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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re AUSTIN H., a Person Coming Under
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

AUSTIN H., a minor,

Defendant and Appellant.

D059383

(Super. Ct. No. J209071)

APPEAL from a judgment of the Superior Court of San Diego County, James H. Lauer, Jr., Judge. Reversed in part; affirmed in part.

PROCEDURAL BACKGROUND

On September 29, 2010, the San Diego County District Attorney filed a petition under Welfare and Institutions Code section 602 alleging in count 1 that Austin H.

committed residential burglary in violation of Penal Code¹ section 459. In count 2 it was alleged he committed grand theft in violation of section 487, subdivision (a), and in count 3 that he committed theft in violation of section 484.

On February 17, 2011, the juvenile court made true findings on all three counts. On March 11, 2011, the court adjudged Austin a ward of the court. He was placed on probation and fines and conditions were imposed. He was ordered to pay restitution to D.C. Shoes, the victim of his crimes, in an amount to be determined at a later date. Austin filed a timely notice of appeal.

FACTUAL BACKGROUND

At 10:00 a.m. on October 25, 2009, a patrol officer for D.C. Shoes in Vista stopped by the facility to ensure it was fully locked and intact. Although the officer did not testify in the trial court, he did not report anything was wrong with the building. However, at 3:00 and 4:00 p.m., a professional skater arrived at the building and noticed a broken window on one of the internal offices. He called Jesse Beas, the D.C. Shoes facility manager, to report a possible break-in.

On inspection, Beas inspected a floor to ceiling window. The window was divided into two parts, a large, approximately nine-foot by three-foot window pane at the top and another three-foot by four-foot window pane at the bottom. The three-foot by four-foot lower pane was broken, and glass was "shattered everywhere" into the interior

¹ All further statutory references are to the Penal Code.

of the building, as if the window had been hit with a high impact item. Broken glass was found all over the concrete floor, couch, counter and desk. No other windows were broken, and the alarm system to the building was not triggered by the window being broken.

The shattered window opened into the room where skate decks and computer equipment were stored. Beas determined a number of items were missing from the area near the broken window, including a big screen television, two desktop computers, three skate tapes, a "server", and between 12 to 15 skate decks. Ten of the unsigned skate decks were valued at about \$100 dollars each and had a total value of about \$1,000. Three of the skate decks were signed and worth at least \$500 each and had a total value of \$1,500. Together, the signed and unsigned skate decks had a value of at least \$2,500. Beas contacted the sheriff's department.

Vista Sheriff's Department Detective Robert Johnson investigated the break-in. Johnson recovered a small amount of blood from a window blind inside D.C. Shoes. The blood taken from the window blind matched a DNA sample Austin had previously provided a law enforcement agency. Roberts contacted Austin and he agreed to come down to the station for questioning and a reference swab.

Austin admitted that on the day of the burglary, he and two friends were at the D.C. warehouse between 12:00 and 1:00 p.m. He testified that when at the facility he and his friends noticed the window was already broken and there were computer pieces and broken glass lying around the window. He admitted that he crawled in through the

already-broken window and stole the skateboard decks. He denied that he stole the computer equipment or any other missing items.

Austin testified further that eventually the boys left D.C. Shoes. He took the skate decks with him and was picked up by his girlfriend. His two friends went their separate ways.

ANALYSIS

Austin argues there is insufficient evidence to support a true finding that he stole the electronic items (the two iMac computers, a flat screen television and server) in addition to the skate decks. We disagree.

In effect, Austin offers us the same defense he offered at trial: someone else broke in and stole the computer equipment before he arrived at the scene. He adds to this analysis both argument and trial testimony that he claims supported his defense. This is simply not the test employed on appeal.

The question presented involves settled appellate law. Where sufficiency of the evidence is challenged, the test we must use on appeal is whether the evidence, considered as a whole, is sufficient to permit any trier of fact to conclude the prosecution proved its case beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) We do not reweigh the evidence on appeal. If the circumstances reasonably justify the trier of fact's findings, the opinion of this court that circumstances could justify a contrary finding does not warrant reversal of the judgment. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

There was a relatively short period of time between Austin's arrival at the warehouse and the discovery of the thefts. There is no question that at 10:00 a.m. on the day in question, the warehouse was intact, with no broken windows. Austin and his friends arrived at the warehouse between noon and 1:00 p.m. They skated for 15 to 20 minutes before Austin crawled through the window and was gone for about five minutes. The burglary was discovered between 3:00 p.m. and 4:00 p.m. Moreover, Austin admitted that during the time period in which the burglary and theft of the computer equipment occurred, he entered the building belonging to D.C. Shoes and stole the expensive skate decks. He admitted the entry was through the broken window that had his blood on the inside.

Not only did Austin admittedly enter the warehouse during the time period the burglary of the computer and television equipment occurred, in addition, the large three-foot by four-foot window broken by Austin was apparently the only channel through which the computer and television equipment could have been taken. As Beas noted, the alarm system to the building did not trigger, as it would have if someone entered the building through a door. No other windows were broken.

Finally, although other burglaries occurred in the area, there is no evidence some third party unrelated to Austin's group entered the building and stole the computer equipment.

As the People note, where after hearing the evidence and observing the witnesses, the trial court has rejected a hypothesis pointing to innocence and there is evidence to

support the implied finding of guilt, we must on appeal accept the trial court's finding. (*People v. Tabb* (2009) 170 Cal.App.4th 1142, 1152.)

As the People note, the value of the skate decks, which totals at least \$2,500, is itself sufficient to support the finding of grand theft (§ 487).²

Austin also urges that he cannot be convicted of both grand theft and the lesser included offense of petty theft. The People agree. (See *People v. Shoaff* (1993) 16 Cal.App.4th 1112, 1118.)

DISPOSITION

The true finding on count 3 (petty theft) is reversed. In all other respects the judgment is affirmed.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

HALLER, J.

² We recognize the finding of guilt as to the computer equipment affects the restitution Austin may have to pay.