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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

BRYAN PATRICK SILVA,

Defendant and Appellant.

D059933

(Super. Ct. No. SCD229100)

APPEAL from a judgment of the Superior Court of San Diego County, Laura H. Parsky, Judge. Affirmed.

Bryan Silva appeals from a judgment convicting him of residential burglary, receiving stolen property, and misdemeanor sexual battery. He argues there is insufficient evidence to support the jury's finding of sexual intent for the sexual battery offense. He also asserts the trial court abused its discretion in declining to adopt the probation officer's recommendation that he be referred for a diagnostic evaluation prior to sentencing. We reject these contentions and affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

The crimes in this case occurred after defendant and a friend (Xavzier Paschal) joined a small group of people drinking late at night at the beach. Defendant and Paschal then followed the group to the driveway of the residence where the group was staying. Several hours later, defendant and Paschal returned and entered the residence while the occupants were sleeping. The people staying at the residence that night included sexual assault victim B, Nathalie Brilliant, Gabriel Kelley, Andrew Price, David Tittle, and Amanda Wellcome. While Paschal was in Tittle's bedroom stealing property, defendant sexually assaulted B who was sleeping on the living room couch. For the sexual assault, defendant was charged with sexual penetration with a foreign object of an unconscious person and with misdemeanor sexual battery. The jury deadlocked on the sexual penetration offense and convicted him of the sexual battery offense.

At trial, B and the other people at the residence testified to describe the events that night. On the evening of August 10, 2010, B and her friends were having a barbecue at the home where Brilliant and Tittle were living. About 11:00 p.m., B, Brilliant, Kelley, and Price walked to the nearby beach. While they were drinking beer at the beach, defendant and Paschal (whom B and the others had not previously met) joined the group.

B had drunk half a glass of wine with her dinner, and at the beach she drank about three beers. She was feeling "a little bit" tipsy. Defendant and Paschal were smoking marijuana and drinking vodka.

While B and her friends were conversing with defendant and Paschal, defendant told B about his job at a restaurant and B joked about him getting her a job there. About 2:00 a.m., B and her friends walked back to Brilliant's home. B was the last person to enter the house, and when she turned to close the door she noticed defendant and Paschal were in the driveway. She asked them what they were doing there. Defendant stated he was concerned she was going to mention "something to someone" at his place of work and she should not do so. B told him she was "just kidding about all that" and not to worry, and she closed (but did not lock) the door. About 20 minutes later, B went to sleep on one of the couches in the living room.<sup>1</sup>

At about 4:00 a.m., Tittle woke up and saw someone (later identified as Paschal) standing in his bedroom. Thinking it might be Price, Tittle said "Excuse me." Paschal "froze up, got really tense," slowly moved towards a curtain (that served as a door), and then "took off running." Tittle saw that his tip money (totaling about \$240) was gone from his desk, and he ran after Paschal.

Meanwhile, B was sleeping on the couch in the living room. She was wearing shorts, underwear, a shirt, and a bra, and was covered with a blanket. B testified she is a "very heavy sleeper" and alcohol consumption would likely make her sleep even more deeply. According to B, she woke up to find someone (later identified as defendant) crouched over at the end of the couch putting his fingers in her vagina. It "took [her] a while to realize what was going on"; she "was still sleeping and starting to come to[]; and

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<sup>1</sup> Price was sleeping on a second couch in the living room.

she was "kind of frozen and confused" and trying to figure out what was happening. She lifted her head and said something.

Meanwhile, Tittle, who was running down the hallway after Paschal, saw defendant crouched down between the two living room couches. Paschal knocked something off the kitchen wall while he was running. Defendant stood up and ran out the front door, followed by Paschal. B heard the noise made by Paschal, and she saw Paschal run through the living room and out the front door. B immediately jumped up, followed Paschal out the door, and chased him down the street.

Tittle ran to his room to grab his clothes and then ran outside. He saw a car driving "really fast" with its lights off. He chased the car so he could provide a description of the vehicle to the police. B and Tittle both called 911. B was crying and hysterical about what had occurred.<sup>2</sup>

A few minutes after receiving a radio call about the incident, Officer Omar Sinclair spotted a car matching the description of the suspect vehicle. At first the driver of the vehicle drove away at a high rate of speed, but after Sinclair activated his car's lights and sirens, the driver pulled over. Officer Sinclair broadcast that he was conducting a "felony hot stop" and held the men at gunpoint until other officers arrived. At trial, Officer Sinclair identified defendant as the driver and Paschal as the passenger.

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<sup>2</sup> The witnesses, including B's friends and a police officer, described B as "violently, angrily crying"; "crying and hysterical"; "more upset than anyone else"; and "very emotional and crying."

When stopped by the police, defendant stated, "I know why you stopped me." Officer Sinclair testified defendant appeared to have been drinking because his breath smelled like alcohol, and he appeared to be "moderately intoxicated." The police found a bottle of vodka in the car. However, defendant was not "falling down drunk" or nonresponsive; he was not having difficulty walking; he was not slurring his words; and he did not appear to have a hard time controlling himself. Although defendant was not fully listening to what Officer Sinclair was telling him to do, he was compliant, coherent and able to understand commands.<sup>3</sup>

During a search of the car and the suspects, the police found numerous items that had been stolen from the residence, including B's purse and cell phone; Kelley's wallet and cell phone; Price's cell phone, driver's license and debit card; Tittle's skateboards; cash that matched the denominations and amount of Tittle's tip money; and a computer and iPhone case belonging to another roommate.<sup>4</sup> Also, when Paschal was being chased by B, he dropped a computer and an iPod that had been taken from Brilliant's room; B retrieved these items.

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<sup>3</sup> When testifying that defendant was not listening, Sinclair explained that when he told defendant to "open up the car with his left hand[,] [he] immediately threw the keys out the door and stepped out without any instruction."

<sup>4</sup> At a curbside lineup at the time of the arrests, Tittle and B identified Paschal as the robber who was in Tittle's bedroom, but they were not able to identify the sexual assault perpetrator. B identified Paschal and defendant as the two men who were with her and her friends at the beach earlier that night.

At about 7:30 a.m. on August 11, the police conducted a videotaped interview of defendant. During the course of the interview, defendant provided several different versions of what occurred, but eventually admitted he went inside the house and touched B while Paschal was stealing the property.<sup>5</sup> However, he claimed he did not digitally penetrate her, but rather he was "rubbing her butt" over the blanket.

A SART examination of B conducted at 7:00 a.m. showed "some redness and tenderness" to her genitalia, which was consistent with the sexual assault she described. On cross-examination, the SART nurse acknowledged that B reported having had sexual intercourse (with condom use) two days earlier, and the redness and tenderness could also be consistent with the intercourse. DNA testing showed no detection of B's DNA on defendant's hands or fingernails, and no DNA from defendant in B's vaginal area.

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<sup>5</sup> At the commencement of the interview, defendant told the police he never entered the residence. He stated he merely went to his car to wait for Paschal who wanted to keep talking to one of the females; he passed out in the car because he was so drunk; and Paschal suddenly arrived with the stolen items saying he was being chased. Later, he told the police he went to the driveway of the residence and served as a lookout for Paschal. Finally, he acknowledged he entered the residence, and then admitted that he touched B.

As the interview unfolded, defendant repeatedly told the police he could not remember pivotal details (such as whether he went inside the house, and what he did inside the house), and stated he drank "a lot" that night; he was "really intoxicated"; he "blacked out" because he had drunk "so much"; and the "weed and alcohol mixture . . . really played its effect." When the police confronted him about his ability to remember numerous details about his conduct but not whether he went into the house or what he did inside the house, he responded "selective memory."

### *Defense*

In closing arguments, defense counsel argued defendant was "drunk out of [his] mind"; he had no intent to steal; the DNA evidence showed he did not put his fingers in B's vagina; B did not accurately perceive what occurred; and the evidence did not establish that he touched B's buttocks with sexual intent. To support the challenge to B's perceptions, a defense psychiatrist testified a person's perceptions can be affected if the person has mild alcohol intoxication and only two to three hours of sleep, particularly if the person is coming out of a deep sleep.

### *Jury Verdict and Sentence*

Defendant was charged with burglary with allegations that it was an inhabited dwelling and a person other than an accomplice was present (count 1); receiving stolen property (count 2); foreign-object sexual penetration of an unconscious victim (count 3); and misdemeanor sexual battery (count 4). The jury found him guilty of the charged offenses and found the charged allegations true, except it deadlocked on the sexual penetration offense (which was thereafter dismissed). The court sentenced him to a two-year prison term for the residential burglary offense; stayed the sentence on the receiving stolen property offense; and imposed a consecutive six-month jail sentence for the sexual battery offense.

## DISCUSSION

### I. *Sufficiency of the Evidence of Sexual Intent*

The count 4 sexual battery offense of which defendant was convicted requires the touching be "for the specific purpose of sexual arousal, gratification, or sexual abuse." (Pen. Code, § 243.4, subd. (e)(1).)<sup>6</sup> Defendant argues the record does not support the jury's finding that he touched the victim with sexual intent.

When reviewing a challenge to the sufficiency of the evidence, we consider the whole record in the light most favorable to the judgment to determine whether there is substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) If the circumstances reasonably justify the trier of fact's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. (*Id.* at p. 793.) Because intent can seldom be proved by direct evidence, it may be inferred from the circumstances. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 662.)

Because the jury deadlocked on the sexual penetration charge, we will assume for purposes of our analysis that its finding of misdemeanor sexual battery was based on defendant's admission that he rubbed the victim's buttocks. The context of this conduct amply supports a finding of sexual intent. The evidence showed defendant was inside the

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<sup>6</sup> Subsequent statutory references are to the Penal Code.

residence in the early hours of the morning, uninvited, and without the knowledge of the sleeping victim. Given these circumstances, the jury could readily deduce there was no rational explanation for him to rub an intimate body part such as the buttocks other than for a sexual motivation.

To support his argument of no sexual intent, defendant cites the evidence showing he was highly intoxicated. Evidence of voluntary intoxication may be used to show the defendant's mental state was so impaired that he or she did not entertain the specific mental state required for commission of the crime. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1118, 1125, 1131; *People v. Marshall* (1996) 13 Cal.4th 799, 848.) However, some level of impairment from drug or alcohol consumption does not necessarily establish an intoxication defense; rather, the impairment must be severe enough that it affects the defendant's state of mind. (See *People v. Marshall, supra*, 13 Cal.4th at p. 848.) "Evidence of intoxication, while legally *relevant*, may be factually unconvincing. '[A]s with any evidence, the jury may give this testimony whatever weight it deems appropriate in light of the evidence as a whole.'" (*People v. Mendoza, supra*, 18 Cal.4th at p. 1134.)

There is nothing in the record that compelled the jury to find defendant was so intoxicated that he did not formulate sexual intent. Notwithstanding his alcohol consumption, defendant was able to flee the scene, drive away, and pull his vehicle over in response to the police siren. When defendant was arrested shortly after the assault, the officer noticed he was intoxicated, but characterized his intoxication as moderate and stated he was coherent and able to control himself. From this evidence, the jury could

infer that although defendant was likely under the influence of alcohol, the influence did not rise to the level of obviating his formulation of sexual intent.

Defendant asserts the videotaped police interview held several hours after the incident showed he was highly intoxicated, and thus he must have been so severely intoxicated at the time of the offense as to negate sexual intent. We have viewed the videotape provided on appeal, and are not persuaded. Notwithstanding his consumption of intoxicants and his repeated claims to the police that he could not remember what occurred, defendant's statements to the police were rational and highly detailed. Further, it is apparent defendant's claimed inability to remember during the interview was designed to minimize his culpability, and as the interview unfolded he gradually provided a fuller description of his conduct that was consistent with the charges against him. Indeed, when the police asked defendant how he could remember numerous details about his conduct that night but then claim not to remember if he went into the house or what he did inside the house, he told them this was "selective memory." (See fn. 5, *ante*.) Defendant's demeanor during the videotaped interview did not compel a finding of lack of sexual intent due to intoxication.

Defendant also cites a statement he made to the probation officer that he merely touched the victim's buttocks to wake her up and ask her where Paschal was. He did not provide this explanation to the police, and his statement to the probation officer was not evidence presented to the jury. In any event, the jury would not have been required to credit this claim of nonsexual intent, particularly since he elected to touch the victim's buttocks rather than a less intimate body part such as her shoulder, back, or leg.

Defendant further cites the facts that he and the victim were fully clothed during the incident, he made no effort to undress himself or the victim, and he made no sexual commands. Although these were relevant factors the jury could consider, they do not defeat the sufficiency of the evidence to support the sexual intent finding based on defendant's act of rubbing the sleeping victim's buttocks during the burglary.

## II. *Decision Not To Order Diagnostic Evaluation*

Defendant argues the trial court abused its discretion by failing to follow the probation officer's recommendation that he undergo a section 1203.03 diagnostic evaluation before the court made its sentencing decision.

### *Background*

The probation report includes the following information. Defendant, age 21, told the probation officer that after high school he attended San Diego City College with the intent of majoring in history, and he hoped to return to school in the future.<sup>7</sup> He had a stable employment history in the restaurant industry since 2008, although he had become unemployed about five months before the offenses. He reported a "normal" sexual relationship with his ex-girlfriend. A records search showed no prior criminal history, except for one altercation with a girlfriend that did not result in a conviction.

Regarding substance abuse, defendant told the probation officer he had "an addictive personality which contributed to his addiction to alcohol"; he consumed " 'everything' " related to alcohol; and he "was often pressured into drinking alcohol." He

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<sup>7</sup> In contrast, during the police interview, defendant stated he was a junior at the University of California, San Diego majoring in sociology.

also smoked marijuana.<sup>8</sup> He now realized drugs and alcohol have impaired his judgment. He had never participated in substance abuse treatment; he felt treatment would help him; and he was currently looking into treatment programs.

Providing his version of the offenses to the probation officer, defendant said he and Paschal were invited into the residence; Paschal disappeared into a bedroom with one of the females; defendant felt uncomfortable being in a residence with strangers; he entered one of the bedrooms and touched the victim's buttocks in an effort to wake her and ask where Paschal was so he could tell him they should leave; and he ran from the residence when he heard a man's voice say, "Hey!" Defendant denied stealing anything, and claimed it was Paschal who did this.

The probation officer did not make a specific recommendation as to whether the court should select imprisonment or a probation grant, but rather recommended that defendant first receive a section 1203.03 diagnostic evaluation. The probation officer noted that based on the residential burglary conviction, defendant was presumptively ineligible for probation, but stated that circumstances supporting probation included his young age and lack of a prior criminal record. On the other hand, factors favoring a denial of probation included the vulnerability of the sleeping victims, defendant's active participation in the crimes, his attempts to blame his intoxication and his codefendant for his conduct, and his lack of remorse and minimization of his conduct.

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<sup>8</sup> Defendant said he smoked marijuana primarily on weekends; he had a medical marijuana card to help him with insomnia, loss of appetite, and knee pain; and although he was not addicted to marijuana he acknowledged his recreational use of the drug may have contributed to his legal problems.

Setting forth her recommendation for a diagnostic evaluation, the probation officer stated:

"Although the Instant Offense is the defendant's first conviction, the circumstances of this offense were egregious enough for this officer to consider a state prison commitment. This officer did not find that the Burglary was a crime of opportunity. It was a calculated act to enter into the residence to steal from the victims. However, this defendant took it one step further and sexually violated a sleeping victim. *This officer is extremely concerned over the defendant's continued potential risk to the community if he was not imprisoned.*

"Therefore, in the interests of justice, this officer recommends that the defendant be temporarily placed in the California Department of Corrections and Rehabilitation (CDCR) for a PC1203.03 Diagnostic Study. *This officer would like to hear from the CDCR experts as to whether the defendant continues to pose a threat to the community or if he could be handled at the local level through a grant of probation.*" (Italics added.)

The probation officer also stated that if the court decided to send defendant to prison, the recommended sentence was the four-year middle term for the residential burglary offense and a stayed sentence for the receiving stolen property offense.

Concerning the selection of the middle term, the probation officer reasoned defendant's lack of prior record was directly balanced by the victims' vulnerability.

In contrast, the prosecutor disagreed with any suggestion that probation should be considered, and argued defendant should receive an upper term six-year prison sentence for the residential burglary, and a consecutive six-month jail sentence for the sexual battery. The prosecutor asserted there were no circumstances overcoming the presumption against a probation grant based on the residential burglary. The prosecutor stated the residential burglary was planned by defendant and Paschal; the sleeping victims were particularly vulnerable; the circumstances of the burglary were aggravated

by defendant's impulsive commission of a sexual assault; defendant was an active participant in the crimes and committed the sexual assault entirely on his own; the sexual assault inflicted emotional injury on the victim; the facts of the crimes outweighed defendant's youthfulness and lack of significant prior criminal record; and defendant showed no remorse and was in "complete denial" about his conduct.

Victim B also addressed the court, stating defendant's sexual assault has "deeply and permanently affected [her] life"; she is "plagued with feelings of helplessness" at bed time; the incident "continues to haunt [her] dreams"; and it has affected her ability to trust people. She stated, "Being a victim of theft would have been bad enough, but to be violated in this manner is almost more than I can bear."

Defense counsel requested that defendant be granted probation and placed under monitored, at-home supervision. Defense counsel argued the crime was out of character for defendant; he had expressed remorse; he was not a danger to others; his background and personality warranted a rehabilitation program; and he should not be imprisoned given his lack of prior record and youthful age. Defense counsel noted defendant could be punished for the sexual battery by a six-month jail sentence, and urged the court not to consider the alleged sexual penetration charge as to which the jury deadlocked.

Further, if the court was considering denying probation, defense counsel requested that the court first "explore defendant's alcohol problem" through a diagnostic study before making its decision. Defense counsel noted it was unclear to the probation officer whether defendant continued to pose a threat to society, and the probation officer was

unable to make a recommendation as to whether probation or prison was the appropriate sentencing choice.

Defendant submitted a letter to the court stating he accepted "full responsibility" for his actions; he regretted what he did; and he was "truly sorry." He asked the court to consider, not as an excuse but as a contributing factor, his "lifelong addiction to drugs and alcohol," and stated he wanted to "break this cycle" and he was certain a rehabilitation program would put him on the path to recovery so could begin living as a productive member of society. Defendant also submitted numerous letters of support from family and friends requesting a low sentence or probation. Defendant's supporters stated he was a highly responsible person, a hard worker, and planning to pursue military service or higher education; his problems were caused by his alcohol consumption; he was very remorseful and not a threat to society; and he needed rehabilitation, not incarceration.

The court declined to grant probation, to place defendant in the home detention program, or to order a diagnostic study. The court stated there was no need for a diagnostic study to explore defendant's alcohol problem because it had the information it needed to make a sentencing disposition.<sup>9</sup> Further, the court explained it was respectful

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<sup>9</sup> The court also responded to defense counsel's offer of proof from Paschal, who had pled guilty and received probation conditioned on a one-year jail sentence. Defense counsel proffered that Paschal would tell the court that he was the one who went in and decided to steal the property and defendant just "went along with it." The court stated it did not need this testimony because it had enough information from the trial evidence to evaluate this claim, and it noted Paschal's credibility was suspect because he had pled guilty and no longer faced any penal consequences for his conduct.

of the jury's verdicts and was making its decision solely on the three counts of which defendant was convicted.

Concerning the request for probation, the court reasoned that despite defendant's youth and lack of prior criminal record he should not receive probation because he committed a residential burglary which made him presumptively ineligible for probation; the victims were at home at the time of the burglary; and he had not shown unusual circumstances that would overcome his presumptive ineligibility.

The court selected the low term of two years for the residential burglary. The court explained it had carefully considered the victims' vulnerability because they were at home and asleep, but it selected the low term due to defendant's youth and lack of prior criminal record. The court stayed the sentence for the receiving stolen property count under section 654. The court imposed a six-month consecutive jail sentence for the misdemeanor sexual battery count, finding it involved a separate intent and objective and the victim was particularly vulnerable.

#### *Analysis*

Defendant asserts the trial court abused its discretion in declining to order a diagnostic study because there was little information about his drinking problem; he had no criminal history including no sexual crimes; and the study could have provided information about his drinking problem and the appropriate sentencing resolution to deal with the issue.

Under section 1203.03, a trial court may order that a defendant convicted of a felony be temporarily placed in a Department of Corrections diagnostic facility for up to 90 days "if [the court] concludes that a just disposition of the case requires such diagnosis and treatment services . . . ." (§ 1203.03, subd. (a).) The diagnostic placement allows the court "to obtain social and psychological information relevant to sentencing[.]" and " 'is warranted where the court concludes a diagnostic study is essential to a just disposition of the case.' " (*People v. Myers* (1984) 157 Cal.App.3d 1162, 1169.) The court abuses its discretion only when the ruling exceeds the bounds of reason, and the mere fact the court exercises its discretion in a manner different from that suggested or requested does not show an abuse of discretion. (*Ibid.*) On appeal, we draw all reasonable inferences in favor of the trial court's sentencing decision. (See *People v. King* (2010) 183 Cal.App.4th 1281, 1323; *People v. Stuart* (2007) 156 Cal.App.4th 165, 179.)

Defendant has not shown that the court abused its discretion in concluding it did not need a diagnostic study to make a just disposition of the case. Defendant's substance abuse problem was reflected in the facts of the crime, his statements to the probation officer, and the statements in the letters to the court from defendant and his parents. Thus, the court was not required to order a diagnostic study to determine if he had a substance abuse problem.

Further, probation is an act of leniency, not a right, and a trial court has broad discretion when deciding whether to exercise this leniency. (*People v. Birmingham* (1990) 217 Cal.App.3d 180, 185; *People v. Groomes* (1993) 14 Cal.App.4th 84, 87; *People v. Stuart, supra*, 156 Cal.App.4th at pp. 178-179.) Defendant's residential

burglary conviction made him ineligible for probation unless there were unusual circumstances warranting a probation grant. (§ 462, subd. (a) [probation shall not be granted for residential burglary conviction "[e]xcept in unusual cases where the interests of justice would best be served if the person is granted probation"].) An unusual case can be shown by such factors as: the crime involved substantially less serious circumstances with respect to the probation limitation than the typical case; the defendant's participation involved great provocation, coercion or duress; the defendant committed the crime because of a mental condition; and the defendant is youthful or aged and has no significant prior criminal record. (Cal. Rules of Court, rule 4.413.) However, the existence of these factors does not compel an unusual case finding; rather, the court has broad discretion to determine whether the ineligibility presumption has been overcome and its decision cannot be overturned unless it " 'is so irrational or arbitrary that no reasonable person could agree with it.' " (*People v. Stuart, supra*, 156 Cal.App.4th at pp. 178-179.)

The court was aware of such relevant factors as the circumstances of the offense and defendant's age, prior criminal record, and use of alcohol, and the defense was given a full opportunity to present its position concerning the unusual case evaluation. The court's ruling that the presumption had not been overcome is supported by the circumstances of the offense, including that defendant engaged in highly invasive conduct by entering a residence in the early morning hours and then touching one of the sleeping victims in a sexual manner, and defendant's purposeful behavior (including fleeing the scene and driving a car) reflected that he was aware of what he was doing

notwithstanding his intoxication. Further, when interviewed by the probation officer, defendant said he was invited into the residence notwithstanding compelling evidence to the contrary and he refused to acknowledge any personal culpability.

Defendant has not shown a diagnostic study might reveal additional unusual circumstances that were essential to the court's assessment as to whether the probation-ineligibility presumption had been overcome. Although the probation officer recommended a diagnostic study to evaluate defendant's dangerousness, the record does not show the court abused its discretion when concluding it had enough information to make its discretionary choice between probation and imprisonment.

Further, the court selected the lowest prison term possible for first degree residential burglary. (§§ 460, 461 [first degree burglary punishable by prison term of two, four or six years].) Thus, defendant cannot complain that a diagnostic study might reveal additional information supporting a lower prison term.

Defendant argues the court's abuse of discretion is reflected in its statement that the probation report did not provide "a clear basis for the [diagnostic study] recommendation other than that it appeared that the probation officer felt unprepared to make a recommendation for sentence." Defendant asserts the court improperly viewed the probation officer as "unprepared," which was contrary to the thorough and detailed analysis in the probation report. Read in context, the court did not say the probation officer was unprepared, but merely stated its view that the probation report did not adequately explain why the recommended diagnostic evaluation was warranted. The court was entitled to make this assessment.

Defendant has not shown the court abused its discretion when declining to order a diagnostic study.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.