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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

IN RE J.C., a Person Coming Under the
Juvenile Court Law.

H038359
(Santa Clara County
Super. Ct. No. JV38442)

THE PEOPLE,

Plaintiff and Respondent,

v.

J.C.,

Defendant and Appellant.

The minor, J.C., appeals from the juvenile court's dispositional order placing him on probation after finding that the minor committed vandalism (Pen. Code, § 594, subds. (a) & (b)(1))¹ and that he resisted, delayed, or obstructed a peace officer (§ 148, subd. (a)(1)).

On appeal, the minor contends: (1) there was insufficient evidence to sustain the juvenile court's finding that he resisted, delayed, or obstructed a peace officer; (2) the juvenile court's oral findings reflect it misunderstood the law; (3) the juvenile court failed

¹ All further statutory references are to the Penal Code unless otherwise indicated.

to exercise its discretion to declare the vandalism count a felony or misdemeanor; and (4) there was insufficient evidence to sustain the juvenile court's finding that the minor had the ability to pay a \$154 fine imposed pursuant to Welfare and Institutions Code section 730.5.

We will remand the matter for a determination of whether the vandalism count is a felony or a misdemeanor and whether the minor has the ability to pay the \$154 fine. In all other respects, we will affirm the judgment.

BACKGROUND

A. Prosecution Witnesses

On May 4, 2011, at about 6:30 p.m., Michael McAvoy was driving back to work at Safeway after a lunch break. He was stopped at an intersection, waiting to make a left turn. The light changed to green, but the the minor and his friend Nathan were walking in the crosswalk, so McAvoy had to continue waiting. McAvoy signaled for the teens to keep going, but they responded by "walking really slow." Through his open window, McAvoy told the minor and Nathan to "hurry up."

The minor and Nathan cursed at McAvoy and flipped him off. After McAvoy began making the turn, the minor turned back toward him and "whacked" his truck with a skateboard. McAvoy pulled over, and the minor hit his truck two more times.²

McAvoy got out of his truck and confronted the minor, who held up his skateboard. McAvoy said, "[Y]ou better not hit me with that skateboard." A man riding a motorcycle came up, told the minor and McAvoy to stop arguing, and instructed McAvoy to get back into his truck. McAvoy did as instructed but told the minor, "Don't worry. You will be sorry. You'll get what is coming to you." McAvoy then drove to Safeway and began working.

² Other witnesses saw the minor strike McAvoy's truck only one or two times total.

Following the incident, the minor went in to Safeway and told the store manager that McAvoy had tried to run him over. Gilroy Police Officer Randy Bentson received a call for service and responded to Safeway, where he spoke to the minor and McAvoy and saw damage to the truck.³

Officer Bentson then went to Nathan's residence. The minor arrived at Nathan's residence while Officer Bentson was interviewing Nathan. Officer Bentson told the minor he was going to "cite him." The minor swore and became "quite verbally abusive." When Officer Bentson asked the minor to "step to the back of the patrol car," the minor threw his hat on the ground and ran into Nathan's residence.

Officer Bentson called the minor's mother. He told her that he was going to issue a citation and asked her to come to Nathan's residence. When she arrived, he spoke to her and gave her a copy of the citation. During the conversation, the minor came out of the residence and interrupted Officer Bentson. The minor was saying things such as "This is bullshit. Why am I being arrested. This guy tried to run me over. And this is wrong." Officer Bentson asked the minor to stop interrupting, but the minor persisted. After asking him two times, Officer Bentson said that if the minor did not stop interrupting, he would be arrested for obstruction of justice.

The minor continued interrupting Officer Bentson, so Officer Bentson told him to turn around and put his hands behind his back. The minor "took off running" towards the residence. Officer Bentson chased him, caught him, and wrestled him to the ground. Officer Bentson got on top of the minor, holding one of the minor's arms. He ordered the minor to put his other hand behind his back, but the minor tried to pull away. Officer Bentson eventually pulled the minor's hand out from underneath his body and arrested him.

³ Officer Bentson saw "minor scratches" to the front fender. Seven days later, McAvoy told the officer that there was additional damage.

B. Defense Witnesses

The minor's friend, Nathan, testified that McAvoy began yelling, using "cuss words," when he and the minor were in the crosswalk. McAvoy threatened them, saying, "If you don't move[,] I'm going [to] hit you." When the minor said, "Do it," McAvoy tapped the gas pedal, moving the truck forward so the minor had to move out of the way. Nathan thought McAvoy's truck was going to hit the minor.

Roberto Gonzalez saw the two boys in the crosswalk and saw McAvoy's truck "cut them off." He called 911 after seeing McAvoy stop the truck and "go after" the minor.

The minor testified that while he and Nathan were in the crosswalk, McAvoy yelled at them to "[g]et out of the fucking way" and told them he was in a hurry to get to work. The minor told him, "It is our right of way. You can wait." McAvoy then drove the truck towards the minor, and he had to jump out of the way. He hit the truck with his skateboard because he was "defending [him]self."

The minor went to Safeway because he noticed that McAvoy was wearing a Safeway hat. While speaking to the manager, McAvoy came up and confronted him. The manager told McAvoy to leave and offered to call the police. The minor waited for the police in the manager's office. When Officer Bentson arrived, he did not seem to believe the minor. The minor provided Nathan's address so the officer could confirm his story.

When the minor arrived at Nathan's residence, he saw Officer Bentson talking to Nathan. Officer Bentson then approached the minor and said he was going to cite him for vandalism. The minor became upset, because he was the one asking for police assistance. Officer Bentson did not tell him to go to the back of the patrol car. He did not run into the house; he walked inside and called his mother.

When the minor saw his mother talking to Officer Bentson, he went outside. He believed Officer Bentson was saying things that were not true, so he interrupted. Officer

Bentson told him to stop interrupting and said that if he kept it up he would be arrested. The minor muttered “go for it” and stuck his hand out. Officer Bentson grabbed his arm and told him to turn around. The minor took a few steps, but Officer Bentson threw him on the ground. He could not give Officer Bentson his second arm because the officer’s weight was on top of him.

The minor’s mother testified that she went to Nathan’s house and spoke to Officer Bentson. The minor came out during the conversation. He was upset and tried to explain what had happened, but Officer Bentson did not let him speak. Officer Bentson and the minor were interrupting each other, and it escalated to a shouting match. The minor did not try to run away, but after Officer Bentson warned that he could be placed under arrest, the minor turned toward the house. At that point, Officer Bentson jumped on top of the minor and pushed his face into the sidewalk.

C. Procedural Background

On November 4, 2011, the District Attorney filed an amended Welfare and Institutions Code section 602 petition alleging that the minor committed felony vandalism (count 1; § 594, subs. (a) & (b)(1)) and resisted, delayed, or obstructed a peace officer (count 2; § 148, subd. (a)(1)).

After a contested jurisdictional hearing, the juvenile court sustained both counts of the petition. At the dispositional hearing on April 12, 2012, the juvenile court placed the minor on probation, ordered him to spend 10 days in the Community Release Program, and ordered him to pay a \$110 restitution fine (Welf. & Inst. Code, § 730.6, subd. (b)) and a \$154 general fund fine (Welf. & Inst. Code, § 730.5).

DISCUSSION

A. *Sufficiency of the Evidence of Violating Section 148*

The minor contends there was insufficient evidence to sustain count 2, the allegation that he violated section 148.⁴

1. **Standard of Review**

“ ‘The standard of proof in juvenile proceedings involving criminal acts is the same as the standard in adult criminal trials.’ [Citation.]” (*In re Cesar V.* (2011) 192 Cal.App.4th 989, 994.) “ ‘ “This court must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] If the circumstances reasonably justify the trial court’s findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. [Citations.] The test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact.” ’ ” (*Id.* at p. 995.)

2. **Proceedings Below**

At the jurisdictional hearing, the prosecutor argued that the minor “engaged in numerous acts that could constitute a [violation of section] 148.” He specified that the violation could be based on the minor’s acts of (1) interrupting when Officer Bentson was talking to Nathan, (2) defying Officer Bentson’s order to stand at the end of the patrol car, (3) interrupting when Officer Bentson was talking to the minor’s mother, and (4) trying to escape when Officer Bentson attempted to place him under arrest.

Trial counsel argued that while the minor’s interruptions “probably [were] rude,” they were “not illegal” because they did not “really obstruct[] the officer in his duty.”

⁴ Section 148, subdivision (a)(1) is violated by a “person who willfully resists, delays, or obstructs any . . . peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment.”

The trial court explained why it was finding that the minor had violated section 148: “[T]he charge is that anytime that you interfere with a[n] officer who is lawfully conducting business – and I don’t think there’s any question that he lawfully was conducting business when he was having a conversation with mom. That’s part of his job. ¶ And, unfortunately, [the minor] was told to be quiet. That’s the end of it. That’s what a 148 is. When you’re told, ‘Be quiet,’ that’s the end of the story. That’s – if you don’t be quiet at that point, you committed a misdemeanor.”

3. First Amendment

The minor contends his verbal interruptions of Officer Bentson were protected by the First Amendment and thus did not violate section 148. Respondent contends the minor’s verbal interruptions fell outside the scope of First Amendment protection.

“Although section 148 proscribes resisting, delaying, or obstructing a police officer, ‘the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.’ [Citation.] In fact, ‘[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.’ [Citations.] Even though the police may dislike being the object of abusive language, they are not allowed to use the awesome power which they possess to punish individuals for conduct that is not only lawful, but which is protected by the First Amendment. [Citation.] For this reason, section 148 must be applied with great care to speech. [Citation.] Although fighting words or disorderly conduct may lie outside the protection of the First Amendment, the areas of unprotected speech are very narrow. [Citation.]” (*In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1330-1331 (*Muhammed C.*))

As this court recognized in *Muhammed C.*, “verbal conduct” may fall outside the parameters of First Amendment protection. (*Muhammed C.*, *supra*, 95 Cal.App.4th at p. 1331.) In *Muhammed C.*, the verbal conduct was Muhammed’s act of “speaking to a detained suspected criminal in police custody when ordered to stop.” (*Ibid.*) The suspect

was sitting in the back of a police vehicle while his own car was being processed across the street. Muhammed ignored three officers' orders for him to step away from the vehicle, and he continued talking to the suspect. He also "extended his right hand out to the back, raising his palm towards the officers," in a gesture of apparent defiance. (*Id.* at p. 1328.) This court upheld the finding that Muhammed had violated section 148 by willfully delaying the officers' processing of the suspect's vehicle "by refusing the officers' repeated requests that he step away from the patrol car." (*Id.* at p. 1330.) This court also held that Muhammed's verbal conduct was not "akin to a mere verbal challenge to police officers" and thus lacked First Amendment protection. (*Id.* at p. 1331.)

The minor asserts his case is akin to *People v. Quiroga* (1993) 16 Cal.App.4th 961 (*Quiroga*). In *Quiroga*, the police entered an apartment where the defendant was attending a party. When an officer told the defendant to sit down, he "argued before complying with the order." (*Id.* at p. 964.) As the officer questioned another subject, the defendant told him that the police had no right to be in the apartment and that they should leave. The defendant was generally uncooperative with the officer's other orders, but he eventually complied each time. The court found nothing in this conduct to "justify a charge of violating Penal Code section 148." (*Id.* at p. 966.) The statute does not "criminalize[] a person's failure to respond with alacrity to police orders," and the defendant "possessed the right under the First Amendment to dispute [the officer's] actions." (*Ibid.*)

The Attorney General asserts that the minor's interruptions of Officer Bentson may not be deemed the mere exercise of free speech, because his conduct was so disruptive that it prevented the officer from performing his duties. We agree.

The United States Supreme Court has recognized that a person may be criminally prosecuted, without running afoul of the First Amendment, for verbally interrupting an officer who is performing his duties. (*Houston v. Hill* (1987) 482 U.S. 451 (*Hill*.)

The *Hill* case involved an ordinance making it unlawful for a person to, inter alia, “ ‘interrupt any policeman in the execution of his duty.’ ” (*Hill, supra*, 482 U.S. at p. 455.) The defendant had interrupted officers by shouting at them while they were speaking with a third party. The defendant was arrested for violating the ordinance but acquitted. He later filed a lawsuit seeking a declaratory judgment as to the constitutionality of the ordinance, “both on its face and as it had been applied to him.” (*Ibid.*)

The lower courts upheld the *Hill* ordinance insofar as it had been applied to the defendant (*Hill, supra*, 482 U.S. at p. 457), and the high court addressed only the question whether the ordinance was unconstitutional on its face. The high court concluded that the ordinance was substantially overbroad under the First Amendment, because it “criminalize[d] a substantial amount of constitutionally protected speech, and accords the police unconstitutional discretion in enforcement.” (*Id.* at p. 466.)

However, the high court was careful to note that “under a properly tailored statute,” it would be constitutional to “ ‘punish an individual who chooses to stand near a police officer and persistently attempt to engage the officer in conversation while the officer is directing traffic at a busy intersection.’ [Citation.]” (*Hill, supra*, 482 U.S. at p. 463, fn. 11; see also *Colten v. Kentucky* (1972) 407 U.S. 104, 109 [an officer is entitled to carry out his or her duties “free from possible interference or interruption from bystanders, even those claiming a third-party interest in the transaction”].)

Hill thus establishes that when a person’s words go “beyond verbal criticism, into the realm of interference with [an officer’s performance of his or her] duty,” the First Amendment does not preclude criminal punishment. (*People v. Lacefield* (2007) 157 Cal.App.4th 249, 261; see also *People v. Green* (1997) 51 Cal.App.4th 1433, 1438 [defendant’s attempts to intimidate the suspected victim into denying the commission of the offense impeded the officer’s investigation and thus were not protected by the First Amendment].)

The case of *King v. Ambts* (6th Cir. 2008) 519 F.3d 607 (*King*), is strikingly similar to the instant case. While an officer was questioning a third party, King interrupted the interview. King “ ‘would speak over’ ” the officer, telling the person he did not have to speak to the officer. (*Id.* at p. 609.) The officer “ ‘advised King that ‘if he said one more word that he would be arrested.’ ” (*Ibid.*) After a third interruption, the officer grabbed King’s arm and tried to arrest him. King broke free, but he was eventually placed under arrest and charged with violating an ordinance that criminalized “ ‘[a] person who obstructs, resists, impedes, hinders or opposes a peace officer in the discharge of his or her duties.’ ” (*Id.* at p. 610.)

On appeal, King challenged his arrest as violating his First Amendment rights, but the Sixth Circuit held that “his statements were not constitutionally protected.” (*King, supra*, 519 F.3d at p. 613.) The court pointed out that “King was arrested for the act of disrupting the officer’s investigation, and not for the content of his speech.” (*Id.* at p. 615.) The court found that King’s “act of speaking, by virtue of its time and manner, plainly obstructed ongoing police activity involving a third party.” (*Id.* at p. 614.) His “exhortations” to the third party and “his refusal to be quiet” during the questioning were thus not “entitled to First Amendment protection.” (*Ibid.*)

Here, the minor’s repeated interruptions of Officer Bentson were not protected by the First Amendment. The minor’s conviction was based on his “act of disrupting the officer’s investigation, and not for the content of his speech.” (*King, supra*, 519 F.3d at p. 615.) His interruptions “plainly obstructed ongoing police activity involving a third party,” and thus were not “entitled to First Amendment protection.” (*Id.* at p. 614.)

In sum, substantial evidence supports the juvenile court's finding that the minor violated section 148 by interrupting Officer Bentson and thereby obstructing or delaying him in the lawful performance of his duties.⁵

B. Felony/Misdemeanor Determination

The minor contends that the juvenile court failed to exercise its discretion to determine whether the offenses were felonies or misdemeanors pursuant to Welfare and Institutions Code section 702, and therefore, that the matter must be remanded for clarification.

1. Proceedings Below

The amended Welfare and Institutions Code section 602 petition alleged, in count 1, that the minor committed vandalism in violation of section 594, subdivisions (a) and (b)(1), "a Felony." In count 2, it alleged that the minor had resisted, delayed, or obstructed an officer in violation of section 148, subdivision (a)(1), "a Misdemeanor." At the end of the jurisdictional hearing, the trial court found that "both charges have been sustained."

The dispositional order, which was signed by the juvenile court, contains a check-mark in the box marked "Felony" next to count 1, and a check-mark in the box marked "Misdemeanor" next to count 2.

2. Analysis

Welfare and Institutions Code section 702 provides that in a juvenile proceeding, "[i]f the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the

⁵ In reaching this conclusion, we also reject the minor's claim that the juvenile court's oral findings indicate a misunderstanding of the law. In addition, we need not reach the minor's argument that count 2 was not supported by the evidence that he ran away from and struggled with Officer Bentson, either because Officer Bentson (1) could not lawfully arrest him at that point, or (2) used excessive force.

offense to be a misdemeanor or felony.” This language is “unambiguous” and its “requirement is obligatory” (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1204 (*Manzy W.*.) Welfare and Institutions Code section 702 “requires an explicit declaration by the juvenile court whether an offense would be a felony or misdemeanor in the case of an adult. [Citations.]” (*Manzy W., supra*, at p. 1204.)

The required declaration as to misdemeanor or felony may be made at the contested jurisdictional hearing or at the dispositional hearing. (Cal. Rules of Court, rules 5.780(e)(5), 5.790(a)(1), 5.795(a).)⁶ “If any offense may be found to be either a felony or a misdemeanor, the court must consider which description applies and *expressly declare on the record that it has made such consideration, and must state its determination* as to whether the offense is a misdemeanor or a felony.” (Rule 5.780(e)(5), italics added; see also rules 5.790(a)(1), 5.795(a).) The court’s determination must also be noted in an order or in the minutes from the hearing. (Rules 5.780(e), 5.795(a).)

The significance of an express declaration under Welfare and Institutions Code section 702 was explained by the California Supreme Court in *Manzy W., supra*, 14 Cal.4th 1199. Among other things, the California Supreme Court pointed out that a minor may not be held in physical confinement longer than an adult convicted of the same offense. (*Id.* at p. 1205; Welf. & Inst. Code, § 731, subd. (c).) Requiring the juvenile court to declare whether an offense is a misdemeanor or felony “facilitat[es] the determination of the limits on any present or future commitment to physical confinement for a so-called ‘wobbler’ offense.” (*Manzy W., supra*, at p. 1206.) Further, “the requirement that the juvenile court declare whether a so-called ‘wobbler’ offense [is] a misdemeanor or felony also serves the purpose of ensuring that the juvenile court is

⁶ All further rule references are to the California Rules of Court.

aware of, and actually exercises, its discretion under Welfare and Institutions Code section 702.” (*Manzy W., supra*, at p. 1207.)

In *Manzy W.*, the juvenile court had imposed a felony-level term of physical confinement in the Youth Authority⁷ for a drug possession offense that would, in the case of an adult, be punishable either as a misdemeanor or as a felony (a so-called “wobbler”), but the court had failed to declare the offense a felony. (*Manzy W., supra*, 14 Cal.4th at p. 1201.) The California Supreme Court considered whether the failure to make the mandatory express declaration pursuant to Welfare and Institutions Code section 702 required remand of the matter. It explained that “neither the pleading, the minute order, nor the setting of a felony-level period of physical confinement may substitute for a declaration by the juvenile court as to whether an offense is a misdemeanor or felony. [Citation.]” (*Manzy W., supra*, at p. 1208.)

The California Supreme Court also refused to apply the Evidence Code presumption that the juvenile court had performed its official duty. The California Supreme Court stated that it was “unpersuaded that such a presumption is appropriately applied when the juvenile court *violated* its clearly stated duty under Welfare and Institutions Code section 702 and there is nothing in the record to indicate that it ever considered whether the . . . offense was a misdemeanor or a felony.” (*Manzy W., supra*, 14 Cal.4th at p. 1209.)

At the same time, the California Supreme Court refused to hold that remand is required in every case when the juvenile court fails to make a formal declaration under Welfare and Institutions Code section 702. The California Supreme Court explained: “[S]peaking generally, the record in a given case may show that the juvenile court, despite its failure to comply with the statute, was aware of, and exercised its discretion to

⁷ The Youth Authority is now known as the Department of Corrections and Rehabilitation, Division of Juvenile Facilities. (§ 6001; Welf. & Inst. Code, § 1710, subd. (a).)

determine the felony or misdemeanor nature of a wobbler. In such case, when remand would be merely redundant, failure to comply with the statute would amount to harmless error. We reiterate, however, that setting of a felony-length maximum term period of confinement, by itself, does not eliminate the need for remand when the statute has been violated. The key issue is whether the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit.” (*Manzy W., supra*, 14 Cal.4th at p. 1209.)

The California Supreme Court ultimately concluded that the matter before it should be remanded to the juvenile court for an express declaration pursuant to Welfare and Institutions Code section 702 and possible recalculation of the maximum period of physical confinement. (*Manzy W., supra*, 14 Cal.4th at p. 1211.) The California Supreme Court found “[n]othing in the record establish[ing] that the juvenile court was aware of its discretion to sentence the offense as a misdemeanor rather than a felony,” and “it would be mere speculation to conclude that the juvenile court was actually aware of its discretion in sentencing Manzy.” (*Id.* at p. 1210.)

In this case, the People alleged in count 1 that the minor committed vandalism, which is punishable either as a misdemeanor or a felony if the amount of damage is \$400 or more. (§§ 17, 594, subd. (b)(1).) The juvenile court did not expressly declare on the record during the jurisdictional or dispositional hearing that it had *considered* whether the vandalism count would be a misdemeanor or a felony, nor did it expressly declare its *determination* in this regard. (*Manzy W., supra*, 14 Cal.4th at p. 1209; Rules 5.780(e)(5), 5.795(a).)

Moreover, at the dispositional hearing, the juvenile court indicated it did not believe the vandalism was as extensive as the victim had claimed.⁸ It further noted that

⁸ The juvenile court stated, “[T]hey have shared responsibility here. I don’t think that the victim was completely candid about his conduct and I think that is clear from the evidence”

the probation report was “very good” and that it was “impressed with” the minor. Its disposition (10 days on the Community Release Program) was more lenient than the probation officer had recommended. Under the circumstances, we cannot say the juvenile court would necessarily declare the vandalism count to be a felony if directed to exercise its discretion under Welfare and Institutions Code section 702 upon remand.

We are aware of the general rule that we presume that the trial court was aware of and exercised its discretion to act, absent evidence to the contrary. (See *People v. Jacobo* (1991) 230 Cal.App.3d 1416, 1430; Evid. Code, § 664.) In a case such as this one, however, where the offense may be treated as a misdemeanor or a felony, the California Rules of Court require that the juvenile court expressly acknowledge its discretion by declaring that it considered whether to treat the offense as either a misdemeanor or a felony. (Rules 5.780(e)(5), 5.790(a)(1), 5.795(a).) In the absence of an express declaration that the offense would be a misdemeanor or a felony, we will remand the matter to the juvenile court for clarification.

C. Fine

The minor contends the \$154 fine imposed pursuant to Welfare and Institutions Code section 730.5 must be stricken because there was insufficient evidence that he had the ability to pay the fine. The minor points out that he had no paying job at the time of the dispositional hearing. He argues that he had no near future prospects for employment, since he was planning to attend college. He asserts he had mental health issues making employment unlikely. He also points out that he had other financial obligations, including payment of up to \$2,577.86 in victim restitution.

1. Proceedings Below

At the dispositional hearing, the juvenile court indicated it was “about to impose \$250 of fines and fees of which [the minor] is responsible.” It noted that the minor’s mother would be “equally responsible” unless she could prove she did not have the “ability to pay.” After the minor’s mother provided some details about her financial

situation, the trial court declined to hold her “jointly and sever[ally] responsib[le].” The juvenile court’s dispositional order reflects that the minor was ordered to pay a \$110 restitution fine (Welf. & Inst. Code, § 730.6, subd. (b)) and a \$154 general fund fine (Welf. & Inst. Code, § 730.5).

2. Analysis

Welfare and Institutions Code section 730.5 provides, in pertinent part: “When a minor is adjudged a ward of the court on the ground that he or she is a person described in Section 602, . . . the court may levy a fine against the minor up to the amount that could be imposed on an adult for the same offense, if the court finds that the minor has the financial ability to pay the fine.”

An ability-to-pay finding must be supported by substantial evidence. (Cf. *People v. Nilsen* (1988) 199 Cal.App.3d 344, 347, 351 [trial court’s determination that the defendant had the ability to pay attorney fees under section 987.8 was not supported by substantial evidence].)

The Attorney General contends that the minor forfeited this claim by failing to object below, whereas the minor claims that an insufficiency of the evidence claim may be raised at any time. The California Supreme Court recently held that a defendant forfeits an appellate claim that he or she is unable to pay a booking fee (Gov. Code, § 29550.2, subd. (a)) by failing to object below. (*People v. McCullough* (Apr. 22, 2013, S192513) __ Cal.4th __ [2013 Cal. LEXIS 3330] (*McCullough*)). In *McCullough*, the Supreme Court explained that “because a court’s imposition of a booking fee is confined to factual determinations, a defendant who fails to challenge the sufficiency of the evidence at the proceeding when the fee is imposed may not raise the challenge on appeal.” (*Id.* at p. __ [*18].) The *McCullough* court noted that unlike other fee and fine statutes, the booking fee statute did not contain any “procedural requirements or guidelines for the ability-to-pay determination,” which indicated “that the Legislature

considers the financial burden of the booking fee to be de minimis,” making “the rationale for forfeiture ... particularly strong.” (*Id.* at pp. __, __, __ [*20, *21, *22].)

It is not clear whether the reasoning of *McCullough* applies to the Welfare and Institutions Code section 730.5 fine, the amount of which can vary greatly depending on the charged offense. (See Welf. & Inst. Code, § 730.5 [“the court may levy a fine against the minor up to the amount that could be imposed on an adult for the same offense”]; § 594, subd. (b)(1) [punishment may include a fine of “not more than ten thousand dollars (\$10,000)”].)

We have already determined that this matter must be remanded so the juvenile court can make an express determination of whether the vandalism count is a felony or a misdemeanor. Upon remand, the juvenile court can also consider whether the minor has the ability to pay the Welfare and Institutions Code section 730.5 fine. Thus, we do not reach the issue of (1) whether the minor may challenge the Welfare and Institutions Code section 730.5 fine for the first time on appeal or (2) whether the record supports an implied ability-to-pay finding by the juvenile court.

DISPOSITION

The juvenile court’s dispositional order is reversed, and the matter is remanded to permit the juvenile court to (1) exercise its discretion to select between misdemeanor or felony treatment for count 1 and to make the express declaration required by Welfare and Institutions Code section 702 and rule 5.795(a), and (2) conduct a hearing on the minor’s ability to pay the Welfare and Institutions Code section 730.5 fine. In all other respects, the judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

PREMO, ACTING P.J.

GROVER, J.