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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re ALLEN T., a Person Coming Under  
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

ALLEN T.,

Defendant and Appellant.

A109975

(Contra Costa County  
Super. Ct. No. J0400667)

Allen T. (minor) appeals from the juvenile court's dispositional order committing him to CYA for a total term of 32 years to life for the felony murder and robbery of 17-year-old Christian Lockhart at the Pittsburg Marina (Marina) in Pittsburg, California. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

**BACKGROUND**

On June 8, 2004, Lockhart drowned at the Marina after running away from three males, including minor, 14 years old at the time, who had confronted him and then given chase until Lockhart went off the edge of a rock jetty.

On June 10, 2004, the Contra Costa County District Attorney filed an amended Welfare and Institutions Code section 602 petition in juvenile court charging minor with willful, deliberate and premeditated murder of Lockhart (Pen. Code, § 187, subd. (a)),

second degree robbery of him, and of personally using a knife in the commission of each offense (Pen. Code, §§ 211, 2125, 12022, subd. (b)(1)).<sup>1</sup> A jurisdictional hearing was subsequently held.

***Testimony by Eyewitnesses to the Incident***

S.J. testified that she had met her friend Lockhart at the Marina earlier on the day of his death. While in a bathroom with Lockhart, she saw minor, her own brother Orlanzo, and Orlanzo's friend Thomas. Orlanzo confronted Lockhart and some words were exchanged. The three pursued Lockhart and S.J. walked away.

S.J. soon encountered her sister, who told her that minor, Orlanzo and Thomas had "[a]ssaulted [Lockhart], robbed him and chased him into the water." S.J. went back and stood on the rocks by the water. She saw some of Lockhart's clothes and minor, Orlanzo, and Thomas in the area. Thomas picked up Lockhart's shoes, said to S.J., "that's what he gets," and "he's too old for you," and rode away on a bicycle. S.J. told police that as Thomas rode past her, he said, "We jumped him. We threw him in the water. We got to go." She also told the police that she saw Lockhart's money on his clothes as she ran up to the rocks, but then saw the money was gone as she headed back to the parking lot.

Several other eyewitnesses testified. James S., a retired police officer, was on his boat when he heard male voices shouting in the rock jetty area, about 150 feet away. He saw a light-skinned, shirtless Black male in his teens or early twenties running towards the rock jetty. Soon he heard more yelling and saw two or three Black males as close as 10 feet from the first male. He had the impression that they were chasing the first male, who ran back and forth before jumping into the water from a rock. James S. saw the male's head come up in the water and heard him say something like, "can't swim" or "don't swim." One of the other males, who was running back and forth, seemed "extremely excited as if there was something terribly wrong."

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<sup>1</sup> Minor was also charged with two misdemeanors regarding another incident that were subsequently dismissed.

James S.'s wife Brenda testified that she heard loud noises and saw a juvenile run on to the very slippery rocks and go off the end of the jetty into the water. He looked "like he was running for his life." A second man was running very fast about 10 to 15 feet behind him, and other young males and two females were behind them. She could see a pile of clothes in the area. As the first juvenile went into the water, Brenda heard the second start to scream, "He went in there . . . He's down there." This second juvenile ran back up, stopped and came back down yelling at the other people. Two females were screaming. The other males yelled, "Let's go. Let's get out of here." One of them appeared to be trying to pick up the clothes that were in a pile.

Ron D., who was on a boat in the Marina, heard some yelling. He saw a "group of kids kind of swinging at each other," about five, two or three of whom were fighting. One of them started to run away with difficulty because his jeans were too low. Someone yelled, " 'Get that nigger,' and two kids ran after him." The person running away was "running like he was going to get his ass whooped." He was "scared." As he ran onto the slippery rocks he disappeared from view. A girl screamed, "He can't swim."

#### ***Other Relevant Testimony***

A Pittsburg police detective testified that he found a black knit cap and two T-shirts piled on the dirt walkway leading to the rocks at the Marina. Lockhart's body was taken out of the water, and the only visible injuries were scratch marks on the outside of his arm. He had on unbuckled blue jeans, with the zipper down, and underwear and socks.

Lockhart's mother testified that Lockhart could not swim and was very fearful of the water. She also recognized a cell phone that the police had recovered from a box found in a culvert in the general area as belonging to her son.

#### ***Minor's Statements to the Police***

Minor made statements to police at the Marina and a videotaped statement at the police station that were admitted into evidence at the hearing, and which we discuss further herein. (Discussion, I.A., *post.*) These statements included one to the effect that minor had displayed a knife as his two friends confronted Lockhart, reached for

Lockhart's money after Lockhart emptied his pockets as demanded by one of minor's friends, chased Lockhart towards the water after Lockhart ran, and saw Lockhart slip and go into the water. At the jurisdictional hearing, minor's counsel moved to exclude and suppress all of minor's statements to the police. The juvenile court excluded a portion of minor's statement at the police station, but admitted the rest. Minor's counsel then moved pursuant to Evidence Code section 356 to admit the portion of the minor's statement that the court had excluded, maintaining minor's objection only to the admissibility of minor's videotaped statement at the police station in its entirety.

### ***The Court's Findings and Disposition***

At the conclusion of the jurisdictional hearing, the court found that "during the course of the encounter [with Lockhart], minor formed the intent to rob the victim, along with his two co-responsibles—and that specific intent, coupled with his conduct, brings him within the felony murder doctrine . . . ." Accordingly, the court found minor had committed murder in the first degree, as well as second degree robbery, and found true the enhancement charges that minor had personally used a concealed, deadly and dangerous weapon, that being the knife, in the commission of each offense.

At the subsequent dispositional hearing, the court received a probation officer's report indicating how minor would probably benefit from a CYA commitment, heard testimony that indicated less restrictive programs for minor's placement had not been found, and received evidence that minor's behavior in juvenile hall had included various threatening and disruptive actions which we also review further in the discussion section, *post*. The court stated that his conduct in juvenile court "gives everybody a lot of concern," and concluded that minor was "very dangerous." The court found that minor would probably benefit from a CYA commitment, and indicated that it had "absolutely no other recourse" but to send him to CYA, including because less restrictive programs had not been found. The court rejected counsel's contention that the court was required to stay the term of commitment for robbery pursuant to Penal Code section 654 (section 654), which we also discuss further, *post*. The court imposed a total term of commitment of 32 years to life as follows: 25 years for felony murder and one additional year for the

related enhancement, and five years for robbery and one year for the related enhancement. Minor subsequently filed a timely notice of appeal.

## **DISCUSSION**

### ***I. The Juvenile Court's Rulings on Minor's Motion to Exclude and Suppress His Statements to the Police***

Minor argues that we must reverse his disposition because the juvenile court admitted involuntary statements that he made at the Marina and the police station, thereby violating his rights under the Fifth and Fourteenth Amendments to the United States Constitution and article I, sections 7 and 15 of the California Constitution. Minor's arguments lack merit.

#### ***A. Minor's Statements to Police at the Marina***

##### ***1. Minor's Statements***

Pittsburg Police Officer Don Pearman testified that he rushed to the Marina's central harbor in response to a dispatch and encountered minor running towards him. When Pearman asked him where the victim was located, minor directed the officer towards the rock jetty, stating that it was where the victim had slipped and fallen into the water. Minor asked Pearman, "Do you want me to jump in and get him[?]" Pearman replied that he did not. Minor said the victim was named Johnny, and described him to the officer. Minor was not wearing a shirt and asked if he could get it. He walked away by himself. Pearman told him not to leave.

Pittsburg Police Officer Aaron Togonon testified that he arrived at the Marina in the midst of the search for Lockhart. A sergeant instructed him to interview potential witnesses. He saw minor standing by himself, leaning on the back of a police car, and approached him. He described minor as "somewhat shaken" and "scared," and asked him if he was okay. They walked a short way over to some rocks and talked. Togonon asked minor "to run down what he saw." Minor told him that he walked to the Marina with a person he had met at a restaurant who claimed to know him, but who minor did not recognize. A young Black male near the Marina restrooms saw them approaching and walked away looking scared. Minor and his companion followed the boy down to

the rock jetty. Although minor told the boy not to go in the water, he continued to the end of the rock jetty and went into the water.

Togonon thought that minor was nervous and somewhat vague and evasive, and that his story was not the whole truth. He told minor “that he needed to tell me the truth—I know he’s scared, which is not uncommon. . . .” Togonon stated that he then said: “ ‘I’m going to leave you alone for a few minutes, maybe to gather your composure, and if you’re ready to tell me the honest version, I’ll come back and talk to you—if you are willing to talk to me.’ ” Togonon also testified that he told minor that he knew minor was nervous, and that minor needed to back up and calm down and run down the story to him, and to “be honest about the whole story.”

Togonon walked about 25 or 30 yards away toward the water to look for the victim. This initial conversation lasted perhaps five minutes.

Minor sat alone on a rock for about 10 minutes. Togonon returned with a police lieutenant and sergeant, who wanted to know what happened. Lockhart had not yet been found. Togonon asked minor to explain what he had seen to the lieutenant. Minor repeated the same story he had told before, taking about three minutes, and then said, “Let me tell you what happened.” He then changed his story to some degree, saying that he was at a restaurant with two acquaintances and that they saw a male juvenile there. One of his acquaintances ordered this juvenile to walk with them to the Marina and the juvenile complied. There, one of minor’s acquaintances told the juvenile to take off his clothing; the juvenile took off his beanie and shirt and then ran, slipping into the water and out of sight.

Minor told this new version in a narrative, with a few questions being asked to clarify things; the narrative lasted less than five minutes. Minor was left alone again as the police went back to look for the victim in the water. Minor was not told that he was under arrest, nor was he touched in any way.

Minor then called Togonon over and said that he wanted to tell him what really happened. In a seven to eight minute conversation, minor said that he had been with two friends, Tanose also known as “Little Tay” and “Bulldog” also known as “Bull” or

“Bullet,” on Fifth Street in Pittsburg. When they approached the Marina, they saw a Black male juvenile standing near the restrooms. Little Tay said, “That nigger’s from Oakland.” They called over to the juvenile, who began to walk away. All three followed the juvenile to the rock jetty, where Little Tay said, “You’re still talking shit, bitch,” before punching the juvenile in the face. Little Tay ordered the juvenile to take off his clothes, and he took off his shirt, beanie and shoes. Bulldog told minor to grab the juvenile’s shoes, which minor did. Little Tay ordered the juvenile to remove everything from his pickets, and the juvenile put six dollars on the ground. The juvenile ran away, asking repeatedly, “What did I do?”

Minor said he ran after the juvenile with his two friends. He was about 20 feet away when the juvenile slipped off the rocks at the end of the jetty, regained his balance, and fell into the water. Minor removed his shirt, preparing to go into the water to try to save the juvenile, but decided not to when the boy did not reemerge from the water. Minor’s two acquaintances ran away.

Togonon went back to look for the boy in the water, about 20 yards away, while minor remained sitting on the rocks for “a good five minutes.” Togonon did not tell minor that he had to stay there, and did not restrain, search, or otherwise touch him. He told a sergeant what minor had said, and an officer was assigned to take minor to the police station.

Pittsburg Detective Steven Albanese testified that he told minor that some investigators at the scene wanted to get a statement from him about what happened, and that minor indicated that he did not have a problem going to the police station and talking. Officer David Cranston testified that he searched minor prior to his being taken in one of the police cars at the scene to be interviewed, as a search was required for anyone transported in a police car, including witnesses. Cranston found a folding knife in one of minor’s pants pockets. The parties do not dispute that minor was not informed of his *Miranda* rights at any time prior to being taken to the police station.

## **2. *The Court Did Not Err by Admitting Minor's Statements***

Minor, as he did before the juvenile court in his motion to exclude his Marina statements, argues that he was in police custody from the beginning of his conversation with Togonon because Pearman told him not to leave and Togonon in effect told him he was lying and that he should sit and think about what he was saying, indicating that minor was not free to end the questioning process and leave. Minor contends that the court should have granted his motion to exclude his statements because he was not told his *Miranda* rights. We agree with the juvenile court that there was no *Miranda* violation because minor had not been detained, and did not provide information in the course of a custodial interrogation.

In *Miranda v. Arizona* (1966) 384 U.S. 436, the United States Supreme Court held “that the Fifth Amendment privilege against self-incrimination prohibits admitting statements given by a suspect during ‘custodial interrogation’ without a prior warning.” (*Illinois v. Perkins* (1990) 496 U.S. 292, 296.) Only custodial interrogation by the police triggers the *Miranda* protections, however. (*Illinois*, at p. 296; *People v. Stansbury* (1995)

9 Cal.4th 824, 831.) Questioning outside of custodial settings does not require the observance of *Miranda*'s safeguards. (*California v. Beheler* (1983) 463 U.S. 1121.)

“The test for whether an individual is in custody is ‘objective . . . : “[was] there a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.” ’ ” (*People v. Ochoa* (1998) 19 Cal.4th 353, 401.) In a case involving a juvenile, the United States Supreme Court described how custody is to be determined as follows:

“ ‘Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players’ lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a

formal arrest.’ ” (*Yarborough v. Alvarado* (2004) 541 U.S. 652, 663.) “[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.” (*Stansbury v. California* (1994) 511 U.S. 318, 323.)

The term “custody” “does not include a temporary detention for investigation.” (*People v. Clair* (1992) 2 Cal.4th 629, 679.) “Such a detention . . . allows ‘the officer . . . [to] ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer’s suspicions.’ ” (*Ibid.*, quoting *Miranda v. Arizona, supra*, 384 U.S. at p. 439.) Such detentions typically do not invoke the *Miranda* rule “because the restraint on liberty often occurs in a nonthreatening or noncompulsive public environment and its duration is limited.” (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1165.) “[P]olice officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because . . . the questioned person is one whom the police suspect.” (*Ibid.*)

Whether a defendant is in custody for *Miranda* purposes is a mixed question of law and fact. (*Id.* at pp. 401-402.) Findings on whether there was custodial interrogation are reviewed for substantial evidence. (*People v. Clair, supra*, 2 Cal.4th at p. 678.) The appellate court accepts the trial court’s resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. (*People v. Cunningham* (2001) 25 Cal.4th 926, 992.) It independently determines from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained. (*Ibid.*)

In the present case, the undisputed evidence indicates that minor was not subjected to any custodial interrogation at the Marina. The only evidence even suggesting a detention was Pearman’s statement to defendant to the effect that he should not leave the scene. The context of this statement, however, indicates that Pearman did not make it for the purpose of detaining defendant in any meaningful sense, nor could minor have reasonably construed it as such. Pearman had rushed to the scene and was told by

defendant that a boy had gone into the water. He was understandably focused on rescuing the boy, if possible, when he talked with minor. He did not question minor for more than a few moments, or about anything more than details about the boy in trouble. Pearman's statement to minor that he should not leave was appropriate under these circumstances, as it was reasonable to think that the minor, as a witness, might have more information that could help the police find the boy in the water. Pearman said nothing of a threatening nature to minor, and did not search or physically constrain him in any way. We conclude that Pearman's statement was, if anything, an instruction consistent with temporarily detaining a witness at the scene of a police investigation. No reasonable person, including a 14-year-old minor such as Allen T., could take Pearman's statement to mean he was under arrest or being detained for the purposes of a custodial investigation.

Similarly, Togonon testified that, upon being instructed to interview witnesses, he had two short discussions with minor, each a matter of minutes, and a third short discussion with the minor that minor initiated. Togonon did not touch the minor, nor did he make any statement suggesting that minor was detained; to the contrary, Togonon indicated at the end of his first discussion with the minor that he would talk further with the minor "if you are willing to talk to me," indicating that the minor had a choice in continuing with any discussions.

It was not until minor volunteered a new version of what happened at the end of his second discussion with Togonon that the officer had information that the males who minor had accompanied to the Marina had confronted Lockhart. Even then, minor did not implicate himself directly. The interviewing police, rather than taking any action indicating minor was detained, walked away from him to look more for Lockhart, further demonstrating that their focus was on interviewing minor as a witness who might have information that would help them in their search.

Minor's third discussion with Togonon was initiated by minor. Although minor proceeded to tell Togonon potentially incriminating information (such as that he took Lockhart's shoes in the course of his friends' confrontation with Lockhart), he

volunteered this information on his own initiative, and outside of custody. Togonon's testimony indicates that he was still focused on finding Lockhart. He returned to looking after his brief discussion with minor rather than take steps to detain minor, leaving minor alone and moving 20 yards away. Clearly, minor offered his third version freely and outside of custody.

Minor argues that Togonon was particularly aggressive at the end of this first discussion with minor because he doubted that minor's story was the whole truth, and told minor that he was going to leave him alone to sit and maybe gather his composure, and would come back and talk with him if minor was ready to tell him the "honest version." Police, if they are entitled to interview witnesses, must be able to question them about whether they are giving them accurate information, or the entire story. Togonon, rather than press minor for more information, indicated to minor that he did not have to talk further, and walked 25 to 30 yards away. Suggesting to witnesses that their recollection does not ring true, and leaving witnesses alone to gather themselves and compose their thoughts hardly amounts to a custodial interrogation. Minor's argument is without merit.

In short, minor spoke freely, largely in narrative form, in a public place and without restraints, was given a choice about continuing to talk, and was left alone for several periods of time. He did not make statements which cast suspicion on himself directly until his third conversation with Togonon, which he initiated. The focus of the police was on their search for the boy, not on minor as a suspect, and they did nothing to restrain him or to lead him to believe he was detained. Minor could not have reasonably believed he was in custody at the time under these circumstances. Therefore, the juvenile court was correct in admitting minor's statements at the scene.

Regardless, assuming for the sake of argument that the juvenile court should have excluded minor's statements at the Marina, the error would not be a basis for reversal. In *Oregon v. Elstad* (1985) 470 U.S. 298, the United States Supreme Court held "that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite

*Miranda* warnings.” (*Id.* at p. 318.) The later statement is admissible if it is voluntarily made. (*Ibid.*) A determination of the voluntariness of the later statement “would take into consideration the surrounding circumstances, the combined effect of the entire course of the officer’s conduct upon the defendant, including the effect of his previously having made a confession, and the manner in which the officers utilized this prior confession in obtaining a second confession.” (*United States v. Wauneka* (9th Cir. 1985) 770 F.2d 1434, 1440.) As we discuss in the next section, minor spoke voluntarily at the police station after he received two *Miranda* warnings, most certainly in telling his first version of events. He made incriminating statements during that time (as well as later in the interview in a portion which cannot now be stricken in light of minor’s waiver of his objections to anything but the entirety of the station interview). In both instances, defendant spoke freely, and the police did little besides listen to his story and ask clarifying questions. The detectives at the police station were not the same people who interviewed minor at the Marina, and they made only passing reference to his statements to Togonon. Therefore, any error in admitting minor’s statements at the Marina was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

## **B. *Minor’s Statements at the Police Station***

### **1. *Minor’s Statements***

Albanese stayed with minor in the administrative room of the police station for about thirty minutes to an hour prior to minor’s interview. According to the detective’s testimony, the two made idle conversation, talking about sports and school, to pass the time. While they waited, minor asked if his mother was at the station. Albanese testified that he “didn’t have a personal reference whether or not she was there or at the scene.” Albanese did not talk with minor about his *Miranda* rights at this time. Albanese and another detective, Solzman, were then assigned to interview minor.

The detectives told minor of his *Miranda* rights, and proceeded to ask him questions, to which minor readily responded. The audio system for recording the interview was not working, so the three moved to another interview room, and the detectives again told minor of his *Miranda* rights. He acknowledged that he understood

his rights and was willing to talk with the detectives, and began responding again to questions.

**a. *Minor's Initial Version of What Happened***

Minor said that he had met two friends, Little Tay and Bulldog, on Ninth Street and walked with them to the Marina. He knew Bulldog for a month or two, and Little Tay for about two months. When they got to the Marina, it appeared that his friends had a problem with “a guy” they saw at the bathrooms (later identified as Lockhart) who was with Little Tay’s sister, so they started following him. Minor had never seen Lockhart before and did not know what was going on. Lockhart (whom minor identified as Johnny) looked back at the three as they followed; his eyes got big and he started walking faster. Minor’s friends “caught him” and Lockhart stopped and looked “hecka scared.”

Minor’s friends started arguing with Lockhart, one saying, “You still talking shit, bitch?” Little Tay socked Lockhart in the face and told him to take off his shirt, pants and shoes, and empty his pockets. Lockhart took off his shirts and took the items in his pocket, including a five and a one dollar bill, and put them on the ground. Minor’s friends told minor to take Lockhart’s money, so minor went to grab for it. However, one of his friends jumped in front of him and grabbed the money instead. Little Tay “pulled out [unintelligible]”<sup>2</sup> and Lockhart started pulling down his pants. Minor said something like, “Why does he have to take off all his clothes like that?” He was told something like “shut up.”

Minor stated that he was playing with a knife while his friends were arguing with Lockhart. He had been flipping it open and shut when walking with his friends, “just playing with it.” As his friends argued with Lockhart, minor had the knife out and was kind of moving it around, in the area of his stomach, pointed away from himself. Lockhart was scared, and minor acknowledged to the detectives that the knife probably added to Lockhart’s fear. He started folding up the knife when Lockhart took everything

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<sup>2</sup> We have carefully reviewed the videotape and, as indicated in the transcript, some parts of minor’s statement are unintelligible.

out of his pockets and put the items on the ground. After he started pulling down his pants, Lockhart pulled up his pants and started running, and minor shoved the knife into his pocket.

The three started chasing Lockhart, minor saying that he did so to find out why his friends were doing so. Minor saw Lockhart run onto the rocks, tumble to the side, run some more, and fall in. Minor ran to the rocks to help, but his friends started running. Minor considered at one point going in the water, but he was afraid of the tow and tide. He then helped the police when they arrived.

Minor agreed that he thought, as one of the detectives said at the end of minor's telling of this first version that "obviously [Bulldog and Little Tay] wanted to beat [Lockhart] up and take his money and shit, whatever he had[.]"

**b. *Minor's Second Version of What Happened***

In response to a question, minor denied having the knife out because he was "jacking" Lockhart. The detectives insisted that was the truth and minor denied it. The detectives then told minor that they had viewed video from cameras all around the Marina, and that "obviously what you're telling us isn't the truth."<sup>3</sup> Among other things, the detectives told him he was "in a bad position," that he was not telling the complete truth and that it was "gonna bite you in the ass big time," and that the detectives "want to work with you here, but we only want to work with you with the truth, okay?"

Minor resisted the detectives' pressure, stating, "No matter what I say, you guys ain't gonna believe me." He asked whether or not he was going to be taken to juvenile hall, but received no direct response. Among other things, minor was told, "I understand you feel like you're in a bad position here, okay? But by not telling us everything, that ain't gonna help you because we know what happened. Its all gonna come out in the end. . . ." He was also told: "[W]hen it comes down to it, dude, you know, the truth is what gets you, you know, going a lot better in the long run here, okay? [¶] By you

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<sup>3</sup> Alabanesse testified at the jurisdictional hearing that there were no video cameras or videotape.

sitting here and not telling us the truth right now or lying to us a little bit, that ain't gonna help you. That only helps you to cooperate, believe me."

After minor again referred to juvenile hall, he was told: "This is your only opportunity to come clean to show you want to cooperate. Your bros ain't cooperating, dude. They're gone. They're the wind. But that doesn't mean we aren't gonna talk to them later and catch up to them later. [¶] And anybody that looks at this case is gonna say, well, hey, guess what, Allen cooperated, Allen is the one that stuck to his guns and said, hey, this is what really happened, he didn't take off like those two other fools did, okay? [¶] So now that you're here in the so-called hot seat talking to us, this is your opportunity to get a jump on the gun from your two bros."

After a little more discussion, minor, apparently referring to pulling the knife out to scare Lockhart, asked, "If I say that I did do that, am I gonna go home or going to (unintelligible)?" The detective told him that he could not make him any promises because it was not his call. After some additional conversation, the following exchange occurred:

"[MINOR]: I'll tell you anything you need to know [unintelligible] that I pulled a knife to scare him.

"DETECTIVE: Allen, I don't have to tell you. I know that that happened, okay? You just got to be—you earned it, you're in the hot seat right now, dude, okay? [¶] But I'm telling you the truth here, dude. By you not telling the truth right now, okay, it's gonna send you in the wrong direction. If you cooperate with us now, dude, anybody that looks at this thing, they're gonna see that. [¶] And I'll tell you what, when we talk to your two buddies, they're gonna be thinking about themselves, not you. So let's straighten this out. We don't have to go in full detail about it because you've told us pretty much some of the stuff that happened here. But you weren't being honest about the knife, dude, okay? [¶] And I'll make it simple for you, Allen. Yes or no, you pulled the knife when you jacked this guy, is that the truth? I won't make it difficult. Is that the truth, Allen?

"[MINOR]: All right. I pulled the fucking knife out, okay?"

Minor then stated that one of his friends and he told Lockhart, “Don’t try to pull nothing out.” Minor agreed that he pulled the knife out when he and his friends “started jacking,” but still claimed he did not do it to scare Lockhart. The detectives suggested that he was still lying and insisted that he tell the truth, referred to purported videotape of the incident and to other witnesses “a couple of feet away working on their boat” who saw the “entire thing happen,” and to their ongoing efforts to find his buddies. Minor insisted that everything he had told them was true, and again wanted to know if he was going to have to be in juvenile hall. When a detective asked again if minor pulled out the knife to scare Lockhart, minor agreed that he did.

After some additional questioning, the detectives focused on the identities of minor’s friends, and again pressed minor to tell “the truth.” Minor provided new information about the identities of his friends, and then insisted on talking to his mother. The detectives continued to press minor for information. After further discussion in this vein, minor changed his story in some particulars again.

### ***c. Minor’s Third Version of What Happened***

Minor now identified his friends consistent with the testimony by S.J. at the hearing, referring to Lorenzo, who was also nicknamed “Bird,” and Thomas. He eventually stated that he and his friends had confronted Lockhart because Bird’s mom had come home and said she saw her daughter S.J., Bird’s little sister, having sex with a man in a bathroom at the Marina and that she wanted them “to go up there and get him—go up there and get her.” Thomas and Bird told him to take the knife, and they were talking about “beating his ass.” Minor was only going to jump in if there was more than two people.

The three found Lockhart in a bathroom with S.J., and confronted him about having sex with S.J. Bird told Lockhart to take off his clothes. When Lockhart reached into his pocket, minor “pulled the knife out [of his pocket] and popped it out and said, ‘Don’t try nothing, don’t try to pull nothing out of your pockets.’ ” When Lockhart took money out of his pockets, Bird told minor to reach for it, but Thomas grabbed it first. Minor said that Lockhart ran away after he was punched in the face, and the three chased

him. Lockhart tripped on the rocks and fell into the water. Minor stayed to try to help Lockhart, but Bird and Thomas ran away.

## **2. *Minor's Motion to Suppress and Waiver of Objections***

At the jurisdictional hearing, minor moved to suppress his statement at the police station. The juvenile court suppressed what minor had told the detectives after minor asked to speak to his mother at page 84 of the videotape transcript, finding that minor's request was an invocation of his right to counsel pursuant to *Miranda, supra*, 384 U.S. 436. This ruling essentially rendered inadmissible minor's third version of what happened.

After the court issued its ruling, minor's counsel waived objections to the portion of minor's statements to the detectives that the court had just excluded. Counsel did so pursuant to Evidence Code section 356, which allows, among other things, for part of a statement or conversation to be admitted in order to complete or explain the rest of the statement or conversation. The following exchange occurred:

“THE COURT: And you're totally waiving all irregularities involving page 84 on. You want the court to read that?”

“[MINOR'S COUNSEL]: I am seeking to have that introduced, that is correct. Making it clear that I'm preserving the objection on the voluntariness on the entirety of the statement. Nor am I saying that the court is incorrect regarding excluding the remainder of that statement, but at this juncture, I'm seeking to introduce, notwithstanding that.

“THE COURT: Then if you're waiving all irregularities regarding that, and you are waiving his right to invoke his Fifth Amendment right by asking to speak to his mother, you're waiving that, I don't see a problem with the court then reading the whole statement in its entirety, and I should look at the video then.

“[MINOR'S COUNSEL]: Yes.”

The court subsequently reviewed that portion of the transcript and considered it.

Thus, minor's counsel preserved only her objection to the voluntariness of the entirety of minor's statement at the police station. She specifically waived her objections

to the portion of the statement from page 84 on unless the entire statement was inadmissible. Accordingly, should we find any significant portion of that statement prior to page 84 of the transcript was admissible, minor's argument for reversal must fail, because minor's third version, which is obviously incriminating, must also be admitted as a result of this waiver below.

### **3. *The Entirety of Minor's Statement was Not Inadmissible***

At the very least, minor's statement to detectives at the police station through page 23 of the videotape transcript, constituting his first version of what happened, is unquestionably admissible. Accordingly, his third version is admissible as well because of minor's waiver in the court below.

In cases of claimed psychological coercion, "[a] confession is involuntary if an individual's will was overborne. [Citations.]" (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 208 (*Shawn D.*)) Voluntariness is determined from the totality of the circumstances, including the personal characteristics of the defendant and the details of the interrogation process. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226; *People v. Neal* (2003) 31 Cal.4th 63, 79 (*Neal*); *Shawn D.*, at pp. 208-209.) Among other factors, threats or implied promises of leniency may render a statement involuntary. (*Neal*, at p. 79; *Shawn D.*, at pp. 209-212.) Although coercive police activity is a necessary predicate to establish an involuntary confession, it "does not itself compel a finding that a resulting confession is involuntary." (*People v. Bradford* (1997) 14 Cal.4th 1005, 1041.) The statement and the inducement must be causally linked. (*People v. Benson* (1990) 52 Cal.3d 754, 778-779.)

The People bore the burden of proving the voluntariness of minor's statements by a preponderance of the evidence. (See *People v. Sapp* (2003) 31 Cal.4th 240, 267.)

On appeal, we apply an independent standard of review to the juvenile court's determination of voluntariness, in light of the entirety of the record. Generally, we must accept the juvenile court's resolution of disputed or conflicting facts and related inferences, as well as the court's determinations of credibility, so long as they are based on substantial evidence. (*People v. Sapp, supra*, 31 Cal.4th at p. 267; *Shawn D., supra*,

20 Cal.App.4th at pp. 207-208.) However, when, as here, there is a videotaped interview and “the facts surrounding the giving of the statement are undisputed . . . the appellate court may independently review the trial court’s determination of voluntariness.” (*People v. Vasila* (1995) 38 Cal.App.4th 865, 873.)

We have carefully reviewed the videotape of minor’s confession. We conclude that, at the very least, minor spoke freely, voluntarily, and without coercion in telling his first version of events after twice being told his *Miranda* rights. He readily provided his account to the detectives, who asked mostly clarifying questions until minor had completed this first account. Although minor changed some of the details of his story in his second and third versions of what happened, his first version, particularly when considered with the other eyewitness testimony and minor’s statements at the Marina, provided more than enough incriminating facts to support the juvenile court’s disposition. Specifically, minor acknowledged in his statement at the police station that he displayed an open knife while his friends confronted and attacked Lockhart, and ordered Lockhart to empty his pockets and take off his clothes; that the way he held the knife probably added to Lockhart’s fear, indicating he knew his display of it affected Lockhart; that he reached for Lockhart’s money after Lockhart emptied his pockets upon demand; and that he and his friends chased Lockhart toward the water.

In this first version, minor did not state that he intended to use the knife to “jack” Lockhart. Nonetheless, his story indicated that he accompanied his companions as they confronted and attacked Lockhart, displayed an open knife in Lockhart’s vicinity as they did so, and that he reached to take Lockhart’s money while displaying the knife. Under the circumstances, any contention that he was merely playing with the knife without any awareness of its impact is incredible. Minor admitted that he chased Lockhart, if only to find out why his friends were chasing Lockhart. In short, minor’s first version established beyond a reasonable doubt that he participated in robbing Lockhart while using a weapon, and that Lockhart ran away and died in the midst of this robbery as minor and his friends pursued him, thereby making minor subject to the felony murder

rule. He continued to tell facts that established these elements in the other versions as well, despite changes in various parts of the story.<sup>4</sup>

Minor contends that under the totality of the circumstances his entire statement at the police station should have been suppressed. Specifically, minor contends that his personal characteristics rendered him vulnerable to police coercion; that he was young and had had little contact with the criminal justice system; that he was distraught and worn out by hours of interrogation; that the detectives “coercively minimized [his] *Miranda* rights, ignored his request to make a phone call, interfered with his right to speak to his mother, and encouraged him not to assert his Fifth and Sixth Amendment rights to counsel”; that the detectives lied to him about having reviewed Marina videotapes and talked to other witnesses; that they implied to him that he would receive more lenient treatment if he confessed and would be in trouble if he did not speak to them and tell the truth; and that the detectives, playing “good cop/bad cop,” were relentless in their interrogation of minor.

Minor’s arguments are not entirely without merit as indicated, for example, by the juvenile court’s suppression of that portion of minor’s statement after minor had invoked his Fifth Amendment right to counsel when he asked to speak to his mother, as indicated on page 84 of the videotape transcript. However, almost all of minor’s arguments relate to the circumstances of minor’s interview *after* he provided his first version of events. There is no merit in any argument that the detectives exercised coercive tactics in this initial portion of minor’s interview, or that minor was worn out by hours of interrogation at that time. The only arguments that conceivably relate to minor’s initial version of events are that he was young, unsophisticated, and had little contact with the criminal justice system; was distraught; and that the detectives “coercively minimized” his *Miranda* rights. We examine each of these arguments.

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<sup>4</sup> S.J.’s testimony that Thomas took some of Lockhart’s clothes after Lockhart went into the water was further evidence that Lockhart fled in the midst of the robbery, as he was in the middle of taking off his pants when he ran.

Regarding his youth, lack of sophistication, and prior experience with the criminal justice system, there is no evidence that minor did not understand his rights or was coerced into telling his first version of events. To the contrary, minor, 14 years old at the time, indicated at the beginning of the interview that his *Miranda* rights had been read to him before and that he knew them. The officers stated his *Miranda* rights to him twice clearly and in plain language, and asked him if he understood them and wished to proceed. Minor indicated that he did, and proceeded without hesitation. For example, minor was told, “You can decide at any time to exercise your rights and not make any statements, okay?” He was then asked, “And understanding those rights, you don’t have any problem talking to us still, right?” Minor calmly and readily indicated that he was willing to proceed. He then volunteered his first version of events, interrupted occasionally by the detective’s questions. Accordingly, we conclude that minor made a voluntary, knowing and intelligent waiver of his *Miranda* rights as he recounted his first version of events, despite his relative youth and inexperience. (See *People v. Lewis* (2001) 26 Cal.4th 334, 384 [13-year-old boy who was later diagnosed as paranoid schizophrenic was found to have knowingly waived his rights]; *In re Brian W.* (1981) 125 Cal.App.3d 590, 601-603 [15-year-old with an I.Q. of 81 and a mental age of 11 or 12 was held to have knowingly waived his *Miranda* rights].)

Regarding his emotional state, minor appeared somber and concerned as he told his first version of events. However, he was composed, spoke coherently, responded readily to questions, and did not break down. Thus, the argument that he was too distraught to properly waive his *Miranda* rights is contradicted by the evidence.

Regarding the detectives’ purported minimization of minor’s *Miranda* rights, minor argues that he was not told his *Miranda* rights until three hours after Lockhart drowned, after he had been “softened up” by Albanese prior to the interview, and that he was told his rights “in a manner and tone which was clearly meant to minimize their importance.” There was nothing inappropriate about Albanese’s conduct prior to the interview. Albanese testified that the two for the most part made idle chatter prior to his assignment as an interviewing officer. Although the minor asked Albanese if his mother

was in the station, there is no indication that he asked to speak to her, or that Albanese knew whether or not she was in fact present in the station. As we have already discussed, the detectives stated minor's *Miranda* rights to him twice, and asked the minor if he understood them and wished to proceed. Minor argues that the detectives, by stating that they were going to review his rights "real quick," and by their tone and manner, minimized their importance. We are satisfied from our review of the videotape that this was not the case. Minor's argument is without merit.

Accordingly, we find that minor's first version of events was plainly admissible. Minor preserved his objection to the admissibility of his statement at the police station in its entirety, but otherwise waived any objections to the admissibility of his third version of events. Therefore, his third version, which is plainly incriminating, cannot be stricken. We need not and decline to analyze the circumstances of his second version further in light of these findings.<sup>5</sup> Minor's argument that the court's jurisdictional order must be reversed because purportedly involuntary statements were improperly admitted into evidence lacks merit.

## ***II. The Juvenile Court Erred by Not Staying the Term of Commitment for Robbery and the Related Enhancement***

The juvenile court imposed a five-year term of commitment for robbery in addition to its imposition of a 25-year term for felony murder. Minor contends that the court's action was a violation of section 654, which does not allow double punishment for the same crime. We agree, and reverse the juvenile court's five-year term of

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<sup>5</sup> Minor argues that some of the detectives' statements during that portion of the interview when minor gives his second version of events implied promises that minor would gain a legal advantage if he changed portions of his story. "The cases . . . are clear from the earliest time that any promise made by an officer or person in authority, express or implied, of leniency or advantage to the accused, if it is a motivating cause of the confession, is sufficient to invalidate the confession and to make it involuntary and inadmissible as a matter of law." (*People v. Hogan* (1982) 31 Cal.3d 815, 838, disapproved in part on other grounds as stated in *People v. Cooper* (1991) 53 Cal.3d 771, 835-836.) However, we do not make any findings about this second version in light of the clear admissibility of minor's first and third versions of events.

commitment for robbery, as well as the use enhancement related to that term of commitment. However, we reject minor's contention that the court's actions violated his constitutional due process rights and require reversal of the court's judgment.

**A. *The Juvenile Court's Imposition of a Separate Term of Commitment for Robbery Violated Section 654***

Section 654, subdivision (a), states in relevant part that “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” Courts have made clear again and again that section 654 applies to circumstances where a felony murder conviction is based on a related robbery, and requires that the shorter robbery sentence be stayed. (*People v. Meredith* (1982) 29 Cal.3d 682, 696 [allowing conviction of, but not punishment for, felony murder and the related robbery]; *People v. Bracamonte* (2003) 106 Cal.App.4th 704, 708-709 [staying robbery sentences where felony murder rule applied; *People v. Boyd* (1990) 222 Cal.App.3d 541, 575-576 [staying robbery sentence pursuant to § 654 where robbery was the crime underlying the first degree murder conviction].) Furthermore, “Where the base term of a sentence is stayed under section 654, the attendant enhancements must also be stayed.” (*People v. Bracamonte, supra*, 106 Cal.App.4th at p. 709.)

At the jurisdiction hearing, the People argued that the felony murder rule should apply because “[i]n this case when [Lockhart] was forced into the water the robbery clearly had not ended.” At the conclusion of the hearing, the court adopted the prosecutor's argument and found “that during the course of this encounter [minor] formed the intent to rob the victim . . . and that specific intent, coupled with his conduct, brings him within the felony murder doctrine: therefore, the court finds count 3, that [minor] did commit a felony, a violation of Penal Code section 187(a), willful, deliberate and premeditated murder[.]” The court then found beyond a reasonable doubt that minor

“did willfully, unlawfully, feloniously and with malice aforethought commit the willful, deliberate and premeditated murder of [Lockhart] . . . .”<sup>6</sup>

Three and a half months later, at a March 29, 2005 dispositional hearing, minor’s counsel noted that section 654, which bars double punishment for the same crime, required that the court stay the imposition of a separate sentence for robbery because the court was already imposing a sentence pursuant to the felony murder rule. The People argued that section 654 should not be applied to this case because “the robbery was completed well before the murder actually occurred.”

The court at first stated that it did not need to make a finding on the issue. After further argument by the People, the court stated, “The robbery was committed before the murder, and the robbery was completed before the murder. [¶] I mean, the evidence absolutely proved that.” The court then stated that it would leave the term of commitment as recommended, which included imposition of a separate five-year term of commitment for robbery and one-year term for the weapon use enhancement.

Thus, at the dispositional hearing the juvenile court denied minor’s request that it stay the imposition of a term of commitment for robbery because the evidence introduced at the prior jurisdiction hearing had established that the murder occurred after the robbery was completed. The court’s statement, however, was not itself a jurisdictional finding. Ours is a “bifurcated juvenile court procedure,” as outlined in Welfare and Institutions Code sections 701, 702, and 706 (*In re James B.* (2003) 109 Cal.App.4th 862, 874), and calls for the court to make findings and issue a jurisdictional order prior to the dispositional hearing. (See *ibid.*) At the jurisdictional hearing below, the court found minor had committed felony murder; nothing in the record suggests that the court intended to alter that finding by its dispositional hearing comments. Rather, the court’s comments, read in the context of the dispositional hearing, amounted to an inaccurate

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<sup>6</sup> The court’s statement that minor committed the premeditated murder of Lockhart, is stated in the paragraph following the court’s invocation of the felony murder rule, and is plainly related to that finding, rather than constituting an alternative finding.

recollection of its jurisdictional hearing finding. The court, based on this finding, should have stayed its imposition of the 6 years of commitment for the robbery and related enhancement pursuant to section 654.

The People argue on appeal that the court's sentencing did not violate section 654 because minor purportedly "harbored separate intents and objectives in carrying out his crimes." The People are correct that separate sentences may be imposed in cases where the offenses involved were incident to separate intents and objectives during a course of criminal conduct that is divisible. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) However, the People incorrectly assert that the juvenile court found that minor held separate intents and objectives in chasing Lockhart after he relinquished his property. Again, the court explicitly invoked the felony murder rule upon stating its finding that minor committed a robbery, indicating its finding was based on one objective and indivisible course of criminal conduct. Therefore, the People's argument is without merit.

***B. The Juvenile Court Did Not Violate Minor's Due Process Rights by Inconsistent Statements so as to Require Reversal of Judgment Here***

Minor also argues that the juvenile court's "diametrically opposite and irreconcilable findings" regarding when the robbery was completed were tailored to achieve the harshest results possible, and violated minor's Fourteenth Amendment right to due process of law, requiring reversal of its judgment. This contention lacks merit.

As minor correctly points out, our Supreme Court held in *In re Sakarias* (2005) 35 Cal.4th 140, 155, that a prosecutor's deliberate use of inconsistent theories in separate trials of defendants to contend, without good faith justification, that each defendant committed the same, exclusive criminal act was a violation of due process for the defendant falsely accused. (*Id.* at pp. 155-156.) As the Supreme Court stated: "For the government's representative, in the grave matter of a criminal trial, to 'chang[e] his theory of what happened to suit the state' is unseemly at best." (*Id.* at p. 159.)

The People's shifting arguments in the present case about when the robbery was completed also are disconcerting. As we have already indicated, the People's counsel

contended at the jurisdictional hearing that Lockhart's death occurred during the robbery. The People's counsel specifically stated: "Your Honor, the evidence shows in this case that Christian Lockhart was killed during the commission of a dangerous felony, and because of that, regardless of whether that killing was intentional, unintentional, or accidental, the minor should be found guilty of murder in the first degree."

The People further stated that "Christian's death occurred during the commission of this robbery" and that "when Christian was forced into the water the robbery clearly had not ended." Yet, the same counsel argued at the dispositional hearing three months later that "although the murder was committed during the course of the robbery, the robbery was completed well before the murder actually occurred." This mischaracterization of the record was unfortunate and, if deliberate, unseemly.

However, minor does not challenge the People's inconsistent arguments, but, rather contends that the court's inconsistent "findings" violated his due process rights. As a preliminary matter, minor has waived the argument on appeal by his failure to first raise this due process objection in the juvenile court below. (*In re Brian K.* (2002) 103 Cal.App.4th 39, 42 ["because Brian K. did not raise a due process objection in the trial court, he may not raise it for the first time on appeal"]; *In re Josue S.* (1999) 72 Cal.App.4th 168, 172 [waiver principles are, under normal circumstances, fully applicable to juvenile court dispositional hearings].)

Even in the absence of waiver here, minor's argument fails because the juvenile court did not make inconsistent findings. As we have already stated, the court found at the jurisdictional hearing that the felony murder rule applied. Its comments at the jurisdictional hearing, rather than constituting another jurisdictional finding, amounted to an inaccurate recollection of this previous finding, not a separate finding itself.

Assuming for the sake of argument that the case law minor cites regarding prosecutorial misconduct applies to judicial action, minor's argument would fail for other reasons as well. First, *In re Sakarias, supra*, 35 Cal.4th 140, found that the People had violated the due process rights of the person falsely accused because it had *deliberately* and without good faith justification argued inconsistent theories against different

defendants. (*Id.* at pp. 155-156.) Nothing in the record suggests that the juvenile court in the present case deliberately applied inconsistent theories here.

Moreover, *In re Sakarias, supra*, 35 Cal.4th 140 held that it was only the due process rights of the falsely accused defendant which were violated by the prosecution's bad faith acts. (*Id.* at p. 156.) The equivalent result in the present case would be reversal of the imposition of the term of commitment that was without evidentiary support. That would be the imposition of a separate robbery term of commitment, because all the evidence indicated that the felony murder rule applied, as Lockhart ran from the others in the midst of being robbed of his money, personal effects, and clothing. On the other hand, there was no evidence presented, or argument made, at the jurisdictional hearing in support of the contention that the robbery ended prior to Lockhart's fall into the water. Therefore, minor's argument, even if successful, could lead to no further relief than that we afford in section II.A., *ante*.

### **III. *The Juvenile Court Did Not Abuse Its Discretion In Committing Minor to the California Youth Authority***

Minor contends that his commitment to the CYA violates his Sixth and Fourteenth Amendment rights because there was a lack of substantial evidence that he would probably benefit from such a commitment as required by state statute. This claim lacks merit.

Generally, "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." (Welf. & Inst. Code, § 202, subd. (b).) Furthermore, "[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." (Welf. & Inst. Code, § 734.)

A commitment must conform to the general purpose of juvenile law, that being that the disposition evidences probable benefit to the minor and that less restrictive alternatives would be either ineffective or inappropriate. (Welf. & Inst. Code, § 202, subd. (e); *In re Teofilio A.* (1989) 210 Cal.App.3d 571, 576.) The rehabilitative value of a CYA commitment results not only from the programs offered, but also from punishment that “ ‘holds [the minor] accountable for [his] behavior . . . .’ ” (*In re Tyrone O.* (1989) 209 Cal.App.3d 145, 151, 153.) The punishment inherent in such commitment itself serves “rehabilitative purposes.” (See *In re Michael D.* (1987) 188 Cal.App.3d 1392, 1396.) The 1984 amendments to Welfare and Institutions Code section 202 reflect an increased emphasis on punishment as a tool of rehabilitation, and a concern for safety of the public. (*In re Asean D.* (1993) 14 Cal.App.4th 467, 473.) “The juvenile court law has long since been changed from the days when rehabilitation was the only goal, and most youth offenders were nonviolent truants or other status offenders who posed no real threat to society. (See § 601.) Instead, we here must apply the amended version of the juvenile court law, which also mandates protection of the public (§ 202), to an apparently incorrigible minor . . . .” (*In re Domanic B.* (1994) 23 Cal.App.4th 366, 373-374.) However, “commitment to CYA cannot be based solely on retribution grounds.” (*In re Teofilio A., supra*, 210 Cal.App.3d at p. 576.)

A juvenile court’s decision to commit a minor to the CYA may be reversed on appeal only upon a showing that the juvenile court abused its discretion. (*In re Lorenza M.* (1989) 212 Cal.App.3d 49, 53.) “An appellate court will not lightly substitute its decision for that rendered by the juvenile court.” (*In re Michael D., supra*, 188 Cal.App.3d at p. 1395.) Rather, the appellate court “indulge[s] 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.” (*Ibid.*)<sup>7</sup>

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<sup>7</sup> Although minor contends that his constitutional rights have been violated, he bases his argument on the purported lack of substantial evidence that he would probably benefit from a commitment to CYA as required by state statutes. Accordingly, we review

The probation officer's dispositional report noted that the offense in this case involved the killing of another human being, the ultimate criminal act, "and the most serious consequences must be imposed." For the protection of the community, as well as the punishment and rehabilitation of the minor, the officer concluded that minor should be placed in a secure setting removed from the community, and stated that the CYA "is the only such option." The officer further stated that while minor was under control in a highly structured and closely supervised environment, he would be able to complete his high school education and participate in anger management counseling, as well as classes that address the impact of his crime on the victims.

Minor presented an expert witness who testified that minor required placement in a level 12 or higher program, and that it would be difficult for minor to succeed in a placement outside of CYA, if such a placement could be found. The expert testified that minor had been rejected by 8 of 10 programs to which his record had been submitted that might serve as an alternative to CYA, and had been offered only a conditional interview at one that remained concerned about the violent nature of his offense. The expert testified that minor would most likely be placed in the general population of the CYA, and would be placed in a "standard educational program."

Juvenile hall staff notes provided to the court indicated that the minor posed a significant risk to those around him. Minor, among many other things indicated in these notes, made comments about taking staff keys and escaping; was noted to be a security risk after getting into a fight in class; threatened to beat up the person he had fought with; cursed staff, threw his food tray in his room, and was constantly door banging; was disciplined repeatedly for cursing at staff; received dining room restrictions for inappropriate behavior; was disciplined for banging on his door and throwing his dinner tray; repeatedly cursed at staff and demonstrated "absolutely pathetic performance, attitude and behavior;" and threatened another minor.

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the juvenile court's dispositional order to determine whether the court met its statutory duties in committing minor to CYA.

Minor did not show significant signs of improvement during his stay in juvenile hall. At the dispositional hearing, the People reviewed the juvenile hall reports about minor's behavior during the month or so prior to his disposition hearing, as follows:

“—on February 23rd—[minor] called [R.W.] an “asshole” and “mother-fucker” for not getting him new pants; he was locked in and proceeded to door-bang, and served . . . a room lockdown.

“ ‘And on 3/3’—which would be March 3rd—[minor] served . . . a room lockdown—for—for some type of sliding under—something under—and arguing with staff.

“ ‘[Minor] insisted that we are trying to punish him, even though he breaks rules in front of staff. [Minor] will serve a . . . room lockdown for telling [staff] “fuck you” and throwing magazines.

“ ‘[Minor] is a very angry boy. He says staff is always wrong and he's always right.

“ ‘Later that day’—on the 3rd—[Minor] said, “I want to kill you” as he left the unit.

“ ‘On 3/5’—two days later —[minor] served a . . . room lockdown for calling staff a “fat, fucking bitch,” a “punk-ass nigger” and a “fucking piece of shit.” Resident also tore his toilet paper and sheet cover and shoved them under his door.’ ”

A few weeks before the dispositional hearing, minor made mock handguns out of paper in his room. Minor threatened to beat up staff after he was informed that he was being placed on “special program” because of his poor behavior.

The court stated that minor as was “very dangerous” based on the offenses involved and the record of his behavior in juvenile hall, and that a commitment to CYA was appropriate. The court noted, “[i]t's not just the disrespect which this minor shows people, and insulting awful things he says . . . . But it's the . . . violent physical threats . . . the threatening of physical harm to [juvenile hall] staff. These are of great concern.” The court also stated: “I have considered all local, less restrictive programs and forms of custody, and I am fully satisfied they are inappropriate at this time, that he could better

benefit from the various programs provided by the Youth Authority, and I do find that the medical, physical needs of the minor do render it probable that he could be benefited by reformatory, educational, discipline or other treatment by the Youth Authority.”

Minor makes several arguments in support of his contention that no substantial evidence supported the court’s findings. First, he contends that the juvenile court erred by judging minor by adult standards, thereby failing to recognize that as the United States Supreme Court recently did, that a juvenile’s mind is different from that of the mind of an adult. (*Roper v. Simmons* (2005) 543 U.S. 551.) Minor contends that the court’s conclusion that he was “dangerous” ignores his unfortunate background as a fatherless and impoverished child who was influenced to commit his offenses by adult males, and that the court’s commitment of him to CYA dooms minor to a future without chance of rehabilitation. We see no merit in minor’s argument. There is nothing in the record to indicate that the court viewed minor inappropriately as an adult. As our discussion demonstrates, the court’s findings that minor would probably benefit from a CYA commitment, and that he posed a danger to others, were obvious conclusions from the probation officer’s report, the testimony presented at hearing, and the record of his offenses and juvenile hall conduct. Moreover, the court reviewed possible placement alternatives and found none to exist. We live in a world of relative opportunities. Minor made no meaningful attempt to establish that there was another placement alternative besides a CYA commitment. Nor did minor submit evidence to counter that he repeatedly had acted in a threatening fashion, including so as to cause Lockhart’s death; his argument on appeal that the juvenile “court ignored the fact that in [minor’s] 295 days in juvenile hall . . . [minor] had never physically assaulted any staff member at juvenile hall” is not persuasive, to say the least.

Next, minor argues that there is no evidence that he will be able to participate in educational programs or counseling opportunities at CYA, relying on certain expert reports submitted in another case involving other parties (*Farrell v. Allen* (Super. Ct. Alameda County, 2004, No. RG 3079344)), which reviewed CYA programs in late 2003, as well as on a November 2004 consent decree and January 2005 stipulation entered into

by the parties in that same case. Minor requests that we take judicial notice of these documents (Exhibits A through D of minor's request), which were neither submitted to, nor referenced in the juvenile court below.<sup>8</sup> We decline to take judicial notice of these documents, except for the limited purposes as discussed, with regard to minor's estoppel argument, because they were not a part of the proceedings below.<sup>9</sup> On appeal, we review "the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration." (*In re Zeth S.* (2003) 31 Cal.4th 396, 405; see also *People v. Sanders* (2003) 31 Cal.4th 318, 323, fn. 1 [declining to take judicial notice of certain documents that were not before the trial court].) We do not mean to suggest that minor would prevail in his arguments if we considered these reports. Again, there was substantial evidence submitted to the juvenile court supporting its finding that minor would probably benefit from CYA commitment.

Minor also argues that the legislative history of Welfare and Institutions Code section 202 and recent case law, such as *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 593, indicate that punishment itself is not sufficient rehabilitation to support a CYA commitment. This argument is a red herring, as it presumes that minor will not otherwise probably benefit from a CYA commitment. Again, the record indicates otherwise.

Finally, minor argues that the "State" should be estopped from arguing on appeal that CYA can provide effective rehabilitation treatment or educational programs from minor because the director of CYA and the Attorney General purportedly stipulated to the absence and/or ineffectiveness of such programs in a consent decree entered into in *Farrell v. Allen, supra*, No. RG 3079344. This argument is premised on minor's mischaracterization of the subject consent decree. Contrary to his contention that the Attorney General agreed to it, the defendant that entered into the consent decree was

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<sup>8</sup> By order dated December 8, 2005, we ruled that we would consider minor's request for judicial notice at the same time as his appeal.

<sup>9</sup> We grant minor's request that we take judicial notice of the legislative history of Welfare and Institutions Code section 202 that is attached as "Exhibit E" to minor's request.

CYA, *represented by* the Attorney General. Minor offers no authority for the proposition that the attorney representing a stipulating party in one proceeding should be bound by that stipulation in another, and we are not aware of any. Therefore, we reject minor's argument.

In short, substantial evidence supported the juvenile court's finding that minor will probably benefit from commitment to CYA, including from the opportunity to pursue his education in a more stable environment, from participating in counseling programs, from the additional structure and discipline, and from experiencing consequences for his offenses. The nature of minor's offenses, his behavior in juvenile hall, and his expert's testimony of minor's needs, as well as that various programs refused to accept placement of minor, support the court's finding that appellant was not acceptable to any program that was not a lockdown facility where his "behavior could be monitored and controlled and where his threats of violence cannot be . . . carried out." In short, the court's findings are supported by substantial evidence, and appropriately balanced the "dual concerns of the best interests of the minor and public protection." (*In re Jimmy P.* (1996) 50 Cal.App.4th 1679, 1684.)

**IV. *The Matter Must be Remanded So that the Juvenile Court May Exercise Its Discretion in Setting the Maximum Time of Commitment***

Minor next contends remand is necessary because the juvenile court failed to exercise its statutory discretion pursuant to Welfare and Institutions Code section 731, subdivision (b),<sup>10</sup> in setting appellant's maximum time of physical confinement at CYA.

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<sup>10</sup> Welfare and Institutions Code section 731, subdivision (b), states in relevant part: "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,

The People concede the issue by its silence. We agree that remand is appropriate for further proceedings regarding the maximum time of confinement.

Effective January 1, 2004, the Legislature added the following sentence to Welfare and Institutions Code section 731, subdivision (b): “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.” In *In re Sean W.* (2005) 127 Cal.App.4th 1177, 1183, this court held that the plain meaning of the statute provides that the juvenile court has discretion to set a maximum confinement time that is less than the adult maximum term when committing a minor to CYA based upon the facts and circumstances of the case. This court further concluded that the legislative history of the amendment “clearly reflects an intent to expand the juvenile court’s discretion in CYA commitments.” (*Id.* at p. 1184.) Finding that the juvenile court failed to exercise this statutory discretion, we remanded the case to the juvenile court with directions to “exercise its discretion” in setting the minor’s maximum term of confinement “pursuant to section 731, subdivision (b).” (*Id.* at p. 1189.)

Two cases determined after *In re Sean W.*, *supra*, 127 Cal.App.4th 1177, are also noteworthy. In *In re Carlos E.* (2005) 127 Cal.App.4th 1529, 1534, the court based its decision solely on the maximum adult term. The court remanded the matter for further proceedings because “section 731 unmistakably requires the trial court to set a maximum term of physical confinement in CYA based upon the facts and circumstances of the matter.” (*In re Carlos E.*, at p. 1543.)

In *In re Jacob J.* (2005) 130 Cal.App.4th 429, the court remanded the case because the record was silent as to whether the juvenile court had exercised its discretion. The

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which may not exceed the maximum period of adult confinement as determined pursuant to this section.”

court acknowledged that normally, on a silent record, a trial court is presumed to be aware of the applicable law when exercising its discretion. (*Id.* at pp. 437-438.) The court continued: “But we think the matter goes somewhat beyond the question of whether the juvenile court was aware of and exercised the discretion granted by the statute. . . . Before the statute was amended, it said the maximum term of physical confinement at CYA could not exceed the maximum period of imprisonment that could be imposed on an adult convicted of the same offenses. After its amendment, the statute spoke of a second and separate, although perhaps not different, period of physical confinement, that is, confinement set by the court given the particular facts and circumstances of the case under consideration. [¶] Thus, while the statute does not require a recitation of the facts and circumstances upon which the trial court depends, or a discussion of their relative weight, the record must reflect the court has considered those facts and circumstances in setting *its* maximum term of physical confinement even though that term may turn out to be the same as would have been imposed on an adult for the same offenses.” (*Id.* at p. 438.)

In the present case, the court at the dispositional hearing discussed facts and circumstances of appellant’s case prior to committing the minor to CYA, but the court’s comments indicate that its discussion was intended to explain its decision to commit appellant to CYA. The record is silent as to whether the court took facts and circumstances about appellant’s case into account when it set his maximum time of confinement.

Accordingly, we also remand this matter to the juvenile court for further proceedings so that the court may clarify what should be the maximum time of appellant's confinement at CYA based upon its exercise of its discretionary powers consistent with this opinion. (*In re Sean W.*, *supra*, 127 Cal.App.4th 1177; *In re Carlos E.*, *supra*, 127 Cal.App.4th 1529; *In re Jacob J.*, *supra*, 130 Cal.App.4th 429.)

#### **DISPOSITION**

We affirm the dispositional order, except that we reverse the juvenile court’s five-year term of commitment for robbery and one-year term of commitment for the related

enhancement, and remand this matter to the juvenile court to exercise its discretion in determining the appropriate maximum period of confinement in CYA consistent with this opinion.

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Lambden, J.

We concur:

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Kline, P.J.

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Haerle, J.