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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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

THE PEOPLE,

Plaintiff and Respondent,

v.

JOEL G.,

Defendant and Appellant.

D060564

(Super. Ct. No. J225756)

APPEAL from a judgment of the Superior Court of San Diego County, Browder

A. Willis III, Judge. Affirmed as modified.

On August 8, 2011, Joel G. and a companion entered a store. They left, each carrying beer. They did not pay for the beer. The store manager confronted Joel outside the store. A struggle ensued. Joel and his companion left with the beer.

The juvenile court entered true findings of robbery (Pen. Code, § 211; count 1) and burglary (*Id.*, § 459; count 3), both felonies, and petty theft of merchandise

(*Id.*, §§ 484, 490.5; count 4) and possession of alcohol as a minor (Bus. & Prof. Code, § 25662, subd. (a); count 5), both misdemeanors. The court continued Joel as a ward and committed him to the Breaking Cycles program for a period not to exceed 365 days, to be followed by home placement.

Joel appeals, contending the true finding of petty theft of merchandise must be dismissed because that offense is a lesser included offense of robbery. The People properly concede the point. "Theft in any degree is a lesser included offense to robbery, since all of its elements are included in robbery." (*People v. Burns* (2009) 172 Cal.App.4th 1251, 1256.) When two charged offenses are based on the same criminal act, and, according to the statutory elements test, one offense is a lesser included offense of the other, the defendant cannot be convicted of both offenses. (*People v. Reed* (2006) 38 Cal.4th 1224, 1231.)

#### DISPOSITION

The judgment is modified by striking the true finding of petty theft of merchandise (Pen. Code, §§ 484, 490.5; count 4). As so modified, the judgment is affirmed.

BENKE, Acting P. J.

WE CONCUR:

HALLER, J.

AARON, J.