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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL SORIA HEIM,

Defendant and Appellant.

E054904

(Super.Ct.No. FVI1101631)

OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Affirmed in part; reversed in part and remanded with directions.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Christopher Beesley and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Manuel Soria Heim was charged by information with four counts of assault with a firearm. (Pen. Code, § 245, subd. (a)(2), counts 1-4.)<sup>1</sup> It was further alleged as to all counts that defendant personally used a firearm within the meaning of section 12022.5, subdivisions (a) and (d). It was also alleged, as to count 1, that defendant personally inflicted great bodily injury. (§ 12022.7, subd. (a).) A jury found defendant guilty of counts 2 and 3, and found true their respective firearm allegations. However, it found him not guilty on the other counts. The trial court denied defendant's request for probation and sentenced him to seven years four months in state prison. The court also ordered him to pay various fines and fees.

On appeal, defendant contends that: (1) the court abused its discretion in denying his request for probation; and (2) there is insufficient evidence to support a finding that he had the ability to pay attorney fees; thus, the court's order for him to pay attorney fees was invalid. We reverse the order to pay appointed counsel fees and remand the matter for the court to make a determination of defendant's ability to pay such fees. In all other respects, we affirm.

### FACTUAL BACKGROUND

#### *Prosecution Evidence*

On July 15, 2011, Kenyon Harman, his brother, Patrick, his son, Cameron, and his son's friend, Kollin, drove to Victorville to go geocaching for a few days. Geocaching

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<sup>1</sup> All further statutory references will be to the Penal Code, unless otherwise noted.

consisted of using a Global Positioning System (GPS) to find geocaches, which were containers that people had hidden throughout the world for others to find, as a game. The understanding among the players was that the geocaches were not to be placed on private property without the owner's permission.

After they arrived in the Victorville/Oro Grande area, Kenyon and the others found about 15 geocaches. They drove along a road, in search of the next geocache and decided to hike to the next location. They hiked up a hill with a lot of rocks. The group of four split into two, as Kenyon and Kollin looked for the geocache together, and Patrick and Cameron looked together. Kenyon and Kollin located the geocache and told the two others. As Kenyon and Kollin opened the container, Patrick told Kenyon that someone was approaching in a car below them. Only Patrick and Cameron were visible to the driver at the time. Patrick saw the car stop and observed defendant get out of the car and yell at them to "get out, get out." Defendant also may have indicated that it was private property. Patrick yelled back to defendant that they were sorry, they did not know it was private property, and that they were leaving. Patrick then told Kenyon that defendant was telling them to leave. Patrick said that they should go, and Kenyon agreed. Kenyon put the geocache back where it was, and the four of them started walking back toward their truck. As they were walking back, they heard two pops and realized that someone was firing a gun at them. They started running as fast as they could. As they were running, they heard four more pops and heard bullets ricochet off the rocks. Cameron felt something hit him in the back of the leg. His leg went numb, and he fell on the ground and held his leg. Kenyon helped him up and they continued on. Cameron stumbled and

fell a couple times, as they made their way down the hill. Kenyon and Cameron reached the truck a few minutes after Patrick and Kollin. Patrick called 911, and they all quickly jumped in the truck and drove away. As they were driving, Cameron's leg was hurting severely. They drove to a gas station and then headed to the hospital. Cameron's leg had been hit by a bullet.

The police responded to defendant's property. The officers made contact with defendant, found a rifle in his car, and found six .22-caliber rifle shell casings near the driver's door of his car.

#### *Defense Evidence*

Defendant was 71 years old at the time of trial. He lived alone with no telephone and no neighbors close by. He testified at trial that on May 15<sup>2</sup>, a few men came on his property and wanted to buy some of his equipment. He agreed, and the next day, the men returned to pick up the equipment. He let them on his property, and they loaded up the equipment on their trucks, but drove away without paying defendant.

On July 15, 2011, defendant heard a vehicle drive by him on his property and heard his dog barking. He waited about 20 minutes, then got in his car and drove toward the hills. He stopped in front of a hill when he saw two people, approximately 250 feet away. He got out of his car and yelled that it was private property and told them to leave. He waited about three minutes and repeated the command. One of the men told him, "no." The two people started walking toward defendant, and he repeated his command.

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<sup>2</sup> Defendant did not specify the year.

They said no again. Defendant became scared, so he drove his car back to his trailer to get his rifle. He loaded 12 bullets in his rifle and went back outside. He saw the people still on the hill and fired his rifle. Defendant testified that he knew nothing about the people's intentions, but believed their intentions toward him were bad. He shot three times in the air to scare them away. Then, he shot three times at the rocks. He said he never intended to hurt anybody.

## ANALYSIS

### I. The Court Properly Exercised Its Discretion in Denying Defendant Probation

Defendant contends the court abused its discretion in denying his request to be placed on probation. We find no abuse of discretion.

#### A. *Standard of Review*

“Probation is an act of leniency, not a matter of right. [Citations.]” (*People v. Walmsley* (1985) 168 Cal.App.3d 636, 638.) “The decision to grant or deny probation requires consideration of all the facts and circumstances of the case. [Citation.]’ [Citation.]” (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1312.) “A denial or a grant of probation generally rests within the broad discretion of the trial court and will not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary or capricious manner.’ [Citation.] A court abuses its discretion ‘whenever the court exceeds the bounds of reason, all of the circumstances being considered.’ [Citation.]” (*People v. Downey* (2000) 82 Cal.App.4th 899, 909.)

Here, the court properly considered the criteria in California Rules of Court, rule 4.414<sup>3</sup> and concluded that the circumstances did not support a grant of probation. The court considered the “circumstances of the crime as compared to other instances of the same crime.” (Rule 4.414(a)(1).) It responded to the defense counsel’s comment that this was “not like the kind of assault with a deadly weapon that we might have where someone’s at a party and somebody pulls out a revolver and there’s gangs.” The court agreed, but noted that defendant did not just pull out a revolver, he got a rifle and shot at least three times in the direction of the victims. The court further noted that if someone went to a party, he would assess the situation and perhaps see that the people looked like gang members, and he would assume “that that’s the kind of environment [he’s] in.” Here, on the other hand, the victims were a man, his brother, his son, and his son’s friend, and they were out doing an activity that the court considered “model family bonding.” The court also remarked that the victims were clearly vulnerable, since they turned their backs and started walking away when they were told to leave. (Rule 4.414(a)(3).) The court further noted that defendant “certainly inflicted emotional damage.” (Rule 4.414(a)(4).) It was apparently referencing Kenyon’s earlier testimony regarding how much he and the other victims had had to “work through the emotional trauma of running for [their] lives, scared out of [their] minds,” as well as how emotionally difficult it had been to watch his child endure the pain of his leg injury for the first two months after being shot. As to the monetary loss to the victim, the court considered the costs that

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<sup>3</sup> All further rule references are to the California Rules of Court.

Kenyon indicated that he had incurred, which included over \$8,000 in expenses to pay for doctor, hospital, therapy, and imaging bills. (Rule 4.414(a)(5).) The court next stated that defendant was clearly an active participant. (Rule 4.414(a)(6).)

The court also considered factors in aggravation, including that the crime “involved great violence, great bodily harm, threat of great bodily harm.” (Rule 4.421(a)(1).) The court stated that, “[a]ny time you fire a firearm at someone, and it’s not once, but whether six times or if it’s only three times, that certainly is a threat of great bodily harm.” The court again stated that the victims were particularly vulnerable, noting that they were not armed and had no reason to expect that someone was going to be shooting at them. (Rule 4.421(a)(3).)

As to the circumstances in mitigation, the court stated that it completely disagreed with the probation department that the crime was committed because of unusual circumstances, such as great provocation, or that defendant participated in the crime under circumstances of coercion or duress, or that the criminal conduct was partially excusable. (Rule 4.423(a)(3), (a)(4).) The probation officer pointed out that defendant had recently had property stolen from him, that he had no way of knowing the victims here were on his property with purely innocent intentions, and that defendant felt he had a right to protect his property. However, the court stated that defendant could not just set up the provocation “in [his] own mind,” and that he could not just determine that he was going to fire a gun at someone just because he had been a victim in the past. The court found that defendant was not justified in his actions, noting that the victims could have been killed (e.g., if one of the bullets had ricocheted and struck one of them in the head).

Additionally, the court commented that it understood that defendant was expressing remorse, in that he “now understands he cannot shoot at people who happen onto his property,” but stated that defendant should have understood that before. The court noted that defendant’s new understanding was “as close as [it could find] in the [probation] report to an expression of remorse.” Finally, the court said it was not unsympathetic to defendant’s age, but noted that he appeared to be in “good shape” and probably had “lots of years left” in him. The court ultimately denied probation, but, in light of defendant’s age and prior clean record, imposed the mitigated term on the counts and firearm allegations.

On appeal, defendant recognizes that section 1203, subdivision (e)(2), provides that, “[e]xcept in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to [¶] . . . [¶] [a]ny person who used, or attempted to use, a deadly weapon upon a human being in connection with the perpetration of the crime of which he or she has been convicted.” However, he argues that his case was unusual, in that he had no prior criminal record, he was 71 years old, he had recently been the victim of theft, he lived in an isolated area without a telephone, and he did not fire his rifle directly at the victims or intend to hit anyone. Defendant then claims that the court denied probation simply because “it believe[d] probation should never be granted in a case where a defendant fires a gun at another.” He further contends that the court failed to give due consideration to the probation officer’s reasoning for recommending probation, and it abused its discretion in arbitrarily denying probation. We disagree. First, the court expressly stated that it read and considered the

probation report. A court need only consider the probation report, and ““may reject *in toto* the report and recommendation of the probation officer.’ [Citations.]” (*People v. Warner* (1978) 20 Cal.3d 678, 683, superseded by statute on other grounds, as stated in *People v. Bailey* (1996) 45 Cal.App.4th 926, 930.) That is exactly what the court did here. Moreover, the court’s explicit statement that it “completely disagree[d] with the probation officer’s analysis” demonstrates that it carefully considered the recommendation. Contrary to defendant’s claim, the court did not simply deny probation under a “blanket prohibition” and belief that probation should never be granted in a case where someone fires a gun at another person. Defendant used “a deadly weapon upon a human being,” and the circumstances showed that this was not an unusual case where the interests of justice would best be served by granting defendant probation. (§ 1203, subd. (e)(2).)

Furthermore, while the factors cited by defendant may be true, they do not show that the court abused its discretion. The record clearly demonstrates that the court thoroughly reviewed and considered the relevant factors before deciding to deny defendant probation. Thus, we cannot say that its decision was arbitrary or capricious. There was no abuse of discretion.

## II. The Matter Should Be Remanded for the Trial Court to Make a Determination of Defendant’s Ability to Pay Appointed Counsel Fees

Defendant argues that the order requiring him to pay \$550 in appointed counsel fees must be stricken because the court failed to make a determination of his ability to pay. He further contends that there is insufficient evidence to support any such

determination. The People concede that the court failed to make a determination on defendant's ability to pay, but argue that the matter should be remanded. We agree with the People.

The court ordered defendant to pay appointed counsel fees in the amount of \$550. It did not cite the statutory basis of the order, but we assume the basis was section 987.8, subdivision (b). That section "authorizes the court to order criminal defendants to pay all or part of the cost of their appointed counsel after the trial court determines the defendant has a present ability to pay. The ability to pay includes the defendant's reasonably discernible future financial position, limited to the next six months." (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537, fn. omitted; see also § 987.8, subd. (b).) We note that section 987.8, subdivision (g)(2)(B) provides: "Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined *not* to have a reasonably discernible future financial ability to reimburse the costs of his or her defense." (§ 987.8, subd. (g)(2)(B), italics added.)

Both parties agree that the court here made no finding of defendant's ability to pay, or of unusual circumstances pursuant to section 987.8, subdivision (g)(2)(B). Defendant asserts that, since the record does not support an inferred finding of unusual circumstances, the order for defendant to pay attorney fees is invalid and must be reversed. On the other hand, the People argue that, in light of the fact that the amount ordered was relatively low (\$550), and the probation report showed that defendant had a monthly social security income of \$759, he was self-employed, had no debt, and his home was valued at \$37,000, the matter should be remanded for the court to determine if

his circumstances were unusual or not. We note that section 987.8, subdivision (g)(2)(B), provides that a defendant who has been sentenced to prison “shall be determined not to have a reasonably discernible *future* financial ability to reimburse the costs of his or her defense.” (§ 987.8, subd. (g)(2)(B), italics added.) In other words, the provision does not appear to apply to the prisoner’s “present financial position.” (§ 987.8, subd. (b); *People v. Polk* (2010) 190 Cal.App.4th 1183, 1211, fn. 29.) In light of the apparent evidence supporting the court’s finding that defendant had the present ability to pay attorney fees, we will remand the matter for the court to make an informed determination, in accordance with section 987.8. (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1403-1404; see also, *People v. Flores* (2003) 30 Cal.4th 1059, 1068-1069.)

DISPOSITION

The order to pay appointed counsel fees is reversed and the matter is remanded for the trial court to make a determination of defendant’s ability to pay said fees, in accordance with section 987.8. In all other respects, the judgment is affirmed.

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HOLLENHORST  
Acting P. J.

We concur:

McKINSTER  
J.

RICHLI  
J.