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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.

ERNEST MITCHELL WALTZ,

Defendant and Appellant.

A135838

(Humboldt County
Super. Ct. No. CR1103879)

After defendant admitted that he was in violation of his probation, the trial court revoked probation and imposed an aggregate four-year state prison term. Defendant argues that inclusion of incorrect information in the probation report created bias on the part of the sentencing court. He also contends that revocation of probation was error, as was the imposition of multiple sentences for his two convictions. We conclude that no bias on the part of the court appears in the record, the revocation of probation was not an abuse of discretion, and the imposition of multiple terms for the separate criminal acts was proper. We therefore affirm the judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On November 28, 2011, defendant entered a negotiated plea of guilty to committing a lewd act on a child under the age of 14 (Pen. Code, § 288, subd. (a)), as charged in count one, and arranging a meeting with a minor for lewd purposes (Pen.

Code, § 288.4, subd. (b)),¹ as charged in count two. Pursuant to the open plea bargain, counts three and four, which alleged additional charges of arranging a meeting with a minor for lewd purposes, were dismissed. The offenses were based on defendant's "relationship with a twelve (12) year old female, Jane Doe, via Facebook and face-to-face meetings" with her, arranged on at least five occasions at a mall or local park, and during which defendant hugged the victim, "gave her piggy back rides," touched "her buttocks," and "kissed her on the mouth" on one occasion.

In accordance with the plea bargain, on December 30, 2011, the trial court suspended imposition of sentence and placed defendant on probation for four years, upon the condition, among others, that he serve a county jail term of 180 days. Defendant objected to the imposition of a condition of probation that prohibited his access to the Internet. The probation report recommended the condition based on the fact that defendant's contact with the victim in the case, Jane Doe, was facilitated through his use of the Facebook social networking site. Defense counsel suggested that the court tailor the term to require defendant to provide his password to the probation officer and limit his access to "those type of sites." The court noted that the probation report and the evaluation of clinical and forensic psychologist, Dr. Andrew Renouf, strongly recommended a complete restriction on access to the Internet to avert potential harm to the community. Limited computer access was considered "not realistic" by the court, given the inadequate monitoring resources of the probation department. Defendant reluctantly accepted the Internet prohibition term of his probation.

A notice of probation violation filed on February 24, 2012, alleged that defendant violated his probation by: failing to register as a sex offender as ordered, and falsely stating to the probation department that he had registered on January 9, 2012; failing to notify the probation department of a change of residence address; residing in the home of his sister and minor niece as proscribed by the terms of his probation; communicating by Facebook, telephone messages and texting with an investigator who posed as a 15-year-

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

old female; and, actively using the Internet and Facebook. A new complaint was also filed against defendant that alleged his failure to register as a sex offender (§ 290.015).

Again as part of a negotiated disposition, on March 15, 2012, defendant agreed to plead guilty to a misdemeanor conviction for failing to register in violation of section 290.015. He also admitted violations of his probation: failure to register as required, accessing the Internet, and failure to comply with his probation officer's instructions to vacate his sister's residence occupied by minor children. The prosecution agreed to dismiss the allegation that on February 24, 2012, defendant associated with a female under the age of 18. The matter was referred to the probation department for a report, and a sentencing hearing was set for April 6, 2012.

Before the sentencing hearing, defendant moved to strike inappropriate matter from the probation report, specifically, the references to his communication with "an investigator posing as a fifteen year old female named 'Kelli.'" Defendant pointed out that the prosecution explicitly agreed to strike the allegations in the probation violation notice "relating to this communication."² At a hearing on the motion, the trial court agreed with defendant that he did not admit the allegation of communication with a minor female, and referred the matter back to the probation department for correction and clarification of the report. The court stated that the alleged "February 24th incident [was a] significant part" of the analysis and recommendation in the probation report, and merely striking the matter would not "work as well" as "re-referral" to the probation department and a corrected report.

A supplemental probation report filed on May 7, 2012, again erroneously stated that defendant admitted the probation violations "as alleged" in the notice. The supplemental report also for a second time included as a probation violation that on February 24, 2012, the Humboldt County District Attorney's Office reported "defendant communicated with Investigator Martin Perrone, who posed as a 15 year old female named 'Kelli.'" A third iteration of the probation report, also filed on May 7, 2012,

² Apparently, the inclusion of the dismissed allegation in the probation report was due to an error in the court minutes of the admissions hearing.

deleted the reference to the probation violation for communication with a minor female, and properly stated that defendant admitted the allegations in the probation violation notice only “in part.”

All versions of the probation report reached the same conclusion: that defendant’s demonstrated lack of suitability for community supervision, his continued association with minor females, his denial and minimization of culpability, and lack of adequate appreciation or level of cooperation with the restrictions of probation, all render him an inappropriate candidate for further probation supervision. Commitment to state prison was recommended.

At the sentencing hearing on May 7, 2012, the trial court mentioned that the second, most recent supplemental probation report properly clarified defendant’s admissions and “took out” the erroneous reference to communication with the minor female “Kelli” that was “not admitted.” The court also considered the statement in mitigation submitted by the defense. The court articulated the probation violations as: failing to register and “lying to probation about that; residing in his sister’s home where a minor lived, despite being advised he couldn’t do that; and using the Internet, including Facebook.” The court also relied on Dr. Renouf’s evaluation letter, which strongly suggested a prohibition “from unsupervised contact with minors and access to the Internet,” to find that defendant intentionally violated “critical conditions” of probation and was “likely unable to abide by probation terms which are critical to the protection of society and, particularly, to minor females.” Due to defendant’s “complete denial,” lack of acceptance of responsibility or expression of remorse, and “continuation” of inappropriate conduct, the court considered defendant a “danger to the community and a poor risk for release on probation.” The court revoked and terminated defendant’s probation, and imposed the lower term of three years on count one, along with a consecutive one-year term on count two.

DISCUSSION

I. The Errors in the Probation Reports.

Defendant argues that errors in the probation reports “were inflammatory and tainted the trial court’s ability to impartially and objectively sentence” him. The focus of defendant’s claim is upon the incorrect references in the two probation reports to his admission of an allegation that he engaged in Internet and telephone contact with a police investigator who posed as a 15-year-old female. In response to defendant’s motion to strike the material in the probation report and the court’s directive to the probation department to correct and clarify the error, the final supplemental probation report ultimately deleted the inaccurate information. Still, defendant asserts that the ability of the sentencing judge “to act impartially and to disregard the incorrect material was significantly impaired.” He contends that the sentencing judge, once confronted with evidence of the erroneous admission in the probation report, was obliged to “recuse himself” and reassign the case to another judge, due to the potential for bias and “substantial doubt” of the “capacity to be impartial.” (Code Civ. Proc., § 170.1, subd. (a)(6)(A)(i)–(iii).)³

We first note that a “ ‘judge may not properly try a case where he has formed partisan opinions from outside sources, but a trial judge will normally and properly form opinions on the law, the evidence and the witnesses, from the presentation of the case. These opinions and expressions thereof may be critical or disparaging to one party’s position, but they are reached after a hearing in the performance of the judicial duty to decide the case, and do not constitute a ground for disqualification.’ [Citation.]” (*Haldane v. Haldane* (1965) 232 Cal.App.2d 393, 395.) The defendant bears the burden to establish as a fact that a judge was biased or prejudiced against him, and the record

³ Code of Civil Procedure section 170.1, subdivision (a)(6)(A) provides that a judge shall be disqualified if for any reason “(i) The judge believes his or her recusal would further the interests of justice. [¶] (ii) The judge believes there is a substantial doubt as to his or her capacity to be impartial. [¶] (iii) A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.”

before us fails to indicate the slightest hint of partiality exhibited by the sentencing judge against defendant. (*Estate of Buchman* (1955) 132 Cal.App.2d 81, 104.)

Nothing in the rulings or conduct of the sentencing judge in the present case create a reasonable doubt of his ability to remain neutral in the case. When the defense pointed out the mistaken reference in the probation report to defendant's admission, rather than merely strike the material the judge directly ordered a "re-referral," correction of the error by the probation department, and submission of a new report. The judge was fully aware of the error, but also of the need to rectify it and disregard the flaw in the probation report before proceeding with sentencing. The final supplemental probation report deleted the inaccurate information. The record further definitively shows that the judge did not consider or rely on the report of defendant's alleged but not admitted contact with the "15 year old female named 'Kelli' " in reaching a sentencing decision. Only the remaining three admissions, along with the evaluation of Dr. Renouf, were cited by the court in support of the ruling to revoke and terminate probation. Based on our review of the record we perceive no reason to believe the sentencing judge was incapable of ignoring the erroneous information. No bias or prejudice has been established.

II. The Trial Court's Decision to Revoke Probation.

Defendant also complains that the trial court abused its discretion by imposing a state prison sentence rather than reinstating probation. Defendant maintains that "absent the improper and unproven allegations concerning decoy 'Kelli,' " his "technical" violations of probation "did not give rise to substantial concerns over safety to the public." He claims that revocation of his probation was not justified, and he should be granted "an additional chance for full compliance with his terms of probation."

"Penal Code section 1203.2, subdivision (a) authorizes a trial court to revoke probation 'if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation officer or otherwise that the person has violated any of the conditions of his or her probation'" (*People v. Jackson* (2005) 134 Cal.App.4th 929, 935; see also *In re Eddie M.* (2003) 31 Cal.4th 480, 487, 503–504; *In re Alex U.* (2007) 158 Cal.App.4th 259, 265.) " 'As the language of section 1203.2

would suggest, the determination whether to . . . revoke probation is largely discretionary.’ [Citation.] ‘[T]he facts supporting revocation of probation may be proven by a preponderance of the evidence.’ [Citation.] However, the evidence must support a conclusion the probationer’s conduct constituted a willful violation of the terms and conditions of probation.” (*People v. Galvan* (2007) 155 Cal.App.4th 978, 981–982; see also *People v. O’Connell* (2003) 107 Cal.App.4th 1062, 1066.) “The role of the trial court at a probation revocation hearing is not to determine whether the probationer is guilty or innocent of a crime but whether he can be safely allowed to remain in society.” (*People v. McGavock* (1999) 69 Cal.App.4th 332, 337; see also *People v. Monette* (1994) 25 Cal.App.4th 1572, 1575.)

“We review a probation revocation decision pursuant to the substantial evidence standard of review [citation], and great deference is accorded the trial court’s decision, bearing in mind that ‘[p]robation is not a matter of right but an act of clemency, the granting and revocation of which are entirely within the sound discretion of the trial court. [Citations.]’ [Citation] [¶] ‘The discretion of the court to revoke probation is analogous to its power to grant the probation, and the court’s discretion will not be disturbed in the absence of a showing of abusive or arbitrary action. [Citations.]’ [Citation.] ‘Many times circumstances not warranting a conviction may fully justify a court in revoking probation granted on a prior offense. [Citation.]’ [Citation.] ‘ “[O]nly in a very extreme case should an appellate court interfere with the discretion of the trial court in the matter of denying or revoking probation. . . .” ’ [Citation.] And the burden of demonstrating an abuse of the trial court’s discretion rests squarely on the defendant.” (*People v. Urke* (2011) 197 Cal.App.4th 766, 773.)

Defendant admitted that he willfully violated his probation, and we find no abuse of discretion in the trial court’s decision to revoke rather than reinstate probation. Defendant manifestly exhibited inability to comply with the terms of his probation. Within a few months of receiving his grant of probation, defendant committed multiple violations of conditions that were directly related to his past criminal conduct and aimed at deterring or discovering subsequent criminal offenses.

Defendant's violations were neither technical nor trivial. He failed to register as a sex offender until seven weeks after he was directed to do so by his probation officer, which was both an additional criminal offense and a probation violation. He resided in his sister's home with her minor daughter, a specific violation of probation which again was reasonably related to his past crimes committed upon a minor. He also had regular contact with his niece. He falsely told the probation department that he completed his registration, and subsequently registered with an address that did not match his sister's residence, both of which demonstrated his knowledge of the conditions and realization that he was in violation. Despite directives not to do so, defendant continued to use the Internet and Facebook, the very instruments he employed to facilitate his prior crimes. Dr. Renouf's report noted the serious potential harm to the community if defendant retained access to the Internet, and strongly suggested a prohibition against it. Defendant's violations demonstrated his unwillingness to comply with probation, his lack of suitability for community release, and the risk he posed to the safety of the community. Revocation of his probation was not an abuse of discretion.

III. The Imposition of Multiple Sentences.

Defendant's final contention is that the trial court erred by imposing a three-year sentence on count one for the conviction of committing a lewd act on a child under the age of 14 (§ 288, subd. (a)), and a consecutive one-year sentence on count two for the conviction for arranging a meeting with a minor for lewd purposes (§ 288.4, subd. (b)). Defendant argues that the sentence on count two violates the proscription against multiple punishment found in section 654. He maintains that the two offenses were "indispensably linked as one course of conduct," and had "no separate objectives." Therefore, he claims that "section 654 prohibits separate punishments for the two offenses," and we must "order the consecutive one-year term stayed."

Defendant relies on the established rule that the double jeopardy clause of the Fifth Amendment of the United States Constitution and section 654 forbid multiple punishment for the same offense. (*People v. Osband* (1996) 13 Cal.4th 622, 730; *People v. Wader* (1993) 5 Cal.4th 610, 670.) Section 654 provides in pertinent 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” (See also *People v. Kramer* (2002) 29 Cal.4th 720, 722; *People v. Hall* (2000) 83 Cal.App.4th 1084, 1088.) The proscription against double punishment in section 654 is applicable where the defendant’s course of conduct violated more than one statute but nevertheless comprised a single act or indivisible transaction. (*People v. Perez* (1979) 23 Cal.3d 545, 551; *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583; *People v. Williams* (1992) 9 Cal.App.4th 1465, 1473.) “On the other hand, section 654 does not apply when the evidence discloses that a defendant entertained multiple criminal objectives independent of each other. In that case, ‘the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citations.] . . .’ [Citation.]” (*In re Jose P.* (2003) 106 Cal.App.4th 458, 469.) “[M]ultiple crimes that arise from a single course of criminal conduct may be punished separately, notwithstanding section 654, if the acts constituting the various crimes serve separate criminal objectives.” (*People v. Davey* (2005) 133 Cal.App.4th 384, 390.)

“The divisibility of a course of conduct depends upon the intent and objective of the defendant. If all the offenses are incidental to one objective, the defendant may be punished for any one of them, but not for more than one. On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citations.] The principal inquiry in each case is whether the defendant’s criminal intent and objective were single or multiple. Each case must be determined on its own facts.” (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.)

“ ‘The question of whether the acts of which defendant has been convicted constitute an indivisible course of conduct is primarily a factual determination, made by

the trial court on the basis of its findings concerning the defendant’s intent and objective in committing the acts. This determination will not be reversed on appeal unless unsupported by the evidence presented at trial.’ [Citation.]” (*People v. Nichols* (1994) 29 Cal.App.4th 1651, 1657; see also *People v. Coleman* (1989) 48 Cal.3d 112, 162; *People v. Avalos, supra*, 47 Cal.App.4th 1569, 1583; *People v. Williams, supra*, 9 Cal.App.4th 1465, 1473.) “We review the trial court’s findings ‘in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]’ [Citation.]” (*People v. Green* (1996) 50 Cal.App.4th 1076, 1085.)

The trial court found that the two offenses, while “related,” were “separate and distinct,” and we agree. At least two separate acts were committed: arranging at least five separate meetings with the minor; then, the commission of lewd acts once the meetings occurred. The acts were not concurrent. In fact, the time frame was lengthy and protracted. A sequence of distinct objectives may be attributed to defendant: convincing the minor to meet him, arranging the meeting, and finally committing the lewd act after he effectuated contact with the minor. No violation of section 654 occurred.

Accordingly, the judgment is affirmed.

Dondero, J.

We concur:

Marchiano, P. J.

Banke, J.