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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.

JOHN ROBERT HALL,

Defendant and Appellant.

C077660

(Super. Ct. No. CM040701)

In this appeal, defendant John Robert Hall contends references in his probation report to unproven but suspected child pornography found on his computer violated his due process rights. Finding no prejudice, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant's arguments on appeal do not require a detailed recitation of the underlying facts. Suffice it to say that during the weekend of February 7, 2014, through February 10, 2014, defendant molested his four-year-old step-granddaughter. Defendant was charged with five counts of committing a lewd act upon a child, and on July 2, 2014,

he pled guilty to one count, with the four remaining counts dismissed with a *Harvey*<sup>1</sup> waiver.

On July 22, 2014, a probation officer submitted a report evaluating defendant's suitability for probation. The probation officer included information within the report concerning the execution of a search warrant at defendant's residence and the seizure of several electronic and media storage devices. According to the report, as of July 1, 2014, "detectives located approximately 4,500 images of suspected child pornography and/or erotica and approximately 3,000 images of age questionable pornography and erotica" after reviewing 5 percent of one of defendant's hard drives. After reading the probation report, defendant's counsel asked the prosecutor if she could view the images. The prosecutor directed defense counsel to contact Butte County Sheriff's Detective Philip Wysocki, who was in the process of conducting a forensic examination of the computer. Defense counsel left a message for Detective Wysocki, but was then told that the prosecutor's office had determined that she would not be able to view the material.

Five days before the sentencing hearing, defendant submitted a statement regarding probation and in mitigation to the court, in which his attorney explained that she had unsuccessfully attempted to discover the suspected child pornography and argued that she would be unable to effectively assist in defendant's defense at sentencing without having access to those images. Defendant argued that despite having not been charged with any child pornography offense, the "alleged, unseen, unknown" images had infected the proceedings and left the impression that he possessed "thousands of images of child pornography." Defendant therefore asked the trial court to strike all references to the suspected child pornography from the probation report or, in the alternative, to suspend

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<sup>1</sup> *People v. Harvey* (1979) 25 Cal.3d 754.

sentencing until defendant could obtain a court order allowing his counsel to view the images.

At defendant's sentencing hearing, the trial court did not explicitly rule on defendant's request to strike the references to suspected child pornography from the probation report. Defendant's request was implicitly rejected though, as the court noted that in determining defendant's sentence, the court considered the "original [probation] report that was dated July 22nd, 2014." The court also permitted both the prosecutor and the victim's mother to reference the suspected child pornography found on defendant's computer while advocating for an aggravated sentence. At no time during the sentencing hearing did defendant renew his objection to the references to suspected child pornography in the probation report. The trial court ultimately followed the probation officer's recommendation, denied probation, and imposed the middle term of six years in prison.<sup>2</sup> This timely appeal followed.

## DISCUSSION

We are presented with three issues on appeal: First, did defendant forfeit his right to challenge the trial court's failure to strike the references to suspected child pornography in the probation report? If not, did the suspected child pornography references included in the probation report violate defendant's right to due process? And lastly, assuming defendant's right to due process was violated by the trial court's failure

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<sup>2</sup> In violation of the California Rules of Court, most of the statement of facts in defendant's opening brief is unsupported by any citation to the record on appeal. (See Cal. Rules of Court, rule 8.204(a)(1)(C) [each brief must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears"]; rule 8.360(a) [with exceptions not applicable here, "briefs in criminal appeals must comply as nearly as possible with rule[] . . . 8.204"].) An appellate court is not required to search through the record in an attempt to find the point asserted and such a failure to cite the record may deem unsupported arguments forfeited. (*In re S.C.* (2006) 138 Cal.App.4th 396, 406-407.) Although we have the authority to find defendant forfeited his argument by failing to cite the record, we will not do so in this case and will proceed with the analysis.

to strike the references to suspected child pornography from the probation report, was defendant prejudiced?

We conclude defendant did not forfeit his right to challenge the trial court's failure to strike the references to suspected child pornography in the probation report, but even assuming the court's failure to strike the references to suspected child pornography violated his due process rights, defendant suffered no prejudice. Accordingly, we affirm.

## I

### *Defendant Did Not Forfeit His Right To Challenge The Probation Report*

The People argue that defendant's statement in mitigation was insufficient to preserve a challenge to the reliability of the information contained in the probation report on appeal. Instead, the People contend defendant needed to object at the sentencing hearing itself or call a witness to rebut the information contained in the probation report to preserve the argument on appeal. We disagree and conclude defendant's statement in mitigation was sufficient to preserve his argument.

## A

### *Defendant Was Not Required To Renew His Objection At The Sentencing Hearing*

The People's first argument is premised on California's forfeiture rule. Under this rule, "reviewing courts have required parties to raise certain issues at the time of sentencing. In such cases, lack of a timely and meaningful objection forfeits or waives the claim." (*People v. Scott* (1994) 9 Cal.4th 331, 351, italics omitted.) Pointing to the related principle that "the failure to make a timely objection to the content of a probation report forfeits the issue on appeal," the People argue that defendant's "failure to object at sentencing to the child pornography references in . . . the probation report . . . forfeits the issue on appeal." While the People note the presence of defendant's objection in his statement in mitigation, they argue the statement in mitigation was insufficient to preserve the issue because defense counsel "never insisted that the trial court rule on her

[request to strike the suspected child pornography references] before allowing the mid-term sentence [to] be imposed.”

We find the People’s proposed application of the forfeiture rule to this particular case unpersuasive. The forfeiture rule seeks “to reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them” (*People v. Scott, supra*, 9 Cal.4th at p. 353) by “encourag[ing] prompt detection and correction of error” (*id.* at p. 351). Here, defendant did not need to renew his objection to advise the court of his concerns and provide the court the opportunity to address his contentions. It is settled that a statement in mitigation is a proper means of “challenging the information . . . contained in [a] probation report.” (*Ibid.*) Such a statement affords the trial court the opportunity to address or correct any errors, either before sentencing or during the hearing, thereby helping to “reduce the number of errors [initially] committed” (*Scott*, at p. 353) and “the number of unnecessary appellate claims” (*id.* at p. 351). Thus, the forfeiture rule does not justify foreclosing defendant’s claim of trial error.

## B

### *Defendant Was Not Required To Call A Witness To Challenge The Probation Report*

The People’s argument that defendant did not preserve his objection to the probation report on appeal because of his failure to call Detective Wysocki as a witness is also unavailing. The People rely on *People v. Chi Ko Wong* (1976) 18 Cal.3d 698 to support their contention. In *Chi Ko Wong*, the defendant challenged the sentencing procedures, arguing that “certain portions of the [probation] report ‘were without factual basis’ . . . and that there were all sorts of ‘allegations, unsupported, [and] unfounded’ in the probation report.” (*Id.* at p. 725.) The appellate court stated that defendant was foreclosed from raising such an issue on appeal, reasoning the defendant failed to “exercise his right to present any materials or call any witnesses to contradict, explain or otherwise rebut materials in the probation report.” (*Ibid.*) The appellate court noted that

a defendant is not relieved from “at least initiating procedures to establish the claimed unreliability of materials properly submitted for sentencing purposes.” (*Ibid.*)

Here, the People argue defendant should have called Detective Wysocki at the sentencing hearing to challenge the contents of the probation report. The People’s argument is misplaced, however, because it overlooks the fact that *Chi Ko Wong* required only that a defendant call a witness *or* present some other material to preserve a matter for appeal. (*People v. Chi Ko Wong, supra*, 18 Cal.3d at p. 725.) In this case, defendant properly challenged the probation report when he submitted his statement in mitigation to the court. Additionally, in the statement in mitigation, defendant explained how he tried to obtain access to the material characterized as suspected child pornography, thereby illustrating the initiative he took “to establish the claimed unreliability” of the allegation that he possessed thousands of images of child pornography. (*Chi Ko Wong*, at p. 725.) We do not find that defendant was required to do more at the sentencing hearing, such as confront Detective Wysocki, in order to preserve his objection for appeal.

## II

### *Defendant Was Not Prejudiced By The Trial Court’s Failure To Strike The References To Suspected Child Pornography From The Probation Report*

Defendant argues the trial court’s failure to strike the references to the suspected child pornography found on his computer from the probation report amounted to a violation of due process. It is true that “[a] court’s reliance, in its sentencing and probation decisions, on factually erroneous sentencing reports or other incorrect or unreliable information can constitute a denial of due process.” (*People v. Eckley* (2004) 123 Cal.App.4th 1072, 1080.) “ ‘Reliability of the information considered by the court is the key issue in determining fundamental fairness’ in this context.” (*Ibid.*, citing *People v. Arbuckle* (1978) 22 Cal.3d 749, 754-755.) For the sake of argument and since the photos are not in the record, we will assume the trial court erred by failing to strike the references to suspected child pornography in the probation report. This assumed error

could have potentially affected the sentencing proceeding in two ways: in the trial court's denial of probation and/or in the trial court's refusal to mitigate defendant's sentence. The question then becomes whether the failure to strike the references was prejudicial with regard to either of those sentencing determinations.

Because defendant contends his constitutional rights were violated by this alleged error, any potential prejudice must be judged under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705]. *Chapman* holds that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." (*Id.* at p. 24 [17 L.Ed.2d at pp. 710-711].) Even applying this heightened standard, we hold any possible error was harmless beyond a reasonable doubt.

#### A

##### *Denial Of Probation*

Defendant argues that it "is not evident from the record" whether the trial court's "consideration of the 'suspected child pornography and/or erotica' " influenced the court's sentencing decision. We disagree. Upon reviewing the record, we conclude that although the court ultimately followed the probation officer's recommendation, the inclusion of the references to the suspected child pornography in the probation report was harmless beyond a reasonable doubt with respect to the trial court's decision to deny defendant probation.

Under California law, the trial court is statutorily required to provide its reasons for imposing a particular sentence. (Pen. Code, § 1170, subd. (c).) Here, the trial court listed several reasons why it denied defendant probation. The trial court stated, "[t]he Court is denying [defendant's] application for [probation] for the following reasons: [¶] The nature, seriousness, and circumstances of this crime compared to other instances of the same crime. The vulnerability of the victim. The defendant . . . clearly inflict[ed] personal injury. [Defendant] [c]learly was an active participant. . . . [T]he defendant

demonstrated criminal sophistication, and he also clearly took advantage of a position of trust to commit the crime.” The court notably went on to state “that any one of the reasons stated for denying probation would, standing alone, be sufficient reason to justify and warrant a denial in this case.” It is clear that none of the stated reasons for denying probation was the suspected child pornography, indicating the references to suspected child pornography in the probation report did not affect the trial court’s decision and thus did not prejudice defendant.

Defendant argues that an appellate court may find that a source of information influenced a sentencing decision despite the sentencing court not explicitly listing that source as a reason for imposing a sentence. (*U.S. v. Corral* (9th Cir. 1999) 172 F.3d 714, 716-717 [holding the trial court “probably” relied on impermissible hearsay, despite not explicitly stating such reliance, thus warranting defendant’s resentencing].) While we acknowledge this may be true in some circumstances, we do not believe that to be the case here. Each of the trial court’s stated factors concerned the crime committed and the victim of the crime. The nature of the crime and characteristics of the victim are wholly distinct from the suspected child pornography found on defendant’s computer. Given this lack of association between the reasons stated and the suspected child pornography referred to in the probation report, we conclude, beyond a reasonable doubt, that the references to suspected child pornography in the probation report did not prejudicially influence the trial court’s decision to deny defendant’s request for probation.

## B

### *Imposition Of The Middle Term*

We likewise conclude that the references to suspected child pornography in the probation report did not prejudicially influence the court’s decision to impose the middle term. In discussing the aggravating factors, the court stated, “[t]he victim clearly was particularly vulnerable. The manner in the Court’s judgment indicates planning and sophistication. The defendant clearly took advantage of a position of trust. And in the

Court's judgment, he has engaged in conduct that indicates a serious danger to society." In mitigation, the court noted only one factor: defendant had "no prior criminal record." In weighing the aggravating and mitigating factors, the trial court sentenced defendant to the middle term of six years. Similar to the reasons stated for denying probation, the factors considered in imposing defendant's sentence did not include the suspected child pornography, and none of the aggravating or mitigating factors listed related to the child pornography accusation. As such, we are convinced beyond a reasonable doubt that the references in the probation report to suspected child pornography did not prejudicially influence the trial court's decision to impose the middle term.

#### DISPOSITION

The judgment is affirmed.

/s/  
Robie, Acting P. J.

We concur:

/s/  
Mauro, J.

/s/  
Hoch, J.