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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.

EDWARD JOEL PANDO,

Defendant and Appellant.

B265711

(Los Angeles County
Super. Ct. No. VA137461)

APPEAL from a judgment of the Superior Court of Los Angeles County, Olivia Rosales, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, and Abtin Amir, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Edward Joel Pando (defendant) on one count of committing a lewd or lascivious act upon a child under 14, in violation of California Penal Code section 288, subdivision (a). The trial court sentenced defendant to the low term of three years in prison. We consider whether sufficient evidence supports defendant's conviction, and whether the court abused its discretion by imposing a prison sentence rather than granting probation.

I. BACKGROUND

A. *The Offense Conduct*

On the night of December 31, 2011, three sisters held a New Year's Eve party at a house where they lived with their parents, their younger sister Hallie, and their younger brother. Hallie was 13 years old at the time. Defendant, who was 21 years old, attended the party. Defendant had visited Hallie's sisters at their house in the past, and although he had spoken with Hallie on occasion during prior visits, their interactions had always been casual and brief.

The New Year's Eve party continued all night and into the next morning, with people gathering in the den. Hallie's parents and her brother stayed in the parents' room that night, but Hallie socialized at the party with her sisters and their friends. Many of the partygoers were drinking alcohol, including defendant, who was "highly intoxicated." Hallie was not drinking. Around 5 a.m., Hallie's sisters and some of their friends left the house to go to a McDonald's across the street. Hallie remained behind in the den, as did defendant and another man.

What happened next, which we will describe in greater detail, was the factual dispute resolved by the jury at trial. According to Hallie, when the unidentified man left the den, defendant draped a blanket over himself and Hallie and then fondled her breasts and touched her vagina while kissing her. According to defendant, Hallie came to sit next to him on the couch, he fell asleep, and the next thing he remembered was one of his friends waking him up to leave the party.

After the party, a friend of Hallie's at school named Rudy noticed she "was just really sad and crying like for most of the month," i.e., January 2012. Late that month, Hallie told Rudy she had been "touched . . . on her chest and private area" by "her sister's friend" at a New Year's party at her house. Hallie pointed to her vaginal area to show Rudy where she meant. Hallie told Rudy that defendant "put a blanket over her and tried to touch her and did." Rudy told Hallie she should tell somebody, but she said she was afraid to tell her parents.

B. The Investigation

Hallie did tell her parents about the incident almost two years later, in December 2013. She explained she overcame her prior fear of revealing what happened because defendant had gone to a party with one of her sisters and Hallie "knew he would start coming around again." Hallie's parents called the police.

Detective Eugene Hatch was assigned to investigate the case. He suggested, and Hallie agreed to conduct, a "pretext call" to defendant, which Detective Hatch described as a "tool that we as investigators use on occasion to elicit truthful statements during the course of our investigation." Prior to making such calls, Detective Hatch discusses with the victim how best to approach the suspect: whether to "play[] on their emotions" or "flirt," for example. The detective listens to the call between the victim and the suspect in real time, provides support and guidance to the victim, and records what transpires during the call.

Hallie made two pretext calls to defendant with Detective Hatch present. During the first call, Hallie told defendant she needed "closure" because defendant "did things to [her]" over New Year's. Defendant said he had heard rumors Hallie told people defendant "was trying to talk to [her] and all this stuff," and that defendant "tried like [to] have sex with her this and that." Defendant said the rumors "made [him] look bad when [he] didn't even do anything like that" and caused a rift between defendant and his friends. He told her, "Well obviously you remember all this stuff so you tell me then what I did." Hallie said, "you put a blanket over me and you were touching me. And you

started asking me questions, like you started asking me whether or not I've been fingered and if I've had sex before." Defendant said he did not remember Hallie being in the den when others went to McDonald's, and he denied ever touching her. When she told him she had "nightmares" about what defendant did to her, he responded, "Wow. . . . You get nightmares supposedly that supposedly I touched you?" Defendant said he "didn't remember things" from the New Year's Eve party because he was "drunk as shit" and it had happened years ago. Hallie told him she thought he was "cute and stuff" and that "it would help [her] [to] like [him] if [he] would just be honest and tell [her] that [he] remember[ed] everything." Defendant said he liked her and thought she "would've been a pretty good girlfriend" but that she was "too young." Hallie told defendant she wanted to "reminisce about it" and that they could "hang out if [he] were to remember . . . and show [her] that [she] meant something to [him]." He responded, "Well let me think about it now, I start to remember stuff because right now I remember it since you brought it up I'm like oh. I'm gonna think about it now though."

Near the end of the call, defendant asked Hallie for a picture of herself. She told him she would call him later, to give him time to remember. He responded, "Well then just take, send me a picture of you under a blanket and I'll probably remember." Over the next day or two, defendant sent Hallie text messages asking for a picture. She told him she was "waiting for [him] to remember." Hallie showed the messages to her parents and they called Detective Hatch.

Hallie then made a second pretext call to defendant. When defendant told Hallie she "still [hadn't] sent [him] a picture," she responded it was because he "still [hadn't] talked to [her] about remembering." He said, "I remember," and she asked him, "And, what do you remember?" He then asked, "Did I go in your pants, t[h]ough?" Hallie said, "Yeah, what do you remember?" He said, "And I do remember going inside your shirt and your pants." "What do you mean?" she asked. "Like touching your boobs," he said. "And going inside your pants. I remember you were hairy." "How did it make you feel?" she asked. "Well, I liked it," he said. "[Y]ou were pretty tight too," he said, and he asked if she was "still tight." After talking about other things, Hallie asked if

defendant remembered anything else. Defendant responded, “I think I kissed you, didn’t I?” After Hallie said, “Yeah,” defendant said, “I kissed you, grabbed your boobs, and played with you down there.” Hallie asked defendant why he told her not to tell people about what he had done, and defendant said it was because they both would have gotten in trouble. When Hallie asked why, defendant replied, “What do you [mean] why? Cause you were young.”

Hallie asked if defendant remembered what questions he asked her, and he responded, “Have you ever done it?” She asked if there was anything else, and he said, “If you got fingered?”; “[f] you ever give a blow job? I think”; and “Have you ever been eaten out?” Defendant asked whether Hallie would want him to do the same things with her again. “Possibly,” she said, and then asked, “But do you remember putting a blanket over me that night?” “Yeah,” defendant replied.¹

The call continued, and Hallie asked defendant if he remembered his “intentions that night? Like what you wanted to do?” Defendant said the conversation “[f]eels like an interrogation,” musing that it was “like if you plan out I remember and then like leave.” Hallie said she would keep talking to him and that she was still a virgin. She asked if defendant had been “planning on like taking [her virginity] away from [her] that night.” He said, “Well, obviously I couldn’t do anything more because there’s a shit lot of people.” Defendant then asked, “Well are you gonna make time for me like when am I going to see you? How about this weekend?” He also asked when her parents would arrive home and again requested a picture of her, saying, “I deserve a sexy ass one after I remembered everything.” She said she would try to send him a picture. Defendant later tried to contact Hallie again, but she had changed her phone number.

¹ During the second pretext call, Hallie also told defendant that he hurt her feelings when he previously said he didn’t “remember everything.” Defendant responded “Well, you are the one that freaking left and tried to get me in trouble on so I was like, I was kind of mad.” Hallie then asked “if you knew I was only 13 like why, why me?” Defendant replied, “You’re cool. You’re attractive, everything.”

After conducting the pretext calls, police arrested defendant. Detective Hatch read defendant his *Miranda*² rights, and he waived those rights and spoke to the detective at length. Defendant initially denied anything improper happened between him and Hallie—stating he “did not touch her at all[, n]o kissing, no nothing.” He told Detective Hatch that Hallie came to sit next to him on the couch, that Hallie was trying to “be all cool, like, touchy,” that he was drunk, but that he was “not going to do anything stupid” with someone who was “like my little sister.” Later in the interview, however, defendant admitted he touched Hallie’s chest under her bra and her vaginal area, but he claimed it was Hallie who put his hand on both areas before he pulled away.

The District Attorney in Los Angeles charged defendant in an amended information with: (1) committing a lewd or lascivious act upon a child under 14 by use of force, in violation of Penal Code section 288,³ subdivision (b)(1); and (2) committing a lewd or lascivious act upon a child under 14 without using force, in violation of section 288, subdivision (a). The information further alleged that defendant had substantial sexual contact with Hallie.

C. Trial

Hallie testified at trial and explained what happened between her and defendant during the New Year’s Eve party. When Hallie rose to leave the den where both she and defendant were present, defendant grabbed her arms, told her to sit down, then positioned himself “on top of” her. While holding her down by her shoulders, defendant asked Hallie if she had “ever had sex.” He draped a blanket across his back and touched Hallie’s breasts, first on top of her clothes and then under her bra. She told him to stop because he was drunk and she tried to pull his hands off her, but he said, “I’m not drunk” and “kept holding [her hands] down.” Defendant asked Hallie whether she “ever gave someone a blow job.” He also “began to go under [her] pants,” and touched “the top” of

² *Miranda v. Arizona* (1966) 384 U.S. 436.

³ Undesignated statutory references that follow are to the Penal Code.

her vagina where she had pubic hair. Defendant kept “trying to go lower” and asked Hallie if she had “ever been fingered before.” She “kept trying to twist [her] legs” to keep defendant’s hand from going lower. Defendant was also kissing Hallie “all over [her] body” and “moving back and forth” from her breasts to her vagina. Hallie never called out for her parents because she “couldn’t think right” and “was in shock.” After 15 or 20 minutes, she heard the latch to the home’s back gate open. Defendant quickly got up and told Hallie not to tell anybody. She immediately went to her room.

Hallie further testified that she never wanted defendant to touch her and that she was not happy about what he did to her. She told defendant otherwise on the pretext calls “just to play the role” of “the flirtatious one” in order to get him to admit what he did. In addition to calling Hallie as a witness, the prosecution also played both pretext calls in full for the jury. Hallie’s friend Rudy also testified about the prior statements she made about the incident shortly thereafter, and about her demeanor in January 2012.

Defendant testified in his own defense. He asserted he had no recollection of any sexual contact with Hallie. He told the jury he was too drunk and tired to go to McDonald’s with the others. He stayed behind in the den because he “wanted to sleep,” but found it difficult to do so because another man in the room “continued talking.” Hallie, who was wrapped in a blanket, came and sat next to defendant on the couch. Defendant fell asleep, and the next thing he remembered was his friend trying to rouse him so they could leave.

Defendant also offered an explanation for flirting with Hallie over the phone during the pretext calls. He said he did so because “she was already flirting,” and he asked for her picture to see how she currently looked. Defendant testified he “felt bad” when Hallie told him it made her sad that he did not remember because “obviously I can see that for some reason she had an attachment to me and stuff.” Defendant said he asked “did I go in your pants” during the second pretext call because “[s]he kept making me try to remember what happened. Obviously, nothing happened. I didn’t remember nothing, so I started trying to talk to her and see what supposedly happened through what she says.” Defendant said he made up the statement about Hallie being hairy and that he

would not know whether she was “tight” because there was no penetration. He claimed to have asked, “I think I kissed you, didn’t I?” as a form of flirting and in order “to just play along to what she was already doing.”

On cross-examination, defendant conceded that his testimony contradicted statements he made during his interview with Detective Hatch.⁴ He agreed that after initially denying he touched Hallie in that interview, he then changed his story and said Hallie had been the seducer and had put his hand on her chest and on her vaginal area. Defendant said he lied to the detective because “from when he first came in he already put me as in his mind guilty. So I mean I was scared. I didn’t know what to do, but make up another story into what he might believe.” Among the lies defendant claimed to have told Detective Hatch were that he put his hand in Hallie’s pants and that his hand wandered, and that he had flirted with Hallie over Facebook. Although defendant testified he was scared during the interview, he admitted he did not feel threatened by Detective Hatch nor did the detective tell him what to say.

The jury found defendant guilty of committing a lewd or lascivious act upon a child as charged in count two. The jury found not true the allegation that there was “substantial sexual conduct” (meaning oral copulation, masturbation, or penetration). On count one, charging a forcible lewd or lascivious act upon a child, the jury did not reach a unanimous decision, being divided 11 to 1 in favor of guilt. Concluding that the jury was hopelessly deadlocked, the court declared a mistrial on that count.

D. Sentencing

In its sentencing memorandum, the prosecution asked the court to impose a six-year term because defendant’s conduct manifested a high degree of callousness, because Hallie was particularly vulnerable, and because defendant abused a position of trust.

⁴ The full interview was not admitted in evidence during trial. Rather, the prosecution used selected portions of the interview for purposes of impeaching defendant during his testimony.

According to the prosecution, those aggravating circumstances outweighed defendant's lack of prior criminal conduct.

At the sentencing hearing, the trial court stated it had considered six letters attesting to defendant's character, his probation report, a sex offender risk-assessment report, and the prosecution's sentencing memorandum. The court then heard in-court statements from Hallie (read by her sister) and Hallie's mother (read by the prosecutor). In her statement, Hallie explained that defendant's conduct caused her to "feel alone" and to eventually attempt suicide, resulting in a stay at a psychiatric hospital. Her mother spoke of the damage defendant had done to their family and to Hallie, who had gone from a "once happy vibrant little girl" to becoming "withdrawn." The mother "never imagined that someone [her] daughters called a friend and trusted in [their] home would violate and take advantage of their little sister." The court also heard from a friend of defendant as well as his father, who suggested Hallie's problems stemmed from a source other than defendant.

Defendant's attorney asked the court to grant probation, with a year in county jail plus conditions, instead of a state prison sentence. He argued defendant presented a "low risk" because his only prior offense was a driving misdemeanor. Defense counsel further contended the collateral consequences of the conviction would impose harsh enough penalties because defendant would be required to register as a sex offender for life and he would suffer impaired employment and living opportunities. Counsel additionally argued that the probation report wrongly identified violence and a position of trust as aggravating factors.

In opposition to the defense request for probation, the prosecutor stated defendant's "testimony on the stand is what swayed the People's position from a probation sentence to asking for state prison because he sat on that stand, he was cold, he was calculated. At no point did he show any remorse. At no point did he take any responsibility for his actions."

The court found defendant's lack of criminal history to be a mitigating circumstance and found the crime should not be considered violent because the jury had

not found substantial sexual conduct or use of force. The court did find, however, that defendant acted with “callousness, not only throughout the act itself, but in response to the situation, to the act . . . and his behavior afterwards, his statements to the police in that he denied and eventually admitted it, and especially the callousness demonstrated during the taped statements with Hallie during the investigation and during his testimony.” The court also found defendant took advantage of a position of trust. Considering “the totality of the circumstances,” the court denied probation and sentenced defendant to the low term of three years in prison.

II. DISCUSSION

Defendant contends the evidence presented at trial is constitutionally insufficient to support conviction. He also maintains the trial court abused its discretion by imposing a prison sentence rather than probation. We hold Hallie’s testimony and defendant’s own statements provide a sound evidentiary basis for the jury’s guilty verdict. We further hold the trial court did not abuse its discretion in deciding a probationary sentence would be inappropriate in light of defendant’s callousness—most prominently on display in his statements and demeanor during the pretext calls and the post-arrest interview with Detective Hatch.

A. *Sufficiency of the Evidence*

“‘When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.] We determine ‘whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) In so doing, a reviewing court ‘presumes in support of the judgment the existence of every fact the trier could reasonably deduce

from the evidence.’ [Citation.] ‘This standard applies whether direct or circumstantial evidence is involved.’ [Citation.]” (*People v. Avila* (2009) 46 Cal.4th 680, 701, original italics.)

Section 288, subdivision (a) makes it felony to “willfully and lewdly commit[] any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child” The elements of a violation of section 288, subdivision (a) are (1) willful touching of a child, (2) who is under 14 years old, and (3) with the intent to arouse or gratify the lust or sexual desires of either the perpetrator or child. (§ 288, subd. (a); *People v. Martinez* (1995) 11 Cal.4th 434, 442; CALCRIM No. 1110; see also *People v. Olsen* (1984) 36 Cal.3d 638, 649 [no requirement that prosecution prove defendant knew the child was under 14; “good faith, reasonable mistake as to the victim’s age [is not] a defense to a lewd or lascivious conduct charge with a child under 14 years of age”].)

Defendant’s conviction is supported by substantial evidence. Hallie testified that defendant touched her bare breasts and vagina, and kissed her while asking if she had ever “had sex,” “been fingered,” or “[given] someone a blow job.” After the incident, he told her not to tell anybody. Even if Hallie’s testimony were the only evidence of guilt, the jury would be entitled to rely on that testimony to convict defendant. (*People v. Young* (2005) 34 Cal.4th 1149, 1181 [“[U]nless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction”]; *People v. Robertson* (1989) 48 Cal.3d 18, 44; CALCRIM No. 301.) Of course, Hallie’s account was not the only evidence against defendant. Defendant’s own admissions during the recorded pretext calls played for the jury both corroborated her testimony and provided additional evidence of guilt. Among other statements during the second call, defendant admitted he “kissed [Hallie], grabbed [her] boobs, and played with [her] down there,” and when asked how it made him feel, he said he “liked it.” Hallie’s friend Rudy provided additional corroboration, specifically, his recollection that Hallie told him shortly after the incident that “her sister’s friend” had touched her

inappropriately and his observations about the changes in Hallie's personality in January 2012 (and her anxiety during Januarys thereafter). This was ample evidence in support of each element of a section 288, subdivision (a) charge and, thus, of the jury's finding of guilt.

The scattershot challenges defendant offers to attack the evidentiary basis for the jury's verdict are all meritless. First, he claims there was insufficient evidence that he acted with lewd intent. To the contrary, the evidence established defendant made skin-to-skin contact with Hallie's breasts and vagina while kissing her, and the jury could infer the requisite intent from the nature of the contact alone. (*People v. Guardado* (1995) 40 Cal.App.4th 757, 761-762 [kissing victim and touching her breasts under her shirt was "quintessentially lewd and lascivious"].) Not only that, the jury also had before it defendant's statements during the pretext calls, including his admission that the reason why he touched her was because she was "cool" and "attractive," and his repeated requests to Hallie for a picture of herself. Second, defendant argues there was insufficient evidence to prove he willfully touched Hallie because he was drunk during the party. This argument, however, is belied by defendant's own trial testimony that he could control his actions even though he was under the influence of alcohol, as well as his statement to the same effect during his post-arrest interview. Third, defendant argues there was no evidence that he knew Hallie was under 14 years old at the time of the offense. This representation is contradicted by the record, and in any event, defendant's knowledge of Hallie's age was not an element of the offense the People were obligated to prove. (*People v. Olsen, supra*, 36 Cal.3d at p. 649.) And finally, defendant's reliance on an Eleventh Circuit case to argue we should discard Hallie's testimony as unbelievable is misplaced. (*United States v. Chancey* (11th Cir. 1983) 715 F.2d 543 (*Chancey*)). The facts here are nothing like the facts that caused the *Chancey* court to believe the victim's account was "inherently incredible,"⁵ and defendant has identified no

⁵ The court found there was insufficient evidence the victim was transported against her will because the victim had repeated opportunities to escape or seek help over several

sound basis on which we should depart from well-established California precedent requiring deference to a jury's (implicit or explicit) credibility determinations. (See, e.g., *People v. Richardson* (2008) 43 Cal.4th 959, 1030 ["It is well settled that, under the prevailing standard of review for a sufficiency claim, we defer to the trier of fact's evaluation of credibility"].)

Although defendant denied molesting Hallie while testifying and sought to explain away his damaging admissions, the jury was entitled to—and necessarily did—reject his defense.⁶ Substantial evidence supports the jury's verdict.

B. Denial of Probation

The commission of a lewd or lascivious act under section 288, subdivision (a) is punishable by a prison term of three, six, or eight years. Trial courts may also grant probation unless prohibited by statute (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282), and here, section 288 does not forbid a probationary sentence.⁷

“A denial or a grant 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. [Citations.]’ [Citations.]” (*People v. Sizemore* (2009) 175 Cal.App.4th 864, 879.) In deciding whether to grant

days, including when she was alone and when she was in the presence of a police officer. (*Chancey, supra*, 715 F.2d at pp. 546-547.)

⁶ Defendant did not challenge the admissibility of his post-arrest statements in the trial court nor does he mount such a challenge on appeal. He does assert in passing that we should not rely on his admissions during the post-arrest interview as evidence in support of the verdict because, he claims, they were made only as the result of cajoling by the interviewing detective. The trial court's instructions informed the jurors that it was up to them to decide how much importance to give to the statements, and the jury was entitled to give greater weight to the statements than to defendant's trial testimony—particularly because defendant admitted during the interview and while testifying that he did not feel threatened by Detective Hatch.

⁷ Defendant was eligible for probation because the jury did not find any facts that would bar probation under section 1203.066, for example, use of force or substantial sexual conduct.

probation, a trial judge must consider various facts relating to the crime and the defendant including, among others, how defendant's crime compares "to other instances of the same crime"; whether the defendant injured the victim physically or emotionally; "[w]hether the defendant took advantage of a position of trust or confidence to commit the crime"; the defendant's prior record; the collateral impact of the conviction on the defendant's future; and "[w]hether the defendant is remorseful." (Cal. Rules of Court, rule 4.414.) The court may also consider any "additional criteria reasonably related to the decision being made" (Cal. Rules of Court, rule 4.408(a)), including aggravating and mitigating circumstances set forth in rules 4.421 and 4.423. One such aggravating circumstance is "acts [by a defendant] disclosing a high degree of cruelty, viciousness, or callousness." (Cal. Rules of Court, rule 4.421(a)(1).) "The circumstances utilized by the trial court to support its sentencing choice need only be established by a preponderance of the evidence. [Citation.]" (*People v. Leung* (1992) 5 Cal.App.4th 482, 506.)

Defendant claims the trial court's reasons for denying probation, namely, its findings of callousness and a violation of a position of trust, are unsupported by the evidence. We hold, however, that the record establishes the trial court was well within its discretion in denying probation based on its finding that defendant acted callously "not only throughout the act itself, but in response to the situation, to the act . . . and his behavior afterwards . . . especially the callousness demonstrated during the taped statements with Hallie during the investigation and during his testimony."

The trial court's callousness finding, which incorporates elements of a determination defendant lacked remorse, is well-grounded in the evidence. Despite being told by Hallie on the pretext calls that what he did to her gave her nightmares, defendant asked when he could see her and when her parents were coming home, hinted at future sexual relations, said he "deserved a sexy ass picture" of her, and continued trying to contact her. During the interview with Detective Hatch, defendant did not simply offer a general denial that he molested Hallie or claim she must be mistaken; rather, he cast Hallie—the victim—as the instigator of the sexual contact. While testifying at trial, defendant claimed to have lied on the second pretext call about what he did to Hallie

because he was “a nice guy” and “thought [he] should help her.” In a sexual abuse case, these are callous actions. Relying on them to deny probation is not the equivalent, as defendant argues, of “punish[ment] for failing to confess or insisting on his innocence.” (Cf. *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 366, overruled on another ground in *People v. Whitmer* (2014) 59 Cal.4th 733, 742 [“Although a defendant need not confess to avoid the inference of lack of remorse [citation], there is no clear implication the trial court rested its finding of no remorse upon that fact. Rather, it appears to be predicated upon the totality of the circumstances of his viewing of [the defendant] and his criminal conduct”].)

We are therefore of the view that the court appropriately found at least one aggravating factor and one mitigating factor, his lack of prior criminal history. There is no indication in the record that the court misunderstood applicable sentencing principles or the facts of the offense. Under the circumstances, the aggravating factor found by the court is sufficient to establish it did not abuse its discretion in refusing to grant probation. (*People v. Robinson* (1992) 11 Cal.App.4th 609, 615, disapproved on another ground in *People v. Scott* (1994) 9 Cal.4th 331, 353, fn. 16 [single aggravating factor may support denial of probation]; *People v. Castellano* (1983) 140 Cal.App.3d 608, 615.)

DISPOSITION

The judgment is affirmed.

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BAKER, J.

We concur:

TURNER, P.J.

KRIEGLER, J.