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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND EASMON, JR.,

Defendant and Appellant.

C068490

(Super. Ct. No.
CRF10290)

Defendant Raymond Easmon, Jr., pleaded no contest to sexual penetration of a minor under the age of 18. The trial court denied probation, sentenced him to three years in prison, and ordered him to register as a sex offender.

Defendant contends (1) the government breached an implicit term of the plea agreement requiring it to obtain a psychological report prior to sentencing; (2) the denial of probation was an abuse of discretion and denied defendant a fair hearing; (3) the trial court abused its discretion in requiring

defendant to register as a sex offender; and (4) defendant was entitled to a jury trial and proof beyond a reasonable doubt on the factual predicates necessary to impose sex offender registration.

We will affirm the judgment.

BACKGROUND

On May 9, 2010, the 16-year-old victim was sleeping in her room when defendant (the victim's stepfather) entered and turned on the light. The victim was wearing "cheer" shorts, a white t-shirt, a sweat shirt, and panties. She pretended to sleep while defendant removed her blankets.

Defendant took pictures of the victim with his cell phone. The victim felt defendant rub her buttocks and thigh while she was lying on her stomach. Defendant then moved the victim's shorts and panties to one side and inserted his finger into her vagina for about 20 seconds. He took another picture of the victim before leaving the room. The victim texted a report of the incident to a friend as soon as defendant left.

When questioned by authorities, defendant denied the incident and said that he considered the victim like a daughter. Defendant's cell phone contained six deleted photographs which were taken on the day of the incident.

Defendant pleaded no contest to sexual penetration of a minor under the age of 18. (Pen. Code, § 289, subd. (h).)¹ The

¹ Undesignated statutory references are to the Penal Code.

trial court denied probation, sentenced defendant to three years in prison, and ordered him to register as a sex offender.

(§§ 290, 290.006.)

DISCUSSION

I

Defendant contends the government breached an implicit term of the plea agreement requiring it to obtain a psychological report prior to sentencing.

A

During a hearing on April 25, 2011, the trial court explained to defendant its understanding of the plea offer. The trial court said the offer was for defendant to plead to count 2, a felony violation of section 289, subdivision (h), sexual penetration of a minor under the age of 18, which carried a possible prison sentence of 16 months, 2 years or 3 years. The trial court added that a favorable psychological report pursuant to section 288.1 was a requirement for a grant of probation.² The trial court confirmed that defendant did not have any "probation limiters" and continued: "So you could be placed on probation for up to five years and serve up to 365 days in the county jail, or you could serve up to three years in state prison. It would depend upon the sentencing." Defendant told

² A psychological report is required under section 288.1 when the victim is under the age of 14. (§ 288.1) Defendant points out that because the victim in this case was 16 at the time of the offense, the references in this case to a "288.1 report" were used as a "shorthand for a psychological evaluation like that found in a statutory section 288.1 report."

the trial court that he understood the plea offer and wished to accept it. Defendant then entered his no contest plea.

Defendant also initialed and signed a plea form. The form said that if defendant pleaded no contest, the trial court could sentence him as follows: up to three years in state prison, or probation for five years with up to 365 days in county jail. The form said it was an open plea, defendant understood the maximum and minimum sentence for the charges and allegations set forth in the form, and no one made any other promises to him about what sentence the trial court might order. The form said defendant had a full opportunity to discuss the consequences of the plea with his attorney.

The probation report initially recommended probation for three years. But the probation department subsequently informed the trial court that, pursuant to section 1203.067,³ a psychological report pursuant to section 288.1 had to be completed before probation could be granted. Because a psychological report had not been completed, the probation department could not make a probation recommendation. The

³ Section 1203.067, subdivision (a) provides in relevant part: "(a) Notwithstanding any other law, before probation may be granted to any person convicted of a felony specified in Section . . . 289, who is eligible for probation, the court shall: [¶] . . . [¶] (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." This provision does not apply if the trial court decides to impose a prison sentence rather than a grant of probation. (*People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1532.)

probation department recommended that the trial court continue the sentencing hearing to permit the preparation of a psychological report.

The People filed a sentencing statement addendum opposing the probation department's recommendation. The addendum said the People believed probation was not appropriate in this case, and that if the trial court was not inclined to grant probation, a continuance for preparation of a psychological report was not required.

At the sentencing hearing, the trial court stated its tentative decision before allowing counsel to argue. The trial court articulated the probation criteria set forth in Rule 4.414 of the California Rules of Court (Rule 4.414) in connection with the facts of the case, saying that the vulnerability of the victim was the criteria that far outweighs all others. The trial court noted evidence that the victim suffered emotional injury and the likelihood that defendant would be a danger to other minors. After having considered the Rule 4.414 criteria, the trial court tentatively concluded that defendant was not amenable to a grant of probation, that the need for a section 288.1 psychological report was thus moot, and that the trial court intended to deny probation.

Defense counsel argued that defendant should be granted probation, but did not argue that the trial court's tentative ruling would violate the plea agreement.

The trial court rejected the defense arguments, articulated the Rule 4.414 probation criteria again, denied probation,

sentenced defendant to three years in prison, and ordered him to register as a sex offender.

B

Under the due process clause, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." (*Santobello v. New York* (1971) 404 U.S. 257, 262 [30 L.Ed.2d 427, 433].) If the agreement is breached, the defendant is entitled to some remedy, which generally involves allowing the defendant to withdraw his or her plea. (§ 1192.5; *People v. Calloway* (1981) 29 Cal.3d 666, 673; *People v. Johnson* (1974) 10 Cal.3d 868, 871.)

In interpreting a plea agreement, we look at the words used in the agreement to determine the parties' intent, and we "seek to carry out the parties' reasonable expectations." (*People v. Nguyen* (1993) 13 Cal.App.4th 114, 120; *People v. Knox* (2004) 123 Cal.App.4th 1453, 1458-1459.)

Defendant contends that although the plea agreement did not expressly promise a psychological report prior to sentencing, such a promise was "implicit" in the plea agreement. Defendant argues this implication is fairly drawn from defendant's desire for probation and the fact that a favorable psychological report is required before probation can be granted. Defendant further argues that ambiguities in the plea agreement must be construed in favor of defendant.

But there are no ambiguities in the plea agreement, and the plea agreement is not reasonably susceptible to defendant's interpretation. The trial court clearly explained to defendant that the plea offer included a possible prison sentence of 16 months, 2 years or 3 years. The trial court said defendant could be placed on probation or he could serve up to three years in state prison. The trial court clearly informed defendant that "[i]t would depend upon the sentencing." Defendant told the trial court that he understood the plea offer and wished to accept it. Defendant also initialed and signed a plea form saying that the trial court could sentence defendant to prison for up to three years, that this was an open plea, that defendant understood the maximum and minimum sentence for the charges and allegations set forth in the form, and no one made any other promises to him about what sentence the trial court might order. There was no promise of probation and hence no promise of a psychological report.

II

Defendant claims the trial court's decision to deny probation was an abuse of discretion and that the trial court denied defendant a fair hearing. He contends the trial court misunderstood the scope of its discretion, overlooked competent and relevant evidence, unfairly penalized defendant for not discussing the offense with the probation officer, improperly relied on ex parte communications, and failed to obtain relevant and reliable evidence essential to its exercise of discretion. We disagree with each of these contentions.

“All defendants are eligible for probation, in the discretion of the sentencing court [citation], unless a statute provides otherwise.’ [Citation.] ‘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. [Citation.]’ [Citation.] ‘In reviewing [a trial court’s determination whether to grant or deny probation,] it is not our function to substitute our judgment for that of the trial court. 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.’ [Citation.]” (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311.)

We begin our analysis by summarizing the information and factors considered by the trial court in sentencing defendant. The probation report said defendant scored zero on the Static-99R test and that he was a low risk for recidivism. The probation officer was nonetheless concerned that defendant refused to talk about the circumstances of the crime. This refusal prevented the probation officer from determining defendant’s “sexual preferences, general mindset, or his feelings as to this being an isolated incident or a future pattern of conduct.”

Regarding aggravating factors, the probation report said the victim was particularly vulnerable and defendant took advantage of a position of trust. The only mitigating factor was defendant’s lack of a criminal record.

Defense counsel argued at the sentencing hearing that defendant was amenable to probation because he did not have a criminal record, no prior incidents were reported by the victim, no force was employed, defendant was willing to undergo counseling, and he scored a zero on the Static-99R test.

The trial court did not give "a significant amount of weight" to defendant's lack of a criminal record because otherwise "everyone would get a free bite at the apple before anything happened to them." The trial court found as aggravating factors the victim's vulnerability, her emotional injury, and the likelihood that defendant would be a danger to minors if not imprisoned. It also found this was a more serious violation of section 289 than normal and that defendant did not express remorse. The trial court then stated that "according to the various letters that have been presented by [defendant] in support of a grant of probation, apparently he has not been candid with the individuals closest to him, his family members who have submitted letters in his support."

The trial court concluded that defendant was not amenable to probation. Later, the trial court added two additional comments about the denial of probation -- finding that defendant "would present a danger to the victim and others if granted probation," and that defendant failed "to admit that he has any type of a problem" as demonstrated by his refusal "to talk about the circumstances of the crime with the probation officer."

With this background in mind, we turn to defendant's contentions. His first contention is that the trial court did

not understand the scope of its discretion. In support of this argument, defendant notes that "the trial court concluded its discussion of its reasons for denying probation by stating that 'the Court does not find that the interest of justice would best be served by granting probation.'" Defendant argues this is an improper standard.

Defendant did not object to the alleged "improper standard" in the trial court, and hence any contention based on an improper standard is forfeited on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 351-352 (*Scott*).) In any event, the record indicates, based on the extensive comments by the trial court at the sentencing hearing, that it understood and exercised its sentencing discretion.

Defendant next argues that the trial court overlooked competent and relevant evidence, his Static-99R score. But the score was included in the probation report, which the trial court read and considered, and the score was also referenced in defense counsel's argument. The record does not support an inference that the trial court did not consider the evidence.

In addition, defendant claims the trial court unfairly penalized him for not discussing the offense with the probation officer, an exercise of his Fifth Amendment right against self-incrimination. However, the trial court could properly infer a lack of remorse from defendant's refusal to talk about the offense. Whether a defendant is remorseful is a proper consideration with respect to probation. (Rule 4.414(b)(7).) Lack of remorse may be used as an aggravating factor

“‘unless the defendant has denied guilt and the evidence of guilt is conflicting.’ [Citation.]” (*People v. Leung* (1992) 5 Cal.App.4th 482, 507, italics omitted.) Because defendant’s no contest plea is an admission of guilt (§ 1016, subd. 3), the trial court could infer a lack of remorse from defendant’s refusal to discuss the crime.

Defendant further asserts that the trial court improperly relied on ex parte communications. He claims the trial court improperly substituted its own expert opinion when it stated “[o]ne of the crucial elements to sex offender counseling that the Court hears time and time again is that chances of successfully completing sexual counseling is enhanced with acknowledgment of culpability.” But defendant did not object to the alleged evidentiary error, which forfeits the contention on appeal. (*Scott, supra*, 9 Cal.4th at pp. 351-352.)

Moreover, defendant says the trial court abused its discretion by failing to obtain relevant and reliable evidence essential to the informed exercise of its discretion, namely a psychological report. But defendant does not cite precedent for the proposition that failing to obtain a psychological report before denying probation constitutes an abuse of discretion. Instead, he analogizes his case to instances where a trial court sentences a defendant based on an out-of-date probation report. (See, e.g., *People v. Rojas* (1962) 57 Cal.2d 676, 682 [15-month lapse between first probation report and resentencing necessitates supplemental report]; *People v. Mercant* (1989) 216 Cal.App.3d 1192, 1195-1196 [defendant entitled to supplemental

probation report when sentenced three years after preparation of original report, even though he was a fugitive during that time].)

His analogy is unpersuasive. In this case, the probation report was issued on the day of sentencing. A psychological report was not mandated by statute, and the trial court had sufficient information to make an informed decision regarding defendant's suitability for probation.

III

Defendant claims the trial court abused its discretion in requiring him to register as a sex offender because there was no factual basis to conclude that he was likely to reoffend. We disagree.

"Any person ordered by any court to register pursuant to the [Sex Offender Registration] 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." (§ 290.006.)

The trial court has discretion to impose registration under section 290.006. "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

In requiring registration as a sex offender, the trial court found that defendant "was essentially making his own pornography as he digitally penetrated his stepdaughter" and that the offense "was committed as a result of a sexual compulsion or for purposes of sexual gratification." The trial court took into account the likelihood that defendant would reoffend, his "extreme reticence in admitting what he did" and the letters from family and friends suggesting further denial.

Regarding the family letters, defendant asserts that the "denial" of his guilt by his family members should be attributed to their unconditional love for him, and not his unwillingness to take responsibility for his crime. But the trial court read the letters and they are part of the record on appeal. We must defer to the findings of the trial court.

Defendant reiterates various arguments that he made regarding the denial of probation: the trial court improperly penalized him for refusing to discuss the offense with the probation officer, ignored his Static-99R score, and failed to obtain a psychological report. We previously explained why these arguments lack merit.

Defendant further claims he is not likely to reoffend because the offense against his stepdaughter was situational. But even if, as defendant argues, people who molest family members may be more amenable to treatment than lifelong pedophiles (see *People v. Wutzke* (2002) 28 Cal.4th 923, 935-936), the Legislature made no such distinction regarding the sex offender registration law.

The trial court could reasonably infer that defendant posed a risk of reoffending and was a danger to minors based on the aggravated nature of his crime and his unwillingness to take responsibility for it. It was not an abuse of discretion to order defendant to register as a sex offender.

IV

Subdivision (b) of section 3003.5, enacted as part of Jessica's Law in 2006, provides that "[n]otwithstanding any other provision of law, it is unlawful for any person for whom [sex offender] registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather."

Defendant contends the residency restriction makes sex offender registration "punishment," and thus the facts required for the trial court to impose a sex offender registration requirement on him under section 290.006 had to be found by a jury beyond a reasonable doubt under the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*). Because no such jury finding was made here, defendant concludes the sex offender registration requirement should be stricken from the judgment.⁴

⁴ The issue is currently before the California Supreme Court. (*People v. Mosley* (2010) 188 Cal.App.4th 1090 (S187965, review granted Jan. 26, 2011 [residency restrictions are punishment, and therefore jury trial required on facts exposing defendant to registration requirement].)

Defendant initialed a provision in the change of plea form indicating that he may be required to register as a sex offender as a consequence of his plea. But even if that did not forfeit his claim on appeal, and even if the trial court erred in requiring him to register as a sex offender without having a jury find the predicate facts required to impose a registration requirement under section 290.006, *Apprendi* error is not reversible per se. Rather, "we must determine whether, if the question of the existence of an aggravating circumstance or circumstances had been submitted to the jury, the jury's verdict would have authorized the upper term sentence." (*People v. Sandoval* (2007) 41 Cal.4th 825, 838.) "[I]f [we] conclude[], beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable-doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury, the Sixth Amendment error properly may be found harmless." (*Id.* at p. 839.)

As our Supreme Court explained about applying the predecessor statute to section 290.006 (former section 290, subdivision (a)(2)(E)), "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. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1197.)

Defendant snuck into his 16-year-old stepdaughter's bedroom at night, took pictures of her while she pretended to be asleep, rubbed her thighs and buttocks with his hand, pulled over her panties and stuck his finger into her vagina for approximately 20 seconds, and then photographed her once more before leaving. Defendant deleted the photographs from his cell phone after the victim accused him of molesting her. Defendant's cell phone contained pictures of naked women and video files of intercourse not involving the victim.

The evidence is overwhelming that defendant's crime was committed for the purposes of sexual gratification. We are convinced beyond a reasonable doubt that a jury would find that defendant committed the offense for the purpose of sexual gratification. Accordingly, even assuming it was error for the trial court, instead of a jury, to make the factual finding

required by section 290.006, that error was harmless beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.

MAURO, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.