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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re Q.H., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. Q.H., Defendant and Appellant.	A142771 (City & County of San Francisco Super. Ct. No. JW12-6271)

Minor appeals from orders of the juvenile court finding that he committed first degree murder and attempted murder and committing him to the Division of Juvenile Justice (DJJ) with a maximum term of confinement of 84 years eight months to life. Minor asserts numerous grounds for the reversal of the juvenile court's orders. We find no prejudicial error and shall affirm.

Factual and Procedural Background

The San Francisco District Attorney filed a wardship petition (Welf. & Inst. Code, § 602) alleging that on June 24, 2013, the minor, then age 15, committed murder (Pen. Code,[1] § 187), attempted murder, with an allegation of great bodily injury (§§ 187, 664, 12022.7, subd. (a)), conspiracy to commit murder and attempted murder (§ 182,

[1] All further statutory references are to the Penal Code unless otherwise noted.

subd. (a)(1)), assault with a firearm (§ 245, subd. (a)(2)), and mayhem (§ 203).[2] With respect to the first three charges, the petition alleged that minor was armed with, personally used, and personally discharged a firearm from a motor vehicle (§§ 12022, subd. (a)(1), (2), 12022.5, subd. (a)(1), 12022.53, subds. (b)-(d), 12022.55). As to the assault charge, the petition alleged that minor personally used a firearm and inflicted great bodily injury (§§ 12022.5, subd. (a)(1), 12022.7, subd. (a)).

A contested jurisdictional hearing was conducted in June 2014. Initially, the court conducted an evidentiary hearing to determine, among other things, the admissibility of evidence regarding the minor's and the victim's involvement with a gang. Inspector Leonard Broberg, as an expert in criminal street gangs in the Bayview area, testified extensively about two local gangs, Harbor Road/Big Block and West Mob. He described Big Block and West Mob as "informal in their make-up" and that membership was determined primarily by where you lived. He explained that there was a "history of violence" between the two gangs. Broberg opined that minor was a member of the Harbor Road/Big Block gang and that the victim was a member of West Mob. Based on his review of police records, Broberg described numerous incidents that he believed supported his opinions regarding the existence of the subject gangs and the membership of those gangs. Following arguments regarding admissibility, the court ruled the gang evidence would remain in the record to prove motive.

As discussed *post*, the court also heard evidence regarding the admissibility of defendant's confession and an eyewitness identification of defendant and concluded that both were admissible.

Thereafter, the following additional evidence was admitted:

On June 24, 2013, at around 12:50 in the afternoon, San Francisco police responded to reports of a shooting in the Hunters Point/Bayview District. They arrived on the scene to find a man and a woman who had sustained multiple gunshot wounds. The

[2] An additional count of aggravated mayhem (§ 205) was dismissed shortly after the filing of the petition.

man, Jaquan Rice, died from a gunshot wound perforating his heart and both lungs. The woman survived, but suffered multiple injuries including an injury to her right hand which required amputation of the tip of her pinky.

The intersection where the bus shelter stood was under surveillance by pole-mounted cameras. The video retrieved from one camera shows an olive green Ford Escape sports utility vehicle stopping in front of the bus shelter. A person in a gray hooded sweatshirt fires multiple shots out of the rear seat on the driver's side. As the person continues to shoot, a second person in a black sweatshirt and black pants emerges from the car, walks around to the rear of the car, and begins shooting, then gets back into the car, which drives away. Another camera showed the victims as they were shot at the bus shelter and glass shattered behind them.

The car captured on film was traced to Renesha Lee, who testified under a grant-of-use immunity. About a week before the incident, Lee rented a Ford Escape. On June 24, Lee drove to minor's home with minor, minor's brother, and Lee's boyfriend. Lee stayed at minor's home, while the three others took the car, claiming they would be "right back." When they left, her boyfriend was driving and minor and his brother were sitting in the rear passenger seat. While Lee was waiting for the return of her vehicle, she heard the sound of gunshots from two different weapons. She could not say how many shots she heard nor did she know where the sound came from. When the car returned a few minutes later, minor's brother was driving, and minor was still in the rear passenger seat. Her boyfriend was no longer in the vehicle. Lee was pulled over by the police later that afternoon on her way to return the rental car. On cross-examination, Lee said she had heard of Rice's reputation for violence and had seen some of his videos on the Internet.

Rice's cousin testified that she and a friend were at home when the shooting occurred. When she looked out of the window, she saw her "cousin getting shot." She identified minor as the shooter. She described the vehicle as a gold or tan car and while she was unsure whether he was seated in the front or back passenger seat, she knew that minor was "on the left side." She thought "10 or more" shots were fired. She had seen minor two weeks before in the same location pretending to shoot at Rice with his fingers

in the shape of a gun. On cross-examination, she said she did not see anyone shooting from outside the vehicle. She thought minor had his gun "out the window." She told Sergeant Burke that minor was wearing a brown or black sweater.

Minor was arrested at his home on the night of the shooting. In a video recorded statement made to the police the following morning, minor admitted using a .357 Magnum in the shooting. The gun had been "passed off" to him, and minor "passed it back to someone." Minor said he fired six shots. When asked why he shot Rice, minor said: "It was like, it was just, it was gonna come. As soon as he see me, he was gonna do the same thing I bet." Minor claimed that "[e]verybody" had disagreements with Rice, including the other shooter that day, and that Rice and the other shooter "just kept on arguing and stuff." Minor denied they were looking for Rice. He claimed they "were just riding around." Minor claimed, "He woulda did the same thing to us." When asked if the shooting was because of the conflict between gangs, minor said, "I don't beef with everybody. I got my personal beef."

Minor called a number of witnesses to testify in support of his defense that Rice was a violent person who maintained an intimidating internet presence and threatened the minor individually. A police officer testified that he arrested Rice in February 2013 for possession of a firearm. Inspector Broberg testified that he prepared a gang validation sheet for Rice and testified as to the police reports involving Rice. Minor also called three additional police officers who each testified regarding an incident involving minor they had investigated and each testified that nothing in the reports indicated the incidents were gang related.

Minor also called Douglas Fort as an expert in gang culture and gang life, with an emphasis on the Bayview Hunter's Point area. Fort testified that at the time of the shooting, Harbor Road and West Mob referred to neighborhoods, not gangs. Fort opined that the acts of violence that occurred between different neighborhoods usually stemmed from individual conflicts. Fort opined that Rice's shooting was a personal matter, not a gang-related crime.

Minor called a witness who testified that shots had been fired at him while with the minor and wearing the minor's jacket. Another witness testified that she saw a "[g]rown man that claimed West Mob punch [minor] in his face" as he got off the bus on his way to work. A third witness testified that she saw a group of boys from the West Point area threatening minor and saw a threat against minor from Rice on minor's Instagram account. Finally, minor's mother testified that she had been warned by a police officer in April 2013 to stay away from Rice because he would kill her. She also witnessed two incidents at her home in which she believed people were threatening her son. Her son was scared and asked if they could move after the last incident. Finally, an expert in the interpretation of rap lyrics and the use of urban slang in rap music interpreted samples of Rice's rap lyrics which were played for the court.)~

The juvenile court sustained all counts and allegations, with the exception of the allegation under section 12022.5, subdivision (a)(1) that minor personally used a firearm in the commission of the assault on the female victim.

Following a contested dispositional hearing, the court ordered that minor be committed to the Division of Juvenile Justice (DJJ) for a period not to exceed 83 years four months to life, with credit for 409 days.

Minor timely appealed.

Discussion

1. *Motion to Suppress Confession*

Prior to the jurisdictional hearing, minor moved to suppress statements to the police following his arrest. The following evidence was presented at the hearing on his motion to suppress:

At approximately 10:30 p.m., a security perimeter was set around minor's home in anticipation of executing a search warrant. Around 11:00 a.m., when minor was asked to exit his home, there were approximately 16 armed police officers, a swat team and an armored vehicle at the scene. When minor appeared in the doorway, three or four officers detained minor inside the threshold of his home, before handcuffing him and escorting

him out of the house. Minor was placed in a police car and read his *Miranda*[3] rights. Minor was also handed a "juvenile rights card" at the police station.

Shortly after minor's arrest, Investigator John Cagney served a search warrant on minor's home. He spoke with minor's mother who told him that she wanted to be present when he interviewed her under-aged sons and gave Cagney her cell phone number.[4] Around 1:30 a.m. on June 25, Cagney permitted minor's parents to speak briefly to him at the Bayview Police Station.

At approximately 2:15 a.m., Cagney and another officer began interviewing the other under-aged brother. Minor's parents were present for the interview. Cagney testified that the interview was interrupted after about 30 minutes with news of another homicide. He told minor's parents that he was going to transport minor and his adult brother to the Hall of Justice while his partners responded to the new homicide.

Minor was transferred to the Hall of Justice, arriving there around 3:30 to 3:45 a.m. Shortly afterward, Cagney learned that he and his partners could resume work on Rice's homicide. At 3:51 a.m., Cagney attempted to contact minor's parents. He twice called the number minor's mother had provided and left a message once. He also called the cell phone number he had obtained from another family member. He again left a message when he received no response. After waiting about 30 minutes, Cagney began his interview with minor. The interview was recorded and lasted less than an hour.

After a brief discussion about where the minor went to school, Cagney stated, "Well, here's the thing, um, you saw your mom and your dad down at the station. Right? So, I told them that we were bringing you down here and that we were gonna talk to you and then I gave them the option to come down here and talk to 'em . . . . So I've been

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

[4] For reasons that are unclear from the record, a third brother, also a juvenile, who was not involved in the shooting, was taken into custody at the family home and transported to the police station around the time of minor's arrest. Minor's older brother, who was an adult and who was suspected of participating with minor in the shooting, was also arrested around the same time.

calling them up and they're not answering the phone so I don't know what to tell you about all that. Alright."

Cagney then again advised minor of his *Miranda* rights. Cagney began "So, uh, you have the right to remain silent. You understand? . . . And you have been arrested or at least the police have grabbed you a couple of times, right? And you've had this read to you before, correct? I mean I looked at your sheet. It's not super bad or super long but you've had contact with the police right?" Cagney apologized for getting off track and started again from the beginning, advising minor of each of his rights. Minor responded that he understood each right.

After 18 minutes of questioning, during which minor claimed that he was at the Boys and Girls Club all afternoon, Cagney asked minor if he knew what is on the telephone poles at the intersection of West Point and Middle Point roads. When minor guessed cameras, Cagney replied, "Exactly. . . . You're sitting here at 5:00 o'clock in the morning in the police station. And we're talking about cameras at West Point and Middle Point. Why do you think that is?" Cagney continued, "You know why you're sitting in that chair. . . . If something happened between you and that dude and you felt like you needed to protect yourself and you were just minding your own business, and he did something crazy and you had to do something to defend yourself, well, then I could listen to that. . . . Otherwise I gotta assume that it is just some cold blooded stuff that someone rolled up and did that guy, and that you were involved in all that." When minor responded "Everybody have problems with him," Cagney stated, "But . . . that doesn't solve my problem about what you're doing at West Point and Middle Point. . . . I don't know what's going on with you. But I can tell you this already. I talked to a lot of folks. It was broad daylight, my man. . . . We got cameras. . . . [T]here's people all over the place. . . . And they told us what happened and they identified the people that were in that car. And they told us what was going on. And we found that car, as you probably already know."

At this point, the minor interrupted asking "Wha, what happened?" When Cagney continued to interrogate him, minor asked, "Who, who are you all? You're all the police?

. . . Wha, What type of police are you?" Cagney informed him that they were the homicide police and then, after a few second pause, continued the interrogation. Cagney stated, "this is a serious problem. And . . . it is not a question in our minds anymore, you know, who did it. It's a question of why it happened. . . . All I know is I can look at that camera and I see you. I see you in that car. I see that green SUV driving around. I know where it ends up. I know who gets dropped off. I know who's driving it. . . . I know who's shooting the guns. I just want to know why. . . . Now, I mean, this beef to me sounds like it's something. I don't know. . . . But the thing of it is that until I hear from you, I mean, I gotta just assume that it is what it is, a cold blooded thing where . . . you rolled up at him and just blasted him." When minor asked, "I'm still going to jail no matter what, right?" Cagney said "If you have a plausible story that makes sense to me, I'm gonna talk to people who are higher up than me, people who are judges, district attorneys, all that stuff. I'm going to tell them what you told me and I'm gonna tell them that I believe what you said . . . . Are you going to jail? Well, you're basically in jail right now. You're not free to leave . . . But what happens from this point on is really up to you . . . . I can't tell you how it's gonna play down the line tomorrow or the next day." Thereafter, minor told the officers Rice had been threatening him. When pressed on why he shot Rice, the minor said "it was gonna come. As soon as he sees me, he was gonna do the same thing I bet." Later he said, "[Rice] woulda did the same thing to us." Minor admitted firing six shots and claimed the gun was a .357 magnum that had been "passed off" to him. He passed it back and was told someone put it in the sewer. Minor insisted the shooting was not gang related and that he had his own "personal beef" with Rice.

Officers also testified to two incidents with minor in July 2012 and October 2012 during which minor was read the *Miranda* warnings. In the first incident, after minor was arrested and advised of his *Miranda* rights, he did not make a statement. In the second incident, minor was interviewed at his school by police with his mother present. After being read his *Miranda* rights he initially refused to make a statement. However, a short time later, minor indicated he wished to make a statement. When he was advised again of his *Miranda* rights, minor said, "I already know it." After concluding the interview, the

officer gave minor a “SF youth know your rights card” and “made sure he read it, underst[ood] it. [H]e said yes he understood and he gave it to me in the presence of his mom and other school officials.”

Minor’s teacher testified that minor had an individualized education plan and in August 2013, minor had tested at the third grade level in both English and math.

Minor’s mother testified minor was “grabbed” and “dragged” out of the house by two or three SWAT team officers. She confirmed that she told Cagney she did not want him to talk to her sons unless she was present, and that minor had a lawyer. She did not recall seeing minor at the station. She also testified that she and her husband were awake at 4:00 a.m. and her phone did not ring. She had no missed calls or voicemail messages that morning.

Finally, minor offered testimony by an expert on the voluntariness of confessions, who opined that the interrogators used motivational strategies to coerce minor’s confession.

The trial court denied the motion to suppress, finding that minor’s statements were voluntary and that minor made a knowing and voluntary waiver of his *Miranda* rights.

On appeal, minor contends the court erred in admitting his statements because they were obtained in violation of his *Miranda* rights. “When a court’s decision to admit a confession is challenged on appeal, ‘we accept the trial court's determination of disputed facts if supported by substantial evidence, but we independently decide whether the challenged statements were obtained in violation of *Miranda*[, *supra*, 384 U.S. 436].’ [Citation.] . . . [W]e inquire ‘into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel.’ Because defendant is a minor, the required inquiry ‘includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.’ The prosecution bears the burden of

demonstrating that the challenged waiver is valid by a preponderance of the evidence." (*People v. Lessie* (2010) 47 Cal.4th 1152, 1169.)

Initially, minor claims that the officers "deliberately befuddled him by mixing up the *Miranda* warning with other talk, then sliding smoothly into questioning without a formal waiver, much less a signature." The record establishes, however, that although Cagney may have initially interrupted his explanation to minor of his *Miranda* rights to discuss his criminal record, when he returned to the subject he started over and clearly advised minor of his rights, and stated that minor understood those rights and the consequences of waiving them. In addition, evidence was presented that minor had been advised of his rights on two prior occasions and had previously invoked his right to remain silent. (See *People v. Lessie*, *supra*, 47 Cal. 4th at p. 1169 [finding a knowing waiver where minor was "was no stranger to the justice system"].) There clearly was substantial evidence to support the juvenile court's finding that minor knowingly waived his *Miranda* rights.

Minor also argues that at the time of his interrogation he was sleep deprived and traumatized from his arrest. While minor was undoubtedly tired and perhaps unnerved by the circumstances of his arrest, those factors do not appear to have led to an involuntary waiver. Minor speculates that the police could have "simply present[ed] themselves at the minor's door in the late afternoon or early evening and serve[d] an arrest warrant" but chose instead to wait "until 10 p.m., arrived with the BearCat purchased from Homeland Security, and surrounded the house with 15 to 20 officers." He suggests that thereafter, "the police went out of their way to ensure that the minor was in even worse condition when the interrogation commenced and he was read his *Miranda* rights" by "kill[ing] time, deliberately allowing the minor's anxiety, exhaustion, and disorientation to mount as he was held in isolation and transported to the Hall of Justice." The record, however, does not support those claims. Minor was arrested about 10 hours after the murder occurred. Throughout the afternoon and evening Cagney was engaged in interviewing witnesses, identifying suspects and obtaining warrants. Under the circumstances, the 10-hour delay before arresting minor was not unreasonable. The police officer who testified

regarding minor's arrest explained the reason for the strong police presence. He explained that the house was put under police surveillance after police learned that minor might have been involved in the shooting. During that time, an officer saw two people attempt to enter the residence carrying an assault weapon and a hand gun. When the officer yelled at them, they ran away. The perimeter was then established to secure the residence. Given the nature of the crime and the obvious concern that weapons might be used to resist arrest, the sizeable police presence at his arrest was not unreasonable.

Nor do we believe minor was tricked into waiving his rights. In *Miranda*, *supra*, 384 U.S. at page 476, the court warned that "evidence that the accused was threatened, tricked, or cajoled into waiver, will, of course, show that the defendant did not voluntarily waive his privilege." Minor claims that the officers "swept the minor's parents out of the way" and "delivered the *coupe de grace* by lying to [him] and telling him that his parents had been given and declined the option to come down to the Hall of Justice for the interview." Minor claims that Cagney falsely told him "his parents had chosen to abandon him." The record, however, does not support minor's claims. First, the record does not support minor's characterization of Cagney's actions as improperly sweeping the parents away. Cagney reasonably advised minor's parents to go home while his team responded to the new homicide case and processed minor at the Hall of Justice. When he resumed the investigation, he telephoned the parents three times, twice leaving a message. He did not begin the interrogation until more than 30 minutes had lapsed. Although mother disputed that she was called, the court could discount her testimony in light of the contrary evidence regarding the phone calls. Moreover, Cagney's statement to minor about his parent's absence was not a "bald-face lie" as minor's counsel suggests. It was perhaps ambiguous and subject to misinterpretation but it was not inaccurate. He did tell the parents he would be transporting minor to the Hall of Justice and would call them before he began the interview. More importantly, his statement did not suggest that minor had been "abandoned" by his parents. Accordingly, we find that minor made a knowing and voluntary waiver of his *Miranda* rights.

Moreover, the record also supports the finding that minor's confession was voluntary. Even if a minor is advised of and waives his *Miranda* rights, "The use of an involuntary confession for any purpose in a criminal or delinquency proceeding violates a defendant's or minor's rights under the Fourteenth Amendment. [Citation.] [¶] '. . . A minor can effectively waive his constitutional rights [citation] but age, intelligence, education and ability to comprehend the meaning and effect of his confession are factors in that totality of circumstances to be weighed along with other circumstances in determining whether the confession was a product of free will and an intelligent waiver of the minor's Fifth Amendment rights [citation].' [Citation.] [¶] The federal and state Constitutions both require the prosecution to show the voluntariness of a confession by a preponderance of the evidence. [Citations.] Voluntariness turns on all the surrounding circumstances, 'both the characteristics of the accused and the details of the interrogation' [citation]; it does not depend on whether the confession is trustworthy. [Citation.] While a determination that a confession was involuntary requires a finding of coercive police conduct [citations], ' " 'the exertion of any improper influence' " ' by the police suffices." (*In re Elias V.* (2015) 237 Cal.App.4th 568, 576-577 (*Elias*).)

Minor argues that his confession was involuntary under the totality of the circumstances, "which include not only his age, learning disability, sleep deprivation, and isolation from parents and counsel as described above, but also the grossly improper police interrogation tactics" used by the police. In particular, minor contends the officers used false evidence to obtain his confession, attempted to minimize his culpability by suggesting the murder was a product of self-defense, and made improper promises of leniency.

Minor relies heavily on *Elias*, in which the court detailed the very real dangers of false confessions in cases involving police interrogation of juveniles, particularly adolescents. (*Elias*, *supra*, 237 Cal.App.4th at pp. 577-579, citing *J. D. B. v. North Carolina* (2011) 564 U.S. 261.) In *Elias*, the court focuses on the use of an interrogation approach referred to as "maximization/minimization" that involves a " 'cluster of tactics' designed to convey two things. The first is 'the interrogator's rock-solid belief that the

suspect is guilty and that all denials will fail. Such tactics include making an accusation, overriding objections, and citing evidence, real or manufactured, to shift the suspects mental state from confident to hopeless. . . . [¶] In contrast, minimization tactics are designed to provide the suspect with moral justification and face-saving excuses for having committed the crime in question,' a tactic that 'communicates by implication that leniency in punishment is forthcoming upon confession.' " (237 Cal.App.4th at p. 583.) The court warned of the dangers posed by the use of these maximization and minimization tactics with juveniles. The court observed that even the police interrogation manual "notes that although the use of deception, including the use of 'fictitious evidence which implicates the subject,' [citation], has been upheld by the courts [citations], 'this technique should be avoided when interrogating a youthful suspect with low social maturity . . .' because such suspects 'may not have the fortitude or confidence to challenge such evidence and depending on the nature of the crime, may become confused as to their own possible involvement if the police tell them evidence clearly indicates they committed the crime. Factors such as the adolescent's level of social responsibility and general maturity should be considered before fictitious evidence is introduced.' " (*Id.* at p. 588.) Similarly, "A convincing body of evidence demonstrates that implicit promises can put vulnerable innocents at risk to confess by encouraging them to think that the only way to lessen or escape punishment is compliance with the interrogator's demand for confession, especially when minimization is used on suspects who are also led to believe that their continued denial is futile and prosecution inevitable." (*Id.* at p. 583.)

Minor contends Cagney's use of these tactics resulted in a confession that was involuntary. He argues Cagney told him the police "already had airtight evidence tying him to the crime," falsely telling him that he "could be identified from law enforcement videotapes," and then suggested it would be best for him to "articulate[] an explanation for his actions, like self-defense, rather than appearing as a cold-blooded killer. They also said that if [he] came forward with a reasonable explanation for the killing, they would pass it on to those in authority."

By the time Cagney interviewed minor he had viewed the videotapes showing the shooting, interviewed Lee, who identified those who she permitted to drive off in her leased car, determined that minor was a passenger in the car at the time of the shooting, and had spoken with witnesses who identified minor as the shooter. Cagney's statement that he could "see [minor] in that car", while suggesting that minor could be identified from the videotape, nonetheless reflected Cagney's confident belief that he knew minor committed the shooting.

The minimization tactics employed by Cagney were not coercive. The police suggested the shooting was either the product of an outstanding disagreement between the minor and the victim or a coldblooded gang killing. While the suggestion that the killing was in self-defense may have been intended to minimize minor's culpability, minor did not adopt that suggestion but simply indicated that he knew he would go to jail anyway. Although Cagney attempted to deflect that possibility, he did not promise that minor would not go to jail or make any other offer of leniency. He said only that if he believed minor's explanation, he would he would "talk to people who are higher up" and tell them he believed minor's story. The facts in this case are vastly different from those in *Elias*, *supra*, 237 Cal.App.4th at pages 585-586, where the police employed a "false choice" strategy to coerce minor's confession to an offense they were not even sure had occurred by suggesting the minor touched the victim either out of curiosity or because he found it exciting. Here, the officers sought only an explanation for a shooting that they had strong reason to suspect minor had committed.

2. *Motion to Exclude Eyewitness Identification*

Prior to the jurisdictional hearing, minor also moved to suppress any identification of him as the shooter by Rice's cousin. The following evidence was presented at the evidentiary hearing on his motion to suppress her testimony:

The cousin's interview at the police station was video-recorded and transcribed. According to the transcript, the cousin and her friend were in the police interview room beginning at 4:15 p.m. They were left alone in the room for about 15 minutes. At one

point they talked about whether the shooter got out of the car. The friend thought that he did, but the cousin thought he did not. They agreed the shooter did not stand over the victim and shoot at him, as one person had claimed. After the girls left to use the restroom, Sergeant Burke entered the interview room and left his notepad and cell phone on the table. When the girls returned to the room, the cousin saw Sergeant Burke's notepad. She removed the phone from on top of his notepad, turned the notepad around to face her, and read Sergeant Burke's notes. After she replaced everything as she had found them, she told her friend minor's last name, adding "I can't stand that boy." At 4:35 p.m., the friend was asked to leave the room and Sergeant Burke interviewed the cousin. After the cousin described the shooting and the shooter, whom she identified as minor, Sergeant Burke asked her, "And how do you know it was [minor]?" The cousin responded, "Because I seen [minor] before and I told you before, I, [minor] and my cousin, they were beefing, the[y] don't like each other and basically right now it's Harbor against West Point." She claimed she "seen the boy face." She said that her friend "identified him . . . [a]nd I, I seen [him] a whole bunch of times and I, I that's how he looks."

The court denied defense counsel's motion to exclude this witness's identification of minor. Minor contends that her testimony linking him to the murder was tainted by suggestive police conduct and was "grossly unreliable."

"In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification." (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.) The defendant bears the burden of demonstrating that the challenged identification procedure was unduly

suggestive. (*People v. Avila* (2009) 46 Cal.4th 680, 700; *People v. Carter* (2005) 36 Cal.4th 1114, 1164.) He must show "unfairness as a demonstrable reality, not just speculation." (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.) We review de novo the trial court's ruling that a pretrial identification procedure was not unduly suggestive. (*People v. Avila*, *supra*, at pp. 698-699.)

Minor argues that exposing a witness to a notepad revealing the suspect's identity is unconstitutionally suggestive. In addition, the "eyewitness identification of the minor was further tainted because the two witnesses were left alone together to discuss the identity of the shooter and reach agreement." Finally, "[o]ther facts concerning the purported eyewitness identification offer nothing to reassure this court of the reliability of [the witness's] identification. If [she] viewed the shooting at all, she viewed it at a distance, through a window embedded with chicken wire. She was anxious to find someone to blame for her cousin's death. She already hated [minor]. Absolutely nothing she said comported with the irrefutable evidence in the FBI videotape. She inaccurately described the car, the shooter's clothing, and positions of various persons in the car. She claimed that no one got out of the car to shoot, which clearly was untrue." While we agree with minor that the sergeant's conduct was remarkably careless, we do not agree that his conduct tainted the identification process to the extent that the court was required to exclude the witness's testimony. Even assuming the witness did not know minor's name at the time of the shooting, her testimony that she recognized him from prior encounters and her identification of him through the photo line-up is untainted. As the trial court observed, "There was an observation of a prior incident and that is what she based her identification on. I'm not sure she associated a name with that, but that seemed to be a big part of what she did. [¶] I was concerned about the cell phone or the—being left with [an] image. I did not see her looking at an image. I did not see any image associated with the folio." The court was fully apprised of the issues surrounding her identification and as the trier of fact was entitled to consider those factors in weighing her testimony. There was no error in the admission of the cousin's testimony.

3. *Motion for Separate Judges*

In conjunction with minor's motion to exclude gang evidence, minor requested that separate judges determine admissibility and conduct the trial "on the grounds that separate judges are necessary to preserve the minor's rights to substantive and procedural due process and to preserve his right to a fair trial under the state and federal Constitutions." As set forth above, at the evidentiary hearing, the court heard testimony regarding minor's involvement with the Harbor Road/Big Block gang and many of the details of his prior contacts with the police. Following argument, this testimony was admitted for purposes of determining jurisdiction.

Minor contends the court violated his due process rights by allowing the same judge to rule on the admissibility of the gang related evidence and to determine his guilt. He argues, "The fact that the defendant is a juvenile does not justify exposing the trier of fact to scurrilous and prejudicial evidence which the trier of fact would not hear in the jury trial of an adult. The trial court also erred by holding what purported to be a section 402 hearing in which the challenged evidence was not heard outside the presence of the trier of fact." To the extent that minor's appellate briefing focuses primarily on the propriety of the evidentiary hearing, we are at a loss to see the prejudice of any purported error. Had the court excluded the gang evidence, minor's argument that the trier of fact was improperly biased by exposure to inadmissible evidence might have colorable merit. But the gang evidence in this case was admitted. Hence, there clearly was no need for a second judge who in all events would have heard the same evidence.

With respect to the admissibility of the gang evidence, minor argues that the court "erred by admitting weeks of inflammatory and irrelevant hearsay evidence regarding the 'informal' street gangs of Bayview/Hunters Point, the minor's alleged membership in one such gang, and all of the minor's misconduct from the time he was nine years old." He argues further that "the litany of the minor's prior misconduct and 'expert' testimony that he belonged to a gang, was nothing more than evidence of the minor's bad character,

offered to prove that he acted in conformity with that bad character. Such evidence is, of course, prohibited by Evidence Code section 1101."

In *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049, the California Supreme Court counseled, "In cases *not* involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.] But evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime."

Here, gang evidence was undoubtedly relevant to establish motive for the shooting. Even assuming that some of Broberg's testimony included inadmissible hearsay or that the amount of gang evidence admitted was excessive, any error is harmless under any standard. The matter was tried to a judge, not a jury, and nothing in the record suggests the judge was prejudiced by any improperly admitted evidence. To the contrary, the court repeatedly emphasized that the gang evidence was relevant only insofar as it showed motive and would not be considered for any other purpose.

Minor's suggestion that the court "eventually realized that the gang evidence was irrelevant, and could not recall why he admitted it in the first place or allowed it to continue for so long" is not supported by the record. The court merely stated, at the dispositional hearing, that "There was never a charge of 186.22(a) here or (b). We spent a whole lot of the trial on that. I don't know why we did. I indicated to both parties it has nothing to do with this case." This comment is entirely consistent with the court's explanation when it admitted the gang testimony that "this is about motive. This is not to make a 186.22(a). This is not to make a 186.22(b). This is not about proving anybody is a member, an associate dot, dot, dot, dot. Gang evidence has been coming [in] for motive since 1944 prior to the introduction of 186.22(a)."

4. *Motion to "Dress out" for Trial*

Minor contends the trial court violated his right to due process by repeatedly denying his request to be dressed in street clothes, rather than his prison garb at trial. It is well-established that a criminal defendant has a constitutional right not to be forced to stand trial, whether before a jury or the bench, while wearing identifiable prison clothing. (*People v. Taylor* (1982) 31 Cal.3d 488, 494 (*Taylor*); *People v. Zapata* (1963) 220 Cal.App.2d 903, 911 (*Zapata*).) In *Zapata*, the court explained that while the judge hearing the case in a bench trial is unlikely to be biased against a defendant in jail clothing, "[t]here are considerations here other than possible bias." (220 Cal.App.2d at p. 911.) There is a psychological disadvantage when appearing in court in prison attire. "Presumed to be innocent, the prisoner is entitled to as much dignity and respect as safety allows. As one court tersely put it, 'The presumption of innocence requires the garb of innocence. . . .' " (*Ibid.*; see also *Taylor, supra*, 31 Cal.3d at p. 495 [citing *Zapata* favorably for proposition that "beside the potential prejudice raised in the minds of the jurors, the defendant may be handicapped in presenting his defense by the embarrassment associated with his wearing jail garb"].)

Although no court has extended this rule to juvenile proceedings, *In re DeShaun M.* (2007) 148 Cal.App.4th 1384, 1386-1387, is instructive. In that case, the court held that a minor has a constitutional right to be free of shackles at a jurisdictional hearing, absent a showing of manifest need for their use. The court observed, "While a primary concern regarding the use of physical restraints is the resultant prejudice if they are viewed by the jury, that is not the only reason for the limitation of their use. Also of concern is the potential unsettling effect on the defendant and therefore on his ability to present a defense, and ' "the affront to human dignity, the disrespect for the entire judicial system which is incident to unjustifiable use of physical restraints, as well as the effect such restraints have upon a defendant's decision to take the stand." ' " (*Id.* at p. 1387.) The court found that these concerns are as applicable in juvenile proceedings as in adult criminal proceedings. The court recognized, however, that a jurisdictional

hearing is more like a preliminary hearing than a trial so that "while some showing of necessity for the use of physical restraints at a juvenile jurisdictional hearing should be required, it should not be as great as the showing required during a jury trial." (*Id.* at p. 1387, citing *People v. Fierro* (1991) 1 Cal.4th 173, 218 ["[W]hile the dangers of unwarranted shackling at the preliminary hearing are real, they are not as substantial as those presented during trial. Therefore, a lesser showing than that required at trial is appropriate."]; see also *Tiffany A. v. Superior Court* (2007) 150 Cal.App.4th 1344, 1359 [decision to shackle minor in juvenile delinquency court must be based on the nonconforming conduct and behavior of that individual minor].)

Just as the constitutional protections regarding the use of shackles should be applied with modification, in juvenile proceedings the rules regarding the ability to dress in street clothes should also be applied. Here, the motion was denied at the request of the probation department on the ground that the juvenile facility, unlike adult facilities, does not have the security features necessary to enable the minors to change clothes for court. While the record does not include an explanation of the probation department's security concerns, we have no reason to question that the facilities at the juvenile court did not readily accommodate a change of clothing, at least without creating security problems. There was not, however, any attempt made by the court to probe the probation officer's generalized security concerns and to determine whether some special arrangements were feasible.

We need not resolve this issue however, because minor plainly has failed to establish prejudice under any standard. (See *Taylor, supra*, 31 Cal. 3d at pp. 499-500 [applying harmless-beyond-a-reasonable-doubt standard of prejudice applicable to federal constitutional error]; *Zapata, supra*, 220 Cal.App.2d at pp. 910-911 [applying less stringent "miscarriage of justice" standard for state law error].) Minor's sole allegation of prejudice stems from the court's purported bias, rather than any inability to participate in his defense: "The prejudice flowing from the minor's appearance in this case was particularly grave because all decisions regarding self-defense, and particularly imperfect self-defense, are so highly subjective. The juvenile court was less likely to conclude that

the minor acted in self-defense when he was dressed as a criminal." Nothing in the record supports minor's claim of bias.

5. *Sixth Amendment Right to Compulsory Process*

"Under the Sixth Amendment to the United States Constitution, a criminal defendant has the right 'to have compulsory process for obtaining witnesses in his favor.' " (*In re Martin* (1987) 44 Cal. 3d 1, 29.) "A defendant's constitutional right to compulsory process is violated when the government interferes with the exercise of his right to present witnesses on his own behalf." (*Id*. at p. 30.) The defendant's Sixth Amendment right, however, must yield to a witness's legitimate claim that his or her testimony might lead to self-incrimination. (*People v. Hill* (1992) 3 Cal.4th 959, 993, overruled on different ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Minor contends the court improperly interfered with his right to present testimony by witnesses Anthony Brown and Matthew Higenbotham.

At the hearing on the admissibility of gang evidence, minor first called Brown, who began to testify. As minor summarizes, "Brown testified without objection to the following: (1) he was a neighbor of the minor's and had known the minor and his family for many years; (2) he heard Inspector Broberg's testimony stating that he, Anthony Brown, and minor . . . were both members of the Big Block gang; (3) in reality, there was no such gang currently in existence; (4) he had never been charged with being a gang member or engaging in criminal conduct on behalf of a gang." Brown testified that he is stopped by the police 15 to 20 times a week and that he has "run from a police officer to avoid being detained." When defense counsel asked Brown why he would run, the prosecutor objected. The court sustained the objection on the ground of relevance. The court also expressed concern that Brown was not represented by independent counsel. The court then asked for the appointment of "conflict counsel . . . before he speaks further."

After being appointed, conflict counsel announced that he would advise Brown not to discuss the "particulars" of his police reports. The prosecutor responded that in that

case she would move to strike Brown's direct testimony based on her inability to cross-examine the witness. After a discussion of the scope of cross-examination, the following colloquy ensued:

> "[Prosecutor]: So, I am going to ask a limited number of questions and we'll go from there.
>
> "[Conflict Counsel]: I guess I would advise him not to testify.
>
> "The Court: Then I will strike the testimony. Well, Mr. Brown you're going to have to testify whether you want to testify or not. I'm not telling you but you have advice by counsel. Let's see if you're going to answer any questions by the DA."

The prosecutor's first question was whether he was familiar with Matthew Higenbotham. On advice of counsel, Brown invoked his right against self-incrimination. The court excused him as a witness and struck his testimony.

Matthew Higenbotham was called next to testify. Prior to swearing in Higenbotham, the court appointed the same attorney to represent Higenbotham. Counsel advised Higenbotham that "When we get into the particulars of any of these crime reports or association with people that are suspected to be gang involved, [he] would advise him not to answer those questions." When asked whether Higenbotham would be following his lawyer's advice, counsel said "I believe he would follow my advice." Thereafter, the court immediately released Higenbotham as a witness. Higenbotham was not sworn or asked any questions before his release.

Minor contends the court interfered with his right to present witnesses by excusing Brown and Higenbotham without properly evaluating the invocation of their right to avoid self-incrimination. He argues, "Where the Fifth Amendment right against self-incrimination comes into play, the trial court must follow a particular protocol to ensure that the right is actually applicable and that the witness is actually asserting it" and that the court, in this instance, failed to follow the required protocol. Minor relies on *People v. Ford* (1988) 45 Cal.3d 431, 440, in which the court stated, "It is well established . . . that in order to assert the privilege against self-incrimination a witness must not only be called, but must also be sworn." This is because "a witness does not have an unqualified

right to exercise the privilege against self-incrimination, and unless the question clearly calls for an incriminating answer the witness who has asserted the privilege bears the burden of satisfying the court that an answer would have a tendency to incriminate the witness." (*Ibid*; see also *People v. Harris* (1979) 93 Cal.App.3d 103, 117 ["[B]efore a claim of privilege can be sustained, the witness should be put under oath and the party calling him be permitted to begin his interrogation. Then the witness may invoke his privilege with regard to the specific question and the court is in a position to make the decision as to whether the answer might tend to incriminate the witness."].)

Here, the court properly excused Brown after Brown refused to answer a question regarding whether he was familiar with Higenbotham, who Inspector Broberg had previously testified was a gang member. The witnesses' refusal to answer questions regarding his relationship with known gang members is a proper basis for invoking his right against self-incrimination. (See, e.g., *In re Jorge G*. (2004) 117 Cal.App.4th 931, 950 [disclosure of the identities of other gang members with whom the registrant associates "would be 'a significant "link in a chain" ' " in proving that the registrant is a knowing participant in a gang].) There is no doubt that Higenbotham would have been asked the same questions and he clearly indicated his intention to invoke his rights under the Fifth Amendment. Any failure of the court to swear Higenbotham and require that he invoke his right on the record in response to a specific question was harmless.

6. *Instagram Subpoena*

Prior to the jurisdictional hearing, defense counsel served a subpoena seeking all records related to minor's Instagram account and the Instagram account of Jaquan Rice, including member information, photos, comments, messages and profile section information. Instagram, LLC filed a motion to quash the subpoena on the ground that the federal Stored Communications Act, 18 United States Code section 2701 et seq., prohibited Instagram from providing the records to defense counsel pursuant to

subpoena.[5] Instagram argued that under 18 United States Code section 2703 only the prosecution had access to the requested records through a warrant.[6] Following a contested hearing, the juvenile court quashed the Instagram subpoena.

As the parties acknowledge, the question of whether the Stored Communications Act prohibits pretrial access to records possessed by Instagram and other social media companies is currently pending before the California Supreme Court. (*Facebook, Inc. v. Superior Court* (2015) 240 Cal.App.4th 203, 208, review granted and opinion superseded *sub nom. Facebook, Inc. v. Superior Court* (Cal. 2015) 362 P.3d 430.) We need not resolve the matter in this case, as the court's order, if error, was harmless beyond a reasonable doubt.[7]

Minor agues, "There is no way that the prosecution can demonstrate that the error was harmless when we do not have the Instagram account documents in the record." Minor, however, acknowledged at the hearing on the motion to quash that the prosecution

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[5] 18 United States Code section 2702, subdivision (a)(1) provides that "a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service." Subdivision (a)(2) imposes a similar restriction on "a person or entity providing remote computing service to the public."

[6] 18 United States Code section 2703, subdivision (a) provides: "A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction. A governmental entity may require the disclosure by a provider of electronic communications services of the contents of a wire or electronic communication that has been in electronic storage in an electronic communications system for more than one hundred and eighty days by the means available under subsection (b) of this section."

[7] Minor requests that this court take judicial notice of the appellate case file in *Facebook v. San Francisco Superior Court* (A144315), which he asserts involves the writ proceeding arising from "the adult case involving the same crime at issue in the instant appeal . . . and involves precisely the same issue with respect to subpoenaed Instagram account records." The request is denied on the ground of relevancy.

had obtained and shared some data from Instagram. The prosecutor confirmed that "Everything that we received, whether it was printed from an inspector doing a screen shot as they were looking at things or pursuant to search warrant has been turned over in electronic and paper copies to [defense counsel]." Minor introduced as exhibits numerous screenshots from his and Rice's Instagram accounts. In addition, at trial a witness testified about a threat made by Rice against minor through minor's Instagram account. While minor speculates that additional exculpatory evidence might have been found in the undisclosed comments to certain posts on Rice's Instagram account, any such evidence would at most have been cumulative of the evidence already introduced.

7. *Attempted Murder Charges*

Minor contends there is no substantial evidence to support the finding that he had the requisite specific intent to kill the female victim. "The mental state required for attempted murder has long differed from that required for murder itself. Murder does not require the intent to kill. Implied malice—a conscious disregard for life—suffices. [Citation.] But over a century ago, we made clear that implied malice cannot support a conviction of an *attempt* to commit murder. ' "To constitute murder, the guilty person need not intend to take life; but to constitute an attempt to murder, he must so intend." [Citation.] "The wrong-doer must specifically contemplate taking life; and though his act is such as, were it successful, would be murder, if in truth he does not mean to kill, he does not become guilty of an attempt to commit murder." ' " (*People v. Bland* (2002) 28 Cal.4th 313, 327-328.) The requisite intent to kill is not transferable. "To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. The defendant's mental state must be examined as to each alleged attempted murder victim. Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others." (*Id*. at p. 328.) However, a person who shoots at a group of people, while primarily targeting only one of them, may be guilty of attempted murder of everyone in the group based on a theory of "concurrent intent." (*Id*. at p. 329.) The court in *People v. Bland* explained,

“ ‘The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim’s vicinity. For example, . . . consider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a “kill zone” to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim. When the defendant escalated his mode of attack from a single bullet aimed at A’s head to a hail of bullets or an explosive device, the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A’s immediate vicinity to ensure A’s death. The defendant's intent need not be transferred from A to B, because although the defendant's goal was to kill A, his intent to kill B was also direct; it was concurrent with his intent to kill A. Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone. This situation is distinct from the “depraved heart” [i.e., implied malice] situation because the trier of fact may infer the actual intent to kill which is lacking in a “depraved heart” [implied malice] scenario.’ ” (*Id.* at pp. 329-330.)

Given that the facts of this case so closely track the example given in *Bland*, the court was entitled to infer a concurrent intent to kill Rice and the female victim, who was sitting on his lap. Minor argues that when the van pulled up to the bus shelter and he saw the female victim, he stopped shooting, but the video of the shooting is not so clear. Moreover, the fact that minor may have felt remorse after learning the identity of the female victim does not alter his intent at the time of the shooting.

8. *Maximum Term of Commitment*

"When a minor within the jurisdiction of the juvenile court is committed to California's Department of Corrections and Rehabilitation, Division of Juvenile Justice, the juvenile court is required to indicate the maximum period of physical confinement. [Citation.] 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." (*In re Julian R.* (2009) 47 Cal.4th 487, 491, fn. omitted; see also §§ 726, subd. (c), 731, subd. (c).)

At the dispositional hearing, minor's counsel requested the court set minor's maximum term of confinement at two years. The court, however, set the maximum term at 84 years eight months to life. As the court noted, minor's actual confinement time will be determined by the DJJ. (*In re A.G.* (2011) 193 Cal.App.4th 791, 800 [" '[O]nce committed to [DJJ], the minor's actual term is governed by [DJJ] guidelines, within the statutory maximum. "Minors most often do not serve their maximum terms, but the statutory maximum may affect both parole eligibility and the extent to which actual confinement may be prolonged for disciplinary reasons." ' "].) According to the dispositional report, minor's murder adjudication "carrie[d] a baseline possible confinement discharge of seven years," and by statute minor could not be confined beyond age 23. Given the circumstances of the offense, we find no abuse of discretion in the court's determination of the maximum term.

Disposition

The juvenile court orders are affirmed.

_____
Pollak, J.

We concur:

_____
McGuiness, P. J.

_____
Siggins, J.

A142771