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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re DANIEL D., a Person Coming Under
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL D.,

Defendant and Appellant.

G050559

(Super. Ct. No. DL049747)

O P I N I O N

Appeal from an order of the Superior Court of Orange County,
Deborah C. Servino, Judge. Affirmed in part and reversed in part.

Sarita Ordonez, 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, Peter Quon, Jr., and
Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

In July 2014, then 16-year-old Daniel D. walked into a drug store, took speakers from a shelf, concealed them, and left the store. He was immediately confronted by a store security guard who initiated a physical confrontation culminating in his taking Daniel back into the store. The juvenile court found Daniel committed one count of second degree commercial burglary (a misdemeanor), and also one count of second degree robbery (a felony) based on the physical confrontation with the security guard.

Daniel contends the juvenile court erred by finding he 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 (*Estes*)). Daniel does not challenge the juvenile court’s finding he committed misdemeanor second degree commercial burglary.

We affirm in part and reverse in part. We affirm the portion of the court’s order finding Daniel committed the offense of second degree commercial burglary. We reverse the portion of the court’s order finding Daniel also committed second degree robbery because insufficient evidence showed he used force or fear against the security guard.

SUMMARY OF TRIAL TESTIMONY

Charles Erin Samtucci was an asset protection agent for a Costa Mesa drug store. His job duties included observing customers in the store to make sure store merchandise was not stolen.

Around 9:00 p.m. on July 14, 2014, Samtucci was on duty, walking around the store floor in plain clothes, when he observed a young man, whom he later identified as Daniel, in the electronics aisle. Samtucci saw Daniel remove a set of speakers from a

shelf and go to the restroom area of the store. When Daniel emerged from the restroom area, he did not have anything in his hands. Samtucci went into the men's restroom where he found an empty package of speakers, which had been opened and placed in the trash can. Samtucci left the restroom and watched Daniel walk past the open registers, without attempting to pay for anything, and out of the store.

Samtucci ran out of the store and confronted Daniel, asking him to give back the speakers. Daniel responded, "what speakers?" Samtucci told Daniel, "I need the speakers you stole from the store." Daniel asked Samtucci who he was. Samtucci told him that he worked for the store and needed the speakers back. Daniel did not comply and instead tried to walk away. Samtucci walked toward him and put his hand on Daniel's shoulder; with his other hand, Samtucci motioned toward the store door. Samtucci told Daniel that he needed him to come back inside the store, give back the speakers, and cooperate.¹ Daniel shrugged off Samtucci's hand from his shoulder and attempted to run. Samtucci grabbed the back of Daniel's shirt to stop him, causing his shirt to rip, and successfully pulled Daniel toward him.

A struggle ensued. The juvenile court, in denying Daniel's motion to dismiss under Welfare and Institutions Code section 701.1, found "he did fight, he did take efforts to take swings at the loss prevention officer." Samtucci grabbed Daniel around his upper body. Samtucci decided "just to take him down to the floor." Daniel struggled and wiggled around, but Samtucci successfully got Daniel down on the ground. Samtucci sat on top of Daniel as he kept struggling. Samtucci tried to get Daniel to calm down and said, "dude, just cooperate, give me the speakers, and it doesn't—you know, we don't have to do all this."

¹ Samtucci testified that he told Daniel about five times to "give me the speakers back."

Samtucci stated Daniel “was trying to throw” punches while he struggled. Samtucci took Daniel into the store and put him in a headlock; Daniel yelled, “you’re choking me.”

The encounter between Samtucci and Daniel was video recorded by the store.

Samtucci told a store associate to call the police. At that point, Daniel calmed down and said, “you don’t have to be that way. I’ll give you back the speakers. Don’t call the cops.” Daniel removed the speakers from his shorts and gave them to Samtucci. The speakers had a value of \$12.99.

Officer Ginna Johnson of the Costa Mesa Police Department responded to the store following a report that a person was in custody for shoplifting and possibly fighting a loss prevention agent. She smelled alcohol on Daniel’s breath and noted he had no money with him.

PROCEDURAL BACKGROUND

A juvenile delinquency petition was filed in the Orange County Juvenile Court, which alleged that on July 14, 2014, Daniel committed one count of second degree commercial burglary (a misdemeanor) in violation of Penal Code sections 459 and 460, subdivision (b), and one count of second degree robbery (a felony) in violation of Penal Code sections 211 and 212.5, subdivision (c). Following trial, the juvenile court found the allegations of the petition, as to both counts, true beyond a reasonable doubt, and declared Daniel a ward of the court under Welfare and Institutions Code section 602.

The juvenile court deemed the robbery offense to be a felony and stated Daniel faced a “maximum term of confinement” of five years. The court credited Daniel for 23 days of time in actual custody in a juvenile facility and placed him on supervised probation with conditions. The court ordered the temporary placement and care of Daniel to be vested in the Orange County Probation Department. Daniel 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 Daniel 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.” Daniel contends the juvenile court’s finding that he committed robbery was not supported by substantial evidence because insufficient evidence showed he had taken or retained the speakers by means of force or fear.

In *People v. McKinnon* (2011) 52 Cal.4th 610, 686, the California Supreme Court stated: “‘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.’” Citing *Estes, supra*, 147 Cal.App.3d 23, the Supreme

Court further stated: “[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, supra*, at pp. 686-687.) “‘The terms “force” and “fear” as used in the definition of the crime of robbery have no technical meaning peculiar to the law.’” (*People v. Griffin* (2004) 33 Cal.4th 1015, 1025-1026.) “The law does require that the perpetrator exert some quantum of force in excess of that ‘necessary to accomplish the mere seizing of the property.’” (*People v. Anderson* (2011) 51 Cal.4th 989, 995.)

Daniel argues his “actions do not fall within *Estes* because he did not use force or fear to try to maintain possession of the speakers; his actions simply constituted a defensive response to the aggressive behavior of the guard.” We agree.

The evidence presented at trial, including Samtucci’s testimony and the video recording of Daniel and Samtucci’s physical confrontation, shows no evidence Daniel used force to resist any attempt by Samtucci to regain the speakers or to attempt to escape with the speakers. Instead, the video recording shows an aggressive confrontation initiated by Samtucci, from which Daniel maintained a defensive posture. Indeed, it appears Daniel was in retreat. The absence of evidence of force by Daniel is underscored by Samtucci’s ambiguous testimony that Daniel *attempted* to take swings at him during their physical struggle. Nor is there evidence Daniel used fear to retain the speakers; the Attorney General does not argue otherwise. Based on this record, we cannot conclude sufficient evidence supported the juvenile court’s finding Daniel committed felony robbery.

Because we reverse the robbery finding for insufficient evidence, we do not need to reach Daniel’s challenge to *Estes*, asserted in his appellate briefs, as constituting an unwarranted departure from the common law upon which Penal Code section 211 is based.

DISPOSITION

The portion of the order sustaining the petition as to the misdemeanor second degree commercial burglary allegation is affirmed. The portion of the order sustaining the petition as to the felony second degree robbery allegation is reversed.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.