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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re J.F., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

J.F.,

Defendant and Appellant.

E055882

(Super.Ct.No. J241839)

OPINION

APPEAL from the Superior Court of San Bernardino County. Cheryl C. Kersey,
Judge. Affirmed.

Paul Stubb, Jr., under appointment by the Court of Appeal, for Defendant and
Appellant.

No appearance for Plaintiff and Respondent.

J.F., a minor, appeals after a final judgment declaring him a ward of the juvenile court. After admitting certain charges, the juvenile court committed the minor to the Department of Juvenile Justice for four years. We affirm the judgment.

FACTS AND PROCEDURAL HISTORY

In November 2011, the Ontario Police Department investigated a reported shooting. The victim, David G., was walking on the sidewalk with friends when a red car with distinctive wheel rims drove by. The victim heard gunshots and saw muzzle flash emanating from the front passenger window, and he was grazed by a bullet. The victim's companions were not injured.

The investigating police officer shortly thereafter received a report that a red car with similar wheels had been spotted, parked in front of the home of the minor's parents. Another officer went to the minor's parents' home and saw two men standing near the red car. The two men got into a pickup truck and began to drive away. A police sergeant made a traffic stop on the pickup truck. The minor was one of the two men in the truck.

When the sergeant told the minor that he was investigating a shooting, the minor at first denied any involvement. Eventually, he admitted being inside the red car when the shots were fired, though he denied firing the weapon himself. The minor told police that his sister had been driving the red car. However, the minor had the keys to the red car in his possession, and the minor's sister told police that she had been driving her own car, not the red car, at the time of the shooting. She said that she had not been in the red car that night, and did not know who had been driving it.

Evidence found in the home showed that the minor resided there with his parents. Police recovered a digital camera with pictures of a handgun, and a young man loading the gun and holding it. The police arrested the minor. He waived his constitutional rights and agreed to speak to the officers. During interrogation, the minor admitted he had been driving the red car while a companion did the shooting. The minor claimed he had done so to protect himself on the belief that any of the three men fired upon would have done the same to him if they had seen him first. The minor claimed that the victim and his friends had been “mad dogging” him at a party a year earlier.

A few weeks before the shooting, while the minor was at a car wash, he saw the same three individuals again. He told police that they “came after him with guns,” but that he “managed to get away.” In a later interview, the minor changed this part of his story: he believed the three young men were threatening him; they put “ ‘their hands down to their waistband,’ ” and drew back their hands, which the minor interpreted as “ ‘pretending they had a gun.’ ” A month after the encounter at the car wash, a schoolmate told the minor that the three young men were “ ‘looking for me,’ ” and that the minor had better watch his back.

The minor decided, “ ‘it’s either them or me,’ ” and thought, “ ‘I’m going to go looking for them and do something to them.’ ” One day, the minor saw the three young men standing in front of a house, and so discovered where they “ ‘hung out.’ ”

On the night of the offense, the minor was out driving the red car with a friend, and they “ ‘just happened’ ” to drive by the “usual hangout” of the three young men. The minor’s companion said that he had a gun, and suggested that they should drive by and

shoot at the young men. In his probation interview, the minor said he intended only to scare the young men into leaving him alone, and not to harm or kill them. He insisted that the shooting was not premeditated, but had “ ‘just happened.’ ” On the other hand, he had told police that he “ ‘had to do what I had to do.’ ”

The district attorney filed a wardship petition charging the minor with three counts of attempted murder and three counts of assault with a firearm. The petition alleged that the attempted murder counts were deliberate, willful and premeditated, and that a principal was armed with a firearm in the commission of the offenses. The petition further alleged that all the charges were serious or violent felonies, or both.

On January 30, 2012, the minor agreed to admit the offense in count 4, assault with a firearm. The agreement allowed the court to exercise its discretion to commit the minor to the Department of Juvenile Justice for up to four years, in exchange for dismissal of the remaining counts. At the disposition hearing, the court declared the minor a ward of the juvenile court. The court found that the minor had used a motor vehicle in the commission of the offense and revoked his driver’s license. (Veh. Code, § 13350.) The court ordered the minor to pay a restitution fine, and to pay victim restitution. The court ordered the minor committed to the Department of Juvenile Justice for a period of four years, with credit for 79 days of time served.

The minor filed a timely notice of appeal.

ANALYSIS

Appointed defense counsel on appeal has filed a brief under authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738 [87 S.Ct.

1396, 18 L.Ed.2d 493], setting forth a statement of the facts, and a statement of the case. Counsel has identified two potential arguable issues: whether the court abused its discretion in imposing the maximum four-year commitment, and whether the court erred in committing the minor to the Department of Juvenile Justice without making certain statutory findings on the oral record (e.g., failure of prior dispositions, inability of parents to provide proper supervision, and other findings). Counsel has also asked this court to review the record to determine if it reveals any issues which could result in reversal or modification of the judgment.

In addition, the minor has been afforded the opportunity to file a personal supplemental brief, which he has not done.

I. The Potential Issues Identified by Appointed Counsel Are Unmeritorious

A. The Court Properly Imposed a Four-year Term

Appointed counsel suggests, as an initial possible issue, that some of the juvenile court's remarks indicated that it may have misunderstood its discretion with respect to the imposition of the four-year commitment. That is, at one point the court questioned why defense counsel had stipulated to a four-year term, but defense counsel quickly reminded the court that the stipulation had been only to a commitment to the Department of Juvenile Justice; the maximum length of the commitment was not part of the stipulation, but was subject to the court's discretion. At another point, the court referred to an "indicated sentence" of four years. Counsel suggests that the court may have misunderstood that four years was not a stipulated commitment, and that the court retained discretion to impose a shorter commitment. The minor's trial counsel attempted

to bring up evidence to suggest that something less than the maximum commitment was warranted. Appellate counsel urges that the juvenile court may have disregarded the mitigating evidence because of a mistaken notion about its discretion to impose less than the maximum confinement time.

The juvenile court did not misunderstand or abuse its discretion. The probation department prepared a report for a fitness hearing and, based on the severity of the charged offenses and the degree of criminal sophistication, recommended that the minor be found not fit for treatment under the juvenile court law. The minor asked for an extension of time to consider a possible plea offer: he would admit one of the assault charges, and be committed to the Department of Juvenile Justice for four years. The court granted the continuance; the offer would remain open for the minor to consider.

At the change of plea hearing, the minor agreed to admit one of the assault charges; the court characterized the matter as, “pleading to the Court, allowing sentencing to be up to me.” The court asked defense counsel to acknowledge that, “by admitting Count IV, the max you’re allowing the Court is four years.” A short while later, the court stated, “the parties have agreed that you’re going to do four years,” but defense counsel quickly corrected the court: “No. Your Honor, the parties have agreed that the minor will be sentenced to the Department of Juvenile Justice. We will wait until disposition to see how much time the Court feels appropriate.

“THE COURT: You realize that four years is all you can get?

“[THE PROSECUTOR]: That was the original agreement.

“THE COURT: So he could get two.

“[THE PROSECUTOR]: That’s what the Court has indicated previously, that she was going to give him four. So but it’s obviously up to the Court’s discretion.”

Upon taking the minor’s admission of the assault offense, the court declared the offense to be a felony, with a “max time” of four years, and the probation department would prepare a report to evaluate whether the minor should be sentenced to something less than four years. The court then stated, “Matter is referred to probation for Gateway [a non-Department of Juvenile Justice placement] evaluation, also placement.

“[THE PROSECUTOR]: It is stipulated sentence to DJJ stipulated [*sic*].

“[DEFENSE COUNSEL]: That is true.

“THE COURT: Can’t have it both ways. Either you want me to think about something less or you[] don’t.

“[DEFENSE COUNSEL]: No, [the prosecutor] is correct. It is a stipulation to Department of Juvenile Justice and the terms of getting that Count IV; however, how much time the minor will do in Department of Juvenile Justice is up to the court. There is—so it could be one day.

“[THE PROSECUTOR]: That is fine. It could be one day.

“THE COURT: Right. It could be up to four years. So it is a lid, but just a lid to DJJ. [¶] . . . [¶] Probation not to refer to Gateway or placement, just terms and conditions for DJJ, and any mitigation you want to present.”

The court then set the dispositional hearing for February 14, 2012. In preparation for that hearing, the defense presented a psychological evaluation of the minor, a report of his conduct in detention, as well as four letters of support.¹ The attorneys reminded

¹ The minor presented a letter from the high school where the minor had formerly been a student, stating that he was “a fine student and citizen” while he had attended, and that he had “behaved appropriately and positively” during that time.

A church pastor provided a character reference letter, stating that the pastor had known the minor for about six years, and that the minor was “a young man of great integrity,” who was “extremely dedicated to his family and work,” and who also was “entirely peace-loving.” The minor had once helped serve at a Thanksgiving lunch for the community.

A third letter from a different pastor of a different church professed that the minor had been baptized at birth in that church, and that the minor had “assisted our church throughout his childhood and adolescence.” The pastor opined that external and social influences, out of the home and church, had “contributed to” the minor’s present “situation.” The pastor knew the minor to be “passive and respectful [*sic*: respectful],” as well as “reflective,” and someone who would “turn[] to reason with the proper ministry, according to his needs.”

A teacher at the minor’s former school provided a letter reciting that, in the past year, the minor had “grow[n] in both academic and social settings.” The minor had made “great strides in his behavior and social skills,” and the teacher believed he had shown both maturity and discipline; for example, the minor had intervened and broken up classroom conflicts.

The psychological profile recited the factual circumstances of the offense, including his admissions that he went looking for the young men who had “mad dogged” him, and that he was driving when his companion shot at the victims from the car. The minor admitted that he had never told his parents or anyone else about the three young men threatening or intimidating him.

The psychologist took a history that indicated the minor was sometimes compliant with his parents, and sometimes not. The minor had started having trouble at school, beginning in middle school. He was suspended several times and earned poor grades in middle school. His first year of high school had seen some improvement, but then his grades and conduct had deteriorated again. He was expelled from high school for tagging and using drugs. His poor grades and low credit hours had resulted in a transfer to a continuation school. His parents reported that the minor’s friends were a bad influence; he was “never home,” and he often violated his curfew.

[footnote continued on next page]

the court that the psychological evaluation had been prepared for the fitness hearing, whereas the minor's plea included a stipulation to confinement with the Department of Juvenile Justice. The defense attorney also brought up one new piece of information: the victim's medical treatment for the injury to his mouth had cost approximately \$900, and was "not consistent with an actual gunshot, but that the victim's mouth was injured as a result of the shooting." In light of the psychological evaluation, the minor's positive behavior summary from juvenile hall, the letters on behalf of the minor, and the additional information about the victim's injuries, counsel requested that "the Court consider giving him a max time less than the four years originally tendered by the Court."

[footnote continued from previous page]

The minor tested at a borderline level in verbal intelligence, with a more normal score in non-verbal functioning. He was cooperative during testing; this cooperation indicated he might be a good candidate for intervention. He would need "considerable intervention" to restore his academic functioning to grade level, but some of his other scores suggested he could be restored to grade-level performance in some areas that were currently lacking.

The minor was easily overwhelmed with feelings, and he was impaired in his ability to relate to others. He lacked adequate coping skills. He also had more oppositional and defiant behaviors than was developmentally normal.

The minor was not generally criminally sophisticated, although there were elements of sophistication in the current offense. Although the minor was not the one who actually procured and fired the gun at the victims, he had behaved violently toward them, seeking them out. The minor also believed the victims had previously threatened him. The minor's criminal history was limited, and was perhaps not yet entrenched in criminal behavior. He had several personality and emotional deficits, poor coping skills, and problems interacting with others which contributed to the offense. The minor was a proper subject for treatment within the juvenile justice system.

Finally, the defense presented a "Detention Behavior Summary" of the minor's conduct in juvenile hall while he was detained pretrial. He performed satisfactorily academically and in terms of conduct on the unit.

The court inquired whether defense counsel had known all the referenced information, “the psychological report, the character letters, and the minor’s behavior in detention before she agreed stipulated four years?” Defense counsel immediately responded that the defense had not “agreed to a stipulated four years. We stipulated to DJJ, but anytime within the frame from 1 day to four years, I believe that the Court had the authority to sentence him. The court had given an indicated previously that it would give four years. But at that time, no, I don’t believe we had all of the information that we have today, particularly not the information from the victim’s mother [i.e., about the extent of the injuries], not the character letters, not the [detention] behavior summary.”

The prosecutor quickly added that defense counsel was correct: “[W]e did stipulate to DJJ. But the Court had indicated a four-year offer, but . . . also stated that it would, the Court would, decide at disposition. However, the Court did indicate a four-year sentence three prior times already. So counsel did know about that. . . .”

The court proceeded to state that it had reviewed all the evidence presented by the defense, together with the probation officer’s report. “The minor previously admitted assault with a firearm The Court’s indicated sentence—I am not persuaded, [defense counsel]—will be four years.”

All of the statements to which the minor might point as indicative of the trial court’s misunderstanding of its discretion were, in each case, immediately corrected by both defense counsel and the prosecutor. The court expressly considered all the mitigating evidence offered by the defense, but deemed four years the appropriate disposition in this case; the court simply was not persuaded by the mitigating evidence

presented. The references to an “indicated sentence” reflected, not a misunderstanding as to the court’s sentencing discretion under the plea agreement, but factual background as to the court’s offers on prior occasions, i.e., the court’s independent assessment of the probable commitment based on the offense.

As an appellate court, we cannot presume error where the record does not establish on its face that the trial court misunderstood the scope of its discretion. (*People v. Davis* (1996) 50 Cal.App.4th 168, 170-173.) Here, the record affirmatively shows otherwise, that the trial court made its decision in full awareness of the scope of its discretion. (*People v. Fuhrman* (1997) 16 Cal.4th 930, 944.)

The court was also well within its discretion in selecting four years as the appropriate disposition based on the circumstances of the offense: the minor felt himself to be threatened or intimidated by the three victims for acts that had occurred up to a year earlier, but never informed anyone of the supposed threats. He accidentally discovered the whereabouts of the three young men who had intimidated him, and he purposely sought them out. The minor, via his companion, deliberately shot at the three victims with a firearm and could easily have killed all three; the minor was simply lucky that no one was more seriously injured or killed. The minor, with limited intellectual and emotional functioning, as well as poor coping and interpersonal skills, chose to solve his problems with deadly force. He chose the wrong kind of companions and made poor decisions. He was a grave danger to the public in anything less than a custodial situation. Four years was an appropriate disposition; the court did not abuse its discretion in

imposing a commitment of four years. (See *People v. Murray* (2012) 203 Cal.App.4th 277, 288.)

B. The Court Did Not Err in Committing the Minor to the Department of Juvenile Justice Without an Oral Statement of Findings on the Record

The second matter to which appellate counsel points as a potential issue is whether the juvenile court erred in committing the minor to the Department of Juvenile Justice without first stating certain findings on the record, e.g., findings that the minor would benefit from such placement, and that other less restrictive placements would be inadequate. (Welf. & Inst. Code, § 734.) The contention is unmeritorious.

First, as part of the plea agreement, the parties stipulated to a Department of Juvenile Justice commitment. Second, where the record is adequate to facilitate review of the juvenile court's commitment determination, there is no reason to require remand for the court to orally recite the statutory language of "probable benefit." The failure to make such a finding is subject to harmless error analysis. (*In re Jose R.* (1983) 148 Cal.App.3d 55, 59-60.) Third, there is no absolute rule precluding commitment to the Department of Juvenile Justice until less restrictive placements have been tried. (*In re James H.* (1985) 165 Cal.App.3d 911, 922 [Fourth Dist. Div. Two].) Fourth, the requisite findings were made in writing in the court's minutes.

Under all the circumstances, including the minor's stipulation to a Department of Juvenile Justice commitment, there was no error in failing to make express findings on the record to support commitment to the Department of Juvenile Justice.

II. No Other Issues Are Disclosed by the Record

Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have undertaken an independent review of the record, and find no arguable issues on appeal.

DISPOSITION

The judgment is affirmed.

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McKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

RICHLI
J.