Filed 12/10/12 P. v. Robison CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MARK EVAN ROBISON, Defendant and Appellant.	D061188 (Super. Ct. No. SCN262876)

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

Mark Robison entered a negotiated guilty plea to causing a victim younger than 16 years old to become a prostitute (Pen. Code, §§ 266i, subd. (a)(2), 266h, subd. (b)(2);[1] count 1; Victim S.); electronically sending a minor harmful matter (§ 288.2, subd. (b); count 2); and two counts of committing a lewd act on a 14- or 15-year-old child (§ 288, subd. (c)(1); counts 7 and 9; Victim A.). The court sentenced Robison to nine years four

1 All further statutory references are to the Penal Code.

months in prison: the eight-year upper term on count 1, eight months each (one-third the middle term) on counts 7 and 9 and a stayed term (§ 654) on count 2. Robison appeals, contending that in imposing the upper term on count 1, the court relied on facts relating to counts 7 and 9, and thus abused its discretion. We affirm.

BACKGROUND

Counts 1 and 2

Victim S. met Robison in 2005. Robison's daughter was on a softball team with Victim S. Robison took his daughter, Victim S. and Victim S.'s sister to practice, to batting cages and to games. Robison and his family socialized with Victim S. and her family, and Robison and Victim S.'s mother went on one or two dates. The families took a trip to Catalina together.

Around 2007, Robison, who was in his 40's, sent Victim S. a friend request on MySpace. She accepted the request. At first, Robison's MySpace messages to Victim S. were friendly. After Robison commented that Victim S. looked sexy in one of her pictures, she deleted him as a friend. In February 2008, when Victim S. was 13 years old, she again accepted Robison as her friend on MySpace. Again, Robison's messages were friendly at first. Later in 2008, he began sending Victim S. disturbing messages. Robison asked Victim S. to look at his photographs on MySpace. The pictures depicted penises and were labeled "suck me." January 8 through January 10, 2009, when Victim S. was 14 years old, Robison sent her messages using graphic language and saying he would give her money to have sex with him.

Counts 7 and 9

Around March 2008, when Victim A. was in the ninth grade, her mother began dating Robison. Victim A.'s mother became ill. When she was unable to pick up Victim A. from school, Robison picked up Victim A. in a car. In the car, Robison touched Victim A.'s legs, grabbed her breast and touched her genital area. In Victim A.'s home, Robison touched her genital area. At a mall, Robison bought Victim A. underwear and said to her, "Why don't we go tell your mom that we're going to go get a hotel room . . . as a couple." Robison told Victim A. they would have sex in the hotel room. He showed her a piece of paper with a list of sexual acts and prices. Robison sent Victim A. text messages with a picture of his penis. He offered her crystal amphetamine.

While Victim A.'s mother was at work, Robison asked Victim A. to come into her mother's bedroom to talk to him. When Victim A. entered the bedroom, Robison locked the door and tried to touch her legs. Victim A. backed away. Robison told her to take off her shirt and said if she did not, he would threaten her family or hurt her. Victim A. took off her shirt. Robison pulled out his penis, masturbated and ejaculated on Victim A.'s body. He threw $200 at her. Victim A. ran out of the room.

Victim A. was in the ninth grade from September 2007 to June 2008. The above offenses occurred when she was in the ninth grade.

Sometime before New Year's Day in 2009, Robison and Victim A.'s mother stopped dating. In January, Victim A.'s mother died of cancer. That month, Robison sent

Victim A. an e-mail saying, "Would you like to make $200 like before?" At that time, Victim A. was 15 years old.

Counts 3 Through 6; 8; and 10 Through 16

As part of the plea bargain, the court dismissed 12 counts with a *Harvey* waiver (*People v. Harvey* (1979) 25 Cal.3d 754). Victim S. was the victim in one of the dismissed counts (count 5, misdemeanor child molestation [§ 647.6, subd. (a)(1)], in January 2009). Victim A. was the victim in three of the dismissed counts (count 6, causing her to become a prostitute; and counts 8 and 10, committing a lewd act, all in 2008). The remaining dismissed counts, which did not name the victims, were as follows: count 3, contacting a minor with intent to commit a sexual offense (§ 288.3, subd. (a)), in January 2009; count 4, sending a minor harmful matter via electronic means, from January to June 2008; count 11, possessing child pornography (§ 311.11, subd. (a)), in June 2009; count 12, furnishing methamphetamine to a minor (Health & Saf. Code, § 11353, subd. (c)), from June 2007 to June 2009; and counts 13, 14 and 15, furnishing marijuana to a minor (Health & Saf. Code, § 11361, subd. (a)), and count 16, inducing a minor to use marijuana (Health & Saf. Code, § 11361, subd. (a)), from January 2008 to June 2009.

DISCUSSION

Robison contends that in imposing the upper term on count 1, pertaining to Victim S., the court relied on facts relating to counts 7 and 9, pertaining to Victim A., and thus abused its discretion. Respondent asserts Robison forfeited the right to raise this contention by not doing so at the sentencing hearing.

In its sentencing statement, filed more than two months before the hearing, respondent argued Robison should serve the maximum term. The statement described Robison as "a predator" and his criminal acts as "disturbing." The statement cited Robison's possession of child pornography; "the number of victims and disturbing nature of his acts"; his cruelty and callousness toward Victim S.; the victims' particular vulnerability; Robison's planning and sophistication; and the fact that he took advantage of a position of trust as to Victim S.

Robison subsequently filed two statements in mitigation. The first requested a sentence of three years eight months; the second requested a sentence of "no more than five years." Aside from acknowledging that Robison's acts were "bizarre," the statements did not respond to the arguments in respondent's sentencing statement. At the hearing, Robison's counsel argued Robison was not a predator and the victims would be able to "recover from this if they move forward from it."

Before imposing sentence, the court discussed all of Robison's crimes and, at the same time, cited its reasons for imposing the upper term on count 1. The court referred to Robison as "dangerous" and "destructive" and his behavior as "despicable" and "predatory." The court mentioned the devastation to Victim A.'s family, and the fact that Robison took advantage of the illness of Victim A.'s mother and exploited his position of trust. The court also cited the permanent damage to all of the victims and their families and stated that "what [Robison] did to all these victims is just awful . . . ." Finally, the court cited Robison's possession of child pornography.

The forfeiture doctrine applies when the defendant contends on appeal the court's stated reasons for imposing the upper term are inapplicable, but did not so contend at sentencing. (*People v. Scott* (1994) 9 Cal.4th 331, 353, 355.) A " 'boilerplate' " objection at sentencing is not sufficient to prevent a forfeiture of the right to raise specific objections on appeal. (*People v. De Soto* (1997) 54 Cal.App.4th 1, 4, 7-9.) Robison did not argue at sentencing that the court relied on facts relating to counts 7 and 9 to impose the upper term on count 1. He has thus forfeited the right to raise the argument now.

In any case, the premise of Robison's contention is unsound. The court's remarks, summarized above, contain ample reasons for imposing the upper term on count 1, and no indication the court used facts relating to counts 7 and 9 to impose that upper term. There was no abuse of discretion.

DISPOSITION

The judgment is affirmed.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

IRION, J.