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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.

KEITH CHRISTOPHER DUENAS,

Defendant and Appellant.

A143481

(Solano County
Super. Ct. No. FRC300343)

Defendant and appellant Keith Christopher Duenas appeals from his sentence imposed following his guilty plea. His sole challenge on appeal is the trial court abused its discretion in denying him probation. We affirm.

BACKGROUND

Appellant pled guilty to continuous sexual abuse of a child under the age of 14 (Pen. Code, § 288.5, subd. (a))¹ and sexual penetration of a child under the age of 18 (§ 289, subd. (h)). According to the preliminary hearing testimony, appellant molested one of his cousins when she was 12 or 13 years old, and molested another cousin several times over a period of years starting when she was in first or second grade.

At sentencing, defense counsel requested probation. The prosecutor sought the maximum sentence allowed under the terms of appellant's plea agreement, 12 years 8 months imprisonment. The probation report recommended a sentence of 12 years 8

¹ All undesignated section references are to the Penal Code.

months. Reports on appellant's mental condition from two doctors were before the court. (See § 288.1.) Both victims spoke at the hearing about the lasting damage they suffered as a result of appellant's conduct.

The trial court denied probation and sentenced appellant to 12 years 8 months. The court noted appellant held "a position of trust" as an older family member and further explained the basis for its decision: "[R]eviewing the actions of the defendant, the impact that they've had on the victims, the defendant's obvious lack of understanding as to the wrongfulness of his acts or the impact that they've had on the victims all leave me to believe that this defendant represents a huge risk to the safety of children, particularly family members or small children that he can get close to on a regular basis. [¶] . . . [¶] And it absolutely concerns the Court that left to his own devices I think [appellant] would re-offend again, so I am going to deny probation in this matter, and I do feel that the mid-term as recommended by probation is appropriate. It is true that the People have from the outset argued for the high-term, and I agreed to a mid-term cap in this because of the factors that I've already mentioned regarding [appellant], that is, his lack of any prior criminal history and the fact that he acknowledged his wrongdoing at an early . . . stage in these proceedings. But as I said, setting that aside, there is absolutely nothing that I see in the facts here to make the Court think that it would be likely that [appellant] would respond favorably to counseling even over an extended period of time, and I'm certainly not willing to take that risk in light of the horrendous damage that he has caused to this point."

DISCUSSION

“ ‘The grant or denial of probation is within the trial court's discretion and the defendant bears a heavy burden when attempting to show an abuse of that discretion.’ ” (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311 (*Weaver*), disapproved of on other grounds by *People v. Cook* (2015) 60 Cal.4th 922.) “ ‘Our function is to determine whether the trial court's order granting [or denying] probation is arbitrary or capricious or exceeds the bounds of reason considering all the facts and circumstances.’ ” (*Ibid.*) “[I]n determining whether a trial court abused its discretion by denying probation, we consider,

in part, whether there is sufficient, or substantial, evidence to support the court's finding that a particular factor was applicable." (*Id.* at p. 1313.)

Appellant argues "a sentencing court cannot deny probation based solely on facts inseparable from the crime itself" and his abuse of trust is inseparable from the underlying crime of sexually abusing minors. Assuming this proposition is correct, it does not demonstrate the trial court abused its discretion in denying probation because abuse of trust was not the sole factor relied upon by the court. (*People v. Parrott* (1986) 179 Cal.App.3d 1119, 1125 [probation denial not an abuse of discretion where, even though one factor impermissibly considered an element of the crime, "three of the four reasons asserted by the court to justify the denial of probation are proper" and "[i]t is improbable that a more favorable result would be obtained by a remand for sentencing based on the court's improper consideration of [the fourth] factor"].)

Appellant also contends the trial court ignored a number of factors weighing in favor of probation, including his lack of a criminal record and his remorse. "Unless the record affirmatively shows otherwise, a trial court is deemed to have considered all relevant criteria in deciding whether to grant or deny probation" (*Weaver, supra*, 149 Cal.App.4th at p. 1313.) Appellant has not demonstrated the trial court failed to consider any favorable factors.

The trial court relied on findings that appellant lacked insight into the harm caused by his conduct and would likely reoffend if granted probation. (See Cal. Rules of Court, rule 4.414(b)(8) [criteria affecting probation decision include "likelihood that if not imprisoned the defendant will be a danger to others"].) Appellant points to certain evidence to the contrary, but we review the trial court's findings solely for substantial evidence. (*Weaver, supra*, 149 Cal.App.4th at p. 1313.) Such evidence was present in the psychiatric evaluations, which reported appellant lacked insight into his crimes, had not demonstrated he learned from his behavior, and was at risk of committing future similar conduct. The trial court's denial of probation was not an abuse of discretion.

DISPOSITION

The judgment is affirmed.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.