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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

GILBERT MONTIJO,

Defendant and Appellant.

G045550

(Super. Ct. No. 08CF0328)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Vickie L. Hix, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Charles R. Khoury, Jr., 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, Anthony Da Silva, Sharon L. Rhodes and Scott Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

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Convicted sex offender Gilbert Montijo contends there is insufficient evidence he willfully violated a condition of his probation prohibiting him from frequenting places where minors congregate without authorized supervision. He also argues any violation was de minimis and the trial court abused its discretion by sentencing him to prison as a consequence of the violation. For the reasons expressed below, we affirm.

## I

### FACTUAL AND PROCEDURAL HISTORY

In March 2008, Montijo pleaded guilty to failing to register as a sex offender within five days of changing his residence. (Pen. Code, § 290.013 subd. (a); all further statutory references are to the California Penal Code unless noted). He admitted he previously had suffered four felony convictions under the Three Strikes law (§ 667, subds. (d) & (e)(2)), and served five prison terms (§ 667.5, subd. (b)). His prior record included a 1980 conviction for assault with intent to rape,<sup>1</sup> convictions for robbery in 1980 and 1982, a 1989 conviction for assault with a deadly weapon, and a 2005 conviction for willful failure to register as a sex offender. The plea and waiver of rights form advised Montijo the maximum sentence for the current offense with enhancements was 30 years to life. After accepting Montijo's guilty plea, the court suspended imposition of sentence and placed Montijo on probation for three years on various terms and conditions, including a condition prohibiting him from associating "with minors or frequent[ing] places where [they] congregate, including but not limited to: schoolyards,

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<sup>1</sup> According to the prosecutor's sentencing brief, defendant entered the victim's garage, placed his hand over her mouth when she began screaming, dragged her into a bedroom, pushed her onto the bed, exposed his penis and pulled down her clothing to expose her vagina, and masturbated and ejaculated on her.

parks [etc.] unless in the company of a responsible adult over the age of 21 who is approved by the probation officer or court . . . .”<sup>2</sup>

In November 2008, Montijo violated his probation by stealing a bicycle. The court reinstated probation and ordered him to serve 90 days in jail. In October 2010, he failed to report to probation authorities after his release from jail in September 2010. The court again reinstated probation on condition he serve 90 days in jail.

In March 2011, the probation department filed a third petition alleging Montijo had violated his probation by visiting a park near a school.<sup>3</sup> At the probation violation hearing in June 2011, probation officer Gina Dransfeldt testified that in February 2011, she reviewed with Montijo the terms and conditions of his probation. She specifically advised him not to have contact with minors, and not to go to parks or playgrounds. Montijo, a paranoid schizophrenic taking medication, was homeless at the time, but Dransfeldt allowed him to stay temporarily with his 83-year-old mother in Riverside County.

Montijo was placed on GPS (global positioning system) monitoring because he posed a high risk of committing another sex offense based on test scores designed to measure a sex offender’s likelihood of reoffending. On March 5, 2011, a Saturday, the GPS device alerted Dransfeldt that Montijo had been at a park adjacent to an elementary school for about 30 minutes. Dransfeldt phoned Montijo and asked why he was at the park. He explained he felt like going to the park after having dinner with his sister. Dransfeldt testified no one had been authorized to accompany Montijo to areas

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<sup>2</sup> The court orally advised him not to “be in the presence of children under 18 unless accompanied by a responsible adult 21 years of age or older and approved in advance by your [probation officer].”

<sup>3</sup> This petition is not contained in the appellate or trial court record.

where minors might be present, and she had not approved Montijo's mother or anyone else to accompany him to a park or school. Dransfeldt earlier had advised Montijo's mother he was not allowed around children, including her grandchildren.

Montijo's mother Mercedes testified her daughter suggested after dinner they go to the park near the school where Mercedes's nine-year-old granddaughter attended. The group included her daughter and son-in-law, Montijo, the granddaughter, and the granddaughter's friend. The adults sat on the grass at the "edge of the park" while the children played in the playground. Montijo sat with the adults and did not go around the play equipment. Mercedes "had no idea" Montijo could not go "where kids are." But she admitted Dransfeldt had "said something about" defendant "couldn't be around children," but she did not "get . . . why, because we got a lot of children." Mercedes believed her son took medication because he could not sleep "from being in the prisons for all the time." She did not know he had to register as a sex offender. She "never had [a] discussion with anybody" about whether she "had the okay from probation to accompany" her son to places where children might be present.

The trial court concluded Montijo had violated his probation by going to the park in the company of minors without approved supervision. The court found there was no "implied approval of the grandmother because she . . . was clearly admonished . . . that [defendant] wasn't to be around minors . . . while he was in her home." The court also noted the GPS device showed that "defendant [was] not merely sitting on the grass" and "most of his time was spent in the playground area." Finally, the court found that "whatever his mental illness" Montijo understood the terms of his probation because he was reporting as ordered, or called immediately if he missed an appointment.

Montijo moved to reopen and the court permitted him to testify. He claimed Dransfeldt advised his mother they could not have minor children in the home, but that he could be anywhere in public “as long as I was with a supervising adult.” He admitted he did not personally discuss with Dransfeldt whether his mother or other adult could be with him in areas where there were minors, and he never asked Dransfeldt to approve an adult to supervise him. He believed it was permissible to be at the park because it was after 5:00 p.m. and “non-business hours,” and his discussion with a Riverside police officer led him to believe a person on GPS monitoring could be in a park after hours. He denied moving around the park, stating he was 10 feet from the play equipment and the girls were on the other side of the playground.

Montijo’s testimony did not persuade the trial court to change its earlier ruling. The court noted the probation officer indoctrinated Montijo, who signed the forms that clearly prohibited him from visiting a park without an authorized person. The probation officer had not authorized anyone to supervise Montijo, and Dransfeldt had advised Montijo’s mother she could not have the grandchildren in her home when Montijo was present. Finally, the court found Montijo understood the terms of his probation.

At the sentencing hearing a month later, the trial court declined Montijo’s request to reinstate his probation, struck all but one of Montijo’s strike convictions (§ 1385), and imposed a six-year aggregate term, comprised of the four-year midterm for the current failure to register conviction (two years doubled because of the strike conviction), plus two one-year prison term enhancements (§ 667.5, subd. (b)).

## II

### DISCUSSION

#### *Substantial Evidence Supports the Trial Court's Finding Montijo Willfully Violated His Probation*

Section 1203.2 provides the trial court may revoke and terminate probation “if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation officer or otherwise that the person has violated any of the conditions of his or her probation.” We review the court’s decision revoking probation for an abuse of discretion; the court’s factual findings are reviewed for substantial evidence. (*People v. Galvan* (2007) 155 Cal.App.4th 978, 981-982; *People v. Rodriguez* (1990) 51 Cal.3d 437.)

Montijo contends the probation officer “had to have considered” his mother a responsible adult to supervise him for a “short stop” at a park or it would not have authorized him to live with her. He also contends he did not willfully violate his probation because he “overheard the probation officer tell his mother that she qualified as a responsible adult.” We must reject Montijo’s arguments because substantial evidence supports the trial court’s decision Montijo willfully violated his probation.

Dransfeldt testified she indoctrinated Montijo on the terms and conditions of his probation less than two weeks before his visit to the park. She specifically advised him not to contact minors, and not to visit parks and playgrounds. When Dransfeldt phoned him and asked why he had gone to the park, Montijo responded he “felt” like going there after dinner. He did not claim he had been unwittingly or unwillingly dragged to the park by his sister, that he believed his relatives could supervise him for “short stops” at parks or schools, or that he had avoided the playground areas while at the park. Dransfeldt testified no one had been authorized to accompany Montijo to areas

where minors might be present and she had not approved Montijo's mother or anyone else to accompany him to a park or school. Moreover, she expressly advised Montijo's mother he was *not* allowed around children, including her grandchildren.

Montijo's mother candidly admitted she "never had [a] discussion with anybody" about whether she "had the okay from probation to accompany" her son to places where children might be present. She also admitted Dransfeldt had "said something about" the probation condition restricting Montijo's proximity to children, but she could not understand why "because we [have] a lot of children." Mercedes claimed she was unaware of Montijo's record or requirement to register as a sex offender. The evidence also demonstrated Montijo spent most of his time in the playground area, contrary to Mercedes's claim Montijo merely sat on the grass observing the children play.

As for Montijo's claim he thought he could be anywhere in public "as long as" he "was with a supervising adult," he admitted he did not discuss with Dransfeldt whether any adult had been authorized to supervise him, and there was no corroborating evidence he overheard Dransfeldt approve his mother or other adult to supervise him or that he asked her to approve his mother or sister for this purpose. He admittedly knew he could not be around his own nieces and nephews in his mother's home. If Montijo knew his mother could not supervise him at home in the presence of her own grandchildren, he could not reasonably have believed she was authorized to accompany him to public places frequented by children. Montijo's credibility was undermined by his claim he did not move around in the park. As the court expressly found, "whatever his mental illness" (paranoid schizophrenia or bipolar), Montijo understood his probation requirements because he was reporting as ordered, and called immediately if he missed an appointment. Based on this record, the trial court reasonably could determine that

Montijo did not believe he was in the company of a responsible adult over the age of 21 approved by the probation officer or court.

Relying on *People v. Zaring* (1992) 8 Cal.App.4th 362 (*Zaring*), Montijo argues his violation was a de minimis, hypertechnical infraction and therefore not willful, he made a good faith effort to comply, and any violation occurred through no fault of his own. He asserts any violation was de minimis and “should not have been punished at all much less with a six year sentence.” In *Zaring*, the trial court accepted the probationer’s explanation she was 22 minutes late because she had to take her children to school due to a “last minute unforeseen circumstance,” but nonetheless found her in violation of probation for failing to appear in court on time. (*Zaring*, at p. 379.) *Zaring* concluded the trial court abused its discretion because there was no evidence the defendant’s tardiness was “the result of irresponsibility, contumacious behavior or disrespect for the orders and expectations of the court.” (*Ibid.*)

Here, unlike *Zaring*, there is no evidence of any last minute, unforeseen circumstance suggesting Montijo did not act willfully. Nor was there evidence of a “justifiable excuse” for the violation. (*Black v. Romano* (1985) 471 U.S. 606, 612.) Montijo’s claim he believed he could be in a park with children supervised by his maternal relatives was not credible. Because Montijo’s current violation and prior performance on probation justified the trial court’s decision to revoke probation,<sup>4</sup> we cannot say the trial court abused its discretion.

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<sup>4</sup> Interestingly, the guilty plea forms Montijo signed noted he was ineligible for probation, probably because he had admitted the prior strikes (see § 667, subd. (c)(2)), but the court nevertheless placed him on probation. Montijo also agreed to sentencing and appeal waivers in conjunction with his plea. He agreed he could not appeal from any “legally authorized sentence the court imposes which is within the terms and limits of this plea agreement.”

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.