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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN CRUZ MORALES,

Defendant and Appellant.

B239543

(Los Angeles County
Super. Ct. No. BA384995)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gail Ruderman Feuer, Judge. Affirmed as modified with directions.

Jeffrey J. Douglas, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Juan Cruz Morales, was charged with: attempting to kidnap a female child under 14 years of age (Pen. Code,¹ §§ 664, 207, 208, subd. (b)) (count 1); two counts of criminal threats (§ 422) (counts 2 and 4); and child molestation (§ 647.6, subd. (a)(1)) (count 3). He pled no contest to the attempted kidnapping charge. The trial court sentenced him to two years, six months in state prison and ordered him to register as a sex offender. Defendant's sole contention on appeal is that the trial court abused its discretion in ordering sex offender registration. We find no abuse of discretion. We modify the judgment with respect to conduct credit. We affirm the judgment in all other respects.

II. THE FACTS

The following facts concerning the events of May 30, 2011, are gathered from: the preliminary hearing transcript; a police report; the probation report; and a section 1203.03 diagnostic study. Defendant, who was 31 years old, had been drinking alcohol. He targeted a 6-year-old victim and her 7-year-old friend. Defendant did not know the children. The two girls were playing outside an apartment building. They were not accompanied by any adult. Defendant stood across the street and stared at the victim and her friend. He crossed the street and walked towards the victim. At the preliminary hearing, the two girls testified defendant said only, "I am going to kill you." The police report reflects, however, that defendant told the victim she was pretty. Defendant then grabbed the victim by her right hand and attempted to drag her away. After she broke free, he threatened to kill her if she said anything. The victim's aunt had seen defendant across the street earlier in the day. According to the probation report, defendant had an

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

outstanding bench warrant and two prior convictions, in 2006 and 2007, all for driving without a license.

At the time of defendant's plea, he agreed to undergo a diagnostic evaluation (§ 1203.03) for purposes of determining whether he should register as a sex offender. A correctional counselor at the North Kern State Prison interviewed defendant on November 1, 2011, five months after the attempted kidnapping. The correctional counselor prepared an Institutional Staff Recommendation Summary. Defendant denied any alcohol or drug problem. But defendant admitted he was under the influence of alcohol when he was arrested for the current offense. He denied any responsibility for the attempted kidnapping and showed no remorse. He claimed the victims lied to the police; he was just playing with them. The correctional counselor concluded:

“[Defendant] is not viewed as a suitable candidate for probation. He attempted to kidnap the young female victim for unknown purposes. When asked about the crime he showed no remorse and denied all responsibility. He threatened to kill the victims and has an active protective order to stay away from them. He entered the United States illegally and has a potential [U.S. Immigration and Customs Enforcement] hold. Due to the nature of his crime, [defendant] poses a serious threat to his victims and the community. Therefore, it is recommended [defendant] be committed to prison for a term prescribed by law.”

Dr. H. D. Roberts, a clinical psychologist, interviewed defendant on November 2, 2011. Dr. Roberts noted, “The purpose of this evaluation is to assess the defendant's psychological state and his potential risk of reoffending if granted probation.” Defendant denied any substance abuse problem but admitted he had been drinking prior to his arrest. Defendant denied he attempted to kidnap the victim. As Dr. Roberts related:

“[Defendant] adamantly refuted the kidnapping conviction, the facts and the sequence of events. He states, ‘I was on my way to the store to purchase some more beer and I saw my neighbor's daughters outside and the youngest child was crying.’ [Defendant] recalls, ‘I walked up to the young child that was crying and held out my hand and asked if everything was okay.’ [Defendant] states that the young child shook his hand and he

walked away. He states that when he returned to the area, he was arrested by the police.” Dr. Roberts recorded his clinical impressions: “[Defendant] is a Mexican born male who presents as articulate, respectful and with no psychiatric problems. . . . [Defendant] believes he was wrongly accused. His report of the incident grossly contradicts the police reports and he lacked remorse for the victims. [Defendant] does not believe that his alcohol use is problematic and yet he was intoxicated at the time of the incident and he reports that he was on his way to purchase more beer. It is this writer’s opinion that [defendant] presents as a risk to the victims and the community at this time. It appears that [defendant] was intoxicated when he had a verbal and physical encounter with the victims causing them to be in fear for their safety. Though he has no juvenile convictions, [defendant] has two convictions for driving without a license and falsifying his identity. His credibility, insight and judgment are questionable. Mr. Morales appears to have limited family support and a dubious expectation of employment upon his release from prison.” Dr. Roberts concluded: “This report was prepared to evaluate the defendant’s potential for probation. The following findings coupled with the aforementioned impressions and considerations provide fair support in favor of incarceration. [Defendant’s] lack of remorse, his history of poor judgment and substance abuse are strong factors in support of incarceration and outweigh those factors in support of probation.”

Maurice Junious, Warden of the North Kern State Prison, submitted the diagnostic evaluation to the court with the following comments: “This evaluation was prepared with the objective of assessing [defendant’s] potential for functioning successfully on probation or under other supervision and the level of threat to the community if he should fail to live up to that potential. It has not focused on the issue of deterrence, nor of punishment; these are factors which are not responsive to the interview and evaluation format of the [section] 1203.03 process. [¶] It is respectfully recommended to the Honorable Court [defendant] be considered for commitment to the [California Department of Corrections and Rehabilitation.] [¶] [Defendant] appears to be an unsuitable candidate for probation, despite his minimal prior record. It is apparent

[defendant's] criminal activity has escalated to a point where he is preying on defenseless and vulnerable children. The six and seven year old [children] who were innocently playing in front of their apartment complex, described [defendant] as staring at them from across the street in an intoxicated state. [Defendant] then crossed the street, commented on how pretty she was, and attempted to forcibly take the six year old. One can only speculate what might have transpired had the victim not been able to break free of his grasp. [Defendant] then threatened to kill the girls if they said anything to anyone. The high degree of risk [defendant] poses to the community cannot be understated or ignored. It is believed if [defendant] were given a grant of formal probation, he would violate those terms and present a significant risk to the victims he threatened, and the community.”

III. DISCUSSION

A. Sex Offender Registration

The trial court had the discretion to order defendant to register as a sex offender under section 290.006, which provides: “Any person ordered by any court to register pursuant to the Act for any offense not included specifically in subdivision (c) of Section 290, shall so register, if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification. The court shall state on the record the reasons for its findings and the reasons for requiring registration.” Our Supreme Court examined the discretionary registration provision in *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1197: “[T]o implement the requirements of section 290, subdivision (a)(2)(E) [now section 290.006], the trial court must engage in a two-step process: (1) it must find whether the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, and state the reasons for these findings; and (2) it must state the reasons for requiring lifetime registration as a sex offender. By requiring a separate statement of reasons for

requiring registration even if the trial court finds the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, the statute gives the trial court discretion to weigh the reasons for and against registration in each particular case.” In making the discretionary determination, the trial court should consider all available relevant information. (*Lewis v. Superior Court* (2008) 169 Cal.App.4th 70, 79; *People v. Garcia* (2008) 161 Cal.App.4th 475, 483, disapproved on another point in *People v. Picklesimer* (2010) 48 Cal.4th 330, 338, fn. 4.)

The trial court did not abuse its discretion. The trial court found defendant was staring at the two girls and then told the six-year-old victim she looked pretty when he attempted to take her. Thus, the trial court found defendant acted as a result of sexual compulsion or for purposes of sexual gratification. With respect to the reasons for requiring registration, the trial court further found the diagnostic report concluded defendant presented a risk to the victims and to the community. The record supports those findings.

B. Conduct Credit

Defendant was sentenced on January 27, 2012. The trial court awarded defendant credit for 243 days in presentence custody, from May 30, 2011, to January 27, 2012, plus 36 days of conduct credit. On defendant’s subsequent motion, the trial court modified the judgment to reflect 81 days of conduct credit. The pertinent minute order states this was pursuant to the parties’ stipulation. We asked the parties to brief two questions. First, we requested briefing on whether it was error to subject defendant to the 15 percent limitation on conduct credits for a person convicted of a violent felony. (§ 2933.1.) Second, we requested briefing on whether defendant was entitled to two days of conduct credit for every four days spent in presentence custody under section 4019 effective September 28, 2010. (Stats. 2010, ch. 426, § 2.) As to the first question, defendant contends, the Attorney General concedes, and we agree that attempted kidnapping is not a violent felony. Therefore, defendant is not subject to the 15 percent limitation on

conduct credits. Moreover, the failure to properly calculate presentence conduct credit is a jurisdictional error that can be corrected at any time. (*People v. Scott* (1994) 9 Cal.4th 331, 354; *People v. Karaman* (1992) 4 Cal.4th 335, 345-346, fn. 11, 349, fn. 15; *People v. Fitzgerald* (1997) 59 Cal.App.4th 932, 935-936; *Wilson v. Superior Court* (1980) 108 Cal.App.3d 816, 818-819.) Under former section 4019, subdivisions (b) and (c) as amended in 2010, and notwithstanding any stipulation to the contrary, defendant is entitled to 120 days of conduct credit. (Stats. 2010, ch. 426, §§ 1-2.) The judgment must be modified and the abstract of judgment amended to grant defendant credit for 243 days in presentence custody plus 120 days of conduct credit for a total presentence custody credit of 363 days.

IV. DISPOSITION

The judgment is modified to award defendant 120 days of conduct credit for a total presentence custody credit of 363 days. The judgment is affirmed in all other respects. Upon remittitur issuance, the clerk of the superior court is to prepare an amended abstract of judgment and deliver a copy to the Department of Corrections and Rehabilitation.

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TURNER, P. J.

We concur:

KRIEGLER, J.

FERNS, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.