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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(San Joaquin)

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THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID MARTINEZ,

Defendant and Appellant.

C079045

(Super. Ct. No. MF037049A)

In November 2013, defendant David Martinez pled no contest to inflicting corporal injury to a spouse or cohabitant and was placed on five years of probation. In October 2014, the trial court found that defendant violated the terms of his probation and sentenced him to three years in prison. On appeal, defendant contends there is insufficient evidence to support the trial court's determination that he failed to satisfactorily participate in a domestic violence program. Defendant also contends his due process rights were violated when he was sentenced because the trial court misunderstood the basis for the violation. We disagree and affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

In September 2013, defendant assaulted the victim and damaged or destroyed property in the victim's home. Prior to these events, defendant and victim were in a relationship. In November 2013, defendant pled no contest to inflicting corporal injury to a spouse or cohabitant. The trial court sentenced defendant to five years of formal probation and required defendant to obey all laws, enroll in and attend a 52-week domestic violence program, and have no contact with the victim or come within 100 yards of the victim.

Beginning in early 2014, defendant and victim texted back and forth. Defendant started to show up at places the victim frequented. In February 2014, defendant and the victim briefly got back together before the victim attempted to end the relationship. The victim caught defendant "sneaking around" outside of his house, which the victim reported to defendant's parole officer. In early March, defendant accosted the victim in a grocery store where defendant got angry and accused the victim of cheating on him. On March 9, defendant appeared in the victim's home. Defendant told the victim to sit down in a chair or else he would hurt the victim. Defendant then broke into the victim's office and ransacked it. He took several items and some cash from the office and then left the house. Afterwards, the victim went to the police station and reported this incident.

Defendant was charged with robbery, violation of a restraining order, and two counts of stalking. Defendant was also ordered to show cause why probation should not be revoked. A hearing was held before a magistrate on October 30, 2014, that served as both a preliminary examination for the new charges and a hearing on the order to show cause. The magistrate found reasonable and probable cause with regard to the charges brought against defendant. The magistrate also found by a preponderance of the evidence that defendant violated the terms and conditions of his probation in that he failed to stay away from the victim. The prosecution ultimately dismissed the new charges in lieu of sentencing on the violation of probation.

Defendant's sentencing took place before a different judge on February 10, 2015. The court determined that defendant's probation would be terminated and sentenced defendant to three years in prison. The court made its determination pursuant to Penal Code section 1203.097, subdivision (a)(12).<sup>1</sup> Specifically, the court found that defendant "has not performed satisfactorily in the domestic violence program." The court based this determination on a supplemental probation report that stated defendant had attended only eight out of the 52 total classes and that defendant had been terminated from the program after his fourth absence. The information in the report was relayed from the domestic violence counseling program to a probation officer over a telephone call. The court had also previously been advised by a probation officer that defendant had violated probation by failing to attend classes. Regarding program participation, defendant contested the probation report and was granted a continuance to subpoena records from the counseling program, but the records were not discussed at sentencing nor were they included in the record.

The court also found that defendant has "not complied with several conditions of probation. First, attending the classes as ordered. [¶] Second, the criminal protective order. [¶] And third, obeying all laws. [¶] Fourth, I find that he's engaged in criminal

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<sup>1</sup> Penal Code section 1203.097, subdivision (a)(12) provides as follows: "If it appears to the prosecuting attorney, the court, or the probation department that the defendant is performing unsatisfactorily in the assigned program, is not benefiting from counseling, or has engaged in criminal conduct, upon request of the probation officer, the prosecuting attorney, or on its own motion, the court, as a priority calendar item, shall hold a hearing to determine whether further sentencing should proceed. The court may consider factors, including, but not limited to, any violence by the defendant against the former or a new victim while on probation and noncompliance with any other specific condition of probation. If the court finds that the defendant is not performing satisfactorily in the assigned program, is not benefiting from the program, has not complied with a condition of probation, or has engaged in criminal conduct, the court shall terminate the defendant's participation in the program and shall proceed with further sentencing."

conduct in that a magistrate found beyond a preponderance that he [committed robbery and violated a protective order.]” The court had “concerns then about the victim’s safety and also concern that the defendant will not obey the Court’s criminal protective order.” Thus, the trial court terminated probation and sentenced defendant to three years.

## DISCUSSION

### I

#### *The Trial Court’s Finding On The Domestic Violence Program Is Supported By Substantial Evidence*

Defendant contends that the trial court’s finding that defendant failed to participate satisfactorily in the domestic violence program violated his due process rights because it was not supported by substantial evidence. Specifically, defendant argues that the supplemental probation report the trial court relied on was unreliable. We disagree.

On review for substantial evidence, we must “examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--evidence that is reasonable, credible and of solid value . . . . [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” (*People v. Kraft* (2000) 23 Cal.4th 978.) A finder of fact “may not rely upon unreasonable inferences, and . . . ‘[a]n inference is not reasonable if it is based only on speculation.’” (*People v. Hughes* (2002) 27 Cal.4th 287, 365.) “Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the [finder of fact].” (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.)

Trial courts have broad discretion to consider relevant evidence at sentencing. (*People v. Towne* (2008) 44 Cal.4th 63, 85.) Probation reports are among the permissible sentencing data the court may consider. (*People v. Baumann* (1985) 176 Cal.App.3d 67, 81.) Courts may consider hearsay statements contained in probation reports to make

findings that guide the court's sentencing decision. (*Ibid.*; see also *People v. Otto* (2001) 26 Cal.4th 200, 212-213.)

The trial court properly relied on the supplemental probation report, which showed that defendant had attended only eight out of the 52 classes of the program. This report was also consistent with prior information that the court received indicating that as of May 2014 defendant already had four absences and was in violation of probation. Thus, we cannot say that the trial court's determination was "based only on speculation." (*People v. Hughes, supra*, 27 Cal.4th at p. 365.) Defendant also points to some minor internal inconsistencies in the probation report regarding the date of enrollment as evidence of unreliability. Even though there are some minor internal inconsistencies, on review for substantial evidence, we presume the trial court reconciled any inconsistencies in making its determinations. We conclude there was substantial evidence to support the trial court's determination that defendant had failed to perform satisfactorily in the domestic violence program.

## II

### *Defendant's Due Process Claim Was Forfeited*

Defendant argues that his due process right was violated because the sentencing court misunderstood the basis for the violation of probation. Defendant refers specifically to the sentencing court's statement that defendant "engaged in criminal conduct in that the magistrate found beyond a preponderance" that defendant had committed robbery and contempt, when in actuality the magistrate found probable cause for those offenses. Because defendant did not object to the trial court's characterization of the magistrate's findings at the sentencing hearing, defendant has forfeited this argument.

### III

#### *Defendant Did Not Receive Ineffective Assistance Of Counsel*

Defendant argues that he did not receive effective assistance of counsel because his attorney did not object to the sentencing court's characterization of the magistrate's findings described above. We disagree.

“Counsel is unconstitutionally ineffective if his performance is both deficient, meaning his errors are ‘so serious’ that he no longer functions as ‘counsel,’ and prejudicial, meaning his errors deprive the defendant of a fair trial.” (*Maryland v. Kulbicki* (2015) 577 U.S. \_\_\_ [193 L.Ed.2d 1, 2].) “A defendant claiming ineffective assistance of counsel under the federal or state Constitution must show both deficient performance under an objective standard of professional reasonableness and prejudice under a test of reasonable probability of a different outcome.” (*People v. Ochoa* (1998) 19 Cal.4th 353, 414.) “Judicial scrutiny of counsel’s performance must be highly deferential.” (*Strickland v. Washington* (1984) 466 U.S. 668, 689 [80 L.Ed.2d 674, 694].)

Here, defense counsel’s performance was not deficient. One of the factors that weighed heavily in the trial court’s decision to sentence defendant to prison was concern for the victim’s safety and the defendant’s continual violation of the court’s protective order. Whether the court characterized the magistrate’s findings as being established by a preponderance or probable cause, the underlying considerations were the same -- defendant’s actions had endangered the victim. Defense counsel likely realized this was the crux of the issue and could have reasonably concluded that any objection to the mischaracterization would have been fruitless since the standard was immaterial and since that reason was only one of several reasons why the court ultimately sentenced defendant to prison.

DISPOSITION

The judgment is affirmed.

/s/  
Robie, Acting P. J.

We concur:

/s/  
Mauro, J.

/s/  
Hoch, J.