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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD ALAN HEADRICK,

Defendant and Appellant.

A133621

(Lake County
Super. Ct. No. CR 926695)

Richard Alan Headrick pleaded no contest to a felony charge of continuous sexual abuse of a child under 14 (Pen. Code, 288.5, subd. (a)).¹ Probation was denied, and Headrick was sentenced to the upper term of 16 years in state prison. The sole issue on appeal is whether the trial court abused its discretion in denying probation and, thereby, denied Headrick due process.² We affirm.

I. BACKGROUND

On September 7, 2011, as part of a negotiated agreement, Headrick entered an open plea of no contest to the continuous sexual abuse of a child under 14, a felony

¹ All statutory references are to the Penal Code unless otherwise indicated.

² Headrick’s notice of appeal states that “[t]his appeal is based on the sentence or other matters occurring after the plea that do not affect the validity of the plea.” (Cal. Rules of Court, rule 8.304(b).) In his briefing on appeal, Headrick challenges only the trial court’s decision to deny his request for probation. (See *People v. Senior* (1995) 33 Cal.App.4th 531, 537 [citing cases holding that points not raised in opening brief are waived].)

pursuant to section 288.5, subdivision (a).³ As charged by information filed July 14, 2011, it was alleged that “on or about the 27th day of July, 2002 to the 1st day of January, 2010, . . . [Headrick] did unlawfully engage in three and more acts of ‘substantial sexual conduct,’ as defined in . . . section 1203.066[, subdivision] (b), and three and more lewd and lascivious acts as defined in . . . section 288 with JANE DOE, a child under the age of 14 years, while [he] resided with, and had recurring access to, the child.”⁴

Regarding the possibility of probation, Headrick specifically acknowledged on the signed plea agreement form that he understood not only the possible maximum and minimum prison terms, but also that he would “not be granted probation unless the court [found] at the time of sentencing that this is an unusual case where the interests of justice would be best served by granting probation.” The plea was not conditioned upon psychological evaluation of Headrick pursuant to section 288.1.⁵ Additionally, both prosecution and defense agreed on the record that there was “a presumption against probation” and that probation could not, in any event, be granted without a section 288.1 evaluation. Thereafter, the court accepted Headrick’s plea of no contest to the felony

³ Section 288.5, subdivision (a) provides: “Any person who . . . has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense, as defined in subdivision (b) of Section 1203.066, or three or more acts of lewd or lascivious conduct, as defined in Section 288, with a child under the age of 14 years at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child and shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years.”

⁴ A special allegation that Headrick used force or fear in committing the offense (§ 1203.066, subd. (a)(1)) was dismissed.

⁵ “Any person convicted of committing any lewd or lascivious act including any of the acts constituting other crimes provided for in Part 1 of this code upon or with the body, or any part or member thereof, of a child under the age of 14 years shall not have his or her sentence suspended until the court obtains a report from a reputable psychiatrist, from a reputable psychologist who meets the standards set forth in Section 1027, as to the mental condition of that person.” (§ 288.1; see also § 1203.067, subd. (a)(1) [probation cannot be granted to any § 288.5 offender without evaluation pursuant to § 1203.03].).

violation of section 288.5, subdivision (a) as charged, and declined to order a psychological evaluation “until I’ve made some determination that probation is a possibility.”

The Sentencing Report

The recommendation by the probation department was to deny Headrick probation and impose an upper term of 16 years in prison. The department’s sentencing report contained, inter alia, a five-page recitation of facts relating to the offense, a letter of apology from Headrick, and a victim impact statement in the form of a letter from the victim’s mother.

The report reiterated information contained in a June 2011 police investigation report that had been admitted, without objection, into evidence at the change of plea hearing to establish the factual basis for Headrick’s plea. This included statements by the victim, her mother, grandmother, and then 55-year-old great uncle, Headrick. The victim, age 13 at the time she spoke to police, reported that Headrick had “fondl[ed] her and motioned to her breast and vaginal area. In addition, . . . he would have her ‘suck em.’ ” The victim’s mother said that the fondling and oral sex had occurred over the course of several years when the child was routinely in the care of her great grandmother at a residence shared with Headrick (the great grandmother’s son). Three days after the victim’s initial report, Headrick voluntarily appeared at the police department, “want[ing] to turn himself in and confess to the molestation of his great niece.” After being advised of his *Miranda* rights, Headrick told investigators that he would have the child “play . . . with his penis,” “‘jack[]’ him off,” and “suck him.” He said that he would “ejaculate[], but not in her mouth, as he had used a condom,” and said that these incidents would take place when the child “would come into his room to watch TV or play.” When asked how many times this had occurred, he could not give a specific number of times but that it was “‘[l]ots of times’ ”—estimating that it might have occurred “between 5 and 25 times, or possibly once a month” from when the victim was “five to seven years of age” until she was 10 or 11. He also stated he “may have touched her breast and vaginal area, but he could not remember.” Headrick told police that “the incidents stopped . . . because it was

wrong and [she] stopped coming over to his house.” He also said he had “alcohol and drug problems and was probably under the influence of both at the time of the molestations.”

The sentencing report included additional statements made by the victim to an investigator with the district attorney’s office: “[T]he first time [the victim] remembers anything happening was . . . when she was five or six years old. She . . . remembered going into [Headrick’s] bedroom. He had told her to touch his penis while he was lying on the bed with his legs spread open. He had her lay on top of him between his legs. . . . [Headrick] had her thinking it was what you were supposed to do. . . . [S]he does not remember him ever making threats towards her [W]hen she got older, [Headrick] started giving her money after he did things to her and he would say, ‘You better not tell no one, girl.’ . . . [He] would give her up to \$10 every time. [¶] . . . [T]he last time she remembers [Headrick] trying anything was when she was in seventh grade. She said when they went into his bedroom and he tried to touch her, she pushed him away and left the room. She concluded by stating the reason why she stopped having contact with [him] was because she reached the age where she was able to go home from school and take care of herself.”

The report identified factors under California Rules of Court, rule 4.414 (criteria affecting the decision to grant or deny probation)⁶ that the probation department believed demonstrated that Headrick was not an appropriate candidate for probation.⁷ In

⁶ All further rule references are to the California Rules of Court.

⁷ The rule 4.414(a) factors identified in the report were: “(1) The nature, seriousness, and circumstances of the crime are more serious than other instances of the same crime due to the amount of time the victim was subjected to the molestation. [¶] (3) The victim was particularly vulnerable as she was only 5 or 6 years old when the molestation began. [¶] (4) [Headrick] inflicted emotional injury to the victim. [¶] (6) [Headrick] was an active participant. [¶] (8) The manner in which the crime was carried out did demonstrate planning on the part of [Headrick]. [¶] (9) [Headrick] took advantage of a position of trust or confidence to commit the crime.”

As to factors relating to Headrick (see rule 4.414(b)), the report specified: “(1) [His] prior convictions are numerous. [¶] (2) [His] prior performance on summary

summation, the sentencing report recommended that Headrick's probation request be denied because "[t]he duration of the molestation in this case was extensive and only stopped as a result of the victim's actions as she became old enough to supervise herself at home. The defendant admitted he stopped molesting the victim when she stopped coming to his residence. Although the defendant's prior record is not serious, it is believed he is a great danger to minor children."

The Sentencing Hearing

At the October 4, 2011 sentencing hearing, the court indicated that it had read and considered the sentencing report, and both parties confirmed having had an opportunity to review the report. Defense counsel was asked if there was any legal cause why sentence should not be imposed, and replied, "No, sir." Upon inquiry as to any evidence to be presented, defense counsel submitted a letter of support from Headrick's mother and stepfather. The victim impact statement was read into the record without objection. The court asked again if either party had any further evidence, and defense counsel stated, "No evidence, your Honor." The prosecutor submitted on the sentencing report, reserving time to respond to defense arguments. Defense counsel stated that, "We think this report is completely in error and in some respects, we believe, lacking in factual basis and foundation relative to Mr. Headrick in this case." He focused on the rule 4.414 factors, arguing that the report was "stretching" to support its recommendation of an upper term in prison and that "Headrick should be evaluated before we deny him probation"

probation was good[, and he] was not on probation at the time of the offense. [¶] (4) [His] ability to comply with reasonable terms of probation is poor as [he] admittedly stated the only reason the molestation stopped was because the victim stopped coming to her [great] grandparent's house. [¶] (5) The likely effect of imprisonment on [him] would be substantial. [¶] (6) The adverse collateral consequences on [his] life resulting from a felony conviction would be substantial. [¶] (7) [He] appeared to be remorseful. [¶] (8) The likelihood [he] will be a danger to others if not imprisoned is substantial based on the circumstances in the current case."

The defense took no issue with two of the six rule 4.414(a) factors identified in the sentencing report—that Headrick was an active participant in the offense and inflicted emotional injury on the victim. As to rule 4.414(a), factors (1) and (3), argument was brief: “We don’t think that the nature and seriousness of the circumstances are more serious than any other crime that falls into the same category. We think that at best case, it’s on the same level as other crimes of the same nature and seriousness. [¶] . . . [W]e think [the statement that the victim is particularly vulnerable] is wrong.” As to rule 4.414(a), factors (8) and (9), argument was more detailed: “[W]e absolutely disagree” with the finding that “ ‘[t]he manner in which the crime was carried out demonstrates planning on the part of [Headrick].’ . . . [¶] This was an extremely, extremely unfortunate event that—it was a meeting of the people in this case where the [great] grandmother happened to be babysitting, the minor child [was] entrusted to the family, and Mr. Headrick happened to be in that home at the time that the minor child was left there in the custody, care, and control of the [great] grandmother in this case. There was no deception. There was no planning or sophistication that was involved in this. The child happened to be in the same vicinity and it happened, plain and simple. . . . [¶] . . . We disagree with [the finding that he took advantage of a position of trust] as well. Yes, this was an uncle. This was a family member. . . . So we’re not talking a teacher. We’re not talking a pastor, a priest, something along those lines, that you typically look up to and say they should be safe at a church; they should be safe at a softball game or at a baseball game or something along those lines. So we certainly disagree with that.”

Defense counsel did not contest the report’s findings regarding rule 4.414(b) factors (2), (5)–(8). As to rule 4.414(b)(1), counsel called the report’s characterization of Headrick’s prior convictions “highly offensive”: “I’m not sure which universe the probation is in where [five misdemeanor convictions between the years of 1976 and 1998] . . . are numerous at all.” In addressing Headrick’s “ability to comply with reasonable terms of probation” under factor (4), it was argued that probation was misleading the court by omitting reference to a statement to police by Headrick “that he was trying to stop before the alleged victim in this case ever stopped coming over.” It

was further argued that the report was “kind of contradictory” in concluding that, “ ‘[a]lthough [Headrick’s] prior record is not serious, it is believed he is a great danger to the minor child.’ I don’t necessarily think he’s going to be a danger to the minor child if he’s granted probation. . . . This conviction is going to allow the Court—it’s going to allow probation a significant amount of latitude on how to deal with Mr. Headrick as far as, perhaps, where he can live, where he can congregate, things along those lines. So I don’t necessarily think that that’s absolutely an issue, your Honor, as far as what’s going on here.” The defense again pressed for a psychological evaluation of Headrick, arguing that the court “would be in a much better position to evaluate Mr. Headrick, because I’m sure that Probation didn’t necessarily go to psychology school either in order to determine whether he should be granted probation. . . . I think they’ve left out considerable items in this presentence report that are favorable to Mr. Headrick. . . . Because I didn’t see any discussion on here whether . . . Probation determined this was aberrant behavior or not.”

In reply to prosecution rebuttal,⁸ the defense asked again that the court “at least give someone an opportunity to evaluate [Headrick] and find out what’s going on and see whether he can be rehabilitated, whether in fact he deserves some type of probation or at

⁸ Headrick’s assertion that the prosecution did not respond to or contest his trial counsel’s arguments is incorrect. The prosecutor vigorously argued that it was undisputed that Headrick was an active participant in conduct that far exceeded the statutory requirements for conviction, and that he had clearly inflicted emotional injury as described by the victim impact statement. The prosecutor also argued that it was reasonable to infer that because the victim went into Headrick’s room “with some sort of object to look at a movie on TV or something to that effect,” that some level of planning existed, though “not, perhaps the most sophisticated.” The prosecution also maintained that “a child should be safe at [her great] grandparent’s house in the company of [her] relatives. That is a position of trust, and he took advantage of that.” The prosecutor emphasized that the victim’s statement that the molestation only stopped when she stopped going to her great grandmother’s house was not inconsistent with Headrick’s own statement that “[h]e stopped because it was wrong *and* the victim stopped coming over to his house.” (Italics added.)

least maybe a low term in this case. [¶] Your Honor, with that, I would submit on the—
on my response.”

Trial Court Findings and Denial of Probation

The court made detailed factual findings, adopting the sentencing report’s recitation of facts regarding the offense and the surrounding circumstances. The court also took note of Headrick’s written statement of remorse and the victim impact statement, emphasizing what the victim’s mother called “an abuse of love and trust” by her “favorite uncle [who] helped take of [her] children,” and the effects of seven years of molestation—including the victim’s loss of “innocence,” disrupted relationship with her mother, nightmares, and need for antidepressants and sleeping pills. The court then turned to the issue of probation:

“Now, in a case such as this, probation shall not be granted unless I make all of the findings under Penal Code section 1203.066, [subdivision (d)] I’m not going to go through all of the findings I would have to make. But what I’m going to do is jump right to the criteria set out in Rule of Court 4.414 to decide whether probation is appropriate in this case. [¶] The nature, the seriousness, and the circumstances of this crime are more serious than other instances of the same crime due to the duration, frequency, and severity of the acts of molestation. [Headrick] was not armed. He did not use a weapon. He did inflict emotional injury. He was an active participant in the crime. The crime was not committed because of an unusual circumstance such as great provocation which is unlikely to recur. The manner in which the crime was carried out does not demonstrate criminal sophistication or professionalism on the part of [Headrick]. [He] did take advantage of a position of trust or confidence to commit the crime, in that he was her trusted and loved great-uncle. [Headrick] has served five misdemeanor convictions from 1976 to 1998 [He] was on a grant of summary probation when he was convicted of false information to a peace officer in ‘78. Other than that, there’s no evidence of probation violations. He was not on probation during the period of the offense. [Headrick] has had an alcohol and drug abuse problem, as evidenced by his prior convictions and his admission that he had alcohol and drug problems and was probably

under the influence of both at the time of the molestations. [¶] . . . [¶] . . . [He] has expressed remorse; albeit, it's remorse after basically being found out, but it is remorse. The likelihood that [Headrick] will be a danger to others if not imprisoned is substantial based on the circumstances of the current case. [¶] It's suggested that it would be of benefit to the Court to have [Headrick evaluated.] . . . There's nothing about this one that I feel like I need further assistance from the professionals at California Department of Corrections and Rehabilitation. There's nothing particularly deep about, you know, analyzing what occurred here. [¶] Probation in this case is denied, primarily because of the danger [Headrick] presents to others and the seriousness of the crime, due to its duration, frequency, and substantial sexual conduct or severity, if you will, of the acts of molestation.”

After announcing its decision to deny probation, the court asked if either party had “[a]nything further” on circumstances in mitigation or aggravation. The prosecution “submitted” and defense counsel said he had nothing to present. After further specifying the factors it considered in aggravation and mitigation, the court sentenced Headrick to the upper term of 16 years in state prison and provided both sides another opportunity to address the court. After some discussion of a collateral matter, the court once again asked if either party had “[a]nything further.” Defense counsel had no further comments.

II. DISCUSSION

A. Waiver

The People argue that Headrick has waived his claim that the trial court erred in denying his request for probation because he did not specifically object to the court's order denying probation or its statement of reasons for that decision. (See *People v. Scott* (1994) 9 Cal.4th 331, 353–354, 356 [“complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal”].) Headrick maintains that his trial counsel's objections to and “rebuttals” of the probation report, with “cit[ation to] evidence in the record,” were sufficient to preserve his claim for appeal. (Citing *People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 725 (*Chi Ko Wong*); *People v. Medina* (1978) 78 Cal.App.3d 1000,

1007–1008 (*Medina*); see also *People v. Peterson* (1973) 9 Cal.3d 717, 725–726 [if sentencing hearing procedures are fundamentally unfair, such as inclusion of unreliable information in probation report, defendant may have relief on due process grounds].)

“The probation report is generally a proper source of information upon which judicial discretion may be exercised when a defendant is arraigned for sentencing. [Citation.]” (*Chi Ko Wong, supra*, 18 Cal.3d at p. 725.) A “mere claim of invalidity” is insufficient to preserve an objection to the report for appeal. (*Ibid*; see *Medina, supra*, 78 Cal.App.3d at p. 1007.) It is difficult to discern how Headrick’s cursory arguments at sentencing about the sentencing report’s recitation of rule 4.414 factors demonstrated that the report was, as he characterizes it, “deeply flawed.” Headrick never disputed the validity or accuracy of any underlying fact set forth in the report. (*People v. Bloom* (1983) 142 Cal.App.3d 310, 320 [defendant free to present witnesses or other evidence to demonstrate a sentencing report contains false or otherwise unreliable information].) Rather, the thrust of Headrick’s arguments at sentencing was that facts cited in the report did not answer the question of why a man without a serious prior criminal history would commit such a serious offense and, thus, further diagnostic evaluation was required before a probation determination could be made. However, the purpose of a section 288.1 diagnostic report is not to aid a defendant in obtaining a grant of probation—it is to ensure the protection of society and is not mandated where the trial court does not intend to grant probation and the record supports denial. (*People v. Thompson* (1989) 214 Cal.App.3d 1547, 1549; cf. *People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1532 [rejecting contention that § 1203.067 diagnostic evaluation was required because “the ‘court could not make an informed exercise of its discretion’ without one”].)

More significantly, Headrick had ample opportunity to object to the trial court’s factual and legal findings immediately following announcement that probation was denied or at any time prior to the hearing’s conclusion. Headrick’s failure to do so forfeits the claim on appeal. (*Scott, supra*, 9 Cal.4th at pp. 340, 353, 355 [finding waiver applied where trial court pronounced sentence, then invited comments from counsel, but

no objections were raised]; *People v. Brown* (2000) 83 Cal.App.4th 1037, 1041–1042 [“failure to state reasons or the use of improper circumstances for a sentencing decision is not a jurisdictional error”].) Even if we were willing to assume that the claim had been preserved for appeal, we would still find that Headrick’s arguments fail on the merits.

B. *No Abuse of Discretion*

“A sentencing court enjoys broad discretion in determining whether to grant or deny probation. A defendant who is denied probation bears a heavy burden to show the trial court has abused its discretion. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120; *People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311 (*Weaver*).) Furthermore, ‘a denial of probation after consideration of the application on its merits is almost invariably upheld. [Citations.]’ (3 Witkin & Epstein, Cal.Criminal Law ([4th ed. 2012]) Punishment, § [638], pp. [1037–1038].) [¶] A sentencing court must state its reasons for denying probation. (. . . rule 4.406; see *People v. Golliver* (1990) 219 Cal.App.3d 1612, 1616–1617 (*Golliver*).) ‘This obligation to state reasons is satisfied by an explanation of why probation has been rejected in favor of imprisonment. [Citations.]’ (*People v. Leung* (1992) 5 Cal.App.4th 482, 506; see *People v. Romero* (1985) 167 Cal.App.3d 1148, 1151.) For instance, the ‘nature and seriousness of the offense’ is sufficient. (*Golliver, supra*, at pp. 1618–1620.)” (*People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1157–1158, parallel citations omitted.)

1. *Presumption Against Probation*

In briefing, both parties approach this case as if it were one in which the sentencing court enjoyed its ordinary discretionary powers in determining whether to grant or deny probation. It is not. Headrick entered an open plea to a violation of section 288.5, subdivision (a). While probation may be *possible* in such a case, the sentencing court’s discretion is restricted by statute. (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282 [“[a]ll defendants are eligible for probation, in the discretion of the sentencing court . . . , *unless* a statute provides otherwise” (italics added)].) Where a statute establishes a sentencing norm and carefully circumscribes the court’s power by requiring explicit justification to deviate from that norm, any sentence conforming to that norm is strongly

presumed to be both rational and proper. (Cf. *People v. Carmony* (2004) 33 Cal.4th 367, 378.)

Section 1203.066 provides for presumptive ineligibility for probation for “[a] person who, in violating Section 288 or 288.5, has substantial sexual conduct with a victim who is under 14 years of age” (§ 1203.066, subd. (a)(8)), as long as “the existence of any fact required in subdivision (a) is alleged in the accusatory pleading and is either admitted by the defendant in open court, or found to be true by the trier of fact” (§ 1203.066, subd. (c)(1)). (See also *People v. Superior Court (Frietag)* (1988) 204 Cal.App.3d 247, 250 [pleading of fact of bodily injury provided sufficient notice of probation ineligibility; express reference to § 1203.066 not required]; *People v. McLaughlin* (1988) 203 Cal.App.3d 1037, 1039 “[i]n enacting § 1203.066 it appears that the Legislature intended that state prison be the sentencing norm in child molestation cases, meeting the criteria in subdivision (a), and that the defendant bear the burden of persuading the court to depart from that norm”].)⁹ Even if substantial sexual conduct is not pleaded or proved, section 1203.066, subdivision (d) prohibits the court from granting probation to any defendant convicted of continuous sexual abuse unless certain terms and conditions are met. In other words, as explicitly acknowledged by Headrick at the change of plea hearing, “the sentencing norm is an order *denying* probation and the court must expressly justify an order *granting* probation.” (*People v. Manners* (1986)

⁹ Before probation can be granted in cases subject to a statutory provision prohibiting probation, a sentencing court must engage in a two-step evaluation. (*People v. Stuart* (2007) 156 Cal.App.4th 165, 177–179 (*Stuart*); *People v. Superior Court (Dorsey)* (1996) 50 Cal.App.4th 1216, 1229; *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831–833.) The court must first consider if the case, as compared to other offenses having the same general characteristic, is “unusual” pursuant to the “narrowly construed” criteria of rule 4.413, i.e., a case in which “the crime is either atypical or the offender’s moral blameworthiness is reduced.” (*Dorsey*, at p. 1229; *Stuart*, at p. 178.) Determination of whether a case is an ‘unusual’ also falls within the sound discretion of the trial court. (*Stuart*, at p. 178; *Du*, at p. 831.) A finding of “eligibility” pursuant to rule 4.413, however, does not alone allow a grant of probation and suitability for probation under the separate criteria of rule 4.414 must also be found. (*Dorsey*, at p. 1229.)

180 Cal.App.3d 826, 835 [remanding for trial court to state on record it knew it had discretion to make special findings for grant of probation under § 1203.066].)

Headrick pleaded no contest to count I of the charging information. Count I specifically alleged that Headrick *not only* had engaged in more than three acts of lewd and lascivious conduct over the course of more than three months with a minor under the age of 14, *but also* that he had engaged in more than three acts of “substantial sexual conduct” as defined in section 1203.066, subdivision (b)—which includes oral copulation or masturbation of an offender. Headrick did not dispute the accuracy of the victim’s statements about the incidents of molestation or of his reported admissions to police that he had the child “play . . . with his penis,” “ ‘jack[]’ him off,” and “suck him . . . [l]ots of times.” It is not clear from the record why the sentencing report and trial court proceeded as if the substantial sexual conduct had not been pleaded or proved, and discussed the limitation on probation in terms of section 1203.066, subdivision (d), rather than section 1203.066, subdivision (a)(8).¹⁰ It is, however, abundantly clear that the court knew it had discretion to grant probation if it made certain findings under section 1203.066.

Implicit in the court’s factual findings and assessment of rule 4.414 factors (without explicit § 1203.066 analysis) is a conclusion that the facts and circumstances of the case did not justify a grant of probation, even if Headrick rebutted a presumption against it. On appeal, Headrick takes issue with only two of the sentencing court’s

¹⁰ Under a heading in the report entitled, “PROBATION ELIGIBILITY: (Rule 4.413),” it was stated that Headrick was “statutorily eligible for probation. However, pursuant to 1203.067 (a)(1) . . . [he] must first be evaluated pursuant to . . . section 1203.03 before probation may be considered.” The prior dismissal of a special allegation of force or fear under section 1203.066, subdivision (a)(1) may have diverted attention from the pleading form of count I and the factual admissions by Headrick that brought him within the provisions of section 1203.066, subdivision (a)(8). While striking the allegation of force or fear appears proper under section 1385 for lack of a factual basis, the same cannot be said for substantial sexual conduct under section 1203.066, subdivision (a) (“a finding bringing the defendant within the provisions of this section [shall not] be stricken pursuant to Section 1385”). In any event, as will be explained *post*, this issue ultimately becomes a distinction without a difference in result.

findings pursuant rule 4.414. We find no abuse of discretion with regard to either finding.

2. *Trial Court Did Not Rely on Prohibited Factors*

Headrick contends that the court impermissibly relied on elements of section 288.5, subdivision (a), when it stated that probation was denied, in part, on the “seriousness of the crime, due to its duration, frequency, and substantial sexual conduct or severity, if you will, of the acts of molestation.” Headrick’s reliance on *People v. Parrott* (1986) 179 Cal.App.3d 1119, 1125, for the proposition that an element cannot be used to deny probation is unavailing. Rule 4.414(a)(1) expressly authorizes consideration of the “nature, seriousness, and circumstances of the crime as compared to other instances of the same crime.” This is not a case where the facts in evidence only met the statutory minimum for conviction or where the sentencing court’s finding merely restated the obvious (e.g., that child molestation is a serious crime). (Cf. *People v. Parrott*, at p. 1122 [a case involving sale of marijuana to a minor and a finding that the victim was vulnerable because she was “a minor”].) The undisputed evidence before the trial court was that Headrick did not simply touch the victim at least three times over a few months in some manner that appealed to his sexual desires; Headrick engaged the child in masturbating him and performing oral sex on him at least once a month for approximately six out of 11 years of her life, resulting in emotional injury as manifest in continuing nightmares, a need for antidepressants and sleeping pills, and disruption to her relationship with her mother. We cannot, and do not, second-guess the trial court’s implicit finding that Headrick’s conduct in violating section 288.5, subdivision (a) offense is more serious than other offenses under same statute. (See *Weaver, supra*, 149 Cal.App.4th at p. 1317 [approving a trial court’s implicit conclusion that “ ‘other instances’ ” of vehicular manslaughter while intoxicated did not involve the same “egregious circumstances” evident in the case before it—“and we cannot presume otherwise”]; see also *Golliver, supra*, 219 Cal.App.3d at pp. 1619–1620 [finding facts in record in addition to victim’s death in manslaughter case to support sentencing court’s “nature and seriousness” finding]; *People v. Lai* (2006) 138 Cal.App.4th 1227, 1257

[concluding statutory prohibition on probation not overcome where welfare fraud was committed over a period of 15 years and the taking was double the amount required by statute to presumptively limit a grant of probation].)

3. *Substantial Evidence Supports a Finding that Headrick Posed a Danger to Others*

Headrick asserts that the sentencing report “does not cite or state a single fact demonstrating that [Headrick] would be a danger to others if granted probation,” and such a finding relies on “unsupported assumptions and speculations.” As indicated by rule 4.414, “ [t]he decision to grant or deny probation requires consideration of all the facts and circumstances of the case. [Citation.]’ [Citation.]” (*Weaver, supra*, 149 Cal.App.4th at p. 1312.) “ ‘The circumstances utilized by the trial court to support its sentencing choice need only be established by a preponderance of the evidence. [Citations.]’ [Citation.] Accordingly, . . . we consider, in part, whether there is sufficient, or substantial, evidence to support the court’s finding that a particular factor was applicable. [Citation.]” (*Id.* at p. 1313.)

Headrick argues that evidence was lacking with regard to dangerousness because the sentencing report did not indicate he had a history of violent or assaultive acts or threats, used or possessed deadly weapons, or opposed the victim’s discontinued contact with him.¹¹ Headrick, however, conveniently ignores that he did not dispute other findings by the court which are indicative of dangerousness and are amply supported by his own admissions—that he was an active participant in molesting a child under circumstances that were not so unusual as to indicate the offense was not likely to recur.

¹¹ To bolster this argument, Headrick also points to two reports previously submitted to the trial court that were not in evidence at the sentencing hearing: a bail status report prepared by the probation department and a psychiatrist’s report finding Headrick competent to stand trial and assist in his own defense. Ironically, he places great emphasis on a statement in the mental competency report that “Headrick is not of [*sic*] danger currently to himself or others.” But Headrick takes this statement out of context. The examining psychiatrist did not conduct any assessment as to Headrick’s risk of sexually molesting children in the future and, disturbingly, Headrick admitted during the diagnostic interview that he had “abused” a second child (his nephew) as well.

In the words of Headrick’s trial counsel, “it was a meeting of the people in this case where the [great] grandmother happened to be babysitting, the minor child [was] entrusted to the family, and Mr. Headrick happened to be in that home at the time that the minor child was left there in the custody, care, and control of the [great] grandmother in this case. . . . The child happened to be in the same vicinity and it happened, plain and simple.” It is Headrick who appears to engage in “assumptions and speculations.” In enacting section 1203.066, the legislature clearly expressed its view of the particular risks posed by an offender who has engaged in substantial sexual conduct with a minor. There is nothing in the record to show that Headrick was *not* likely to molest another child who might just “happen” to be in the “same vicinity.” The dangerousness finding was supported by substantial evidence.

C. *Conclusion*

Headrick has not met his burden to show that the trial court, in denying probation, acted “in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v. Jordan* (1986) 42 Cal.3d 308, 316; *People v. Axtell* (1981) 118 Cal.App.3d 246, 259 [absent “a clear showing that the sentencing decision was irrational or arbitrary, a trial court is presumed to have acted to achieve legitimate sentencing objectives”]; see also *People v. Giminez* (1975) 14 Cal.3d 68, 73 [same]; *People v. Rodriguez* (1990) 51 Cal.3d 437, 443 [reviewing court should interfere “ ‘only in a very extreme case’ ”].) Accordingly, we need not reach Headrick’s due process argument.

III. DISPOSITION

The judgment is affirmed.

Bruiniers, J.

We concur:

Jones, P. J.

Needham, J.