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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re F.S., a Person Coming Under the  
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

F.S.,

Defendant and Appellant.

A133452

(Contra Costa County  
Super. Ct. No. J0900446)

F.S. appeals from juvenile court orders committing him to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ).<sup>1</sup> He seeks a new dispositional hearing on the grounds that the juvenile court erred in considering certain evidence and abused its discretion by ordering DJJ commitment. Alternatively, F.S. argues the matter should be remanded so that the juvenile court may exercise its discretion in setting the maximum term of confinement after counsel is afforded an opportunity to advocate for a lower maximum term. We conclude F.S.’s contentions require neither reversal nor remand to the juvenile court for further proceedings. Accordingly, we affirm.

<sup>1</sup> We deem the September 20, 2011, notice of appeal from the September 15, 2011, dispositional order to encompass the juvenile court’s formal order of commitment filed October 4, 2011. (Cal. Rules of Court, rule 8.406(d) [premature notice of appeal].)

## FACTUAL AND PROCEDURAL BACKGROUND

F.S. first became a ward of the juvenile court at age 15, based on a 2009 Welfare and Institutions Code section 602<sup>2</sup> petition, alleging he had committed second degree burglary (Pen. Code, § 460, subd. (b)) and theft (Pen. Code, § 484). The petition alleged, in pertinent part, that defendant and his companions (another minor and an adult) had “entered a . . . department store, selected several items, went into a fitting room, blocked the sensors with foil, placed the stolen items under their own clothing, and walked out of the store without attempting to pay for the items. [F.S.] and his companions were detained by a loss prevention agent who escorted them to the loss prevention office, and recovered the stolen items [that] totaled \$410. [¶] [F.S.] admitted to the police that he and his companions had planned the theft prior to entering the store, and entered with the intent to steal merchandise. [F.S.] admitted this was not his first time stealing merchandise from a store; he used to take clothes for himself at [a mall] but never got caught.” At the jurisdictional hearing, F.S. admitted to having committed the lesser offense of misdemeanor burglary and the charged counts were dismissed. At the dispositional hearing on April 21, 2009, the juvenile court adjudged F.S. a ward of the court. He was remanded to his father’s custody and placed on probation for an indefinite term and ordered not to have any contact with his co-participants.

Four months later, on August 7, 2009, a probation violation petition (§ 777) was filed, alleging that F.S. had left home without permission for four days, failed to obey his father, and acted beyond his father’s control by breaking the back door to the residence and punching holes in the walls. F.S. admitted to failing to obey his father and acting beyond his father’s control, and the other allegations were dismissed. On August 31, 2009, the juvenile court reinstated F.S.’s probation with modified terms and conditions, and again placed him in his father’s custody.

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<sup>2</sup> All further unspecified statutory references are to the Welfare and Institutions Code.

### **Proceedings Leading to DJJ Commitment**

On January 7, 2011, a section 602 petition was filed, alleging that on December 30, 2010, F.S. had committed the felony offenses of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c)), first-degree burglary (Pen. Code, § 460, subd. (a)), assault with a deadly weapon (wooden object) and by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)), and battery inflicting serious bodily injury (Pen. Code, § 243, subd. (d)). Three of the counts (robbery, assault, battery) included a “special allegation” that F.S. personally used a deadly or dangerous weapon (wooden object). (Pen. Code, § 12022, subd. (b).) It was further alleged the District Attorney intended “to move for an increase of the maximum term of confinement by aggregating the terms of all previously sustained petitions known to [the District Attorney] at the time of disposition.” At a jurisdictional hearing, F.S. admitted to the allegations in the first count of the petition (second degree robbery) and the remaining counts and special allegations were dismissed. F.S. acknowledged that he understood his maximum term of confinement could be five years and four months.

Before the dispositional hearing originally scheduled for May 25, 2011, the probation department officer filed a report recommending that F.S. be continued as a ward of the court and committed to DJJ, for a “maximum term 5 yrs, 120 days.” The probation department report set forth the “circumstances of petition” by summarizing information taken from the San Bruno police department report.

Additionally, the probation officer reported his interviews with both the victim and F.S. According to the victim: “He was at home when [F.S.] and [his] co-responsible ‘pretty much broke in . . . caught me alone . . . beat the shit out of me with a piece of wood.’ . . . [T]he attackers<sup>[1]</sup> faces were covered but during the struggle he caught sight of [F.S.’s] face and later hear [F.S.] speaking. He recognized [F.S.] as a former fellow high school student. [¶] . . . [H]e was alone at the time of the instant offense except for his grandparents who were upstairs and did not hear anything.” The victim said “a playstation 3 was taken along with two blu ray movies.” The victim “was injured but was ‘able to recover from that,’ ” and he did not seek any medical attention as a result of

the instant offense. According to F.S., his female cousin had called him several times from the victim's residence. After the third phone call, F.S. went to the victim's home because he believed the victim " 'was going to rape' " his cousin. F.S. and his "coresponsible" went around the back of the residence and went into the victim's room, which was unlocked. F.S. told his cousin to get out. F.S. then " 'started taking off on' the victim. . . . [A]fter the first swing, when he hit the victim with the "2X4" piece of wood he 'felt bad' because he 'only had one story.' By that he meant that he realized he did not know what had really happened. However, . . . this lead him to restrain the victim while the coresponsible hit him. [F.S.] claims that as they were 'chunk'n it' or struggling with the victim, he lost track of the coresponsible and speculates that was when the coresponsible stole the victim's property. [F.S.] became concerned that the police were on their way and decided to leave . . . . [F.S.] reiterated that 'the robbery' was 'the other guy.' "

In his analysis of the case problems and risks, the probation officer explained: "Soon to be eighteen year old [F.S.] appears in court for disposition on robbery by means of force and fear with the personal use of a deadly and dangerous weapon. The minor and co-responsible entered the victim's residence and struck him in the head with a wooden 2X4. Prior to doing this they concealed their faces with ski masks. Fortunately the victim did not suffer any lasting injuries from the attack. The minor admits to entering the victim's room and striking the victim and then restraining the victim while the co-responsible (whom the minor refuses to identify) struck the victim. The minor tries to claim that he was upset that the victim was mistreating his cousin. However, there is no indication that his cousin was not free to leave and clearly if she was able to make three calls to him, she would have been able to summon help from law enforcement. [¶] Given the facts of the case and the victim's statement, the instant offense could be viewed as a planned robbery. The minor and co-responsible arrived at the victim's residence at a time when they knew he was there and that the door was unlocked. They had black ski masks to conceal their identities and the victim's property was taken. From speaking with the victim, this deputy received the impression that the

minor may have had reason to believe that there would have been something of considerable value, perhaps something that neither the minor nor victim is disclosing. This points to a sophisticated, planned, violent criminal act. [¶] On the other hand, based on the minor's explanation of events, he was racing to protect his cousin and her female friend from being raped or injured by the victim. If this is indeed the case, then the minor showed extremely poor judgment. He failed to note that his cousin had ample opportunity to contact the police if she felt she was in danger. In fact, [F.S.] was clearly also in a position to alert the authorities. After arriving at the scene and seeing that his cousin and her friend were in fact safe, he proceeded to batter the victim with a wooden 2X4. Further he noted that he realized at the time that perhaps he did not have the full story. Instead of ending the attack, he instead restrained the victim while the co-responsible continued to beat him. [¶] While this deputy finds the scenario presented by the minor to be unlikely in the extreme, either scenario makes the minor out to be a very dangerous and violent individual." The probation department officer also thought "[i]t is noteworthy" that the victim "was a co-responsible in the offense for which [F.S.] was originally placed on probation. Thus, [F.S.] ha[d] been previously ordered to have no association with him."

As to F.S.'s placement, the probation department officer noted F.S. had been screened for commitment to the Orin Allen Youth Rehabilitation Facility, but the manager determined F.S.'s current offense indicated F.S. was "too violent for the open setting of the program." F.S. was also screened for "YOTP" [Youth Offender Treatment Program] suitability, but his age and the violent nature of the offense precluded him being accepted in that program. F.S. was screened for commitment to DJJ. F.S. "would be classified as a category four with discharge in two years and jurisdiction to age 25. On intake he would be given a battery of tests to determine treatment needs. Services would address drug use, anger management, victim awareness and include gang intervention. Until he turned eighteen he would be required to attend a fulltime academic program with the goal of him completing high school requirements and passing the exit exam."

In support of the recommendation for commitment to DJJ, the probation officer opined that the current robbery offense, viewed in conjunction with F.S.'s gang affiliation and ongoing failure to comply with the terms and conditions of probation, pointed to a need for a highly secure setting for both F.S.'s safety and the safety of the community. F.S. "has gang issues that need to be addressed in order to identify the underlying causes of this behavior as well as to provide practical guidance in breaking from and maintaining distance from gang members and gang activity. [F.S.] is nearly eighteen years old and still needs 160 of the 225 credits required to graduate. Thus, he needs an environment where he is able to focus on academic pursuits. Drug and alcohol use has been identified as a concern. This too needs to be addressed. [F.S.] himself has pointed to poor judgment and anger management. He needs practical training to improve his decision making skills and channel anger in acceptable ways."

On August 3, 2011, the parties appeared in court. At that time, F.S.'s counsel submitted a letter from Dayle C. Carlson, a correctional or sentencing consultant in private practice, who in essence indicated DJJ "is not a good choice and suggested [the] Bar-O" program. The court agreed to have F.S. screened for the Bar-O program. On August 10, 2011, the probation department officer reported that Bar-O's manager stated he would be " 'willing to consider [F.S.] for placement at Bar-O,' but he had a 'couple of concerns.' " "Bar-O can only house wards up to their nineteenth birthday, which would limit the minor's maximum stay to a little more than ten months. It was also noted that Bar-O is not a locked facility."

At the dispositional hearing held on September 15, 2011, F.S. called two witnesses. Carlson testified that if the court did not send F.S. to DJJ, the minor could be placed at Bar-O, which was a program run by the Del Norte County probation department. The program was "a camp/wilderness based program that is essentially behavior modification." Carlson believed the program would meet F.S.'s needs because it was isolated and would separate him from negative peer associations, and it provided drug education. F.S. would also be able to participate in a GED program. If F.S. was committed to Bar-O he could conceivably complete the program in six months; "[t]he

average is six to eight months.” According to Bar-O’s director, F.S. would be expected to finish the program by his nineteenth birthday, i.e., within nine months, which the director felt was sufficient time assuming F.S.’s “participation in the program . . . [and] his motivation and . . . positive participation.” If the court did not commit F.S. to Bar-O, then commitment to DJJ was certainly an option. Additionally, Carlson believed “legally” the court could direct F.S.’s participation in “YOTP,” but Carlson understood the program had already rejected F.S.

On cross-examination, Carlson admitted he had reviewed only the probation department’s report for the dispositional hearing in this case. He had not reviewed the police reports or spoken with any police agencies or detectives involved in the investigation of the crimes. During Carlson’s interview with F.S., the minor did not admit his gang involvement or reveal the identity of his coparticipant in the robbery offense. F.S. also minimized his involvement in the robbery, indicating, among other things, that the victim was not actually struck, but that the victim “blocked the board from descending on him.” Carlson was also not aware of the circumstances of the previous “shoplifting” incident, including that F.S. had admitted he had planned the theft.

Carlson agreed that an appropriate placement should be determined after considering the planning, sophistication and overall criminality of the person. Carlson noted Bar-O was “an open facility. It is not a locked facility.” The protocols for recovery of an minor who walked off the property consisted of “notifying the Sheriff’s Department immediately. There is a team that goes into the area.” The facility is near a town and in the National Forest. “It’s in a very isolated and rural environment.” Carlson conceded the current robbery offense was a violent offense and that F.S.’s propensity for violence had increased over his time in the justice system. Although F.S. had not run away from a placement, Carlson agreed F.S. was a “runaway risk,” based on his conduct while living with each of his parents. F.S.’s “runaway risk” was a factor in determining whether a locked facility was an appropriate placement. Of the locked facilities available to the court, the court could place F.S. in DJJ or “the YOTP program,” and only DJJ had agreed to accept F.S. Carlson commented that Bar-O had a gang intervention program

that was similar to the DJJ program. However, DJJ's "gang awareness" program had as a component "a debriefing process and removal from the gang system," that was not available in the Bar-O program.

Carlson also opined that the most recent report of the special master regarding the problems at DJJ indicated three areas of prime concern still existed: (1) an incomplete classification system to determine the residency and programming for individual wards; (2) incidents of violence, both ward-on-ward and ward-on staff; although DJJ's population had gone down dramatically, the per capita rate of violent incidents had not changed much; and (3) difficulties delivering a consistent education program. Carlson went on to note: "The positives are that apparently at this point in time there are now developed plans in place to address these issues. Those plans began at the last special master[']s assessment the quarter before that, so they are still in the process of putting together a response."

John Schooley, a probation counselor and F.S.'s assigned counselor, testified regarding F.S.'s conduct while he had been detained in juvenile hall on the current petition. According to Schooley, F.S.'s adjustment records had nothing but positive findings from all the staff on the unit. On cross-examination, the witness indicated F.S. was "classified as a 14 gang in our unit." The witness never talked to F.S. about his gang membership. The witness testified F.S. had never been caught breaking the rule that he was not to sit in association with more than one other Norteno gang member at any given time. When asked if he was "unaware if there [was] an adjustment record indicating [F.S.] was disciplined for that particular activity," the witness replied, "I highly doubt it."<sup>3</sup>

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<sup>3</sup> The probation department's report also discussed F.S.'s conduct while he was detained in juvenile hall: "The minor has had no major problems while detained in Contra Costa Juvenile Hall. Staff note the minor doing well. He is currently the middle level of three levels based on behavior. On May 5, 2011<sub>[,]</sub> the minor received a restriction for violating the unit rule that no more than two gang members may sit together. He was reportedly one of four '14's' sitting together. He had three other minor infractions. There are four notations by staff of a positive nature."

The juvenile court read and considered (1) the detention information sheets and the probation department reports concerning the earlier 2009 sustained petition for the misdemeanor burglary; (2) the police reports, detention information sheet, and probation department report concerning the current 2011 sustained petition for robbery; (3) a report prepared by Carlson, and (4) five letters from F.S.'s relatives and individuals who knew F.S. for a long time.

The juvenile court followed the probation department's recommendation and committed F.S. to DJJ for a maximum term of five years and 120 days, with credit for time served of 224 days. In so ruling, the juvenile court explained that "[n]o one's going to question the seriousness of this offense. [¶] There seems to be no dispute that the victim in this case was home, defenseless late in the night. That two people came in, . . . whether it be bandannas, masks or whatever, came in and their faces were obscured. The only reason he knew this minor is because this minor actually had been a friend of his and who recognized his eyes, his hair, his body, and he was struck multiple times by a 2 X 4. [¶] The reason why he did not immediately come forth is because he was embarrassed by this because he seemed to not be able to defend himself appropriately. [¶] In reviewing the police report the day that the minor, I believe, was apprehended, which was in March of this year, a statement that he mentioned to the police officer . . . when he was discussing the event post-*Miranda*, he indicated that after he hit the victim with the 2 X 4 the victim replied, 'Help me,' and that [F.S.] stated he responded by laughing at [the] victim . . . and saying, 'You are a little bitch nigga.' [¶] That shows no remorse. That shows a . . . complete and call[o]us disregard for someone who used to be his friend. [¶] Also in the report is a reference attributed to the minor from the victim, I believe, where the victim again tries to tell him, you know, 'What are you doing?' And . . . [F.S.], the minor, references that he's . . . 'a Blood now.' That's when [the victim] recognized the voice of [F.S.] And that the suspect was telling him that he was now a Norteno gang member and no longer his friend. [¶] So in looking at the full circumstances of the adjudicated offense this behavior was dangerous, as I've indicated it was call[o]us. [¶] The victim believes he lost consciousness for a couple of different times, albeit for short

instances, but there is no question that the underlying offense is extremely violent behavior or indicates extremely violent behavior.”

The juvenile court, “[h]aving reviewed truly the entire list of reports, be it disposition reports and the police report attached to this, any other reports that I’ve mentioned, I obviously have considered what I believe to be the least restrictive alternative possible . . . to rehabilitate [F.S.] appropriately has to be a locked facility, there is no question about this.” “This has been a minor who was adjudged a ward of the court [in] 2009, albeit for a misdemeanor. His behavior has escalated. The prior efforts to rehabilitate him have not been effective, . . . and that given his age that there are basically only a limited amount of alternatives that can be imposed. [¶] The one locked facility here at juvenile hall, the Youthful Offender Treatment Program (YOTP), does not believe he is acceptable to the program and they have declined to accept him into that program.” The court also considered the Bar-O program. However, the facility was not a locked facility and F.S. could only remain at that program until his 19th birthday, allowing for a commitment of only nine months at the facility. “Given the plethora of [F.S.’s] needs,” the court could not find that the Bar-O program was going to appropriately rehabilitate F.S.. The court could not find, nor could Carlson definitively testify, that F.S. “could actually and would complete this [Bar-O] program successfully.”

The court additionally noted: “[T]here have been issues of [F.S.] having been away from his father’s home, and I will draw and I’m sure everyone is aware of this, at the time of this offense he was not living in the home of his father, he was living in the home of some other relative and he actually had an active warrant out for him, so this is not an issue of his possible speculative ability to run away, he has run away. It’s not in any way speculative. It is actually what has occurred in the past. [¶] His performance on probation has not been good. . . . [I]t has escalated, and at this time I believe given the circumstances that accompany this case that the true appropriate disposition in this case is the [DJJ.]” ~2 RT 88)~ The court also found “[l]ocal resources are inappropriate in the rehabilitation of [the] minor,” and F.S.’s “mental and physical conditions” would benefit by “the reformed discipline or other treatment provided by [DJJ].” “As [the court] went

into great length, but to make sure this finding is in the record, [it had] considered the age of the minor, circumstances in the gravity of the offenses committed by the minor and the minor's previous delinquent history." The court concluded by stating, "This is obviously a disposition that I feel was necessary but I think it's very sad to have to make. [¶] I was not given many choices here given the minor's age, given the fact that I truly feel he needs to be housed in a locked facility and that I certainly did not believe that being limited to potentially up to nine months at Bar-O would be a sufficient amount of time to truly rehabilitate the level of problems that this minor has at this time."

## DISCUSSION

### I. Commitment to DJJ

F.S. argues his commitment to DJJ was inappropriate and warrants a new dispositional hearing. We disagree.

Under section 202, "juvenile proceedings are primarily 'rehabilitative' (*id.*, subd. (b)), and punishment in the form of 'retribution' is disallowed (*id.*, subd. (e))." (*In re Eddie M.* (2003) 31 Cal.4th 480, 507 (*Eddie M.*); see *In re Julian R.* (2009) 47 Cal.4th 487, 496 (*Julian R.*) [accord].) Nevertheless, "[w]ithin these bounds, the court has broad discretion to chose probation and/or various forms of custodial confinement in order to hold juveniles accountable for their behavior, and to protect the public. ([§ 202], subd. (e).)" (*Eddie M.*, *supra*, 31 Cal.4th at p. 507.)

As an appellate court, we review "a commitment decision for abuse of discretion, indulging all reasonable inferences to support the juvenile court's decision. [Citations.] Nonetheless, there must be evidence in the record demonstrating both a probable benefit to the minor by a [DJJ] commitment and the inappropriateness or ineffectiveness of less restrictive alternatives. [Citations.] A [DJJ] commitment may be considered, however, without previous resort to less restrictive placements. [Citations.]" (*In re Angela M.* (2003) 111 Cal.App.4th 1392, 1396; *In re Martin L.* (1986) 187 Cal.App.3d 534, 544 ["[c]ircumstances in a particular case may well suggest the desirability of a [DJJ] commitment despite the availability of . . . alternative dispositions".])

In this case the juvenile court properly focused on “the dual concerns of the best interests of the minor and public protection.” (*In re Jimmy P.* (1996) 50 Cal.App.4th 1679, 1684.) The record reflects the court’s careful consideration of the minor’s age, the seriousness of the minor’s conduct that led to the current section 602 petition, and the minor’s prior delinquent history. (§ 725.5.) The court finding that “the minor would need a closed setting, i.e., DJJ, in order to succeed with a long-term rehabilitation program,” is supported by evidence that the “ ‘minor has a history of running away’ and has displayed violent behavior.” (*In re Jonathan T.* (2008) 166 Cal.App.4th 474, 485.) Additionally, the noted problems at DJJ did not preclude the court from finding that the minor would benefit from being committed to DJJ. (*Id.* at p. 486 [court rejected minor’s argument that he would not benefit from being committed to DJJ due to its allegedly subpar programs].) F.S.’s expert witness conceded that if the court did not place F.S. at Bar-O, then commitment to DJJ was certainly an option. F.S.’s expert witness specifically noted that DJJ provided “a debriefing process and removal from the gang system” as a component of its gang program, which was not available at Bar-O. Also, “it is not merely the programs at DJJ which provide a benefit to [F.S.], but the secure setting as well” which the juvenile court found was necessary for F.S.’s “rehabilitative care.” (*Id.* at p. 486.)

We are not persuaded by F.S.’s arguments that the evidence does not support the juvenile court’s rejection of his request for placement at “even one out-of home placement less restrictive than” DJJ. The juvenile court stated its reasons for rejecting F.S.’s requests for placement at either Bar-O or YOTP. As an appellate court, we have “no power to judge the effect or value of the evidence, to weigh the evidence, to consider the credibility of witnesses or to resolve conflicts in the evidence or the reasonable inferences which may be drawn from that evidence.” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.) The juvenile court “ ‘fully satisfied’ ” itself, as required under

section 734,<sup>4</sup> that F.S.’s commitment to DJJ was appropriate, finding that DJJ, “offered the promise of probable rehabilitative benefit to” F.S. (*In re Tyrone O.* (1989) 209 Cal.App.3d 145, 151, 153.)<sup>5</sup>

## **II. Juvenile Court’s Consideration of Police Reports At Dispositional Hearing**

### **A. Relevant Facts**

At the conclusion of the testimony heard at the dispositional hearing, the prosecutor asked the court to take judicial notice of certain documents in the minor’s file, including three San Bruno police reports associated with the underlying current sustained robbery offense. Although F.S.’s counsel indicated he was not aware that these particular documents were going to be “noticed,” he did not immediately lodge an objection. After further discussion regarding the documents that were to be considered as part of the prosecutor’s request, the court indicated “[s]o the record is clear,” that it had read “the various police reports associated with the underlying sustained offense . . . .”

The court then heard counsel’s arguments regarding disposition. Before F.S.’s counsel began his argument, he stated his position with regard to the prosecutor’s request for judicial notice. Counsel objected to the admission of the mentioned documents under the theory of judicial notice on the grounds of “hearsay and lack of foundation and reliability.” As to the police reports, counsel specifically stated that “just because they are thrown into a juvenile file,” police reports did not “show the foundation and reliability of various pieces of information in those reports to be admitted under the

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<sup>4</sup> Section 734 reads: “No ward of the juvenile court shall be committed to the Youth Authority unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by the Youth Authority.”

<sup>5</sup> At the time of the dispositional hearing, F.S.’s counsel asked the court to place F.S. either at Bar-O or the YOTP at the county’s juvenile hall. We recognize that F.S.’s placement at Bar-O is no longer available due to his reaching the age of nineteen during the pendency of this appeal. Nevertheless, we have addressed the issue of the court’s rejection of an alternative placement on the assumption that were we to reverse, the court could place F.S. at the YOTP at the county’s juvenile hall or some other placement that currently exists for minors who have reached the age of nineteen.

theory of judicial notice.” In response, the court stated: “I did review those reports and I understand what your argument is. [¶] For the purposes of disposition hearsay is clearly allowable and we can call this judicial notice or we can call this my referring to these documents in reading them and considering them in the disposition. [¶] . . . I do believe at disposition I’m able to read police reports clearly that reflect the underlying conduct that has been alleged supporting the sustained allegation. [¶] There is nothing wrong with reading the police reports to help me further get a grasp of what all happened allegedly in this case. [¶] Obviously there has been a sustained count. I do not read police reports prior to a sustained count at all.”<sup>6</sup>

### **B. Analysis**

F.S. argues the juvenile court committed prejudicial error by taking judicial notice of the police reports. We disagree.

Initially, we do not read the juvenile court’s ruling as expressly granting judicial notice of the police reports, which would have been improper. (*People v. Jones* (1997) 15 Cal.4th 119, 171, fn. 17, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) Recognizing that the prosecutor’s “request for judicial notice” of certain documents was somewhat of a misnomer, the juvenile court correctly acknowledged that the issue was whether it could properly review and consider the information in the police reports on the matter of disposition. We conclude the court properly reviewed and considered the police reports.

Unlike the jurisdictional phase, where the Evidence Code applies (§ 701), “[n]o statute expressly subjects [the dispositional] phase to the Evidence Code.” (*Eddie M.*, *supra*, 31 Cal.4th at p. 487.) Section 706 reads, in pertinent part: “After finding that a minor is a person described in Section 601 or 602, the court must hear evidence on the question of the proper disposition to be made of the minor. The court shall receive in

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<sup>6</sup> After F.S.’s counsel concluded his closing arguments, the prosecutor stated the specific reason for requesting judicial notice of the police report was that it was very clear F.S. had given inconsistent statements to the police, the probation officer, and his expert about the underlying offense. However, there is no evidence in the record the juvenile court relied on the minor’s purported inconsistent statements in reaching its disposition.

evidence the social study of the minor made by the probation officer and any other relevant and material evidence that may be offered, including any written or oral statement offered by the victim, the parent or guardian of the victim if the victim is a minor, . . . as authorized by subdivision (b) of Section 656.2. . . . In any judgment and order of disposition, the court shall state that the social study made by the probation officer has been read and that the social study and any statement has been considered by the court.”

Probation department reports prepared for the dispositional phase of a juvenile delinquency case are similar to reports that are prepared for adult sentencing proceedings. In the latter proceedings, it is “contemplate[d] that police reports will be used as a source of information for summarizing the crime in the presentence report.” (*People v. Otto* (2001) 26 Cal.4th 200, 207 (*Otto*)). Also, “courts routinely rely [on] hearsay statements contained in probation reports to make factual findings concerning the details of the crime. These findings, in turn, guide the court’s sentencing decision—a decision which has a great impact on the defendant’s liberty interest.” (*Id.* at pp. 212-213; see *In re Vincent G.* (2008) 162 Cal.App.4th 238 [hearsay evidence admissible in dispositional phase of juvenile delinquency case]; see also *People v. Valdivia* (1960) 182 Cal.App.2d 145, 148 “[a] probation officer could not make an investigation and report . . . if restricted to the rules of evidence. Much of the prior record and history of a defendant, as well as the circumstances surrounding the crime, are hearsay and can be investigated and reported [on] only by the use of hearsay information”). By permitting the use of a probation department report at the juvenile dispositional hearing, we conclude “the Legislature necessarily endorsed the use of multiple-level-hearsay statements that do not otherwise fall within a hearsay exception.” (*Otto, supra*, 26 Cal.4th at p. 208.)

In this case we see no prejudicial error in the juvenile court’s review and consideration of the San Bruno police reports for the purposes of ascertaining the circumstances of the robbery offense. F.S. concedes the juvenile court was required to receive and consider the probation department report, which included a summary of the circumstances of the robbery taken from the San Bruno police report. Because the court

could appropriately review and consider the information taken from the San Bruno police report as summarized in the probation department report, we see no prejudice to F.S. by the court's review and consideration of the actual police reports merely because they were presented directly to the court rather than in the form of a summary in the probation officer's report to the court.<sup>7</sup>

### **III. Maximum Term of Confinement**

During its oral pronouncement of disposition, the juvenile court indicated F.S.'s maximum term of confinement would be five years and 120 days. In so finding, the juvenile court did not orally state its reasons for imposing that maximum term of commitment. However, the juvenile court signed a Judicial Council form JV-732, revised January 1, 2009, in which it specifically acknowledged it "ha[d] considered the individual facts and circumstances of the case in determining the maximum period of confinement." As explained by our Supreme Court, "[i]t would have been better practice if the juvenile court had stated on the record that it had considered, based on the 'facts and circumstances,' of [F.S.'s] offenses, a confinement period less than the prison term for an adult convicted of the same offenses (§ 731, subd. (c)), and that in the exercise of its discretion it had decided against such a shorter confinement." (*Julian R.*, *supra*, 47 Cal.4th at p. 499, fn. 4.) However, the court went on to hold that the juvenile court's

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<sup>7</sup> To the extent F.S. complains about the juvenile court's rendition of some of the circumstances of the robbery reported in the police reports, we note that F.S.'s counsel made no objection to the court's statements regarding the circumstances of the robbery. Additionally, a fair reading of the record does not indicate the court based its disposition on "an erroneously exaggerated criminal history" (*People v. Tang* (1997) 54 Cal.App.4th 669, 680), as F.S. suggests. Most notably, the court's statement that the victim was struck "multiple times by a 2X4" is supported by the probation department officer's interviews with the victim and F.S., during which the victim said that F.S. and his coparticipant " 'pretty much broke in . . . caught [him] alone . . . beat the shit out of [him] with a piece of wood,' " and F.S. admitted (Evid. Code, § 1280) that he " 'started taking off on' the victim. . . [and] after the first swing, when he hit the victim with the "2X4" piece of wood . . . [he] restrain[ed] the victim while the coresponsible hit him." Any purported inconsistencies in the court's rendition of other information reflected in the actual police reports were neither material nor relevant to the court's conclusion regarding the gravity of the robbery offense.

exercise of its discretion is “evident” by its making the required finding in the Judicial Council form JV-732, revised January 1, 2009, which acknowledges “its consideration of the crime’s facts and circumstances” in setting the maximum term of confinement. (*Julian R.*, *supra*, 47 Cal.4th at p. 499, fn. 4; see *id.*, at p. 500 [“[o]n remand the juvenile court is to complete Judicial Council form JV-732, as revised January 1, 2009, acknowledging that the court has considered the facts and circumstances of the offenses in determining the maximum period of [the juvenile’s] physical confinement”].) Given the fact that the juvenile court made the required finding in this case, we need not evaluate whether the record otherwise shows the court was aware of, and exercised its discretion, pursuant to section 731, subdivision (c). Contrary to F.S.’s contention, we see nothing in the court’s oral pronouncement of the maximum term of commitment at the dispositional hearing that calls into doubt its later finding in the commitment order that it had considered the crimes’ “facts and circumstances” before setting the maximum term of commitment.

We also see no merit to F.S.’s contention that a remand is required because his counsel was ineffective for failing to expressly advocate for a lower maximum term of commitment. To establish ineffective assistance of counsel, F.S. “must establish either: (1) As a result of counsel’s performance, the prosecution’s case was not subjected to meaningful adversarial testing, in which case there is a presumption that the result is unreliable and prejudice need not be affirmatively shown [citations]; or (2) counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel’s unprofessional errors and/or omissions, the [hearing] would have resulted in a more favorable outcome.” (*In re Visciotti* (1996) 14 Cal.4th 325, 351-352.)

The rule of *per se* reversal in cases where counsel fails to subject the prosecution’s case to adversarial testing is narrowly applied. “Defendants have been relieved of the obligation to show prejudice only where counsel was either totally absent or was prevented from assisting the defendant at a critical stage. Neither factor is present here. . . . Therefore, while [F.S.] argues that he is entitled to relief without a showing of

prejudice, we conclude that he must satisfy the standards established in *Strickland v. Washington* [(1984)] 466 U.S. 668.” (*In re Visciotti, supra*, 14 Cal.4th at p. 353.)<sup>8</sup>

Alternatively, F.S. argues that a more favorable outcome was reasonably probable had counsel performed effectively by requesting the court to consider a lower maximum term of commitment. However, “a court 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.” (*Strickland v. Washington, supra*, 466 U.S. at p. 697.)

Assuming, without deciding, that F.S.’s counsel had no sufficient reason for failing to request a lower maximum term of confinement, we cannot conclude this failure was prejudicial. In determining whether counsel’s failure was prejudicial, we evaluate the entire record, not the single error in isolation. “In practice, the maximum term of imprisonment rarely determines the actual period of confinement of a ward committed to DJJ. Rather, ‘[o]nce committed to [DJJ], the minor’s actual term is governed by [DJJ] guidelines, within the statutory maximum. ‘Minors most often do not serve their maximum terms, but the statutory maximum may affect both parole eligibility and the extent to which actual confinement may be prolonged for disciplinary reasons.’” [Citation.]” (*In re A.G.* (2011) 193 Cal.App.4th 791, 800.) The probation department report indicated that if the court committed F.S. to DJJ to the maximum term of commitment of five years and 120 days, F.S. “would be classified as a category four with

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<sup>8</sup> Relying on *People v Barocio* (1989) 216 Cal.App.3d 99 (*Barocio*), F.S. argues that to the extent that it was *legally possible* for the juvenile court to set a lower maximum term of confinement, had defense counsel requested one, counsel’s omission is *presumed prejudicial per se* because as an appellate court we should not speculate as to how the court would have exercised its discretion. However, this case is factually distinguishable from *Barocio*, in which the court made no ruling on a statutorily authorized recommendation against deportation. (*Id.*, at p. 110.) In this case the juvenile court exercised its discretion in making the required finding regarding the maximum term of commitment. Consequently, we will not presume counsel’s omission is prejudicial per se.

discharge in two years and jurisdiction to age 25.” Given the juvenile court’s statements at the dispositional hearing, it is not reasonably probable it would have chosen to exercise its discretion in a different manner had counsel asked the court to impose a lesser maximum term of commitment. On this record, we cannot say the court’s ruling was “rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel’s assistance.” (*Strickland v. Washington, supra*, 466 U.S. at p. 700.) Consequently, we deny F.S.’s request to remand the matter to the juvenile court to provide counsel an opportunity to advocate for a lesser maximum term of confinement.

**DISPOSITION**

The dispositional order and commitment order are affirmed.

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McGuiness, P.J.

We concur:

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Siggins, J.

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Jenkins, J.