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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

SANTIAGO SERVIN MENDEZ,

Defendant and Appellant.

A134589

(Napa County Super. Ct.
No. CR-159016)

Following a no contest plea, the trial court found defendant Santiago Servin Mendez guilty of a felony violation of Penal Code section 288, subdivision (a)¹ (lewd or lascivious act on a child under the age of 14 years). The court denied probation and sentenced defendant to the midterm of six years' state imprisonment. Defendant contends the court abused its discretion in denying probation. We disagree and affirm.

BACKGROUND

In a complaint filed October 13, 2011, defendant was charged with three felony counts of violating section 288, subdivision (a). Three specific acts against the then 13-year old victim, occurring between September 9 and October 9, 2011, were identified: count 1 related to "kissing, first time;" count 2 related to "kissing, second time," and count 3 related to "touching breasts and vaginal area" of the victim. At his arraignment, defendant pleaded not guilty to all charges.

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

On October 26, 2011, defendant entered a change of plea, pleading no contest to count 1. On the motion of the district attorney, the trial court dismissed counts 2 and 3 and referred the matter for a presentencing report.

The report, submitted November 22, 2011, noted defendant, in 1999, had been convicted of a felony violation of section 261.5, subdivision (d) (unlawful sexual intercourse by person 21 years of age or older with minor under 16 years of age). He had also been convicted of misdemeanor battery in 1999 (§ 242) and theft in 2000 (§ 484, subd. (a)). The report also stated defendant had been tested on the Static-99R, “an actuarial measure of risk for sexual offense recidivism,” and had scored on four of the ten factors, placing him in the “Moderate-High Category for being charged or convicted of another sexual offense.” The probation officer concluded defendant did not appear to be “appropriate for a grant of probation,” and recommended denial of probation.

Defendant’s trial counsel filed a sentencing memorandum and statement in mitigation. In arguing for probation, counsel requested the matter be referred to probation for a psychological evaluation to determine defendant’s suitability for probation, notwithstanding his conviction of a violation of section 288, subdivision (a). (§ 288.1; see also § 1203.067, subd. (a)(3).) Two days later the trial court continued sentencing and ordered a psychological assessment pursuant to section 288.1.

Psychiatrist Madeline Andrew submitted this assessment on January 9, 2012. Dr. Andrew noted defendant, following his 1999 conviction under section 261.5, subdivision (d), had married the 15-year-old victim. The couple had lived together for nine years, had two children, and were now separated but still married. She, too, tested defendant with the Static-99R, and found he scored on three of the 10 factors, placing him in the “moderate to low risk category for recidivism.” Adjusting this score due to the fact defendant’s prior sexual offense occurred over five years before his current conviction, she placed defendant in the “low risk category for recidivism.” Dr. Andrew concluded defendant’s risk of reoffending in the community was low, rehabilitation was feasible, and defendant was amenable to treatment. She recommended, if the trial court granted probation, that its terms prohibit defendant from contacting the victim as long as

she remained a minor, and require him to abstain from alcohol, noting finally “probation is not in the best interest of the child victim.”

At the sentencing hearing on January 20, 2012, the trial court identified “two really significant factors”—defendant had “done this kind of conduct previously [and] . . . was more than on notice that the behavior . . . was illegal,” and he was now 34 years old, more than 20 years older than the victim. The court denied probation based on the nature, seriousness and circumstances of the offense, that the victim was “particularly vulnerable” and defendant had taken advantage of a position of trust and confidence, that defendant had a prior record that included unlawful sexual conduct, and his prior performance on probation had been poor. (See Cal. Rules of Court, rule 4.414(a)(1), (3), (9) & (b)(1)-(2).)² The court sentenced defendant to the midterm—six years in state prison.

Defendant’s appeal followed, limited to postplea issues. (See § 1237.5; rule 8.304(b)(4)(B).)

DISCUSSION

Defendant contends the trial court abused its discretion by sentencing him to state prison given the “overwhelming evidence” supporting probation.³ His assertions in support of this claim are numerous and varied. He maintains kissing the 13-year-old victim was far “less egregious” than most acts punished under section 288, subdivision (a). He points out there was no *Harvey*⁴ waiver, so the court could not consider the facts underlying the dismissed counts. He contends the court’s emphasis on his age as an aggravating circumstance was “arbitrary,” since punishment for a violation of section 288, subdivision (a), does not provide for differentiation based on the age of the perpetrator. He claims consideration of his age should have been mitigated by the

² All further rule references are to the California Rules of Court.

³ It is unnecessary to address defendant’s initial concern, that his trial counsel was ineffective for failing to preserve this issue for review, because it is apparent his counsel did preserve the issue, arguing strongly in favor of a grant of probation at the sentencing hearing.

⁴ *People v. Harvey* (1979) 25 Cal.3d 754.

victim's own age at the time, since at 13, she was approaching the "outer limits" of those protected by section 288, subdivision (a) (i.e., those under the age of 14). He similarly claims, given that the victim was 13, the court improperly characterized her as "particularly vulnerable." He further asserts the victim "acted out" and initiated contact with him, demonstrating a maturity beyond her age, far from the "defenseless position" assumed by the court. He also claims he was a "relative stranger" to the victim (a "neighbor" who had been introduced to her by his cousin) and thus was not in a position of "trust" and "confidence." In addition, he contends his prior convictions do not suggest a pattern of increasingly serious criminal conduct, and his prior performance on probation could not properly be characterized as poor.

We review the court's sentencing choice under the abuse of discretion standard. 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.) A denial of probation generally rests within the broad discretion of the trial court and will not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary or capricious manner, that is, when that court has exceeded the bounds of reason, all of the circumstances being considered. We do not interfere with that court's exercise of discretion when it has considered all facts bearing on the offense and the defendant to be sentenced. (*People v. Downey* (2000) 82 Cal.App.4th 899, 909-910.)

We see no merit in defendant's claims regarding the trial court's decision to deny probation. That defendant would entertain sexual advances from a 13-year-old child, even if limited to a single "kiss," cannot but support, under the abuse of discretion standard, a determination that the nature of defendant's offense was serious. (Rule 4.414(a)(1).) Similarly, we do not view as arbitrary or capricious the court's conclusion that the 13 year old was in a vulnerable position as compared to defendant, nor its conclusion that defendant violated a duty of trust and confidence arising from the fact he is an adult, with presumed greater maturity. (Rule 4.414(a)(3) & (9).) We reject absolutely the notion that the egregiousness of defendant's conduct with the 13-year-old

victim should be minimized because she was approaching the age limit, 14 years of age, of the protections afforded by section 288, subdivision (a). Finally, we decline, as we must, to reweigh the trial court's assessment as to the gravity of defendant's prior convictions and his prior performance on probation.

We therefore conclude the trial court acted well within its discretion in declining a grant of probation.

DISPOSITION

The judgment is affirmed.

Banke, J.

We concur:

Margulies, Acting P. J.

Dondero, J.