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

In re EVELYN G., a Person Coming Under
the Juvenile Court Law.

H040162
(Santa Clara County
Super. Ct. No. JV40104)

THE PEOPLE,

Plaintiff and Respondent,

v.

EVELYN G.,

Defendant and Appellant.

The juvenile court declared appellant Evelyn G. a ward after it found that she had committed three counts of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c)), one count of second degree burglary (Pen. Code, §§ 459, 460, subd. (b)), and one count of battery (Pen. Code, §§ 242, 243, subd. (a)) and that she had personally used a knife in the commission of two of the robbery offenses (Pen. Code, §§ 667, 1192.7). The court committed her to the Ranch for six to eight months to be followed by a period on probation.

On appeal, she claims that a remand is required because the juvenile court failed to expressly declare that the burglary was either a felony or a misdemeanor. She also

contends that probation conditions barring possession of drug paraphernalia and contact with the victims are unconstitutionally vague and overbroad. We reverse and remand the matter for the court to declare the burglary offense to be either a felony or a misdemeanor and to modify the two challenged probation conditions.

I. Discussion

A. Declaration That Burglary Was Felony or Misdemeanor

Appellant argues that a remand is required because the juvenile court failed to expressly declare that the burglary count was either a felony or a misdemeanor.

Second degree burglary may be punished as either a felony or a misdemeanor. (Pen. Code, § 461, subd. (b).) “If 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 offense to be a misdemeanor or felony.” (Welf. & Inst. Code, § 702, italics added.)

In *In re Manzy W.* (1997) 14 Cal.4th 1199 (*Manzy*), the California Supreme Court held that a remand was required where the juvenile court had failed to make an express declaration as to whether the offense was a felony or a misdemeanor. In *Manzy*, the offense had been alleged as a felony, and Manzy had admitted the allegation. (*Manzy*, at p. 1202.) The juvenile court had committed Manzy to the California Youth Authority and set his maximum term of physical confinement at three years, a felony-level term. (*Manzy*, at p. 1203.) Nevertheless, the California Supreme Court held that Welfare and Institutions Code section 702’s requirement of an express declaration required a remand. The court noted that a reference to the offense as a felony in the minutes of the dispositional hearing would not obviate the need for an express declaration by the court. (*Manzy*, at pp. 1207-1208.)

The California Supreme Court pointed out in *Manzy* that a remand was not “‘automatic’” whenever the juvenile court failed to make an express declaration.

(*Manzy, supra*, 14 Cal.4th at p. 1209.) “[T]he 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 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*, at p. 1209.)

Nothing in the record before us reflects that the juvenile court was aware of its discretion to treat the burglary count as a misdemeanor. The Attorney General claims that the juvenile court’s oral statement at the conclusion of the jurisdictional hearing reflects that the court was aware of its discretion to treat the burglary count as a misdemeanor. When the juvenile court found true the robbery, burglary, battery, and personal use allegations, it stated on the record: “Just to be clear on the count one [(one of the robbery counts)], that’s a felony. And that’s sustained as a felony. [¶] Count two [(the burglary count)] also alleges a felony, this is a felony violation of Penal Code Section 459/460(b), that’s the second degree burglary And that petition is sustained or that count is sustained at this time.” This statement does not reflect that the juvenile court was aware that the burglary count, unlike the robbery count (which was a straight felony), could be treated as a misdemeanor. Indeed, by treating the two counts similarly, the court’s statement reflected that it was unaware that the two counts were different. The burglary could be treated as a misdemeanor, but the robbery could not.

The Attorney General also relies on language in the dispositional order.¹ The dispositional order, which was signed by the judge, had a box checked next to the following preprinted statement: “The court previously sustained the following counts. Any charges which may be considered a misdemeanor or a felony for which the court has not previously specified the level of offense are now determined to be as follows:” Below this statement, the felony boxes were checked next to the three robbery counts and the burglary count and the misdemeanor box was checked next to the battery count. The Attorney General’s reliance on this notation is undermined by the same inadequacy as her reliance on the court’s oral statement. Since this notation by the court plainly treated the burglary count the same as the robbery counts, it failed to demonstrate that the juvenile court was aware of its discretion to treat the burglary count only, but not the robbery counts, as a misdemeanor.

As the record as a whole does not reflect that the juvenile court was aware of its discretion to treat the burglary count as a misdemeanor, a remand is required.

B. Probation Conditions

Appellant challenges two of the probation conditions as unconstitutionally vague and overbroad. One of these conditions provided “That said minor not be in possession of any drug paraphernalia.” The other provided “That said minor have no contact of any type with Jader A., the Walmart Store (600 Showers Drive, Mountain View, CA),

¹ The Attorney General puts misplaced reliance on a statement in the clerk’s minutes from the jurisdictional hearing that the robbery and burglary counts were felonies. The clerk’s minutes cannot be relied upon under *Manzy* because these minutes were not signed by the judge. (*Manzy, supra*, 14 Cal.4th at pp. 1207-1208.) The Attorney General points out that the dispositional order set a maximum time of confinement that treated the burglary count as a felony. However, under *Manzy*, such treatment does not obviate the need for an express declaration. (*Manzy*, at p. 1209.)

Wendee W., Cynthia J., and Cam H.” The individuals and the store were the victims of appellant’s offenses.

“The juvenile court has wide discretion to select appropriate 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.’”” (*In re Sheena K.* (2007) 40 Cal.4th 875, 889 (*Sheena K.*)) “[A] condition of probation that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court. [Citations.] “Even conditions which infringe on constitutional rights may not be invalid if tailored specifically to meet the needs of the juvenile [citation].”” (*In re Tyrell J.* (1994) 8 Cal.4th 68, 81-82, overruled on other grounds by *In re Jaime P.* (2006) 40 Cal.4th 128, 139.)

“[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.’” (*Sheena K., supra*, 40 Cal.4th at p. 890.) “In deciding the adequacy of any notice afforded those bound by a legal restriction, we are guided by the principles that ‘abstract legal commands must be applied in a specific *context*,’ and that, although not admitting of ‘mathematical certainty,’ the language used must have “reasonable specificity.”” (*Ibid.*) “A probation condition ‘must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,’ if it is to withstand a challenge on the ground of vagueness. [Citation.]” (*Ibid.*)

The overbreadth doctrine focuses on other, though related, concerns. “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.) Under this

doctrine, ““a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.”’ [Citations.]” (*In re Englebrecht* (1998) 67 Cal.App.4th 486, 497.) “‘A law’s overbreadth represents the failure of draftsmen to focus narrowly on tangible harms sought to be avoided, with the result that in some applications the law burdens activity which does not raise a sufficiently high probability of harm to governmental interests to justify the interference.’ [Citation.]” (*Ibid.*)

Appellant claims that the no contact condition is vague and overbroad because she could “inadvertently violate it by accidentally coming into contact” with one of the victims. She asks us to insert a knowledge requirement to limit the condition’s prohibition to knowing contacts. Her claim is not one of vagueness but of overbreadth as she does not argue that the condition lacks specificity but that it reaches too far. The Attorney General does not object to a modification of the no contact condition to require that appellant “not knowingly have contact with” the named victims. We agree with appellant that the condition should be restricted to knowing contacts. The purpose of the condition is to avoid additional harm to any of the victims from contact with appellant. Unknowing contact does not pose a significant risk of harm to a victim beyond the risk to nonvictims.

Appellant also challenges the paraphernalia condition as vague and overbroad. She claims that this condition should contain a knowledge requirement and be limited to items that appellant “intends to use” in connection with “illegal drugs” because “paraphernalia” includes many common household items that have legal uses. The Attorney General does not object to the addition of a knowledge requirement that would limit the paraphernalia condition to items “known to her to be used for the ingestion, preparation, or packaging of controlled or otherwise illegal drugs or substances.” However, the Attorney General opposes any modification of the paraphernalia condition

to prohibit only those items that appellant “intends to use” in connection with illegal drugs or substances.

While the word “paraphernalia” itself is a rather broad term, the condition’s prohibition is limited to “drug paraphernalia.” In this context, the word “paraphernalia” means “articles of equipment” or “accessory items.” (Merriam-Webster’s Collegiate Dict. (10th ed. 1993) p. 843.) Thus, the condition’s prohibition extends only to items used in connection with drugs. Still, there could be vagueness concerns due to the fact that the condition does not specify “illegal drugs” and the word “paraphernalia” is not necessarily in common usage among minors. Under these circumstances, we believe that the Attorney General’s suggested modification has merit because it contains a readily understood definition of the type of paraphernalia that is prohibited and specifies that the prohibition extends to only illegal drugs and substances. This modification, which we will order, cures any potential vagueness concerns.

With respect to overbreadth, we agree with appellant that the condition should contain a knowledge requirement. The purpose of the condition is to assist appellant in avoiding substance abuse. If she is unaware that an item can be used in connection with substance abuse, the prohibition does not serve its purpose. Restricting the condition to items that she knows can be used in connection with substance abuse closely tailors the condition to its purpose.

We agree with the Attorney General that the juvenile court was not required to limit the condition, as appellant contends, to items that appellant “intends to use” in connection with illegal drugs. Appellant, who was 15 years old and pregnant at the time of disposition, had a significant substance abuse history. She had used inhalants, marijuana, alcohol, Ecstasy, cocaine, and methamphetamines, and she was intoxicated when she committed the offenses. Her current offenses involved violence against strangers while she was intoxicated. This is a young woman who needs every possible incentive to avoid anything associated with illegal substance use. Restricting the

paraphernalia condition to only those items she “intends to use” in connection with illegal substance use would allow her to keep paraphernalia on hand that she might end up using in connection with illegal substances even if she did not initially intend to do so. In light of her violent offenses and her wide-ranging substance abuse, such a limitation would pose a danger to her rehabilitation. The juvenile court was well within its discretion in barring appellant from possessing anything that she knows can be used in connection with illegal substances to protect her from herself and the community from her.

II. Disposition

The order is reversed, and the matter is remanded to the juvenile court with the following directions. First, the court shall declare the burglary count to be either a misdemeanor or a felony and make any necessary changes to the maximum time of confinement. Second, the court shall modify the no contact condition to read: “That said minor not knowingly have contact of any type with Jader A., the Walmart Store (600 Showers Drive, Mountain View, CA), Wendee W., Cynthia J., and Cam H.” Third, the court shall modified the paraphernalia condition to read: “That the minor not knowingly be in possession of any item known to her to be used for the ingestion, preparation, or packaging of controlled or otherwise illegal drugs or substances.”

Mihara, J.

WE CONCUR:

Premo, Acting P. J.

Elia, J.