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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re C.D., a Person Coming Under the  
Juvenile Court Law.

THE PEOPLE,  
Plaintiff and Respondent,

v.

C.D.,  
Defendant and Appellant.

A134857

(Alameda County  
Superior Ct. No. SJO9012877)

C.D., a minor, appeals from the order of the court, following a disposition hearing, that he be committed to the custody of the Department of Juvenile Justice (DJJ). At the preceding contested jurisdictional hearing, the court had sustained a count of robbery and a count of attempted robbery. C.D. seeks reversal of the court’s order sustaining the count of attempted robbery, arguing that his identity as the perpetrator was unsupported by substantial admissible evidence and that insufficient evidence supported a finding that the elements of an attempted robbery were established.

C.D. also seeks reversal of the order committing him to the custody of the DJJ. He contends that there is no evidence that he would benefit from such a commitment or that less restrictive alternatives would be ineffective or inappropriate. He also contends that this order should be vacated due to prosecutorial misconduct. Additionally, C.D. maintains that he was prejudiced by ineffective assistance of counsel because his counsel failed to advocate for a lower maximum term of confinement.

We affirm the orders of the court.

## **BACKGROUND**

### ***I. Procedural Background***

C.D. first came before the juvenile court at age 13, when he was charged with intimidating and threatening a schoolmate (Pen. Code,<sup>1</sup> § 422.6) and misdemeanor battery on school grounds (§ 243.2) in a petition filed pursuant to Welfare and Institutions Code section 602 on June 24, 2009. C.D. was placed on informal probation. On February 11, 2010, the court terminated informal probation and dismissed the petition.

A second petition was filed on April 29, 2010, charging C.D. with eight felonies: four counts of robbery (§ 211); two counts of attempted robbery (§§ 664, 211); and two counts of threatening to use force to prevent the victim from reporting the crimes (§ 140). On August 13, 2010, the first robbery count was amended to allege the lesser charge of grand theft (§ 487), which C.D. admitted, and the other counts were dismissed, with the facts and restitution open. C.D. was released, but GPS monitoring was ordered. On August 31, C.D. was found in violation of the monitoring because he had not charged the monitoring device after several admonishments that he do so. On September 15, the court issued a bench warrant for C.D.'s arrest after he failed to appear at a disposition hearing. C.D. was arrested on September 20. The court ordered C.D. to be held at juvenile hall pending disposition.

A third petition was filed on October 5, 2010, alleging that C.D., now age 14, committed six counts of robbery (§ 211). On November 8, C.D. admitted the robbery alleged in the first count and the remaining counts were dismissed, with facts and restitution open.

A combined disposition hearing on the second and third petitions was held on December 2, 2010. The court adjudged C.D. a ward and ordered him placed in the custody of the Probation Department. On December 15, C.D. was placed in the Thunder

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<sup>1</sup> Unless otherwise indicated, all statutory citations are to the Penal Code.

Road group home, from which he absconded the next day. A petition for modification of placement was filed on December 21, and a warrant was issued for C.D.'s arrest.

A supplemental wardship petition, pursuant to Welfare and Institutions Code section 777, subdivision (a), was filed on December 30, 2010, alleging that C.D. had violated his terms and conditions of probation by absconding from Thunder Road, attempting a robbery (§§ 664, 211), and giving false information to a police officer at the time of his arrest (§ 148.9). On January 12, 2011, the petition was amended to remove the allegations of attempted robbery and giving false information to an officer. At a hearing that day, C.D. admitted to absconding from Thunder Road. In February, the probation department placed C.D. in Rite of Passage (ROP) in San Andreas County.

C.D. completed the program at ROP and was discharged on October 31, 2009, into the care of his grandmother. C.D.'s initial adjustment at ROP was satisfactory, but he began to exhibit a negative attitude and incurred several disciplinary referrals. Following intervention, his attitude and behavior significantly improved and he advanced to the program's honor level.

A fifth petition was filed on December 9, 2011, charging C.D., now age 15, with robbery (§ 211), attempted robbery (§§ 664, 211), and possession of stolen property (§ 496). At a contested jurisdictional hearing held on January 4, 2012, the court sustained the robbery and attempted robbery charges. No finding was made on the charge of possessing stolen property. The court found that the maximum term of confinement on all admitted and sustained counts was seven years and four months.

The probation department disposition report recommended that another attempt at an out-of-home placement be made rather than commitment to the DJJ, a disposition that C.D.'s counsel urged the court to accept. Following a disposition hearing on February 22, 2012, the court continued C.D. as a ward, found the counts in the petitions were qualifying offenses (Welf. & Inst. Code, § 707, subd. (b)), and ordered C.D. committed to the DJJ. The court imposed seven years and four months as the maximum term of confinement.

C.D. filed a timely notice of appeal on March 5, 2012.

## **II. *Factual Background***

The facts regarding the allegations in the first four petitions are taken from probation and police reports. The facts supporting the fifth petition are taken from the evidence presented at the contested jurisdictional hearing.

### **A. *C.D.'s Personal History***

C.D.'s mother died of cancer when he was five years old. C.D. and his older brother, who has been in and out of jail, grew up in the custody of their maternal grandmother.

### **B. *First Petition***

On February 24, 2009, two boys at Martin Luther King Jr. High School in Berkeley reported that C.D. and three or four friends had bullied them for several months. On the day of the incident, after C.D. and his friends engaged in name calling, one of the victims threw C.D.'s clothes from a locker onto the floor. C.D. pushed one victim into a wall and the other boys surrounded the second victim and punched him in the back of the head. C.D. and the others followed the victims from the building and C.D. grabbed one of the victims from the back in a chokehold and pushed him to the ground. The victims again started to walk away and C.D.'s friends pushed both to the ground. A teacher intervened.

### **C. *Second Petition***

In one incident, C.D. approached two juveniles and demanded money. He made one student empty his pockets and took \$3.00. The other student objected and C.D. told him to back up, or he would be hurt.

In a second incident, C.D. approached five juveniles. C.D. feigned having a knife and made threats of harm. He made moves as if to strike one victim, causing him to flinch. C.D. also grabbed the backpack from one victim. He obtained money from three of the victims, a total of \$8.50, attempted to get money from the fourth, who had none, and made no attempt to rob the fifth.

#### **D. *Third Petition***

On four days in September 2010, C.D., robbed, or attempted to rob, six students, walking home from school in Berkeley. The police reports indicate that C.D. committed these robberies with associates, typically blocking the paths of the victims. The police reports do not indicate that any weapons were used (though one robbery victim described a perpetrator as making gestures as though he had a weapon), that specific threats were made, or that items beyond small amounts of cash, cell phones, and car keys were taken.

#### **E. *Fourth Petition***

After absconding from Thunder Road in Oakland, C.D. intimidated a victim, and “gestured towards him,” demanding money. When apprehended, C.D. gave a false name to the arresting officer.

#### **F. *Fifth Petition***

##### **1. *The Fagan Incident***

About 9:00 p.m. on December, 5, 2011, Benjamin Fagan was walking down Ward Street toward his apartment in Berkeley at the corner of Dohr and Ward. Fagan noticed a young African-American man, wearing a hooded sweatshirt and jeans, following close behind him. Porter could not conclusively identify the color of the sweatshirt because he is colorblind in the red-green spectrum. He could definitely state that it was not black, blue, white, or yellow, but it might have been green or gray. Near the door to Fagan’s apartment, the young man cut in front of him and asked Fagan where he lived. The young man then put his hand into the front pocket of the sweatshirt and said, “I have a gun. Give me your money.” Fagan did not at first believe the young man and said, “Really?” The young man confirmed that he had a gun. Fagan put up his hands and said, “You can take whatever you want.” The young man again asked for his money.

Fagan handed the young man his wallet, which had only two dollars in it. The young man asked where the rest of his money was and Fagan replied that he was a student and had no more. The young man asked if he had a phone, and Fagan said he did. Fagan handed over the phone when asked for it. The young man also took Fagan’s iPod, with attached headphones.

While still facing Fagan, the young man told him, “Don’t call the police.” The young man repeated this admonition as he walked away.

The hood of the young man’s sweatshirt only came to his hairline and Fagan was able to see his assailant’s face. Fagan, who had previously identified C.D. in a photo lineup, identified C.D. in court as the young man. A few days after the incident, the police returned Fagan’s phone to him, but he never recovered his wallet or iPod.

## ***2. The Porter Incident***

About 9:00 p.m. on December 5, 2011, Gerald Porter was in front of his house on Ward Street in Berkeley. Porter identified Dohr Street as being a few blocks from his house. While kneeling down looking for something under the seat of his car, he heard a voice ask, “Where is the money?” Porter turned around and saw a young man, whom he guessed to be about 20 years old, wearing a “black or very dark hoodie.” The young man had his hand in his pocket and Porter thought he might have a gun because the pocket bulged out. Porter said that he didn’t have any money and started emptying his pockets on top of his car. The young man did not examine these items, but asked where Porter’s wallet was. Porter said it was in his house and the young man looked at the house. Porter became scared and put his hands up, saying “Please leave.” The young man started to walk away and asked, “Are you calling the police?” He repeated this question again as he continued to walk away. Porter testified that the question was asked at least three times. The young man did not touch any of Porter’s possessions and nothing was taken.

In court, Porter said that the young man looked “a lot like the kid,” referring to C.D., but he could not say for sure that C.D. was the young man. Porter had earlier examined a photo lineup in which he ruled out four of the photographs as being the young man. Porter did not rule out a photograph of C.D. and another individual.

## ***3. The Investigation***

Berkeley Police Sergeant David Lindenau testified that when he read reports of the Fagan and Porter incidents, he thought that C.D. might be the perpetrator based on the descriptions. Lindenau created a photo lineup and showed it separately to Porter and

Fagan. Following a positive identification by Fagan, Lindenau served a search warrant at C.D.'s home. Lindenau searched the room identified as C.D.'s by his grandmother and found a cell phone of the type Fagan reported stolen. Lindenau testified that C.D.'s home was one block away from both the location of the Porter incident and the location of the Fagan incident.

#### **4. Defense**

C.D.'s grandmother testified that C.D. was locked in the house as punishment and in his room at the time of the Fagan and Porter incidents. She occasionally checked on him in his room and he could not have come downstairs without passing by her in the kitchen, where she was studying the Bible.

### **DISCUSSION**

#### **I. Sufficiency of the Evidence**

C.D. asserts that there was insufficient admissible evidence to establish his identity as the perpetrator on the count of attempted robbery and also that insufficient evidence demonstrated an intent to rob. On appeal, “[w]e review the entire record in the light most favorable to the judgment below to determine whether it discloses sufficient evidence—that is, evidence that is reasonable, credible, and of solid value—supporting the decision, and not whether the evidence proves guilt beyond a reasonable doubt.” (*People v. Jennings* (2010) 50 Cal.4th 616, 638.)

#### **A. Identity**

During summation arguments, the prosecutor stated: “I would concede that the attempted robbery is based in somewhat part on both direct and circumstantial evidence. My argument with respect to the circumstantial evidence is that the minor lives within one block of both—well, approximately a block away from where the robbery happened with Fagan. Porter testified that Dohr Street is about a block away from his house, and I’m estimating here. So we’re within a few blocks one way or the other. Both happened within minutes of each other at approximately 9:00 p.m., and in both situations the person who committed the robbery and then the attempted robbery had the same M-O, by asking on repeated occasions, ‘Are you going to call the police? Don’t call the police. Are you

going to call the police?’ And, of course, then the direct evidence being that Porter identified one of two people in a photo line-up, one of which, of course, is the minor, and then here in court said that the minor resembles the person that committed this crime. So I think, as far as the attempted robbery, my argument is both direct and circumstantial.”

C.D. contends that no modus operandi was shown and that use of the Fagan incident to bootstrap the count related to the Porter incident was improper. We frame the issues raised by C.D. as follows: (1) Could the court properly consider modus operandi evidence to establish C.D.’s identity as the perpetrator in the Porter incident; and (2) if not, was there substantial evidence supporting the court’s determination to sustain the count of the attempted robbery of Porter? We need not address the first issue, because even without consideration of the similarities between the Fagan and Porter incidents, substantial evidence supported a finding that C.D. was the perpetrator in the Porter incident.

First, whatever result we might reach in considering use of the Fagan incident to establish identity in the Porter incident, use of the Fagan incident to establish C.D.’s opportunity to have been the perpetrator in the Porter incident would be proper. Evidence Code section 1101, subsection (a), provides: “Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person’s character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.” Evidence Code sections 1102, 1103, 1108 and 1109 deal with sex crimes and are not applicable in this case. However, Evidence Code section 1101, subdivision (b), provides: “Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.” That the Porter incident took place close to the Fagan

incident, both in time and location, tends to show that if C.D. robbed Porter, then he also had the opportunity to attempt to rob Fagan. Thus, the court could properly consider the timing and location of the Fagan incident when considering whether it was proved that C.D. attempted to rob Porter beyond a reasonable doubt.

In addition to evidence of opportunity, we have the testimony of Porter, who was unable to positively identify C.D. as the perpetrator, either in a photo lineup or in court. Porter was unable to rule out C.D. as the perpetrator, but he was also unable to rule out the photo of another youth. In court, he testified that the perpetrator looked “a lot like” C.D. The encounter between Porter and the perpetrator lasted a couple of minutes and there was a streetlight across the street. When asked what it was about C.D. that looked a lot like the perpetrator, Porter replied: “The shape of the face, the color of the skin, . . . the shape of the nose. [¶] . . . [¶] The height and the build.”

When we examine the issue of identity, of particular relevance is the principle enunciated by Division One of this District in sustaining a determination of juvenile robbery: “The strength or weakness of the [victim’s] identification, the incompatibility of and discrepancies in the testimony, if there were any, the uncertainty of recollection, and the qualification of identity and lack of positiveness in testimony are matters which go to the weight of the evidence and the credibility of the witnesses and are for the observation and consideration of the trier of fact, whose determination will stand unless the testimony is inherently incredible.” (*In re Corey* (1964) 230 Cal.App.2d 813, 825-826; accord, *People v. Mohamed* (2011) 201 Cal.App.4th 515, 522; see *People v. Rist* (1976) 16 Cal.3d 211, 216 [“lack of . . . positiveness in a witness’ identification goes [only] to the weight . . . of the testimony”], superseded by statute on another ground as stated in *People v. Collins* (1986) 42 Cal.3d 378, 393.) Division One also held that “it is not essential that a witness be free from doubt as to one’s identity.” (*People v. Lindsay* (1964) 227 Cal.App.2d 482, 494, limited on another point in *People v. Haston* (1968) 69 Cal.2d 233, 250, fn. 22.) The Second District was equally emphatic: “Positive identification free from doubt, often difficult under the best circumstances, is not required.” (*People v. Jackson* (1960) 183 Cal.App.2d 562, 568.)

Closer to home, this court has held that “[t]estimony that a defendant resembles the robber suffices [as sufficient evidence of identity], and the testimony of one witness is sufficient to support the verdict if such testimony is not inherently incredible.” (*People v. Holt* (1972) 28 Cal.App.3d 343, 354, overruled on other grounds in *Evans v. Superior Court* (1974) 11 Cal.3d 617, 625, fn. 6.)

As the cases cited above indicate, we cannot discount Porter’s testimony that C.D. looked “a lot like” the person who attempted to rob him. This testimony, by itself, constitutes substantial evidence of identity. In this case, that testimony was also supported by evidence of opportunity.

### **B. *The Elements of Attempted Robbery***

“An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.” (§ 21a.) “The act required must be more than mere preparation, it must show that the perpetrator is putting his or her plan into action. That act need not, however, be the last proximate or ultimate step toward commission of the crime.” (*People v. Bonner* (2000) 80 Cal.App.4th 759, 764.) C.D. contends that there was neither sufficient evidence of his specific intent to rob Porter, nor evidence that he took a direct step, beyond mere preparation, toward robbing Porter.

The first words C.D. said to Porter, kneeling down in a vulnerable position and looking into his car, were: “Where is the money?” As Porter pulled items from his pockets and put them on top of his car, C.D. asked where Porter’s wallet was. This is more than ample evidence that C.D. intended to take Porter’s money or wallet if produced by Porter.

“Whether acts done in contemplation of the commission of a crime are merely preparatory or whether they are instead sufficiently close to the consummation of the crime is a question of degree and depends on the facts and circumstances of a particular case.” (*People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 14.) “Although a definitive test has proved elusive, we have long recognized that ‘[w]henver the design of a person to commit crime is clearly shown, slight acts in furtherance of the design will

constitute an attempt.’ ” (*Id.* at p. 8.) The “slight-acts rule . . . has long been the rule for attempted crimes in California.” (*Id.* at p. 10.)

Here, C.D., directly confronting a person he intended to rob, twice asked the intended victim the location of what he wanted to obtain—money or a wallet. This was an act, and not just a slight act, in furtherance of C.D.’s design. When one intends to rob a specific item, requiring the assistance of the victim to determine its location is more than mere preparation.

We conclude that substantial evidence supported a finding that the elements of an attempted robbery were present in the Porter incident.

## **II. *Benefit to Minor and Less Restrictive Placements***

C.D. contends that the order committing him to the custody of the of the DJJ should be vacated because the record presents no evidence that he would benefit from the DJJ commitment or that less restrictive placements would be ineffective or inappropriate. We disagree.

### **A. *Legal Standard***

A trial court’s decision to commit a minor to the DJJ will be reversed only if the trial court abused its discretion. (*In re Jose T.* (2010) 191 Cal.App.4th 1142, 1147.) A reviewing court must indulge all reasonable inferences in favor of the decision and affirm the decision if supported by substantial evidence. (*In re Robert H.* (2002) 96 Cal.App.4th 1317, 1330.) For evidence to be substantial, it “must be reasonable in nature, credible, and of solid value.” (*Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1219.) In determining whether substantial evidence exists, a reviewing court examines “the record presented at the disposition hearing in light of the purposes of the Juvenile Court Law.” (*In re Michael D.* (1987) 188 Cal.App.3d 1392, 1395; see also Welf. & Inst. Code, § 202.)

Since 1984, the Welfare and Institutions Code has required that courts commit minors “in conformity with the interests of public safety and protection, [to] receive care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances.” (Welf. &

Inst. Code, § 202, subd. (b); *In re Michael D.*, *supra*, 188 Cal.App.3d at p. 1396.) “ [T]he Legislature intended to place greater emphasis on punishment for rehabilitative purposes and on a restrictive commitment as a means of protecting the public safety.’ [Citation.]” (*In re Carl N.* (2008) 160 Cal.App.4th 423, 433.) Nevertheless, “the Legislature has not abandoned the traditional purpose of rehabilitation for juvenile offenders . . . .” (*In re Julian R.* (2009) 47 Cal.4th 487, 496.) “[W]hile there has been a slight shift in emphasis, rehabilitation continues to be an important objective of the juvenile court law. To support a [DJJ] commitment, it is required that there be evidence in the record demonstrating probable benefit to the minor, and evidence supporting a determination that less restrictive alternatives are ineffective or inappropriate.” (*In re Teofilio A.* (1989) 210 Cal.App.3d 571, 576; accord, *In re Angela M.* (2003) 111 Cal.App.4th 1392, 1396; see also Welf. & Inst. Code, § 734 [requiring probability of benefit to the minor before commitment to the Youth Authority (now DJJ)].) In determining the appropriate disposition for the minor, the trial court is required to consider “(1) the age of the minor, (2) the circumstances and gravity of the offense committed by the minor, and (3) the minor’s previous delinquent history.” (Welf. & Inst. Code, § 725.5.)

### **B. *Benefit to the Minor***

C.D. contends that “the only ‘evidence’ in the record that the minor might benefit from [DJJ] commitment was the prosecutor’s testimony that he had ‘visited DJJ and witnessed the art program’ which was ‘very robust,’ and that the minor, who was artistically inclined, could participate in the art program at [DJJ].”

In committing C.D. to the custody of the DJJ, the court stated: “I find under [section] 734 of the Welfare and Institutions Code that your mental and physical condition and qualifications are such that you’d benefit from the reformatory education and disciplinary programs provided by the [DJJ].”

The court here expressly found that C.D. would benefit from the disciplinary programs provided by the DJJ. Substantial evidence supported this finding because C.D., while in the controlled and disciplined environment at ROP, performed well. C.D. had

not exhibited such progress in less disciplined environments, and reoffended very shortly after leaving the discipline of ROP. We conclude that the court did not abuse its discretion in finding that C.D. would benefit from commitment to the DJJ.

### ***C. Less Restrictive Placements***

In committing C.D. to the custody of the DJJ, the court stated: “Specifically, it’s been shown by your actions that placement at home and placement in a group home, local group home first, and then a distant group home, have not changed your behavior. [¶] So based upon that, you will be committed to the [DJJ] with county paying. That’s the only place I can see that the public would be protected and that you would get the education and help to be straightened out in your future and, hopefully, avoid what the District Attorney was talking about, which is a life in prison, because you’re very, very close to that.”

As the court noted, C.D. had already been afforded the opportunity to change his behavior at a local group home. Instead of taking advantage of that opportunity, C.D. absconded during his first day. C.D. was then placed in a distant group home, ROP, and, though he performed well while in the program, the program proved ineffective in changing C.D.’s behavior, as the Porter and Fagan incidents indicate. The failure of the two prior placements to change C.D.’s behavior provides substantial evidence that a less restrictive placement would be ineffective in this case. We conclude that the court did not abuse its discretion in determining that a less restrictive placement would be ineffective or inappropriate.

### ***III. Prosecutorial Misconduct***

During argument to the court at the disposition hearing, the prosecutor stated that C.D. had “threatened to kill people if they report [him] to the police. He has threatened victims not to tell if they testify.” The prosecutor continued: “We also have, as does the defense, . . . letters from people in the Longfellow School, letters that Dr. Susan Craig, who is on the Board of Supervisors of Berkeley, begging, begging someone to do something. Because it’s not only these 16 robberies; we have letters saying he is out of control robbing people at school. Out of control.” Defense counsel protested these

statements: “Your Honor, I need to object here. The—I know this is argument, but there is no evidence about what it is that he’s saying.” The prosecutor responded: “I have it right in my file. Do you want to see this? Do you want to see these letters?” Defense counsel renewed his objection and the prosecutor said “This is part of this record, Judge. This is nothing new. This is old information.” Defense counsel said “It’s not in evidence; that’s all I’m saying.” The prosecutor then offered to move on.

C.D. argues that statements by the prosecutor constituted prosecutorial misconduct, requiring reversal of his commitment to the DJJ because the prosecutor used deceptive or reprehensible methods to persuade and infected the hearing with such unfairness as to violate due process.

We first note that, based on the record before us, the prosecutor did misstate what was in the record. We count 11 charges of robbery contained in the various petitions and 4 counts of attempted robbery. One of the robbery charges was reduced to grand theft and one of the attempted robbery charges was dropped in an amended petition. Most of these charges were dismissed, but with the facts open, so that it was proper for the court to consider them on disposition. (See *In re Robert H.*, *supra*, 96 Cal.App.4th at pp. 1329-1330.) However, it does appear that in stating that C.D. had committed more than 16 robberies, the prosecutor was conflating robberies and attempted robberies, and exaggerating the count.

As for threats, the petitions contained two counts of threatening to use force to prevent the victim from reporting the crimes. These counts were dismissed, but with the facts open. We have reviewed the information in the record concerning these charges and find no indication that C.D. made a threat to kill a victim if the crime was reported, only that he would find the victim and the victim would “be sorry.” Again, the prosecutor misstated the evidence by saying that C.D. had threatened to kill.

The only “letter” we find in the record, and to which the People direct us on appeal, is a cover note to a fax from the Longfellow Arts and Technology Middle School, written by Lisa Gonzalez: “[C.D.] was recently suspended with a recommendation for expulsion. Our Director of Student Services is recommending one more opportunity. He

is a big concern on campus and despite our repeated attempts to work with him, he is not responding.” The fax consisted of: (1) a notification of C.D.’s truancy sent to his grandmother; (2) a statement by C.D. acknowledging that he was being sent home to change clothes because he smelled of marijuana; (3) a notice of C.D.’s suspension from school; (4) a notice to C.D.’s grandmother of a meeting to consider extension of suspension; (5) a behavioral contract with the school district signed by C.D. and his grandmother; and (6) a three-page log of school incidents and disciplinary actions regarding C.D. Again the prosecutor misstated the evidence. We find no letter from a member of the Berkeley Board of Supervisors and the “letter” from C.D.’s school recommended that, despite being a concern on campus, C.D. be given “one more opportunity.” It did not beg for intervention from the court.

“ ‘It is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.’ ” (*People v. Wharton* (1991) 53 Cal.3d 522, 567.) It is prosecutorial misconduct for a prosecutor to misstate the evidence. (*People v. Davis* (2005) 36 Cal.4th 510, 550.) Here, the prosecutor misstated the evidence during argument and this constituted, as C.D. argues, misconduct on his part.

However, in order for us to reverse the court’s order committing C.D. to the custody of the DJJ, C.D. must demonstrate that he was prejudiced by the misconduct. This was a court trial and there was no jury to be misled. Defense counsel objected to the prosecutor’s misstatements, putting the court on notice that if it were swayed by the misstated facts, it should consult the record. Because there is no affirmative indication in the record that the court was misled by the prosecutor’s misstatements, we must conclude that defense counsel’s objection cured the harm of the misconduct. (See *People v. Lashley* (1991) 1 Cal.App.4th 938, 952 [rejecting prejudice from claimed prosecutorial misconduct “in light of the fact that the arguments advanced by the parties were heard by an experienced trial judge and not a lay jury”].)

#### ***IV. Ineffective Assistance of Counsel***

C.D. argues that he was denied effective assistance of counsel because trial defense counsel failed to advocate for a lower maximum term of confinement.

“A claim of ineffective assistance requires the defendant to establish ‘(1) that counsel’s representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel’s unprofessional errors, a determination more favorable to defendant would have resulted.’ ” (*People v. Homick* (2012) 55 Cal.4th 816, 893, fn. 44.)

Welfare and Institutions Code section 731 “sets two ceilings on the period of physical confinement to be imposed. The statute permits the juvenile court in its discretion to impose either the equivalent of the ‘maximum period of imprisonment that could be imposed upon an adult convicted for the offense or offenses’ committed by the juvenile (§ 731, subd. (c)) or some lesser period based on the ‘facts and circumstances of the matter or matters that brought or continued’ the juvenile under the court’s jurisdiction (*ibid.*)” (*In re Julian R.*, *supra*, 47 Cal.4th at p. 498.) When a court imposes a maximum period of confinement equal to the maximum adult term, as the court did in C.D.’s case, then unless the record indicates otherwise, we must presume that: “(1) the court exercised its discretion in setting a maximum period of physical confinement that was measured against both the ceiling set by the maximum adult prison term and a possibly lower ceiling set by the relevant ‘facts and circumstances’ (§ 731, subd. (c)), and (2) the court determined that [the minor’s] appropriate confinement period was a period equal to the maximum adult term.” (*Id.* at p. 499, fn. omitted.)

C.D. relies on *People v. Barocio* (1989) 216 Cal.App.3d 99 for the proposition that “[t]o the extent that it was *legally possible* for the Juvenile Court to set a lower maximum term of confinement, had defense counsel requested one, trial counsel’s omission is *presumed prejudicial per se*; it is not for this court to speculate as to how sentencing discretion might have been exercised.” However, this case is factually distinguishable from *Barocio*, in which counsel failed to seek a court ruling on a statutorily authorized recommendation against deportation. (*Id.* at p. 110.) In this case, because there is no

indication otherwise in the record, we must presume that the court exercised its discretion in determining the appropriateness of the maximum term of confinement. We will not view counsel's omission as prejudicial per se.

Assuming, without deciding, that C.D.'s counsel had no sufficient reason for failing to request a lower maximum term of confinement, we cannot conclude that this failure was prejudicial. As we have noted, the record does not indicate that the court failed to exercise its discretion, or abused its discretion, in determining the appropriate maximum term of confinement based on the facts and circumstances before it. C.D. argues here that "there is much in the record to suggest that a well-honed argument should have swayed the Juvenile Court to set a lower term of confinement." However, all of the facts in the record that C.D. goes on to cite (such as his age, lack of history of carrying weapons, and willingness of his grandmother to make changes in his home life) were elements of defense counsel's argument advocating a disposition other than commitment to the DJJ. The facts and circumstances that C.D. believes would have swayed the court to impose a lower maximum term of confinement were already before the court and, we must presume, were factors the court considered in its exercise of discretion in setting the maximum term of confinement.

C.D. has demonstrated no prejudice from his trial counsel's failure to advocate for a lower maximum term of confinement and we must reject his ineffective assistance argument.

**DISPOSITION**

The orders of the trial court are affirmed.

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Lambden, J.

We concur:

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Kline, P.J.

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Richman, J.