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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re MOISES R., a Person Coming Under
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

MOISES R.,

Defendant and Appellant.

G050550

(Super. Ct. No. DL044353)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Deborah C. Servino, Judge. Affirmed as modified.

Gail Ganaja, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

In this appeal, appellant takes aim at *People v. Estes* (1983) 147 Cal.App.3d 23 (*Estes*), which held that a person who uses force or fear to *retain* property he has stolen before reaching a place of relative safety is guilty of robbery. Appellant contends *Estes* constitutes an unwarranted departure from common law, but we uphold the trial court's finding he committed robbery in this case. Other than to modify one of appellant's probation conditions, we affirm the judgment against him.

FACTS

Fifteen-year-old Shane L. was skateboarding at a shopping plaza when appellant approached him and asked if he could use his skateboard to demonstrate a trick. After Shane handed appellant his skateboard, appellant asked if he could keep it. Shane said no and repeatedly asked for his skateboard back. However, appellant refused to give it up. While Shane was pressing appellant for the skateboard, appellant asked him, "Do you want me to fuckin' shank you, bro?" Fearful appellant was going to stab him, Shane relented. Appellant rode away on the skateboard, but he did not get far. A busboy from a nearby restaurant confronted him and demanded the skateboard back. Although appellant pulled a knife and made slashing gestures toward the busboy, the busboy retrieved the skateboard and returned it to Shane.

The trial court found appellant robbed Shane and assaulted the busboy with a deadly weapon. Since appellant was already a ward of the court due to prior gang-related activity, the court reaffirmed his status as a ward and ordered him to remain on supervised probation with the standard gang terms. Under those terms, appellant cannot "appear at any court proceeding unless [he is] a party or a defendant in a criminal action or subpoenaed as a witness."

DISCUSSION

The Robbery Finding

Appellant contends the trial court erred in finding he committed robbery because he did not use force or fear to acquire the skateboard from Shane. Although he

acknowledges *Estes* defined robbery to include situations where the defendant uses force or fear to retain stolen property, he argues *Estes* was wrongly decided because it is contrary to common law. However, as appellant grudgingly admits, *Estes* has become established law in California.

Robbery is defined by statute as “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.” (Pen. Code, § 211.) This definition suggests the requisite force or fear must occur before or during the taking, and according to some authorities, that is how the crime of robbery was understood at common law. (See, e.g., *People v. Randolph* (Mich. 2002) 648 N.W.2d 164.) However, California courts have not taken such a rigid approach to the force or fear requirement.

In *Estes*, the court upheld the defendant’s robbery conviction even though he stole property without incident from a department store and did not use force or fear until he was confronted by a security guard outside in the parking lot. Viewing robbery as “a continuing offense that begins from the time of the original taking until the robber reaches a place of relative safety,” *Estes* determined, “Whether defendant used force to gain original possession of the property or to resist attempts to retake the stolen property, force was applied against the guard in furtherance of the robbery and can properly be used to sustain the conviction.” (*Estes, supra*, 147 Cal.App.3d at p. 28.)

Appellant assails *Estes*’ continuing offense theory as being inconsistent with the common law upon which our Penal Code is premised. However, the holding in *Estes* was based on a California Supreme Court case (*People v. Anderson* (1966) 64 Cal.2d 633, 638), and since *Estes* was decided our Supreme Court has cited it with approval on a number of occasions. (See, e.g., *People v. Williams* (2013) 57 Cal.4th 776, 787, 790-799; *People v. Gomez* (2008) 43 Cal.4th 249, 257-261; *People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn. 8.) These cases make clear that even if the defendant takes the subject property by peaceful means, he is nonetheless guilty of robbery if he uses force or

fear to retain the property while he is carrying it away or attempting to escape. (See also *Miller v. Superior Court* (2004) 115 Cal.App.4th 216, 224 [describing this rule as a correct statement of California law].) Because that is precisely what appellant did in this case, we are powerless to disturb the trial court's finding he committed robbery. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.)

Probation Condition

Appellant also asserts the condition of his probation requiring him to steer clear of all court proceedings unless he is a party or subpoenaed witness in the proceeding is unconstitutionally overbroad. We agree.

“The juvenile court has wide discretion to select appropriate probation conditions and may impose “any reasonable condition that is ‘fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.’” [Citations.]” (*In re Sheena K.* (2007) 40 Cal.4th 875, 889.) “[E]ven where there is an invasion of protected freedoms “the power of the state to control the conduct of children reaches beyond the scope of its authority over adults” [Citation.]” (*In re Victor L.* (2010) 182 Cal.App.4th 902, 910.) However, while the government may legitimately restrict a juvenile probationer's constitutional rights, any such restriction must be “closely tailor[ed to] the purpose of the condition to avoid being invalidated as unconstitutionally overbroad. [Citation.]” (*In re Sheena K., supra*, 40 Cal.4th at p. 890.)

In this case, the probation condition prohibiting appellant from attending court proceedings in which he is neither a party nor a subpoenaed witness is reasonably related to the governmental interest of preventing witness intimidation in gang-related cases. (*People v. Martinez* (2014) 226 Cal.App.4th 759, 766-767.) However, that interest is not served by barring appellant from attending proceedings in non-gang cases. In addition, there may be situations where appellant has a legitimate interest in attending

court proceedings in which he is not a party or a subpoenaed witness. Therefore, as respondent concedes, the subject condition is overbroad and must be modified to ensure appellant's constitutional right to attend public court proceedings is not unduly infringed. (*Ibid.*; *In re E.O.* (2010) 188 Cal.App.4th 1149, 1155-1157; *People v. Leon* (2010) 181 Cal.App.4th 943, 952; *People v. Perez* (2009) 176 Cal.App.4th 380, 383-386.)

DISPOSITION

The probation condition respecting appellant's right to attend court proceedings is modified to state: "You shall not be present at any court proceeding where you know or the probation officer informs you that a member of a criminal street gang is present or that the proceeding concerns a member of a criminal street gang unless you are a party, you are a defendant in a criminal action, you are subpoenaed as a witness, or you have the prior permission of your probation officer." As so modified, the judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

THOMPSON, J.