Filed 2/28/11 In re Mario Y. CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re MARIO Y., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. MARIO Y., Defendant and Appellant.	A129330 (Alameda County Super. Ct. No. SJ1015125)

Appellant Mario Y. was accused of committing robbery (Pen. Code, § 211)[1] after he took $20 from a friend while roughhousing. After hearing evidence at the jurisdictional hearing, the juvenile court found that the minor had committed a lesser crime, grand theft person (§ 487, subd. (c)). The minor argues that grand theft person is not a lesser included offense of robbery, and that the wardship petition did not provide notice that he could be found to have committed the crime. Based upon the California Supreme Court's decision in *People v. Ortega* (1998) 19 Cal.4th 686 (*Ortega*), we conclude that grand theft person is a lesser included offense of robbery, and affirm.

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

I.
FACTUAL AND PROCEDURAL BACKGROUND

On the evening of June 28, 2010, a high school senior (M.M.) was walking alone on Edes Street in Oakland. He had a $20 bill that his mother had provided in order to buy food at the store. He saw the minor walking toward him with two other people, and they all stopped and talked. M.M. and the minor attended the same high school and had known each other for about six years, and M.M. considered the minor to be a "pretty good" friend. M.M. and the minor started to "play fight." The minor grabbed M.M.'s t-shirt by the sleeve and would not let go after M.M. asked. The minor then hit M.M. in the face. M.M. fell to the ground, and the minor took $20 from the victim and walked away. The victim testified that the minor "snatched the money out [of] my hand."

M.M. went home and told his mother what had happened, and his mother called police. A short time later, police arrested the minor after the victim's mother (who knew the minor) identified him to officers. A search of the minor revealed a single $20 bill as well as $1 bills in his pockets.

A juvenile wardship petition was filed alleging that the minor came within the provisions of Welfare and Institutions Code section 602, in that he committed robbery (§ 211). Specifically, the petition alleged that on June 28, 2010, in Alameda County, the minor "did then and there commit a FELONY, to wit: ROBBERY, a violation of Section 211 of the Penal Code of California, in that said minor(s) did then and there rob [the victim] of PERSONAL PROPERTY." (Boldface omitted.)

A contested jurisdictional hearing was held on July 20, 2010. Following the close of evidence, a supervised law student argued that the People had proven that the minor had committed robbery "and any lesser included offenses, including grand theft and . . . petty theft and grand theft from [the] person." The minor's counsel argued that inconsistencies in the victim's testimony showed that he was not a credible witness, and that there was insufficient evidence that the minor took money from the victim.

On its own motion, the juvenile court amended the petition to allege one count of grand theft person (§ 487, subd. (c)), and sustained the petition as amended, stating, "I don't know if this raises [*sic*] to the level of a robbery, so I'll make a finding he's described by [Welfare and Institutions Code section] 602 in that he committed a [section] 487, theft from a person, which is a lesser to the [section] 211. It doesn't seem that [the money] was taken by force or fear." The minor's counsel did not comment on the court's amendment of the petition.

At a dispositional hearing on August 3, 2010, the juvenile court placed the minor on probation after declaring the offense a misdemeanor at the minor's request. This timely appeal followed.

II.
DISCUSSION

The minor argues that the juvenile court's finding that he committed grand theft person must be vacated, because the uncharged crime was not a lesser, necessarily included offense of the charged crime of robbery. "A defendant may be convicted of an uncharged crime if, but only if, the uncharged crime is necessarily included in the charged crime. (§ 1159; *People v. Lohbauer* (1981) 29 Cal.3d 364, 368-369.) The reason for this rule is settled. ' "This reasoning rests upon a constitutional basis: 'Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial.' [Citation.]" ' [Citation.] The required notice is provided as to any charged offense and any lesser offense that is necessarily committed when the charged offense is committed. [Citation.]" (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.)

The California Supreme Court has articulated two tests to determine whether an uncharged offense is necessarily included within a charged offense: "the 'elements' test and the 'accusatory pleading' test. Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former." (P*eople v. Reed*, *supra*, 38 Cal.4th at p. 1227.)

" ' " 'The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense.' " [Citations.]' [Citation.]" (*People v. Lohbauer*, *supra*, 29 Cal.3d at p. 369.) "Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former. [Citation.]" (*Reed*, *supra*, at pp. 1227-1228.)

" '[Due] process requires that a minor, like an adult, have adequate notice of the charge so that he may intelligently prepare his defense. [Citation.]' [Citation.]" (*In re Robert G.* (1982) 31 Cal.3d 437, 442.) " '[N]otice is adequate and due process is served when the trier of fact is permitted to find an accused guilty of an offense *necessarily included* in that with which he is charged [citation] *or* of a lesser offense which, although not necessarily included in the statutory definition of the offense, is *expressly pleaded* in the charging allegations. [Citation.]' " (*Id.* at pp. 442-443, original italics.) The minor argues, respondent does not dispute, and we agree that the elements of grand theft person were not expressly pleaded in the wardship petition. The petition alleged that the minor robbed the victim of personal property, without specifying that it was taken from the victim's person or from his immediate presence. We therefore focus on whether grand theft person is a lesser included offense of robbery under the elements test.

The statutory definition of 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.) " '[I]mmediate presence' is 'an area over which the victim, at the time force or fear was employed, could be said to exercise some physical control' over his property. [Citation.] 'Under this definition, property may be found to be in the victim's immediate presence "even though it is located in another room of the house, or in another building on [the] premises." [Citations.]' [Citation.]" (*People v. Gomez* (2008) 43 Cal.4th 249, 257; see also *Miller v. Superior Court* (2004) 115 Cal.App.4th 216, 218-219 ["immediate presence" element satisfied where defendant stole property victim left in bathroom that was no longer in victim's presence, where defendant later used force to keep property].)

"[T]he crime of theft is divided into two degrees, grand theft and petty theft." (*Ortega, supra,* 19 Cal.4th at p. 696; § 486.) Theft committed when property is "taken from the person of another" is grand theft. (§ 487, subd. (c).) Grand theft person requires a finding that defendant took property " 'actually upon or attached to the person, or carried or held in actual physical possession—such as clothing, apparel, or ornaments, or things contained therein, or attached thereto, or property held or carried in the hands, or by other means, upon the person; [the statute] was not intended to include property removed from the person and laid aside, however immediately it may be retained in the presence or constructive control or possession of the owner while so laid away from his person and out of his hands.' " (*In re Jesus O.* (2007) 40 Cal.4th 859, 863 (*Jesus O.*), quoting *People v. McElroy* (1897) 116 Cal. 583, 586.)

The minor argues that grand theft person is not a lesser included offense of robbery, because one can commit a robbery without *necessarily* committing grand theft person. For example, a person could feloniously take property located in another room of the house from the victim (*People v. Gomez, supra,* 43 Cal.4th at p. 257), without necessarily taking property that was on the person of the victim, an element of grand theft person (§ 487, subd. (c); *Jesus O., supra,* 40 Cal.4th at p. 863). (*People v. Chandler* (1965) 234 Cal.App.2d 705, 708 [robbery that consists solely of taking property from " 'immediate presence' " of victim does not include all elements of grand theft person].)

Respondent disagrees, arguing that the California Supreme Court's decision in *Ortega, supra,* 19 Cal.4th 686, is controlling here, and that this court may not apply the law in a manner that directly contradicts our Supreme Court's interpretation of it (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455). We agree. In *Ortega,* defendant was charged with both robbery and grand theft of a vehicle (former § 487, subd. 3, now § 487, subd. (d)(1)). (*Ortega* at pp. 689-690.) The Court concluded that a defendant could not be convicted of both crimes, because "[t]heft, in whatever form it happens to occur, is a necessarily included offense of robbery." (*Id.* at p. 699.) The Court reasoned that even though a robbery could be committed without the taking of an automobile (*id.* at p. 695), "[f]ocusing upon whether a particular form of theft necessarily

is included within the offense of robbery misses the point, recognized in our early case law, that the crime of theft, in one form or another, *always is included within robbery*." (*Id.* at p. 697, italics added.) "Because theft is a necessarily included offense of robbery [citation], it follows that both degrees of theft, grand and petty, are necessarily included offenses of robbery." (*Ibid.*) The Court observed that it had applied the rule that theft—whether grand theft or petty theft—is a necessarily included offense of robbery "in a long, unbroken line of authority," and it cited with approval cases holding that grand theft person is a lesser included offense of robbery. (*Id.* at pp. 694-695 & fns. 3, 4, citing *People v. Church* (1897) 116 Cal. 300, 303-304 [force or fear are only elements that differentiate robbery from grand theft person], *People v. Jones* (1992) 2 Cal.App.4th 867, 869 ["Where the elements of force or fear are absent, a taking from the person is grand theft, a lesser included offense of robbery."] & *People v. Morales* (1975) 49 Cal.App.3d 134, 139.) At least two cases have relied on *Ortega* for the proposition that grand theft person is a lesser included offense of robbery, and we are aware of no post-*Ortega* cases that have reached a contrary conclusion. (*People v. Burns* (2009) 172 Cal.App.4th 1251, 1256 [trial court obligated to instruct on grand theft person as lesser included offense of robbery if evidence supports instruction]; *People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1411 [depending on facts, grand theft person can be lesser included offense of robbery].)

In *Ortega*, Justice Ming Chin dissented from the majority's conclusion that grand theft was a necessarily lesser included offense of robbery. (*Ortega*, *supra*, 19 Cal.4th at pp. 703-713 (conc. & dis. opn. of Chin, J.).) Justice Chin agreed that simple theft is a necessarily included offense of robbery, because a defendant cannot commit robbery (which requires the taking of personal property) without committing theft. (*Id.* at p. 705.) However, Justice Chin observed that a defendant may commit robbery without committing *grand* theft, because there are many types of grand theft—including grand theft person—that include elements not necessarily included in robbery. (*Id.* at pp. 705-706.) "Courts have long recognized the difference between the narrow from-the-person requirement for theft and the broader from-the-person-or-immediate-presence requirement for robbery." (*Id.* at p. 706, citing *People v. McElroy*, *supra*, 116 Cal. at

pp. 586-587.) "To commit robbery but not grand theft, a defendant merely has to take, by force or fear, *from the victim's immediate presence but not person*, property not of a specified type and worth less than $400 [elements of different types of grand theft]," which means that grand theft is not a lesser included offense of robbery. (*Ortega* at p. 706, italics added.)

Here, the minor essentially adopts the reasoning of Justice Chin's dissent in *Ortega* when he argues that grand theft person is not a lesser included offense of robbery. He argues that Justice Chin's majority opinion in *Jesus O.*, *supra*, 40 Cal.4th 859, is controlling here, because that opinion emphasized the differences between grand theft person and robbery. *Jesus O.* held that a minor committed grand theft person where a victim's cell phone fell out of his pocket during an assault, and the minor later picked up the cell phone from the ground. (*Id.* at pp. 868-869.) The question presented in *Jesus O.* was whether the fact that the cell phone was on the victim's person when the assault began, but not when the property was taken, satisfied the " 'from the person of another' " element of section 487, subdivision (c). (*Jesus O.* at p. 861.) The case stressed that the grand theft person statute is meant to protect people and property against actions such as pickpocketing and other takings from the person, and the Court distinguished the elements of the crime from robbery: " 'Had the legislature intended that the offense [of grand theft person] should include instances of property merely in the immediate presence, but not in the manual possession about the person, it would doubtless have so provided, as it has in defining robbery.' " (*Id.* at p. 863.) The requirement that property be "taken from the person" is different from the element of robbery that property may be taken from a victim's person *or* " ' "immediate presence." ' "[2] (*Ibid.*)

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[2] The *Jesus O.* Court concluded that the "taken from the person" element had been satisfied in that case, because the victim's cell phone had been physically connected to his person (in his pocket) when the initial assault began. (*Jesus O.*, *supra*, 40 Cal.4th at p. 869.) Two juveniles wrongly caused the cell phone to become separated from the victim's person, and they later gained possession of it, which amounted to grand theft person. (*Id.* at pp. 868-869.)

Were it not for the Supreme Court's decision in *Ortega*, we would agree with the minor that grand theft person is not a lesser included offense of robbery under the elements test, and that *Jesus O.* supports this conclusion. One can commit robbery without *necessarily* committing grand theft person, because a person can feloniously take property from the immediate presence of the victim (*People v. Gomez*, *supra*, 43 Cal.4th at p. 257) without taking property that was on the person of the victim, an element of grand theft person (*Jesus O.*, *supra*, 40 Cal.4th at p. 863). However, although *Jesus O.* distinguished the elements of grand theft person and robbery, it did not specifically address whether the former was a necessarily included offense of the latter. (*People v. Jennings* (2010) 50 Cal.4th 616, 684 [cases are not authority for proposition not considered].) The minor argues that *Ortega* likewise did not decide the question, because the case addressed the issue of whether a form of grand theft based on the type of property taken (an automobile) was a lesser included offense of robbery, and did not address grand theft based on the from-the-person character of the taking itself, the issue presented in this appeal. Although *Ortega* did not specifically address grand theft person, it relied on several cases that had (*Ortega*, *supra*, 19 Cal.4th at pp. 694-695 & fns. 3, 4), and it did not distinguish between types of grand theft in reaching its conclusion that "[t]heft, *in whatever form it happens to occur*, is a necessarily included offense of robbery." (*Id.* at p. 699, italics added.)

Because we are bound by *Ortega*'s unambiguous holding (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 455), we conclude that grand theft person is a lesser included offense of robbery, and that the minor's due process rights therefore were not violated when the juvenile court found that he had committed the lesser, uncharged crime.

III.
DISPOSITION

The juvenile court's orders are affirmed.

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Sepulveda, J.

We concur:

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Reardon, Acting P.J.

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Rivera, J.

People v. Mario Y. (A129330)