The California Legal Update

Remember 9/11/2001; Support Our Troops

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Robert C. Phillips (858) 395-0302
Deputy District Attorney (Retired) RCPhill808@AOL.com

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This edition of the *California Legal Update* is dedicated to the memory, and in honor of:

Ventura County Sheriff's ***Deputy Eugene Kostiuchenko***; killed in *the line of duty* by a drunk driver on October 28, 2014; *and*
Pomona Police Department SWAT ***Officer Shaun Diamond***; murdered in *the line of duty* on October 28, 2014.

THIS EDITION'S WORDS OF WISDOM:

"*Always remember that you are absolutely unique; just like everyone else.*" (Margaret Mead)

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ADMINISTRATIVE NOTES:

***Proposition 47*:** As has been well-publicized, Proposition 47 was passed by the electorate and, as of November 5, is now law. In short, Prop. 47 converts certain

felonies into misdemeanors, with limited exceptions, and creates a new misdemeanor crime of "shoplifting." To list all the changes effected by this Proposition would eat up an entire *Update*, and then some. So instead, I'm taking the easy way out by merely referring you to the excellent Training Bulletin published by the San Diego Sheriff's Department which you can find at http://www.sdsheriff.net/legalupdates/docs/prop47.pdf. If this link doesn't work for you, let me know and I'll send it to you. This bulletin, which appears to be about as thorough and precise as you're going to find at least for law enforcement purposes, was authored by San Diego Sheriff's Deputies Michael Cruz and Michael Pepin. My suggestion is that if you're a patrol cop, you copy this and stick it into your back pocket for easy reference. However, when the difference between a felony and a misdemeanor depends solely upon the suspect's prior convictions, it might be best to let the District Attorney figure that out when we can get verification of the guy's full criminal history. In response to questions I've already received and that aren't covered in the Sheriff's Training Bulletin, you should also know that persons already convicted of one of the listed felonies may "*petition*" (if still in custody) or "*file an application*" (after the sentence is served) to the sentencing court for a reduction to a misdemeanor. (P.C. § 1170.18(a) & (f)) The former requires an evidentiary hearing and is anything but automatic, with the court given the discretion to deny the petition if "the petitioner would pose an unreasonable danger to public safety." (subd. (b)) The latter will most often be summarily granted. (subds. (g) & (h)) *However*, for purposes of "own(ing), possess(ing), or having in his or her custody or control any firearm," the individual in either case is still considered to be a convicted felon. (P.C. § 1170.18(k))

CASES:

***Dissuading Witnesses, per P.C. § 136.1*:**

People v. Wahidi **(Dec. 30, 2013) 222 Cal.App.4th 802**

Rule: The "malice" necessary to prove a charge of attempted dissuading of a victim or witness, per P.C. § 136.1, includes an intent to thwart or interfere in any manner with the orderly administration of justice.

Facts: Defendant got into a physical altercation with Farakan Khan and three other individuals, resulting in defendant punching one of Khan's friends in the face and breaking out the windows to Khan's car with a baseball bat. As result, defendant was charged in state court with four counts of assault with a deadly weapon, a count of felony vandalism, and misdemeanor battery. The day before the scheduled preliminary examination, defendant approached Khan at Khan's mosque and apologized to him about the incident. He also told Khan: "*We're both Muslims. That if we could just settle this outside the court in a more Muslim manner family to family, have our families meet and settle this out of court and not take this to court.*" Khan reported this conversation to the prosecutor the next day and asked if the criminal matter couldn't be handled in another way. He also indicated that while he'd seen defendant before at various mosques, he'd never seen him at his (Khan's) mosque. Khan said that he understood defendant's request

to be for him not to testify, but rather that they handle the matter out of court. Although it was never claimed that defendant had threatened Khan, nor did defendant specifically demand that Khan refrain from testifying, the prosecutor added a count of felony attempting to dissuade a witness by using force or threat of force, per P.C. § 136.1(a)(2) & (c)(1). Defendant waived his right to a jury trial and the case was heard by a judge. Defendant testified that while he did in fact talk to Khan at the mosque, it was not with the intent to persuade him from going to court or testifying. The trial judge found defendant guilty of one count of ADW, felony vandalism, and certain enhancements. As for the attempt to dissuade count, the Court found defendant guilty, but only of a misdemeanor attempt to dissuade; i.e., without the use of force or threat of force. Defendant appealed from his two-year prison sentence.

Held: The Second District Court of Appeal (Div. 7) affirmed. On appeal, defendant argued that the attempted dissuading charge, even though reduced to a misdemeanor, was not supported by the evidence. P.C. § 136.1(a)(2) provides, in pertinent part, that it is a crime for one to "[*k*]*nowingly and maliciously attempt to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law*." This is a "*specific intent*" crime; i.e., done with the intent to affect or influence a potential witness or victim's testimony or acts. The circumstances in which a defendant's statement is made, and not just the statement itself, must be considered. But even an ambiguous statement may come within the section's prohibition if it may reasonably be interpreted as intending to achieve the future consequence of dissuading the witness from testifying. Defendant, while acknowledging that he asked Khan to settle the matter informally, using Muslim custom, he denied an intent to persuade Khan not to go to court or to refuse to testify. The trial court didn't believe him. To be illegal, such an attempt to dissuade must be both "*knowing*" and "*malicious*." The Appellate Court concluded that given the timing of the conversation (i.e., the day before the prelim), the location (i.e., at Khan's mosque where defendant had never been seen before), and the fact that Khan himself interpreted defendant's statement to be a request that he not testify, all support the trial court's conclusion that the attempt was "*knowing*." While the issue of "*malice*" was a closer question, the Court found that there was also sufficient evidence of this element to support defendant's conviction. "*Malice*," for purposes of the dissuading statute, is defined in P.C. § 136 as requiring either (1) "an intent to vex, annoy, harm, or injure in any way another person," *or* (2) "*to thwart or interfere in any manner with the orderly administration of justice.*" Looking at the legislative history of the section, there was some debate by legislators about how broad an application the word "*malice*" should be given. Ultimately, it appears that the Legislature envisioned a relatively broad application of the term. Recognizing this, the Court found here that while there was no evidence of an intent to vex, etc., the intent "*to thwart or interfere . . . with the orderly administration of justice*" was supported by the evidence. Defendant was therefore properly convicted of the attempt to dissuade charge.

Note: In my front-line prosecution days, I always took great pains to insure that my victims and witnesses were not subject to intimidation, but (secretly) loved it when it happened, at least when I could tie the threats in some way to the defendant himself. Efforts to dissuade witnesses from testifying, whether or not separately charged, make for dynamite evidence of the defendant's guilt and really piss off jurors, not to mention the sentencing judge. So, as prosecutors and cops, we need to vigorously protect our victims and witnesses. That goes without saying. And we

should never hesitate to use this "consciousness of guilt" evidence against a defendant when at all possible.

***Miranda and Volunteered Statements*:**

Hernandez v. Holland (9th Cir Apr. 24th, 2014) 750 F.3rd 843

Rule: An in-custody defendant's volunteered statements made in response to law enforcement's comments that were not reasonably expected to elicit an incriminating response, and thus not an interrogation, do not require a *Miranda* admonishment and waiver.

Facts: On January 12, 2002, John McMillian picked up Marylin West when she got off from work, intending to take her out to dinner. He took her to her apartment in the Wilmington area of Los Angeles first, however, so she could change out of her work uniform. He waited in the car while West went inside to change. At about 9:30 p.m., West walked back outside towards the car. On the way she was intercepted by defendant who followed her, asking her name, who the man in the car was, and where they were going. Although defendant was wearing a hooded sweatshirt, the walkway was well lighted and she could see his face clearly. West recognized him as someone she'd seen in the apartment complex five to ten times before and had spoken to him briefly on occasion. As they neared McMillian's car, a second Hispanic male joined them. When they got to the car, defendant turned his attention to McMillian, asking him where he was from and if he "gang-banged." West was prevented from getting into the car by defendant standing in the way although he'd opened the door himself. Defendant and the other male "interrogated" McMillian for some five minutes as West pleaded with them to leave them alone. Meanwhile, a group of about fifteen Hispanic males gathered around the car. An older man from the group was heard to say something like, "*Don't do it*." But defendant wasn't to be dissuaded, producing a gun and shooting McMillian in cold blood. The victim died at the scene. West identified defendant from a photographic lineup, resulting in his arrest several months later. He denied being the murderer, claiming to have been 100 miles away at the time and that West had mistakenly identified him. Defendant was charged with first degree murder. During trial, after Marylin West's testimony, the court took a morning recess. The bailiff, Sheriff's Deputy Donald Moore, escorted defendant out of the courtroom and back to a lockup cell. On the way there, Deputy Moore asked defendant if he was going to testify. Defendant told Moore that he had an alibi but that his attorney didn't want him to use it. For the next 45 seconds to a minute, no one spoke. Upon reaching the landing at the top of the stairs, defendant renewed the conversation by asking Moore "what (he) thought about West's testimony." Deputy Moore responded that he "thought she was nervous and that (the defense) attorney tripped her up a little bit." To this, defendant "immediately blurted out that *'the bitch couldn't recall anything. She opened the door, we didn't'—excuse me—'she didn't open the door, we did*.'" Although not sure whether defendant had said that "*she*" or "*we*" opened the door (either version of which put defendant at the scene), Deputy Moore wrote down his recollection (i.e.; that "*she didn't open the door; we did*"). Deputy Moor later claimed that the only reason he asked defendant whether he was going to testify was to help gauge how long the trial was going to take. He also said that talking to prisoners helped him understand how they might react in court, for "security purposes." Defendant, although admitting having had a conversation with Moore about what West testified to concerning the car door, denied that he'd told Moore that it was he (defendant) who had opened it. Over defendant's objection (despite admitting that the conversation between

defendant and Deputy Moore was essentially a "consensual, non-interrogation style encounter"), Deputy Moore was allowed to testify to defendant's statements. Defendant was convicted of first degree murder and sentenced to prison. His conviction was upheld on appeal. He then filed a writ of habeas corpus, specifically challenging the admission of Deputy Moore's testimony as a violation of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436. The writ was denied by the California state courts, and then by the federal district court. Defendant appealed the district court's ruling to the Ninth Circuit Court of Appeal.

Held: The Ninth Circuit Court of Appeal affirmed. The issue contested by defendant was the admissibility of his admission to Deputy Moore about who opened the car door, putting him at the scene of the murder and corroborating Marylin West's ID of him as the shooter. The legal proof standards on appeal of the denial of a writ of habeas corpus is (1) whether the state appellate court's decision on direct appeal was an unreasonable application of federal law, as clearly established Supreme Court precedent, or (2) whether the state appellate court's decision rested on an underlying unreasonable determination of fact. The Court ruled here that neither test required reversal in this case. The legal basis for challenging the trial court's admission of Deputy Moore's testimony was defendant's argument that it violated *Miranda v. Arizona*; i.e., as an *un-Mirandized* interrogation of defendant. For *Miranda* to apply, it must be found that defendant was both in custody at the time and that he was "*interrogated*," as that term is defined by *Miranda's* progeny. It was undisputed that defendant was in custody. It was also stipulated that Moore did not *Mirandize* defendant. California's courts (trial and appellate) held, however, that the conversation between defendant and Deputy Moore was not an "interrogation." An "*interrogation*" is legally defined as "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." Volunteered statements of any kind are not typically the product of an interrogation and are therefore not barred by the Fifth Amendment. Here, Deputy Moore first asked defendant if he intended to testify. The Court found this to be "a neutral question which called only for an equally neutral answer." It was therefore not unreasonable for the California trial judge, as upheld by the California Court of Appeal, to find that such a question was *not* one a reasonable person would have expected to elicit an incriminating response. The second conversation, on a whole different topic (i.e., what Deputy Moore thought of Ms. West's testimony), was initiated by defendant himself. Also, there was nothing about Deputy Moore's response that one would reasonably have expected to elicit defendant's incriminatory response that it was he, and not West, who opened the car door on that fateful night. The Court also rejected defendant's arguments that his "youth" (19 years old), the timing of the conversation (i.e., during the "heat of trial,"), the physical setting (in a jail, where he was "isolated, handcuffed, and alone"), or the fact that defendant himself could have interpreted Moore's question as one likely to elicit an incriminating response, were relevant. The issue was the reasonableness of the California Court of Appeal's decision on this issue. Ultimately, "the California Court of Appeal was not 'unreasonable' in its determination that there was no 'interrogation' and that Hernandez's inculpatory diatribe as to West was volunteered." Deputy Moore's testimony, therefore, was properly admitted into evidence.

Note: This really didn't appear to be a close issue, the defendant having lost on this argument in four separate courts, state and federal. But aside from the rule of law described here (i.e., that volunteered statements do not require a *Miranda* admonishment nor waiver to be admissible),

this case is important for two more reasons: (1) Crooks are as a general rule stupid and will often hand a conviction to the prosecution mid-trial. (2) Jail deputies and other employees need to stay alert and listen for incriminatory comments by defendants in their custody, be ready to report it, and willing to testify about it. Incarcerated defendants tend to let their guard down. And despite the fact that jail deputies, particularly those who develop a rapport with their prisoners, are in a unique position to collect and report some very incriminatory information, conversations like the one in this case too often go unreported. Jail personnel tend to ignore such evidentiary windfalls for reasons that are sometimes unexplainable. Prosecutors need to be alert to this phenomenon and sometimes take it upon themselves to go looking for such evidence.

***The CASE Act: Human Trafficking and Solicitation of Prostitution*:**

In re Aarica S. **(Feb. 21, 2014) 223 Cal.App.4th 1480**

Rule: Having been the victim of "Human Trafficking" in the past does not provide the necessary "causal connection" to excuse commercial sexual activity not related to the sexual exploitation of another.

Facts: Defendant, a 17-year-old minor, solicited undercover Los Angeles Police Officer Roberto Morales on January 31, 2013, to commit a sex act for money. At around 5:40 p.m., Officer Morales observed defendant talking with a pedestrian on a street corner in an area known for prostitution activity. Another officer told Officer Morales that defendant had been seen trying to attract the attention of lone males in vehicles for about five minutes. Officer Morales drove his car up to defendant, making eye contact with her. Asking if she wanted a ride, she said that she didn't, but wanted to know if he needed "a date;" a term commonly used by prostitutes. Officer Morales said that he did. She asked him if he was a cop, and he said "no." At Morales' invitation, defendant got into his car. After asking Morales what he wanted, they eventually negotiated an act of oral copulation in exchange for $60. Morales arrested her for soliciting an act of prostitution, per P.C. § 647(b). A petition was filed in Juvenile Court alleging the 647(b) violation. In a contested hearing, defendant moved to dismiss the petition and to exclude the evidence relating to her engaging in a commercial sex act, arguing that as a victim of human trafficking, such evidence is inadmissible pursuant to the "Californians Against Exploitation Act" ("CASE Act") and Evidence Code § 1161(a). In support of her motion, defendant testified to being the victim of forced sex acts since the age of 3, when her father raped her. She testified to having been forced into prostitution by a series of approximately 10 exploitive and abusive pimps since she was 14 years old, and how she'd had two abortions during that time period. However, she also admitted that she hadn't been under the control of any pimps since November, 2012. On the date of this offense, she testified that she was living with her grandmother who provided her with room and board. She was on her way to enroll in school, intending to later meet her sister for lunch. When she saw Officer Morales circling the area, she "just decided that (she) could do whatever he wanted really quick" as a means of putting some "money in (her) pocket because (she) didn't have any money." The Juvenile Court judge denied defendant's motion and sustained the petition. The court ruled that at the time of this offense, she was acting as an "independent contractor," and not at the behest of a pimp, and that Evid. Code §1161 did not apply to her under these circumstances. She was declared to be ward of the court pursuant to W&I § 602. Defendant appealed.

Held: The Second District Court of Appeal (Div. 4) affirmed. The CASE Act, approved by voters in November, 2012, was directed at the problem of the sexual exploitation of minors, which the Act refers to as "*Human Trafficking*," a modern-day form of slavery. The Act declares that the crime of "human trafficking" applies to "[a]ny person who causes, induces, or persuades, or attempts to cause, induce, or persuade, a person who is a minor at the time of commission of the offense to engage in a commercial sex act, with the intent to effect or maintain a violation of [various listed sexual crimes]." (P.C. § 236.1(c)) A "commercial sex act" is defined as "sexual conduct on account of which anything of value is given or received by any person." (P.C. § 236.1(h)(2)) A part of the Act includes the enactment Evidence Code § 1161, which, in subd. (a), states that: "Evidence that a victim of human trafficking . . . has engaged in any commercial sexual act as a result of being a victim of human trafficking is inadmissible to prove the victim's criminal liability for the commercial sexual act." Defendant argued that as a victim of human trafficking, these provisions prohibited the use as evidence her contact with Officer Morales. The Court disagreed. To accept defendant's argument would be to provide victims of human trafficking with a blanket immunity for the commission of commercial sexual acts, regardless of whether there was any specific "*causal connection*" between their victim status and the particular commercial sex act at issue. The CASE Act was not intended to be applied so broadly. Evid. Code § 1161(a) clearly requires such a "causal connection." The causal relationship between the defendant's previous status as a victim of human trafficking and the particular commercial sex act at issue requires, by definition, that the defendant had been "cause(d), induce(d), or persuade(d) . . . to engage in a commercial sexual act." (P.C. § 236.1(c)) Here, defendant was not induced to solicit Officer Morales by any other person, but was rather motivated to do so to put money in her own pocket. So while she may have been the victim of human trafficking at one time, there was no "*causal connection*" between her status as such and her particular act here. "The evidence thus supports the conclusion that (defendant) did not solicit prostitution in this instance '*as a result of* being a victim of human trafficking.'" The juvenile petition was property sustained.

Note: To accept defendant's argument here would be to recognize that because she was induced at one point in her life (or over some 3 years) to be a prostitute, she was forever after condemned to such a lifestyle. Such a theory makes it far too easy for each of us to expect forgiveness for our misdeeds under the theory that we're incapable of seeing the error of our ways, and to change. It certainly shouldn't be allowed to be used as an excuse for committing new criminal acts. ("*It ain't my fault. Mama wasn't nice to me when I was a child*.") And while Human Trafficking is indeed a serious problem, giving its victims a lifetime pass isn't going to cure it. Good case for making that point.

***Criminal Threats, per P.C. § 422(a)*:**

People v. Lipsett **(Feb. 10, 2014) 223 Cal.App.4th 1060**

Rule: The threat made pursuant to P.C. § 422(a) does not necessarily have to be directed to the intended victim.

Facts: David Smith woke at 4:00 a.m. one morning at the sound of a large truck backing up his driveway. Defendant jumped out of the passenger seat of the truck and ran up to Smith's dirt bike that was parked under Smith's bedroom window, and started to drag it away. Smith ran outside and got into a tug-of-war over the bike, with Smith yelling at defendant several times to "drop the bike." Smith's German Shepard dog followed him outside. Seeing the dog, defendant yelled "at the top of his lungs:" "Shoot him; shoot him; shoot the dog!" Defendant yelled this six to ten times. This brought the driver out of the truck who raised his arm and pointed what "looked like a gun" at Smith's stomach. Seeing this, Smith ran back into his house, telling his wife to call 911. Smith also yelled that he was going to get his own gun. Defendant and the driver hurriedly threw the bike onto the back of the truck and left. A few days later, the bike was recovered from a third party who told police that he'd bought it from defendant for $500. This led to a photographic lineup in which Smith identified defendant. Defendant was charged in state court with carjacking (P.C. § 215(a)), auto theft (V.C. § 10851(a), and making a criminal threat. (P.C. § 422), with firearm allegations (P.C. § 12022(a)(1)) attached to all counts. Convicted on all counts (minus the firearm allegations), and with the trial court finding a prior serious felony conviction, defendant was sentenced to prison for a healthy 23 years. He appealed his conviction on the criminal threat charge only.

Held: The Fifth District Court of Appeal affirmed. On appeal, as he did in the trial court, defendant argued that there was insufficient evidence to support his conviction for making a criminal threat, per P.C. § 422(a). Section 422(a) provides in pertinent part: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, . . " is guilty of a felony. Defendant contends he was improperly convicted of making criminal threats because he did not "direct" the alleged threat to the victim, Smith. Defendant's comment was not "directed" to Smith, but rather to the driver of the truck, as evidenced by his use of the third-person pronoun, "*him*." (E.g., "*Kill him*," directed to a third person, as opposed to "*I'm going to kill you*," directed to the intended victim.) This, the Court held, is irrelevant. Section 422 contains no exceptions to liability for threats that are technically addressed to third parties (the driver, in this case). Instead, it requires merely that a defendant intend "the statement … to be taken as a threat" by the victim. A defendant may harbor such intent even though he was channeling the threat through someone other than the intended victim. The real issue is whether defendant intended his "statement . . . to be taken as a threat" by Smith, not whether the threat was addressed to him. Here, it was apparent that defendant made the threat intending to scare Smith into retreating with his dog so defendant could steal the bike and escape. That's sufficient to prove a violation of section 422(a).

Note: In a footnote (#2), the Court also rejects defendant's contention that section 422 requires a "conditional threat." (E.g., " . . . *or else*.") Not sure where defendant got that from. The section specifically requires that the threat be "unequivocal, *unconditional*, immediate, and specific." The Court also noted in the same footnote that the jury could well have found that defendant's threat alone put Smith in "*sustained fear*," as required by the section, even if when

the driver emerged with an apparent gun the "pucker factor" (my words, not the Court's) might have even become more sustained. Historically, the Courts have given P.C. § 422 a broad interpretation. This case continues that trend, although when you think about it, defendant's arguments were all pretty ridiculous. But it's good to have an appellate court decision, in writing, putting these potential issues out of their misery.

***Trespass, per P.C. § 602(m)*:**
***Vandalism, per P.C. § 594(a)*:**

In re Y.R. **(June 3, 2014) 226 Cal. App. 4th 1114**

Rule: Trespass, per P.C. § 602(m), requires a non-transitory continuous type of occupancy with some degree of dispossession and permanency. Being present at the scene of a vandalism without any evidence to show that a person aided and abetted in such vandalism, or that the vandalism was a natural and probable consequence of a conspiracy, is insufficient to prove one's guilt for the crime of vandalism.

Facts: On December 17, 2011, the clubhouse at a condominium complex in Vista (northern San Diego County) was locked up for the night by the president of the condominium homeowners association. The clubhouse consisted of a recreation room, a kitchen, and two bathrooms. The bathrooms, with one having an outside access door, were kept locked, being available to residents and their guests only. The following day, it was discovered that both bathroom doors had been kicked open, leaving the doorjambs splintered, and the place "trashed." DNA led to the arrest a year later of Y.R., a female juvenile. Being interviewed by Detective Robert Forbes of the San Diego County Sheriff's Department, she admitted that she and her boyfriend, Ricardo, had broken into the clubhouse that night. According to Y.R., she and Ricardo used the Clubhouse to meet in that their parents didn't like them hanging out together. They would meet in the clubhouse for several hours at a time, "and talk." (*Yeah, right*.) On the night in question, Y.R. told Ricardo that she was cold. So while she was talking to someone on her phone, she heard a crash and saw that Ricardo had broken open the outside bathroom door. She claimed that she didn't know that he was going to do that. Ricardo then broke open a door to the second bathroom, giving them access to the clubhouse. They hung out for several hours during which time they used the kitchen. She also turned on the shower in one of the bathrooms to generate a little heat from the steam. The San Diego County District Attorney's Office filed a petition in Juvenile Court alleging that Y.R. had committed a felony vandalism (P.C. § 594(a) & (b)(1)) and unauthorized entry to property (P.C. § 602.5(a)). At the adjudication hearing, Y.R. testified to a story consistent with what she'd told Detective Forbes although she claimed now that she didn't want to enter the clubhouse but did so at Ricardo's insistence. She reiterated that she did not see Ricardo break open the first door and was surprised when he did so. She also claimed that she didn't see him break open the second door. She denied telling Detective Forbes that they used the kitchen although she admitted that they planned to cook there sometime. Following the adjudication hearing, the Juvenile Court Judge found the vandalism allegation to be true, although he later reduced it to a misdemeanor. At defense counsel's request, the judge also amended the trespass violation to P.C. § 602(m), to "conform to the proof," and found that

allegation to be true as well. Y.R. was declared to be a ward of the court and put on probation. She appealed.

Held: The Fourth District Court of Appeal (Div. 1) reversed. On appeal, Y.R. argued that the evidence was insufficient to prove either a P.C. § 602(m) trespass, or that she herself had committed a vandalism. As for 602(m), that section provides that a person commits misdemeanor trespass by "[e]ntering and occupying real property or structures of any kind without the consent of the owner, the owner's agent, or the person in lawful possession." The issue here was what "*occupying*" means. The legislative history and the case law is clear that to occupy real property under this section, more than just a transitory occupancy is needed. The word "*occupy*" was intended by the Legislature "to mean a nontransient, continuous type of possession" with "some degree of dispossession and permanency." Camping out overnight has been held to be insufficient for purposes of this section. (See *People v. Wilkinson* (1967) 248 Cal.App.2nd Supp. 906.) Certainly then, "hanging out" for a couple of hours is insufficient. "Had the Legislature intended to prohibit mere transient possession of a property, it would have used a verb such as 'be, remain, loiter, tarry, camp [or] stay' in lieu of 'occupy.'" (*Wilkinson*, at p. 910.) In this case, Y.R. and Ricardo made only transient use of the clubhouse. Such a short stay does not constitute "*occupying*" for purposes of section 602(m). The fact that Y.R. and Ricardo may have asserted some sort of "dominion and control" over the bathrooms, or even "trashed the place" in the several hours they were there, does not make up for the lack of permanency that section 602(m) requires. Y.R. also challenged the sufficiency of the evidence to support the Juvenile Court's finding that she committed vandalism. Here, the prosecution proceeded on a conspiracy theory to support a true finding that Y.R. committed vandalism; the vandalism being a "natural and probable consequence" of the conspiracy. However, conspiracy requires proof of a specific intent to commit some "target offense." The target offense for the alleged conspiracy in this case was the alleged trespass. And as noted above, the evidence was insufficient to prove a trespass. So without any target offense, there can be no conspiracy. The evidence as presented showed that Ricardo committed the vandalism with no substantial evidence showing that Y.R. had aided and abetted in such an offense. While the Juvenile Court may not have believed Y.R. in her denials that she participated in, or even had any prior knowledge of, a vandalism, the Court here did not find the necessary "substantial evidence" to support the argument that Y.R. aided, promoted, instigated, or encouraged Ricardo to break open the doors. Therefore, the evidence was legally insufficient as a matter of law to show that Y.R. had committed the offense of vandalism. The Court, therefore, reversed the Juvenile Court's true finding as to both charges.

Note: There didn't appear to me to have been a lot of preparation time put into the prosecution of these offenses. The trespass as originally charged; i.e., a P.C. § 602.5, is a residential trespass section and clearly not applicable to non-residential structures, such as a condominium complex clubhouse. And letting the defense attorney get away with encouraging the trial court to change that charge to P.C. § 602(m), when the case law is so clear that the section doesn't apply to a transitory trespass, shows a lack of research on someone's part. Also, it was clear that there really was no evidence to show that Y.R. participated in, or even aided or abetted in, the commission of the vandalism of the clubhouse unless there was some expectation that the prosecution was going to have the benefit of Ricardo's testimony. Being present at the scene of a crime may certainly raise your suspicions, but isn't enough by itself to convict. Her denials

that she knew what was going on without any evidence to show to the contrary, other than her presence, is built in reasonable doubt. While I don't always trust an appellate court judge's rendition of the facts, this decision was written by Justice Richard Huffman, whose reputation for honesty, integrity, and intelligence, is beyond reproach. This case really should never have been filed.