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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

In re Y.W., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

Y.W.,

Defendant and Appellant.

A137281

(Alameda County
Super. Ct. No. SJ1101760201)

Following his admission to felony murder while armed with a firearm, the minor, who was 15 years old at the time of the offense, was committed to the Department of Juvenile Justice (DJJ)¹ with a maximum term of confinement of 25 years to life. He contends the dispositional order should be reversed because the prosecutor engaged in prejudicial misconduct, the court considered improper victim impact evidence and abused its discretion in committing him to DJJ for an excessive maximum term of confinement, which constitutes cruel and unusual punishment in violation of the California Constitution. He also contends his trial counsel rendered ineffective assistance. We find no merit in these contentions and shall affirm.

¹ As of July 1, 2005, the correctional agency formerly known as the Department of the Youth Authority (or California Youth Authority) became known as the Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF). The DJF is part of the DJJ. (Gov. Code, §§ 12838, subd. (a), 12838.5; Pen. Code, § 6001; Welf. & Inst. Code, § 1710, subd. (a).) Statutes that formerly referred to the Department of the Youth Authority now refer to the DJF. However, the parties to this appeal, the trial court, other cases, and certain of the California Rules of Court, refer to the DJF as the DJJ. (See, e.g., *In re D.J.* (2010) 185 Cal.App.4th 278, 280, fn. 1; Cal. Rules of Court, rule 5.805.) In this opinion, we likewise refer to the DJF as the DJJ.

Factual and Procedural History

On September 9, 2011, the Alameda County District Attorney filed a wardship petition (Welf. & Inst. Code,² § 602, subd. (a)) alleging that the minor, then age 15, committed murder (Pen. Code, § 187), personally discharged a firearm, causing great bodily injury (Pen. Code, §§ 12022.7, 12022.53, subds. (b)-(d)), and was armed with a firearm (Pen. Code, § 12022, subd. (a)(1)). A motion to determine the minor's fitness to be adjudicated in the juvenile justice system was filed the same day.

On September 13, 2012, the court conducted a special hearing, at which the minor submitted to questioning by the prosecutor. Counsel explained that under an agreement reached with the prosecutor, in exchange for the minor's truthful testimony, the prosecutor would consider withdrawing the fitness petition so that the minor would not be tried as an adult.

The minor testified that on May 20, 2011, he left school and with three other young men decided to steal gold chains to sell for cash. He knew that one of his cohorts was carrying a handgun. After walking around for a "couple hours" looking for potential victims, they came across a man wearing a gold chain, later identified as Antonio Torres, who was inside a gated yard with his back to the street, listening to music through earphones while gardening. They decided that Torres would be a good victim because he would not see or hear them approach. The minor described what happened next: "We sat on the corner for a minute, made sure nobody was going to walk past, and then we go up. And then [his friend] grabbed the chain and he starts running, and we all run behind him. And then . . . we get down the street, and I hear a gunshot going off. [¶] And I keep running because I don't know what happened. And then [another friend] . . . , he runs up. He calls my name. I turn around and I stop, and . . . I asked him . . . 'What happened?' [He replied,] 'Umma [*sic*] tell you later.' So then he . . . gave me the gun for me to throw. I throw it in the . . . first bushes I see and we keep running. And then we get down the street. I ask him what happened. He said that his hoodie got caught on the fence and the

² All further statutory references are to the Welfare and Institution Code unless otherwise noted.

man had the shears above his head like he was going to . . . stab him with them, so he said he turned around and shot him.” Later, the minor learned that his friend lied about the circumstances of the shooting because Torres was shot in the back. The minor denied receiving any proceeds from the sale of Torres’s gold chain. He also testified that in the four months between the commission of the crime and his arrest, he was not stopped by the police or arrested for any other criminal activity.

On October 1, 2012, pursuant to an agreement, the minor admitted to felony murder while armed with a firearm in exchange for the district attorney’s promise to withdraw the fitness motion and to dismiss the great bodily injury enhancement allegation.

The dispositional hearing was set for November 15, 2012. In advance of the hearing, the court received dispositional recommendations from the defense and the probation department, and a mental health evaluation.

The defense recommendation was prepared by former Alameda County Probation Officer Debra Mendoza. Her report details the minor’s “exposure to chronic and acute trauma,” including the death of his parents caused by drug overdose when he was eight years old, and his diagnosis of oppositional defiant disorder (ODD) and post-traumatic stress disorder (PTSD). The report also includes the opinion of his long-term therapist that his diagnosed disorders “stem from the general neglect in his childhood combined with bereavement.” The therapist opined, “The best rehabilitative approach [for the minor] would be to offer trauma informed care, where youth are expected to recover and there is a culture of trust, safety, security and control.” She recommended placement in a residential treatment program, which “can offer the hope and progress of rehabilitation, accountability and preparedness for the eventual return to the community.” She recommended against placement in an “environment staffed by correctional guards with little if any training in any trauma-informed care.” She reported that a juvenile facility in Iowa called Clarinda Academy, which she believed would be a suitable placement, had accepted defendant.

The probation department's dispositional report recommended that the minor be committed to the DJJ. The report acknowledges that the minor "had a very difficult upbringing and has residual mental health issues from the lack of nurture he received prior to being taken into the custody of his current guardians." The report states that despite these mitigating factors, "it has also been demonstrated that the minor is in need of intervention with services that will be able to address the preexisting underlying issues that likely contributed to the minor's delinquency." The report indicates that the minor's needs would be best served at the DJJ. "While in custody, the Department of Justice has several programs and options that can be beneficial in ensuring the minor reform and be able to reenter the community prepared to live a productive and crime free lifestyle. The minor seems most suitable for a program called Counter Point, which addresses antisocial attitudes and behavior, including the impulsivity that acts as a catalyst to many criminal impulses." The report notes that because murder is a "category I" offense, the minor will first be considered for parole after seven years in custody. His commitment time, however, could be reduced "by complying with the rules, participating in his treatment and exhibiting good behavior."

The mental health evaluation was prepared by Janice Thomas, Ph.D., of the Alameda County Mental Health Department. Based on interviews with the minor, his guardians, his probation officer, his prior counselors, and one of his current teachers, Dr. Thomas concluded that commitment to the DJJ was not contraindicated because the minor was "not cognitively impaired" and "there is no direct relationship between [the minor's] mental disorder and criminal activity." Dr. Thomas also noted that the minor did not have a psychological problem or condition that would contraindicate "placement at Clarinda Academy, which is reportedly the only placement which has accepted him."

At the dispositional hearing, the court heard from three of the victim's family members and two of the minor's supporters. The victim's sister Maria spoke first. She said that she was representing her older brothers because they were at work and could not attend the hearing. She expressed "the pain we deal [with] every day of our lives since my brother is gone, since they took his life away." Maria described how the murder had

adversely affected her parents and her children. She stated, “[T]he worst . . . is to see my mother every day. She don’t complain, she don’t wish nothing to nobody. But you can see her face, the sorrow. Like they just didn’t kill my brother, they killed my mother.”

A victim advocate read a letter from the victim’s youngest sister, who was unable to appear in court. In the letter, the sister describes how angry she is with defendant and his accomplices: “I can’t describe the ugly feelings I’m having since [the murder.] . . . I don’t wish that to nobody except this criminal and their families. . . . I want the most years in prison for everyone of these guys. I don’t even know how to call them, because for me and my family they are even worse than an animal with no heart and no feelings.” The victim advocate also spoke on behalf of the victim’s domestic partner, Jude Solerio. She explained that the victim’s death had an indirect impact on his diabetes, which ultimately led to his death and she wanted the court to know that Mr. Solerio attended every court session in this case until he was hospitalized.

The district attorney also read a statement from the Torres family describing their sadness and anger about the murder. The letter reads, “We see you in the courts and we feel so much hate towards you hoping that someday you realize you hurt an entire family and regret what you have done, but of course that won’t remedy anything.” The letter continues, “If you were a good person you would never have done what you did, which was to kill. For us, you are a killer. All we wanted is for justice and all we wanted is for you to pay for what you’ve done [to] all of us.”

The prosecutor also noted for the record that the family had given her two pictures of the victim that she had placed in frames, which she displayed at the hearing.

The minor’s “mentor and friend” spoke on his behalf. She said that her sessions with defendant had allowed her to “experience forgiveness” for her own father’s murder 30 years earlier by “two African-American men.” She said that she had “experienced a lot of racism personally,” and offered to help the minor when he is released. The minor’s uncle extended his “sincerest sympathy” to the Torres family for the minor’s “bad mistake.”

Defense counsel also expressed sympathy for the victim's family on behalf of the minor's family. "I think I speak for [the minor]'s family and friends when I say that . . . they feel for the [Torres] family and . . . they're saddened by the loss." Counsel also reminded the court that the "two precepts that form the cornerstone of the juvenile justice system" are rehabilitation and the least restrictive placement. He argued that given the minor's background, "the only way you rationalize a . . . commitment to DJJ is if you threw out any idea of rehabilitation, if you throw out any idea of the least restrictive setting, because that's all it is. DJJ commitment is just retribution, just a disposition based on a 187 admission and nothing more. You are not looking at the minor, you are not looking to see who this minor really is and what he needs and what he deserves."

The court adjudged the minor a ward and committed him to DJJ for a maximum term of commitment of 25 years to life, with credit for 435 days time served. The court explained, "I've been doing this for 25 years. I've had my share of families come into court who have suffered horribly. . . . It's always heartbreaking to see, because what [defense counsel] said is correct, this family is suffering, too, and they are losing their . . . nephew to a considerable amount of time, but that is nothing compared to the loss of a life, and I understand that. I understand what all of you are going through. [¶] [Defense counsel] has made very good points about how the minor does need rehabilitation and how we need to find a place for him so that when he does come out, whether it's in 2 years, 5 years, 7 years . . . that he doesn't do anything like that again. [¶] [Minor] you've got a brain up there . . . and you know what you need to do to be a citizen that people can respect and people can be proud of. There are a lot of people who care for you. Ms. [Mendoza] . . . wrote a very, very good report. I went through it carefully, a lot of detail. Lot of things brought to the court's attention that I didn't get from the other reports. That also makes a big difference. [¶] Then all of that comes down to what do we do, what's the best thing to do? I hope I can make the right decision But under the circumstances here, [minor], I think you had a tremendous, tremendous break by the fact that you are not going [to be] tried as an adult. And I know [two of your accomplices] are going . . . to prison for a while. Twelve years I think one of them, and I think 40 or 50 for the other

one. What you are doing here is you are going to not go to prison, you are not going to be charged as an adult, and it's a huge difference for you. Huge, huge difference from what could have happened. [¶] So with that in mind, I'll find under 726(a)(3) that your welfare requires that your custody be taken from your parents. Reasonable efforts were made to prevent or eliminate the need for removal, and remaining in the home is contrary to your welfare. [¶] I find under 734 that your mental and physical condition and qualifications are such as to render it probable that you will benefit from the reformatory educational discipline or other treatment provided by the [DJJ]. [¶] Specifically, and there are so many specifics in this case because there are so many reports, but the facts in the guidance clinic evaluations and the oppositional defiance disorder that [the district attorney] mentioned are very important in my decision. I believe that the only place that you can get treatment for that would be at the [DJJ]. [¶] You need to be in a place where you understand your victim's family's misery that you've caused. I know you weren't the shooter, but we've been through this now for months, and you know that your responsibility is pretty much the same as the shooter in these kind of cases. That family that you hurt can never have that person back or the other people that have died as a result, or they claim have died as a result of this. [¶] So that education is the only thing, the only place that I believe you can get that . . . is the [DJJ]. The program that the guidance clinic referred to Crossroads [*sic*] is the program that I think is appropriate for you. I think it's something that will help you. I agree with [the district attorney] that your maximum time may not be as long as 7 years. It's up to you how you are going to do there. Are you going to follow instructions? Are you going to do the best you can every single day to be a better citizen? If you are, you will get out of there. But that's something that's going to be on you. And if you are getting into fights at juvenile hall that might be kind of tough."

Defendant timely filed a notice of appeal.

Discussion

Minor describes the dispositional hearing as "a circus, dominated by victim impact statements." He contends that the juvenile court erred by allowing photographs of the

victim to be displayed in the courtroom and by allowing multiple victim impact statements to be read at the dispositional hearing. He also asserts that his commitment to the DJJ was improperly “based upon his admission of the murder charge, and the inflammatory victim impact presentation” and that the court’s justification for the commitment—that he “need[ed] to be in a place where you understand your victim’s family’s misery that you’ve caused”—is “thinly disguised retribution.”

1. *The court did not err in considering the victim impact evidence presented at the dispositional hearing.*

Under section 706, “After finding that a minor is a person described in Section 601 or 602, the court shall hear evidence on the question of the proper disposition to be made of the minor. The court shall receive in 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 . . . or if the victim has died or is incapacitated, the victim's next of kin, as authorized by subdivision (b) of Section 656.2.” Section 656.2 secures the right of a “victim” to “present a victim impact statement in all juvenile court hearings concerning petitions filed pursuant to Section 602 alleging the commission of any criminal offense.” (§ 656.2, subd. (a).) The statute defines “victim” to mean “the victim, the parent or guardian of the victim if the victim is a minor, or, if the victim has died, the victim’s next of kin.” (§ 656.2, subd. (e).) Subdivision (b) of section 656.2 gives a victim “the right to attend the disposition hearing conducted pursuant to Section 702 and to express their views concerning the offense and disposition of the case.”³

³ Section 656.2 reads in relevant part: “(a)(1) Notwithstanding any other law, a victim shall have the right to present a victim impact statement in all juvenile court hearings concerning petitions filed pursuant to Section 602 alleging the commission of any criminal offense. In any case in which a minor is alleged to have committed a criminal offense, the probation officer shall inform the victim of the rights of victims to submit a victim impact statement. If the victim exercises the right to submit a victim impact statement to the probation officer, the probation officer is encouraged to include the statement in his or her social study submitted to the court pursuant to Section 706 and, if applicable, in his or her report submitted to the court pursuant to Section 707. The

The minor argues these provisions “allow[] for a single victim impact statement to be delivered by the victim, or by the victim’s surrogate where the victim is unable to deliver the statement himself [Section 656.2] does not contemplate a multiplicity of statements, statements delivered by ‘advocates’ . . . or statements read by the prosecutor purportedly on behalf of the ‘entire family.’ Nor does the code section contemplate framing and displaying photographs of the victim.” The Attorney General argues that under section 706 the court has discretion to consider all evidence that is relevant and material to the minor’s disposition.

We agree that sections 706 and 656.2 require the court to permit at least one victim impact statement, but do not restrict the number of statements that may be presented if otherwise relevant. *People v. Mockel* (1990) 226 Cal.App.3d 581, 584-585, cited by the Attorney General, is persuasive. In that case, the court rejected a defendant’s argument that Penal Code section 1191.1, which governs victims’ rights at sentencing hearings for adult offenders, did not limit participation on behalf of a deceased victim to one person.⁴ The court explained, “Section 1191.1 codified the Victims’ Bill of Rights

probation officer also shall advise those persons as to the time and place of the disposition hearing to be conducted pursuant to Sections 702 and 706; any fitness hearing to be conducted pursuant to Section 707, and any other judicial proceeding concerning the case. [¶] . . . [¶] (b) Notwithstanding any other law, the persons from whom the probation officer is required to solicit a statement pursuant to subdivision (a) shall have the right to attend the disposition hearing conducted pursuant to Section 702 and to express their views concerning the offense and disposition of the case pursuant to Section 706, to attend any fitness hearing conducted pursuant to Section 707, and to be present during juvenile proceedings as provided in Section 676.5.”

⁴ Penal Code section 1191.1 provides in relevant part: “The victim of any crime, or the parents or guardians of the victim if the victim is a minor, or the next of kin of the victim if the victim has died, have the right to attend all sentencing proceedings under this chapter and shall be given adequate notice by the probation officer of all sentencing proceedings concerning the person who committed the crime. [¶] The victim, or up to two of the victim’s parents or guardians if the victim is a minor, or the next of kin of the victim if the victim has died, have the right to appear, personally or by counsel, at the sentencing proceeding and to reasonably express his, her, or their views concerning the crime, the person responsible, and the need for restitution. The court in imposing sentence shall consider the statements of victims, parents or guardians, and next of kin

and requires that the victim or a family representative be notified of all sentencing proceedings and be given an opportunity to appear and express views concerning the crime. The statute mandates that the court consider the victim's statement. [Citation.] The statute restricts the number of individuals a court must hear; it does not restrict the number of individuals a court may hear. [Citation.] The obvious rationale for limiting the scope of the right to be heard is to protect against overburdening the court. The court remains free, however, to exercise its discretion to hear and consider additional witnesses where appropriate.” (*Id.* at p. 586.) Section 656.2 was also enacted as part of “The Victims’ Bill of Rights” (Stats. 1989, ch. 569, § 3, eff. Sept. 20, 1989) and the statutory language is similar. We discern no justification for interpreting the two statutes differently.

Contrary to the minor’s argument, the different purposes served by juvenile dispositional hearings and adult sentencing hearings do not require a different conclusion. Section 202, subdivision (d) expressly recognizes the “importance of redressing injuries to victims . . . in all deliberations pursuant to this chapter.”⁵ As noted by the Legislature,

made pursuant to this section and shall state on the record its conclusion concerning whether the person would pose a threat to public safety if granted probation.”

⁵ “Prior to the amending of section 202, California courts have consistently held that ‘[j]uvenile commitment proceedings are designed for the purposes of rehabilitation and treatment, not punishment.’ [Citation.] . . . [¶] In 1984, the Legislature replaced the provisions of section 202 with new language which emphasized different priorities for the juvenile justice system. [Citation.] The new provisions recognized punishment as a rehabilitative tool. [Citation.] Section 202 also shifted its emphasis from a primarily less restrictive alternative approach oriented towards the benefit of the minor to the express ‘protection and safety of the public’ [citations], where care, treatment, and guidance shall conform to the interests of public safety and protection. [Citation.] [¶] Thus, it is clear that the Legislature intended to place greater emphasis on punishment for rehabilitative purposes and on a restrictive commitment as a means of protecting the public safety.” (*In re Michael D.* (1987) 188 Cal.App.3d 1392, 1396, fn. omitted.)

At present, section 202 reads in relevant part: “(a) The purpose of this chapter is to provide for the protection and safety of the public and each minor under the jurisdiction of the juvenile court and to preserve and strengthen the minor's family ties whenever possible, removing the minor from the custody of his or her parents only when necessary for his or her welfare or for the safety and protection of the public. . . . [¶] (b) . . . Minors

inclusion of victim impact statements at juvenile dispositional hearings serves this purpose: “While victims and their families feel the primary impact of juvenile crime, the juvenile justice system pays little heed to their concerns, focusing instead on the juvenile offender. Giving an appropriate voice to victims and their families would strengthen the juvenile justice system in at least three ways: (a) the status and needs of victims would be recognized in a formal way by the juvenile justice system, giving the victims a sense of inclusion and making the system more accountable; (b) juvenile offenders would be confronted with the impact that their crime has had, which is a necessary step for rehabilitation, rather than experiencing the juvenile justice system as a paperwork process; (c) judges would receive a more fully delineated context for the juvenile’s crime before making a decision about case disposition.” (Stats. 1995, ch. 234, § 1, p. 835.)

under the jurisdiction of the juvenile court as a consequence of delinquent conduct shall, in conformity with the interests of public safety and protection, 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. This guidance may include punishment that is consistent with the rehabilitative objectives of this chapter. If a minor has been removed from the custody of his or her parents, family preservation and family reunification are appropriate goals for the juvenile court to consider when determining the disposition of a minor under the jurisdiction of the juvenile court as a consequence of delinquent conduct when those goals are consistent with his or her best interests and the best interests of the public. When the minor is no longer a ward of the juvenile court, the guidance he or she received should enable him or her to be a law-abiding and productive member of his or her family and the community. [¶] . . . [¶] (d) Juvenile courts and other public agencies charged with enforcing, interpreting, and administering the juvenile court law shall consider the safety and protection of the public, the importance of redressing injuries to victims, and the best interests of the minor in all deliberations pursuant to this chapter. . . . [¶] (e) As used in this chapter, ‘punishment’ means the imposition of sanctions. It does not include retribution Permissible sanctions may include any of the following: [¶] . . . [¶] (5) Commitment of the minor to the [DJJ]. [¶] (f) In addition to the actions authorized by subdivision (e), the juvenile court may, as appropriate, direct the offender to complete a victim impact class, participate in victim offender conferencing subject to the victim’s consent, pay restitution to the victim or victims, and make a contribution to the victim restitution fund after all victim restitution orders and fines have been satisfied, in order to hold the offender accountable or restore the victim or community.”

Also contrary to the minor's assertions, the admission of victim impact evidence in juvenile cases is not "so inherently emotionally inflammatory as to produce unreliable results which violate federal due process," nor is such evidence "simply irrelevant in the context of California juvenile disposition." Such evidence may serve to hold the minor accountable for his actions and to increase his understanding of the consequences of his acts. There is a point to the minor's concern that "statements by family members and victim's rights advocates demanding vengeance" may distract the court from focusing on the selection of a proper rehabilitative placement. However, the ultimate dispositional decision is made by the court, not by jurors or other lay persons. There is no reason to presume that the reasonable exercise of judicial discretion will be overwhelmed by such emotional presentations. As noted in *People v. Mockel, supra*, 226 Cal.App.3d at page 587, "judges spend much of their professional lives separating the wheat from the chaff and have extensive experience in sentencing, along with the legal training necessary to determine an appropriate sentence. [Citation.] It is unlikely a judge would respond to the type of expression found in the letters here challenged." (See also *People v. Sewell* (1989) 210 Cal.App.3d 1447, 1450 ["The dangerous uses to which a lay jury may put a victim impact statement are not present when the statement is submitted to a dispassionate judge trained in the law and experienced in sentencing."].)

Moreover, the record in this case indicates that the court neither permitted the victim testimony to exceed reasonable limits nor caused it to disregard appropriate dispositional considerations. In light of the severity of the crime and the size of the victim's family, it was no abuse of discretion to hear from three speakers representing a family with at least 14 siblings. Their statements were balanced by two speakers on behalf of the minor. The speakers did not offer factual information that could be "exaggerate[d], fabricate[d] and distort[ed]" as suggested by the minor, but merely reported how the crime had affected their family. However little weight should be attached to these matters (or, indeed, to the victim's photographs) in determining an appropriate disposition for the offender, the Victims' Bill of Rights has accorded crime victims this cathartic opportunity. To whatever extent the acceptance of victim impact

statements may depart from the primary function of the delinquency proceedings, permitting such statements need not, and in this case did not, cause the juvenile court to lose sight of the factors properly considered in determining the disposition of the minor.

2. *The record does not reflect prosecutorial misconduct.*

“ “ “The applicable federal and state standards regarding prosecutorial misconduct are well established. “ ‘A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.” ’ ” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “ ‘ “the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.” ’ ’ ’ ’ ’ ” (*People v. Redd* (2010) 48 Cal.4th 691, 733-734.)

Minor contends the district attorney committed misconduct at the dispositional hearing by showing the photographs of the victim and by reading the victim impact statement for one of the victim’s family members. For the reasons indicated above, there is no basis to find prosecutorial misconduct in presenting these materials to the court.

The minor also argues that throughout the proceedings “the prosecutor appeared unconcerned with the welfare of the minor, and used any and all means at her disposal to obtain a murder conviction and the maximum period of incarceration.” He claims the district attorney committed prejudicial misconduct by filing an unwarranted fitness petition then using the petition as leverage in the plea bargaining process by requiring the minor “to waive his privilege against self-incrimination and testify at a hearing where the prosecutor was permitted to examine the minor but his own counsel was not.” He argues further that, at the hearing, the prosecutor “twist[ed] the minor’s arm to admit a murder charge in juvenile court” by telling him “what this means for you is that you will more than likely go to DJJ on a charge of murder, but will not be sent to adult court, and it’s my belief that if you go to adult court, you will be convicted of first degree murder on a robbery murder and you would do at least 25 to life”

Contrary to this argument, minor admitted his participation in the crime prior to the special hearing. At the time of his arrest in September 2011, the minor waived his rights, admitted his part in the robbery that led to the victim's murder, and identified the gunman. Based on the gravity and circumstances of the crime, a fitness petition was filed in connection with the wardship petitions that were filed for each of the juveniles involved. The behavioral study found the minor unfit to proceed under the juvenile court law and recommended he be remanded to adult court. However, in response to the effort made on minor's behalf to remain in juvenile court, and unlike its position with respect to the two other juvenile accomplices who were tried and convicted in adult court, the prosecution negotiated an agreement by which minor could remain in juvenile court in exchange for his truthful sworn testimony. The record reflects that minor gave a knowing and intelligent waiver of his rights prior to testifying. There is nothing fundamentally unfair about the procedure proposed by the prosecutor and adopted by the court.

Minor also contends the prosecutor made an "inflammatory allegation" and referred to "a fact not in evidence" by arguing at the dispositional hearing that the minor and his accomplices "went where they know there are Mexicans to rob." The prosecutor's argument was based on minor's testimony at the September hearing that he and his accomplices went to the Fruitvale BART station and walked around East 12th and 34th Streets, because they were looking to rob someone wearing a gold chain. At the hearing, when asked whether they were looking for "a Mexican to rob?" the minor replied "Not necessarily." He clarified that they were looking for "anybody with a chain. . . . I basically wasn't just looking for a Mexican." The minor also replied "no" to the prosecutor's follow-up question: "So if one of your other friends that . . . was with you said we only rob Mexicans and Chinese, that conversation didn't happen during those two hours?" The minor's denial of an intent to rob only a Mexican is not necessarily inconsistent with the prosecutor's argument that the minor knew that the group was likely to find "Mexicans to rob" in the neighborhood through which they wandered. However, even assuming the prosecutor's argument went beyond the evidence, the misstatement

was hardly prejudicial. The minor admittedly was looking to forcibly steal a gold chain from somebody, which is the only fact to which the court attached significance.

3. *The juvenile court did not abuse its discretion in committing the minor to the DJJ.*

A juvenile court's commitment decision may be reversed on appeal only upon a showing the juvenile court abused its discretion. (*In re Todd W.* (1979) 96 Cal.App.3d 408, 416.) In evaluating the record, we apply the substantial evidence test. (*In re Teofilio A.* (1989) 210 Cal.App.3d 571, 579.) The reviewing court indulges all reasonable inferences in support of the juvenile court's decision. (*In re Asean D.* (1993) 14 Cal.App.4th 467, 473.)

A DJJ commitment must conform to the general purpose of the juvenile court law. (§ 202; *In re Todd W.*, *supra*, 96 Cal.App.3d at p. 417.) As set forth above, section 202 now recognizes punishment as a rehabilitation tool and shifts the "emphasis from a primarily less restrictive alternative approach oriented towards the benefit of the minor to the express 'protection and safety of the public' [citations], where care, treatment, and guidance shall conform to the interests of public safety and protection." (*In re Michael D.*, *supra*, 188 Cal.App.3d at p. 1396.) This shift in approach "by no means loses sight of the 'rehabilitative objectives' of the Juvenile Court Law. [Citation.] Because commitment to [DJJ] cannot be based solely on retribution grounds [citation], there must continue to be evidence demonstrating (1) probable benefit to the minor and (2) that less restrictive alternatives are ineffective or inappropriate. However, these must be taken together with the Legislature's purposes in amending the Juvenile Court Law." (*Id.* at p. 1396.)

The minor maintains the juvenile court abused its discretion in committing him to the DJJ because there was no evidence of probable benefit to him from the commitment, the court failed to consider less restrictive alternatives, and the commitment order rests on improper factors, including that he was found to have committed a "felony murder" and that he avoided trial as an adult. We disagree.

Substantial evidence supports the court's finding that the DJJ commitment would be of probable benefit to the minor. The minor's need for a secure residential treatment

program is well documented in the record. The dispositional reports prepared in this case paint a picture of a teenager whose aggressive and disruptive behavior was increasing rapidly. According to Mendoza's report, "When [the minor] was twelve years old, he began to present problematic behaviors such as disruptive behavior, anger, fighting, and academic failure." Despite receiving "the highest level of outpatient services provided to Medi-Cal patients," defendant was "not progress[ing] adequately in his treatment goals." "At the end of 2009 and the beginning of 2010, [the minor] began an escalation in delinquent behaviors such as leaving and remaining away [from home] without permission or his whereabouts known, increased displays of aggression and use of marijuana." By March 2011, he was described as displaying "patterns of negativistic, hostile and defiant behavior toward most adults most of the time" and was diagnosed with an oppositional defiance disorder. The present offense was committed in May 2011. Since being arrested in September 2011 and being held in juvenile hall, he had received numerous write-ups for being disruptive and defiant. As of November 2012, it was reported that he was doing a "very poor program." He had been placed on "room time" frequently, was slow to follow directions, and swore at staff.

Based on consultation with the screening committee and staff at the DJJ, the probation officer determined that the minor would be benefitted by the program offered at the DJJ. His report indicated that the DJJ "will be able to address the minor's educational needs, provide mental health support, and equip the minor with the skills and services necessary to rehabilitate the minor." As noted by the court, the probation report identified the Counter Point program as beneficial for the minor. The court also observed that the minor's rehabilitation required that he be held accountable for his actions and that he would be able to obtain an understanding of the pain he has caused the victim's family at the DJJ. (See § 202, subd. (b) [care, treatment, and guidance provided to delinquent youth should "hold[] them accountable for their behavior" and "may include punishment that is consistent with the rehabilitative objectives" of the juvenile court law]; *In re Michael D.*, *supra*, 188 Cal.App.3d at p. 1396 [The rehabilitative value in a DJJ

commitment lies not only in the programs offered but in the punishment inherent in such a commitment.])

The record also demonstrates that the court considered and reasonably rejected alternative placements. In making a DJJ commitment, a juvenile court need not expressly discuss and reject each possible alternative placement. (*In re Ricky H.* (1981) 30 Cal.3d 176, 184.) In this case, the dispositional report submitted by the defense identified three residential programs to which the minor could potentially be accepted with screening and at least one, Clarinda Academy, to which the minor had been accepted. The report also indicated that the severity of the minor's offense disqualified him from some programs. At the hearing, defense counsel did not argue for placement in any specific program but requested "a preliminary placement screening as Ms. [Mendoza] has suggested . . . to see if there's some placement alternative to DJJ that can seriously be considered by this court." The court indicated that it had carefully reviewed Ms. Mendoza's report, including presumably the section recommending screening and assessment options for out-of-home placement. In committing the minor to DJJ, the court ultimately concluded that "the only place that [the minor] can get treatment for [his oppositional defiance disorder] would be at the division of juvenile justice" and that "the only place [the minor] can get [victim awareness education], in contrast to what [defense counsel] has said, is the division of juvenile justice."

Finally, we disagree with the minor that the additional factors referenced by the court demonstrate an abuse of discretion. The record does not support the minor's argument that the court improperly relied on the felony murder offense in committing him to the DJJ. The court was fully aware of and properly considered the extent of the minor's involvement in the crime and the gravity of the offense. The court's acknowledgment that the minor's "responsibility is pretty much the same as the shooter in these kind of cases" does not reflect an over-emphasis of the murder charge but the reality that the minor engaged in a robbery with an armed friend that resulted in the death of an innocent person and subjected him to the consequences of a felony murder. The minor may not have intended or even have foreseen such a result. (See *Miller v. Alabama*

(2012) __ U.S. __-__ [132 S.Ct. 2455, 2476-2477], Breyer, J. concurring [“the theory of transferring a defendant’s intent is premised on the idea that one engaged in a dangerous felony should understand the risk that the victim of the felony could be killed, even by a confederate. [Citation.] Yet the ability to consider the full consequences of a course of action and to adjust one’s conduct accordingly is precisely what we know juveniles lack capacity to do effectively.”].) Nonetheless, the seriousness of the crime and of the minor’s participation in it cannot be trivialized, and were properly considered by the juvenile court.

Similarly, the court properly considered the fact that the minor avoided more severe punishment by remaining within the juvenile court system. Although retribution is not a permissible motive, punishment for the purposes of rehabilitation is. (§ 202, subds. (b) and (e).) The court reasonably reminded the minor that he had already received considerable leniency in being permitted to remain in juvenile court but that he could not avoid all serious consequences flowing from his criminal conduct.

4. *The court did not err in setting the maximum term of confinement.*

A juvenile court must set the maximum term of confinement at the DJJ based on the facts and circumstances of the matter that brought a minor within the jurisdiction of that court. That maximum term of confinement may be less than, but may not be more than, the prison sentence that would be imposed on an adult offender. (§ 731, subd. (c); *In re Julian R.* (2009) 47 Cal.4th 487, 491-492, 495.) The maximum term of confinement set by the court is not a determinate term, but is a ceiling on the amount of time that a minor may be confined to the DJJ. (*In re Carlos E.* (2005) 127 Cal.App.4th 1529, 1542.) The DJJ “retains the power, subject to the applicable rules and regulations, to determine the actual length of confinement at or below the ceiling set by the juvenile court” (*Ibid.*)

Moreover, under section 1769, subdivision (c), a minor “shall be discharged upon the expiration of a two-year period of control, or when he or she attains 23 years of age, whichever occurs later, unless an order for further detention has been made by the

committing court pursuant to Article 6 (commencing with Section 1800).” (§ 1769, subd. (c).) An order for further detention may be made upon a finding that the minor is “physically dangerous to the public because of the person’s mental or physical deficiency, disorder, or abnormality that causes the person to have serious difficulty controlling his or her dangerous behavior.” (§ 1800, subd. (a).)

In this case, the court concluded that “[u]nder 731(c) the maximum term of confinement is 25 years to life, and I think that that’s appropriate in the case of the death.” Minor contends the court abused its discretion in setting the maximum term of confinement. He argues that “the juvenile court’s focus upon a death which the minor did not cause, and its failure to consider the actual nature of the minor’s participation in the crime, constituted an abuse of discretion.” He suggests that “ ‘Twenty-five years to life’ is not a meaningful maximum term of juvenile confinement; the [DJJ] is not authorized to hold a ward that long. Rather ‘twenty-five years to life’ is simply a parroting of the adult determinate sentence for murder.”

While the minor is correct that the DJJ cannot hold the minor for the maximum term of confinement, the designation of this maximum period is not without justification. Contrary to defense counsel’s arguments, the minor’s “involvement and moral culpability” in the crime were not “minimal” and he did not do “absolutely nothing to contribute to the death of Antonio Torres.” The circumstances of the crime and the minor’s participation, as described by the minor, warranted a serious and substantial response by the court. The selection of the 25-year-to-life term as the maximum term of confinement emphasizes the gravity of the offense and reminds the minor of the potential consequences of such conduct in the future.

5. *The minor’s commitment to the DJJ does not constitute cruel and unusual punishment under the California Constitution.*

California Constitution article I, section 17 prohibits the infliction of cruel or unusual punishment. “ ‘ “To determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the

manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities. [Citation.] If the court concludes that the penalty imposed is ‘grossly disproportionate to the defendant's individual culpability’ [citation], or, stated another way, that the punishment ‘ “ ‘shocks the conscience and offends fundamental notions of human dignity’ ” ’ [citation], the court must invalidate the sentence as unconstitutional.” ’ ” (*People v. Wallace* (2008) 44 Cal.4th 1032, 1099.)

Minor argues that in light of his “minimal” involvement in the commission of the crime, his relative youth, and his traumatic childhood, the punishment imposed in this case was grossly disproportionate to his moral culpability. We agree with the juvenile court, however, that while the minor’s offense may have been his first, the crime was very serious. Even considering the mitigating circumstances of the minor’s childhood, the record reflects that his behavior was becoming increasingly more aggressive and any potential rehabilitation would require a substantial intervention. His commitment to the DJJ is not disproportionate to his individual culpability.

Moreover, although his maximum term of confinement under section 731, subdivision (c) is 25 years to life, because under section 1769, subdivision (c) he cannot and will not in fact be confined for more than eight years, none of the recent cases holding lifetime sentences on minors to constitute cruel and unusual punishment have any application here. (See, e.g., *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455, 183 L.Ed.2d 407]; *People v. Caballero* (2012) 55 Cal.4th 262.)

6. *Minor received effective assistance of counsel.*

Minor contends that his trial counsel failed to provide effective assistance of counsel “in failing to object to the victim impact presentation, in failing to object to prosecutorial misconduct, and in failing to advocate for a lower maximum term of confinement.” Having rejected his claims of error regarding the victim impact evidence and prosecutorial misconduct, we must also reject minor’s ineffective assistance of counsel arguments based on those issues. With respect to minor’s argument that counsel

should have advocated for a lower maximum term of commitment, any conceivable failure in this regard clearly was not prejudicial. Defense counsel made an impassioned argument regarding minor's traumatic childhood and his particular involvement in this case, yet the trial court expressly stated that the 25-year-to-life term was appropriate under the circumstances. Minor does not suggest what additional facts or circumstances counsel should have brought out, but in all events it is highly improbable that anything not mentioned would have swayed the court to impose a lower maximum term of confinement. Additionally, for the reasons indicated above, a reduction in the maximum under section 731, subdivision (c) is not likely to have affected the length of minor's actual confinement.

Disposition

The dispositional order is affirmed.

Pollak, J.

We concur:

McGuinness, P. J.

Jenkins, J.