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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL MANLEY,

Defendant and Appellant.

D060408

(Super. Ct. No. SCN284558)

APPEAL from a judgment of the Superior Court of San Diego County, Kimberlee A. Lagotta, Judge. Affirmed.

Daniel Manley appeals his sentence following a guilty plea to two counts of committing lewd acts upon a child under the age of 14. (Pen. Code, § 288, subd. (a).)¹ Manley contends the trial court abused its discretion by not granting him probation and by ordering him to pay an administrative screening fee. (§ 1463.07.) We determine that

¹ All further statutory references are to the Penal Code unless otherwise specified.

imposition of the fee was unauthorized, and strike it. In all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Manley was charged in a felony complaint with having committed five counts of lewd acts upon a child under the age of 14 between the years of 1993 and 1997. (§ 288, subd. (a).) Manley pled guilty to two counts of the crime and admitted tolling allegations in exchange for an indicated maximum sentence of eight years in prison, and a dismissal of the balance of the complaint.

On June 6, 2011, the probation officer conducted an interview with Manley. In that interview Manley noted that the incidents in question took place over 15 years ago, when "'child molestation did not have the same stigma as today.'" According to Manley, historically the young looked to the older members of society to teach them about sex and, at the time, he saw nothing wrong with what he was doing. Manley admitted digitally manipulating the victim, and "'interpreted'" the victim as wanting to be sexually active. He denied being sexually aroused when manipulating the victim's clitoris. Manley claimed to now understand that his actions were "'tremendously inappropriate,'" but he was surprised that a criminal complaint was filed.

The probation officer prepared a report for the trial court recommending that it deny probation and sentence Manley to prison for eight (8) years. The report stated Manley was potentially eligible for probation, assuming the court first complied with the requirements of section 1203.067, subdivision (a). The probation report then delineated

the circumstances under California Rules of Court,² rule 4.414 that supported a grant of probation and those that supported denial of probation. (§ 1202.7; rule 414.)

Manley's counsel filed a sentencing statement with the trial court which responded to the probation report, most particularly its conclusion that "'although the defendant pled guilty, and admitted that he molested [the victim,] he has not accepted responsibility for his actions.'" The defense statement argued Manley had accepted responsibility for his actions, as he pled guilty at an early stage of the proceedings, relieving the victim from testifying, and had enrolled in a sex-offender treatment program. Defense counsel encouraged the court to place Manley on formal probation:

"He is 62 years old and has no prior record. He admitted guilt early in the proceedings and has already begun participation in sex offender treatment His conduct, although serious, occurred 15 years ago and there is nothing to suggest that he has ever or would ever re-offend. He poses no threat to the victim and has had no contact with her whatsoever. He is in the process of being divorced by the victim's mother. Mr. Manley now spends his days caring for this [*sic*] two elderly parents who are both suffering from Alzheimer's disease and dementia." (Capitalization omitted.)

On July 21, 2011, the court held a sentencing hearing. The court began the hearing by stating it had reviewed both the probation officer's report and Manley's counsel's sentencing statement. The court stated it "did put a lid of eight years in State prison, and I'm prepared to abide by that indication." It then entertained argument from counsel, and took testimony from the victim and her mother.

² All further rule references are to the California Rules of Court.

Manley's counsel again argued that his client had accepted responsibility for his act, as evidenced by his early plea and enrollment in sex offender therapy. He characterized Manley's sexual crimes as ones of "opportunity," as the relative-victim lived in his house at the time the crimes occurred. Counsel argued that while the acts themselves are unforgivable, "this was not somebody who was preying upon a stranger or seeking that out," and there was not a risk Manley would reoffend. Defense counsel concluded:

"I think that Mr. Manley is an appropriate candidate for probation. He's never served any custody in his life. The court could give him custody as part of that condition. He certainly is ordered to register, carrying around two strikes now. And just even local time sentence is quite punitive and would be a dramatic change in his life, and, you know — so I'd ask the Court to consider that, as someone who stands before you, . . . 62 years of age with no prior record, dealing with an event that occurred some 15 years ago, and bearing in mind that he did enter a plea, he did accept responsibility, and he did — in doing so he prevented [the victim] from having to testify to the exact same Court."

The victim then testified briefly, stating: "I know it took me a very long time to report the different threats and things like that with me not supposed to have been telling, when it's already passed. I even seen the other family members here today. People that you think love you, you know. And then to be called a bit of circumstances and opportunity is like" Unable to continue, the victim's mother spoke on her behalf:

"I would like to say how much this has impacted her life. She has moved locations at least six times in the last few years. She's had a hard time holding down a job. She's currently working someplace where she thought she'd never have any contact with men, and someone came in and put two little girls on their lap. Now she is feeling like she needs to leave San Diego. This was not a crime of something that just happened a few times. It happened repeatedly. It was something that never should have happened. And it has destroyed her life.

"She's going in [*sic*] therapy. She's trying to do everything that she can to get past these things that were done to her and robbed her of her childhood. It happened over a many-year period, and I am sorry that I believed Mr. Manley when he told me that it only happened a few times and that — that he was going through therapy and to please forgive him. I know much more of the facts and the details now, and everything that he said was a lie.

"He woke up one morning and told me how it was all her fault and she wanted it. And I can't even look at the man. He doesn't deserve to be in the public. He has destroyed my daughter's life, my family's life, and there's just — I don't really know that there's anything further that I can say."

The Prosecutor elaborated upon the extent of the harm Manley inflicted upon the victim and argued against a grant of probation to defendant.

At the conclusion of the hearing the court the court reiterated that it had reviewed the probation officer's report, the facts and circumstances behind the criminal offenses, as well as the argument in mitigation from the defense. It stated, "At the time that we looked at this case, I indicated this was an eight-year lid, but I also indicated that I thought eight years was appropriate. Absent nothing to the contrary, that is my intent, and I'll tell you why."

The court then stated that Manley had committed sexual molestation of the victim for a four-year period, and had taken away her innocence and her ability to enjoy her childhood — and it can never be given back. It noted that although Manley faces a strict state prison commitment, the victim faces a lifetime of damage and pain and "therefore, the punishment in this case needs to reflect both the conduct and the impact on this young girl."

"So for that reason, I begin first by analyzing whether or not the defendant is a suitable candidate for probation. I find that the circumstances

supporting a denial of probation outweigh those supporting the grant of probation. Although the defendant is a 62-year-old gentleman with no prior record, the following circumstances impact the Court's decision.

Rule 4.421(a)(3), the victim was particularly vulnerable. It is more of an aggravant, in the Court's mind, that this victim was an individual who was in his home. He was in a position of trust. He was in a position of care, so to speak, as the companion of her mother, and he took advantage of the victim. Rule 4.421(a)(4), the defendant inflicted extreme emotional injury. It's clear from the position from the probation report as well as the information presented to the Court today from both the victim and her mother that this is a lifelong emotional injury that she will suffer for the remaining years of her life. Rule 4.421(a)(8), the manner in which the crime was carried out demonstrated criminal sophistication on the part of the defendant. Rule 4.421(a)(11) has indicated the defendant took advantage of the position of trust to commit the crime. And therefore, the court finds that the circumstances supporting a denial of probation outweigh those supporting a grant of probation."³

The court then examined the sentencing circumstances in mitigation and those in aggravation:

"The circumstances in aggravation do weigh heavier in the Court's mind, and it does appear that this is an appropriate case for the middle term. The circumstances in aggravation that I look at, rule 4.421(a)(3), the victim is particularly vulnerable. She was very young when the abuse started. Rule 4.421(a)(8), the manner in which the crime was carried out indicates planning and sophistication. Defendant would use a blanket to cover his actions, which allowed him to abuse the victim even when his family was present. Rule 4.421(a)(11), the defendant took advantage of the position of trust to commit this offense. He had married the victim's mother, making him a father figure to the victim, and took advantage of that position of trust.

"I did want, once again, to give substantial weight to the fact that the defendant has no prior criminal record, plead guilty at an early stage, relieving the victim from having to testify, and that he voluntarily entered

³ We note that the court's citation references are to rule 4.421 (aggravating circumstances for sentencing purposes), not to rule 4.414 (probation criteria). However, the court was entitled to use these sentencing factors in its discretionary decisionmaking regarding probation. (*People v. Weaver*(2007) 149 Cal.App.4th 1301, 1313 (*Weaver*).

sex offender treatment; however, this is counter-balanced by fact that the victim was very young, very vulnerable, and the position of trust was used in order to access the victim for this crime. [¶] . . .

"So, therefore, in this matter, having considered all of the circumstances in aggravation and in mitigation, I make the following finding: Probation is denied. The defendant is committed to the California Department of Corrections and Rehabilitation for the term of eight years."

The court set forth its calculations for arriving at the eight-year sentence, awarded custody credits, imposed statutory restitution fines and victim restitution, and ordered Manley to pay various fines and fees, including an administrative screening fee. It also ordered defendant to submit to DNA testing pursuant to section 296.

Manley appeals, contending the trial court abused its discretion by not granting him probation and by ordering him to pay an administrative screening fee.

DISCUSSION

We first address Manley's contention that the court abused its discretion in denying him probation. Manley makes three arguments in support of this contention, namely, that the trial court (1) failed to take into consideration many of the factors that supported a grant of probation; (2) incorrectly found the victim particularly vulnerable as a factor against granting probation; and (3) improperly denied probation because the factors in support of probation outweighed the factors supporting denial of probation.

We are not persuaded.

All defendants are eligible for probation, in the discretion of the sentencing court unless a statute provides otherwise. (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.)

"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." (*Ibid.*) "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.'" (*Weaver, supra*, 149 Cal.App.4th at p. 1311, citing *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 825.)

Section 1202.7 sets forth the primary considerations for determining whether to grant defendant probation. It provides in relevant part: "The safety of the public, which shall be a primary goal through the enforcement of court-ordered conditions of probation; the nature of the offense; the interests of justice, including punishment, reintegration of the offender into the community, and enforcement of conditions of probation; the loss to the victim; and the needs of the defendant shall be the primary considerations in the granting of probation." (*Ibid.*; see also *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.)

In addition, the sentencing rules explain in greater detail the criteria affecting the decision whether to grant probation, including: the nature, seriousness and circumstances of the crime; whether a deadly weapon was used; whether the defendant planned or instigated the commission of the crime; whether the manner in which the crime was carried out demonstrated criminal sophistication; the defendant's remorsefulness and willingness and ability to comply with the terms of probation; age, education, health, mental faculties, family background; employment history; abuse of alcohol or narcotics;

the likely effect of imprisonment on the defendant; and the possible effects of a felony conviction on the defendant's life. (Rule 4.414.)

A trial court is generally required to state its reasons for denying probation and imposing a prison sentence, including any additional reasons considered pursuant to rule 4.408. (Rules 4.406(b)(2), 4.408(a); see *Weaver, supra*, 149 Cal.App.4th at p. 1313.) The decision to grant or deny probation requires consideration of all of the facts and circumstances of the case, including the probation officer's report. (*People v. Axtell* (1981) 118 Cal.App.3d 246, 256-257; *People v. Ingram* (1969) 272 Cal.App.2d 435, 439.) However, while a court must *consider* all relevant facts and circumstances, it need not recite the circumstances relating to each rule 4.414 probation criteria that it used to support its discretionary decision. Unless the record affirmatively shows to the contrary, a trial court is deemed to have considered all relevant criteria in deciding whether to grant or deny probation or in making any other discretionary sentencing choice. (Rule 4.409; *Weaver*, at p. 1313; *People v. Superior Court (Du)*, *supra*, 5 Cal.App.4th at p. 836.)

Manley asserts the trial court considered only one criterion that supported a grant of probation — appellant was a 62-year-old gentleman with no prior criminal record — but failed to consider the many other rule 4.414 factors that supported a grant of probation. Specifically, he contends the trial court should have considered the following additional circumstances that favored a grant of probation: (1) Manley expressed a willingness to comply with the terms of probation, and a psychological evaluator indicated he would pose few if any problems with community supervision (rule 4.414(b)(3)); (2) appellant had the ability to comply with probation (rule 4.414

(b)(4)); (3) the effect of imprisonment on Manley's family would be severe (rule 4.414(b)(5)); (4) the effect of imprisonment on Manley would also likely be great, as he was likely to be victimized in prison (*ibid.*); (5) Manley's offenses were strikes, and the commission of any future strike offense would greatly increase the punishment to which he was subject (rule 4.414(b)(6)); and (6) the felony convictions would adversely impact his employment opportunities and he was subject to lifetime registration (*ibid.*).

Although the trial court did not expressly state that it considered these circumstances, we note the probation report listed *all* of the circumstances.⁴ Also, the defense statement listed and discussed most of these circumstances in support of Manley's request for probation. Because the trial court twice expressly stated on the record that it had the opportunity to review both of those documents, we presume the court did, in fact, consider those circumstances even though it did not expressly restate, recite, or otherwise refer to each one.⁵ As we noted above, unless the record

⁴ Rule 4.414 factors cited in the probation officer's report which supported a grant of probation included: Manley had no prior record (*id.*, subd. (b)(1)); Manley appeared willing to comply with the terms of probation (*id.*, subd. (b)(3)); Manley had the ability to comply with reasonable terms of probation as indicated by his age, education, health, mental faculties, and family background and ties (*id.*, subd. (b)(4)); imprisonment would likely have a negative effect on Manley and his dependents, as he was caring for his ailing parents (*id.*, subd. (b)(5)); and a felony conviction would have adverse collateral consequences on Manley's life (*id.*, subd. (b)(6)).

⁵ We also note that before denying probation and imposing sentence the court stated it gave "substantial weight" to the fact Manly had no prior criminal record; plead guilty at an early stage, relieving the victim from having to testify; and that he voluntarily entered sex offender treatment. Although these factors were made in the context of analyzing the circumstances in mitigation of sentence, the factors are the same as those defense counsel argued should support a grant of probation.

affirmatively shows otherwise, a trial court is deemed to have considered all relevant criteria in deciding whether to grant or deny probation or in making any other discretionary sentencing choice. (Rule 4.409.)

Manley next contends the trial court erroneously considered the victim's vulnerability as a factor in denying probation because there was nothing to indicate the victim was particularly vulnerable, other than the fact of her minority. Relying on *People v. Flores* (1981) 115 Cal.App.3d 924, 927, and *People v. Fernandez* (1990) 226 Cal.App.3d 669, 680, Manley argues it was improper for the court to make a probation finding that the victim was particularly vulnerable as the victim's minority is an element of the subject offenses. Manley concedes there are situations in which a victim of sexual crimes may be considered particularly vulnerable, such as when the child is mentally deficient, physically handicapped or rendered intoxicated; however, he contends no such evidence existed here. The issue is not preserved for appellate review as no objection on this ground was made in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 353; *People v. Brown* (2000) 83 Cal.App.4th 1037, 1042; *People v. de Soto* (1997) 54 Cal.App.4th 1, 7-8.)⁶

Finally, Manley contends the court erred in denying him probation as it found the four factors supporting the denial of probation outweighed the single factor it found in

⁶ In his reply brief Manley also argues for the first time that even if the fact that he was the victim's stepfather could support a finding that she was particularly vulnerable, the trial court used that fact to find he violated a position of trust. This, he argues, constituted an improper dual use of facts in sentencing. No claim as to improper dual use of facts was asserted below, and therefore this claim is forfeited.

support of probation. He posits that removal of vulnerability as a factor to be used against a grant of probation left only "three factors against granting probation while seven strong factors . . . supported the grant of probation." We are not persuaded. We have rejected the premise of Manley's argument, namely that the court considered only a single circumstance which supported a grant of probation. We also decline Manley's invitation to reweigh the circumstances that entered into the court's analysis to grant or deny probation. Manley's showing amounts to no more than a request that we review the circumstances presented and reach a different conclusion as to the appropriateness of probation. We are not authorized to substitute our judgment for that of the trial court. Manley's showing is insufficient to establish that the trial court abused its discretion. (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.)

Although we conclude the trial court did not abuse its discretion or otherwise err in considering circumstances regarding the grant or denial of probation, we further note that Manley has not attempted to carry his appellate burden to show the errors purportedly made by the court were prejudicial. Alternatively stated, assuming *arguendo* the trial court erred as Manley asserts, he has not shown it is reasonably probable the court would have granted him probation had it not so erred. (*People v. Price* (1991) 1 Cal.4th 324, 492 ["When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper."], superseded by statute on other grounds as stated in

People v. Hinks (1997) 58 Cal.App.4th 1157, 1161-1165.) We conclude any error the trial court may have made in denying probation was harmless.

We next consider Manley's appellate contention that the trial court's imposition of an administrative screening fee under section 1463.07⁷ was unauthorized. Manley argues, correctly, that this fee applies only where a defendant is arrested and released on his own recognizance. It is not to be imposed where, as here, a defendant is released on bail. The People concede the error. Accordingly, we will order the administrative fee under section 1463.07 stricken.

⁷ Section 1463.07 provides in relevant part: "An administrative screening fee of twenty-five dollars (\$25) shall be collected from each person arrested and released on his or her own recognizance upon conviction of any criminal offense related to the arrest other than an infraction."

DISPOSITION

The administrative screening fee under Penal Code section 1463.07 is ordered stricken. The trial court shall correct the abstract of judgment accordingly and send a copy of the amended abstract of judgment to the Department of Corrections. In all other respects, the judgment is affirmed.

IRION, J.

WE CONCUR:

HALLER, Acting P. J.

O'ROURKE, J.