Filed 2/27/17 In re J.R. CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re J.R., a Persons Coming Under the Juvenile Court Law.	H043051 (Santa Clara County Super. Ct. No. 3-14-JV-40959
THE PEOPLE, Plaintiff and Respondent, v. J.R., Defendant and Appellant.	

The Santa Clara County District Attorney alleged in a Welfare and Institutions Code section 602, subdivision (a) petition that J.R., a minor, had committed burglary (Pen. Code, §§ 459-460, subd. (a))[1], attempted to unlawfully drive or take a vehicle without the owner's consent (Veh. Code, § 10851, subd. (a)), and possessed burglary tools (§ 466). After a contested jurisdictional hearing, the juvenile court found true the allegations that the minor had attempted to violate Vehicle Code section 10851, subdivision (a) and had violated section 466. At the dispositional hearing, the juvenile court continued the minor as a ward of the court and placed him on probation.

On appeal, the minor contends there was insufficient evidence to sustain the allegation that he attempted to drive or take a vehicle without the owner's consent (Veh. Code, § 10851, subd. (a)). Alternatively, he maintains that the offense must be

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

reduced to a misdemeanor pursuant to Proposition 47, the Safe Neighborhoods and Schools Act (Cal. Const., art. II, § 10, subd. (a)) (Proposition 47). The minor also argues that the juvenile court committed prejudicial evidentiary error in admitting certain testimony. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Welfare and Institutions Code Section 602, subdivision (a) Petition

The Santa Clara County District Attorney filed a Welfare and Institutions Code section 602, subdivision (a) wardship petition on September 9, 2015. It alleged that the minor committed felony first degree burglary (§§ 459-460, subd. (a), count 1) of an occupied residence (§ 667.5, subd. (c)(21)), felony attempted theft or unauthorized use of a vehicle (§ 664, Veh. Code, § 10851, subd. (a), count 2), and possession of burglar's tools (§ 466, count 3).

B. Jurisdictional Hearing

The court held a two-day contested jurisdictional hearing, at which the following evidence was adduced.

Jamie Martinez shared a Sunnyvale apartment with her three children, her boyfriend, and his brother Alexis Ayala. At about 4:30 a.m. on September 8, 2015, Martinez woke up and heard what sounded like someone removing the screen from her open bedroom window. She smelled cigarettes but did not see anything because the blinds were closed. She slammed the window closed without looking out because she was scared and went back to sleep.

Ayala also heard someone removing the screen from his bedroom window in the early hours of September 8, 2015. He recognized the noise because it had happened to him previously. He yelled and stuck his head out the window. No one was there but the screen was missing. Ayala called 9-1-1.

Sean Mula, a Sunnyvale police officer, responded to Ayala's call. He observed that the screens to the bedroom windows had been removed and were sitting on the ground outside.

Ayala woke his brother and Martinez when Mula arrived. Martinez told Mula what she had observed earlier that morning. While Mula was present, Martinez realized that her iPhone, which had been on the window sill, was missing.

Emmett Larkin, a Sunnyvale police lieutenant, testified that he responded to a call regarding a residential burglary at about 4:30 a.m. on September 8, 2015. As he approached the area of the reported burglary, he observed an individual standing on the sidewalk in the shadows of a tree, which he considered suspicious. Larkin exited his vehicle to contact the individual. As he approached, he observed a second person, J.C., kneeling on the sidewalk with his torso leaning into the open driver's door of a dark-colored Honda Accord. Larkin ordered the individuals to get on the ground and show him their hands. As they complied, Larkin noticed a third person in the car's rear passenger seat and saw that the rear passenger side door was open as well. That third individual, whom Larkin identified in court as the minor, also complied with the order to get to the ground.

Larkin opined that the first individual he had observed was acting as a lookout. That individual smelled of cigarettes and was found in possession of Martinez's iPhone.

Backup arrived, including Officer Corinne Abernathy, who searched the minor with his consent. She found a screwdriver and a roll of coins in his pockets and a box of latex gloves and binoculars in his backpack. Abernathy testified that screwdrivers, gloves, and binoculars are typical burglary tools that can be used to break in to a vehicle or home. After searching the minor, Abernathy spoke to him about the incident. He told her he and two friends were hanging out and smoking cigarettes. While they were walking, he noticed that the Honda was unlocked. He took the roll of coins and

screwdriver he was carrying from that vehicle. Unprompted, the minor told Abernathy that he did not intend to steal the car.

Alfredo Rivera testified that he drove a dark blue 1991 Honda Accord, which he parked outside his home on the evening of September 7, 2015 with the doors locked and windows closed. Rivera was in the process of buying the car from his cousin for $600. He had paid $300 as of September 7, 2015. The vehicle's title remained in his cousin's name. On the morning of September 8, 2015, police officers knocked on his door and informed him that his car had apparently been broken into. Rivera inspected the car with the officers. The passenger side windows were partially rolled down, and one would not roll back up all the way as it previously had. The rear passenger window was rolled down several inches. There was no damage to the door handles or any other obvious signs of forced entry. The steering column panel was detached and wires were exposed. The car would not start. Rivera had not previously had any issues starting the vehicle. Rivera testified that he did not leave latex gloves or a screwdriver in the car.

Sunnyvale police detective Karin Jenks testified that she interviewed the minor on the morning of September 8, 2015. The prosecutor asked Jenks whether she "had experience with minors being dishonest" with her. When Jenks responded that she did, the prosecutor asked her to describe that experience. Defense counsel objected on relevance grounds. The court allowed Jenks to answer, stating "I don't know. I'm going to hear the answer, and I'll give it whatever weight it deserves." Jenks responded that minors who are lying generally remain calm, fidget, don't show a lot of emotion, hesitate to answer, and look up, "as if trying to come up with the right answer."

Jenks testified that, as reflected in her report, she told the minor she thought he was being dishonest. She reached that conclusion because the minor hesitated to answer her questions, fidgeted, and said "I don't remember." Jenks further testified that the minor's behavior during the interview was consistent with that of other minors she had

interviewed who she thought were being dishonest. Jenks did not describe the substance of what the minor told her during the interview.

At the conclusion of the contested jurisdictional hearing, the court sustained the petition as to count 2, attempted unlawful driving or taking of a vehicle, on an aider and abettor theory of liability. The court reasoned that the minor's presence in the car gave "comfort and assistance to" and "encourage[d]" the juvenile in the front seat (J.C.), who was trying to hot wire the vehicle. The court also sustained the petition as to count 3 (possession of burglary tools), but not as to count 1 (residential burglary).

C. Disposition and Appeal

At a November 23, 2015 dispositional hearing, the juvenile court continued the minor as a ward of the court[2] and placed him on probation. The minor timely appealed.

II. DISCUSSION

A. Sufficiency of the Evidence

The minor contends there was insufficient evidence to support the court's finding that he aided and abetted an attempted violation of Vehicle Code section 10851, subdivision (a) for three reasons: (1) there is insufficient evidence that he shared J.C.'s intent to drive or take the vehicle, (2) there is insufficient evidence that he did anything to assist in the attempt to drive or take the vehicle, and (3) there is insufficient evidence to establish lack of consent to take the vehicle.

1. Standard of Review

" 'The standard of proof in juvenile proceedings involving criminal acts is the same as the standard in adult criminal trials. [Citation.]' [Citation.] 'In considering the sufficiency of the evidence in a juvenile proceeding, the appellate court "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—such that a reasonable trier of fact could find the

[2] The minor had previously been declared a ward on May 15, 2015 for unrelated conduct.

defendant guilty beyond a reasonable doubt. We must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence [citation] and we must make all reasonable inferences that support the finding of the juvenile court. [Citation.]" ' [Citation.] Substantial evidence is 'evidence which is reasonable, credible, and of solid value . . . .' [Citation.]" (*In re Gary F*. (2014) 226 Cal.App.4th 1076, 1080.)

2. Substantive Law

Vehicle Code section 10851, subdivision (a) provides, in relevant part: "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense . . . ."

"[A] person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) "[A] person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561.) "Thus, proof of aider and abettor liability requires proof in three distinct areas: (a) the direct perpetrator's actus reus—a crime committed by the direct perpetrator, (b) the aider and abettor's mens rea—knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends, and (c) the aider and abettor's actus reus—conduct by the aider and abettor that in fact assists the achievement of the crime." (*People v. Perez* (2005) 35 Cal.4th 1219, 1225.) "[N]either presence at the scene of a crime nor knowledge of, but failure to prevent it, is sufficient to establish aiding and abetting its commission. [Citations.]

However, '[a]mong the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense.' " (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.)

3. Analysis

Viewing the evidence in the light most favorable to the judgment, as we must, sufficient evidence supported the juvenile court's finding that the minor aided and abetted the attempted unlawful driving or taking of the car.

The evidence showed that the minor was found in the rear passenger seat of the Honda while J.C. tried to hot wire the car. There was evidence that the rear passenger window had been forced open. And the minor was found in possession of burglary tools, which Officer Abernathy testified could be used to break into a vehicle. The foregoing evidence gives rise to the reasonable inferences that the minor broke into the car through the rear passenger window and opened the driver's door for J.C., thereby giving him access to the steering column and ignition for purposes of hot wiring the vehicle. Accordingly, there is sufficient evidence that the minor acted to aid in the attempted commission of the crime by providing J.C. with access to the car's interior.

With respect to the requisite mens rea, there was sufficient circumstantial evidence from which the juvenile court could reasonably infer the minor had knowledge of and shared in J.C.'s intent. (*People v. Thomas* (2011) 52 Cal.4th 336, 355 ["Mental state and intent are rarely susceptible of direct proof and must therefore be proven circumstantially"].) As discussed above, the evidence supports the inference that the minor broke into the vehicle through the rear passenger-side window and opened the driver's door for J.C. That the minor gave J.C. direct access to the steering column and ignition and remained in the vehicle while J.C. attempted to hot wire the vehicle supports the further inference that the minor knew of and shared in J.C.'s intent to drive or take the vehicle.

Finally, there was sufficient evidence to establish the minors lacked the Honda's owner's consent to drive or take the vehicle. The minor contends Rivera's testimony that he did not give the minors consent to take the vehicle was insufficient to establish that element of the crime because he did not qualify as the Honda's owner. According to the minor, Vehicle Code section 460's definition of "owner" applies to Vehicle Code Section 10851, subdivision (a). Vehicle Code section 460 defines "owner" as "a person having all the incidents of ownership, including the legal title of a vehicle whether or not such person lends, rents, or creates a security interest in the vehicle; the person entitled to the possession of a vehicle as the purchaser under a security agreement . . . ." The minor argues that Rivera was not the Honda's "owner" because legal title was in his cousin's name and there was no security agreement.

We need not decide whether Rivera qualified as the Honda's owner because, wholly apart from his testimony, there was sufficient circumstantial evidence to create the reasonable inference that the minors were attempting to take the vehicle without the owner's consent. The minors gained access to the vehicle by tampering with the windows. They did so under cover of darkness at 4:30 a.m., while one of them—who had just stolen an iPhone from a residence—operated as a lookout. Once inside, the minor admittedly stole coins while J.C. tampered with the steering column and wiring in an apparent attempt to hot wire the vehicle. As a result of the minors' actions, the vehicle would not start and one window would not roll up. The juvenile court could reasonably have inferred from the foregoing circumstances that the minors lacked the owner's consent to drive the vehicle.

B. Admissibility of Detective Jenks' Testimony

The minor contends the admission of Detective Jenks' testimony opining that he was dishonest with her was an abuse of discretion because that testimony was irrelevant. He further contends the admission of the challenged testimony violated his federal due process rights by invading the province of the juvenile court as fact-finder.

1. The Due Process Challenge is Forfeited

The People maintain the minor forfeited his due process challenge by failing to assert it below. The minor argues his relevance objection was sufficient to preserve the due process argument. Alternatively, he contends objecting on due process grounds would have been futile.

New constitutional arguments are not forfeited on appeal where they "do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as it was wrong for the reasons actually presented to that court, had the additional *legal consequence* of violating the federal Constitution." (*People v. Avila* (2006) 38 Cal.4th 491, 527, fn. 22.) So long as "the trial objection fairly informs the court of the analysis it is asked to undertake," the objecting party need not "inform the court that it believes error in overruling the actual objection would violate due process." (*People v. Partida* (2005) 37 Cal.4th 428, 437 (*Partida*).) Here, the minor objected to Jenks' testimony as irrelevant. Now, he says it invaded the fact-finder's province to determine credibility. That "different theory for exclusion than he asserted [below] . . . is not cognizable" on appeal. (*Id*. at pp. 438-439, 435 ["A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct"].)

The minor contends that because the trial court overruled his objection to Jenks' testimony on relevance grounds, opting "to hear the answer[] and . . . give it whatever weight it deserves," an objection on due process grounds would have been futile. We disagree. The overruling of an objection on one ground does not demonstrate that an objection to the same evidence on a different ground would have been futile. (See, e.g., *People v. Valdez* (2012) 55 Cal.4th 82, 138-139 ["Nor is defendant correct in asserting that, because the trial court overruled the objections defense counsel did make, an objection under Evid. Code, § 352 would have been futile"]; *People v. Demetrulias* (2006) 39 Cal.4th 1, 31, fn. 8 [no showing that objection would have been futile where

previous objections were overruled "on different, if somewhat related, points"].) Nor does the court's reaction to the relevance objection—choosing to hear the evidence and give it the weight it deserves—indicate it would have been futile to object to Jenks' testimony on due process grounds. Accordingly, we conclude the due process argument was not preserved for appeal.

2. Counsel Was Not Ineffective for Failing to Object on Due Process Grounds

The minor argues, in the alternative, that counsel was ineffective in failing to object below on due process grounds. "Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish both that his counsel's performance was deficient and that he suffered prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) The deficient performance component of an ineffective assistance of counsel claim requires a showing that "counsel's representation fell below an objective standard of reasonableness" "under prevailing professional norms." (*Id.* at p. 688.) With respect to prejudice, a defendant must show "there is a reasonable probability"—meaning "a probability sufficient to undermine confidence in the outcome"—"that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.* at p. 694.) We "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Id.* at p. 697.)

Turning immediately to the prejudice prong, we consider whether there is a reasonable probability that the result of the proceeding would have been different had Jenks' testimony been excluded. As to the attempted violation of Vehicle Code

section 10851, subdivision (a), the minor's theory of prejudice is that, absent Jenks' testimony, the juvenile court would have credited his unprompted statement to Abernathy that he did not intend to steal the vehicle and, thus, would not have sustained the petition as to attempted unlawful driving or taking of a vehicle. There is no reasonable probability that the juvenile court would have credited the minor's self-serving statement if Jenks' testimony as to his veracity had been excluded. At the time the minor made the statement, he had a powerful motive to lie. And, as discussed above, significant circumstantial evidence supported the conclusion that the minor intended to aid J.C. in driving or taking the car. More significantly, Vehicle Code section 10851 can be violated "with or without intent to steal the vehicle." (Veh. Code, § 10851, subd. (a).) Accordingly, the minor's statement was not exonerating, as intent to joyride rather than steal is sufficient to violate Vehicle Code section 10851. (*People v. Garza* (2005) 35 Cal.4th 866, 876 (*Garza*).)

With respect to possession of burglary tools, the minor contends the admission of Jenks' testimony was prejudicial because her opinion as to his credibility cast doubt on his statement to Abernathy that he stole the screwdriver from the Honda. But the minor offered no explanation for his possession of latex gloves and binoculars. Given the minor's admission to stealing and unexplained possession of latex gloves and binoculars, even if Jenks' testimony had been excluded and the court credited the minor's statement that he stole the screwdriver, there is no reasonable probability that the court would not have sustained the petition as to the possession of burglary tools count.

For the foregoing reasons, we conclude the minor cannot establish ineffective assistance of counsel.

3. Assumed State Law Error in Admitting Testimony Was Harmless

We shall assume Jenks' testimony was irrelevant such that it was state law error to admit it. Nevertheless, reversal is not warranted because, for the reasons discussed above, it is not reasonably probable that a result more favorable to the minor would have

been reached in the absence of Jenks' testimony. (*People v. Watson* (1956) 46 Cal.2d 818, 837; *People v. Ocegueda* (2016) 247 Cal.App.4th 1393, 1407, fn. 4 ["the *Watson* standard . . . is substantially the same as the prejudice prong of *Strickland*"].)

C. Proposition 47

The minor contends that as a result of Proposition 47, approved by the electorate in November 2014, a violation of Vehicle Code section 10851 is no longer punishable as a felony where the automobile is worth $950 or less.[3] Because Rivera purchased the car for $600, the minor argues the juvenile court erred in deeming his attempted violation of Vehicle Code section 10851 to be a felony. For the following reasons, we disagree.

1. Background and Principles of Interpretation

"Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) Relevant here is Proposition 47's addition of section 490.2, which provides: "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor . . . ." (§ 490.2, subd. (a).) Section 1170.18 identifies "those sections [that] have been amended or added" by Proposition 47; it lists section 490.2 but not Vehicle Code section 10851. (§ 1170.18, subd. (a).)

"[O]ur interpretation of a ballot initiative is governed by the same rules that apply in construing a statute enacted by the Legislature. [Citations.] We therefore first look to

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[3] The issue of whether Proposition 47 applies to the offense of theft or unauthorized use of a vehicle (Veh. Code, § 10851) is currently before the California Supreme Court. (See, e.g., *People v. Page* (2015) 241 Cal.App.4th 714, review granted January 27, 2016, S230793.)

'the language of the statute, affording the words their ordinary and usual meaning and viewing them in their statutory context.' [Citations.]" (*People v. Park* (2013) 56 Cal.4th 782, 796.) "'"When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it." [Citation.]' [Citation.]" (*People v. Hendrix* (1997) 16 Cal.4th 508, 512.)

2. Analysis

Proposition 47 did not amend Vehicle Code section 10851, subdivision (a), which provides that a violation of the statute is punishable as either a felony or a misdemeanor. The minor argues that section 490.2 should be construed as reducing violations of Vehicle Code section 10851 to misdemeanors where the value of the vehicle taken does not exceed $950. He reasons that section 490.2, which redefines "obtaining any property" worth $950 or less "by theft" as petty theft punishable as a misdemeanor, applies to Vehicle Code section 10851 because a violation of that provision (1) is referred to as "auto theft" and (2) is a lesser-included offense of grand theft auto (§ 487). We are not persuaded.

The shorthand reference of "auto theft" sometimes used to refer to a violation of Vehicle Code section 10851 is not dispositive as to whether such a violation involves "obtaining any property by theft" for purposes of section 490.2. Theft requires an intent to deprive another of property permanently or temporarily but for an unreasonable time so as to deprive the person of a major portion of its value or enjoyment. (*People v. Avery* (2002) 27 Cal.4th 49, 52, 58.) By contrast, Vehicle Code section 10851 proscribes a wide range of conduct, including joyriding. (*Garza*, *supra*, 35 Cal.4th at p. 876.) Intent to temporarily deprive the owner for any period of time, even a brief or reasonable period of time, suffices for a Vehicle Code section 10851 violation. (See Veh. Code, § 10851, subd. (a) ["with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle"]; CALCRIM No. 1820 [defendant "intended to deprive the owner of possession

or ownership of the vehicle for any period of time"].) Because Vehicle Code section 10851 encompasses to both theft and nontheft conduct, we conclude it does not fall within the ambit of section 490.2.

The minor correctly notes that Vehicle Code section 10851 is a lesser-included offense of section 487, grand theft auto (*People v. Buss* (1980) 102 Cal.App.3d 781, 784), which is subject to section 490.2. He contends that because section 490.2 applies to the "more serious" greater offense, it would be unreasonable to conclude that section 490.2 does not also apply to the lesser included crime proscribed by Vehicle Code section 10851. Not so. As a general matter, a lesser included offense simply has fewer statutory elements than the greater offense; it is not necessarily less serious or subject to less severe punishment. (See *People v. Wilkinson* (2004) 33 Cal.4th 821, 839 (*Wilkinson*) [finding no equal protection violation where "The Legislature's actions tend to demonstrate it contemplated that the ostensible 'lesser' offense of battery without injury sometimes may constitute a more serious offense and merit greater punishment than the 'greater' offense of battery accompanied by injury"].) Here, the electorate rationally could have intended to exclude Vehicle Code section 10851 from Proposition 47 to preserve prosecutorial discretion to charge certain vehicle takings as felonies based on the circumstances of the case. (*Wilkinson*, *supra*, at pp. 838-839.)

We reject the minor's absurd results argument for the same reason. He claims it would be absurd for someone who stole a car worth $950 (or less) to face prison time because they were charged under Vehicle Code section 10851, while someone charged under section 487, subdivision (d) for stealing the same car would be sentenced as a misdemeanant. We find nothing absurd about the electorate's apparent decision to maintain prosecutorial discretion to charge vehicle takings as felonies in certain circumstances, regardless of the value of the vehicle.

D. Equal Protection

The minor contends that it would violate his right to equal protection to interpret section 490.2 to reduce vehicle theft violations under section 487, subdivision (d)(1) to misdemeanors while leaving violations of Vehicle Code section 10851 as felonies. That contention lacks merit.

" 'Broadly stated, equal protection of the laws means "that no person or class of persons shall be denied the same protection of the laws [that] is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property and in their pursuit of happiness." [Citation.]' [Citation.] . . . [A] threshold requirement of any meritorious equal protection claim 'is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner. [Citation.]' [Citation.]" (*People v. Guzman* (2005) 35 Cal.4th 577, 591-592.) Assuming that showing is made, " '[i]n considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment . . . we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. [Citations.] Classifications based on race or national origin . . . and classifications affecting fundamental rights . . . are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy. [Citations.]' [Citations.]" (*Wilkinson, supra,* 33 Cal.4th at p. 836.)

Even assuming the minor could satisfy the similarly-situated requirement, his equal protection claim would fail. We apply the rational basis test because a defendant " 'does not have a fundamental interest in a specific term of imprisonment or in the designation a particular crime receives.' " (*Wilkinson, supra,* 33 Cal.4th at pp. 837-838 [rejecting argument that the strict scrutiny standard applies "whenever one challenges upon equal protection grounds a penal statute or statutes that authorize different sentences

for comparable crimes . . .”].) In applying the rational basis test, the California Supreme Court has stated that “neither the existence of two identical criminal statutes prescribing different levels of punishment, nor the exercise of a prosecutor’s discretion in charging under one such statute and not the other, violates equal protection principles.” (*Id*. at p. 838.) “[N]umerous factors properly may enter into a prosecutor’s decision to charge under one statute and not another, such as a defendant’s background and the severity of the crime, and so long as there is no showing that a defendant ‘has been singled out deliberately for prosecution on the basis of some invidious criterion,’ that is, ‘ “one that is arbitrary and thus unjustified because it bears no rational relationship to legitimate law enforcement interests[,]” ’ the defendant cannot make out an equal protection violation. [Citation.]” (*Id*. at pp. 838-839.) The minor makes no such allegation. Accordingly, he cannot establish an equal protection violation.

III. DISPOSITION

The disposition order is affirmed.

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ELIA, ACTING P.J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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MIHARA, J.