

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JERRETT MARTELL LEWIS,

Defendant and Appellant.

D059015

(Super. Ct. No. INFO58881)

APPEAL from a judgment of the Superior Court of Riverside County, James S. Hawkins, Judge. Affirmed in part, reversed in part and remanded with directions.

A jury convicted Jerrett Martell Lewis of premeditated and deliberate murder (Pen. Code,¹ § 187, subd. (a), count 1); active participation in a criminal street gang (§ 186.22, subd. (a), count 2); and robbery (§ 211, count 3). It found true special circumstance allegations that the murder was committed during the commission of a robbery (§ 190.2, subd. (a)(17)), and allegations that counts 1 and 3 were committed for

¹ All statutory references are to the Penal Code.

the benefit and direction of, and in association with, a criminal street gang (§ 186.22, subd. (b)). The trial court denied probation and sentenced Lewis to life without the possibility of parole for the count 1 conviction, a concurrent two-year midterm for the count 2 conviction, and on count 3, a five-year upper term plus a 10-year enhancement under section 186.22, subdivision (b). The court stayed the sentence on count 3 under section 654.

Lewis contends the trial court prejudicially erred by denying his motion to suppress self-incriminating statements he made to police both before and after he was read his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*); that his pre-*Miranda* statements were the product of custodial interrogation, and his post-*Miranda* statements were elicited by the sort of deliberate two-step interrogation process condemned in *Missouri v. Seibert* (2004) 542 U.S. 600. Lewis alternatively contends remand for resentencing is required because the trial court did not appreciate its sentencing discretion with regard to the special circumstance murder conviction, and relied on dicta to find a statutory preference for imposing a sentence of life imprisonment without the possibility of parole. Lewis further contends in the absence of reversal or remand, the clerk's minutes and abstract of judgment do not conform to the trial court's oral pronouncement.

We conclude the trial court erred because it neither imposed nor struck the 10-year enhancement on count 1 under section 186.22, subdivision (b)(1)(C). We agree the trial court must correct the clerk's minutes and abstract of judgment to accurately reflect its oral rendition of judgment as to count 2 and the absence of a jury finding as to section

12022, subdivision (b). Accordingly, we reverse and remand the matter for resentencing on count 1, and to permit the court to make the foregoing corrections. In all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Events of June 9, 2007

In the early morning hours of June 9, 2007, Wallace Brown, who was at the time working his job as a security guard, was found severely beaten and bleeding on the ground next to his vehicle. The driver's side window of the vehicle was smashed, and there were bloody rocks on the ground and floorboard of the vehicle. Brown later died from injuries caused by blunt force trauma. Security video from a nearby Valero gas station showed that four males were at the station shortly before Brown's beating and left in a Ford Explorer. Later that afternoon, Palm Springs Police Department Detective Frank Browning conducted a traffic stop on an Explorer driven by then 17-year-old Lewis after searching for the Explorer with other officers.

Lewis's Interview and Arrest

Detective Browning asked Lewis to step outside and spoke with him at the rear of the vehicle, asking Lewis if he knew anything about the robbery and beating. Lewis denied knowing anything. After the detective reminded him that the Valero station had cameras, Lewis admitted he had driven the vehicle that morning and stood by while others got out and beat up Brown, but claimed he was not involved in the crime. At Detective Browning's request, Lewis agreed to go to the police station give a more

detailed statement. He rode with the detective in the front passenger seat of the detective's unmarked police vehicle. Lewis was not handcuffed.²

Detective Browning took Lewis to an interview room equipped with audio and video monitors, where he proceeded to interview Lewis about what happened that morning. According to the detective, Lewis was at that time considered a witness and was free to leave even though he had already admitted he was at the scene of the assault and robbery as the vehicle driver. The detective began the interview by saying, "Alright man, like I said, we know what happened. You're not, you're not under arrest right now, you know that, okay? You're free to leave. The door's out that way. Okay. What I'm gonna do is, I just wanna ask about what you know about this. As real as it may be, okay? . . . [W]hat I'm gonna ask you to do, no matter what you tell me, I want the honest . . . truth. That's all I'm asking you for. Okay? Cause I don't wanna take everything you tell me and prove it all to be a lie."

Detective Browning asked Lewis who was in the car that night, and Lewis told him he was with Jamar Thomas, Darius Lee and Akil Williams, and they all went into the store for cigarettes and various items. Lewis said that before they went to the store, he drove by Brown's vehicle to see who was in the car, then went into the store and left. Browning reminded Lewis that he had already told them "how it went down," not exactly what happened, but that something "went down" and he waited for the others. When

² On appeal, Lewis does not renew his Fourth Amendment challenge to his initial traffic stop, or raise any issue concerning the statements he made to Detective Browning at the scene of the traffic stop.

Lewis said he was just "down the street" and left after everyone got back into the car, Browning suggested he was lying based on his earlier statements, and pressed him for the truth.³ He told Lewis he was going to pinpoint the time they drove by Brown and someone asked who he was, and they exited the car. Lewis again denied anyone left his vehicle, and Browning asked why he had told them otherwise. Browning said, "I'm not saying you got off the car with them, but I know you were there, I know you waited for them." When Lewis finally admitted he had gotten out of the car with the others, the detective responded, "You made a mistake man. Now's your time to correct your mistake."

Lewis then admitted helping the others pull Brown out of the car, because the others could not, but then claimed he left: "I'm saying, I didn't do all of the little killing and what ever ya'll said we beat him, I just (Unintelligible), and that's it." (Bold omitted.) Lewis denied knowing what happened, claiming to be drunk and tired. Detective Browning continued to ask Lewis what happened, why it all started, and Lewis said he was being stupid and everyone was "loaded"; that someone in the car thought Brown was "messaging" with them by his look, and that he jumped out of the car and pulled Brown out, after which they all scattered.

Lewis continued to talk, saying that Brown's head was already "busted and shit" before he pulled him out of the vehicle, and alternately that Brown was still sitting in his car with the window broken before he pulled him out. Lewis eventually told the

³ At one point, Detective Browning remarked, "Right there you're gonna, like I told you man, you're gonna choose your destiny. If you, you're gonna lie to me—that's fine."

detective that he had run over to Brown to see what was going on and pulled Brown out when he got there. Lewis said, "He [Brown] was already (Imitating groans of victim) like that—on the floor and shit. So then and shit, everybody just broke, they didn't want no more of him or something. I guess he was beat up or something. I don't know. He was like bloody right here." (Bold omitted.) Lewis said that the men "probably" did more to Brown while he was on the ground; "he was on the floor and I guess they hit him a couple more times." The detective asked how they hit Brown and with what, and Lewis responded that they hit him one at a time: "Oh, they poom, poom (imitating punches thrown), and then just poom, poom and then just" (Bold omitted.)

Detective Browning began to press Lewis about who was hitting Brown and their names, when Detective Rhonda Long entered the room. About nine minutes later, Detective Long asked Detective Browning if she could speak with him, and Browning asked Lewis if he wanted water. Browning told Lewis if he needed to use the restroom, "it's right out here." While alone, Lewis whispered, "What did I get myself in?" He then opened the door, which was unlocked, and asked Detective Long how much longer the interview would take because he wanted to get his mother's car back to her. He asked Long to tell his mother he was "sorry for this" and was just trying to get her car back.

When Detective Long reentered the room, she began asking questions about where Lewis was living and where his mother was staying. She then asked Lewis his age, and he told her he was seventeen. Long responded that because he was a juvenile and she was chatting with him, she had to give him *Miranda* warnings as a matter of procedure, telling him he was "not in custody or anything" She had Lewis sign a written

acknowledgment of the waiver. Afterwards, Lewis complained to Detective Long that Detective Browning did not seem to be listening to him, that he seemed to be trying to "nail" him or make it seem like he was lying and Lewis wanted her to tell Detective Browning he did not know "who did what really." Lewis explained he was trying to tell Detective Browning that Brown was already beat up when they got to his car; that he hit Brown once, Thomas "hit him a couple of times," and then "[s]ome other dude just ran up and did the rest" by kicking Brown a couple of times, and then left.

Detective Browning reentered the room, and Lewis reiterated that Brown was already beat up before he pulled him out of his vehicle; that he and Thomas hit him "a couple of times," and then another person came up and "did the damage." Lewis explained he did not want to get innocent people in trouble and have their family "coming back and hating on me" because he " 'snitched.' " Lewis claimed that he hit Brown on the side, in his ribs, and that he did it because he was "[j]ust in the moment or whatever" He claimed not to know the person who kicked Brown last. In response to questioning, he told the detective he and the others all ran away because "dude sat there bloody" and they were not going to stay while he was in that condition. Lewis later admitted he saw Thomas take Brown's wallet, but it did not contain any money.

During additional questioning, Lewis told the detectives that Thomas broke the window of Brown's vehicle with a rock, struggled with Brown and also punched him a couple of times, then rummaged through Brown's pockets for his wallet. Lewis admitted throwing a rock at Brown and trying to hit him, but said the rock broke the other window of his vehicle. Lewis also admitted hitting Brown twice in the back and ribs with both

hands while Brown screamed and moaned. He recounted that he looked down at Brown's face and body and saw that he was "fucked up." Lewis later told Detective Long that after they saw the security guard, he knew the others were going to do something to him just because he looked at them without any fear. According to Lewis, he got blood "all in my" shirt and remembered "grabbing all my clothes and throwing it in [the washing machine]." After the interview, the detectives placed Lewis under arrest.

Later that night, detectives put Lewis and Williams together in the same room and recorded their conversation. Lewis made additional incriminating statements, telling Williams he had not seen the videotape "where we were beating him up" and that he was being honest by telling the detectives he hit Brown. Lewis told Williams he had told the detectives that Thomas threw the rock through the window and hit him a couple of times; that all Lewis had done was pull him out of the car. Speaking about Thomas, Lewis told Williams he had dropped him off, and that he [Lewis] "buried the shoes." According to Lewis, he "thought [Brown] was done" and was "scared 'cause [Brown] was gone . . . him beat up and all." Lewis told Williams he had told detectives that "somebody else came up and kicked him in the head" and asked Williams to help him "make up the name to just tell them that . . ."

Motion to Suppress and Hearing

Lewis moved under section 1538.5 to suppress the incriminating statements he had made to police during the traffic stop and at the police station, in part on grounds his incriminating statements were made during a custodial interrogation without required *Miranda* warnings.

Detective Browning testified at the hearing. The detective described his traffic stop on Lewis's vehicle, explaining he pulled it over at approximately 12:50 p.m., after seeing it make a left hand turn without signaling. Though he was accompanied by another officer in a marked vehicle, the detective did not have his gun drawn or conduct a "felony stop." Detective Browning identified himself as a police officer and asked Lewis for his driver's license, which Lewis did not have. The detective asked Lewis to step outside and, while they stood behind Lewis's vehicle, inquired about the incident at the Valero station and obtained Lewis's agreement to return to the station with him, where Lewis was interviewed in an "out-of custody" interview room adjacent to the dispatch area. Lewis's brother was a passenger in the car, but Browning did not speak to him. At the time he asked if Lewis would come to the station, Detective Browning did not understand that Lewis was 17 years old, and did not attempt to notify Lewis's mother that he would be at the police station. Detective Browning testified that he did not give Lewis Miranda warnings when he began questioning him at the station because Lewis was not a suspect or in custody. The prosecution played the tape of Lewis's interview up to the point he was given Miranda warnings by Detective Long.

Lewis's brother, Jarrett Lewis, testified concerning the traffic stop. He testified that when Lewis entered Detective Browning's vehicle, he asked an officer where they were taking him, and the officer told him his brother was not in trouble and that was why he was not handcuffed, and they were taking him to talk to him. Jarrett testified that for six hours afterwards, he and his mother called the police station to find Lewis and were told he was not there.

The trial court denied the motion: "I don't see any problem with the . . . detention. And everything that I saw indicates that the Defendant Lewis voluntarily went to the police station, voluntarily talked to police officers, was not a custodial situation, there was no need for *Miranda* [warnings]"

DISCUSSION

I. *The Trial Court Did Not Err in Admitting Lewis's Pre-Miranda Statements to Police*

Lewis contends the trial court erred in denying his motion to suppress the incriminating statements he made to Detectives Browning and Long; that under the relevant legal standards he was in custody for purposes of *Miranda* and should have been given warnings before his interrogation. According to Lewis, under all of the circumstances, a reasonable person in his situation would not feel at liberty to terminate the interrogation and leave. Lewis further argues the "midstream recitation" of the *Miranda* warnings were ineffective and thus his admissions made after Detective Long gave him the *Miranda* advisements were also obtained unlawfully.

A. *Applicable Legal Principles*

In *Miranda, supra*, 384 U.S. at p. 444, the United States Supreme Court declared that a person questioned by law enforcement officers after being "taken into custody or otherwise deprived of his freedom of action in any significant way" must first "be warned that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Statements elicited without complying with this rule are

inadmissible for certain purposes in a criminal trial. (See *Stansbury v. California* (1994) 511 U.S. 318, 322; *People v. Nelson* (2012) 53 Cal.4th 367, 374.)

"An interrogation is custodial, for purposes of requiring advisements under *Miranda*, when 'a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' [Citation.] Custody consists of a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest. [Citations.] When there has been no formal arrest, the question is how a reasonable person in the defendant's position would have understood his situation. [Citation.] All the circumstances of the interrogation are relevant to this inquiry, including the location, length and form of the interrogation, the degree to which the investigation was focused on the defendant, and whether any indicia of arrest were present." (*People v. Moore* (2011) 51 Cal.4th 386, 394-395; see also *Howes v. Fields* (2012) ___ U.S. ___ [132 S.Ct. 1181, 1189]; *Yarborough v. Alvarado* (2004) 541 U.S. 652, 663 [courts must examine " 'all of the circumstances surrounding the interrogation' " and determine " 'how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action' "]; *Stansbury v. California*, 511 U.S. at pp. 322, 325.) "[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." (*Yarborough*, at p. 663.)

In *Yarborough v. Alvarado*, the Supreme Court addressed whether a seventeen-year-old defendant was in custody. (*Yarborough*, 541 U.S. at p. 656.) Police left messages at Alvarado's house and with his mother that they wished to speak with him,

and his parents brought him to the police station. (*Ibid.*) During the two-hour interview, in which Alvarado's parents were not permitted to be present and Alvarado was not told he was free to leave, the officer questioned Alvarado's honesty in answering questions by confronting him about what witnesses had said. (*Ibid.*) When Alvarado slowly began to change his story, the officer pressed him to discuss what happened, appealing to his sense of honesty. (*Id.* at p. 657.) Alvarado ultimately made several incriminating statements, but was allowed to leave with his parents. (*Id.* at p. 658.) The police recorded the conversation with Alvarado's knowledge. (*Id.* at p. 656.)

Noting that "fair-minded jurists could disagree," the court determined that the state court's finding of no custody was eminently reasonable. (*Yarborough v. Alvarado, supra*, 541 U.S. at pp. 664-665.) According to the court, several facts weighed against a finding of custody: the police did not transport Alvarado to the station or require him to appear at a certain time; they did not threaten or suggest that he would be placed under arrest; instead of threatening arrest, the interviewing officer appealed to Alvarado's interest in telling the truth and being helpful to the officer; the officer asked the defendant if he wanted to take a break; and Alvarado went home at the end of the interview. (*Id.* at p. 664.) According to the court, other facts weighed in favor of custody: the officer interviewed Alvarado at the police station; the interview lasted two hours; the officer did not tell Alvarado that he was free to leave; and instead of arriving of his own accord, Alvarado's parents brought him to the station, making his control over his presence at the station unclear. (*Id.* at p. 665.) Given the circumstances on both sides of the custody

determination, and in view of the custody test's general nature, the court ruled the state court's application fit within the matrix of the court's prior decisions. (*Ibid.*)

More recently, in *J.D.B. v. North Carolina* (2011) ___ U.S. ___ [131 S.Ct. 2394], the court held a child's age can be relevant to the custody determination for purposes of *Miranda* warnings because "[i]n some circumstances, a child's age 'would have affected how a reasonable person' in the suspect's position 'would perceive his or her freedom to leave.'" (*Id.* at p. ___ [131 S.Ct. at pp. 2402-2403].) The court held inclusion of that consideration is consistent with the objective nature of the custody analysis, "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer" (*Id.* at p. ___ [131 S.Ct. at p. 2406].)

"Whether a defendant was in custody for *Miranda* purposes is a mixed question of law and fact. [Citation.] When reviewing a trial court's determination that a defendant did not undergo custodial interrogation, an appellate court must "apply a deferential substantial evidence standard" [citation] to the trial court's factual findings regarding the circumstances surrounding the interrogation, and it must independently decide whether, given those circumstances, "a reasonable person in [the] defendant's position would have felt free to end the questioning and leave." ' ' (*People v. Moore, supra*, 51 Cal.4th at p. 395.)

B. *Analysis*

Having reviewed the record, and giving deference to the trial court's factual findings, we conclude Lewis was not in custody before he was provided *Miranda*

warnings, and thus his pre-*Miranda* incriminating statements were admissible. Lewis was brought to the police station by Detective Browning, but the record shows he was not "summoned" as Lewis argues. Rather, he went there voluntarily, sitting unrestrained in the front passenger seat of the detective's vehicle. (*Oregon v. Mathiason* (1977) 429 U.S. 492, 495 [the fact that the defendant came to the police station voluntarily and was told he was not under arrest suggested he was not in custody]; *California v. Beheler* (1983) 463 U.S. 1121, 1123-1124 (*Beheler*).) Furthermore, at the time he agreed to go to the station, Lewis understood he would be questioned there. (*Beheler*, at p. 1125 [holding defendant was not in custody when he agreed to accompany police to the station to answer questions and was allowed to leave immediately afterwards].) While at the station, Detective Browning told Lewis he was not under arrest and was free to leave. During the interview, Lewis was not handcuffed or otherwise physically restrained; his freedom of movement was restricted only by virtue of the fact the questioning occurred in an interview room with the door closed. However, the door was unlocked and Detective Browning made it clear Lewis could use the bathroom if he wished, telling him, "[I]t's right out here." Indeed, at one point during a break in the interview, Lewis was alone for three minutes and stepped outside the room to speak with Detective Long, who asked him if he was "fine," and if he wanted a soda or water. (Accord, *Howes v. Fields*, *supra*, ___ U.S. at p. ___ [132 S.Ct. at p. 1193] [concluding coercive circumstances, including the fact that an in-prison interview lasted from five to seven hours, were offset by the circumstances that the respondent was told at the outset and reminded he could leave and go back to his cell whenever he wanted, he was not physically restrained, he was offered

food and water, and the door to the room was sometimes left open].) Detective Long also told Lewis that he was not in custody when she explained that the *Miranda* warnings were a matter of procedure due to his age. The detectives did not display force, and though Detective Browning was accusatory at times in the interview, he was not overly aggressive in tone and he focused on the actions of the other individuals with Lewis that morning. We conclude the objective facts are consistent with an environment in which a reasonable person in Lewis's position would have felt free to leave at any time.

Concededly, there are some facts that would weigh in favor of a custody finding; namely, the length of Lewis's interview and the fact it occurred in a police station, and Lewis's arrest at the conclusion of the interview. But as a whole, the facts suggesting that Lewis was in custody are less compelling than those present in *Yarborough v. Alvarado*, *supra*, 541 U.S. 652, and they are outweighed by the other facts showing Lewis understood he could leave the interview room and was primarily questioned about the crimes that others committed against Brown.

In urging us to reject the trial court's finding he was not in custody, Lewis argues that "[e]ven though [he] was not under formal arrest, in handcuffs, or in a locked, windowless room, the fact that he was being interrogated by two police detectives at a police station, as opposed to at his home or at another non-law-enforcement venue, should not be underestimated, particularly when [his] youth and lack of experience with the criminal justice system are taken into account." But in *Yarborough*, the court suggested that reliance on a suspect's prior history with law enforcement was improper when applying the objective custody rule, which is "designed to give clear guidance to

the police" (*Yarborough v. Alvarado*, *supra*, 541 U.S. at p. 668.) As for his age, Lewis was over six-feet tall and his probation report indicates he weighed approximately 200 pounds; there is no reason to conclude the fact he was a minor was "known to [Browning] or objectively apparent" to him or a reasonable officer for purposes of considering his age in the custody analysis. (*J.D.B. v. North Carolina*, *supra*, ___ U.S. ___ [131 S.Ct. at p. 2406].)

Given the foregoing conclusion, we need not address Lewis's further contentions that his post-*Miranda* incriminating statements were tainted by his earlier, assertedly illegally obtained, statements, and that the admission of his pre-*Miranda* statements was not harmless error.

II. *Youthful Defender Sentencing Discretion*

Lewis contends his case should be remanded for resentencing because the trial court applied an erroneous statutory presumption for an indeterminate term of life without the possibility of parole (LWOP) on his count 1 murder charge, and thus misunderstood the scope of its discretion. The contention is without merit.

A. *Background*

The court at Lewis's sentencing hearing gave its indicated sentence on the count 1 first degree murder under section 190, subdivision (b) as follows: "Under Penal Code section 190 [Lewis is] not eligible for probation. Count 1, for a violation of [section] 187, 190.2[, subdivision] (a)(17), in the court's discretion he's a candidate for life without the possibility of parole or 25 years to life. That's because he was convicted of murder with special circumstances, he was under the age of 18, and the trial court has

discretion under [section] 190.5[, subdivision] (b) to consider both and to also utilize the factors under California Rules of Court[, rules] 4.421, 4.423 and Penal Code section 190.3[, subdivisions] (a) through (k). But life without the possibility of parole is the statutory preference according to *People v. Ybarra* [2008] 166 Cal.App.4th 1069"

The court stated the only circumstance in mitigation for Lewis was that he had no record, but there were numerous aggravating circumstances; namely, the crime involved "great violence, viciousness, cruelty and callousness"; Lewis used a rock as a weapon; Brown was particularly vulnerable; Lewis induced others to participate; and the crime showed planning, sophistication and professionalism in that Lewis planned out the robbery and snuck up on Brown. It found Lewis was a serious danger to society if not imprisoned. After considering the probation report, sentencing documents and letters on Lewis's behalf, the court stated the appropriate sentence for Lewis was life without the possibility of parole.

B. *Legal Principles*

Lewis was 17 years old at the time of the offense. Section 190.5, subdivision (b) provides: "The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances . . . has been found to be true . . . who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life." (§ 190.5, subd. (b).)

Several courts have held, or have adopted the reasoning of cases holding, that section 190.5 establishes a presumptive penalty of LWOP for a 16- or 17-year-old

convicted of special circumstances murder, allowing the court to exercise its discretion and impose a lesser 25-year-to-life sentence. (*People v. Murray* (2012) 203 Cal.App.4th 277, 282 [Second District, Division Eight]; *People v. Blackwell* (2011) 202 Cal.App.4th 144, 159-160 [First District, Division Five]; *People v. Ybarra, supra*, 166 Cal.App.4th at p. 1088 [Fifth District]; *People v. Demirdjian* (2006) 144 Cal.App.4th 10, 16 [Second District, Division Four]; *People v. Guinn* (1994) 28 Cal.App.4th 1130, 1145 [Fourth District, Division Two].)

In *People v. Guinn, supra*, 28 Cal.App.4th 1130, a defendant who was 17 at the time he committed murder argued that his sentence of life imprisonment without the possibility of parole was arbitrarily and capriciously imposed under the Eighth and Fourteenth Amendments of the federal Constitution because section 190.5 did not give adequate guidelines to the court in choosing which punishment—LWOP or an indeterminate 25-year-to-life term—to impose. The Court of Appeal disagreed: ". . . Penal Code section 190.5 means, contrary to the apparent presumption of defendant's argument, that 16- or 17-year-olds who commit special circumstance murder *must* be sentenced to LWOP, *unless* the court, in its discretion, finds good reason to choose the less severe sentence of 25 years to life. Our construction is based on the ordinary language and structure of the provision; in context, the word 'shall' appears to be mandatory. In addition, this construction is consistent with the history of Penal Code section 190.5, enacted as part of Proposition 115, the 'Crime Victims Justice Reform Act.' Under the former law, youthful offenders were exempted from application of the

death penalty provisions. They also were excluded from application of the special-circumstance proceedings under Penal Code section 190.4, so that murderers under age 18 tried as adults were subject neither to the death penalty nor to LWOP. [Citation.] Penal Code section 190.5 was amended specifically to make youthful offenders, who committed what would have been a death-eligible crime for an adult, subject to special circumstances and LWOP. The fact that a court might grant leniency in some cases, in recognition that some youthful special-circumstance murderers might warrant more lenient treatment, does not detract from the generally mandatory imposition of LWOP as the punishment for a youthful special-circumstance murderer. In the first instance, therefore, LWOP is the presumptive punishment for 16- or 17-year-old special-circumstance murderers, and the court's discretion is concomitantly circumscribed to that extent." (*Guinn*, at pp. 1141-1142.) Construing the statute with reference to other special-circumstance provisions, the court further held that the factors of section 190.3, to the extent relevant to an exercise of discretion to grant leniency, as well as the criteria of what is now California Rules of Court, rule 4.423, were available as guidelines under section 190.5 for the court's exercise of discretion. (*Guinn*, at pp. 1142-1143.)

The *Guinn* court concluded that "[t]he circumstances of the crime and of defendant Guinn himself fully justify imposition of the LWOP sentence." (*People v. Guinn*, 28 Cal.App.4th at p. 1146.) Though it acknowledged there was evidence the defendant had been drinking alcohol before committing the offenses, it explained his conduct evidenced conscious action in intending to rob the victim and observed the defendant challenged, chased and attacked the victim; disposed of the weapon afterward; attempted to dispose

of other evidence; and lied to police about his involvement. (*Ibid.*) The defendant had one similar offense in the recent past and was on probation at the time. (*Ibid.*) Further, the court noted the defendant was not panicked or threatened, was in complete control of the situation and his own actions, was unprovoked, and instigated the crimes. It rejected his claim of disproportionality, reasoning: "Defendant Guinn argues that imposition of a sentence of LWOP on a 17-year-old is extreme. While we agree that the punishment is very severe, the People of the State of California in enacting the provision have made a legislative choice that some 16- and 17-year-olds, who are tried as adults, and who commit the adult crime of special circumstance murder, are presumptively to be punished with LWOP. We are unwilling to hold that such a legislative choice is necessarily too extreme, given the social reality of the many horrendous crimes, committed by increasingly vicious youthful offenders, which undoubtedly spurred the enactment." (*Id.* at p. 1147.)

C. *Analysis*

Lewis characterizes *Guinn's* analysis as having "logical flaws" and constituting dictum. He argues in these circumstances a trial court must choose between the two punishments listed in section 190.5, subdivision (b) without reference to any perceived statutory preference for LWOP. According to Lewis, the statutory language is unambiguous: "[n]othing in the statute suggests that the word 'shall' applies only to LWOP and not to 25 years to life." He also argues that assuming the statute is ambiguous and can be read to express a preference for LWOP, we should resolve the ambiguity in favor of the nonexistence of such a preference under the rule of lenity.

Finally, he maintains public policy as to how society should deal with juveniles convicted of special-circumstance murder militates against making LWOP the default sentence, as juveniles are more capable of change than adults. Lewis emphasizes he does not argue his sentence is cruel and unusual, that it should be interpreted to express a preference for a 25-year-to-life sentence, or that the court could not lawfully impose LWOP on him under the circumstances. He merely maintains the trial court acted in a legally incorrect manner by "circumscrib[ing]" its discretion with a statutory preference for LWOP, and we should remand the matter for resentencing to give the court an opportunity to exercise its informed discretion on the point.

We need not dissect *Guinn's* analysis and construction of section 190.5, subdivision (b), or engage in our own interpretation or construction of the statute,⁴ because we see nothing in the trial court's discussion at sentencing showing it circumscribed its discretion in any way based on a presumption or preference for LWOP in section 190.5, subdivision (b). It is plain from its commentary that the trial court

⁴ In interpreting a voter initiative, we apply the same principles that govern the construction of a statute. (*People v. Canty* (2004) 32 Cal.4th 1266, 1276.) Our role is to ascertain the Legislature's intent so as to effectuate the purpose of the law. (*Ibid.*) "In determining intent, we look first to the words of the statute, giving the language its usual, ordinary meaning. If there is no ambiguity in the language, we presume the Legislature meant what it said, and the plain meaning of the statute governs." (*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063.) "The language is construed in the context of the statute as a whole and the overall statutory scheme, and we give 'significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.'" (*Canty*, 32 Cal.4th at p. 1276.) Notably, though Lewis argues *Guinn's* analysis of the statute is wrong, he does not offer any alternative interpretation until his reply brief, where he argues, among other things, the word "or" in the clause "or, at the discretion of the court" is disjunctive, signifying a choice between two alternatives.

understood it had a discretionary sentencing choice: either an LWOP or 25-to-life sentence, and could exercise its discretion in choosing either of the two sentences after considering the aggravating and mitigating factors reflected in the California Rules of Court, an exercise that Lewis does not challenge. The court thus engaged in " 'a proper exercise of discretion in choosing whether to grant leniency and impose the lesser penalty of 25 years to life for 16- or 17-year-old special circumstance murderers.' " (*People v. Ybarra, supra*, 166 Cal.App.4th at p. 1089.) There is no indication that in its analysis the trial court took into account any fact or circumstance that it believed required it to default to a presumptive LWOP sentence.

III. *Claim of Inconsistencies in the Abstract of Judgment and the Trial Court's Oral Pronouncement of Judgment*

Lewis contends the clerk's minutes and the abstract of judgment do not correspond with the trial court's oral rendition of judgment. He points out the minutes show the trial court imposed but struck a 10-year section 186.22, subdivision (b) enhancement on count 1, when the court in fact stated the enhancement could not legally be imposed. Further, he argues the minutes incorrectly show the jury found true a section 12022, subdivision (b)(1) enhancement. Finally, he argues the abstract of judgment reflects imposition of a consecutive two-year midterm sentence on count 2, when the trial court ordered it to be concurrent. Lewis asks that the minutes and abstract of judgment be corrected to reflect the court's oral pronouncement.

The People concede that the abstract of judgment should be corrected as to these matters. Having reviewed the reporter's transcript of the sentencing hearing, we agree in

part. In orally pronouncing judgment, the trial court initially stated it would impose a consecutive two-year term on count 2 but changed it to a concurrent term after considering counsel's arguments. The trial court should amend the abstract of judgment accordingly. "It is, of course, important that courts correct errors and omissions in abstracts of judgment. An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Further, there is no indication the jury found true a section 12022, subdivision (b)(1) enhancement. Though the abstract of judgment does not reflect the error, it is nevertheless within the court's power to correct clerical errors in its records so as to ensure the minute order reflects the true facts. (*Ibid.*)

However, we disagree with the People that Lewis was not subject to the 10-year enhancement under *People v. Lopez* (2005) 34 Cal.4th 1002. The jury found true the 10-year gang enhancement under section 186.22, subdivision (b)(1)(C), which provides: "Except as provided in paragraphs (4) [life terms for certain enumerated felonies] and (5) [minimum parole eligibility for life terms], any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows: [¶] . . . [¶] (C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional

term of 10 years." However, at sentencing, the trial court stated that under *People v. Lopez, supra*, 34 Cal.4th 1002, the 10-year "punishment should not be imposed."

The trial court's reliance on *People v. Lopez, supra*, 34 Cal.4th 1002, was misplaced. In *Lopez*, the California Supreme Court held that a defendant who commits a gang-related violent felony that is punishable by life imprisonment is not subject to the 10-year gang enhancement under section 186.22, subdivision (b)(1)(C) but, rather, is subject to a minimum parole eligibility term of 15 years under section 186.22, subdivision (b)(5). (*Lopez, supra*, at p. 1010.) Section 186.22, subdivision (b)(5), provides: "Except as provided in paragraph (4), any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served."

Lopez is inapposite. There, the defendant was sentenced to a term of 25 years to life for first degree murder (*Lopez, supra*, 34 Cal.4th at p. 1005), whereas here, Lewis was sentenced to life without the possibility of parole for special circumstance first degree murder. Because a term of life without parole contains no anticipated parole date, it would be incongruous to include a minimum parole date on such a term. The purpose of sentencing the defendant to additional enhancements, such as the 10-year gang enhancement, is to protect against the eventuality that the defendant's sentence might one day be reduced on direct appeal or habeas corpus. (See, e.g., *People v. Garnica* (1994) 29 Cal.App.4th 1558, 1564.)

Moreover, the California Supreme Court has suggested that the minimum parole eligibility provision was never intended to apply to persons sentenced to life without

parole. In *Lopez*, the court examined the history of the California Street Terrorism Enforcement and Prevention Act (STEP Act) and noted that a 1988 enrolled bill report that analyzed the financial impact of the provision stated: " ' "This proposed provision relating to life terms [former section 186.22, subdivision (b)(3), now section 186.22 [subdivision] (b)(5)] would apply to all lifers (except life without possibility of parole)." ' "

" The court concluded that "at the time the STEP Act was enacted, the predecessor to section 186.22[, subdivision] (b)(5) was understood to apply to *all* lifers, *except those sentenced to life without the possibility of parole.*" (*Lopez, supra*, 34 Cal.4th at p. 1010, italics added.) Similarly, in *People v. Montes* (2003) 31 Cal.4th 350, the court examined in detail the 1988 enrolled bill report, which summarized the terms that would be affected by what is now section 186.22, subdivision (b)(5), and noted that the terms of first degree murder would be affected only when there were no special circumstances. (*People v. Montes, supra*, at p. 358, fn. 10.) Though these discussions are dicta, they are nevertheless persuasive. (*People v. Valencia* (2011) 201 Cal.App.4th 922, 930-931.)

Here, the trial court neither imposed the gang enhancement on count 1, nor exercised its discretion to strike the enhancement under section 186.22, subdivision (g).⁵ The court was jurisdictionally obligated to do one or the other. (*People v. Bradley* (1998)

⁵ Section 186.22, subdivision (g), provides: "Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section . . . in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would be best served by that disposition."

64 Cal.App.4th 386, 390-391 ["The trial court had a duty to impose sentence in accord with the law. [Citations.] The failure to impose or strike an enhancement is a legally unauthorized sentence subject to correction for the first time on appeal".]) Accordingly, the sentence imposed on count 1 is unauthorized. We therefore remand the cause to the trial court to consider whether to impose the gang enhancement on count 1 or to strike the enhancement as to that count under section 186.22, subdivision (g). (See *People v. Dominguez* (1995) 38 Cal.App.4th 410, 426 [remanding to trial court for resentencing when record silent as to whether court would have exercised its discretion to dismiss prior conviction].)

DISPOSITION

The cause is remanded for resentencing to allow the trial court to consider whether to impose the 10-year enhancement on count 1 under Penal Code section 186.22, subdivision (b)(1)(C) or strike it under Penal Code section 186.22, subdivision (g). The court is directed to modify the minute order from the May 15, 2010 hearing to omit the portion of the order indicating that the jury found true a Penal Code section 12022, subdivision (b)(1) enhancement on count 1. The judgment is otherwise affirmed. Following resentencing the trial court shall prepare an amended abstract of judgment reflecting its sentence on count 1 and a concurrent two-year sentence on count 2. The trial court shall forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McINTYRE, J.