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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re Q.L., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

Q.L.,

Defendant and Appellant.

F063316

(Super. Ct. No. 11CEJ600485-1)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Alvin M. Harrell, III, Judge.

Hassan Gorguinpour, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Sean M. McCoy and Ward A. Campbell, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Cornell, J., and Detjen, J.

The court found that appellant, Q.L., was a person described in Welfare and Institutions Code section 602 after it sustained allegations charging appellant with second degree burglary (count 2/Pen. Code, §§ 459, 460 subd. (b))¹ and two counts of second degree robbery (counts 1 & 3/§ 211). On September 13, 2011, the court set appellant's maximum term of confinement at six years eight months and committed appellant to the New Horizons program for a term not to exceed one year.

On appeal, appellant contends: 1) the court violated section 654 when it used his adjudication for second degree burglary to add a consecutive eight-month term to his maximum term of confinement; and 2) by doing so, the court also violated his federal due process rights. We will find merit to appellant's first contention and that his second contention is moot. In all other respects, we affirm.

FACTS²

On July 29, 2011, at appellant's jurisdictional hearing, Anna Venegas testified that on May 27, 2011, she was working at a convenience store in Fresno when appellant came into the store at approximately 9:30 a.m. Venegas began watching appellant because he came into the store holding his pants and walking with a limp like he had dropped something down his pants and it was sliding down his leg. Appellant got some candy from the candy aisle. After getting a fruit drink, appellant made eye contact with Venegas as he walked through the coffee aisle to the counter. Appellant was "shifting around his clothing" as he set the candy and drink on the counter. Venegas asked

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

² Count 1 charged appellant with the robbery of a Johnny Quik store on May 27, 2011. Count 3 charged him with the robbery of Jenna Arreola on May 29, 2011. The facts pertaining to count 3 are omitted because appellant does not raise any issues with respect to that count.

appellant if that was all. Appellant replied that he forgot his money and would be right back, and left the store.

Approximately 20 to 30 minutes later appellant came back into the store. Venegas told appellant that she had his candy and drink and placed them on the counter. Appellant pulled out a gun³ and told Venegas to give him the money in the cash register. Venegas stepped back and did not open the register. Appellant shook the gun at her and told her to hurry up. Venegas replied that she could not open the register unless he bought something. Appellant looked at Venegas and then at some people who were about to walk into the store. He then put the gun away, grabbed the candy and the drink off the counter, and left without paying for them.

On September 13, 2011, the court set appellant's maximum term of confinement at six years eight months, consisting of the aggravated term of five years for one robbery offense, a consecutive one-year term for the other robbery offense (one-third the middle term of three years) and an eight-month term for his burglary offense (one-third the middle term of two years).

DISCUSSION

Appellant contends that since his burglary conviction was based on his entry into the store with the intent to commit the robbery charged in count 1, the court violated section 654 when it relied on his burglary offense to add a consecutive eight-month term to his maximum term of confinement. Respondent contends that section 654 does not apply because the first time appellant entered the store he intended to steal some candy and a drink, whereas the second time, he entered with the intent to commit a robbery, and appellant had time to reflect on his conduct between the two entries. We agree with appellant.

³ The gun was later determined to be an imitation semiautomatic handgun.

Section 654 provides in pertinent 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.” (§ 654.)

“The statute itself literally applies only where such punishment arises out of multiple statutory violations produced by the ‘same act or omission.’ [Citation.] However, because the statute is intended to ensure that defendant is punished ‘commensurate with his culpability’ [citation], its protection has been extended to cases in which there are several offenses committed during ‘a course of conduct deemed to be indivisible in time.’ [Citation.]

“It is defendant’s intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.] ... [I]f all of 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. [Citation.]

“If, on the other hand, defendant harbored ‘multiple criminal objectives,’ which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, ‘even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.’ [Citation.]” (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

The trial court’s finding that section 654 does not apply will be upheld on appeal if supported by substantial evidence. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143; *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1252-1253; but see *People v. Britt* (2004) 32 Cal.4th 944, 953 [avoid an analysis which “parses the objectives too finely”].)

Second degree burglary requires the entry into a structure with the intent to commit a theft or a felony. (*People v. Anderson* (2009) 47 Cal.4th 92, 101.) The evidence here does not support respondent’s assertion that appellant intended to steal some candy the first time he entered the store. Although the clerk testified that she thought appellant walked as if something had slid down his pants, there was no evidence

that he attempted to put any merchandise down his pants or that he actually took anything from the store. Further, appellant's conduct in placing the candy and drink on the counter was inconsistent with an intent to steal this same merchandise. Therefore, since there is also no evidence that appellant intended to commit a felony when he entered the store the first time, the court must have found that appellant committed the burglary offense when he entered the store the second time.

In *People v. Le* (2006) 136 Cal.App.4th 925 (*Le*), the defendant and a confederate entered a store and took a cart full of merchandise without paying. The defendant and his cohort took the merchandise to a sports utility vehicle where another confederate helped them load the stolen merchandise into the vehicle. After three store managers walked out to the defendant's vehicle, one of them reached into the vehicle and removed the keys from the ignition. The defendant struggled with one of the managers and was able to retrieve the keys when the manager dropped them on the floorboard. The defendant then drove off with the merchandise and dragged the manager a short distance. (*Le, supra*, 136 Cal.App.4th at p. 929.)

The defendant pled no contest to second degree burglary and robbery based on the above incident. He also admitted that he had three prior convictions within the meaning of the three strikes law (§ 667, subs. (b)-(i)), and admitted a serious felony enhancement. After the court struck two of the prior convictions, the court sentenced the defendant to an aggregate term of 12 years 4 months consisting of a doubled middle term of six years on the defendant's robbery conviction, a doubled one-third the middle term of 16 months on his burglary conviction, and a five-year serious felony conviction. (*Le, supra*, 136 Cal.App.4th at p. 930.)

On appeal, the court found that the burglary was the means of accomplishing the single intent of stealing merchandise and thus, the consecutive term imposed on that count violated section 654. (*Le, supra*, 136 Cal.App.4th at pp. 931-932.)

Here, appellant committed the burglary and robbery offenses during a continuous course of conduct that occurred upon his second entry into the store. Therefore, the record does not support the juvenile court's implicit finding that in committing the burglary and robbery offenses appellant had multiple criminal objectives, which were independent of and not merely incidental to each other. Accordingly, we conclude that the court violated section 654 when it used appellant's burglary offense to add eight months to appellant's maximum term of confinement.⁴

DISPOSITION

Appellant's maximum term of confinement is reduced from six years eight months to six years. As modified, the judgment is affirmed.

⁴ Appellant's remaining contention is moot in light of our conclusion on this issue.