

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

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

THE PEOPLE,

Plaintiff and Respondent,

v.

H.D.,

Defendant and Appellant.

A146480

(Contra Costa County
Super. Ct. No. J13-00966)

Sixteen-year-old H.D. was found to have committed two counts of assault by force likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(4)) and one count of simple kidnapping (*id.*, § 207, subd. (a)), and he was committed to the Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ). On appeal, H.D. primarily asserts the juvenile court violated his due process rights, made jurisdictional findings unsupported by substantial evidence, abused its discretion by committing him to DJJ, and failed to exercise its discretion to set a maximum term of confinement below the adult maximum term. We will order the Judicial Counsel Forms, form JV-732 (Form JV-732) modified to reflect the correct maximum term. In all other respects, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2013, when H.D. was 14 years old, the Contra Costa County District Attorney filed a Welfare and Institutions Code section 602 wardship petition alleging H.D. committed first degree burglary (Pen. Code, §§ 459, 460, subd. (a)), second degree

robbery (*id.*, §§ 211, 212.5, subd. (c)), prowling (*id.*, § 647, subd. (h)), and possession of burglar's tools (*id.*, § 466). H.D. pleaded no contest to the burglary allegations in exchange for dismissal of the remaining counts, and H.D. was declared a ward of the juvenile court. The court placed him on probation with various conditions, including his parents' agreement that he would attend Hanna Boys' Center (Hanna), a residential group home in Sonoma.

In May 2015, the Contra Costa County District Attorney filed a supplemental wardship petition alleging that, on or about May 27, 2015, H.D. committed assault by force likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(4); count one) against P.P., his girlfriend.¹ H.D. was found ineligible for deferred entry of judgment and was detained in juvenile hall pending further proceedings.

The contested jurisdictional hearing was initially scheduled for June 19, 2015. On June 17, the prosecutor filed a motion to continue the hearing because P.P. was unavailable. On June 18, at a hearing on the motion to continue, the prosecutor also apparently submitted for filing an amended petition that added two new counts: kidnapping (Pen. Code, § 207, subd. (a); count two) and a May 25, 2015 assault by force likely to cause great bodily injury (*id.*, § 245, subd. (a)(4); count three).² Defense counsel refused to waive time, and the juvenile court granted the prosecution's request to continue the jurisdictional hearing to June 22.

On June 22, 2015, defense counsel raised a due process objection to the amended petition, which the juvenile court overruled. H.D. was arraigned on the amended supplemental petition and denied all three counts. Immediately thereafter, the contested jurisdictional hearing commenced.

P.P., who was 16 years old at the time of the hearing, testified she was H.D.'s girlfriend for a period of slightly less than one year. At one point in November 2014, P.P. lived with H.D. and his sister, brother, and parents. The first five months of the

¹ H.D. was arraigned on the May 27 assault charge on June 1, 2015.

² The record before us contains no reporter's transcript from June 18, 2015.

relationship “was nice,” but H.D. later became physically aggressive. H.D. initiated fights “most of the times,” by grabbing P.P.’s hair or slapping her face.³

On May 25, 2015, H.D. called P.P. from Hanna, and they quarreled. P.P. told him she wanted to end the relationship. H.D. returned to his home in Richmond the same day.⁴ That evening, P.P. walked from her home to H.D.’s home. They made up and went inside H.D.’s house. P.P. talked with H.D.’s sister in the living room. From his bedroom, H.D. called out to P.P. As she approached, H.D. grabbed P.P. by the hair and pulled her into his room.

H.D. and P.P. laid on the bed, talked, and listened to music for a while. He picked up her cell phone and began reviewing her call logs and social media exchanges. He called several of the telephone numbers listed on her phone and told those who answered not to speak to P.P. Although she asked H.D. to return her cell phone, he would not do so. Instead, he reminded P.P. he had “told” her not to talk to guys. She attempted to retrieve her cell phone and H.D. punched her in the nose with a closed fist. P.P. felt her nose “crack.” It bled heavily and hurt “a lot.” She was not particularly frightened because H.D.’s physical aggression was not unusual. She laid on his bed, crying, while he continued to review her cell phone communications. During the night, P.P. made several attempts to put on her shoes and leave, but H.D. repeatedly took her shoes off and told her to go to sleep.

The following morning was a Tuesday. When a friend called and offered to drive her to school, H.D. allowed P.P. to go to school, but informed her that he would be at her house later. While waiting for her ride, H.D.’s mother asked P.P. “why was [her] nose crooked?” P.P. lied and said she had “accidentally” hit herself. While at school, P.P.’s friends also asked why her nose was “a little crooked?”

³ P.P. was five feet tall and weighed 120 pounds, whereas H.D. was three or four inches taller and stronger.

⁴ The probation report, prepared for the disposition hearing, indicates H.D. became very upset after the phone call and persuaded Hanna staff to drive him home by threatening to run away.

After school, P.P. invited H.D. to her home with the intention of breaking up with him. He arrived around 5:00 or 6:00 p.m. They spoke outside the house for about 30 minutes, argued, and H.D. left. When H.D. returned to her house later that evening, P.P. initiated a physical fight because she was angry that he was talking over her. She slapped him five to 10 times and he departed around 11:00 p.m.

On May 27, 2015, P.P. decided not to go to school because she was embarrassed by the appearance of her nose, which was swollen, with a big bump on top. Around 10:00 a.m., H.D. pushed his way into her house, appearing intoxicated. P.P. told H.D. she did not want to be with him anymore. H.D. refused to leave and kept repeating, “he wanted to be with [her].” P.P. testified: “He didn’t want to leave, and so I just started slapping him.” H.D. responded by punching her in the face. Eventually, he left.

H.D.’s mother telephoned P.P., said she was worried about H.D., and asked P.P. to go out looking for him. P.P. found him collapsed on the sidewalk. She tried to help him up, as did others who stopped to help. H.D. got up and tried to fight with them. Eventually, he and P.P. started walking and arguing. H.D.’s mother arrived, in her car, and P.P. began walking away from H.D. Instead of cooperating with his mother’s efforts to get him in the car, H.D. ran to catch up with P.P. and hit her in the back of her head. He also put one arm around her neck and started to strangle her. H.D.’s mother told him to let go, but H.D. turned around and began yelling at his mother.⁵

H.D.’s mother physically removed H.D., told P.P. to get into her car, and drove P.P. back to H.D.’s family home. When H.D. called P.P. on her cell phone, she initially lied about her whereabouts, but eventually told him she was at his house. H.D. was very angry. P.P. testified that his mother looked “nervous,” was visibly “shaking,” and was pacing “back and forth.” H.D.’s mother said, “she was just scared for [H.D.],” and told P.P. not to tell the police what was going on.

⁵ P.P.’s initial reports to police did not include any mention of this instance of H.D. choking her.

When H.D. arrived home, P.P. hid behind the sofa in the living room and sent a text message to her mother, asking to be picked up. From her hiding place, P.P. saw H.D. arguing with and hitting his mother. When H.D.'s sister tried to intervene, he also turned on her. P.P. stood up from behind the couch and H.D. dragged her out by her hair. After P.P. made an unsuccessful attempt to run for the front door, H.D. pulled her back into his bedroom. H.D.'s mother tried to block him from entering the bedroom, but he punched his mother in the face, locked the door, and threw P.P. onto the bed.

Inside his bedroom, H.D. begged P.P. not to leave him. When she said she wanted to go home, he began punching her. Then, using both of his hands, H.D. strangled P.P. until she could not "feel her face" and was scared she might die. She began coughing and he let go. P.P. said she needed water. H.D. turned to the doorway and called his sister to get some. As soon as he turned away, P.P. jumped out an open window into the backyard. She scaled a fence into the next yard, but, upon landing, saw H.D. standing in front of her. He punched P.P. in the face, wrapped his left arm around her, and dragged her back into his house, in a headlock, with her feet dragging along the ground. She could see the street from the place she stood when H.D. began dragging her away. P.P. estimated the distance H.D. dragged her was the length of the back wall of the courtroom. The court initially stated the wall was about 19 feet long, but then corrected the measurement to "actually 26.9 feet."

When H.D. and P.P. returned to the house, H.D.'s mother and sister were on the couch and made only ineffectual attempts to intervene. P.P. tried to run again, but H.D. dragged her, by her hair, past his mother and back into his room, where he locked the door. H.D. punched P.P. in the back of the head and bit her jaw. Shortly thereafter, P.P.'s mother and younger brother arrived at H.D.'s house and were able to remove her. P.P.'s mother contacted the police, who interviewed P.P. and photographed her injuries.

On the same day, Richmond Police Officer Jeremy Odegaard arrested H.D. and interviewed his sister.⁶ After being advised of his *Miranda*⁷ rights, H.D. told Odegaard, “[H]e was going to break up with [P.P.] because she was cheating on him, and she went out of control and started flailing her arms and becoming really upset so he tried to grab ahold of her to keep her from hurting herself.” When asked to explain P.P.’s injuries, he said “she had injured herself by walking into a door.” H.D. specifically denied hitting or choking P.P.

At the conclusion of the evidence, the court found P.P. credible and sustained all three counts. The court explained: “[P.P.] . . . did admit the facts that were less than favorable to her, but her testimony to the court was very believable, and her testimony is corroborated by her physical injuries, which include the two black eyes, the very swollen nose, the bite mark on her face, and yet she was able to differentiate the scratches and wasn’t trying to exaggerate with regard to . . . scratches on her face saying they came from another source. But her neck did also show circumstantial evidence of the strangulation, which she describes in graphic detail. [¶] So the court does find proof beyond a reasonable doubt that the assault by force likely to produce great bodily injury as charged in Count One, the assault on May the 27th, 2015, was proven. [¶] . . . [¶]

“With regard to Count Two, the charge of kidnapping, the court also finds that there’s proof beyond a reasonable doubt that the kidnapping occurred. The testimony was that the victim was dragged by the hair and was pulled back into the house after she had escaped. This is not an insignificant distance. It wasn’t incidental to the crime. The court does find that [the kidnapping charge] has been proven beyond a reasonable doubt.

⁶ H.D.’s mother was uncooperative. At the jurisdictional hearing, H.D.’s sister testified that she did not see H.D. hit or drag P.P. at any point on May 27. Her testimony conflicted with her May 27 statement to Odegaard, in which she said she saw H.D. hitting P.P., as well as dragging P.P. back into the house after P.P. jumped out the window. Because the juvenile court did not find H.D.’s sister credible, we do not describe her testimony in detail.

⁷ *Miranda v. Arizona* (1966) 384 U.S. 436.

“As to the May 25 assault . . . by force likely to produce great bodily injury [Count Three], which includes the . . . punches to the face of [P.P.], which are reflected in the pictures with two black eyes and her swollen nose and her description of her nose cracking, there’s also testimony that her nose was crooked after this assault, the court does find proof beyond a reasonable doubt that the assault by force likely to produce great bodily injury did occur.”

At disposition, the juvenile court continued H.D. as a ward of the court and ordered his commitment to DJJ for a term not to exceed seven years, with credit for 159 days served. H.D. filed a timely notice of appeal.

II. DISCUSSION

H.D. maintains the juvenile court (1) violated his due process rights by permitting amendment of the supplemental petition to add new charges shortly before the jurisdictional hearing; (2) made jurisdictional findings unsupported by substantial evidence; (3) abused its discretion by committing him to DJJ; and (4) failed to exercise its discretion to set a maximum term of confinement below the adult maximum term. Anticipating an argument his second and fourth arguments were forfeited, H.D. insists his defense counsel was ineffective. We agree with H.D. that Form JV-732 should be modified to reflect the maximum term orally pronounced at disposition. In all other respects, H.D.’s arguments are meritless.

A. *Due Process*

First, H.D. maintains the juvenile court abused its discretion, and violated his due process rights, by permitting the prosecutor to amend the wardship petition on the eve of the jurisdictional hearing to charge two new offenses (counts two and three). We review the juvenile court’s decision for abuse of discretion. (*In re D.W.* (2015) 236 Cal.App.4th 313, 321; *In re A.L.* (2015) 233 Cal.App.4th 496, 500.)

“No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts” (*Cole v. Arkansas* (1948) 333 U.S. 196, 201.) Minors are

constitutionally entitled to similar notice in juvenile court proceedings. (*In re Gault* (1967) 387 U.S. 1, 12.) Due process requires that a juvenile, like an adult, “ ‘have adequate notice of the charge so that he may intelligently prepare his defense.’ ” (*In re Robert G.* (1982) 31 Cal.3d 437, 442 (*Robert G.*.)

1. *Background*

On June 22, 2015, at the commencement of the week-long jurisdiction hearing, the following colloquy occurred on the record:

“THE COURT: . . . The Court is also in possession of a first amended petition on the first supplemental petition, which seeks to add a charge in the kidnapping . . . and also [another] assault by force likely to produce great bodily injury . . . [¶] And, [defense counsel], do you have a copy of the new petition?

“[DEFENSE COUNSEL]: I do.

“THE COURT: And so the first matter to take up, then, is the arraignment on the new petition. [¶] Do you waive reading of the petition and advisement of rights?

“[DEFENSE COUNSEL]: Well, I’m actually objecting to the filing of the petition at this stage, your Honor. I was only notified a few days ago that the district attorney intended to file the supplemental petition. This is a case that first appeared before Department 35 on June 1st. It appeared twice after that for pretrial, and at no time did the district attorney . . . indicate that they were going to be filing these additional charges.

“So, late last week, I received these additional charges. They are serious. At this point, [H.D.] is being denied due process. The D.A. has had more than ample time to bring the charges forth.

“THE COURT: All right. And has discovery been provided for the charges, [prosecutor]?

“[PROSECUTOR]: Yes, your Honor. All the discovery and all the factual bases underlying the additional two charges were included as part of Officer Odegaard’s original, and only, police report in this case.

“I also wish to bring to the Court’s attention the fact that I do have a copy of an e-mail that I personally sent [defense counsel] on Thursday, June 4th of this year, three

days after the arraignment, indicating to [defense counsel], quote, ‘I want to give you notice that I do intend to file additional charges, including an additional count of [assault] regarding the May 25th, 2015 incident described in Officer Odegaard’s report.’

“I also suggested to [defense counsel] in that e-mail that there may be additional charges forthcoming. Last week, on Wednesday, [June 17,] I informed [defense counsel] that the amended petition would be filed sometime Thursday, that it would include that same [assault] I just referred to, as well as an additional count of [kidnapping], which is found in the amended petition as Count 2. On Thursday, [June 18,] I e-mailed her a draft copy of this petition

“So I don’t think that [H.D. has] been deprived any sort of meaningful notice concerning the facts underlying these changes or the D.A.’s intention to proceed on them.

“[DEFENSE COUNSEL]: And, your Honor, I just want to point out that the e-mail referred to by [the prosecutor] on June 4th only cited the [assault charge]. It was very much to my surprise, because there was no discussion about the [kidnapping] being added until last week. And that was the first time that I had received notice, even though this case had been before the Court on several occasions and had been pending for several weeks. [¶] It is the most serious charge. [H.D.] has, most definitely, been denied due process [by] the district attorney attempting to amend the complaint this late in the game, especially to include such an allegation.

“THE COURT: Right. He is saying that he provided notice with regard to the [kidnapping count] on Wednesday and Thursday and he gave you a copy of the petition.

“[DEFENSE COUNSEL]: That’s correct, your Honor, late last week.

“THE COURT: All right. And that you had the reports going back to June the 4th, I assume. Is that correct?

“[THE PROSECUTOR]: Correct. Also, the People filed a motion to continue that was heard on Thursday after [defense counsel] had learned of . . . the additional charges, and she still objected, and her client is still proceeding time not waived. So I have a difficult time reconciling that with any claimed due process violation.

“[DEFENSE COUNSEL]: Well, I can clear that up. As of Thursday, [H.D.] just had one count of [assault] pending against him, so we did call ready. I did object to the [continuance], but that was the only count pending at that time.

“THE COURT: All right. So I do find that you have been on notice by virtue of the discovery and also by the e-mails that [the prosecutor] sent. So I don’t find that there’s a due process violation.”

2. *Analysis*

H.D. asks us to enforce a blanket rule preventing amendment of a juvenile wardship petition any time after arraignment because preliminary examinations are not conducted in juvenile cases. The People, in contrast, point us to Penal Code section 1009 and contend that, in the absence of a showing of prejudice, a wardship petition can always be amended to add counts “which might properly have been joined in the original [petition].”⁸ Neither party is correct.

“In juvenile cases the provisions of the Code of Civil Procedure, not the Penal Code, apply to amendment of the petition [citations], so long as those provisions comport with due process ([*Robert G.*], *supra*, 31 Cal.3d at p. 443).” (*In re Man J.*

⁸ Penal Code section 1009 provides, in relevant part: “An indictment, accusation or information may be amended by the district attorney, and an amended complaint may be filed by the prosecuting attorney, without leave of court at any time before the defendant pleads or a demurrer to the original pleading is sustained. The court in which an action is pending may order or permit an amendment of an indictment, accusation or information, or the filing of an amended complaint, for any defect or insufficiency, at any stage of the proceedings The defendant shall be required to plead to such amendment or amended pleading forthwith, or, at the time fixed for pleading, if the defendant has not yet pleaded and the trial or other proceeding shall continue as if the pleading had been originally filed as amended, unless the substantial rights of the defendant would be prejudiced thereby, in which event a reasonable postponement, not longer than the ends of justice require, may be granted. *An indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination. A complaint cannot be amended to charge an offense not attempted to be charged by the original complaint, except that separate counts may be added which might properly have been joined in the original complaint.*” (Italics added.)

(1983) 149 Cal.App.3d 475, 480–481.) In order to ensure due process, courts will look to the more restrictive amendment rules found in the Penal Code. (*Id.* at p. 481.) Thus, “any amendment of the charging allegations in a delinquency petition is strictly limited once a minor has entered a plea of not guilty. In particular, absent the minor’s consent, amendment *during a contested hearing* is only appropriate if an offense is ‘ “necessarily included” ’ in the offense actually charged or is ‘ “a lesser offense which, although not necessarily included in the statutory definition of the offense, is expressly pleaded in the charging allegations.” ’ (*Robert G.*, *supra*, 31 Cal.3d at pp. 442–443; [citations].)” (*In re A.L.*, *supra*, 233 Cal.App.4th at pp. 499–500, italics added & omitted.)

In asserting the absence of prejudice is determinative, the People rely on *In re Man J.*, *supra*, 149 Cal.App.3d at page 481, in which a petition was amended to change the factual allegations supporting the offense already charged. The People’s reliance is misplaced, as here the petition was amended to charge two new offenses, not merely to correct or increase the specificity of the underlying factual circumstances. (*Id.* at pp. 479–480.) This case is also distinguishable from the opinions H.D. relies on, in that the petition was not amended in the middle of a contested jurisdictional hearing. (*Robert G.*, *supra*, 31 Cal.3d at pp. 439–440; *In re A.L.*, *supra*, 233 Cal.App.4th at p. 499; *In re Johnny R.* (1995) 33 Cal.App.4th 1579, 1584.) In the situation before us, due process is satisfied when the juvenile is “ ‘notified, in writing, of the specific charge or factual allegations to be considered at the hearing, and . . . such written notice [is] given at the earliest practicable time, and in any event sufficiently in advance of the hearing to permit preparation.’ ” (*Robert G.*, *supra*, 31 Cal.3d at p. 442, quoting *In re Gault*, *supra*, 387 U.S. at p. 33; accord, *In re D.W.*, *supra*, 236 Cal.App.4th at p. 322 [no due process violation when new charge added before hearing, which did not proceed until two months after amendment].)

Here, the petition was amended at the beginning of the contested hearing, before any evidence was presented, and H.D. had notice of the prosecutor’s intent to proceed on the May 25 assault charge more than two weeks before any evidence against him was presented. With respect to the kidnapping charge, H.D. had at least five days’ notice. It

is undisputed that the facts underlying both counts two and three were included in the initial discovery.⁹ H.D. correctly points out there was less time between the amendment and commencement of the evidentiary hearing here than in *D.W.* Be that as it may, defense counsel still had advance notice of the amendment before the jurisdictional hearing. And H.D. had notice of the factual circumstances underlying counts two and three since June 4. Despite H.D.’s current speculation regarding new research and investigation that could have been conducted, it remains true that he did not request a continuance or otherwise suggest he needed more time to prepare his defense. Due process was satisfied because H.D. was notified in writing of the specific charges and underlying facts “ ‘at the earliest practicable time, and in any event sufficiently in advance of the hearing to permit preparation.’ ” (*Robert G.*, *supra*, 31 Cal.3d at p. 442.) The juvenile court did not abuse its discretion in permitting the amendment to add counts two and three.

B. *Substantial Evidence*

H.D. next challenges the juvenile court’s true findings on all three counts, asserting the findings are unsupported by substantial evidence. When faced with a substantial evidence challenge, “the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *Jackson v. Virginia* (1979) 443 U.S. 307, 318–319; *In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1371.) “[O]ur perspective must favor the judgment. [Citations.] ‘This court must view the evidence in a light most

⁹ The People contend P.P.’s statement to police provided defense counsel with notice of the events underlying the May 25 charge. Although the record does not support that assertion, we assume Odegaard’s report did, as it is not in the record before us and defense counsel conceded as much. (See *In re Julian R.* (2009) 47 Cal.4th 487, 498–499 (*Julian R.*) [“ ‘ ‘ ‘judgment or order of the lower court is presumed correct[, and a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown’ ” ’ ” (italics omitted)].)

favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] If the circumstances reasonably justify the trial court’s findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. [Citations.] The test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact; it is not whether guilt is established beyond a reasonable doubt. [Citation.] [¶] Before the judgment of the trial court can be set aside for insufficiency of the evidence . . . , it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support it.’ ” (*Ryan N.*, at p. 1372.)

“By definition, ‘substantial evidence’ requires evidence and not mere speculation.” (*People v. Cluff* (2001) 87 Cal.App.4th 991, 1002, italics omitted.) Nor is “substantial” evidence synonymous with “ ‘any’ ” evidence. (*People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681, fn. 3.) However, “the direct testimony of a single witness is sufficient to support a finding unless the testimony is physically impossible or its falsity is apparent ‘without resorting to inferences or deductions.’ [Citations.] Except in these rare instances of demonstrable falsity, doubts about the credibility of the in-court witness should be left for the [fact finder]’s resolution.” (*People v. Cudjo* (1993) 6 Cal.4th 585, 608–609.)

1. *Kidnapping*

In order to prove the crime of simple kidnapping, “the prosecution must prove three elements: (1) a person was unlawfully moved by the use of physical force or fear; (2) the movement was without the person’s consent; and (3) the movement of the person was for a substantial distance. ([Pen. Code,] § 207, subd. (a).)” (*People v. Jones* (2003) 108 Cal.App.4th 455, 462, fn. omitted; accord, *People v. Bell* (2009) 179 Cal.App.4th 428, 435 (*Bell*).) At the jurisdictional hearing, H.D. attacked the kidnapping charge on the theory there was no forced movement of P.P. Relying on his sister’s testimony, H.D. asserted P.P. voluntarily returned to his house and bedroom. He has now changed course

and only challenges the sufficiency of the evidence on the “asportation” element.¹⁰ He maintains no substantial evidence supports the finding that he moved P.P. a “substantial distance,” as required under Penal Code section 207, subdivision (a).

“[T]he standard for proving the asportation element of simple kidnapping is not the same as for aggravated kidnapping.” (*Bell, supra*, 179 Cal.App.4th at p. 435.) “With respect to asportation, aggravated kidnapping requires movement of the victim that is not merely incidental to the commission of the underlying crime and that increases the risk of harm to the victim over and above that necessarily present in the underlying crime itself. ([Pen. Code,] § 209(b)(2); [citations].)” (*People v. Martinez* (1999) 20 Cal.4th 225, 232 (*Martinez*)).

“The asportation requirement for simple kidnapping has historically been less clear.” (*Martinez, supra*, 20 Cal.4th at p. 233.) “In 1999, *Martinez* changed the standard previously established in *People v. Caudillo* (1978) 21 Cal.3d 562 (*Caudillo*), and *People v. Stanworth* (1974) 11 Cal.3d 588 (*Stanworth*). Under the *Caudillo/Stanworth* standard, the ‘actual distance’ the victim was moved was the sole factor for determining whether the evidence showed asportation for purposes of simple kidnapping. (*Caudillo*, at p. 574; *Stanworth*, at p. 603.) The rationale was that, because simple kidnapping entails no underlying crime, ‘the victim’s movements cannot be evaluated in the light of a standard which makes reference to the commission of another crime.’ (*Stanworth*, at p. 600.) [¶] *Martinez* overruled *Caudillo* to the extent it ‘prohibited consideration of factors other than actual distance’ (*Martinez, supra*, 20 Cal.4th at p. 237, fn. 6) because ‘limiting a trier of fact’s consideration to a particular distance is rigid and arbitrary, and ultimately unworkable’ (*id.* at p. 236). *Martinez* established a new asportation standard for simple kidnapping—one that took into account ‘the “scope and nature” of the movement . . . , and any increased risk of harm’—thereby bringing the standard closer to the one for aggravated kidnapping. (*Ibid.*) *Martinez* required a jury to ‘consider the totality of the

¹⁰ A substantial evidence challenge is not forfeited by the failure to object in the trial court. (*People v. Viray* (2005) 134 Cal.App.4th 1186, 1217.)

circumstances’ in deciding whether a victim’s movement is substantial. (*Id.* at p. 237.) . . . But *Martinez* clarified that, unlike the asportation element of aggravated kidnapping, the standard for simple kidnapping *does not require a finding* of ‘an increase in harm, or any other contextual factors,’ so long as the evidence shows the victim was moved a substantial distance.” (*Bell, supra*, 179 Cal.App.4th at p. 436, italics added.)

Thus, “in determining whether the movement is ‘substantial in character’ [citation], the [fact finder] should consider the totality of the circumstances. . . . [T]he [fact finder] might properly consider not only the actual distance the victim is moved, but also such factors as whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent in a victim’s foreseeable attempts to escape and the attacker’s enhanced opportunity to commit additional crimes.” (*Martinez, supra*, 20 Cal.4th at p. 237, fn. omitted.) “In addition, *in a case involving an associated crime*, the jury should be instructed to consider whether the distance a victim was moved was incidental to the commission of that crime in determining the movement’s substantiality.” (*Id.* at p. 237, italics added; *Bell, supra*, 179 Cal.App.4th at p. 437.) At the same time, *Martinez* emphasizes that “contextual factors, whether singly or in combination, will not suffice to establish asportation if the movement is only a very short distance.” (*Martinez*, at p. 237.)

“[A]n ‘associated crime,’ as that phrase was used by the *Martinez* court, is any criminal act the defendant intends to commit where, in the course of its commission, the defendant also moves a victim by force or fear against his or her will.” (*Bell, supra*, 179 Cal.App.4th at pp. 438–439.) “[W]hether the movement was over a distance merely incidental to an associated crime is simply one of several factors to be considered by the [fact finder] (when permitted by the evidence) under the ‘totality of circumstances’ test enunciated in *Martinez*. The factor is not a separate threshold determinant of guilt or innocence, separated from other considerations bearing on the substantiality of the movement” (*Id.* at p. 440.)

In *Bell*, the defendant had driven his ex-wife to work when police arrived to arrest him on an outstanding warrant. He drove away to evade police, with his ex-wife still in the car. (*Bell, supra*, 179 Cal.App.4th at pp. 431–432, 439.) Because a reasonable jury could have found the defendant’s ex-wife fortuitously happened to be in the car and he did not flee in order to kidnap his ex-wife, the defendant’s reckless evasion of the police was deemed an “associated crime” to simple kidnapping. Thus, the trial court erred by failing to instruct the jury on the evasion’s relationship to the kidnapping. (*Id.* at p. 439.)

Here, there is obviously no suggestion of instructional error. Yet relying on *Martinez* and *Bell*, H.D. contends the juvenile court’s substantial distance finding is unsupported because his movement of P.P. was merely incidental to the May 27 assault. We are not persuaded.¹¹

The facts of this case are more analogous to those presented in *People v. Delacerda* (2015) 236 Cal.App.4th 282. In that case, the defendant dragged the victim somewhere between 22 and 40 feet, from the front door of her apartment and pushed her into a closet in her bedroom. (*Id.* at pp. 286, 287.) On appeal from his conviction for simple kidnapping, the defendant argued the jury had been misinstructed because it was not instructed to consider “whether the distance the other person was moved was beyond that merely incidental to” false imprisonment, assault with a firearm, and domestic violence battery. (*Delacerda*, at pp. 287–288, & fn. 1, italic omitted.)

The reviewing court concluded false imprisonment and assault with a firearm were not “associated crimes” of simple kidnapping, under the *Martinez/Bell* definition. (*People v. Delacerda, supra*, 236 Cal.App.4th at p. 289.) False imprisonment could not be an associated crime because it was a lesser included offense of simple kidnapping. (*Id.* at p. 291.) With respect to assault with a firearm, the court explained: “A review of the evidence reveals the only such act occurred when defendant pointed the gun at [at the victim], after she ran for the third time and he tackled her near the front door, but *before*

¹¹ In the alternative, H.D. maintains his defense counsel was ineffective in that she failed to argue this aspect of the asportation element. We do not address this argument because H.D.’s substantial evidence argument fails on the merits.

he dragged her back into the bedroom. *So this act involved no movement at all, and was complete before the movement which comprised the kidnapping began.* Consequently, this act was not an associated crime as a matter of fact.” (*Ibid.*) The court also rejected a substantial evidence challenge to the kidnapping count, concluding a reasonable trier of fact could find the movement was substantial. (*Id.* at pp. 294–295.) It explained: “[T]he evidence shows defendant dragged [the victim] for an actual distance at least 22 feet and perhaps as much as 40 feet. This distance was neither slight nor trivial. In addition, the jury could reasonably infer the reason for the movement was to decrease the likelihood of detection. Likewise, the jury could reasonably deduce the movement increased the risk of physical or psychological harm to [the victim], increased the danger of a foreseeable escape attempt by her, and gave defendant a greater opportunity to commit additional crimes against her.” (*Id.* at p. 295.)

Here too, there is no associated crime. The May 27 assault (count one) occurred before P.P. jumped out of H.D.’s window and was forcibly dragged back into the house, and then into H.D.’s locked bedroom. H.D. correctly points out that he punched P.P. as he was dragging her back to the house. However, the record is clear the true finding on count one was based solely on H.D.’s act of choking P.P. in his bedroom—an act that was complete before the kidnapping began. The juvenile court could have reasonably concluded P.P. was forcibly dragged a nontrivial distance from an outside area visible from the street, where she was potentially able to receive help from passersby, to the relative seclusion of his home and locked bedroom. By virtue of this movement, it was less likely H.D. would be detected if he committed additional crimes against P.P. It also became more difficult and dangerous for P.P. to escape.

H.D. insists only an alternative inference could be drawn from the evidence—that H.D. brought P.P. to a place of relative safety, where his mother could intervene. But the existence of an alternative inference is not dispositive. (*In re Ryan N., supra*, 92 Cal.App.4th at p. 1372.) And P.P.’s testimony made quite clear that H.D.’s intimidation of his own family members made it highly unlikely anyone inside the home

would successfully intervene on P.P.'s behalf.¹² Substantial evidence supports the juvenile court's true finding on the kidnapping count.

2. *Assault with Force Likely to Produce Great Bodily Injury*

H.D. also challenges the sufficiency of the evidence supporting the true findings on counts one and three. His argument rests largely on the mistaken assumption the People were required to show he *in fact* inflicted great bodily injury on P.P. Under the correct governing standard, there is no failure of proof.

In his opening brief, H.D. relies on Penal Code section 12022.7, subdivision (a), which provides: "Any person who *personally inflicts* great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years." (Italics added.) No such enhancement was charged or sustained. Rather, the juvenile court found H.D. committed two counts of assault by force likely to produce great bodily injury (*id.*, § 245, subd. (a)(4)).

Penal Code section 245, subdivision (a)(4), provides: "Any person who commits an assault upon the person of another *by any means of force likely to produce great bodily injury* shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment." (Italics added.) "The statute prohibits an assault by means of force *likely* to produce great bodily injury, not the use of force which does *in fact* produce such injury. While . . . the results of an assault are often highly probative of the amount of force used, they cannot be conclusive.' [Citation.] '[T]he question of whether or not the force used was such as to have been likely to produce great bodily injury, is one of fact for the determination of the jury based on all the evidence, including but not limited to the injury inflicted.' " (*People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1065–1066.) It is well established that "[o]ne may commit

¹² Some evidence supports H.D.'s assertion his mother "triggered [P.P.'s] rescue" by telephoning P.P.'s mother. However, P.P. also testified that she texted her mother, from behind the couch, and requested a ride home.

an assault without making actual physical contact with the person of the victim; because the statute focuses on . . . force *likely* to produce great bodily injury, whether the victim in fact suffers any harm is immaterial.” (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028 [construing former Pen. Code, § 245, subd. (a)(1)].) For these reasons, H.D. misplaces his reliance on cases involving enhancements for infliction of great bodily injury. (See, e.g., *People v. Nava* (1989) 207 Cal.App.3d 1490.)

In H.D.’s reply brief, he concedes his mistake but insists “nothing in the record supports a conclusion [H.D.] employed force likely to cause great bodily injury.” We disagree. “Great bodily injury is bodily injury which is significant or substantial, not insignificant, trivial or moderate.” (*People v. Armstrong, supra*, 8 Cal.App.4th at p. 1066.) H.D. insists P.P.’s injuries were insignificant because she did not seek medical treatment nor present any expert testimony regarding her injuries. P.P.’s testimony regarding the force H.D. used, combined with the evidence of the injuries she suffered, supports the juvenile court’s findings.

P.P. testified that, on May 25, 2015, H.D. punched her in the face, causing her nose to “crack” and bleed heavily. A blow from hands or feet may be sufficient to support a finding the defendant used force likely to produce great bodily injury. (*People v. Aguilar, supra*, 16 Cal.4th at p. 1028.) At the jurisdictional hearing, P.P. was shown photographs taken by police officers on May 27, 2015. She stated that, as a result of the May 25 blow, her nose looked different than normal in the photographs, and the area around her eyes was bruised. She testified her nose still had a bump at the time of the hearing. Furthermore, several people commented on P.P.’s “crooked” nose in the days immediately thereafter.

On May 27, 2015, H.D. used both hands to strangle P.P. to the point she could no longer feel her face and was scared she was going to die. P.P. also testified that certain marks on her neck and jaw, captured in the police photographs, were caused by H.D. choking her. The finger marks on her neck lasted “about three or four days.” “ ‘Abrasions, lacerations and bruising can constitute great bodily injury.’ ” (*People v. Hale* (1999) 75 Cal.App.4th 94, 108.) Even if P.P. did not in fact suffer great bodily

injury on May 27, the juvenile court could reasonably infer that H.D. used force likely to produce great bodily injury. (See *People v. Covino* (1980) 100 Cal.App.3d 660, 664, 667–668 [evidence defendant choked victim until she was gasping sufficient to support inference force was likely to produce great bodily injury].)

Substantial evidence supports the juvenile court’s findings H.D. used force likely to produce great bodily injury.

C. *Commitment to DJJ*

H.D. maintains the juvenile court abused its discretion by committing him to DJJ when less restrictive alternative placements existed. Specifically, he contends “his commitment to the [DJJ] was not preceded by a thorough investigation of the developmental and environmental factors which contributed to his behavior problems, and that in the absence of such analysis one could not reliably conclude that [H.D.] was likely to benefit from commitment to DJJ.” We disagree and affirm the commitment order.

We review an order committing a minor to DJJ for abuse of discretion. (*In re Carl N.* (2008) 160 Cal.App.4th 423, 431–432; *In re Asean D.* (1993) 14 Cal.App.4th 467, 473.) “ ‘We will not disturb the juvenile court’s findings when there is substantial evidence to support them. [Citation.] “ ‘In determining whether there was substantial evidence to support the commitment, we must examine the record presented at the disposition hearing in light of the purposes of the Juvenile Court Law.’ ” ’ [Citation.] ‘A trial court abuses its discretion when the factual findings critical to its decision find no support in the evidence.’ ” (*In re Khalid B.* (2015) 233 Cal.App.4th 1285, 1288.)

“The purpose of juvenile delinquency laws is twofold: (1) to serve the ‘best interests’ of the delinquent ward by providing care, treatment, and guidance to rehabilitate the ward and ‘enable him or her to be a law-abiding and productive member of his or her family and the community,’ and (2) to ‘provide for the protection and safety

of the public’ ([Welf. & Inst. Code,] § 202, subs. (a), (b) & (d); [citations].)”¹³ (*In re Charles G.* (2004) 115 Cal.App.4th 608, 614.) “In determining the judgment and order to be made in any case in which the minor is found to be a person described in Section 602, the court shall consider, in addition to other relevant and material evidence, (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.” (§ 725.5.)

1. *Background*

At the disposition hearing, the People presented a probation report in which H.D.’s probation officer recommended commitment at DJJ for a maximum term of seven years. The probation officer recognized H.D. suffers from numerous physical, emotional, and cognitive problems—limited range of motion due to back surgery, a kidney that had been surgically removed, mental health challenges, possible past trauma (physical abuse), and learning challenges. H.D. also admitted association with Sureños gang members and a history of substance abuse. The probation officer also indicated “[H.D.] has an extensive school discipline history of aggressive behavior, conflict, defiance and substance abuse and an extensive intervention history at Hanna . . . for continued aggressive behavior, conflict, disrespect, gang activity, . . . and verbal/physical altercations” It was further reported that, while at juvenile hall in connection with the instant charges, H.D. was deemed a security risk and transferred to a different unit. He was determined to be at “high risk to reoffend.”

The probation officer considered, but found H.D. unsuitable for, other placement options because of the gravity of H.D.’s offenses, his behavior in juvenile hall, and security concerns. The probation officer’s report indicated the Youthful Offender Treatment Program (YOTP) was unsuitable because of the gravity of the offenses and H.D.’s continued aggression. The Orin Allen Youth Rehabilitation Facility was found unsuitable because it was not sufficiently secure and because H.D. requires “a higher

¹³ All further undesignated statutory references are to the Welfare and Institutions Code.

level of counseling services than are available at [that facility].” In contrast, at DJJ, H.D. would receive an education consistent with his Individualized Education Plan (IEP), aggression interruption training, gang intervention, substance abuse treatment, and cognitive behavioral therapy.

H.D. presented testimony from his caseworker at Hanna, therapist Kevin Thorpe. Thorpe testified H.D. had made progress at Hanna; he had completed an anger management course, improved his grade point average, and done well in a forestry internship. Thorpe did not believe H.D.’s gang commitment was anything other than superficial. However, during the 16 months he was at Hanna, H.D. had also struggled—making gang references, testing positive for alcohol, having verbal and physical altercations with his peers, and exhibiting defiance and disrespect to staff.

At the conclusion of the evidence, defense counsel argued for a placement at YOTP, Hanna, or one of several “level 14” placements (Right of Passage, Optimist, or Courage to Change). The juvenile court observed that none of the “level 14” placements were locked facilities. The probation officer also reiterated that H.D. had been found unsuitable for out-of-home placement because of the gravity of the offenses, his behavior in juvenile hall, and security concerns.

The juvenile court explained its ruling: “My job as a judge is to do what I think is best for you, and it’s not to punish. It is to figure out where you’re going to get the most resources so that you don’t end up in prison. . . . [¶] . . . I’m thinking that you’re somebody who’s . . . very impulsive, and somebody who . . . needs a lot of assistance. . . . [¶] . . . [Y]ou had marijuana use in high school, gang activity . . . [, and] sexual harassment. You even shoulder-bumped teachers, and then you committed the residential burglary, and your parents arranged for you to go to [Hanna], and you were on probation at the time of this offense. [¶] And at [Hanna], your progress was stalled at times. You struggled. You had 22 discipline records. That’s . . . [a] lot of things . . . that you need to overcome. [¶] . . . And at Hanna some of the notable things were that you were disrespectful to the staff, you had verbal, and physical altercations. . . . [A]nd you’ve had solid representation, but the facts are the facts, and they’re really stubborn things. And

the facts in this case are extreme, you know, biting somebody, hitting in the face, hitting somebody possibly breaking their nose, choking them to the point where they think they're going to die. With having this activity continue for not just half an hour or something, but over the course of several days, shows somebody that's really in need because he's really out of control. You were really out of control. It's extreme conduct.

“[I]t isn't the first time that you've had these kind of problems. You had a history of abusing your mother. There's a record of you assaulting your mother, slapping your mother, hitting your mother. . . . [A]nd in this case, . . . there's also a battery of your mother. All this happens after . . . your anger management program [at Hanna] . . . [¶] And so then at juvenile hall, there's references in the report to you hitting another resident, being removed from school, not following directives, shouting profanity at staff, and you being a security problem.

“The request by your counsel is that you be put in placement, and placement has been rejected because of the seriousness of the offense and also because of your security risk. And . . . YOTP has also been rejected by probation because of the level of aggression and the services that they have. It's obvious to the court that you need intervention in the form of mental health counseling, and that's one of the things that YOTP doesn't appear to be equipped to provide the necessary rehabilitative services . . . with your continued aggressive behavior. YOTP also doesn't have the mental health component like DJJ does. [¶] And I know you're worried about going to [DJJ] because you're on the smaller side and you're 16, but they do separate kids by their ages. . . . [A]nd they do have . . . school and, they also have programs for someone like yourself who has an IEP. [¶] . . . [¶] So the court is going to follow the recommendation of probation. I do think it's the best rehabilitative means for you. [¶] . . . [¶] I do think that you are also a security risk and flight risk, as noted with [Hanna]. . . . [¶] And also because of the threats to the community because anybody who could allow themselves to do this kind of thing, as in this case, is a danger to the community. [¶] And so I adopt and accept the recommendations of probation. . . . [¶] . . . [A]nd you will go to [DJJ]. . . .

[Y]ou do have an IEP, and . . . [DJJ] need[s] to make special accommodations for your education with regard to that.”

With regard to H.D.’s term of confinement, the court stated: “And so you have 10 years, 326 days of custody time remaining. [¶] You are continued as an indefinite ward of the court. . . . [¶] . . . [Y]ou will go to the [DJJ]. The maximum term will be seven years with credit for time served of 159 days, but that doesn’t mean you’re actually going to serve seven years. So how well you program and how well you do will determine when you’re released.”

2. *Analysis*

Commitment to DJJ is the most restrictive permissible sanction, intended for the most serious juvenile offenders. (§ 202, subd. (e)(5); *In re Teofilio A.* (1989) 210 Cal.App.3d 571, 578 (*Teofilio A.*)) Before 1984, California courts treated a commitment to DJJ’s predecessor, the California Youth Authority, as “ ‘the placement of last resort’ for juvenile offenders.” (*In re Carl N., supra*, 160 Cal.App.4th at p. 432.) “ ‘In 1984, the Legislature replaced the provisions of section 202 with new language which emphasized different priorities for the juvenile justice system. (Stats. 1984, ch. 756, §§ 1, 2, pp. 2726–2727.) The new provisions recognized punishment as a rehabilitative tool. (§ 202, subd. (b).) 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” (§ 202, subd. (a); [citation]), where care, treatment, and guidance shall conform to the interests of public safety and protection. (§ 202, subd. (b).) [¶] 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. This interpretation by no means loses sight of the “rehabilitative objectives” of the Juvenile Court Law. (§ 202, subd. (b).)’ ” (*Teofilio A.*, at pp. 575–576.) “In 1999, although the Legislature deleted from the statute a list of punitive sanctions available to the juvenile court (Stats. 1999, ch. 997, § 1.1, p. 7588) it retained language, which still appears, that ‘ “punishment” means the imposition of sanctions,’ and that punishment ‘does not include retribution’ (§ 202, subd. (e)). . . .

[Thus, j]uvenile proceedings continue to be primarily rehabilitative, disallowing punishment in the form of retribution.” (*Julian R.*, *supra*, 47 Cal.4th at p. 496.) “[W]hen we assess the record in light of the purposes of the Juvenile Court Law [citation], we evaluate the exercise of discretion with punishment and public safety and protection in mind.” (*In re Lorenza M.* (1989) 212 Cal.App.3d 49, 58.)

The juvenile court’s discretion to commit a minor to DJJ is limited. (*Teofilio A.*, *supra*, 210 Cal.App.3d at p. 576.) “[A DJJ] commitment must be based on a recent violent offense or sex crime adjudicated in a delinquency petition.” (*In re Greg F.* (2012) 55 Cal.4th 393, 404; accord, §§ 731, subd. (a)(4), 733, subd. (c).) Furthermore, “[n]o ward of the juvenile court shall be committed to [DJJ] unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by the [DJJ].” (§ 734.) “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.” (*Teofilio A.*, at p. 576; accord, *In re Angela M.* (2003) 111 Cal.App.4th 1392, 1396.)

“Nevertheless, there is no rule that a [DJJ] placement cannot be ordered unless less restrictive placements have been attempted, and there is no requirement that the juvenile court expressly state on the record the reasons for rejecting less restrictive placements. [Citations.] Rather, ‘if there is evidence in the record to show a consideration of less restrictive placements was before the court, the fact the judge does not state on the record his consideration of those alternatives and reasons for rejecting them will not result in a reversal.’ ” (*In re Nicole H.* (2016) 244 Cal.App.4th 1150, 1159.)

We are not convinced by H.D.’s claim that the juvenile court failed to properly consider his unique needs or less restrictive placements. At the time of the disposition, H.D. was 16 years old, and shown to be a recidivist offender who, despite prior attempts at rehabilitation, had most recently committed kidnapping and two violent assaults against his girlfriend. Assault by means of force likely to produce great bodily injury is

one of the serious offenses for which the Legislature has specifically deemed a DJJ commitment appropriate. (§§ 731, subd. (a)(4), 707, subd. (b)(14).) “The gravity of the offense is by statute a proper consideration at disposition.” (*In re Robert H.* (2002) 96 Cal.App.4th 1317, 1330.)

The juvenile court not only considered the seriousness of H.D.’s offenses, but also properly considered H.D.’s prior juvenile history, his unsuccessful attempts to rehabilitate in a less secure environment, and his disregard for authority at home, at Hanna, and in juvenile hall. The record is replete with explicit references to H.D.’s educational and mental health needs. Indeed, the juvenile court recognized that DJJ would provide H.D. with services tailored to those needs, including mental health services not available in other less secure settings.

The juvenile court did not abuse its discretion in concluding DJJ would provide probable benefit to H.D., as well as public safety. “There is no requirement that the court find exactly how a minor will benefit from being committed to DJJ. The court is only required to find if it is probable a minor will benefit from being committed” (*In re Jonathan T.* (2008) 166 Cal.App.4th 474, 486.) The court clearly considered DJJ to be in H.D.’s best interest because he would receive, in a secure environment where he would be less likely to commit additional offenses, an education consistent with his IEP, aggression interruption training, gang intervention, substance abuse treatment, and cognitive behavioral therapy.

Nor can the record of the juvenile court’s consideration of less restrictive alternatives be described as “devoid.” H.D. suggests the probation officer and juvenile court failed to explore Hanna or several “level 14” placements, including Right of Passage, Optimist, and Courage to Change. The record does not support his argument. The court expressly stated it had considered these less restrictive alternatives and rejected them because they were insufficiently secure and did not provide optimal rehabilitative services. H.D. committed the present offenses after 16 months in a less restrictive

placement, where he received anger management counseling, but nonetheless threatened flight after learning his girlfriend wanted to break up with him.¹⁴

The juvenile court did not abuse its discretion in concluding H.D. would probably benefit from the services at DJJ *and* that less restrictive alternatives were inappropriate. (*In re Angela M.*, *supra*, 111 Cal.App.4th at p. 1396; *Teofilio A.*, at pp. 575–576.) Substantial evidence supports the juvenile court’s determination.

D. *Maximum Term of Confinement*

Finally, H.D. insists the juvenile court failed to exercise its discretion to set a maximum term of confinement under section 731, subdivision (c). “When a minor within the jurisdiction of the juvenile court is committed to [DJJ], the juvenile court is required to indicate the maximum period of physical confinement. (§ 726, subd. [(d)(1)].) In setting that confinement period, which may be less than, but not more than, the prison sentence that could be imposed on an adult convicted of the same crime, the court must consider the ‘facts and circumstances’ of the crime. (§ 731, subd. (c).)”¹⁵ (*Julian R.*, *supra*, 47 Cal.4th at pp. 491–492.)

“The courts construe . . . section 731, subdivision (c) to confer on the court the discretion not only to impose a theoretical maximum term of physical confinement equal to an adult’s maximum period of imprisonment . . . for the identical offense . . . but also to impose a shorter theoretical maximum term of physical confinement on the basis of the

¹⁴ Thorpe only testified H.D. would be welcome to “reapply” to Hanna and made clear he did not know if H.D. would be accepted.

¹⁵ Section 731, subdivision (c), provides in relevant part: “A ward committed to [DJJ] may not be held in physical confinement for a period of time in excess of the maximum period of imprisonment that could be imposed upon an adult convicted of the offense or offenses that brought or continued the minor under the jurisdiction of the juvenile court. *A ward committed to the [DJJ] also may not be held in physical confinement for a period of time in excess of the maximum term of physical confinement set by the court based upon the facts and circumstances of the matter or matters that brought or continued the ward under the jurisdiction of the juvenile court, which may not exceed the maximum period of adult confinement as determined pursuant to this section.*” (Italics added.)

facts and circumstances of the case.” (*In re Alex U.* (2007) 158 Cal.App.4th 259, 264, fn. omitted.) The record need not affirmatively show the juvenile court considered imposition of a confinement period shorter than the adult maximum. On a silent record, the reviewing court will presume the juvenile court performed its statutory duty to consider the “ ‘facts and circumstances’ ” of the juvenile’s offense. (*Julian R., supra*, 47 Cal.4th at p. 492; Evid. Code, § 664.)

The People assert H.D. forfeited the instant argument by failing to urge the juvenile court to exercise its discretion to impose a confinement term shorter than the adult maximum term. “In juvenile court, as in an adult criminal proceeding, a claim that the court failed to make or articulate a discretionary sentencing choice must be raised by objection in the trial court in order to preserve the claim for appeal.” (*In re Travis J.* (2013) 222 Cal.App.4th 187, 201 (*Travis J.*)) In response, H.D. alleges that, if there was a forfeiture, his defense counsel was ineffective. We need not resolve the forfeiture issue however, because H.D.’s argument fails on the merits.¹⁶

H.D. maintains the juvenile court’s failure to check a box on Form JV-732 is evidence it failed to exercise its discretion under section 731. Here, under the heading “Confinement period,” the Form JV-732 shows two boxes; the first box is labeled “[t]he maximum period of confinement” and the second states, “[t]he court has considered the individual facts and circumstances of the case in determining the maximum period of confinement” (see § 731). The first box reflects a maximum period of confinement of 11 years and four months, while the second box is not checked.

In *Travis J., supra*, 222 Cal.App.4th 187, we rejected a similar argument that a juvenile court committed reversible error when it failed to check the same box (No. 8.b) on Form JV-732 to confirm that the court had “ ‘considered the individual facts and circumstances of the case in determining the maximum period of confinement.’ ” (*Id.* at p. 201.) We explained: “As here, the minor [in *Julian R., supra*, 47 Cal.4th 487] argued

¹⁶ Likewise, we need not address H.D.’s assertion his defense counsel was ineffective.

that ‘a reviewing court must presume from the record’s silence that the juvenile court was either unaware of, or failed to perform, its statutory duty to consider that the “facts and circumstances” might warrant a confinement period shorter than the adult maximum term.’ (*Julian R.*, at p. 498.) Rejecting that argument, the court observed that applying such a presumption would ‘ “ignore a cardinal principle of appellate review”: [that a] “ “judgment or order of the lower court is *presumed* correct” ’ ” ’ and ‘ “ “that a trial court is presumed to have been aware of and followed the applicable law.” ’ ” . . . [T]hus when “a statement of reasons is not required and the record is silent, a reviewing court will presume the trial court had a proper basis for a particular finding or order.” ’ (*Id.* at pp. 498–499, citations omitted.)” (*Travis J.*, at p. 201.)

In *Travis J.*, the record was not silent because defense counsel had repeatedly reminded the juvenile court of its obligation to make an independent finding on the appropriate DJJ term, specifically referencing section 731, subdivision (c). The court also gave a detailed statement of reasons supporting its decision to select a three-year maximum term. (*Travis J.*, *supra*, 222 Cal.App.4th at pp. 201–202.) Although the juvenile court did not expressly reference section 731, subdivision (c) in doing so, we presumed “the juvenile 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” [citation]’ (*Julian R.*, *supra*, 47 Cal.4th at p. 499, fn. omitted.)” (*Travis J.*, at p. 202.)

Here too, the record is not silent. The unchecked box on Form JV-732 is not conclusive and is rebutted by the court’s oral pronouncement at disposition that “[t]he maximum term will be seven years.” We can reasonably infer from the juvenile court’s oral pronouncement, which came immediately after the juvenile court stated H.D. had “10 years, 326 days of custody time remaining,” that the court exercised its discretion under section 731 to impose a lower maximum term of confinement. (See Pen. Code, § 208, subd. (a) [“Kidnapping is punishable by imprisonment in the state prison for three, five, or eight years”].) The record does not support H.D.’s contention the juvenile court

failed to exercise its discretion to set the minor's maximum term at something less than the maximum term that could be imposed on an adult. (See *Travis J.*, *supra*, 222 Cal.App.4th at pp. 201–202; *In re H.D.* (2009) 174 Cal.App.4th 768, 776.)

In the alternative, H.D. asks us to correct Form JV-732, which reflects his maximum term of confinement as 11 years and four months instead of the seven years the juvenile court orally pronounced at disposition. The People acknowledge there is a discrepancy between the court's oral pronouncement and the Form JV-732, but unpersuasively argue no modification is required because the "11 years and 4 months" shown on Form JV-732 is merely a correct statement of H.D.'s "'maximum period of confinement' under . . . section 726." Ordinarily, where there is a discrepancy between an oral pronouncement of judgment and an abstract of judgment or minute order, the record of the oral pronouncement controls over the clerk's entries. (*People v. Farrell* (2002) 28 Cal.4th 381, 384, fn. 2; *People v. Hong* (1998) 64 Cal.App.4th 1071, 1075.) Accordingly, we will order Form JV-732 to be corrected.

III. DISPOSITION

The juvenile court is ordered to correct Form JV-732 to reflect a maximum term of commitment, per section 731, subdivision (c), of seven years. In all other respects, the judgment is affirmed.

BRUINIERS, J.

WE CONCUR:

SIMONS, Acting P. J.

NEEDHAM, J.

A146480