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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,
Plaintiff and Respondent,
v.
JUSTIN WADE EDWARDS,
Defendant and Appellant.

A106399
(Sonoma County
Super. Ct. No. SCR33375)

Appellant Justin Wade Edwards was found guilty by a jury of robbery (Pen. Code,¹ § 211); unlawful possession of a billy (§ 12020); misdemeanor assault (§ 245) and petty theft (§ 484). He was sentenced to the upper term of five years on the robbery conviction, with concurrent terms of three years on the billy possession and six months on the remaining misdemeanors.

In light of the contentions raised on this appeal, a brief statement of the facts is sufficient. Appellant entered a Safeway store in Santa Rosa and took several boxes of frozen food which he placed into his backpack. When confronted by the store manager, appellant walked by him toward the exit. When the manager followed appellant outside and asked him to stop, appellant swung a billy at the manager, striking him in the chin. Appellant then fled with the stolen items.

Appellant initially contends that his conviction of petty theft must be reversed because the stolen items were the same items taken in the robbery. The Attorney

¹ Section references are to the Penal Code.

General concedes that the petty theft conviction must be reversed under these facts. (See *People v. Ortega* (1998) 19 Cal.4th 686, 692.) We accept the concession and will reverse the petty theft conviction.

Appellant also contends that “the imposition of an upper term based on a finding of aggravating facts without jury findings to support them violated appellant’s right to jury trial and due process under the federal Constitution.” This precise contention was recently rejected by our California Supreme Court in *People v. Black* (June 20, 2005, S126182) ___ Cal. 4th ___ [2005 D.A.R. 7308]: “[W]e conclude that the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence . . . under California law does not implicate a defendant’s Sixth Amendment right to a jury trial.” (*Ibid.*) We reject the contention as well. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The petty theft conviction is reversed. In all other respects, the judgment is affirmed.

Reardon, J.

We concur:

Kay, P.J.

Rivera, J.