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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

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THE PEOPLE,

Plaintiff and Respondent,

v.

TIMOTHY MICHAEL THOMPSON,

Defendant and Appellant.

C067855

(Super. Ct. No.  
CM032266)

Defendant Timothy Michael Thompson appeals from a judgment sentencing him to state prison for committing a lewd and lascivious act on a child under the age of 14. (Pen. Code, § 288, subd. (a); unspecified section references that follow are to the Penal Code.) He argues that the trial court abused its discretion in refusing to grant probation, and erred in imposing various fines and fees. We find no abuse of discretion; we order the challenged fines reduced and stricken, respectively, and otherwise affirm the judgment.

## FACTS AND PROCEEDINGS

The parties stipulated to a factual basis for the plea "from the probation report." We take the facts from that report.

Defendant exposed his penis to his young niece and made her touch it with her hand. When she was 11 years old, the victim told her mother that defendant did this "over 10 times[,]" beginning in 2003, when she was five years old. Defendant was then 18 or 19 years old. Sometimes he tried to bribe her with candy or ice cream to touch his penis. When contacted by the police, defendant admitted committing the offense once or twice.

Defendant pleaded no contest to one count of committing a lewd and lascivious act in 2003 on a child under the age of 14 (§ 288, subd. (a)), in exchange for dismissal with a *Harvey* waiver (*People v. Harvey* (1979) 25 Cal.3d 754) of two additional charges he committed the same crime in 2004 and 2005. The court referred the matter to the probation department and requested a psychological evaluation of defendant (see §§ 288.1, 1203.03, 1203.067).

Before the probation and sentencing hearing, the court reviewed the investigator's report, two reports by a psychologist, and the probation officer's report. The court also reviewed the defendant's written sentencing statement regarding probation and in mitigation, and letters submitted to the court by the victim's mother and a friend of defendant's father.

The psychologist's reports both state that his evaluations of defendant do not indicate defendant would be a threat to the victim or the public, and he has the ability and potential to benefit from an outpatient sex offender therapy program. The first report states that defendant has psychological difficulties, including chronic depression and anxiety, but he does not appear to be impulsive, violent, potentially dangerous or unstable, and he expresses no resentment toward the victim. The offenses occurred when defendant was sexually inexperienced and, in the psychologist's view, his conduct was similar "to that of a typical adolescent sex offender with no sexual experience who is exploring his sexuality in an inappropriate and unhealthy way that creates a victim, in part because of his self-centeredness and immaturity." The psychologist's second report states explicitly that defendant "is an appropriate probation candidate, as his level of dangerousness is low, he has a positive prognosis for responding to sex offender therapy, and he would benefit from the structure and accountability of probation, especially a requirement that he participate in a mental health intervention which combines outpatient counseling and a referral for psychotropic medication."

The probation officer who authored the report also recommended granting probation, concluding (in part) that the acts were not egregious compared to other instances of the same crime and did not escalate, defendant's prior criminal record is minimal, he is willing and able to comply with terms of probation, and he has expressed remorse.

The victim's mother (defendant's sister) described him as the "spoiled golden child" of parents who struggled with drugs and alcohol. At age 18 or 19, when the man who defendant had believed to be his father died, a disillusioned defendant fell in with bad companions.

Defense counsel submitted a written statement urging the court to grant probation. He reiterated portions of the psychologist's reports, and emphasized factors in mitigation: that his criminal record is insignificant, his prior performance on probation was satisfactory, he acknowledged culpability early, and his mental disorder should be found to reduce his culpability for the crime.

Finally, the court entertained lengthy arguments by counsel at the sentencing hearing.

In denying defendant's request for probation, the trial court acknowledged his statutory eligibility for probation, and noted the circumstances that weighed in favor of granting probation, i.e., that he has no real prior criminal record (Cal. Rules of Court, rule 4.414(b)(1); further references to rules are to the California Rules of Court), and he indicates a willingness to comply with the terms of probation (rule 4.414(b)(3)). But in weighing the factors set forth in rule 4.414, the court found the victim was particularly vulnerable, both because of her young age and her relationship to the defendant who is her uncle (rule 4.414(a)(3)), defendant took advantage of a position of trust (rule 4.414(a)(9)), and inflicted emotional injury on the victim (rule 4.414(a)(4)).

The court also noted the ongoing nature of the abuse and the number of incidents, and questioned whether defendant has admitted the full degree of his responsibility for the number of criminal acts. In sentencing defendant to the middle term of six years, the court also noted that the crime indicated planning in the form of enticing the victim to be with him so he could molest her (rule 4.421(a)(8)).

## DISCUSSION

### I

#### *The Court Did Not Abuse its Discretion in Denying Probation*

Defendant contends the court abused its discretion in failing to consider the factors set forth in section 1203.067, each of which weighed in favor of granting probation. In his view, the trial court erred in "ignor[ing] the criteria" set forth in that section.

Section 1203.067, subdivision (a) provides: "(a) Notwithstanding any other law, before probation may be granted to any person convicted of a felony specified in Section 261, 262, 264.1, 286, 288, 288a, 288.5, or 289, who is eligible for probation, the court shall do all of the following:

"(1) Order the defendant evaluated pursuant to Section 1203.03, or similar evaluation by the county probation department.

"(2) Conduct a hearing at the time of sentencing to determine if probation of the defendant would pose a threat to the victim. The victim shall be notified of the hearing by the

prosecuting attorney and given an opportunity to address the court.

"(3) Order any psychiatrist or psychologist appointed pursuant to Section 288.1 to include a consideration of the threat to the victim and the defendant's potential for positive response to treatment in making his or her report to the court. Nothing in this section shall be construed to require the court to order an examination of the victim."

We hold the trial court did not err. The court had full discretion to grant probation, subject to consideration of the criteria listed in rule 4.414. (See *People v. Bruce G.* (2002) 97 Cal.App.4th 1233, 1247.) Indeed, a court considering a probation request from a defendant convicted of a felony listed in section 1203.067 must *first* review the criteria affecting the grant or denial of probation set forth in rule 4.414. Only if the court decides to deny probation based on the factors set forth in rule 4.414, does it consider the factors set forth in section 1203.067. (See *ibid.*; *People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1532.)

Moreover, the trial court possesses broad discretion applying the criteria set forth in the Rules of Court in determining whether or not to grant probation. We will not disturb that discretion on appeal except on a showing that the court exercised this discretion in an arbitrary or capricious manner. A court abuses its discretion when its determination exceeds the bounds of reason. (*People v. Downey* (2000) 82 Cal.App.4th 899, 909-910; *People v. Lai* (2006) 138

Cal.App.4th 1227, 1256-1257.) The defendant bears the burden of demonstrating that the trial court's sentencing decision was irrational or arbitrary. (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.) ""In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."" (Ibid.)

Here, the trial court stated it had received and reviewed the probation officer's report, two reports by the psychologist, defendant's statement in mitigation, and letters. In addition, the court heard lengthy arguments from counsel. After considering all this information, the court denied probation because of the nature, seriousness, and circumstances of the offense. We find no abuse of discretion.

We note that, in light of the arguments by defense counsel at the hearing, as well as in the written statement in mitigation, we cannot accept the People's suggestion on appeal that defendant forfeited his right to argue on appeal that the court abused its discretion in denying probation.

## II

### *The Penal Code Section 290.3 Fine Must Be Reduced, and Those Imposed Pursuant to Government Code Sections 76104.6 and 76104.7 Stricken*

The trial court imposed a \$300 fine pursuant to section 290.3, on which were imposed various penalty assessments. Defendant contends the underlying fine must be reduced to \$200, the amount authorized by statute at the time of the offense.

The People agree, and so do we. (*People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1248 [under ex post facto principles, the assessable amount of a section 290.3 fine is calculated as of the date of the 2003 offense].) We also agree with the parties that the matter must be remanded to the trial court for its recalculation of penalty assessments, based on the reduced, \$200 former section 290.3 fine.

Defendant also contends the trial court erred in imposing two \$30 DNA penalty assessments pursuant to Government Code sections 76104.6 and 76104.7, respectively. The People agree. So do we: both are penalties and both postdate the criminal conduct underlying defendant's conviction. (See *People v. Batman* (2008) 159 Cal.App.4th 587, 591; Stats. 2006, ch. 69, § 18.)

#### DISPOSITION

The imposition of the following fines is reversed: the \$300 Penal Code section 290.3, subdivision (a) fine, the \$30 DNA penalty assessment imposed pursuant to Government Code section 76104.6 and the \$30 DNA penalty assessment imposed pursuant to Government Code section 76104.7. The judgment is modified to include a \$200 fine, imposed pursuant to former Penal Code section 290.3, subdivision (a), and the matter remanded for the trial court to calculate and impose the applicable penalty assessments upon the \$200 former Penal Code section 290.3 fine. In all other respects, the judgment is affirmed. The clerk of the superior court shall prepare an amended abstract of judgment

reflecting these modifications and forward a certified copy to  
the Department of Corrections and Rehabilitation.

\_\_\_\_\_ HULL \_\_\_\_\_, Acting P. J.

We concur:

\_\_\_\_\_ ROBIE \_\_\_\_\_, J.

\_\_\_\_\_ MURRAY \_\_\_\_\_, J.