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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

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

THE PEOPLE,

Plaintiff and Respondent,

v.

D.H.,

Defendant and Appellant.

A140779

(Contra Costa County
Super. Ct. No. J13-01271)

D.H. appeals from a judgment entered in a proceeding under Welfare and Institutions Code section 602. He contends (1) the juvenile court erred by admitting a photograph of a photograph that was on someone else’s cell phone, and which was also posted on a social media site, depicting him holding what appeared to be two firearms; (2) the court erred by admitting a photograph of the same image downloaded from the cell phone using a Cellebrite machine; (3) the evidence at the jurisdictional hearing was insufficient to sustain the court’s finding that he possessed firearms in violation of Penal Code section 29610; and (4) the court’s indication of a maximum term of confinement should be stricken because no physical confinement was ordered. We will affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

A wardship petition (Welf. & Inst. Code, § 602, subd. (a)) charged D.H. with felony possession of a concealed firearm (Smith & Wesson) and felony possession of a second concealed firearm (Glock) on October 21, 2013. (Pen. Code, § 29610.) The matter proceeded to a contested jurisdictional hearing.

A. Evidence at the Jurisdictional Hearing

San Francisco Police Officer Eduard Ochoa testified that he regularly used an undercover Instagram account to investigate crime. He described Instagram as a means of posting photographs to an account “for all your friends and family . . . to view.”

1. Ochoa’s Observation of Instagram Photos

Throughout the day on October 21, 2013, Officer Ochoa observed several photographs, posted on Instagram, depicting D.H., M.M., and K.B. holding “at one point or another” what appeared to be firearms. Ochoa knew that M.M. was a wanted felon and K.B. was on probation, and both were prohibited from possessing a firearm.

One of these Instagram photographs—central to this appeal—showed D.H. and three other individuals Officer Ochoa knew from prior investigations and contacts. In this photograph, D.H. was holding what Ochoa believed to be two firearms.¹ The photograph bore the Instagram account name of “40 Glock,” which Ochoa believed to belong to K.B. The photograph also bore a time stamp indicating it had been posted on Instagram on October 21, 2013 (although Ochoa did not know when or where the photo had been taken or who took it).

Around 8:30 p.m. on October 21, 2013, Officer Ochoa saw another Instagram photograph, which showed three of the individuals he sought (including K.B. and M.M., but not D.H.) with a camouflage curtain in a background window. Knowing that the

¹ Ochoa testified that one of the individuals (D.H.) was holding two guns in this photograph. The image was later introduced at trial as Exhibit 13 (see *post*) and was described by the prosecutor as depicting an individual holding two guns. Defense counsel stated that D.H. was holding only one gun in the photograph. Exhibit 13 is not in the record on appeal.

individuals in the photograph frequented the vicinity of the Westpoint Middlepoint apartment complex, Ochoa and Officer Dave Johnson went to the Hare Street area to look for the residence with the camouflage curtain.

2. Arrest of D.H., K.B., and M.M. at the Hare Street Residence

Officers Ochoa and Johnson arrived at Hare Street around 9:30 p.m. and located a residence with a green camouflage curtain hanging in a second-floor window. Other officers arrived, and together they “set up a perimeter” around the residence.

Officer Johnson and Officer Alcares went to the rear of the building, where Johnson observed D.H. “poke his head” out of the second-story window with the camouflage curtain. Alcares shined a light on the window area and announced himself as a police officer. D.H.’s head “disappeared behind the camouflage curtain.” Five or six seconds later, a firearm was thrown out of the same second-floor window, hit a chain-link fence, and fell to the ground. Another firearm fell to the ground immediately afterward. Johnson saw a hand reach out of the window but could not tell who had thrown the firearms.

Meanwhile, Officer Ochoa, Sergeant Griffin, and two other officers had approached the front of the residence. Griffin knocked on the front door, and one of the officers identified himself as the police. Ochoa testified that, “immediately” after this, Officer Johnson informed him by radio that he had just seen someone look out of the rear window of the residence. The officers pounded on the front door a little harder; “seconds” later, Johnson reported there were “guns coming out the back window.”

A female opened the front door to the residence. Officer Ochoa entered and saw D.H. on a stairway between the first and second floors of the residence. Ochoa went to the second floor and located M.M. and K.B. in a bedroom on the west side of the building. (Officer Johnson had observed D.H.’s head, and subsequently the guns, emerge from the window of a bedroom on the *east* side, which had the camouflage curtain.) No one else was found on the second floor.

Officer Ochoa seized the camouflage curtain, along with two cell phones from M.M., one from K.B., and one that was in the bedroom with the camouflage curtain. Officers also recovered the firearms that had been thrown from the second-story window, which were determined to be a loaded Smith & Wesson handgun and a loaded Glock 23 handgun.

D.H., M.M., and K.B. were arrested. Photographs of D.H., M.M. and K.B., admitted as People's Exhibits 23 through 25, showed them in the clothing they wore when arrested. D.H., M.M. and K.B. were wearing the same clothes at the time of their arrest that they were wearing in the Instagram photos that depicted them carrying the apparent firearms.

3. Exhibit 13 and Other Photos of Photos on M.M.'s Phone

Officer Ochoa looked through the text messages, contacts, and photo galleries of M.M.'s iPhone. Ochoa took photographs of photos he found on the phone, which matched the photos he had previously seen posted on Instagram (described *ante*). Ochoa's photographs were marked and admitted as People's Exhibit 13 (the primary subject of this appeal, showing D.H. holding firearms), People's Exhibits 14 and 15 (depicting M.M. and K.B. holding firearms), and People's Exhibit 16 (showing some of the individuals holding firearms in front of a camouflaged curtain).

4. Exhibit 13A and Other Photos Downloaded from M.M.'s Phone

Officer Steven Wood testified that he performed a "cell phone dump" on M.M.'s iPhone by connecting it to a Cellebrite machine, "which is basically a computer program that retrieves information from the cell phone" (including photographs) and generates a report. Defense counsel objected, unsuccessfully, on the ground that Wood was not an expert and Cellebrite technology had not been subjected to a "*Kelly-Frye*" analysis. (See *People v. Kelly* (1976) 17 Cal.3d 24, 30 (*Kelly*); *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013.)

Officer Ochoa testified that he reviewed the Cellebrite report referring to M.M.'s iPhone and found the image that showed D.H. holding two firearms (i.e., the image

depicted in Exhibit 13, which he photographed from M.M.'s iPhone and earlier saw on Instagram). The photograph as it appeared in the Cellebrite report was admitted as Exhibit 13A. Ochoa also found the photographs depicted in Exhibits 14 through 16 in the Cellebrite report; these photos were admitted as Exhibits 14A through 16A.

B. Jurisdictional Order

The court sustained the two felony counts of possession of concealed firearms and advised D.H. of a maximum term of confinement of three years eight months.

C. Disposition Hearing and Order

The case was transferred to Contra Costa County for disposition. The Contra Costa County juvenile court declared wardship and placed D.H. on 90 days' home probation in the care of his grandmother. The court orally stated a maximum confinement period, but no maximum term of confinement appears in the written disposition order.

This appeal followed.

II. DISCUSSION

We consider each of D.H.'s arguments in turn.

A. Admission of Photographs (Exhibits 13 and 13A)

D.H. contends the juvenile court erred in admitting Exhibit 13 (the photograph of a photograph that Officer Ochoa originally viewed on Instagram, showing D.H. holding firearms) and Exhibit 13A (the same image that was retrieved from M.M.'s cell phone using a Cellebrite machine). Specifically, D.H. argues that (1) Exhibits 13 and 13A were not properly authenticated, and (2) Exhibit 13A was not subjected to a *Kelly-Frye* analysis or explained by expert witness testimony. We review for an abuse of discretion. (*People v. Vieira* (2005) 35 Cal.4th 264, 292.)

1. Authentication of Exhibits 13 and 13A

A photograph is a "writing," which is authenticated by "evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is" or

“the establishment of such facts by any other means provided by law.” (Evid. Code, §§ 250, 1400.) Essentially, there must be evidence from which a trier of fact *could* reasonably conclude that the photograph is what the proponent purports it to be. (*People v. Goldsmith* (2014) 59 Cal.4th 258, 267 [a photograph is authenticated when there is “sufficient evidence for a trier of fact to find that the writing is what it purports to be, i.e., that it is genuine for the purpose offered”].) If this threshold finding is met, the photograph is admitted (in the absence of any other meritorious objection) and the ultimate conclusion as to the photograph’s authenticity is a question for the trier of fact. (*McAllister v. George* (1977) 73 Cal.App.3d 258, 262; see *People v. Valdez* (2011) 201 Cal.App.4th 1429, 1437 (*Valdez*) [burden of authentication is “*not* to establish validity or negate falsity in a categorical fashion, but rather to make a showing on which the trier of fact reasonably could conclude the proffered writing is authentic”].) That “conflicting inferences can be drawn regarding authenticity goes to the document’s weight as evidence, not its admissibility.” (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 321.)

Here, Exhibits 13 and 13A were offered as photographs depicting photos on M.M.’s iPhone, which in turn depicted D.H. holding what Ochoa believed to be firearms. There was ample foundation that these photographs were indeed contained on M.M.’s iPhone: as to Exhibit 13, Officer Ochoa testified that he personally photographed M.M.’s iPhone, and there was no evidence that Exhibit 13 did not fairly and accurately depict the image as it appeared on M.M.’s iPhone (or as it had appeared on Instagram); similarly as to Exhibit 13A, Ochoa testified it showed the same image he had personally observed and photographed on M.M.’s phone (and observed on Instagram).

Moreover, there was a sufficient foundation that the image depicted in Exhibits 13 and 13A showed D.H. holding what appeared to be firearms. Ochoa testified that he was familiar with the individuals pictured in Exhibits 13 and 13A, and there was no dispute at the hearing that D.H. was in fact depicted in those exhibits. Ochoa testified to the effect that D.H. was holding what he believed to be two firearms, and although the defense argued there was no proof that the objects *were* firearms, there was no dispute that they at

least *appeared* to be firearms.² From this evidence, a trier of fact could reasonably conclude that Exhibits 13 and 13A were what they purported to be—photographic images of D.H. holding one or more apparent firearms. It was not an abuse of discretion to conclude the foundational element of authentication was met.³

Instructive on this point is *Valdez, supra*, 201 Cal.App.4th 1429. There, the trial court admitted pages from the defendant’s MySpace social networking site that included his gang moniker, a photograph of him making a gang sign, and various written notations referring to gangs. (*Id.* at p. 1433.) An investigator testified that he printed out the Web pages a year before the shootings for which the defendant was charged; that a person’s MySpace pages were accessible publicly, but only the person who has a password for the page may upload content or manipulate the images; and that he did not know who uploaded the photographs, created the MySpace page, or had a password to post content on the page. (*Id.* at p. 1434.) The court ruled that the defendant’s challenge on authentication grounds nonetheless failed because there was evidence from which the trier of fact could conclude the site belonged to the defendant

² D.H.’s counsel stated at the hearing that People’s Exhibit 13 (and 14) “are the photos where my client is holding something that looks like a gun,” adding that a person next to D.H. was holding another gun. Defense counsel also agreed that Officer Ochoa “can say it’s a picture of something that looks like a gun.”

³ We note that the foundational requirement of authentication (Evid. Code, § 1401) is distinct from the foundational requirement of relevance (Evid. Code, § 350). Exhibits 13 and 13A were authenticated as photographs of D.H. holding two apparent firearms. It is a separate question whether photographs of D.H. holding apparent firearms are relevant (Evid. Code, § 350) and otherwise admissible (see, e.g., Evid. Code, §§ 1101, 352) to show that D.H. was in possession of concealable firearms (a Glock and a Smith & Wesson) on *October 21* as charged. D.H. urges that there was no direct evidence of when the image was taken, and that the background in Exhibits 13 and 13A showed a green or brown couch (not the purple couch in the room with the camouflage curtain), suggesting it may not have been taken at the Hare Street residence where D.H. was arrested on October 21. On the other hand, the time stamp on the photograph indicated it was uploaded to Instagram on October 21 (so it could not have been taken after that date) and the clothes D.H. was wearing when arrested on October 21 matched the clothes he wore in Exhibits 13 and 13A (suggesting the photo of D.H.’s apparent firearm possession was taken on October 21). In any event, D.H. does not raise any issue other than authentication under Evidence Code section 1400 et seq.

and the photographs depicted what they purported to show. (*Ibid.*) Of particular pertinence here, the court concluded that a photograph of the defendant forming a gang signal was authenticated: the defendant did not dispute he was the person depicted in the photograph; the content of the photograph suggested the placement of the defendant's hands was an intentional gesture; nothing on the page undermined the impression that the photograph was an accurate depiction; and other content on the page reinforced the impression. (*Id.* at p. 1436.)

Here, as in *Valdez*, the defendant did not dispute he was the person in the photograph holding what appeared to be at least one firearm, and other evidence in the case—including D.H.'s appearance at the window before firearms were tossed out—tended to corroborate rather than undermine the impression that D.H. was holding what appeared to be firearms in Exhibits 13 and 13A.

D.H. protests that “[n]o one who was present” when the photograph of D.H. was taken testified as to its authenticity, and there was no expert testimony as to when it was taken or whether it was fake. His reliance on *People v. Beckley* (2010) 185 Cal.App.4th 509 (*Beckley*) in this regard is misplaced.

In *Beckley*, the trial court admitted a photograph downloaded from the MySpace Web page of one of the defendants. (*Beckley, supra*, 185 Cal.App.4th at p. 514.) The photograph purportedly depicted the defendant's girlfriend making a gang sign, and was introduced to rebut her testimony that she was not associated with a gang. (*Ibid.*) The appellate court held that the trial court erred in admitting the photograph, because there was not any “evidence sufficient to sustain a finding that it is the photograph that the prosecution claims it is, namely, an accurate depiction of [the girlfriend] *actually flashing a gang sign.*” (*Id.* at p. 515, italics added.) The detective could not testify from personal knowledge that the photograph truly portrayed the girlfriend flashing a gang sign, and no expert testified that the picture was not a composite or faked photograph. (*Ibid.* [distinguishing *People v. Doggett* (1948) 83 Cal.App.2d 405 on the latter point].)

Beckley did not establish a bright-line rule that no image from the Internet can ever be authenticated without testimony from someone who was present when the

photograph was taken or an expert witness who can opine as to when and where the photograph was taken and whether it is a fake. The point in *Beckley* was that there was not *any* evidence that the girlfriend’s hand placement was actually intended by her to be a gang sign. Here, there is ample evidence—even from the face of the photographs themselves—that D.H. was holding what appeared to be a firearm. (See Evid. Code, § 1421 [contents of a document may authenticate it].) With this evidence, any argument that the photo might have been fabricated or manipulated goes to the weight of the exhibits, not their admissibility. (*Valdez, supra*, 201 Cal.App.4th at pp. 1436-1437.)

The juvenile court did not abuse its discretion in concluding there was sufficient evidence of authentication for the admission of Exhibits 13 and 13A.⁴

2. Cellebrite Technology As to Exhibit 13A

D.H. argues that Exhibit 13A—the image extracted from M.M.’s cell phone using the Cellebrite machine—was inadmissible because “Officer Wood’s testimony concerning the Cellebrite technology he employed, and the data he extracted from [M.M.’s] cell phone by using Cellebrite,” was subject to the *Kelly-Frye* test for new scientific techniques, and Officer Wood was not qualified as an expert and lacked sufficient knowledge or training concerning the device. (See *Kelly, supra*, 17 Cal.3d 24; *Frye, supra*, 293 F. 1013.) D.H. is incorrect.

Wood’s testimony regarding the Cellebrite machine did not require testimony by an expert witness. The testimony was not for the purpose of explaining how the Cellebrite technology worked, and Wood did not opine about the technological means by which the transfer occurred. Instead, he essentially testified to his experience that

⁴ In any event, the admission of Exhibits 13 and 13A was harmless, since there was other admissible evidence that D.H. was in the possession of apparent firearms. Officer Ochoa testified that *he saw* a photo on Instagram on October 21, 2013, in which D.H. was bearing a firearm. Even if Exhibits 13 and 13A depicting this photo were not admitted, Ochoa’s testimonial evidence as to what he saw *was* admitted, and D.H. does not contend in his appellate briefs that Ochoa’s testimonial evidence was inadmissible. D.H. fails to establish that the admission of Exhibits 13 and 13A was prejudicial in light of the admission of Ochoa’s testimonial evidence.

attaching a phone to this machine resulted in a display of photographic and other information that was contained in the phone, and identified the type of machine he used to download the material from M.M.'s iPhone. The idea that images may be downloaded from a cell phone is familiar to the general population and, in this case, to the juvenile court as the trier of fact, as indicated by the court's comment that the photograph was "essentially just downloaded from the phone on to a piece of paper." In short, Wood's testimony was not of matters so "beyond common experience" that his qualification as an expert was required. (See Evid. Code, § 801.)

Nor did Wood's testimony require a *Kelly-Frye* analysis. The *Kelly-Frye* test applies to (1) expert testimony concerning a technique, process or theory new to science and to the law; and (2) unproven techniques or procedures that are presented as infallible, such as in the analysis of physical data. (*People v. Johnson* (2006) 139 Cal.App.4th 1135, 1148 (*Johnson*) [use of database search to identify potential suspects, followed by DNA analysis, was a mere "investigative technique" for law enforcement rather than independent evidence presented to the jury of the defendant's guilt, and therefore not subject to *Kelly-Frye*].) Wood's testimony about the Cellebrite technology was aimed at merely describing the machine he used to download the images from M.M.'s cell phone, not to analyze the photographs or draw any scientific conclusions from them. Furthermore, the testimony described law enforcement's investigative technique of downloading photos, as opposed to independent evidence of D.H.'s guilt.

Moreover, the essential point of *Kelly-Frye* and its progeny is to guard against a jury's inclination to give considerable weight to scientific evidence presented with a "misleading aura of certainty." (*Johnson, supra*, 139 Cal.App.4th at p. 1147; *Kelly, supra*, 17 Cal.3d at pp. 31-32.) Here, the trier of fact was a judge, not a jury; Wood's testimony was not expert witness testimony or even scientific evidence; and there was no "misleading aura of uncertainty," since the reliability of the Cellebrite process was confirmed by the fact the photo purportedly downloaded by the Cellebrite machine from M.M.'s phone was independently observed on M.M.'s phone by Officer Ochoa.

In any event, any error in admitting Exhibit 13A was harmless. The image depicted in Exhibit 13A was identical to the image shown in Exhibit 13. Even if Exhibit 13A had been excluded, the court would have still properly admitted and considered Exhibit 13, as well as Ochoa's testimony that he saw D.H. holding two firearms in a photograph he viewed on Instagram.

D.H. fails to establish that the court committed a prejudicial abuse of discretion in admitting Exhibits 13 and 13A.⁵

B. Substantial Evidence of Possession of Firearm

Penal Code section 29610 provides that a "minor shall not possess a pistol, revolver, or other firearm capable of being concealed upon the person." D.H. contends that, with or without Exhibits 13 and 13A, the evidence was insufficient to support the juvenile court's finding that he possessed the firearms in violation of the statute.

1. Possession for Purposes of Penal Code Section 29610

Possession may be actual or constructive: actual possession means the object is in the defendant's immediate possession or control, as when the defendant is holding a weapon; constructive possession means the object is not in the defendant's physical possession, but the defendant "knowingly exercises control or the right to control the object." (*In re Daniel G.* (2004) 120 Cal.App.4th 824, 831.) Possession for even a limited time and purpose may be sufficient. (*Id.* at p. 831 [testimony that a witness saw a weapon passed to and from the defendant created a "reasonable inference that the weapon was under his control and was therefore in his actual possession"]; see *People v. Nieto* (1966) 247 Cal.App.2d 364, 368 [joint or constructive possession, custody, or control of the gun is enough].)

⁵ Any error in admitting Exhibits 13 and 13A would have been harmless for another reason: there is no reasonable probability that the outcome would have been more favorable to D.H. if the evidence had been excluded. (See *People v. Carter* (2005) 36 Cal.4th 1114, 1152; *People v. Watson* (1956) 46 Cal.2d 818, 836.) As shown *post*, there was ample evidence of D.H.'s guilt even without Exhibits 13 and 13A.

2. Substantial Evidence

Substantial evidence supported a finding that D.H. had actual or constructive possession of the Glock and Smith & Wesson firearms on October 21, 2013. Photographs viewed by Officer Ochoa on Instagram on October 21—which are not challenged in this appeal—depicted D.H.’s associates with purported firearms in the room at Hare Street with the camouflage curtain. D.H. was seen poking his head out of the window with the camouflage curtain on October 21, mere seconds before two firearms were tossed out of that window. Police recovered the two firearms, which turned out to be a Glock firearm and a Smith & Wesson firearm. And D.H. was observed holding two apparent firearms in a photograph posted on Instagram on October 21, in the same clothes he had on when he was arrested on October 21, suggesting the photo of D.H. holding the firearms was taken that day. From this evidence—relying on Ochoa’s testimony and not Exhibit 13 or 13A itself—it could reasonably be inferred that D.H. was in physical possession of the Glock and Smith & Wesson, or exercised control over them. In addition, D.H. was found by police on the stairway leading from the second floor to the first floor; from this it could reasonably be inferred that he was running down the stairs to flee from the residence after tossing the guns, suggesting consciousness of guilt. (See *People v. Martinez* (2009) 47 Cal.4th 399, 449.)

D.H. argues that the two firearms thrown from the second-story window merely proved that D.H. was in the same room with firearms, which would be insufficient to establish constructive possession under *People v. Sifuentes* (2011) 195 Cal.App.4th 1410 (*Sifuentes*). But *Sifuentes* is inapposite. There, officers entered a motel room and found Sifuentes, a gang member, on one of the beds. Officers recovered a gun under the mattress of another bed, next to a fellow gang member (Lopez). (*Id.* at p. 1414.) The appellate court ruled that expert testimony that a “gang gun” is typically shared and accessible to other gang members was insufficient to prove joint possession of the particular gun seized in the case, and in any event the evidence did not show that

Sifuentes had the right to control the firearm discovered near Lopez, even though he was in the same motel room and knew the gun was there. (*Id.* at pp. 1415, 1417-1420.)

In the matter before us, the guns were not found under someone else's mattress, but on the ground below the window from which officers saw them thrown, and at which D.H. had appeared. Furthermore, the evidence linking D.H. to the firearms was not merely expert witness testimony about gang behavior in general, but the officers' percipient observation that the firearms were tossed out the window seconds after D.H. appeared.

D.H. argues that the fact he was seen shortly before the guns were thrown from the window is insufficient, because K.B. and M.M. were also upstairs and *they* could have thrown out the guns. We note, however, that although K.B. and M.M. were found on the second floor, and had been photographed with guns in the room with the camouflage curtain *before* the police arrived, they were not found in that room *when* the police arrived; *only D.H.* was observed at the window through which the firearms were thrown. In any event, we must view the evidence in the light most favorable to the prosecution. (*People v. Marshall* (1997) 15 Cal.4th 1, 34.) A reasonable inference from the evidence is that D.H., as the one who appeared at the window seconds before the guns were thrown out the window, was in fact the one who threw them out the window.

D.H. contends that, even if he did throw the guns out the window, he was just tossing them to the police and ending his friends' unlawful possession of the contraband, such that his possession was only a transitory possession for the purpose of disposal. (See *People v. Mijares* (1971) 6 Cal.3d 415.) But the transitory (or momentary) possession defense does not apply to "individuals who, fearing they are about to be apprehended, remove contraband from their immediate possession." (*Id.* at p. 422.) Here, the evidence showed that the firearms were thrown out the window *after* the police announced their presence. There is "nothing in the record from which to infer that [D.H.] would have voluntarily relinquished" the firearms without the possibility of impending arrest, so the defense does not apply. (See *People v. Paz* (2010) 181 Cal.App.4th 1413, 1416 [unnecessary to instruct jury on transitory possession where the defendant let go of

a tin of methamphetamine not voluntarily, but because the dealer from whom he stole it was choking him].)⁶

In sum, with or without Exhibits 13 and 13A, substantial evidence supports the juvenile court's conclusion that D.H. possessed the firearms as charged.

C. Statement Regarding Maximum Term of Confinement

D.H. contends the San Francisco County juvenile court erred by setting a maximum term of confinement in the jurisdictional order, and that this statement should be stricken because it was premature and void. Respondent agrees and adds that the Contra Costa County juvenile court's recitation of the maximum term of confinement at the disposition hearing should also be stricken.

A juvenile court must specify a maximum term of confinement when a minor is removed from the physical custody of his parent or guardian. (Welf. & Inst. Code, § 726, subd. (d).) However, when the minor is not removed from the physical custody of his parent or guardian, such a pronouncement "is of no legal effect." (*In re Ali A.* (2006) 139 Cal.App.4th 569, 574; see *In re Matthew A.* (2008) 165 Cal.App.4th 537, 541-542.)

Here, D.H. was sentenced to 90 days' probation in the home of his maternal grandmother, with whom he had been residing. Because D.H. was not removed from parental custody, the juvenile courts were not required to pronounce a maximum term of confinement.

We disagree with the parties, however, that we need to strike anything from the record. The statement of the San Francisco juvenile court in the *jurisdictional* order was merely an advisement of the potential maximum confinement D.H. might *later face*,

⁶ D.H. also contends the firearms *pictured* may have been "pellet guns, bb guns, or gun-replicas." However, Ochoa testified that, in his experience, most times that individuals are pictured with an item that appears to be a firearm, the item turns out to be a firearm. D.H. points to no evidence the items in the photographs in this case were not real guns. In any event, while D.H. could *argue* the photos depicted him with fake weapons, there was sufficient evidence for the trier of fact to conclude that D.H. possessed real firearms—the Glock and Smith & Wesson found beneath the window at which he appeared—on October 21, 2013, as charged.

depending on the eventual disposition. It is otherwise of no legal effect. The written disposition order of the Contra Costa juvenile court does not specify any maximum term of confinement, so there is nothing to strike from that order. (*In re A.C.* (2014) 224 Cal.App.4th 590, 592 [where juvenile court’s order includes maximum confinement term for minor who is not removed from parental custody, the remedy is to strike the term].) The Contra Costa juvenile court’s oral statement at the disposition hearing, even if it prevailed over the written order, is of no legal effect, and the parties provide no authority persuading us that we can strike what a judge said from the reporter’s transcript. Furthermore, the parties do not establish prejudice arising from the courts’ references to a maximum term of confinement under the circumstances of this case. Because they fail to demonstrate cause to strike anything from the record, we decline to do so.

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P. J.

BRUINIERS, J.