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

In re KARINA B., a Person Coming Under
the Juvenile Court Law.

H040237
(Santa Clara County
Super. Ct. No. JV40236)

THE PEOPLE,

Plaintiff and Respondent,

v.

KARINA B.,

Defendant and Appellant.

Appellant Karina B. admitted committing second degree burglary (Pen. Code, §§ 459, 460, subd. (b)). The juvenile court declared her a ward and placed her on probation with numerous conditions, including gang conditions. The court also ordered her to pay a general fund fine and a restitution fine and found that the public defender's reimburseable attorney's fees amounted to \$200.

Karina appeals from the court's disposition order and challenges the juvenile court's (1) failure to declare the burglary offense to be a misdemeanor or a felony, (2) imposition of gang probation conditions that she claims were not reasonably related to her future criminality, (3) imposition of a restitution fine in the absence of any evidence

of her ability to pay, and (4) public defender reimbursement order. The Attorney General concedes this last point, and we accept the concession. We find that a remand is required for the court to declare the offense to be a felony or a misdemeanor. We reject her challenge to the probation conditions, but we direct the juvenile court to clarify the amounts of the fines on remand due to a conflict in the record concerning the amounts and to make an appropriate ability-to-pay finding.

I. Background

On the evening of May 26, 2013, 16-year-old Karina and her 16-year-old female cousin took 10 bottles of “car oil” from a Walmart in Gilroy and left the store without paying for the merchandise. When they were confronted, they ran away. The girls were apprehended, and they provided a receipt for oil from earlier in the evening. Surveillance video showed that a male had purchased oil earlier and given the receipt to the girls before the girls entered the store and took the oil from the store. The girls told the police that the male had promised to pay them for taking the oil.

A Welfare and Institutions Code section 602 petition was filed in August 2013 alleging that Karina had committed felony second degree burglary in connection with the May 2013 incident. The petition also alleged an unrelated August 2013 robbery count. In September 2013, Karina admitted the second degree burglary count in exchange for dismissal of the robbery count.¹ The probation report recommended that the court impose 10 gang probation conditions, a restitution fine of \$110, and a general fund “fine and penalty assessment” of \$158. It said nothing about attorney’s fees.

¹ This was a negotiated disposition that also included a stipulation that there would not be deferred entry of judgment.

In October 2013, the court declared Karina a ward and placed her on probation with the 10 requested gang conditions among the probation conditions. The written probation order ordered Karina “and her parents” to pay a restitution fine of \$110 and a general fund fine and penalty assessment of \$158. The court made both written and oral findings that Karina’s mother had the ability to pay the general fund fine and penalty assessment. Karina timely filed a notice of appeal.

II. Discussion

A. Declaration That Burglary Was Felony or Misdemeanor

Karina 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.)

The burglary count was alleged as a felony, and Karina admitted the count as alleged. At the bottom of the plea waiver form that Karina filled out and signed and the judge signed, there was a set of preprinted checkboxes next to a paragraph of text. The text read: “**For setting max time:** The felonies to the left would have been **wobblers** if filed against the minor in adult court. The Court is aware of, and actually exercises it’s [sic] wobbler discretion in this case. A check in box F is a finding of a felony. A check in box M is a finding of a misdemeanor. W&I 702.” None of the checkboxes was checked.

The court made no oral declaration at either the jurisdictional hearing or the dispositional hearing that the burglary count was a felony or a misdemeanor, nor did the

court acknowledge that it had the discretion to treat the offense as a misdemeanor. The jurisdictional order, which was signed by the judge, stated that Karina had admitted a felony burglary allegation. 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, next to unchecked boxes labeled “Felony” and “Misdemeanor,” had been written: “Ct. 2 - PC 459/460(b) - Felony.”

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.)

The Attorney General concedes that the juvenile court did not orally declare the offense to be a felony or misdemeanor, but she argues that a remand would be pointless as the record establishes that the court was aware of, and exercised, its discretion. The Attorney General’s reliance on the preprinted language in the plea waiver form is misplaced. Had the court checked one of the boxes next to this language, this would be some indication that the court was aware of and was exercising its discretion. The absence of any checks in any of the boxes does nothing to assure us that the court was aware of its discretion to treat this burglary count as a misdemeanor rather than a felony. The Attorney General’s reliance on other *unchecked* boxes on the plea waiver form is equally unresponsive of her argument as they also tell us nothing about the court’s awareness of its discretion.

Preprinted language on the dispositional form is also inadequate to demonstrate that the court was aware of its discretion. This language appears above a set of unchecked checkboxes next to which was written “Ct. 2 - PC 459/460(b) - Felony.” The problem with this preprinted language is that it does not unambiguously call for the court to list only a count that may be treated as a felony or a misdemeanor rather than all counts. This preprinted language does not assure us that the court was aware of its discretion to treat the burglary count as a misdemeanor.

All in all, the record as a whole does not reflect that the juvenile court was actually aware of its discretion to treat the burglary count as a misdemeanor. Consequently, a remand is required to give the court the opportunity to expressly exercise its discretion to do so.

B. Probation Conditions

Karina claims that the juvenile court abused its discretion in imposing the gang conditions because these conditions were not “‘reasonably related to future criminality.’” She asserts that “[t]here is no basis to believe that gangs have ever tempted Karina to engage in criminal conduct or that they are likely to in the future.”

1. Background

The probation report stated: “The minor denies any gang involvement; however, she has [a] tattoo of the ‘Sharks’ name on her left ankle which is indicative of gang affiliation with either criminal street gang ‘Nortenos’ or ‘Surenos’. In addition, she has two ‘grim reaper’ tattoos, one located on her right arm and one is located on her back.” “When the minor was asked about the Sharks team and to provide basic information, she stated, ‘I watch games when I have time’; however, she was unable to elaborate and provide specific details of the sports team. In addition, she further mentioned that she played indoor hockey while she attended Escuela Popular. She further reported while at Fischer Middle School in San Jose, California, she ‘hung out’ with ‘Northerners.’ She denied further association with any gang members. She reported she does not have any close friends, but has ‘a lot’ of different friends which are older and they normally ‘hang out’ in a group.” Karina was in 10th grade at the time of the offense and was just entering 11th grade at the time of disposition. She had apparently attended Fischer Middle School in 8th grade, two years before her offense. She admitted that she used both marijuana and alcohol.

Karina’s mother reported that she had moved her family to Tracy from San Jose in 2012 to remove Karina from “negative peer influence.” Since then, Karina had twice run away from Tracy and gone to San Jose. Karina had “severe truancy issues” while in Tracy. The mother “suspects her daughter may smoke illegal substances and be attracted to the gang lifestyle.” Karina’s mother believed that Karina had committed the offense

“to impress her friends.” Karina’s mother told the probation officer that Karina “continued to associate with negative peer influences” after she committed the May 2013 offense. As a result of Karina’s arrest, Karina’s mother had been forced to move her family back to San Jose, where she intended to remain.

The probation officer recommended: “[Since] the minor reported she previously associated with gangs and has a tattoo which is indicative of gang association, it is recommended the Court impose full gang Orders for the minor.” The probation report included the 10 recommended gang conditions: “15. That said minor not knowingly associate with any person whom she knows to be, or that the Probation Officer informs her to be, a probationer, parolee, or gang member; [¶] 16. For the purposes of these conditions, the words gang and gang-related activity refer to a criminal street gang as defined in Penal Code Section 186.22 subdivisions (e) and (f); [¶] 17. That said minor not knowingly possess, display, or wear any insignia, clothing, logos, emblems, badges, or buttons, or display any gang signs or gestures which she knows to be, or that the Probation Officer informs her to be, gang-related; [¶] 18. That said minor not obtain any new tattoos that she knows to be, or that the Probation Officer informs her to be, gang-related; [¶] 19. Unless expressly permitted by the Probation Officer, that said minor not post, display or transmit any symbols or information that the minor knows to be, or that the Probation Officer informs the minor to be, gang-related; [¶] 20. You must not attend any gang-related case unless at least one of these things is true: [¶] a- You are a party to the case. [¶] b-You or a member of your immediate family is a victim of the activity charged in the case. [¶] c-You are there to obey a subpoena, summons, court order, or other official order to attend. [¶] d-A party’s attorney has asked you to testify or to speak to the court. [¶] 21. In all other cases, you must stay at least 50 feet away from the entrance to any courtroom or courthouse where you know there is a gang-related case going on. [¶] 22. A gang-related case is a court case that you know

involved charges of gang-related activity, or other charges against a person you know or have been told by your probation officer is a member of a gang. A gang is a ‘criminal street gang’ as defined in section 186.22 of the Penal Code. [¶] 23. You must not try to scare or otherwise cause anyone not to take part in a gang-related case. This includes a witness, victim, juror or court worker. You must not try to get any witness in any court case not to testify. You must not try to get them to change their testimony; [¶] 24. For the purposes of these gang conditions, the words gang and gang-related activity refer to a criminal street gang as defined in Penal Code Section 186.22 subdivisions (e) and (f).”

At the disposition hearing, Karina’s trial counsel objected to “the gang terms” as a group solely on the ground that Karina “is not a gang member and does not hang with gang members.” “I don’t think the facts of that [(her tattoo and her report to the probation officer that she had associated with Northerners)] requires the terms.” The court responded: “[S]he does have the tattoo that is gang affiliated and has admitted to probation of associating with gang members and that this is to prevent her from going further down that road. I think that there is sufficient nexus.”

2. Analysis

“The [juvenile] court may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.” (Welf. & Inst. Code, § 730, subd. (b).) “[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.” (*In re Tyrell J.* (1994) 8 Cal.4th 68, 81, overruled on other grounds by *In re Jaime P.* (2006) 40 Cal.4th 128, 139.) “Despite the differences between the two types of probation, it is consistently held that juvenile probation conditions must be judged by the same three-part standard applied to adult probation conditions under *Lent . . .*” (*In re D.G.* (2010) 187 Cal.App.4th 47, 52.) “A condition of probation will

not be held invalid unless it ‘(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality’ [Citation.]” (*People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*).

Karina’s offense was not gang-related, and the challenged gang conditions are not primarily aimed at conduct that is in itself criminal. Karina’s contention is that the gang conditions are invalid because they do not satisfy the third *Lent* prong. She relies heavily on this court’s decision in *People v. Brandão* (2012) 210 Cal.App.4th 568, 570-571 (*Brandão*.) In *Brandão*, this court found that an adult gang probation condition was invalid because the “defendant had never been involved with any criminal street gangs, nor did he have any family members who associated with such groups,” and he had never committed any gang-related offense. (*Ibid.*) “Our holding is narrow. In our view, a no-gang-contact probation condition cannot be imposed on defendant here, given that the record divulges (1) no ties between defendant and any criminal street gang, (2) no such ties involving any member of defendant’s family, and (3) no criminal history showing or strongly suggesting a gang tie.” (*Brandão*, at p. 576.)

Brandão is readily distinguishable. First, juvenile courts have considerably more discretion than adult criminal courts in fashioning probation conditions; a probation condition that would be improper for an adult, like the defendant in *Brandão*, may be proper for a juvenile. Second, and more importantly, the record here discloses that Karina, unlike the defendant in *Brandão*, has an affinity for gangs that threatens to lead her into future criminality. Her “‘Sharks’” tattoo is properly considered a gang tattoo in light of her apparent lack of devotion to the local hockey team. She admitted some level of gang affiliation when she told the probation officer that she had “‘hung out’ with ‘Northerners’” when she was in middle school. Karina minimizes this evidence as dated, but this affiliation was just a couple of years before Karina’s offense. Nor was this the

sum total of the evidence of the threat that gang influences pose to Karina's future. Karina's mother stated that Karina is "attracted to the gang lifestyle" and committed her offense "to impress her friends." In fact, Karina's mother was so concerned about "negative peer influences" on Karina that she moved the entire family to Tracy from San Jose in a failed attempt to wrench Karina away from those influences. The fact that she had been forced to return her family to San Jose after Karina's offense meant that Karina would again be at risk from these same "negative peer influences" while Karina was on probation.

Karina claims that "[t]here is an insufficient nexus between the conduct prohibited by the probation conditions and the goal of deterring criminal conduct by Karina." We disagree. Karina has a gang tattoo, a history of affiliation with gang members, an attraction to "the gang lifestyle," and a susceptibility to "negative peer influences" so strong that it has led her to repeatedly run away from home and to commit a criminal offense to impress her friends. A teenager who is attracted to the gang lifestyle and highly susceptible to "negative peer influences" is at great risk from any association with gangs. We see in this evidence a substantial nexus between Karina's affinity for gangs and her future criminality. Accordingly, we find that the gang conditions were reasonably related to her future criminality and therefore satisfy the *Lent* test.

Karina does not make a facial challenge to the constitutionality of any of the gang conditions. She states: "To be clear, appellant does not argue that the gang-related probation conditions would be unconstitutional in all circumstances." In her opening brief, she observes, without any argument or citation to authority, that "[t]he gang conditions imposed here restrict a wide range of conduct that is unrelated to potentially illegal activity and can impinge upon protected constitutional rights of expression and association." In her reply brief, she asserts that, because the gang conditions impact

constitutional rights, a heightened standard of review applies, and the conditions must be invalidated unless they are “narrowly tailored to meet the needs of the individual.”

We do not address Karina’s contention in her reply brief that the gang conditions are invalid unless they are “narrowly tailored” because she forfeited this contention both below and on appeal. First, Karina’s trial counsel’s objection in the trial court mentioned nothing about constitutional issues or the need for narrow tailoring. Only facial constitutional challenges may be raised on appeal without an objection below. (*In re Sheena K.* (2007) 40 Cal.4th 875, 881-882, 886-887.) Karina explicitly concedes that her constitutional challenge is *not* a facial challenge. This is not a situation where the appellate constitutional claim is based on the same legal principle as was the subject of an objection below. (See *People v. Partida* (2005) 37 Cal.4th 428, 436.) Karina’s claim that the individual gang conditions are not “narrowly tailored” involves a different legal principle from her claim that the gang conditions as a group are not reasonably related to her future criminality. Second, Karina’s opening appellate brief’s argument regarding the probation conditions said nothing about a heightened standard of review or any constitutional requirement that the conditions be “narrowly tailored.” Appellate courts ordinarily do not consider new issues raised for the first time in an appellant’s reply brief. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764-765.) Under these circumstances, we decline to reach this doubly forfeited contention.

The juvenile court did not abuse its discretion in imposing the gang probation conditions.

C. Fines and Penalty Assessments

Karina contends that the trial court erred in imposing a \$158 general fund fine and penalty assessment without making a finding that *she*, not her mother, had the ability to pay that fine. She does not challenge the court’s imposition of the statutory minimum

restitution fine and penalty assessment. Karina also asks us to reduce the total fines to \$250 because the court orally stated that it would be imposing \$250 in fines. The Attorney General asserts that Karina forfeited her challenge to the general fund fine and penalty assessment by failing to make it below and that the court's finding that Karina's mother had the ability to pay was sufficient to support the court's imposition of the general fund fine.

The court told Karina and her mother at the disposition hearing: "I need to ask I am about to impose \$250 of fines and fees. That is the very minimum that I am required to order. That, of course, Karina is responsible for those fines and fees but you as her mother are equally responsible until they are paid in full unless you can convince me you do not have the ability to pay. You do not have to pay that today; and you don't have to pay it all at once and you do have the entire period of probation and you can make relatively small payments through the department of revenue. Is there any financial reason not to hold you responsib[le]?" Karina's mother said no and told the court that she was employed. The court then made an oral finding "that the mother has the ability to pay."

The written probation order ordered Karina "and her parents" to pay a restitution fine of \$110 and a general fund fine and penalty assessment of \$158. The written order also found that Karina's mother had the ability to pay the general fund fine and penalty assessment.

"When a minor is adjudged a ward of the court on the ground that he or she is a person described in Section 602, in addition to any of the orders authorized by Section 726, 727, 730, or 731, 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." (Welf. & Inst. Code, § 730.5.) The court made no

finding that Karina had the ability to pay the general fund fine and penalty assessment. It instead found that her mother had the ability to do so.

Although Karina's challenge to the general fund fine was arguably forfeited, since we are remanding this matter for another reason, we deem it appropriate to direct the juvenile court to also clarify both the ability to pay finding and the total amount of the fines. It is not clear from the record whether the court found that *Karina* had the ability to pay the general fund fine and penalty assessment, and it also unclear whether the court intended to impose precisely \$250 in fines and penalty assessments as it stated at the dispositional hearing or \$268 as reflected in the dispositional order.

D. Public Defender Reimbursement

At the dispositional hearing, the court asked the public defender how many appearances he had made, and he responded "four." The court then said: "\$200 attorney fees." The disposition order also stated: "Attorney's Fees - \$200.00." It did not specify who was to pay these fees.

Karina and the Attorney General agree that only Karina's mother, and not Karina, may be ordered to reimburse the public defender. (Welf. & Inst. Code, § 903.1.) On remand, the court shall clarify that this order applies solely to Karina's mother.

III. Disposition

The juvenile court's dispositional order is reversed and remanded with the following directions: (1) the court shall exercise its discretion to treat the burglary count as either a misdemeanor or a felony; (2) the court shall clarify the amounts of the restitution fine, general fund fine, and the penalty assessments and shall consider whether Karina has the ability to pay the general fund fine and penalty assessment; and (3) the

court shall clarify that Karina's mother, not Karina, is responsible for reimbursing the public defender.

Mihara, J.

I CONCUR:

Bamattre-Manoukian, Acting P. J.

Grover, J., Concurring and Dissenting

Although I concur in the elements of the disposition, I respectfully disagree with the majority's analysis of the challenged gang conditions and with the broad conclusion that all 10 gang conditions are reasonably related to Karina's future criminality.

At the disposition hearing, Karina's counsel objected to the gang conditions recommended in the probation report, stating: "I don't think that she is a gang member. I don't think that she affiliates with gangs. I know that she has reported to an officer that she hangs out with Northern[er]s. And I know that it says she has a star tattoo on her ankle. I don't think the facts of that require the terms." The juvenile court concluded there was a "sufficient nexus" between Karina's conduct and all of the proposed gang conditions.

When examining probation conditions, a reviewing court "will uphold the trial court's broad discretion so long as a challenged condition relates generally to criminal conduct or future criminality or specifically to the probationer's crime. (*People v. Lent* (1975) 15 Cal.3d 481, 486 [(*Lent*)]; *People v. Olguin* (2008) 45 Cal.4th 375, 379–380 [.]) The reasonableness of a probation condition may be challenged on appeal only if the probationer has questioned it in the trial court. (*People v. Welch* (1993) 5 Cal.4th 228; 237; see *In re Sheena K.* (2007) 40 Cal.4th 875, 882 [.])" (*People v. Rodriguez* (2013) 222 Cal.App.4th 578, 585.) Karina's juvenile court objection essentially challenged the reasonableness of the gang conditions as applied to her circumstances.

When a probationer objects that no part of a set of gang conditions is reasonable, the trial court must consider the reasonableness of each condition separately, as well as the set of conditions cumulatively and their possible redundancy. (Cf. *In re E.O.* (2010) 188 Cal.App.4th 1149, 1155–1156 (*E.O.*.) I do not question the reasonableness of imposing some gang conditions on a minor such as Karina who admitted to previous associations with Northerners and who displays one or more apparently gang-related

tattoos. However in my view, an all or nothing, one size fits all approach to imposing and reviewing gang conditions as a set does not satisfy the principles in *Lent*. Karina's relatively minimal gang history demands a more individualized assessment of each gang condition.

The Attorney General correctly observes that the language of the conditions at issue here was suggested by this court in *E.O.*, *supra*, 188 Cal.App.4th at page 1157, footnote 5. But as that case illustrates, linguistic clarity and reasonable application are distinct; *each* condition's applicability to the particular probationer must be evaluated. That condition-specific analysis was not undertaken by the juvenile court, and I believe Karina's objection was sufficient to warrant a more detailed review on appeal.

Grover, J.