

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**In re ANDREW G., a Person Coming
Under the Juvenile Court Law.**

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW G.,

Defendant and Appellant.

A105329

**(Alameda County
Super. Ct. No. J188442)**

Andrew G. (Andrew) appeals from his commitment to the California Youth Authority (CYA) under Welfare and Institutions Code section 202. A 14-year-old first-time and unarmed offender, Andrew contends the disposition was not supported by substantial evidence, in that there was no showing a CYA commitment would provide a likely benefit to him in accord with the purpose of the statute. We will vacate the order and remand for resentencing.

I. FACTS AND PROCEDURAL HISTORY

A juvenile wardship petition under Welfare and Institutions Code section 602 charged Andrew with two counts of assault with a weapon (hands, feet, bat, pole, and nunchukas) by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)). It was further alleged, as to both counts, that he personally inflicted great bodily injury on his victims (Pen. Code, § 12022.7) and committed the offenses for the benefit of, at the direction of, or in association with, a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)).

We summarize the underlying facts from the police and dispositional reports:

At approximately 12:45 a.m. on August 19, 2003, Union City police officers responded to the scene of a reported fight in the parking lot of In-N-Out Burgers. The officers discovered two young Asian men, later identified as victims Jim A. and Jordan A., lying in the parking lot with a pool of blood near their heads.

A witness reported that about 10 Filipino males, between 16 and 20 years old, had hit and kicked two Asian males who were on the ground. One of the Filipino males held a set of nunchukas in his hand. A Filipina female also struck one of the victims about 15 times in the head with a silver pipe or bat. The assailants then drove off. Another witness heard one of the males yell “Westside” as they drove away. One of the witnesses provided the license number of one of the assailants’ vehicles to the 911 dispatcher.

After further investigation, the police contacted Andrew’s mother, who invited them to her residence. There, they met with Andrew, his sister Katherine, and a young man named Robert. Andrew provided the police with the names and telephone numbers of two other suspects, Joshua and Benjamin. Katherine acknowledged they were all members or associates of a Filipino gang known as the Bahala Na Gang (BNG).

According to Andrew and Katherine, the incident stemmed from the vandalism of two automobiles belonging to Andrew’s friends on August 17 and 18, 2003. While attending a party on August 18, Andrew also received several “crank” calls on his cell phone from a person named “Jordan,” who was thought to be one of the vandals. “Jordan” was a member of a rival gang, Vicious Family. Andrew and Jordan agreed to meet at In-N-Out Burgers to settle their differences. Andrew and his friends drove to the restaurant in two vehicles, taking along weapons so they would prevail in the fight. When they arrived, Andrew observed a group of Filipinos walking into the restaurant. He approached and asked one of them if he was “Jordan.” When the man responded affirmatively, Andrew hit him with a closed fist. Another person hit Jordan over the head with an object. As Jordan’s friends ran to help him, the rest of Andrew’s group approached with nunchukas, bats, and a metal pole, and beat and kicked the victims. Andrew was 14 years old at the time of his arrest.

Katherine admitted to the police that she struck one of the males a “couple of times” with a metal pipe. Robert and Benjamin admitted kicking one of the victims. Benjamin also admitted he used the nunchukas on one of the victims.

All of the suspects eventually conceded their involvement in the assault, which they perpetrated in the *mistaken* belief that their victims were the people responsible for the earlier incidents of gang-related vandalism. Six witnesses to the assault (including two victims) identified Andrew in separate lineups. Two of the victims sustained head injuries in the attack, and one sustained arm injuries.

Katherine and Robert acknowledged being members of the BNG and planning the attack on persons they believed to be members of the rival Vicious Family gang. The BNG gang members intended to inflict as many injuries on their victims as they could, and considered entry into their turf by a rival gang to be disrespectful.

At the October 17, 2003, hearing, Andrew admitted the count one violation of Penal Code section 245, subdivision (a)(1) (after deletion of references to weapons other than hands and feet), and the gang allegation, in exchange for the dismissal of count two and the bodily-injury allegation, and with the further understanding the court could consider the dismissed count and allegations in determining disposition and restitution.

The probation department’s dispositional report advised that Andrew had no prior juvenile record. Andrew and his mother and sister were living with his maternal grandfather and aunt at the time of the offense, but when Andrew and Katherine were arrested, they and their mother were evicted. The whereabouts of Andrew’s father was unknown. Andrew’s mother divorced him in 1993, because he was physically abusive and had a gambling addiction. After they remarried in 2000, he kicked Andrew in the chest, for which Andrew received medical attention. Andrew and his mother and sister moved away. Although Andrew’s father reunited with them in May 2003, he subsequently moved out and had not contacted them since. According to Andrew’s mother, Andrew had been upset about their father’s abandonment, lack of interest, and abuse. She frequently worked from 11:00 p.m. to 7:30 a.m. and was unable to supervise Andrew and Katherine during that time. While she worked, they often left the house,

stayed out late, went home before she returned, and lied to her about leaving. Andrew indicated he had joined the BNG gang months before the incident, because “it was something to do.” He frequently cut school, Andrew explained, so he could “kick it” at his friend’s house, where they drank and played video games. While his mother was at work, he and Katherine went out or had friends over, against her wishes. Although he tried marijuana, he preferred to drink hard liquor, which he consumed at least once a week. Andrew attended high school only sporadically in March and April 2003, and did not attend at all in May and June 2003. He had not received any behavioral referrals in high school.

The probation department recommended that Andrew be placed in a licensed rehabilitation facility, stating: “a placement recommendation will be made pursuant to Section 726(a) W&I, with the gang conditions, no co-participant association, no victim contact, reserved restitution and a restitution fine.”

At the October 31, 2002, dispositional hearing, the prosecutor argued that a CYA commitment was necessary. As the prosecutor described it, Andrew was so caught up in violence that he initiated a fight with people he did not know, and without knowing what his intended victims looked like, while accompanied by armed gang members and motivated by his allegiance to the gang. The prosecutor remarked: “I just don’t see how you can have him go stay in some group home after he’s done this. . . . So he needs to be somewhere where there is a fence around it, and I think we both know what that is. He ought to go to the Youth Authority. I don’t think anything short of that would be fair punishment to him, and it’s definitely not fair to the community to have somebody like him just move into somebody’s neighborhood to live in a group home.” Defense counsel urged the court to follow the probation department’s recommendation, asserting there were placement facilities that offered sufficient security.

The juvenile court, after noting (from the dispositional report) that Andrew had been rejected by Camp Sweeney, expressed its view that the group homes known to the court, as well as the Boys Republic program, were not sufficiently secure. “So even if I were to select a program that specializes in gang intervention services, basically he’d be

placed in the community with freedom to come and go as he pleases at some point.” The court voiced its concern that Andrew would not receive the treatment he needed if he were placed in an “open setting,” and then observed: “I guess the question is whether he can be trusted to stay somewhere to receive treatment.”

The juvenile court continued the dispositional hearing for further investigation into alternatives to CYA. The court remarked: “Well, I would certainly like to know if the probation department can find a group home for him. I would like to know which one and what the proposed treatment would be. I’m not inclined to give the probation department a lot of wiggle room in this one because if it turns out that the plan, the proposed plan, can’t be carried out our options would be closed. So if you’re willing to waive time, what I will do is direct the probation department to find out if a placement facility with gang intervention services is willing to take him and, if so, what the proposed treatment would be for him, and I’m not making any promises, but perhaps I’ll consider a suspended Youth Authority commitment. I certainly would expect him to receive not less than one year and possibly more treatment away from the family home. I’m thinking more in terms of 18 months away from the family home as a minimum amount of treatment and -- but I’m not making any promises.”

In a supplemental dispositional report, the probation department advised there were placements for which Andrew was eligible and which could address gang issues and develop a treatment plan. Nevertheless, the report noted, “all the placements are unlocked facilities in the community and the minor can run if he chooses. If the safety of the community is the Court’s concern then a CYA commitment should be considered.”

When the dispositional hearing resumed, the court described the probation department’s view as “a loose recommendation for the Youth Authority.” The prosecutor argued that a CYA commitment would “let [Andrew] know how serious his conduct was,” “protect the community,” provide Andrew education, and offer a structured setting. Defense counsel recognized that Andrew had played an “active role” in a serious offense committed on behalf of a gang, but requested a one-year term at Boys Republic.

Although Boys Republic was not a locked facility, counsel urged, it was well respected and Andrew would realize the seriousness of his offense.

The court concluded: “[T]his is a pretty serious offense. In spite of his age, I think the best solution for the community is the Youth Authority. He no doubt will need more treatment than he would receive in an ordinary group-home setting. . . . [¶] . . . The court finds that the welfare of the minor requires that his custody be taken from his parents. Reasonable efforts have been made to avoid removing him from his family home. The court has considered less restrictive options for him. Remaining in the home would be contrary to his welfare. Parents have failed to provide proper maintenance, education, and training for the young man in that he has refused to accept proper parental direction. [¶] . . . [¶] . . . The record will also reflect that the minor’s mental and physical qualifications are such to render it probable that he will be benefited by the California Youth Authority commitment, and that’s the finding pursuant to section 734.” The juvenile court committed Andrew to CYA for a maximum period of eight years, less 91 days custody credit.

This appeal followed.

II. DISCUSSION

Andrew contends the juvenile court erred in committing him to CYA, because there was no evidence he would benefit from the commitment, there was no evidence of CYA programs available to address his gang issues, and placing him with criminally sophisticated juveniles at CYA will ultimately be detrimental to him and to the public.

Welfare and Institutions Code section 202, subdivision (b), states in part: “Minors under the jurisdiction of the juvenile court as a consequence of delinquent conduct shall, in conformity with the interests of public safety and protection, receive care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances. This guidance may include punishment that is consistent with the rehabilitative objectives of this chapter.” The term “punishment” includes limitations on the minor’s liberty imposed as a condition of probation or parole, commitment of the minor to a local detention or treatment facility

such as a juvenile hall, camp or ranch, and commitment of the minor to CYA. (Welf. & Inst. Code, § 202, subd. (e).)

The juvenile court has discretion to choose among these alternatives. “We review a commitment decision only for abuse of discretion, and indulge all reasonable inferences to support the decision of the juvenile court.” (*In re Asean D.* (1993) 14 Cal.App.4th 467, 473 (*Asean D.*)) Appellate decisions express the view “it is clear that a commitment to the Youth Authority may be made in the first instance, without previous resort to less restrictive placements.” (*Ibid.*) On the other hand, commitment to CYA should be made only in the more serious cases. (*In re Todd W.* (1979) 96 Cal.App.3d 408, 417-418; *In re Lorenza M.* (1989) 212 Cal.App.3d 49, 58.) We are mindful, as well, that amendments to the juvenile court law in 1984 “reflected an increased emphasis on punishment as a tool of rehabilitation, and a concern for the safety of the public.” (*Asean D.*, *supra*, at p. 473.) Thus, there must still be evidence showing the commitment will be of probable benefit to the minor and less restrictive alternatives are ineffective or inappropriate, but these factors must be considered in light of the Legislature’s clear purpose behind the amendments. (*In re Michael D.* (1987) 188 Cal.App.3d 1392, 1396.)

In the matter before us, we appreciate the juvenile court’s concern with public safety, which is a worthy and very important aim in selecting a disposition. On the record before us, however, there was simply no *evidence* to support the conclusion that CYA was the appropriate disposition for Andrew.

We begin with the statutory mandate that the disposition provide a likely benefit to the minor: specifically, that he receive care, treatment, and guidance consistent with his best interest, holding him accountable for his behavior, and appropriate for his circumstances. In this case, there was no evidence of any effective or appropriate treatment programs at CYA to address the main reason Andrew committed the offense: his involvement in the BNG gang. By contrast, the probation department found a number of placements for which Andrew was eligible, which could address gang issues and develop a treatment plan. Further, Andrew now insists he needs to be “placed in a rehabilitation program which will deal with his issues of the physical abuse he suffered at

the hands of his father and his inevitable despair at being abandoned by his father.” Although neither the probation department nor Andrew identified this as a cause of his crimes, it does underscore the utter lack of any showing that a CYA commitment would benefit Andrew in his particular situation. Thus, while the juvenile court stated that Andrew “no doubt will need more treatment than he would receive in an ordinary group-home setting,” there was no *evidence* of any treatment Andrew would receive at CYA, let alone that it would address his needs and circumstances.

We recognize it has been said, as a general matter, that the CYA has programs of benefit to wards with psychological, emotional, or educational needs, and a CYA commitment affords a rehabilitative form of punishment. (See *In re Tyrone O.* (1989) 209 Cal.App.3d 145, 153; *In re Gerardo B.* (1989) 207 Cal.App.3d 1252, 1258.) No doubt CYA would hold Andrew accountable for his behavior and, in that sense, the disposition would yield *some* benefit to him. But even if this constituted substantial evidence of a probable benefit to Andrew, there was no showing that lesser alternatives—such as those recommended by the probation department—would not provide the same benefit. Indeed, those lesser alternatives *had* treatment programs specifically suited to Andrew’s needs.

We still might conclude that the disposition was within the juvenile court’s discretion, if a CYA commitment was shown to be necessary to protect the public. Despite the prosecutor’s insistence, however, there was no *evidence* that public safety required Andrew to be placed in a locked facility. The assault was Andrew’s first offense, he did not use a weapon, and he did not *intend* to harm an innocent member of society. While the harm he inflicted and the danger of future attacks stems from his association with armed gang members, an unlocked facility offers the opportunity for him to be separated from BNG associates and gang activities. Moreover, there was *no indication Andrew would flee* from an unlocked facility. He had no history of violating terms of probation, disobeying court orders, refusing treatment, or running away from home. While Andrew and his sister ventured out at night against his mother’s wishes, he always returned. Although he and his companions left the scene after the assault, there is

no evidence they fled from the police. To the contrary, Andrew admitted his participation in the offense and cooperated with the police by identifying two co-perpetrators. And if a CYA commitment could be justified because the juvenile left the scene of the offense, virtually *every* first-time juvenile offender would constitute a flight risk and be deemed appropriate for CYA. Surely that was neither what the Legislature intended nor what justice requires.

Finally, we must consider the potential effect of CYA on a youth of Andrew's age. As observed by the court in *In re Teofilio A.* (1989) 210 Cal.App.3d 571, 577: “The courts have persistently shown a realistic concern for commingling of unsophisticated, mildly delinquent minors “with the more criminally oriented groups of delinquents committed to California Youth Authority,” thereby converting them to trained and sophisticated criminals.” In the final analysis, in giving importance to *both* Andrew's needs *and* the protection of society, the commitment to CYA was not a reasonable choice.

Our decision should not be misread. By no means do we trivialize Andrew's actions, the harm to his victim, the dangers of gang association, or the need to promote public safety. But on this record, we must conclude that there exists insubstantial evidence that a CYA commitment would provide a likely benefit to Andrew, or that the public safety required his placement in a locked facility. In the absence of such evidence, the disposition was an abuse of discretion, and the commitment order must be vacated. We therefore remand this matter to the trial court for resentencing in light of this opinion and any new or additional information relevant to a proper placement.

III. DISPOSITION

The order is vacated and the matter remanded for resentencing.

STEVENS, Acting P.J.

We concur.

SIMONS, J.

GEMELLO, J.