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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re ALAN B., a Person Coming Under
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

ALAN B.,

Defendant and Appellant.

G045311

(Super. Ct. No. DL039926)

O P I N I O N

Appeal from orders of the Superior Court of Orange County,
Nick A. Dourbetas, Judge. Affirmed in part, reversed in part and remanded with
directions.

Doreen B. Boxer, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney
General, James D. Dutton, Donald W. Ostertag and Joy Utomi, Deputy Attorneys
General, for Plaintiff and Respondent.

* * *

INTRODUCTION

In April 2011, then 14-year-old Alan B. walked into a drug store, took four candy bars from a shelf, concealed the candy bars in his pants, and walked out of the store without paying for the candy bars. Alan was immediately confronted by a security guard who had seen Alan steal the candy bars and asked Alan to return to the store. Alan started to run away and the security guard gave chase. As the security guard got close to Alan, Alan threw the skateboard that he had been carrying; the skateboard struck the security guard in the head. The juvenile court found Alan had committed one count of robbery and one count of aggravated assault as alleged in a juvenile dependency petition (the petition), sustained the petition, and declared Alan a ward of the court under Welfare and Institutions Code section 602.

Alan contends the juvenile court erred by finding Alan committed robbery because insufficient evidence showed he used force or fear “to gain original possession of the property or to resist attempts to retake the stolen property.” (*People v. Estes* (1983) 147 Cal.App.3d 23, 28.) He argues the portion of the order sustaining the petition as to the robbery count should therefore be reversed. As Alan does not challenge the finding in the same order that he committed aggravated assault, that portion of the order is affirmed. He also argues the juvenile court’s disposition order, which set a maximum six-year confinement period and imposed restitution fines, violated Penal Code section 654.

We reverse the portion of the order sustaining the petition as to the court’s finding Alan committed robbery. The juvenile court erred by finding Alan had committed robbery, because insufficient evidence showed he had possession of the stolen candy bars at the time he used force against the security guard. We remand to the juvenile court with directions to dismiss the robbery count. We therefore do not need to decide Alan’s arguments based on Penal Code section 654. Because the juvenile court made a single disposition order based on the true findings on both the robbery and

aggravated assault counts, the latter of which is not at issue in this appeal, we remand with directions to issue a new disposition order.

SUMMARY OF TRIAL TESTIMONY

Around 8:30 p.m. on April 9, 2011, Tupulata Talo was on duty, working as a loss prevention agent for a Rite Aid store in Westminster, when he saw Alan walk into the store. Talo watched Alan walk into the candy aisle, lift up his shirt, and conceal candy bars in his pants. Talo positioned himself outside the store and waited about 40 seconds before Alan walked out of the store without paying for the candy.

Talo stopped Alan in front of the store, identified himself as “Rite-Aid security,” showed Alan his badge, and asked Alan to step back inside the store. Alan initially appeared cooperative, but then turned around and ran away. Talo chased after Alan. When Talo came within a couple of feet of Alan, Alan threw the skateboard that he had been carrying; the skateboard hit Talo in the head. Another employee caught up with Alan and detained him. The record does not show that Alan was searched after he was detained.

Talo never saw the candy bars outside the store; he never saw Alan with the candy bars outside the store; and he did not see Alan throw, remove any of the candy wrappers, or eat the candy bars. Talo, along with Officer Jose Flores of the Westminster Police Department, who reported to the scene, retraced the path Talo took when he was chasing after Alan to look for the stolen candy bars; no one found the candy bars Alan took. Talo found one brown Hershey’s candy bar wrapper, which had creases and appeared to be bent, in the center of the parking lot.

Flores interviewed Alan. Alan admitted he went into the Rite Aid and decided to steal four Hershey’s bars. He told Flores that Talo approached him and Alan initially pretended to cooperate with Talo, but then threw away the candy bars and started to run from Talo. Flores understood from the interview that Alan threw away the candy

bars before he started running from Talo, and, thus, before he threw the skateboard that hit Talo.

Alan's trial testimony was consistent with Talo's testimony regarding the sequence of events. Alan also testified he threw away the candy bars before he threw the skateboard. He further testified he never removed any wrappers from the candy bars he stole.

PROCEDURAL BACKGROUND

The petition was filed in the Orange County Juvenile Court and alleged that on April 9, 2011, Alan committed one count of second degree robbery in violation of Penal Code sections 211 and 212.5, subdivision (c) (count 1), one count of aggravated assault in violation of Penal Code section 245, subdivision (a)(1) (count 2), and one count of making a false representation to a peace officer in violation of Penal Code section 148.9, subdivision (a) (count 3). The juvenile court dismissed count 3 of the petition on the motion of the People.

Following trial, the juvenile court found the allegations of the petition as to counts 1 and 2 true beyond a reasonable doubt, and declared Alan a ward of the court under Welfare and Institutions Code section 602. The court found the "matters to be felonies with maximum term of confinement of 6 years." The court credited Alan with 41 days of actual custody credit in a juvenile facility, placed him on supervised probation, and ordered that he be released to his mother's care. Alan appealed.

DISCUSSION

I.

Standard of Review

The same substantial evidence standard of review in adult criminal cases is applicable in juvenile delinquency proceedings. (*In re Roderick P.* (1972) 7 Cal.3d 801, 809.) "In considering the sufficiency of the evidence in a juvenile proceeding, the appellate court 'must review the whole record in the light most favorable to the judgment

below to determine whether it discloses substantial evidence—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. We must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence [citation] and we must make all reasonable inferences that support the finding of the juvenile court. [Citation.]” (*In re Babak S.* (1993) 18 Cal.App.4th 1077, 1088-1089; accord, *People v. Thomas* (1992) 2 Cal.4th 489, 514; *People v. Barnes* (1986) 42 Cal.3d 284, 303.)

II.

Insufficient Evidence Supported the Juvenile Court’s Finding Alan Committed Robbery.

Penal Code section 211 provides: “Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” Alan contends the juvenile court’s finding that he committed robbery was not supported by substantial evidence because insufficient evidence showed he took or retained the stolen candy bars by means of force or fear. We agree with Alan.

“A defendant who does not use force or fear in the initial taking of the property may nonetheless be guilty of robbery if he uses force or fear to retain it or carry it away in the victim’s presence. [Citations.]’ [Citation.] That is, ‘[a] robbery is not completed at the moment the robber obtains possession of the stolen property. The crime of robbery includes the element of asportation, the robber’s escape with the loot being considered as important in the commission of the crime as gaining possession of the property. . . . [A] robbery occurs when defendant uses force or fear in resisting attempts to regain the property or in attempting to remove the property from the owner’s immediate presence regardless of the means by which defendant originally acquired the property.’ [Citation.]” (*People v. McKinnon* (2011) 52 Cal.4th 610, 686-687.) “A robbery cannot be committed against a person who is not in possession of the property

taken or retained.”” (*Id.* at p. 687.) Possession may be actual or constructive. (*Ibid.*)
““““[T]he theory of constructive possession has been used to expand the concept of
possession to include employees and others as robbery victims.”””” (*Ibid.*)

At trial, the People argued Alan committed a robbery because he used force to retain the candy bars by throwing his skateboard at Talo. Insufficient evidence supported the juvenile court’s finding Alan committed such a robbery because there was no evidence presented at trial, which showed Alan had the candy bars in his possession at the time he threw the skateboard.

The Attorney General argues that “[t]here are a host of reasonable inferences that can be drawn,” in support of the juvenile court’s robbery finding, including that “if [Alan] discarded the stolen candy, it was not until Talo was distracted from being hit in the head with a skateboard. That would be consistent with Talo’s testimony that he never saw [Alan] discard the stolen candy, and that if [Alan] had discarded the property, it was likely in the area where Talo was hit with the skateboard.”

Although “substantial evidence may consist of inferences, such inferences must be ‘a product of logic and reason’ and ‘must rest on the evidence’ [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding [citations].” (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633; see *Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1144 [same].) On this record, the inference Alan had the candy bars in his possession at the time he threw the skateboard did not rest on the evidence presented at trial, but was the product of mere speculation.

Talo testified he saw Alan place the candy bars in his pants while inside the store. Talo also testified he lost sight of Alan for about 40 seconds while Talo walked out of the store and waited to confront Alan. During Flores’s interview with Alan, Alan stated he had thrown away the candy bars before he started running away from Talo. At trial, Alan testified that he threw away the candy bars as he was running, but before he

threw the skateboard. No evidence was presented at trial that contradicted Alan's statement to Flores and trial testimony that he had thrown away the candy bars before he threw the skateboard.

Talo did not testify that he watched all of Alan's movements from the moment Alan walked out of the store until he threw the skateboard. No evidence showed that if Alan had thrown away the candy after leaving the store, but before he threw the skateboard, Talo necessarily would have seen it. Talo testified he never saw the stolen candy bars outside the store and the stolen candy bars were never found. The juvenile court's finding that Alan used force by throwing the skateboard to retain possession of the candy bars was therefore speculative and not supported by substantial evidence.

In the respondent's brief, the Attorney General cites *People v. Pham* (1993) 15 Cal.App.4th 61 (*Pham*), in support of the argument substantial evidence supported the juvenile court's robbery finding. That case, however, is factually distinguishable from this one.

In *Pham, supra*, 15 Cal.App.4th at page 64, one of the victims discovered the defendant in the backseat of that victim's car, removing items through an opening in the trunk. The defendant got out of the car and fled, carrying away a black bag containing items that he stole from the car. The victim chased the defendant and caught him by his shirt. (*Ibid.*) The defendant "dropped the bag where he stood and began slugging [the victim] in his head several times." (*Ibid.*) The victim's companion grabbed the defendant, who "continued to struggle, kicking, punching, biting, and kneeling both" the victim and the victim's companion. (*Ibid.*)

After the defendant was convicted of robbery, he argued on appeal that insufficient evidence showed he took the property by force or fear because he dropped the stolen goods just as the victim apprehended him. (*Pham, supra*, 15 Cal.App.4th at pp. 64-65.) The appellate court rejected that argument, holding: "[T]he asportation or carrying away of the property occurred when defendant removed the victims' property

from [the victim]’s car and began to flee. The asportation continued while defendant struggled with the victims and prevented them from immediately recovering their goods. Contrary to defendant’s contention, robbery does not require that the loot be carried away *after* the use of force or fear.” (*Id.* at p. 65.)

Unlike the circumstances in *Pham, supra*, 15 Cal.App.4th 61, there was no evidence Alan threw the skateboard to prevent Talo from recovering the candy bars. The undisputed evidence at trial showed that the candy bars had already been thrown away at the time the skateboard was thrown. After the skateboard was thrown, Alan continued to run away. The facts of *Pham* are simply not analogous to those here.

DISPOSITION

The order sustaining the petition is reversed as to the true finding on count 1. The juvenile court is directed to dismiss count 1. The same order is affirmed as to the true finding on count 2. Because the juvenile court made a single disposition order based on the true findings on both counts 1 and 2, we reverse the disposition order and remand with directions to issue a new disposition order.

FYBEL, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.