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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DEBORAH MARLOW,

Defendant and Appellant.

D060520

(Super. Ct. No. SCE300132)

APPEAL from a judgment of the Superior Court of San Diego County, Peter C.

Deddeh, Judge. Affirmed.

On May 19, 2011, Deborah Marlow, mother of two sons, pled guilty to the crime of willful cruelty to one of her sons, a dependent adult (Pen. Code,<sup>1</sup> § 368, subd. (b)(1)) and admitted to personally inflicting great bodily injury upon him (§ 12022.7, subd. (a)).

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise noted.

On August 5, 2011, Marlow's request for probation was denied and she was sentenced to state prison for the low term of two years based on her guilty plea and admission. Marlow was awarded 365 days of actual custody credit and 54 days of section 4019 credits, for a total award of 419 days.

On appeal, Marlow claims that the sentencing court abused its discretion in denying her request for probation. As we explain, we conclude that the sentencing court did not abuse its discretion in determining to deny Marlow probation. Judgment affirmed.

## FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>

Marlow was the mother of the 28-year-old victim and his 26-year-old younger brother. The victim was born with severe retardation and cerebral palsy. He had the mentality of a two-year-old, could only speak a few words and was completely dependent on the aid and protection of his mother and younger brother. Both Marlow and her younger son admitted being the victim's sole caretakers and provided him with all necessities of life.

Since 1995, Marlow had received financial compensation from the government for the victim's care. She also signed documents stating that she was responsible for his care and protection while she was receiving compensation funds.

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<sup>2</sup> We view the evidence in the light most favorable to the judgment. (*See People v. Osband* (1996) 13 Cal.4th 622, 690.) Certain portions of the factual and procedural history related to Marlow's claim of alleged error are discussed *post*, in connection with those issues.

Marlow's health declined between 2007 and 2010. In 2007 she was diagnosed with cancer and underwent chemotherapy. In 2008, her lower leg was amputated due to gangrene. During this time, she also began experiencing mental issues and relied heavily on the care of her younger son for herself and for the care of the victim.

On January 21, 2010, the victim was transported from his home to Grossmont Hospital after Marlow's younger son activated the emergency response system. Paramedics described unsanitary conditions in the home where the victim was found. When admitted to the hospital, the victim had many infections, poor hygiene, malnutrition, pressure wounds, sores all over his body, as well as a strong smell of urine on him. He had to be bathed three times to clean off all the feces and to clean out his wounds while at the hospital. The victim eventually succumbed to the infections and passed away on January 26, 2010.

A visit to the victim's house the following night confirmed he was living in filth and squalor. The entire apartment smelled strongly of cigarette smoke and was generally unkempt and unclean. The victim's room was locked and could only be accessed when his younger brother used a flathead screwdriver to pry it open. Once inside, it was noticed that the victim's mattress was heavily saturated and soiled and appeared to have black mold covering the entire top and sides of it. Only a wet and soiled mattress pad was on the mattress. The bedroom was strewn with trash and debris. The odor of the room was foul and smelled strongly of urine, feces and decaying food. The victim's

wheelchair, including the wheels, was covered in food, feces, urine, cat hair and unknown debris.

The younger brother admitted to sleeping in the living room and locking the victim in his room. He also stated that the victim's room was filthy and in a state of squalor and that the victim had not been out of the apartment in over a year.

While Marlow was recovering from her medical problems, she was able to continuously care for herself by cooking, brushing her teeth and bathing. During the investigation, however, Marlow stated that she was not allowed to leave her room and was being physically abused by her younger son while she was under his care.

During an investigation by a social worker on January 22, 2010, Marlow told a detective that she had not cared for the victim in the past eight months since having her right leg amputated. She identified her younger son as the victim's caretaker and noted that the last time she spoke to the victim was "a few days ago." Marlow admitted that the victim had not been very active and that his physical condition was "a little concerning." She further stated that she had never asked for help in caring for the victim because she has "never needed it." Rather, she admitted that she refused to place the victim in outside care because of the money was she receiving for taking care of him, which was her sole income.

## DISCUSSION

On appeal, Marlow claims that the sentencing court abused its discretion in denying her probation. More specifically, she contends that her own deteriorating

medical condition, health and malnutrition, which coincided with the severe deterioration of the victim's health that resulted in his death, combined with the fact she had no prior criminal record, should have been sufficient reason for the sentencing court to place her on probation.

Probation is an act of clemency which rests within the discretion of the trial court, whose order granting or denying probation will not be disturbed on appeal unless there has been an abuse of discretion. (*People v. Mancha* (1963) 213 Cal.App.2d 590, 592.) Discretion imports an individual judgment, and an appellate court will not substitute its opinion for that of the trial court. (*People v. Miller* (1960) 186 Cal.App.2d 34, 36–37.) Sentencing courts have broad discretion when deciding to grant or deny probation. This discretion, however, is neither arbitrary nor capricious, but is an impartial discretion, guided and controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. (*People v. Russel* (1968) 69 Cal.2d 187, 194; *Bailey v. Taaffe* (1866) 29 Cal. 422, 424.)

"In reviewing the matter on appeal, a sentencing court is presumed to have acted to achieve legitimate sentencing objectives in the absence of a clear showing the sentencing decision was irrational or arbitrary. [Citations.]" (*People v. Martinez* (1985) 175 Cal.App.3d 881, 896.) A single valid reason suffices to justify a sentencing choice. (*People v. Dancer* (1996) 45 Cal.App.4th 1677, 1695–1696, overruled on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123.) A defendant bears a heavy burden

in attempting to show an abuse of discretion in denying probation. (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.)

Here, the sentencing court reasoned the low two-year prison term was an appropriate sentence instead of probation because, although Marlow did not have a criminal history and she too was experiencing deteriorating health about the time the victim had to be hospitalized, her intent to continue receiving the monthly government payment for her care of him was the reason why she did not make the telephone call to an appropriate agency to report that the victim's health was deteriorating and he needed help that she could not provide to him. The sentencing court stated that Marlow's failure to simply telephone an appropriate agency to take care of the victim's deteriorating health was inexcusable and inexplicable, and thus found that the omission to call was a willful act.

Accordingly, the sentencing court took into consideration the underlying facts of this case and balanced the aggravating and mitigating factors before determining to deny Marlow probation.

An argument that Marlow assumed her younger son was adequately taking care of the victim simply does not correspond with the fact that she understood and was worried about the victim's physical condition, that he had not been eating as much, that she had not seen him in days, that the condition of the house was rapidly deteriorating or that the victim had not been outside of the house in over a year. Faced with these facts, a reasonable person would arguably conclude that Marlow's younger son was not

adequately assisting the victim. Moreover, Marlow was being physically abused and locked in a room by her younger son. This would have concerned a reasonable person and put her on notice of a potential neglect issue with the victim. Accordingly, we conclude that the sentencing court did not abuse its discretion in refusing to grant Marlow probation.

DISPOSITION

Judgment affirmed.

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BENKE, Acting P. J.

WE CONCUR:

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HUFFMAN, J.

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O'ROURKE, J.