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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re MICHAEL C., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL C.,

Defendant and Appellant.

A109929

(San Mateo County
Super. Ct. No. 66651)

I.

INTRODUCTION

Appellant Michael C., already a ward of the court, entered a plea in which he admitted violation of Penal Code section 261.5, subdivision (b) (unlawful sexual intercourse with a minor not more than three years younger than the perpetrator), a misdemeanor. The court subsequently ordered him to the California Youth Authority (CYA) for a maximum period of confinement and directed him to pay \$11,000 in victim restitution. Appellant argues that the trial court abused its discretion both in making the commitment itself, and in setting the length of the commitment. He argues further that there was insufficient evidence to support the restitution award. We conclude that both the CYA commitment and the restitution order were supported by substantial evidence.

Regarding the maximum period of confinement, we remand for a determination based on the specific facts and circumstances of appellant's case.

II.

PROCEDURAL AND FACTUAL BACKGROUND

Appellant was first arrested in July 1999 on suspicion of burglary. The court later found that appellant and some friends broke into a home while on a school field trip. Several items taken from the home were later found in appellant's residence. The court subsequently found true charges of first degree burglary and misdemeanor theft. Appellant was adjudged a ward of the court and placed on probation.

On April 10, 2003, a referral was received by the San Mateo Police Department alleging that appellant stole another student's purse from the gymnasium at his high school. The court ultimately found true a charge of felony possession of stolen property and committed appellant to Camp Glenwood.

Later that year, while at Camp Glenwood, a fellow student accidentally stepped on appellant's foot as they were entering a classroom. Appellant responded by stabbing the student with a pencil. In December 2003, a petition alleging misdemeanor battery was sustained and appellant was ordered to the CYA for a 90-day diagnostic evaluation. He was recommitted to Camp Glenwood following this period.

On the evening of October 8, 2004, while on a home pass, appellant, then 17 years old, met up with a group of friends at a Redwood City movie theater. The group decided to return to appellant's house where they played video games and listened to music in the living room. Appellant and a 15-year-old female later moved to the kitchen and began drinking tequila, which was obtained from an unlocked liquor cabinet. The two of them ultimately ended up in appellant's bedroom where they had sexual intercourse.

The next day, the 15-year-old female told her friends and a school counselor that she had been raped. On October 27, 2004, appellant was arrested on suspicion of rape. On December 8, 2004, the San Mateo District Attorney filed a petition against appellant, charging him with felony rape by force or fear (Pen. Code, § 261, subd. (a)(2); count one); felony rape by intoxication (Pen. Code, § 261, subd. (a)(3); count two); felony false

imprisonment (Pen. Code, §§ 236, 237; count three); and misdemeanor unlawful sexual intercourse with a minor (Pen. Code, § 261.5, subd. (b); count four). Appellant admitted to having sex with the minor but maintained that the encounter was consensual. A plea agreement was subsequently reached in which appellant agreed to plead to count four. In exchange, the district attorney dismissed the remaining counts.

A probation report submitted on April 13, 2005, recommended that, based on the facts, appellant be committed to the CYA. The report also indicated that appellant's probation officer had spoken with the victim's mother about restitution. According to the report, the victim's mother told the probation officer that she had incurred \$10,000 in copayments for her daughter's "medical/psychological treatment." However, the mother later reported to an advocate for the Victim Compensation Program that these expenses had subsequently increased to \$11,000. Consequently, the report also recommended that appellant be ordered to pay \$11,000 in restitution to the State Victim Restitution Fund.

At the April 15, 2005 dispositional hearing, the court accepted the recommendations included in the probation report. The court continued wardship and committed appellant to the CYA for the maximum period of confinement allowable, calculated to be seven years six months, less 658 days custody credit. Further, the court ordered that appellant pay \$11,000 in restitution to the victim. The trial court overruled counsel's objection that this figure was unsubstantiated¹, and ordered appellant to pay the full amount of the costs incurred by the victim's mother for her daughter's care.

This appeal followed.

¹ Appellant's counsel argued: "The implication from the police reports is this particular young lady had some emotional problems and was possibly seeking counseling prior to the incident, yet we have a demand or request for some \$11,000 in what I assume are probably counseling expenses. . . . [¶] And I have no supporting information to indicate how much of that medical treatment may be attributable from this sexual contact that took place or how much of it stemmed from something that was going on before. We just have no breakdown."

III. DISCUSSION

A. The CYA Commitment was Supported by Substantial Evidence

Welfare and Institutions Code section 734² provides that “[n]o ward of the juvenile court shall be committed to the Youth Authority unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by the Youth Authority.”

“An appellate court will not lightly substitute its decision for that rendered by the juvenile court. We must indulge all reasonable inferences to support the decision of the juvenile court and will not disturb its findings when there is substantial evidence to support them [Citations.]” (*In re Michael D.* (1987) 188 Cal.App.3d 1392, 1395.) Generally, substantial evidence exists where a dispositional order is based on consideration of the extent of the minor’s need for a controlled environment, the minor’s prior record of delinquency, the circumstances and gravity of the minor’s criminal conduct, the threat the minor poses to the community, the efficacy of prior dispositions in rehabilitating the minor, the minor’s compliance with prior court orders, and the minor’s age. (§ 725.5; see, e.g., *In re Mikeal D.* (1983) 141 Cal.App.3d 710, 718-720; *In re Anthony M.* (1981) 116 Cal.App.3d 491, 503-505.)

In 1984, the Legislature amended section 202 to recognize punishment as a rehabilitative tool and to emphasize the safety and protection of the public. (Stats. 1984, ch. 756, §§ 1, 2, pp. 2726-2727; see also *In re Michael D.*, *supra*, 188 Cal.App.3d at p. 1396.) The amendment requires that courts commit delinquent minors “in conformity with the interests of public safety and protection, [to] 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.” (§ 202, subs. (b), (e)(5); see

² All further undesignated statutory references are to the Welfare and Institutions Code.

Stats. 1984, ch. 756, §§ 1, 2, pp. 2726-2727; *In re Lorenza M.* (1989) 212 Cal.App.3d 49, 57-58, fn. 2; *In re Michael D., supra*, 188 Cal.App.3d at p. 1396.)

Nevertheless, rehabilitation continues to be a critical objective of juvenile court law, and must be considered in addition to the greater emphasis on punishment and societal protection in section 202. (*In re Michael D., supra*, 188 Cal.App.3d at p. 1396.) To commit a minor to the CYA, the juvenile court must be “fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by the [CYA].” (§ 734.) Accordingly, the rehabilitative purposes of a CYA commitment are satisfied when there is 1) evidence in the record demonstrating probable benefit to the minor, and 2) evidence supporting a determination that less restrictive alternatives are ineffective or inappropriate. (*In re Teofilio A.* (1989) 210 Cal.App.3d 571, 576; *In re Michael D., supra*, 188 Cal.App.3d at p. 1396.)

First, placements less restrictive than CYA were repeatedly tried without success. An initial attempt in 2000 at probation without an out-of-home placement ended when appellant was charged with a felony in 2003, and thereafter sent to Camp Glenwood. While there, he committed an assault on another student. He was then ordered to CYA for a 90-day evaluation and returned to the camp. Despite his exposure to CYA, while on furlough from Camp Glenwood, appellant committed the present offense. In light of this history, the trial court was fully justified in concluding that less restrictive alternatives were ineffective or inappropriate. (*In re Teofilio A., supra*, 210 Cal.App.3d at p. 576; *In re Michael D., supra*, 188 Cal.App.3d at p. 1396.)

Appellant contends that the record fails to demonstrate substantial evidence of a probable benefit to the appellant by committing him to CYA. He maintains that the CYA “is not the environment best suited” to meet his needs or interests. In making this argument, appellant relies on several studies which have questioned the efficacy of the CYA, placing particular reliance on those studies which indicate that those who are incarcerated as juveniles are more likely to reoffend and to go to prison as adults than the rest of the population. According to appellant: “The fact is, that after spending years at

CYA, appellant will not be rehabilitated. He will not have received effective treatment, and he will be continually exposed to unsavory and unfavorable influences.” We are not persuaded.

To the extent appellant now relies on studies questioning the ability of CYA to meet its reformatory goals, he has waived any error in the juvenile court’s sentence on this ground by failing to make this argument below. (*People v. Scott* (1994) 9 Cal.4th 331, 356) [“[C]omplaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal.”].) “It is settled that failure to object and make an offer of proof at the sentencing hearing concerning alleged errors or omissions in the probation report waives the claim on appeal. [Citations.]” (*People v. Welch* (1993) 5 Cal.4th 228, 234-235; *In re Justin S.* (2001) 93 Cal.App.4th 811, 814.)

Moreover, even on appeal, appellant has presented no evidence of the ineffectiveness of CYA programs as they might relate to his own circumstances. To the contrary, there is ample record evidence that appellant, and society, would best be served by CYA programs and institutional structure. Appellant’s significant and escalating criminal misbehavior led the probation department to conclude that he had not taken responsibility for his actions, and continued to blatantly disregard other people and their property ever since becoming a ward of the court in 2000. The report characterized him as a “serious threat and danger to society,” and not capable of behaving appropriately when in the community.

Thus, the probation report concluded that: “In serving a commitment to the California Youth Authority, the Minor will be held accountable for his behavior, will have the opportunity to participate in the rehabilitative programs available at the Youth Authority, and will be removed from . . . all the familiar negative influences that have been surrounding him throughout the years.”

At the commencement of the disposition hearing, the trial court noted that it had read the probation report. The court was not convinced by appellant’s argument that he was ready to make a change in his life and conform his behavior to the court’s

expectations, noting that “the fact that he actually went to [CYA], saw what it was like, came back, and reoffended after being given chance after chance is of grave concern.” The court concluded that appellant was “a serious threat and a danger to society” because his continuing misconduct appeared to be the result of a conscious choice not to behave. As a result, the court noted “the only thing that is going to change the path that you’ve chosen is to go [*sic*] to [CYA].” The court also concluded that appellant had no exceptional educational needs.

Based on this record, we conclude that there was substantial evidence to support the commitment. Given the fact that the record contains substantial evidence that CYA will benefit appellant and is the best placement option, particularly in light of the lack of less restrictive alternatives, we cannot say that the juvenile court abused its discretion in committing appellant to CYA.

B. Welfare and Institutions Code section 731, subdivision (b) Requires That Juvenile Courts Exercise Discretion in Determining a Juvenile’s Maximum Period of Confinement Based on the Facts and Circumstances of the Case

Welfare and Institutions Code section 731, subdivision (b) was amended in 2004. It now provides, in relevant part, as follows: “A minor committed to the Department of the Youth Authority may not be held in physical confinement for a period of time in excess of the maximum period of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court. *A minor committed to the Department of the Youth Authority also may not be held in physical confinement for a period of time in excess of the maximum term of physical confinement set by the court based upon the facts and circumstances of the matter or matters which brought or continued the minor under the jurisdiction of the juvenile court, which may not exceed the maximum period of adult confinement as determined pursuant to this section. . . .*” (Italics added to represent the language added to the statute, operative as of January 1, 2004; see 2 Stats. 2003 (2003-2004 Reg. Sess.), ch. 4, § 1, pp. 147-148, eff. Apr. 8, 2003, operative Jan. 1, 2004.)

Prior to 2004, it was customary for juvenile courts to impose maximum terms of confinement equivalent to that which could be imposed on adults convicted of the same offense(s). While courts still maintain this power, recent cases interpreting the newly amended section 731, subdivision (b) have held that courts have an affirmative duty to exercise their discretion, based on the facts and circumstances of the case before it, when setting the juvenile's maximum term of confinement. (See, e.g., *In re Sean W.* (2005) 127 Cal.App.4th 1177, 1183, rev. denied June 22, 2005 (S133413) (2005 LEXIS 6878); *In re Carlos E.* (2005) 127 Cal.App.4th 1529, 1543; *In re Alex N.* (2005) 132 Cal.App.4th 18, 26-27; *In re Jacob J.* (2005) 130 Cal.App.4th 429, 432.)

The first of these cases, *In re Sean W.*, was decided on March 28, 2005, although it did not become final until review was denied on June 22, 2005, by the California Supreme Court. The disposition in the case currently before us was entered on April 15, 2005. Although the standard presumption is that courts are aware of and follow the law in exercising their official duties (*People v. Coddington* (2000) 23 Cal.4th 529, 644-645, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; *People v. Mack* (1986) 178 Cal.App.3d 1026, 1032), it would be improper to apply that presumption where, as in the present instance, the case establishing the rule of law has yet to become final. Respondent has conceded as much. Accordingly, we remand this case to the juvenile court for a determination as to whether the facts and circumstances of appellant's case warrant a reduction in the maximum term of confinement.

C. The Restitution Order was Supported by Substantial Evidence

The standard of review applicable to restitution orders is abuse of discretion (*In re Johnny M.* (2002) 100 Cal.App.4th 1128, 1132), and the victim's right to restitution is to be "broadly and liberally construed." (*People v. Mearns* (2002) 97 Cal.App.4th 493, 500-501.) " "When there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court." ' [Citations.]" (*Johnny M., supra*, at p. 1132.) "[T]he court may use any rational method of fixing the amount of restitution, provided it is reasonably calculated to make

the victim whole, and provided it is consistent with the purpose of rehabilitation. In doing so ‘ ‘ ‘ “[s]entencing judges are given virtually unlimited discretion as to the kind of information they can consider and the source from whence it comes.” . . . ’ . . . [¶] This is so because a hearing to establish the amount of restitution does not require the formalities of other phases of a criminal prosecution.” ’ ’ [Citation.]” (*In re Brittany L.* (2002) 99 Cal.App.4th 1381, 1391-1392, fns. omitted.)

In the present case, the court based its restitution order on the recommendation included in the probation report. According to that report, the incident out of which the present offense arose has had a devastating impact on the victim. As a result of the sexual encounter with appellant, the victim had a nervous breakdown, requires ongoing psychological counseling, changed high schools, was subjected to harassment by her peers and those of appellant, and contracted a sexually transmitted disease. The victim’s mother stated that her copayments for her daughter’s care at first totaled \$10,000, which later rose to a total of \$11,000.

Appellant contends that the court’s award was not based on substantial evidence because what was presented to the court was “without evidentiary foundation.” For this reason, appellant argues, the court abused its discretion in ordering him to pay to the victim \$11,000 in restitution. Essentially, appellant raises two points: First, the trial court could not simply rely on the statement of the victim’s mother attributed in the probation report as a evidentiary base upon which to make the award of restitution. Second, he claims there was no substantial evidence that the economic loss claimed resulted from appellant’s conduct which he characterizes as a “single act of sexual intercourse.”

As to the first point, appellant cites *People v. Vournazos* (1988) 198 Cal.App.3d 948, 958-959 (*Vournazos*), for the proposition that a hearsay statement contained in a probation report is an insufficient basis upon which to order restitution. In *Vournazos* the trial court ordered restitution based on items enumerated by the victim in a statement of loss that was attached to the probation report. These items were purportedly in a briefcase that was never recovered from the victim’s Mercedes automobile taken by the defendant without the victim’s consent. The statement of loss also included a line item

claiming \$300 to “[r]epair driver’s seat which was damaged in Mercedes 300SD,” and \$600 for three days lost earnings. (*Id.* at p. 952, fn. 2.)

Initially we note that the holding in *Vournazos* has been criticized. In *In re S.S.* (1995) 37 Cal.App.4th 543, the appellate court rejected both a claim that a victim’s itemization of losses was insufficient because the probation department should have “verified” the claim, and appellant’s suggestion that some form of declaration or affidavit should have been required by the trial court before ordering restitution tied to the itemization. The court concluded that where the items, amounts, and sources are adequately identified in the report, it was the minor’s burden or refuting them, and no meritorious objections had been presented: “The . . . items were identified, and their values asserted, with sufficient specificity to permit a defense to the claims. Having presented no meritorious objections, appellant cannot contend that it was petitioner’s (or the probation officer’s) burden to further embellish the showing made.” (*Id.* at p. 548.) The court also observed that the trial court always retains discretion to reject unsubstantiated claims, particularly where, like in *Vournazos*, the probation officer requested documentation relating to the claimed loss from the victim’s bookkeeper which was never supplied. (*Id.* at p. 547, fn. 2.) Moreover, recent cases have concluded that a victim’s statement regarding the amount of loss constitutes prima facie evidence for purposes of restitution. (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1048; *People v. Fulton* (2003) 109 Cal.App.4th 876, 885-886.)

The present case is even more distinguishable from *Vournazos* and the cases cited by appellant in that here the victim is not making a statement as to the *value* of lost property, or the cost to repair it. Instead, the mother simply was confirming the amount of out-of-pocket costs actually expended for the victim’s medical and psychological care after appellant’s criminal act. Appellant has not cited any cases which conclude that a crime victim’s statement of amounts paid for crime-related professional care is an inadequate basis to support an award of victim restitution. To the contrary, to the extent the statement constitutes an expression of “value,” we accept it as prima facie evidence of the victim’s actual loss. The burden was then on appellant to demonstrate that this figure

was erroneous or excessive. (*People v. Hartley* (1984) 163 Cal.App.3d 126, 130; *People v. Fulton, supra*, 109 Cal.App.4th at p. 886.)

Appellant was aware from his receipt of the probation report before disposition that the victim, through her mother, was claiming the cost for professional services relating to her post-crime care. He had an opportunity to proffer evidence at the disposition hearing to contest the amount of restitution sought, yet he failed to do so. We conclude that the probation report's inclusion of expenses incurred provided both a factual and rational basis for the court to issue its restitution order. Appellant has failed to proffer evidence that the \$11,000 was erroneous or excessive.

We also reject appellant's argument that there was no substantial evidence linking these expenses to the "single act of sexual intercourse" for which he was convicted. As noted by the very *Vournazos* case appellant relies on, "in ordering restitution as a condition of probation the court 'is not limited to the transactions or amounts of which defendant is actually convicted.'" (*People v. Lent* [1975] 15 Cal.3d [481,] 486[, overruled on other grounds in *People v. Wheeler* (1993) 4 Cal.4th 284, 290-292].) "Thus, "restitution, as a valid condition of probation, need not be limited to the direct consequences of the criminal acts of which a defendant is actually convicted." [Citations.]' (*People v. Baumann* [1985] 176 Cal.App.3d 67, 76.)" (*People v. Vournazos, supra*, 198 Cal.App.3d at p. 956.)

More to the point, the evidence here establishes quite clearly that the victim's need for care was related to her sexual encounter with appellant.³ It was unrefuted by appellant that, as a result of this event, the victim had a nervous breakdown, required continuing psychological counseling, changed high schools, was subjected to harassment by her peers and those of appellant, and contracted a sexually transmitted disease. There is simply no justification for appellant to now claim otherwise, and we discern no abuse

³ Appellant's plea did not include a waiver under *People v. Harvey* (1979) 25 Cal.3d 754, thus preventing the facts underlying the three dismissed counts from being considered in the disposition.

of discretion in the court awarding restitution for the totality of costs incurred on behalf of the victim for treatment.

IV.
DISPOSITION

The CYA commitment and the restitution order are affirmed. The case is remanded for a determination of appellant's maximum period of confinement, based on the specific facts and circumstances of his case.

Ruvolo, P.J.

We concur:

Sepulveda, J.

Rivera, J.