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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Butte)**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOEL CARLISLE RICKARDS,

Defendant and Appellant.

C074151

(Super. Ct. No. CM035361)

Defendant Joel Carlisle Rickards entered a negotiated no contest plea to sexual battery by restraint (Pen. Code, § 243.4, subd. (a)—count 2)¹ and vandalism causing damage over \$400 (§ 594, subd. (a)—count 3) in exchange for dismissal of the remaining counts (sexual penetration by foreign object with force and violence, assault with a

¹ Undesignated statutory references are to the Penal Code in effect at the time of defendant's crimes.

deadly weapon [a car], and two counts of misdemeanor battery) with a waiver pursuant to *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*).

The trial court denied probation and sentenced defendant to state prison for an aggregate term of three years eight months, that is, the midterm of three years for the sexual battery offense and a consecutive one-third the midterm or eight months for vandalism.

Defendant appeals. He contends the (1) trial court abused its discretion in denying probation, (2) the theft and sex offender fines must be stricken because they were not part of the plea agreement, and (3) the restitution fine must be reduced to the mandatory minimum in effect at the time of the offense. We will affirm the judgment.

FACTUAL BACKGROUND

About 3:00 p.m. on October 29, 2011, defendant went to his estranged wife's home, entered her bedroom and started to kiss her. She pushed him away, telling him to stop. He pinned her down on the bed, kissed her on the neck, fondled her breasts, and inserted his fingers into her vagina. During the 30-minute assault, she unsuccessfully called 911 but successfully called her boyfriend. When her boyfriend arrived at her home, she was able to escape and they went to his house. Defendant followed them and crashed his car into the boyfriend's truck, causing about \$1,100 in damage. Defendant then started a fight and hit the boyfriend. Defendant also hit his wife when he took another swing at the boyfriend.

DISCUSSION

I. Denial of Probation

Although noting defendant's lack of a significant prior criminal record, progress in a batterer's treatment program, and willingness to comply with probation, the trial court denied probation based on the nature, seriousness, and circumstances of the offense

compared with other like offenses and defendant's lack of remorse. Defendant contends the trial court abused its discretion because it did not "properly consider the relevant factors." We reject defendant's contention.

We review a trial court's denial of probation for an abuse of discretion. The trial court has broad discretion to determine whether a defendant is suitable for probation. (*People v. Olguin* (2008) 45 Cal.4th 375, 379.) " '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.' " (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311.)

Defendant argues that the offense was "certainly serious but then so are all crimes of sexual assault." He notes that he and the victim were not strangers, having been married since 1991 and had four children together. Although acknowledging the victim's claim that defendant's insertion of his fingers in her vagina caused injury to her uterus and bladder, he continues to argue that the offense "was not significantly worse than others [and] [b]y its nature it is going to involve sexual touching against the will of the victim." As far as lack of remorse, defendant argues that he had taken a batterer's course and had progressed well, and that he stated his remorse at hurting the victim. He also notes that the probation officer recommended probation, citing defendant's age (42) and his minimal record (DUI and traffic offenses).

Here, the sentencing court was entitled to consider the counts, which had been charged but dismissed with a *Harvey* waiver when defendant entered his plea. As far as the seriousness of the offense of which defendant was convicted, the victim's description of the offense as reflected in the probation report supports the trial court's determination that the victim suffered much more than simply sexual touching—defendant digitally

penetrated the victim with such force as to cause her to suffer physical injury. As far as remorse, the trial court could properly read defendant's statement that he had been drugged by the victim and hit by her boyfriend with a hammer, and defendant accidentally hit the boyfriend's truck, as disputing his culpability even though he entered a plea to sexual battery by restraint and vandalism causing over \$400 in damage.

At sentencing, defense counsel noted the probation officer's recommendation of probation, defendant's insignificant prior record, and his progress in a batterer's treatment program. The prosecutor responded that defendant had lied about what transpired, having claimed injury from a blow from a hammer, and sought the upper term.

The trial court considered the mitigating factors defense counsel cited, found there were factors in aggravation and mitigation, and denied probation based on the aggravating factors it cited. The trial court's findings indicate that it considered the relevant factors in making its sentencing choices, which were well within the bounds of its discretion. This court does not reweigh the factors or substitute its judgment for that of the trial court. Defendant has failed to demonstrate that the trial court's denial of probation was arbitrary or irrational.

II. Sex Offender and Theft Fines

Defendant next contends and the People concede that the sex offender fine and the theft fine should be stricken since imposition of these was not part of the plea bargain and the trial court found that defendant did not have the ability to pay other discretionary fees and/or fines. We reject defendant's contention and the People's concession.

In entering his plea, defendant signed a written plea agreement listing the terms and conditions which included a fine up to \$27,000, a restitution fine from a minimum of \$200 to a maximum of \$10,000, and victim restitution. As defendant notes, left

unchecked was a box indicating that other possible consequences included “[a]dditional fines.” Thus, pursuant to the written plea agreement, defendant faced a maximum of \$37,000 in fines as well as victim restitution. At the entry of plea hearing, defendant confirmed that he had not been promised anything concerning sentencing other than dismissal of the remaining counts. The trial court failed to advise defendant that its approval of the plea agreement was not binding and that defendant may withdraw his plea if the court withdrew its approval before sentencing.²

In sentencing defendant to state prison, the court imposed, without objection, the following fee and/or fines in accordance with the probation officer’s recommended financial obligations: a \$280 restitution fine (§ 1202.4, subd. (b)); a \$280 parole revocation restitution fine suspended (§ 1202.45); a \$10 theft fine (§ 1202.5) plus \$29 in penalty assessments; a \$300 sex offender fine (§ 290.3) plus \$840 in penalty assessments; and victim restitution to defendant’s estranged wife (\$32.67) and to the California Victim Compensation and Government Claims Board (\$2,841). Defense counsel, when asked, stated that defendant did not have the ability to pay attorney fees in light of the sentence. The court then found that defendant did not have the ability to pay public defender fees.

“[F]ailure to make a statutorily mandated punishment an express term of a defendant’s plea agreement did not render imposition of such punishment a violation of the plea agreement. With regard to statutorily mandated restitution fines, we have said that parties are free to negotiate the amount of those fines. [Citations.] However, where

² Defendant’s failure to object to the theft and sex offender fines as exceeding the terms of his plea agreement at sentencing does not constitute forfeiture of his claim of error; the trial court failed to advise defendant that, in the event it did not approve the plea agreement, he would be permitted to withdraw his plea. (*People v. Villalobos* (2012) 54 Cal.4th 177, 182 (*Villalobos*) [because the court did not give a “section 1192.5 admonition,” defendant’s failure to object at sentencing did not result in forfeiture of claim on appeal].)

the parties have not mentioned the amount of the fine during the plea negotiation, and where the trial court has not threatened or promised any particular amount of fine during the plea colloquy, the amount of the fine is not part of the plea agreement, and the trial court is free to impose a fine within the statutory range. Absent an expressly negotiated term in the plea bargain concerning the fine, we see no basis to conclude that imposition of a fine within the statutory range constitutes more punishment than what the defendant bargained for.” (*Villalobos, supra*, 54 Cal.4th at p. 184.)

In *People v. Cruz* (2013) 219 Cal.App.4th 61 (*Cruz*), this court concluded that the rule in *Villalobos* applies “equally to mandatory penal fines.” (*Id.* at p. 65.) Here, the plea agreement did not mention either the theft fine or the sex offender fine. We conclude that *Villalobos* applies because both fines are statutorily mandated punishment.

Sexual battery (§ 243.4), to which defendant entered a plea of no contest, is listed in section 290.3, which mandates a \$300 sex offender fine unless the court finds no ability to pay the \$300 sex offender fine. Vandalism (§ 594), to which defendant entered a plea of no contest, is listed in section 1202.5, which provides that the sentencing court “shall order the defendant to pay a fine of ten dollars (\$10) in addition to any other penalty or fine imposed.” (§ 1202.5, subd. (a).) Section 1202.5, subdivision (a) further provides: “If the court determines that the defendant has the ability to pay all or part of the fine, the court shall set the amount to be reimbursed and order the defendant to pay that sum to the county” The probation report recommended the theft and sex offender fines and defendant did not claim he had no ability to pay the fines. On a silent record, we presume the trial court lawfully performed its duty in imposing sentence and found that defendant had an ability to pay the theft and sex offender fines. (*People v. Burnett* (2004) 116 Cal.App.4th 257, 261-262; *People v. McMahan* (1992) 3 Cal.App.4th 740, 748-750.)

Because the amount of the theft fine and the amount of the sex offender fine were “neither made a part of defendant’s plea agreement nor otherwise specified in the plea colloquy, it was left to the trial court’s discretion.” (*Cruz, supra*, 219 Cal.App.4th at p. 66.) We find no error.

Defendant and the People claim the theft fine and the sex offender fine are discretionary rather than mandatory because of the ability-to-pay consideration. We disagree. Defendant cites *People v. Tillman* (2000) 22 Cal.4th 300, but in that case the California Supreme Court held that the People’s failure to object to the trial court’s failure to state reasons for not imposing a restitution fine forfeits the issue on appeal. (*Id.* at pp. 301-303.) *Tillman* did not hold that a theft fine and sex offender fine are discretionary rather than mandatory because of an ability-to-pay consideration, and it does not support defendant’s position that the imposition of the theft fine and sex offender fine violated the terms of his plea agreement.

III. Restitution Fines

Finally, defendant contends that the \$280 restitution fine and the corresponding \$280 parole revocation restitution fine violated the ex post facto clause of the federal and state Constitutions and must be reduced to the minimum allowable at the time of his offense (\$200). (§ 1202.4, subd. (b)(1).) The People argue defendant has forfeited this contention by failing to object below. (*People v. Gamache* (2010) 48 Cal.4th 347, 409; *People v. Scott* (1994) 9 Cal.4th 331, 353 (*Scott*); *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468.)

The restitution fine statute is considered punishment for purposes of ex post facto analysis. (*People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1248.) Even if the issue is not forfeited, however, we do not agree with defendant on the merits.

At the time of defendant's offenses in October 2011, the minimum restitution fine a trial court could impose pursuant to section 1202.4 was \$200. (§ 1202.4, subd. (b) [as amended by Stats. 2010, ch. 351, § 9].) Effective 2012, the minimum was \$240 and effective 2013, the minimum was increased to \$280. (See § 1202.4, subd. (b)(1) [also scheduling an increase to \$300 for 2014].) Specifically, defendant contends that because the minimum restitution fine at the time of his crime was \$200, the \$280 fines amount to an unauthorized sentence. Defendant is wrong.

An unauthorized sentence is a sentence that “could not lawfully be imposed under any circumstances in the particular case.” (*Scott, supra*, 9 Cal.4th at p. 354.) When defendant committed his crimes, the minimum restitution fine was \$200 and the maximum fine was \$10,000. (§ 1202.4, subd. (b)(1).) Defendant's \$280 fine clearly falls within the lawful discretionary statutory range; therefore, the fine is not a sentence that “could not lawfully be imposed under any circumstances.” (*Scott, supra*, 9 Cal.4th at p. 354.)

The record does not support defendant's argument that the trial court intended to impose the “lowest” possible restitution fine. The probation report filed in April 2013 recommended that defendant pay a \$280 restitution fund fine. At sentencing, the trial court ordered, “Financial terms and conditions are set forth attached to the probation report. I'm incorporating my comments and those fines. I'll impose a state restitution fund fine pursuant to [section] 1202.4[, subdivision] (b)[(1)], \$280; . . . [and] a fine under [section] 1202.45 suspended, \$280.” From this succinct comment, we cannot conclude that the trial court intended to impose the minimum possible restitution fine as an act of leniency. Accordingly, the trial court properly exercised its discretion by imposing the \$280 restitution fine and suspended parole revocation fine in the same amount.

In the alternative, defendant contends counsel rendered ineffective assistance in failing to object. We reject this claim.

A defendant claiming ineffective assistance of counsel has the burden to show: (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692 [80 L.Ed.2d 674, 693-694, 696]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) That is, "there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." (*People v. Kelly* (1992) 1 Cal.4th 495, 520.) " 'Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." ' [Citations.] '[W]e accord great deference to counsel's tactical decisions' [citation], and we have explained that 'courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight' [citation]. 'Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.' " (*People v. Weaver* (2001) 26 Cal.4th 876, 925-926.)

Defense counsel's decision not to object could have been a reasonable tactical decision. Defendant was subject to a restitution fine in the amount of a minimum of \$200 and a maximum of \$10,000 and his \$280 fine was well within the range and below the available statutory formula (more than \$1,200). (§ 1202.4, subd. (b)(2).) Defendant has failed to demonstrate that counsel's performance was deficient in not objecting to the \$280 restitution fine.

DISPOSITION

The judgment is affirmed.

BUTZ, Acting P. J.

We concur:

MAURO, J.

HOCH, J.