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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

MILISSA JOHNSON,

Defendant and Appellant.

F062076

(Super. Ct. No. VCF233885)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Tulare County. Joseph A. Kalashian, Judge.

Laurie Wilmore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and J. Robert Jibson, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Wiseman, Acting P.J., Cornell, J., and Detjen, J.

Appellant, Milissa Johnson, pled no contest to two counts of second degree robbery (Pen. Code, § 211).<sup>1</sup>

On appeal, Johnson contends that her statutory and due process rights were violated by the trial court's failure to order and consider a complete probation report. We affirm.

### **FACTS**

On January 16, 2010, at around 11:00 a.m., a Hispanic male juvenile wearing a bandanna over his face and a Raiders sweatshirt walked into My Alter Ego clothing store in Tulare. The juvenile walked up to Johnson, who appeared to be a customer in the store, handed her a plastic bag, and directed her to fill the bag with money. The juvenile then pushed Johnson to the ground, approached the clerk with a firearm pointed at her face, and demanded money from the cash register. The juvenile threatened to kill the clerk if she called police, and left with cash from the register and a laptop computer that was on the counter.

On January 17, 2010, at approximately 8:55 a.m., the manager of the Lane Bryant store in the Tulare Outlet Mall placed the previous day's receipts in her purse and left the store to deposit them at a bank. As she walked out of the store, a black pickup drove up and a man got out. The man approached the manager and asked what time the store opened. He then lunged at her and, after a brief struggle, took her purse which contained \$1,423.05 in cash, six checks, and miscellaneous personal property. Witnesses subsequently identified Robert Grijalva as the robber and Johnson as the driver of the pickup.

Later that day, a Walmart employee called police to report that a customer had found a purse in the store's restroom. The customer also reported that while he was in

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<sup>1</sup> Unless otherwise indicated, all further statutory references are to the Penal Code.

the restroom he overheard two men talking about stealing a purse and having to fight for it. While investigating the report, Tulare police officers spotted an unoccupied black pickup in the Walmart parking lot that had the same license plate number as the pickup used earlier in the robbery. After being advised that a Hispanic male had gotten into the black pickup and was driving through the parking lot followed by a white van, police officers stopped both vehicles and discovered that the van driver was Johnson and the pickup driver was her boyfriend, Andres Martinez. Inside the truck the officers found a Raiders sweatshirt that was similar to the one worn by the juvenile male during the robbery of the My Alter Ego store. The officers later learned that Johnson and Grijalva had gone to the Walmart store after robbing the manager of the Lane Bryant store and discarded the stolen purse in the restroom. They left the area and Johnson returned with her boyfriend to get the pickup.

On January 19, 2010, a caller identified J.B. as the juvenile who robbed the My Alter Ego store.

On January 21, 2010, Johnson was contacted and arrested after she admitted being the driver of the pickup involved in the robberies.

On February 3, 2010, J.B. told police that Johnson gave him rides and frequently talked about committing robberies. According to J.B., Johnson planned the My Alter Ego robbery and threatened to get her brother to shoot him if he did not cooperate. Johnson also gave him a toy gun and ordered him to go into the business.

Further investigation led police to believe Johnson was involved in the November 27, 2009, robbery of an employee from the Claire's store in the Tulare Outlet Mall which occurred while the employee was making a deposit. Johnson had been an employee at the store and knew the schedule of deposits, and quit the day after the robbery. Additionally, the manager of the store told officers that after she hired Johnson money started going missing from the cash registers and that Johnson had talked about

how easy it would be to steal from local stores. Police also learned that Johnson had bragged about being involved in the Claire's store robbery.

On August 16, 2010, the district attorney filed an information charging Johnson with three counts of second degree robbery. Counts 1 and 2 also alleged a firearm enhancement (§ 12022, subd. (a)(1)).

On October 22, 2010, Johnson pled no contest to the robberies charged in counts 2 and 3 in exchange for the dismissal of the remaining count and enhancements and a stipulated middle term of three years. After taking Johnson's plea, the court stated, without objection, that it was referring the matter to the probation department for an abbreviated probation report.

On January 18, 2011, the probation department filed an abbreviated probation report. Although the department did not interview Johnson in preparing the report, the report had attached to it several certificates of recognition and several letters, including one from Johnson.

On January 18, 2011, at the beginning of Johnson's sentencing hearing, defense counsel argued that Johnson was amenable to probation and asked the court to "override" the plea agreement because Johnson got caught up with gang members and was acting "under duress from these people" when she committed the robberies.

The prosecutor argued that a prison term was appropriate because the three robberies involved violence, two of them involved a gun, and all three involved sending young men to commit crimes about which she provided information. The prosecutor also argued that Johnson never showed remorse prior to the hearing.

When Johnson was allowed to address the court she denied that she had never shown remorse. She also denied that she was a member of a Hispanic gang and stated

that she was coerced into participating in the robberies by a female Hispanic gang member's threats to use some unspecified information about Johnson against her.<sup>2</sup>

After hearing further argument, the court sentenced Johnson, in accord with the plea bargain, to the middle term of three years on one robbery count and a concurrent three-year term on the second count. During the hearing, neither Johnson nor defense counsel objected to the court considering only an abbreviated probation report.

### DISCUSSION

Johnson contends that she was statutorily entitled to a full probation report and that she was prejudiced by the failure of the court to order one. We will reject these contentions.

The court must order the preparation of a probation report whenever a person is convicted of a felony *and is eligible for probation*. (§ 1203, subd. (b)(1); Cal. Rules of Court, rule 4.411.)<sup>3</sup> A probation report, however, is not required when a defendant is statutorily ineligible for probation. (*People v. Johnson* (1999) 70 Cal.App.4th 1429, 1431-1432.) Here, Johnson was not eligible for probation pursuant to her plea agreement because it provided that she would receive a stipulated three-year term. Further, had the court not sentenced her in accord with this agreement, the People would have been entitled to reinstate the dismissed charges. (*People v. Collins* (1978) 21 Cal.3d 208, 213-217.) In any event, the court had an abbreviated report prepared even though probation

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<sup>2</sup> During the hearing Johnson stated, "I met this girl and I tried to help her. And she found bits and pieces of information about me to use against me for gain - - ... her gain. I'm not part of a Hispanic gang. I'm African-American. What would I have to gain or prosper to help these people? What would be the purpose? [¶] I have no gang tattoos...."

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

was not an option under her plea bargain. Therefore, we conclude that the court did not violate section 1203 by its failure to have a full probation report prepared.<sup>4</sup>

Moreover, “... the right to challenge a criminal sentence on appeal is not unrestricted. In order to encourage prompt detection and correction of error, and to reduce the number of unnecessary appellate claims, reviewing courts have *required* parties to raise certain issues at the time of sentencing. In such cases, lack of a timely and meaningful objection forfeits or waives the claim. [Citations.] These principles are invoked as a matter of policy to ensure the fair and orderly administration of justice. [Citation.]’ (*People v. Scott* (1994) 9 Cal.4th 331, 351 ... [failure to challenge statement of sentencing reasons constitutes a waiver] ....)” (*People v. Llamas* (1998) 67 Cal.App.4th 35, 38 (*Llamas*).)

“Thus, presentation of the probation report in oral rather than written form [citation] and its untimely preparation [citation] are matters waived by failure to object. (*People v. Scott, supra*, 9 Cal.4th at p. 352, fn. 15.) Furthermore, ‘[i]t is settled that failure to object and make an offer of proof at the sentencing hearing concerning alleged errors or omissions in the probation report waives the claim on appeal.’ (*People v. Welch* (1993) 5 Cal.4th 228, 234 ... [failure to object to probation conditions operates as a waiver].)” (*Llamas, supra*, 67 Cal.App.4th at pp. 38-39.) “[A] timely objection to the [preparation of an abbreviated] report would have permitted the court to consider the issue and order a [full] report or explain why none was necessary. [Citation.] Either course might have prevented this appeal ....” (*Id.* at p. 39.)

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<sup>4</sup> Johnson cites *People v. Gutierrez* (1986) 177 Cal.App.3d 92 and *People v. Harrington* (1970) 2 Cal.3d 991 to contend that the abbreviated probation report was the functional equivalent of no probation report. Neither case so holds. Further, each case is easily distinguishable because in neither case was probation precluded under the defendant’s plea bargain.

Since neither Johnson nor her counsel objected to an abbreviated report when the court ordered the report, or at her sentencing hearing, Johnson forfeited any issues relating to her probation report.<sup>5</sup> (Cf. *People v. Begnaud* (1991) 235 Cal.App.3d 1548, 1555-1556 [defendant forfeited right to supplemental probation report by failure to request supplemental report and to object to proceeding without a supplemental report and stating that there was no reason judgment could not be imposed].)

Johnson cites section 1203, subdivision (b)(4) and *People v. Dobbins* (2005) 127 Cal.App.4th 176 (*Dobbins*) to contend that she did not forfeit her right to a full probation report.

Section 1203, subdivision (b)(4) provides:

*“The preparation of the [probation] report or the consideration of the report by the court may be waived only by a written stipulation of the prosecuting and defense attorneys that is filed with the court or an oral stipulation in open court that is made and entered upon the minutes of the court, except that there shall be no waiver unless the court consents thereto. However, if the defendant is ultimately sentenced and committed to the state prison, a probation report shall be completed pursuant to Section 1203c.”* (Italics added.)

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<sup>5</sup> Alternatively, Johnson contends that she was denied the effective assistance of counsel by the failure of her defense counsel to preserve this issue by interposing an appropriate objection. We disagree. In order to prove that she was denied the effective assistance of counsel, Johnson has to show that counsel’s performance was deficient under an objective standard of reasonableness and that she was prejudiced. (*People v. Lucas* (1995) 12 Cal.4th 415, 436.) However, “a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.... If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed.” (*Strickland v. Washington* (1984) 466 U.S. 688, 697 [104 S.Ct. 2052].) Johnson cannot prevail on her ineffective assistance of counsel claim because, as discussed, *infra*, any error in the failure to obtain a full report was harmless beyond a reasonable doubt.

In *Dobbins*, the court sentenced the defendant pursuant to a plea bargain to a 16-month term, suspended execution of sentence, and placed him on Proposition 36 probation. After the defendant violated his probation by committing several non-drug-related offenses, the court imposed the 16-month term. Although a probation report was prepared for the defendant when he was originally placed on probation, no supplemental report was prepared for the subsequent sentencing hearing, which occurred eight months after the preparation of the original report. (*Dobbins, supra*, 127 Cal.App.4th at pp. 178, 180.)

The *Dobbins* court found that section 1203 applied and required that a waiver of the supplemental report be made in the manner described in that section. In so finding, the court relied on the fact that “the [trial] court had discretion to allow a further grant of probation subject to the same or modified conditions” (*Dobbins, supra*, 127 Cal.App.4th at p. 180) and that the eight-month period of time between the original probation report and the defendant’s resentencing was a “significant period of time” within the meaning of rule 4.411(c).<sup>6</sup> (*Dobbins, supra*, at p. 178.)

*Dobbins* and section 1203, subdivision (b)(4) are inapposite because the court, here, did not retain discretion under Johnson’s plea agreement to grant her probation, and unlike the situation in *Dobbins*, a current probation report was prepared for Johnson, albeit an abbreviated one.

Further, even assuming the court erred by its failure to obtain a full probation report, the error was harmless. “Because the alleged error implicates only California statutory law, review is governed by the *Watson* harmless error standard. (See *People v. Watson* (1956) 46 Cal.2d 818, 834–836 ....)” (*Dobbins, supra*, 127 Cal.App.4th at

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<sup>6</sup> Rule 4.411(c) provides: “The court must order a supplemental probation officer’s report in preparation for sentencing proceedings that occur a significant period of time after the original report was prepared.”

p. 182.) However, even assuming that the more rigorous *Chapman*<sup>7</sup> standard applies to the instant case, any error in failing to get a full report was harmless.

Johnson contends that the following criterion that is related to the court's decision whether to impose probation were omitted or improperly catalogued in the abbreviated report: her willingness and ability to comply with reasonable terms of probation and the likely effect of imprisonment on Johnson, the disposition of her codefendants' cases, whether she was remorseful, whether she was affiliated with a gang, and the likelihood that if not imprisoned she would pose a danger to others. However, these circumstances were irrelevant to the court's sentencing decision because Johnson's plea bargain provided for a stipulated three-year term. Further, Johnson presented most of this information to the court in her letter to the court and/or her sentencing comments wherein she expressed remorse for her involvement in the three robberies and emphatically explained that she was not a gang member and participated in the robberies under duress. Johnson also submitted letters of support from her parents and several certificates of recognition, some of which attested to her accomplishments and good character.

Johnson also contends that she suffered prejudice even though her plea bargain provided for a stipulated sentence because she never expressly waived consideration of a grant of probation and the court had a duty to ensure the stipulated term was the appropriate sentence. We disagree. Johnson implicitly forfeited consideration of a grant of probation by agreeing to a stipulated three-year term. Further, she had a report prepared that contained much of the same information that a full report would have included and, as discussed above, she provided the court with most of the information that she complains was missing from the report.

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<sup>7</sup> *Chapman v. California* (1967) 386 U.S. 18.

Johnson further contends that she was prejudiced by the failure to obtain a full probation report because the Department of Corrections relied on the probation report to classify her as gang affiliated and this classification will adversely impact her housing and qualification for custodial programs, and will trigger gang supervision terms upon her release on parole.<sup>8</sup> According to Johnson, this would not have happened if the probation officer had interviewed her as part of preparing a full report because she would have been able to explain that she was not affiliated with a Hispanic street gang. Johnson is wrong.

“California prison inmates are classified pursuant to a scoring system that determines their prison custody level.... A higher score means the inmate is considered a higher security risk and would be assigned to a correspondingly higher security facility; a lower score means the inmate is considered a lower security risk and would be assigned to a correspondingly lower security facility. After the initial classification, inmates receive an annual classification review....” (*In re Jenkins* (2010) 50 Cal.4th 1157, 1171.)

When a defendant is received at a Department of Corrections and Rehabilitation (Department) Reception Center, the defendant is evaluated for placement within the system on CDC Form 839 (Cal. Dept. of Corrections & Rehabilitation, Operations Manual (2012) ch. 6, art. 1, § 61010.8.1 (DOM)) and scored on various factors including whether the defendant has been involved with gang activity outside of prison (DOM, *supra*, ch. 6, art. 1, § 61010.11.2).<sup>9</sup> Johnson’s CDC Form 839 indicates that she was involved in gang activity with a Northern Hispanic gang and that this was verified

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<sup>8</sup> Johnson’s motion for judicial notice of her CDC Classification form (CDC Form 839) that has a date of action of April 21, 2011, is granted.

<sup>9</sup> Being involved in gang activity outside of prison added six points to Johnson’s total placement score of 30 which resulted in her being assigned to a level III prison instead of a lower security level II prison. (DOM, *supra*, ch. 6, art. 1, §61020.20.8.)

through “Legal documents. POR [probation officer’s report] or court transcripts evidencing gang activity.” (*Ibid.*) Johnson’s probation report stated that, “Police reports indicate that the defendant is affiliated with a Northern street gang.” However, during the preliminary hearing, an officer testified that Johnson originally told him that she met up with people she identified as Norteño gang members two months earlier and that she participated in the robberies to pay back gang members for a favor. Further, at her sentencing hearing, defense counsel acknowledged that Johnson committed the underlying robberies because she got “caught up with gang members.” Additionally, when Johnson addressed the court she implicitly admitted that she participated in the robberies in order to help a Hispanic gang, although she claimed that she was coerced into doing so. Therefore, since the Department may have relied on a transcript of Johnson’s preliminary hearing or of her sentencing hearing to conclude that Johnson was involved in gang activity outside the prison, the record does not support her claim that the court relied on her abbreviated probation report to arrive at this conclusion.

In any event, the Department’s procedures provide: “In the process of completing the CDC Form 839, ..., the counselor shall interview the inmate. In the interview the inmate shall be informed of the nature and purpose of the CDC Form 839, ... *and allowed to verbally contest specific score items and other case factors on the form.* Documentation for score items that is absent or conflicting shall be discussed during the interview. The inmate shall be responsible for providing documentation to support his or her challenge of information on the CDC Form 839.” (DOM, *supra*, ch. 6, art. 1, § 61010.9, italics added.)

These procedures also provide that “Counselors are responsible for initiating a corrected CDC Form 839 ... when the inmate or other party presents verifiable documentation, which supports the change. When the change to the score results in a

different security level, the inmate shall be referred to the appropriate classification committee ....” (DOM, *supra*, ch. 6, art. 1, § 61010.9.)

Thus, Johnson should have been given the opportunity to explain to the counselor filling out her CDC Form 839 her version of her involvement in the three robberies and to explain why she believed that it did not qualify as gang activity. However, since the gist of Johnson’s statements about her involvement in the three robberies indicate that she committed them for the benefit of a Hispanic gang, albeit under duress, there does not appear to be anything she could have said to alter the counselor’s conclusion on CDC Form 839 that she had been involved in gang activity. Accordingly, since 1) the court did not have discretion under Johnson’s plea agreement to place her on probation; 2) Johnson provided the court with most of the information she claims was not included in the abbreviated probation report; and 3) the Department should have given her an opportunity to explain that she was not a gang member and participated in the offenses under duress, we conclude that any error in the court’s failure to obtain a full probation report was harmless beyond a reasonable doubt.

#### **DISPOSITION**

The judgment is affirmed.