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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re J.A., a Person Coming Under the  
Juvenile Court Law.

H037839  
(Santa Clara County  
Super. Ct. No. JV38465)

THE PEOPLE,

Plaintiff and Respondent,

v.

J.A.,

Defendant and Appellant.

The juvenile court sustained two juvenile wardship petitions (Welf. & Inst. Code, § 602) alleging that J.A. (the minor) had committed two counts of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)),<sup>1</sup> one count of receipt of stolen property (§ 496, subd. (a)), and one count of robbery (§§ 211, 212.5, subd. (c)). On appeal, the minor argues that (1) the evidence is insufficient to support the robbery finding, (2) the receiving stolen property allegation must be stricken because it relates to the same property he was found to have stolen in the robbery, and (3) four probation conditions must be modified. The Attorney General concedes the second point and also agrees that three of the four probation conditions must be modified.

<sup>1</sup> Further unspecified section references are to the Penal Code.

We conclude that the evidence is sufficient to support the robbery finding and that the receiving stolen property count must be stricken. We accept the Attorney General's concession with regard to three of the probation conditions and agree with the minor that the fourth must be modified as well. We shall reverse with directions to the trial court to modify the judgment and recalculate the minor's maximum time of confinement.

## I. FACTS

Benjamin Bremer was returning home from work at about 2:00 a.m. on June 11, 2011. He was riding his rare blue Beach Cruiser bicycle. As he neared the place where he lived, he passed a group of young men who started yelling at him in a violent way to "come here." The group ran after Bremer. Bremer was very frightened and pedaled toward home as fast as he could; his pursuers were just steps behind. One of the men in the group had a knife, which Bremer described as a kitchen knife. "There was a knife involved. And I [saw] the knife at the time that I passed them on the bicycle on the corner. . . . and that's when I really felt scared and I started to go really fast to my house."

When Bremer got home, he parked the bicycle behind his house, went inside, and locked the door. "They were about ten seconds behind me . . . ." Bremer was "Very afraid." He watched from his back door as the group took away his bicycle and his friend's red vintage Schwinn that had been parked behind the house. Bremer was alone so he did not confront the thieves or chase after them. But when he saw the group leave the property with the two bicycles he immediately called the police.

Bremer lived in a separate unit situated behind a main house. The main house had surveillance cameras so that some of the incidents of the evening were recorded. Gilbert Rosa, Bremer's landlord, played the surveillance video for the police. The video showed a group of young men entering the yard and then leaving with the two bicycles. Rosa, Bremer, and others reviewed the video over and over that night hoping it would help them identify the thieves. Rosa was unable to make a copy and the video has since been lost.

Nearly a month after the bicycles were stolen, Rosa was driving his truck when he observed a group of young men with the two bicycles. They looked like the same people Rosa had seen in the surveillance video. He called 9-1-1, then returned to the scene with Bremer and their friend Howard Hyden. As they drove past the men with the bicycles, Bremer lowered the window of the truck and yelled at the men to return the bikes. The men dropped the bicycles and moved back about 40 yards. When the victims got out of the truck to retrieve the bicycles, the other men began throwing large chunks of broken concrete at them. Hyden was hit in the forehead.

Rosa saw the minor hit Hyden with the rock. Rosa grabbed the minor and they both went down. Rosa was then hit in the face with a large object. The blow left him “[c]ompletely numb” and dizzy. He was able to hold on to the minor until the police arrived.

## **II. PROCEDURAL BACKGROUND**

The first wardship petition filed July 25, 2011, alleged that the minor had committed two counts of assault with a deadly weapon upon Hyden and Rosa and one count of having received a stolen bicycle. The petition also alleged that in connection with the assault upon Hyden the minor had personally used a deadly or dangerous weapon, a rock. (§§ 667, 1192.7.) The second petition was filed September 1, 2011, and alleged that the minor had committed robbery (§§ 211, 212.5, subd. (c)) when he stole two bicycles from Bremer. The two petitions were consolidated for trial. The minor remained on home probation until October 1, 2011, when he was arrested for suspected gang activity and placed in Juvenile Hall. A third petition filed on October 5, 2011, alleged that the minor had been in possession of a dirk or dagger. (Former § 12020, subd. (a)(4).)

Following a contested jurisdictional hearing on January 10, 2012, the juvenile court sustained as felonies the four counts alleged in the first two petitions and found true the allegation that the minor had personally used a dangerous or deadly weapon in the

course of the first assault. The court dismissed the third petition for insufficient evidence. The court placed the minor at the Santa Clara County Juvenile Rehabilitation Facility for the Enhanced Ranch Program, finding his maximum term of confinement to be seven years eight months. Upon successful completion of the Ranch program, the minor was ordered returned to the custody of his parents on probation. The court imposed a lengthy list of standard probation conditions. This timely appeal followed.

### **III. DISCUSSION**

#### *A. Standards of Review*

We review the minor's evidentiary challenge under the sufficiency of the evidence standard of review. "To assess the evidence's sufficiency, we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) As to the probation conditions, the minor implicitly acknowledges that he did not object to these conditions below and, therefore, has forfeited all claims except a challenge that the conditions are facially unconstitutional. (*In re Sheena K.* (2007) 40 Cal.4th 875, 878 (*Sheena K.*)) We review the constitutionality of the probation conditions de novo. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.)

#### *B. Evidence to Support the Robbery Allegation*

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." (§ 211.) "The taking element of robbery itself has two necessary elements, gaining possession of the victim's property and asporting or carrying away the loot." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165.) In order to constitute robbery, there must be some use of force or fear either in the taking or in the asportation. Either way, to constitute the crime of robbery, the use of force or fear must be motivated by the intent to steal the property. (*People v. Green* (1980) 27 Cal.3d 1, 54 overruled on a different point in *People v. Martinez* (1999) 20 Cal.4th 225.) The finder of fact may infer

a defendant's intent from all of the facts and circumstances shown by the evidence. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) Indeed, evidence of a person's state of mind is almost inevitably circumstantial, "but circumstantial evidence is as sufficient as direct evidence to support a conviction." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.)

The minor argues that there is no evidence that he used fear for the purpose of stealing the bicycle; he may have wanted only to assault the victim. But the circumstantial evidence is sufficient to support the conclusion that the minor's original intent was to steal. Bremer was riding a rare Beach Cruiser bicycle past the minor and his friends. It was late at night. He was alone. There was no evidence that the men knew each other. No words were exchanged between them other than the minor's group yelling at Bremer to come back. When Bremer fled, the minor and his associates chased Bremer, brandishing a knife, until they reached Bremer's home, where the minor and his group took the bicycles and left. They did not attempt to enter Bremer's house or call him outside, which one might expect them to do if their intent was to assault him. Rather, they entered the yard, grabbed the bike, and left. This is sufficient to support a finding that the minor yelled at Bremer and ran after him with the rest of the group in order to frighten him into giving up his bicycle.

### *C. Possession of Stolen Property*

The juvenile court found that the minor had committed robbery (§ 211) and receipt or possession of stolen property (§ 496). Both crimes involved the stolen bicycles. "Courts have long held that one cannot be charged for theft and receipt of the same property. The Legislature codified this common law rule in section 496, subdivision (a), which states in pertinent part: 'A principal in the actual theft of the property may be convicted pursuant to this section. However, no person may be convicted both pursuant to this section and of the theft of the same property.' (§ 496, subd. (a), 2d par.; see *People v. Garza* (2005) 35 Cal.4th 866, 871.)" (*People v. Love* (2008) 166 Cal.App.4th

1292, 1298-1299.) Thus, as the Attorney General correctly concedes, the allegation that the minor violated section 496 must be stricken.

*D. The Probation Conditions*

The minor objects to four probation conditions, which are numbered 11, 14, 22, and 25 in the dispositional order.<sup>2</sup> The minor challenges the conditions on the ground that they are unconstitutionally vague or overbroad. “[T]he underpinning of a vagueness challenge is the due process concept of ‘fair warning.’ [Citation.] The rule of fair warning consists of ‘the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders’ [citation], protections that are ‘embodied in the due process clauses of the federal and California Constitutions. (U.S. Const., Amends. V, XIV; Cal. Const., art. I, § 7.)’ ” (*Sheena K., supra*, 40 Cal.4th at p. 890.) Thus, to escape a vagueness challenge, a probation condition must be sufficiently precise for the probationer to know what is required and for the court to know when the condition has been violated. (*Ibid.*)

“A probation condition that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.” (*Sheena K., supra*, 40 Cal.4th at p. 890.) “The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant’s constitutional rights--bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.” (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

*1. Condition No. 11--“adjacent to any school”*

Probation condition No. 11 provides that the minor shall “not be on or adjacent to any school campus unless enrolled or with prior administrative approval.” The minor

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<sup>2</sup> The same conditions are numbered 17, 20, 28, and 31 in the order of probation.

argues, and the Attorney General concedes, that the condition is unconstitutionally vague with regard to the phrase “adjacent to.” Both sides urge us to modify the condition as we did in *People v. Barajas* (2011) 198 Cal.App.4th 748, 753. *Barajas* modified a similar condition to more precisely describe the prohibited behavior as: “ ‘not knowingly be on or within 50 feet of a school campus . . . .’ ” (*Id.* at p. 761.) A modification like the one adopted by *Barajas* would give the minor fair notice of what is prohibited and would minimize the potential for arbitrary enforcement. Accordingly, we will modify the condition to require that the minor “not knowingly be on or within 50 feet of any school campus unless enrolled or with prior administrative approval.”

2. *Condition No. 14--possession of drug paraphernalia*  
*Condition No. 22--participating in gang activity*

Condition No. 14 requires that the minor “not be in possession of any drug paraphernalia.” Condition No. 22 provides that the minor shall “not participate in any gang activity and not visit or remain in any specific location known to him to be, or that the Probation Officer informs him to be, an area of gang-related activity.” The Attorney General agrees with the minor that it is appropriate to modify the conditions to add a knowledge requirement. Indeed, the California Supreme Court has concluded that in many cases “an explicit knowledge requirement is necessary to render the condition constitutional.” (*Sheena K.*, *supra*, 40 Cal.4th at p. 892.) The probation condition in *Sheena K.* prohibited the minor from associating with “ ‘anyone disapproved of by probation.’ ” (*Id.* at p. 889.) Without requiring that the minor know that the person was disapproved by probation, the condition did not give notice of which persons were prohibited. (*Id.* at pp. 891-892.) The same reasoning applies here. Adding a knowledge requirement will help ensure that the minor will not be punished for conduct that he does not know is prohibited. Accordingly, we shall modify both conditions to include a knowledge requirement.

3. *Condition No. 25--gang-related information on cell phone*

Condition No. 25 reads: “That said minor not post, display or transmit on or through his cell phone any symbols or information that the minor knows to be, or that the Probation Officer informs the minor to be, gang-related.” The minor argues that this condition does not require that he “knowingly” post gang-related material. But the condition very clearly specifies that the prohibited material is that which the minor knows is gang-related. The minor’s argument seems to be that he should be prohibited from posting only gang-related material that will further criminal street gang activity; prohibiting his posting of general information relating to gangs unduly infringes his First Amendment right to free speech and is not narrowly tailored to the purpose of the condition. The Attorney General responds that the minor has forfeited the argument by failing to raise it below.

Although a probation condition may be overbroad when considered in light of all the facts, only those constitutional challenges presenting a pure question of law may be raised for the first time on appeal. (*Sheena K., supra*, 40 Cal.4th at pp. 888-889.) The Supreme Court has made it clear that not all constitutional defects in conditions of probation may be raised for the first time on appeal; some questions cannot be resolved without reference to the particular sentencing record developed in the trial court. (*Id.* at p. 889.) Such questions are subject to the traditional objection and forfeiture principles that encourage the parties to develop the record and allow the lower court to properly exercise its discretion. Here, however, the minor’s overbreadth argument can be resolved without reference to the record. Accordingly, we reject the Attorney General’s forfeiture argument.

The general aim of gang-related probation conditions is to discourage a minor from associating with gang members and to help the minor disengage from gang culture. A probation condition that targets gang-related symbols and information is superficially confined to these purposes. We recognize, however, that the condition, as written, would

disallow transmission of information related to the general topic of gangs when it is consistent with the goals of the minor's probation. Therefore, to mitigate any facial overbreadth, we will modify the condition to exempt gang-related communication expressly permitted by the probation officer.

#### **IV. DISPOSITION**

The judgment of wardship is reversed. The juvenile court is directed to strike the finding that the minor violated Penal Code section 496 and to recalculate the minor's maximum time of confinement. The court is further directed to modify the conditions of probation as follows:

Condition No. 11 (17 in the order of probation) shall read: "That said minor not knowingly be on or within 50 feet of any school campus unless enrolled or with prior administrative approval."

Condition No. 14 (20 in the order of probation) shall read: "That said minor not knowingly be in possession of any drug paraphernalia."

Condition No. 22 (28 in the order of probation) shall read: "That said minor not knowingly participate in any gang activity and not visit any specific location known to him to be, or his Probation Officer informs him to be, an area of gang-related activity."

Condition No. 25 (31 in the order of probation) shall read: “Unless expressly permitted by the Probation Officer, that said minor not post, display, or transmit any symbols or information that minor knows to be, or that the Probation Officer informs the minor to be, gang-related.”

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Premo, Acting P.J.

WE CONCUR:

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Mihara, J.

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Márquez, J.