

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re R.A., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

R.A.,

Defendant and Appellant.

A125053

(Alameda County
Super. Ct. No. SJ09012038)

I. INTRODUCTION

R.A. appeals from a juvenile court order sustaining allegations of vandalism, possession of a sawed-off shotgun and possession of a firearm capable of being concealed. He claims his *Miranda*¹ rights were violated in connection with police questioning about the vandalism and no substantial evidence supports his convictions of possessing a sawed-off shotgun and possessing a concealable firearm. We find no merit in his first two assertions of error, but we do in the third. We therefore reverse the conviction for violating Penal Code² section 12101, subdivision (a)(1).

¹ *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

² All further undesignated statutory references are to the Penal Code.

II. FACTUAL AND PROCEDURAL BACKGROUND

Two separate incidents lead to the charges against R.A. On December 18, 2008, Newark Police Officer Joshua Horst responded to a “report of some juveniles . . . writing on a real estate sign with markers.” When Officer Horst arrived at the scene, he observed three juveniles standing around the sign, one of whom was later identified as R.A. He also observed on the sign “[m]ultiple graffiti-type writings.” The minors immediately began walking away when they saw Horst, who stepped out of his car and said “Hey, come here a second. What’s going on?” Officer Horst “requested” that the three minors sit on the curb.

The “graffiti-type writings” Officer Horst saw on the sign were made with green ink and included the markings “YNL Gangstaz” and “West End YNL.” Officer Horst found a green marker about 12 inches from the sign with no cap and a moist tip.

Newark Police Officer Anthony Cerini and his partner then arrived at the scene, and Officer Horst told him about the green marker. Officer Cerini compared the marker tip to the still-moist green writing on the sign and concluded the marker tip was the same width and color as the writing.

Officer Cerini asked the group of minors who vandalized the sign. One of the minors responded “ ‘We all did.’ ” Officer Cerini then asked each minor individually to accompany him to the sign and point out which markings he had made. R.A. admitted he had written the phrase “West End YNL.”

The second incident occurred four months later, on April 17, 2009. At about 10:00 p.m., Union City Police Officer Christopher Leete observed two males near the intersection of 6th and E Streets. One male appeared to be watching the intersection, while the second male, later identified as R.A., was walking out of a park carrying a black baseball bag over his back. Officer Leete stopped his car to detain R.A. because it is unlawful to be in a city park after 10:00 p.m., and because it was a “well-documented”

gang area. He exited his patrol car and twice “called out” to R.A. to stop. R.A. looked directly at Officer Leete, turned and ran into an alleyway behind a residence on E Street.

Officer Leete called dispatch, then went down the alleyway. R.A. was gone, but the black bag he had been carrying was on the ground. Officer Leete gave the bag to Officer Harden, who had arrived at the scene, and instructed him to lock it in his patrol car trunk while Officer Leete continued searching for R.A.

Two other officers detained R.A. and another minor about a block away. Officer Leete identified R.A. as the person he saw running with the black bag.

Officer Leete removed the black bag from Officer Harden’s trunk and brought it to the Union City police station, where he searched it. Inside, he found a loaded short-barreled shotgun and three live shotgun shells. Officer Leete measured the barrel of the shotgun and determined it was 16 inches long.

The Alameda County District Attorney filed a juvenile wardship petition and amendment to the petition alleging a total of six counts arising out of the two incidents: misdemeanor vandalism (§ 594, subd. (b)(2)(A)); possession of a sawed-off shotgun (§ 12020, subd. (a)); carrying a concealed firearm (§ 12025, subd. (a)(2)); carrying a loaded firearm (§ 12031, subd. (a)(1)); possession of a firearm capable of being concealed (§ 12101, subd. (a)(1)); and possession of ammunition (§ 12101, subd. (b)(1)).

Following a hearing, the court sustained the petition as to the vandalism, possession of a sawed-off shotgun and possession of a concealable firearm counts and made no findings as to the remaining counts. R.A. was adjudged a ward of the court, placed on probation subject to certain conditions, and ordered to reside with his parents on electronic monitoring. This timely appeal followed.

III. DISCUSSION

A. Vandalism

R.A.³ claims the juvenile court erred in denying his motion to suppress the statements he made to police at the scene of the vandalism because he was not advised of his *Miranda* rights.

“ ‘[P]olice officers are not required to administer *Miranda* warnings to everyone whom they question. . . . *Miranda* warnings are required only where there has been such a restriction on a person’s freedom as to render him “in custody.” ’ ” (*People v. Macklem* (2007) 149 Cal.App.4th 674, 690, quoting *Oregon v. Mathiason* (1977) 429 U.S. 492, 495.) An interrogation is custodial when “a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” (*Miranda, supra*, 384 U.S. at p. 444.) Whether a person is in “custody” for purposes of *Miranda* is an objective test. (*People v. Ochoa* (1998) 19 Cal.4th 353, 401.) “[T]he ultimate inquiry is simply whether there is a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.” (*California v. Beheler* (1983) 463 U.S. 1121, 1125.)

Whether a defendant is in “custody” for *Miranda* purposes is a mixed question of law and fact. (*People v. Ochoa, supra*, 19 Cal.4th at p. 401.) When reviewing a trial court’s determination that a defendant did not undergo custodial interrogation, we “apply a deferential substantial evidence standard” to the trial court’s factual findings regarding the circumstances surrounding the interrogation, and independently decide whether, given those circumstances, “a reasonable person in [the] defendant’s position would have felt free to end the questioning and leave” (*Id.* at pp. 401-402).

³ Appellant’s opening brief refers to the minor by his initials in the caption, but uses his full name in the body of the brief, in violation of California Rules of Court, rule 8.400(b)(2).

A temporary detention is not the equivalent of “custody” requiring *Miranda* advisements. (*Berkemer v. McCarty* (1984) 468 U.S. 420, 439-440; *People v. Farnam* (2002) 28 Cal.4th 107, 180.) “The *Miranda* court itself declared that ‘[g]eneral on-the-scene questioning as to facts surrounding a crime . . . is not affected by our holding.’ ” (*People v. Clair* (1992) 2 Cal.4th 629, 679, quoting *Miranda, supra*, 384 U.S. at p. 477.)

Thus, “the term ‘custody’ generally does not include ‘a temporary detention for investigation’ where an officer detains a person to ask a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer’s suspicions.” For example, in *People v. Clair, supra*, 2 Cal.4th at p. 679, the Supreme Court held the defendant was not subject to a custodial interrogation where the officer approached him at an apartment crime scene, with his gun drawn, to ask who he was, whether he had identification and lived in the apartment, what he was doing in the apartment, and whether he knew the residents. Similarly, in *People v. Forster* (1994) 29 Cal.App.4th 1746, the Court of Appeal held the defendant was not subject to a custodial interrogation where a United States Customs Inspector noticed he appeared to be driving under the influence, asked him to step out of his vehicle, conducted a patdown search, and directed him to sit on a bench, and after an hour passed, a highway patrol officer questioned him about his drinking. (*Id.* at pp. 1750-1751, 1754.)

The instant case also involves initial investigatory questioning following a lawful detention. The officer responded to a report of an ongoing crime. When he approached the scene, R.A. was present. The officer immediately observed evidence of the reported crime. R.A. was not placed in hand cuffs, but simply directed to sit on the curb and then questioned briefly about the situation on a public street, not at a police station, when asked who vandalized the sign. He and the other minors were not handcuffed. The officers did not draw their weapons. And the questioning was not prolonged. Rather, the officers were simply “ ‘ask[ing] . . . a moderate number of questions to . . . try to obtain

information confirming or dispelling [their] suspicions.’ ” (*People v. Clair, supra*, 2 Cal.4th at p. 679.)

We therefore reject R.A.’s challenge to his vandalism conviction.

B. Possession of a Sawed-Off Shotgun

R.A. argues no substantial evidence supports his conviction under section 12020, subdivision (a), of possessing a sawed-off shotgun. He claims the eyewitness identification was “questionable,” the evidence of gun possession was “circumstantial” and the evidence of a “culpable mental state” was insufficient.

“Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant’s burden to affirmatively demonstrate error. [Citation.] Thus, when a criminal defendant claims on appeal that his conviction was based on insufficient evidence . . . we must begin with the presumption that the evidence . . . was sufficient, and the defendant bears the burden of convincing us otherwise.” (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573, italics omitted.)

The standard of review in determining whether substantial evidence supports a conviction is well settled. “On appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] ‘ “[I]f the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness’s credibility for that of the fact finder.” ’ ” (*People v. Snow* (2003) 30 Cal.4th 43, 66, quoting *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) “ ‘In reviewing the sufficiency of the evidence, we must determine “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” ’ [Citation.] We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the

evidence. [Citation.] ‘The focus of the substantial evidence test is on the whole record of evidence presented to the trier of fact, rather than on “ ‘isolated bits of evidence.’ ”

[Citation.]’ [Citation.]” (*People v. Medina* (2009) 46 Cal.4th 913, 919, italics omitted.)

Given our standard of review, R.A.’s assertion that the evidence was not substantial because it was “questionable” and “circumstantial” is meritless. Regardless of whether eyewitness identification is “among the least reliable evidence,” as R.A. argues, it can, by itself, constitute substantial evidence if the trier of fact credits the testimony of the witness. (See *People v. Cuevas* (1995) 12 Cal.4th 252, 271-272 [“[T]he substantial evidence test . . . should be used to determine whether an out-of-court identification is sufficient to support a criminal conviction.”].) Circumstantial evidence, of course, also can constitute substantial evidence. “Circumstantial evidence may be sufficient to prove a defendant’s guilt beyond a reasonable doubt.” (*People v. Bamberg* (2009) 175 Cal.App.4th 618, 625.) “Where the jury convicts on circumstantial evidence, our opinion that the evidence was reasonably susceptible to a contrary finding does not lead to reversal of the judgment.” (*People v. Leal* (2009) 180 Cal.App.4th 782, 787.)

R.A. also maintains the prosecution failed to prove he had the requisite “culpable mental state” as set forth in *People v. King* (2006) 38 Cal.4th 617 (*King*). In *King*, the Supreme Court held a violation of section 12020 requires “proof of a defendant’s actual knowledge.” (*Id.* at p. 627.) “[T]he prosecution must prove that the item had the necessary characteristic to fall within the statutory description. It must also prove that the defendant knew of the characteristic. That is, it must prove that a defendant charged with possession of a short-barreled rifle knew the rifle was unusually short, but the defendant need not know the rifle’s actual dimensions.” (*Ibid.*)

R.A. claims there was no substantial evidence of his knowledge “that a sawed off shotgun was in the bag,” because there was “no evidence that [R.A.] had handled or seen the gun that was in the bag” or that the “bag or gun belonged to” him. However, “[k]nowledge can, of course, be proved circumstantially.” (*King, supra*, 38 Cal.4th at

p. 627.) Here, there was evidence R.A. was carrying a black bag on his back as he fled from Officer Leete down an alleyway, Officer Leete found the bag in the alleyway within moments, the soft-sided bag contained a 16-inch sawed-off shotgun, and R.A. was detained within minutes, a block away, out of breath and without the bag he earlier carried. This is ample circumstantial evidence that R.A. possessed the black bag and knew of the illegal nature of its contents. (See *People v. Martinez* (2009) 47 Cal.4th 399, 449; CALJIC No. 2.52 [flight may be considered in determining guilt].)

We therefore reject R.A.'s challenge to his conviction of possessing a sawed-off firearm under section 12020, subdivision (a).

C. Possession of Firearm Capable of Being a Concealed Weapon

R.A. argues his conviction under section 12101, subdivision (a)(1), of possessing a firearm capable of being concealed cannot stand because the shotgun found in the bag was “not a concealable weapon as a matter of law.” A firearm capable of being concealed upon a person “shall apply to and include any device designed to be used as a weapon, from which is expelled a projectile by the force of any explosion, or other form of combustion, and that *has a barrel less than 16 inches in length.*” (§ 12001, subd. (a)(1), italics added.) Officer Leete testified he measured the barrel of the shotgun, and it was 16 inches.

The Attorney General does not dispute the “less than 16 inches” requirement of section 12001, subdivision (a)(1), or the state of the evidence. At oral argument, counsel withdrew the waiver argument advanced in the respondent's brief, and candidly conceded the conviction for violating section 12101, subdivision (a)(1), cannot stand.

IV. DISPOSITION

The finding that R.A. violated Penal Code section 12101, subdivision (a)(1), is reversed. In all other respects, the dispositional order of the juvenile court is affirmed.

Banke, J.

We concur:

Margulies, Acting P. J.

Dondero, J.

A125053, *In re R.A.*