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We concur:

ROTHSCHILD, J.

MALLANO, P. J.

JOHNSON, J.