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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,
Plaintiff and Respondent,
v.
SUSAN GILNER,
Defendant and Appellant.

A130916

(San Francisco City and County
Super. Ct. No. 202154)

A jury found defendant guilty of nine counts of embezzlement (Pen. Code, § 507)¹ and two counts of forgery (§ 470) and found true an enhancement that she took more than \$50,000 (§ 12022.6, subd. (a)(1)). The jury found defendant not guilty of nine grand theft charges (§ 487, subd. (a)); it also found the allegation that she took property in excess of \$150,000 (§ 12022.6, subd. (a)(2)) not true. The trial court denied defendant's request for probation and sentenced her to state prison for two years and four months.

On appeal, defendant does not challenge her convictions but argues the lower court abused its discretion in denying her probation. We conclude that the lower court did not abuse its discretion in sending defendant to state prison and we affirm the judgment.

¹ All further unspecified code sections refer to the Penal Code.

BACKGROUND

The Charges, Trial, and Verdicts

On June 3, 2007, an information was filed charging defendant with nine counts of grand theft (§ 487, subd. (a)), nine counts of embezzlement (§ 507), and two counts of forgery (§ 470, subd. (d)). The information also alleged that defendant took property in excess of \$150,000. (§ 12022.6, subd. (a)(2).)

The matter proceeded to a jury trial. Since the sole issue on appeal is a challenge to the sentence, the evidence presented at trial is only briefly summarized.

Defendant operated a luxury piano consignment business out of her home in San Francisco. Her business was called Encore Vintage Pianos. Defendant would appraise clients' pianos and, if the parties agreed on a minimal price, they would enter into a consignment agreement that generally provided for a sale price for the piano and a 10 percent commission for defendant. Upon the signing of the agreement, defendant would have the piano moved to her showroom for display.

The offenses charged against defendant involved nine pianos she took on consignment between 1999 and 2003. She sold all nine pianos but did not remit the proceeds to the sellers. She made up reasons for the delay of payment and on two occasions created false bills of sale to deceive the sellers.

Specifically, in June 1999, Dennis McLeod contacted defendant about selling his Steinway piano. Defendant appraised the piano as being worth between \$3,000 and \$5,000. Defendant and McLeod entered into a consignment contract and defendant informed him in June 2002 about a buyer who had made a \$500 down payment. Defendant claimed that the piano had been sent out for some repairs. In June 2003, McLeod received a \$1,000 partial payment, which he refused. He never received payment for his piano. Subsequently, he obtained a \$6,237.03 judgment against defendant.

On March 3, 2001, Edward and Sarah Kozel signed a consignment agreement with defendant to sell their Steinway piano for \$18,000, minus the 10

percent commission. In November 2001, defendant sold the piano for \$22,000. In March 2002, she told the Kozels that she had sold the piano for \$16,000 and that the buyers were paying in installments. Defendant forged a sales agreement that she provided to the Kozels. In February 2003, defendant told the Kozels that she had received a \$2,000 partial payment on the piano and three months later she sent the Kozels a check for \$8,000.

In July 2001, Stephen and Florence Austin signed a consignment agreement for defendant to sell their Steinway piano for \$20,000. Defendant reported to them that the piano had sold but she had sent the piano to Mexico for repairs and the buyer could not immediately complete payment. Defendant sent the Austins a check for \$5,000, and indicated a balance of \$11,363 was due. The Austins refused to cash the check, as the balance was too low. Defendant stopped payment on the check for \$5,000. Subsequently, defendant informed the Austins that she used the proceeds from the sale of their piano to pay her own attorney fees and that she could not pay them.

Susan Valentine signed a consignment agreement with defendant on August 22, 2001, to sell her Steinway piano for \$20,000, less 10 percent commission. Subsequently, defendant told Valentine that she had repaired the piano and now it was worth \$28,000. Valentine called to check about the selling of the piano and informed defendant that her family's financial circumstances were precarious. In September 2002, the piano became Valentine's separate property in divorce proceedings. She was the single parent of two young girls and the family was in dire financial straits because her ex-husband had left the country and had failed to pay child support. In July 2003, her daughter was in an auto accident, and she needed money for a car and medical bills. Valentine called defendant and pleaded with her, telling her that the family was "not surviving" financially. Defendant responded that she had her own financial problems. Defendant did not tell Valentine that she sold her piano on August 3, 2003, for \$33,000.

On March 15, 2002, Linda Licalsi signed an agreement for defendant to sell her Bechstein piano for \$20,000 to \$30,000. Without receiving permission, defendant consigned the piano to another dealer and this dealer sold it for \$56,000. For over one year, defendant told Licalsi that the piano had not sold. Licalsi discovered through her own research that another dealer had her piano. She contacted the dealer and was told that the piano had sold and the proceeds had been given to defendant. Licalsi received none of the money.

John Kiskaddon, on March 21, 2002, entered into a consignment agreement with defendant to sell his Steinway piano for \$25,000, less \$1,500 in repairs and 10 percent in commission. Defendant sold the piano for \$30,000 and did not tell Kiskaddon about the sale. Subsequently, she paid Kiskaddon a \$5,000 partial payment, but never paid him the balance owed.

On March 28, 2002, Jim and Susan Malott signed a consignment agreement for defendant to sell their Steinway piano for \$20,000, less 10 percent commission. Defendant sold the piano for \$15,000 without informing the Malotts. Subsequently, defendant told the Malotts that she had sent the piano out for repairs but, when the Malotts contacted the restoration company, they were told that the company had no record of the piano.

The following year, on January 30, 2003, John Horner and his sister Kristen Rowe agreed to have defendant sell their Steinway piano for \$18,000, less 10 percent commission. Defendant sold the piano for \$18,000, but did not tell the owners. When the owners contacted defendant, she told them that the piano had been sent to Mexico for repairs. The repair company had no record of the piano. Subsequently, defendant promised to pay the sellers, but she never gave them any payment.

Brothers Christopher and Dan Coffman signed an agreement on March 28, 2003, for defendant to sell their Steinway piano for \$15,000, "as is." Some time later, defendant told the brothers that the piano was being repaired and would not

be ready until the summer of 2004. The brothers learned at a bankruptcy creditors' meeting that defendant had sold the piano for \$18,000.

Christine Varon also testified at trial, although the sale of her piano was not a basis for any of the criminal charges against defendant. Varon reported that she had a Steinway piano and in 2002 she entered a consignment agreement for defendant to sell it for her. Varon decided to sell the piano because her daughter was sick and the family had medical bills to pay. Varon testified that the insurance was not covering many of the procedures her daughter needed and she had a number of bills building up. Varon would call defendant about once a month about the piano; defendant told her that the piano needed repairs or that the market had slowed down. Defendant never paid Varon any money for the piano. In 2005, Varon asked for her piano back. Subsequently, Varon made a claim for the piano on her insurance policy.

In 2005, defendant declared bankruptcy and the jury heard a tape recording of defendant's comments in the bankruptcy court. At the hearing, Horner asked defendant for the bill of sale for his piano. She responded that she did not have the paperwork and added: "[Y]ou can pull off my legs, you can pull off my arms, you can take me to court, I have no money—I—there is nothing you can do." When the trustee suggested that a criminal complaint could be filed against her, she replied: "How can they prove that I've done anything wrong? When all I did was try[] to keep the business afloat."

The defense at trial was that defendant had a serious psychiatric illness and her behavior was caused by this illness and unusually difficult financial circumstances. Dr. Jeffrey Gould, a psychiatrist, testified that defendant suffered "several discrete periods of what we call mania and psychosis, in which she was hospitalized for these symptoms" as well as experiencing the depressive phases of bipolar disorder. He concluded that her psychotic episodes could impair defendant's ability to perceive her interpersonal interactions accurately.

Defendant testified that she went into a partnership with Mary Mackie in 1988 and they called their consignment business Affordable Acquisitions of Quality Pianos. Mackie did all of the bookkeeping. They dissolved the partnership in 1993, and defendant filed a civil suit against Mackey. Defendant then formed Encore Vintage Pianos. She testified about the stresses she was under, her economic woes, and her mental and emotional breakdowns. In addition to her civil lawsuit against Mackey and the decline in business for luxury pianos, her husband became unable to work because of a breakdown following the events of “nine-eleven.”

On November 10, 2009, the jury convicted defendant on all nine embezzlement charges and the two forgery charges. It found true a lesser-included excessive taking enhancement of more than \$50,000. The jury found defendant not guilty of the nine grand theft charges and the allegation that she took property in excess of \$150,000.

The Sentencing Reports

Defendant requested probation. In her sentencing memorandum, her attorney argued that defendant had an alcohol problem and had used alcohol to self-treat her psychiatric illnesses. Counsel argued that her alcoholism and bipolar disorder affected her judgment. Counsel argued that there was no intent to steal.

The probation report recommended that the court deny defendant probation. The probation report noted that on June 25, 2005, as a result of defendant’s bankruptcy proceeding, she was required to meet with her creditors and disclose her assets and liabilities. Several of the victims asked about their pianos and the money from the selling of their pianos. Defendant told the victims that she had sold all of their pianos and the money had gone to pay her legal expenses in a lawsuit against her former business partner or otherwise had been used for her own business expenses. The probation report stressed that the circumstances in aggravation included defendant’s manner in carrying out the crime indicated planning, sophistication, or professionalism; the amount of money taken; and the

advantage defendant took of a position of trust or confidence to commit the offense. In mitigation, defendant did not have a prior record.

Dayle C. Carlson, an independent correctional consultant, provided a sentencing report. He noted that defendant had been diagnosed with fibromyalgia, chronic fatigue syndrome, polyarthritis, and chronic pulmonary disease. In July 2007, she was diagnosed with a benign brain tumor. At the time of the report, defendant was taking the following medications: Naproxen, Wellbutrin, Prozac, Tegretol, Diazepam, and Trazedone. Additionally, she admitted to being an alcoholic; she had been sober for one year and six months.

Carlson also noted mental health issues that defendant had experienced. In 1995, defendant was diagnosed with “Bipolar Disorder-Manic.” In 2003, she was hospitalized and appeared “ ‘incoherent and delusional.’ ” He stated that Dr. Gould concluded that defendant suffered from “ ‘Bipolar I Disorder, Manic, Severe with Psychotic Features and Alcohol Dependence.’ ”

Carlson stated that defendant’s offense took place over four years and that she victimized nine victims for a total loss of over \$130,000.² He pointed out that none of the victims was targeted because of vulnerability; each victim initially sought out defendant. He wrote that defendant’s forgery of two bills of sale constituted “the only measure of criminal sophistication or professionalism. Otherwise, she simply entered into contracts and then lied about the dispositions of the victims’ pianos.” He acknowledged, however, that she had taken advantage of a position of trust. He believed that her ability to comply with reasonable terms of probation “hinge[d] on her medicine compliance” He also opined that imprisonment of defendant could have tragic consequences. He observed that defendant had expressed remorse although she continued to engage in a level of rationalization for her actions. He did not believe that she continued to present any type of danger to the community.

² Carlson specified that the amount of restitution owed was \$133,000 (\$146,000 minus \$13,000 payment made).

Carlson recommended that the court admit defendant “to five years felony probation, upon the conditions that she make restitution, continue in a program of mental health care, be prohibited from entering into any fiduciary relationships, and serve an appropriate period of local custody.”

The Sentencing Hearing and Sentence

The court held the sentencing hearing on November 17, 2010. Several of the victims and defendant’s friends spoke. Prior to issuing the sentence, the court stated: “[T]his is an incredibly hard case. It is that simple. Some things I agree with you on, [defense counsel], that perhaps the system doesn’t do well with people with mental illnesses. I also agree with the [prosecutor], that your own psychiatrist seemed to indicate that [defendant’s] mental illness was something that was relatively transitory when she was not in one of the serious illnesses.” The court confirmed that it “absolutely agreed with the jury verdict.”

The court continued: “I think it’s a case that no one is going to be happy with. The victims sitting on one side of the courtroom, having lost \$139,000, which is a large sum of money, and the—on the other side of the courtroom are the friends and family and loved ones of the defendant. [¶] We see an elderly woman who has a good, perfect, noncriminal record before this event, and so the first question that the court has to answer . . . is whether probation should be granted in this matter.”

The court added: “The victims were—they were injured in this case, and they were probably injured in more than just losing money. [¶] I am not going to grant probation in this matter, and some of the reasons are, in particular, two victims in this matter. One is Ms. Valentine, who had explained to [defendant] the necessity of the money she needed to have her and her family survive, and cavalierly [defendant], after selling her piano, did not give her that money, no matter how many times Ms. Valentine asked for it.”

The court commented that defendant sold Valentine’s piano for \$33,000, which was more than Valentine earned in a year. The court observed that

Valentine's husband had just left her and she had no way to support herself and defendant knew these facts. The court also mentioned Varon as being particularly vulnerable.

The court also referred to the tape recording from the bankruptcy court and concluded that defendant's comments established a lack of remorse. Defendant, according to the court, "deliberately looked at the victims, and said: Too bad. There is nothing—I'm paraphrasing—there is nothing you can do to me. I got your money. Too bad. [¶] The cavalier attitude I heard on that tape was also something that I—it was offensive to me, that people can lose that much money, and somebody who took it didn't care. [¶] The only remorse I have ever heard from you, and the only time I heard anything is today about restitution." The court emphasized that this was the first time defendant had mentioned restitution.

The court denied defendant's request for probation and sentenced defendant to a state prison term of two years and four months. This sentence consisted of the lower term of 16 months on one of the embezzlement counts, a consecutive one-year term for the excessive taking enhancement, and concurrent terms of 16 months on the remaining counts.

Defendant filed a timely notice of appeal.

DISCUSSION

Defendant's sole contention on appeal is that the lower court abused its discretion when it denied her request for probation. For the reasons discussed below, we conclude the court did not abuse its discretion when sentencing defendant to a state prison term of two years and four months.

Probation is "an alternative form of punishment in those cases when it can be used as a correctional tool." (*People v. Edwards* (1976) 18 Cal.3d 796, 801, superseded by statute on another issue.) Trial courts have "wide discretion" in granting or denying probation. (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 364; § 1203, subd. (b)(3).)

“Where the defendant is eligible for probation, the court must state its reasons for selecting a prison commitment as its sentencing choice. This obligation to state reasons is satisfied by an explanation of why probation has been rejected in favor of imprisonment.” (*People v. Leung* (1992) 5 Cal.App.4th 482, 506.) “The circumstances utilized by the trial court to support its sentencing choice need only be established by a preponderance of the evidence.” (*Ibid.*)

We review the denial of probation under the standard of an abuse of discretion. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120-1121.) A trial court’s “decision denying probation will not be disturbed on appeal except upon a clear showing the trial court abused its discretion in an arbitrary or capricious manner.” (*People v. Kronemyer, supra*, 189 Cal.App.3d at pp. 364-365.) On appeal, “ [t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.’ [Citation.]” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

In granting or denying probation, the trial court must consider statutory guidelines, including “[t]he safety of the public, which shall be a primary goal through the enforcement of court-ordered conditions of probation; the nature of the offense; the interests of justice, including punishment, reintegration of the offender into the community, and enforcement of conditions of probation; the loss to the victim; and the needs of the defendant shall be the primary considerations in the granting of probation. . . .” (§ 1202.7.)

California Rules of Court, rule 4.414 also provides criteria for the court to consider in deciding whether to grant or deny probation. Under this rule, the following facts related to the crime affect the decision to grant or deny probation: “(1) The nature, seriousness, and circumstances of the crime as compared to other instances of the same crime; ¶¶ (2) Whether the defendant was armed with or

used a weapon; [¶] (3) The vulnerability of the victim; [¶] (4) Whether the defendant inflicted physical or emotional injury; [¶] (5) The degree of monetary loss to the victim; [¶] (6) Whether the defendant was an active or a passive participant; [¶] (7) Whether the crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur; [¶] (8) Whether the manner in which the crime was carried out demonstrated criminal sophistication or professionalism on the part of the defendant; and [¶] (9) Whether the defendant took advantage of a position of trust or confidence to commit the crime.” (Cal. Rules of Court, rule 4.414(a).)³

The following facts related to the defendant affect the decision to grant or deny probation: “(1) Prior record of criminal conduct, whether as an adult or a juvenile, including the recency and frequency of prior crimes; and whether the prior record indicates a pattern of regular or increasingly serious criminal conduct; [¶] (2) Prior performance on probation or parole and present probation or parole status; [¶] (3) Willingness to comply with the terms of probation; [¶] (4) Ability to comply with reasonable terms of probation as indicated by the defendant’s age, education, health, mental faculties, history of alcohol or other substance abuse, family background and ties, employment and military service history, and other relevant factors; [¶] (5) The likely effect of imprisonment on the defendant and his or her dependents; [¶] (6) The adverse collateral consequences on the defendant’s life resulting from the felony conviction; [¶] (7) Whether the defendant is remorseful; and [¶] (8) The likelihood that if not imprisoned the defendant will be a danger to others.” (Rule 4.414(b).)

The factors enumerated in rule 4.414 “[do] not prohibit the application of additional criteria reasonably related to the decision being made.” (Rule 4.408(a).)

Here, the trial court stated that this was a “hard case” and it carefully considered the sentence it was imposing. The court noted that defendant, an

³ Further rule references are to the California Rules of Court.

elderly woman, had no prior criminal record. The court, however, concluded that probation was not warranted because two of the victims were particularly vulnerable and the court found defendant's treatment of these two people "unconscionable." The court also stressed that the tape of the bankruptcy proceedings established that defendant did not show remorse and displayed a "cavalier attitude." The court also cited the amount of money taken.

Defendant contends that the trial court ignored many factors favoring probation. Specifically, she cites her lack of a criminal record, the fact that no weapon was used, her age (born in 1942), the serious consequences of prison on her health, the unlikelihood that she would reoffend, the loss she suffered, and the fact that she turned to crime only when suffering serious economic crises. She maintains that the evidence showed that she was naïve when it came to business but she could not have foreseen the money missing from her books of her former partnership, the decline in the market for used pianos, and her husband's breakdown after the events of "nine-eleven." She claims that her offense was not criminally sophisticated but simply based on her irrational belief that she could make people whole if she receive a lucky break. She stresses that the evidence also established that she was not a danger to others.

"[E]ven if there were several mitigating factors that might weigh in favor of probation, this does not necessarily mean that the trial court abused its discretion in deciding against granting probation." (*People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1530-1531.) "A trial court may minimize or even entirely disregard mitigating factors without stating its reasons." (*People v. Salazar* (1983) 144 Cal.App.3d 799, 813.) "[U]nless the record affirmatively indicates otherwise, the trial court is deemed to have considered all relevant criteria, including any mitigating factors." (*People v. Holguin* (1989) 213 Cal.App.3d 1308, 1317-1318; see also rule 4.409.)

Here, the court announced that it had read the probation report, all of the letters submitted, the sentencing memoranda of defendant and the prosecution, and

all the other reports submitted to the court. Furthermore, the court did expressly consider several of the factors in mitigation and then weighed them against those in aggravation. The court noted defendant's mental health issues, her age, and the fact that she had no prior criminal record before committing these crimes.

Although there were some factors in mitigation, there were numerous factors in aggravation. As the trial court pointed out, two of the victims were particularly vulnerable because of their financial situation (rule 4.414(a)(3).) Their vulnerability resulted in defendant's inflicting severe emotional injury on them. (Rule 4.414(a)(4).) With regard to all of the victims, defendant took advantage of their trust when she promised to give them the money she received for selling their pianos. (Rule 4.414(a)(9).) Furthermore, the court properly considered that defendant did not show remorse. (Rule, 4.414(b)(7); *People v. Leung, supra*, 5 Cal.App.4th at p. 507.) Other aggravating factors supporting the trial court's ruling included the following: the extensive monetary loss of over \$130,000 to the nine victims (rule 4.414(a)(5)), defendant's active participation in the scam (rule 4.414(a)(6)), the seriousness of the crime as it involved continuous lying and two forgeries (rule 4.414(a)(1)), and the evidence demonstrating defendant's planning and attempting to cover up the crimes (rule 4.414(a)(8)). Given these numerous aggravating factors, the court acted within its discretion in denying defendant probation.

Defendant also claims that a preponderance of the evidence did not support the trial court's findings. She claims that the court discounted the evidence regarding her mental condition and its impact on her behavior. She complains that the trial court gave too much emphasis to Dr. Gould's comment that, hypothetically, a person suffering from bipolar disorder might have periods of high functioning between acute episodes. She asserts that the court dismissed other evidence of her mental condition suggesting that it could affect her ability to understand what she was saying or doing.

The trial court made it clear that it considered the evidence regarding defendant's mental condition. The court stated: "Some things I agree with you on, [defense counsel], that perhaps the system doesn't do well with people with mental illnesses. I also agree with the [prosecution] that your own psychiatrist seemed to indicate that [defendant's] mental illness was something that was relatively transitory when she was not in one of the serious illnesses."

According to the probation report, Dr. Gould stated the following in his report: "In Bipolar disorder, as opposed to a chronic psychotic disorder such as schizophrenia, the individual is usually relatively free of manic or psychotic symptoms when not in a manic episode. Between mood episodes they may function at their full capacity, without any residual cognitive or psychiatric symptoms." (Italics omitted.) Moreover, the record showed that defendant's crimes involved sophisticated planning as she acted in a manner to keep her nine victims ignorant of the fact that she had sold their pianos. Furthermore, defendant had the presence of mind to declare bankruptcy to absolve her of the monies she owed the victims in this matter. This evidence in the record amply supported the lower court's conclusion that defendant's psychological disorder did not stop her from engaging in complex thinking and that she was aware of what she was doing during the four years she took advantage of nine victims in order to fund her own civil lawsuit against her former partner.

Defendant also objects to the court's finding that two of the victims, Valentine and Varon, were particularly vulnerable. She asserts that the court ignored that Valentine initiated the contact with her as well as the fact that Valentine's piano was in poor shape when defendant agreed to fix her piano and sell it. As a result of defendant's actions and spending more than \$12,000 to rebuild the piano, the piano, according to defendant, increased in value from less than \$5,000 to \$33,000. Defendant asserts that Valentine's emotional injury and economic problems were related to her ex-husband and not her actions. Furthermore, she maintains she showed concern because she offered to return the

rebuilt piano to Valentine if she would pay her \$6,000 for half of the repair costs. She criticizes the court's comment that \$33,000 was more than Valentine earned in a year because Valentine was not entitled to this sum given the costs of repair and her commission. With regard to Varon, defendant maintains that the court was incorrect when it stated that Varon had to sell everything because her child was suffering from a very unusual disease and medical condition. She argues that the record did not show that Varon was desperate to sell the piano.

Defendant's rendition of the facts ignores those facts that supported the lower court's conclusion that Valentine was particularly vulnerable (see rule 4.414(a)(3)), and that defendant treated her in a manner that was unconscionable. " '[P]articularly vulnerable' . . . means in a special or unusual degree, to an extent greater than in other cases. Vulnerability means defenseless, unguarded, unprotected, accessible, assailable, one who is susceptible to the defendant's criminal act." (*People v. Smith* (1979) 94 Cal.App.3d 433, 436.) In assessing a victim's vulnerability pursuant to rule 4.421, we consider "the total milieu in which the commission of the crime occurred," including both the victim's personal characteristics and the crime's setting. (*People v. Price* (1984) 151 Cal.App.3d 803, 814.)

Valentine was particularly susceptible to defendant's promises as she was desperate to sell the piano. Defendant attempts to discount Valentine's vulnerability by arguing that the piano was worth very little because it needed to be refurbished. However, defendant made promises to Valentine and Valentine relied on those promises. More significantly, despite knowing about Valentine's precarious situation, defendant never provided her with any of the money from the sale. Valentine, the single parent of two young girls, testified that defendant "knew that the sale had to be fairly prompt, and my daughters and my circumstances became progressively desperate I continued to make phone calls in our desperation because [the children's] father became a deadbeat dad and fled to Amsterdam and refused [to pay] all alimony and child support." Despite

having this knowledge, defendant took a long time to have the piano repaired and never informed Valentine that she sold the piano for \$33,000. Defendant claims that Valentine's debt was so great that \$33,000 would have been insufficient to remedy her credit and loan problems. However, this simply underscores the dire need for money that Valentine had.

Defendant's quibbling with the court's finding that Varon "had to sell almost everything" because her child was suffering from a very unusual disease and medical condition has little merit. She asserts that the court incorrectly characterized Varon as being desperate. Varon testified that at the time she met with defendant and agreed to have her sell the piano, her daughter was sick. She added: "And we had been taking her to different doctors and different hospitals all over the place, to try to find out what was wrong with her. And our insurance was not covering a lot of the procedures because we had different kind of insurance. So, we had a ton of medical bills building up." This evidence clearly supported the trial court's finding that Varon was under serious emotional distress with regard to her child's illness and was concerned about the mounting bills related to her daughter's illness. The court's characterization that the family had to sell everything may not have been completely accurate, but the record supported its conclusion that Varon was particularly vulnerable.⁴

Finally, defendant attacks the trial court's finding that her lack of remorse affected its decision to deny her probation. She argues that contrition is not an official factor included in rule 4.414, although she does note that rule 4.414(b)(7) states that the court should consider whether the defendant is remorseful.

⁴ Defendant also criticizes the court for relying on Varon's situation because none of the counts in the criminal complaint was based on the consignment of Varon's piano. She acknowledges, however, that the court could properly rely on Varon's testimony at trial when considering whether to grant probation. (See *People v. Towne* (2008) 44 Cal.4th 63, 85-86, see also § 1170, subd. (b); rule 4.408(a).) The record establishes that the court focused more on Valentine's situation than on Varon's circumstances and, in any event, the record supported a finding that both women were particularly vulnerable.

Defendant argues that the court's finding of a lack of remorse was based on the recording from the bankruptcy court and she asserts that this recording was unreliable because the court could not observe the witnesses. She also stresses that her statements at the bankruptcy proceeding were accurate. She notes that she had no assets and therefore her comment that the creditors could pull off her arms and legs and she would still have no money to pay them was accurate. She also criticizes the court's ignoring her later statements that she now understood how much she hurt the victims. She argues that remorse is "shorthand for determining whether a person might reoffend" and then repeats that the evidence showed that her age and illness made it unlikely that she would be a repeat offender. She contends that the court simply did not like her emotional response, even though she was not a danger to others, and therefore applied the wrong test and abused its discretion when denying her probation based on a lack of remorse.

Courts have consistently held that remorse is a proper factor to consider when determining a defendant's suitability for probation. (*People v. Leung, supra*, 5 Cal.App.4th at p. 507; see also rule 4.414(b)(7).) Contrary to defendant's assertion, remorse is *not* "shorthand for determining whether a person might reoffend." Remorse, which falls under rule 4.414(b)(7) is distinct from considering whether the person will be a repeat offender, which falls under rule 4.414(b)(8). Remorse is "a gnawing distress arising from a sense of guilt for past wrong." ([http://www.merriam-webster.com/dictionary/remorse.](http://www.merriam-webster.com/dictionary/remorse)) Thus, remorse relates to the person's acceptance of culpability and empathy for the victims. Accordingly, defendant's argument that the court used the wrong legal test is entirely without merit.

Here, the record supported a finding that defendant did not show remorse. The court properly considered defendant's statements at the bankruptcy hearing and defendant testified at court and had an opportunity to explain the reasons for her comments. Not only did defendant not show any empathy towards her victims when she simply stated that she had no money without expressing any sorrow, but

she denied any culpability when she replied in response to the trustee' comment that a criminal complaint could be filed that no one could prove that she had done anything wrong and that she was simply trying to keep her business afloat.

Furthermore, the bankruptcy recording was not the only evidence of defendant's lack of remorse. When Valentine called defendant and pleaded with her to sell her piano and give her the money from it because her family was "not surviving" financially, defendant responded that she had her own financial problems. Despite knowing about Valentine's financial situation, defendant did not inform her that she sold her piano for \$33,000 on August 23, 2003.

In Carlson's sentencing report, he stated that defendant had "endeavored to explain the context of her behavior during this time, which, in this writer's opinion, is inadequate to either explain or excuse her conduct. Although [defendant] expresses a sense of remorse for her actions, she continues to engage in a level of rationalization, particularly as it relates to her intention to fully repay her customers at the conclusion of a civil lawsuit, which she expected to win." Defendant's attempt to minimize her own culpability or rationalize her actions supported a finding that she lacked remorse.

Accordingly, we conclude that the trial court did not abuse its discretion when it denied defendant's request for probation and sentenced her to prison.

DISPOSITION

The judgment is affirmed.

Lambden, J.

We concur:

Kline, P.J.

Haerle, J.