Filed 12/27/12 P. v. Ignacio CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GELADIN FRONDA IGNACIO, Defendant and Appellant.	F063886 (Fresno Super. Ct. No. F11905178) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. John F. Vogt, Judge.

Stephen M. Lathrop, 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, Carlos A. Martinez and Wanda Hill Rouzan, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Poochigian, Acting P.J., Detjen, J. and Franson, J.

STATEMENT OF THE CASE

On October 20, 2011, a Fresno County jury found appellant Geladin Fronda Ignacio guilty of two counts of performing a lewd act upon a child under age 14 (Pen. Code,[1] § 288, subd. (a)). On November 22, 2011, the court denied appellant probation and sentenced him to a total term of eight years in state prison. The court imposed the middle term of six years on the first count and a consecutive term of two years (one-third of the middle term) on the second count. The court imposed various fines, fees, and penalties, including a $40 court security fee (§ 1465.8), and awarded 294 days of custody credits. On the same date, appellant filed a timely notice of appeal. We will modify the monetary amount of the court security fee and affirm in all other respects.

STATEMENT OF FACTS

In 2010, appellant's wife left him alone at their family apartment with the couple's daughters, ages three and four, and the wife's 13-year-old daughter, Jane Doe. While Jane was watching a movie with a friend, appellant called Jane into his bedroom. He told the friend he needed to speak with Jane about getting her a cell phone. Once Jane entered the bedroom, appellant removed her pants and undergarments and touched her vagina with his hand. After appellant finished the touching, Jane went to her bedroom, cried, and told her friend what occurred.

Jane's mother returned a short time after the touching occurred, and Jane advised her of the conduct. Jane's mother told her, " 'Maybe you are just mistaken.' " When Jane's mother confronted appellant with the accusation, appellant admitted his conduct, apologized to both mother and daughter, and said he did not do it intentionally. Appellant also told her that he was "tempted" and that "a devil went into his head or his mind." Appellant also told his wife he would not do it again. Appellant's wife explained

[1] All further statutory references are to the Penal Code unless otherwise stated.

that she and Jane accepted appellant's apology "so we live like a family." She also explained, "He said that he will not do it again, and since then I never left my daughter alone. She's always with me." Jane did not disclose the 2010 incident to police because she was afraid that her family would be broken up if she reported the incident.

On February 27, 2011, appellant's wife left Jane in the apartment with her mother, sister, and appellant. The mother and sister departed a few minutes after appellant's wife left the apartment. When appellant's wife returned home, appellant was present with their two daughters, but Jane was absent. When the wife asked appellant about Jane's location, he began banging his fists against his head and said the devil tempted him. Appellant then told his wife that Jane went out, but he did not know where she went. Appellant's wife ultimately found Jane with her friend, Mia, and Mia's mother.

Jane testified that appellant had entered her bedroom and lay down beside her. He started kissing Jane and got on top of her as she reclined on her back. Jane said appellant kissed her mouth, neck, and face in a continuous fashion. Jane said her sisters entered the room several times during the incident, and appellant took them out of the room each time. Jane said the kissing went on for between 30 and 45 minutes, but she did not scream out. She eventually ran outside, went to a recreation center in the apartment complex, and called her friend, Mia. Mia, Mia's mother, and Mia's grandmother were driving near Jane's apartment complex. They found Jane, picked her up, and took her back to the apartment complex parking lot. Jane then saw her mother inside a car in the parking lot. Jane told her mother what had happened, and Jane's mother spoke with Mia's mother. When appellant came outside, Mia's mother started shouting and yelling at him.

After the confrontation, Jane and her mother left the apartment complex, drove to a store parking lot, and spoke about the situation. They decided to leave the family apartment and stay with an aunt. They returned to the family apartment to pick up the two younger children. Mia and her mother had called police in the interim, and Jane and

her mother encountered officers when they reached the family apartment. Jane spoke to an officer about the touching by her stepfather.

On March 13, 2011, while in custody at the Fresno County Jail, appellant and his wife spoke by telephone. They spoke in Tagalog, and their conversation was recorded, interpreted, and transcribed. The court admitted the transcript into evidence, copies of the transcript were given to the jurors, and portions were read aloud. One pertinent exchange read as follows:

> "[Appellant's wife]: Was it a cop that told you?
>
> "[Appellant]: Yes, then you're the one who say it, and they write it down. (pause). They said, what they wrote on paper was stated by you. They said you were the one who said it.
>
> "[Appellant's wife]: Oh, I can't remember anything.
>
> "[Appellant]: Then the child, she said that I touched her three times, touched her…
>
> "[Appellant's wife]: How did it become three?
>
> "[Appellant]: I don't know. (pause)… You said in your last declaration that I just kissed her, touched (*not very clear*) her … did you change your declaration?
>
> "[Appellant's wife]: No! (Sounds agitated).
>
> "[Appellant]: O,
>
> "[Appellant's wife]: Wasn't that what you have told me, what you have recounted to me?... your own story to me? That's also what the child had complained to me!
>
> "[Appellant]: Yes… It's nothing. I just thought you changed it.
>
> "[Appellant]: Uhmmm…
>
> "[Appellant]: According to them you said that, you said there that I shouldn't touch the child anymore (*not very clear*). That's what you said.
>
> "[Appellant's wife]: I can't remember anything. [¶] … [¶]

"[Appellant]: The charge that was filed against me was doubled.

"[Appellant's wife]: Why?

"[Appellant]: Because the child said three things. Three. But there were only two that they did… The child said a couple of things… Uhm.… Then…

"[Appellant's wife]: From what I know, there were two.

"[Appellant]: Yes, two.

"[Appellant's wife]: From what I know, there were two. But she has no other…

"[Appellant]: Whatever the child said, that's already it! It cannot be changed. Then the defense lawyer asked if the cop was there."

Randall Robinson, Ph.D., a clinical psychologist in private practice, testified: "[C]hildren tend to [underreport] abuse, sexual abuse, to preserve the integrity of the family because that's home. They have nowhere else to go. And even if they could go to extended family, it's generally not to live with extended family, and those extended family are related to their parents, and … they have nowhere else to go. [N]o young child will want to be a foster child, so they [underreport]. They don't report."

Shelly Sweeton, a senior investigator with the district attorney's office, testified she spoke with appellant's wife on April 27, 2011. Sweeton and appellant's wife discussed the February 27 incident, and appellant's wife said appellant had kissed Jane Doe. Appellant's wife also told Sweeton about a phone conversation she had with her husband. From appellant's statements during that phone conversation, the wife understood that appellant did not want Jane Doe to come to court.

Defense Evidence

Appellant did not present any documentary or testimonial evidence but chose to rely on the state of the prosecution evidence.

DISCUSSION

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT PROBATION.

Appellant contends the trial court abused its discretion by denying probation based upon speculation that a report from a mental health professional under section 288.1 would be unfavorable to the defense.

A. The Trial Court's Statements at the November 22, 2011 Sentencing Hearing

The trial court stated:

> "In looking at the particular circumstances of it, I think the thing focused on is the fact that Mr. Ignacio, as a stepfather, and the victim in fact testified to the level of acceptance that she and other siblings have of the defendant in the family context. What it comes down to is that the defendant did take advantage of a position of trust o[r] confidence to commit these offenses. He was responsible and accepted responsibility by marrying into the family. He became responsible to protect this child, not abuse her. In a way, the whole thing was unraveled in front of the jury, why it wasn't reported to begin with, the steps that were taken to essentially sweep the problem under the rug, and then to have it arise again does in fact show a sophistication, if that can really be the word, but more of a sense of planning and ultimate design to commit the acts again.
>
> "Now, throughout the process and the evidence being produced, there was references to Mr. Ignacio immediately understanding his wrongdoing and trying to square things up within the family unit, and I suppose that's a certain level of acknowledgement. And as Ms. Dana [defense counsel] pointed out, he did turn himself into the police when he found out that there was a warrant for him, but since then the defendant has continued to deny any wrongdoing. The defendant has continued to say that everything that he admits to doing was simply innocent, wrongly interpreted by the victim, and totally misconstrued by a jury of twelve people from the community, and I don't accept that.
>
> "I listened to the child. I listened to the child's mother. I listened to other people who corroborated the series of events. I accept the expert testimony in the context of explaining how the reporting process takes place, and I find absolutely no reason to disregard the verdicts that were entered by the jury here, which brings me to probation eligibility.

> "You've asked me to consider probation. In order to do that the mandates of Penal Code Section 1203.067 have to be met. That would include a favorable analysis and evaluation pursuant to Penal Code Section 288.1. *And, quite frankly, where somebody is in total denial of wrongdoing, that just isn't going to happen. You aren't going to get a favorable report.* That report would address issues of how we are not going to have this happen again, how we are going to avoid having somebody continue to be a danger to other members of the community. Now, I'm not sure that Mr. Ignacio would present a danger to other people, but I am convinced beyond a reasonable doubt, as this jury was, that he would continue to present a danger to the victim in this case and possibly other people within an immediate family circle.
>
> "So as I review the provisions of Penal Code Section 1203.067, I have complied with the first order required. I have a report and recommendation of the Probation Department. And, number two, we are conducting right now the hearing to determine whether the defendant would pose a threat to the victim, and I've just addressed that. Number three would be to order a psychiatric evaluation under 288.1 and I've addressed that.
>
> "I do not find that the defendant at this time is eligible for a grant of probation." (Italics added.)

B. <u>Appellant's Specific Contention</u>

Appellant contends: "Here a grant of probation depended on the existence of evidence that appellant's release on probation would not pose a threat to the victim. (Pen. Code, § 1203.067, subd. (a)(2) ….) [¶] The trial court's discretionary decision to deny probation was an abuse of discretion because it was based on conjecture that a report from a mental health professional – a report that was never in fact obtained – would yield unfavorable results. ' "Suspicion is not evidence; it merely raises the possibility, and that is not a sufficient basis for an inference of fact." ' [Citations.]"

C. <u>Applicable Law</u>

The trial court enjoys broad discretion in determining whether a defendant is suitable for probation. A decision denying probation will be reversed only on a showing of abuse of discretion, i.e., that the denial was arbitrary or capricious. California Rules of

Court, rule 4.414 provides the criteria a court is to consider when making the decision whether to grant or deny probation. Section 1203.067, which governs probation for specified felony offenders, provides in relevant part:

> "(a) Notwithstanding any other law, before probation may be granted to any person convicted of a felony specified in Section … 262 … who is eligible for probation, the court shall do all of the following:
>
> "(1) Order the defendant evaluated pursuant to Section 1203.03, or similar evaluation by the county probation department.
>
> "(2) Conduct a hearing at the time of sentencing to determine if probation of the defendant would pose a threat to the victim. The victim shall be notified of the hearing by the prosecuting attorney and given an opportunity to address the court.
>
> "(3) Order any psychiatrist or psychologist appointed pursuant to Section 288.1 to include a consideration of the threat to the victim and the defendant's potential for positive response to treatment in making his or her report to the court. Nothing in this section shall be construed to require the court to order an examination of the victim."

Based on these statutory provisions and the general rule concerning a sentencing court's discretion to grant probation, a court considering a probation request of a defendant convicted of a felony listed in section 1203.067 must undertake the following analysis. First, the court reviews the criteria affecting the grant or denial of probation set forth in California Rules of Court, rule 4.414. Second, the court weighs those criteria and makes a discretionary determination either to (1) deny probation or (2) consider further the possibility of granting probation. (*People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1532 [a diagnostic evaluation under § 1203.067 is not necessary where the court has decided to deny probation based on the criteria in Cal. Rules of Court, rule 4.414].) Third, assuming the court decides to consider further the possibility of probation, it orders the evaluation and conducts the hearing required by section 1203.067, subdivision (a). Fourth, the court considers the results of the evaluation and other evidence presented at the hearing, makes the required determination, and exercises its discretion whether to

grant probation. "A section 1203.067 diagnostic evaluation becomes necessary only if, after weighing the criteria listed in [California Rules of Court,] rule 4.414, a court is inclined to order probation rather than prison time. When the court has no intention of granting probation, and the record adequately supports such a determination, there is no need for a section 1203.067 diagnostic evaluation. [Citation.]" (*People v. Ramirez, supra,* 143 Cal.App.4th at p. 1532.)

D. <u>Analysis</u>

"Generally, on appeal, statements made by the trial court in the course of trial as to its reasoning are not reviewable. [Citations.] However, there are exceptions to this general rule. In criminal cases, an appellate court may take into consideration the ' "judge's statements as a whole" [when they] disclose an incorrect rather than a correct concept of the relevant law, embodied not merely in "secondary remarks" but in [the judge's] basic ruling ….' [Citation.]" (*People v. Butcher* (1986) 185 Cal.App.3d 929, 936, citing *People v. Ortiz* (1964) 61 Cal.2d 249, 253.)

In this case, the court cited numerous reasons for the denial of probation, including: (1) the jury convicted appellant of two separate incidents of lewd and lascivious conduct on a child under age 14; (2) appellant took advantage of a position of trust and confidence within his family unit to commit these offenses; (3) appellant's behavior reflected "a sense of planning and ultimate design to commit the acts again"; (4) although appellant turned himself in to police in response to a warrant, the court observed that "defendant has continued to say that everything he admits to doing was simply innocent, wrongly interpreted by the victim, and totally misconstrued by a jury of twelve people from the community"; and (5) although the court was unsure whether appellant would present a danger to other people, the court was "convinced beyond a reasonable doubt, as this jury was, that he would continue to present a danger to the victim in this case and possibly other people within an immediate family circle."

In addition to making the foregoing findings, the court did say, "You've asked me to consider probation. In order to do that the mandates of Penal Code Section 1203.067 have to be met. That would include a favorable analysis and evaluation pursuant to Penal Code Section 288.1. And, quite frankly, where somebody is in total denial of wrongdoing, that just isn't going to happen. You aren't going to get a favorable report." Appellant characterizes these brief remarks as an abuse of discretion "because it was based on conjecture that a report from a mental health professional – a report that was never in fact obtained – would yield unfavorable results.…" Appellant's assertion is not supported by the entirety of the record. Although the trial court did make the observation, the remarks were idle or secondary in nature, at most. Moreover, read in context, the remarks were supportive of the court's denial of probation because, as the court noted, a section 288.1 report by a psychologist "would address issues of how we are not going to have this happen again, how we are going to avoid having somebody continue to be a danger to other members of the community." The court went on to suggest that an individual "in total denial of wrongdoing" was not a likely candidate for a favorable report. In making these comments, the court did not attempt to supplant the role and responsibility of the mental health professional under section 288.1. Rather, the court simply implied, based on his experience, that a defendant who failed to acknowledge wrongdoing was unlikely to demonstrate "potential for positive response to treatment" as required by section 1203.067, subdivision (a)(3).

Moreover, "[a] section 1203.067 diagnostic evaluation becomes necessary only if, after weighing the criteria listed in [California Rules of Court,] rule 4.414, a court is inclined to order probation rather than prison time. When the court has no intention of granting probation, and the record adequately supports such a determination, there is no need for a section 1203.067 diagnostic evaluation. [Citation.]" (*People v. Ramirez*, *supra*, 143 Cal.App.4th at p. 1532.) Here, the court weighed the criteria of California

Rules of Court, rule 4.414 at length and gave detailed reasons for declining to grant probation. No abuse of discretion occurred and reversal is not required.

II. THE COURT SECURITY FEE IMPOSED AS TO COUNT 1 MUST BE REDUCED TO $30.

Appellant contends and respondent concedes the judgment of sentence should be modified to reflect a court security fee of $30 under Penal Code section 1465.8.

Respondent explains: "Under Penal Code section 1465.8, subdivision (a)(1), court security fees shall be imposed in the amount of $30 for convictions on any date from July 1, 2011, until July 1, 2013. Because appellant's conviction was on October 20, 2011, respondent agrees that this Court should reduce his security fee from $40 to $30."

DISPOSITION

The judgment is affirmed. The superior court is directed to reduce the fee imposed under section 1465.8 from $40 to $30, to amend the abstract of judgment accordingly, and to transmit certified copies of the amended abstract to all appropriate parties and entities.