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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. JONIS CENTENO, Defendant and Appellant.	E054600 (Super.Ct.No. FVA801798) OPINION

APPEAL from the Superior Court of San Bernardino County. Cara D. Hutson, Judge. Affirmed.

Jean Ballantine, 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, Steve Oetting and Vincent P. LaPietra, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Jonis Centeno guilty of two counts of willfully committing a lewd or lascivious act upon a child under the age of 14 years old (Pen. Code, § 288, subd. (a)),[1] and one count of molesting a child under 18 years of age (§ 647.6, subd. (a)(1)). The trial court sentenced defendant to prison for a term of five years. Defendant raises six issues on appeal. First, defendant contends the prosecutor committed misconduct by misstating the State's burden of proof. Second, defendant asserts his trial counsel was ineffective for failing to object to the prosecutor's misconduct. Third, defendant contends the trial court acted in excess of its jurisdiction by sentencing him to prison because defendant was a juvenile at the time the crimes were committed. Fourth, defendant asserts the trial court erred by not considering probation as a sentencing option. Fifth, defendant contends his due process rights were violated to the extent the trial court relied on an outdated probation report when denying defendant probation. Sixth, defendant contends the trial court erred by relying on inaccurate information in the probation report when sentencing defendant. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

The victim is female and was born in April 2000. The victim lived with her father (Father) and brother. Defendant's aunt owned a home with a garage that was converted into two living areas, separated by a thin wall. Defendant lived in one of the garage living spaces in his aunt's home. The victim, her brother, and Father lived in the

[1] All subsequent statutory references will be to the Penal Code unless indicated.

second garage living space. Approximately seven men lived in the house, in the various rooms. Defendant's living space did not have a door, so anyone walking by it could see inside.

One day (Father could not recall the exact date), Father walked by defendant's room and saw defendant lying on top of the victim. Father walked into defendant's room and defendant "quickly jumped off" the victim. The victim, who had been on the bed, ran out of the room. Father then left defendant's room. Later, Father and defendant's aunt confronted defendant, asking if anything inappropriate had taken place between defendant and the victim. The result of the confrontation was an agreement that defendant would not have contact with the victim and her brother for the sake of avoiding future problems.

On March 24, 2008, the San Bernardino County Sheriff's Department was asked to follow-up on a child protective services referral involving defendant being found lying on top of the victim. The initial report was made to child protective services on March 10, 2008. Deputy Ruiz interviewed defendant. Defendant denied touching the victim in an inappropriate manner. Defendant explained the victim went into defendant's room looking for her brother. Defendant and the victim began playing with a ball in defendant's room. The victim threw the ball at defendant while also running towards defendant to hug him. Defendant was sitting on the edge of his bed at the time, and the victim's hug threw him off-balance. Defendant accidentally rolled over on the victim, and was getting up from rolling over when Father walked in the room.

On June 25, 2008, San Bernardino Sheriff's Detective Brown observed a forensic interview of the victim through a two-way mirror at the Children's Assessment Center. During the interview, the victim said defendant laid on top of her on four separate occasions. During three of the incidents, defendant and the victim were clothed and defendant laid on top of the victim, not moving. During the fourth incident, while the victim was clothed, defendant exposed his penis and placed it on the victim's clothed genitals. The victim was seven years old when the incidents took place; the victim was seven years old during the interview in June 2008.

At trial, the victim testified that when she was seven years old, defendant laid on her two separate times. The victim laid on her stomach, while defendant laid on his stomach. During one of the incidents, the victim felt defendant's penis touching her clothed genitals.

During trial, Father testified that when he walked by defendant's room, he did not see defendant lying on top of the victim. Rather, he saw the victim, her brother, and defendant all trying to grab a ball or piece of candy that was on the ground. Since 2006, Father has attended the church where defendant's father (Denis)[2] worked as a pastor. People at the church sometimes gave Father financial assistance, as well as assistance with clothing, shoes, food, and transportation. For example, Denis drove Father to court to testify in the instant case.

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[2] For the sake of clarity, we refer to witnesses with the last name "Centeno" by their first names; no disrespect is intended.

Defendant testified at trial. Defendant explained the victim's brother came into defendant's room with a ball. Defendant and the victim's brother played with the ball, bouncing it against a wall. Then the victim entered defendant's room. The victim wanted the ball, so she, her brother, and defendant started trying to grab the ball on the floor. Father walked by while the three were "bunched up" on the floor trying to grab the ball. Father called the two children and they exited defendant's room.

DISCUSSION

A. REASONABLE DOUBT

1. *PROCEDURAL HISTORY*

During rebuttal closing argument, the prosecutor made the following statements: "Let me give you a hypothetical. Suppose for me that there is a trial, and in a criminal trial, the issue is what state is this that is on the Elmo. Say you have one witness that comes in and this witness says, hey, I have been to that state, and right next to this state there is a great place where you can go gamble, and have fun, and lose your money. The second witness comes in and says, I have been to this state as well, and there is this great town, it is kind of like on the water, it has got cable cars, a beautiful bridge, and it is call Fran-something, but it is a great little town. You have another witness that comes in and says, I have been to that state, I went to Los Angeles, I went to Hollywood, I saw the Hollywood sign, I saw the Walk of Fame, I put my hands in Clark Gable's handprints in the cement. You have a fourth witness who comes in and says, I have been to that state.

"What you have is you have incomplete information, accurate information, wrong information, San Diego in the north of the state, and missing information, San Bernardino has not even been talked about, but is there a reasonable doubt that this is California? No. You can have missing evidence, you can have questions, you can have inaccurate information and still reach a decision beyond a reasonable doubt. What you are looking at when you are looking at reasonable doubt is you are looking at a world of possibilities. There is the impossible, which you must reject, the impossible but unreasonable, which you must also reject, and the reasonable possibilities, and your decision has to be in the middle. It has to be based on reason. It has to be a reasonable account. And make no mistake about it, we talked about this in jury selection, you need to look at the entire picture, not one piece of evidence, not one witness. You don't want to look at the tree and ignore the forest. You look at the entire picture to determine if the case has been proven beyond a reasonable doubt."

2. *ANALYSIS*

Defendant contends the prosecutor committed misconduct by misstating the prosecution's burden of proof. The People assert defendant forfeited this issue for appeal by failing to raise an objection in the trial court. We agree defendant forfeited this issue for appeal. In examining the merits, we conclude the prosecutor did not commit misconduct.

"[A] claim of prosecutorial misconduct is not preserved for appeal if defendant fails to object and seek an admonition if an objection and jury admonition would have cured the injury. [Citation.]" (*People v. Crew* (2003) 31 Cal.4th 822, 839.) The record

reflects defendant did not object to the reasonable doubt statements made by the prosecutor. There is nothing indicating that an objection would have been fruitless or that an admonition would not have cured the problem. The record reflects when the prosecutor characterized defendant's argument in a particular way, defense counsel raised an objection. The trial court heard the objection and explained its reasons for overruling the objection. Thus, it appears the trial court was responsive to objections raised by defense counsel during closing argument. In sum, defendant should not be raising this claim of prosecutorial misconduct for the first time on appeal. The time to raise it was during closing argument, and the place to raise it was the trial court. As a result, we conclude defendant has forfeited this issue for appeal. Nevertheless, we will address the merits of defendant's contention because it is easily resolved.

Defendant contends the prosecutor misstated the burden of proof by arguing: "You can have missing evidence, you can have questions, you can have inaccurate information and still reach a decision beyond a reasonable doubt. What you are looking at when you are looking at reasonable doubt is you are looking at a world of possibilities. There is the impossible, which you must reject, the impossible but unreasonable, which you must also reject, and the reasonable possibilities, and your decision has to be in the middle." Defendant interprets the foregoing argument as asserting the jury "could convict [defendant] if, from the evidence, it merely found that it was reasonably possible within the world of possibilities that he was guilty." Defendant contends this is not compatible with the reasonable doubt standard of proof.

"It is misconduct for a prosecutor to misstate the law during argument. [Citation.] This is particularly so when misstatements attempt 'to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. [Citation.]' [Citation.]" (*People v. Otero* (2012) 210 Cal.App.4th 865, 870-871 (*Otero*).) "'When, as here, the point focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained of remarks in an objectionable fashion.' [Citation.]" (*People v. Thomas* (2012) 53 Cal.4th 771, 797.)

Section 1096 defines reasonable doubt as follows: "'It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.'" No further information about the definition of reasonable doubt, other than that in section 1096, needs to be given to a jury. (§ 1096a.)

The prosecutor's description of the reasonable doubt standard was not eloquent, but it also does not constitute a misstatement of the law. The prosecutor explained to the jury, albeit in a roundabout manner, that reasonable doubt involves reflecting on the spectrum of possibilities that are supported by the evidence—from those that are impossible, to those that are unreasonable, and then to those that are reasonable and possible. The prosecutor argued that the jury's "decision has to be in the middle. It has to be based on reason. It has to be a reasonable account." Thus, the prosecutor argued

the jury needed to reject the impossible, the unreasonable, and the mere possibilities in favor of a reasonable factual scenario that was supported by the evidence. The prosecutor did not lower the State's burden of proof by making this argument to the jury. Rather, the prosecutor took a somewhat circuitous path in telling the jury that reasonable doubt requires the jury to be reasonable. If anything, the prosecutor's statement was not a misstatement of the law, as much as a poorly worded redundancy of the reasonable doubt instruction. Therefore, we conclude the prosecutor did not commit misconduct.

As far as arguing to the jury that some evidence might be inaccurate or incomplete, that is yet another redundancy, which was explained to the jury by the trial court instructions. For example, the trial court informed the jury, "If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest." (CALCRIM No. 226.) The trial court also informed the jury of its obligations related to conflicts in the evidence. (CALCRIM No. 302.) The overall point in the prosecutor's remark being—the evidence may not be perfect, but that does not mean the case is over. The trial court gave the jury the same information in a more complete and specific manner—you may find problems in the evidence, but you have an obligation to work through those problems. In sum, we are not persuaded the prosecutor committed misconduct.

Further, in regard to prejudice, to the extent the prosecutor's argument led to confusion on the part of the jury concerning the reasonable doubt standard, we note the trial court instructed the jurors that if they "believe[d] that the attorneys' comments on the law conflict with [the court's] instructions, [they] must follow [the court's] instructions." (CALCRIM No. 200.) The trial court also instructed the jury on the reasonable doubt standard of proof. (CALCRIM No. 103.) We presume the jury obeyed the admonition in CALCRIM No. 200, and disregarded any part of the prosecutor's argument that could have conflicted with the court's instructions on reasonable doubt. (*People v. Stanley* (1995) 10 Cal.4th 764, 836-837.) Defendant does not assert any errors concerning CALCRIM No. 200. Accordingly, defendant has not shown he was prejudiced by the prosecutor's statements.

Defendant relies on *Otero*, *supra*, 210 Cal.App.4th 865 to support his argument the prosecutor committed misconduct. Defendant did not cite *Otero* in his original briefs, because it had not yet been published, but includes it in a supplemental letter brief. In *Otero*, the prosecutor gave an example concerning a map, which was nearly identical to the example given in the instant case.

The prosecutor in *Otero* showed the jury a PowerPoint slide. The slide reflected outlines of California and Nevada. San Diego was marked at the northern end of California; San Francisco was south of San Diego, and Los Angeles was marked in southern California. (*Otero*, *supra*, 210 Cal.App.4th at p. 869.) The prosecutor told the jury she was "'thinking of a state'" with a centrally located city named San Francisco and a southern city named Los Angeles. The prosecutor said to the jury, "'Is there any

doubt in your mind . . . that state is California? Okay. Yes, there's inaccurate information. I know San Diego is not at the northern part of California, and I know Los Angeles isn't at the southern. Okay. But my point to you in this—.'" (*Id.* at p. 870.) At that point, the defendant's trial counsel objected. The trial court instructed the prosecutor to not use the diagram and admonished the jury to follow the reasonable doubt instruction given by the trial court. (*Ibid*.)

On appeal, the defendant argued the prosecutor committed misconduct by using the "thinking of a state" argument. The appellate court agreed the argument was misconduct, but concluded the error was harmless in light of the trial court's instructions. The appellate court found the argument to be misconduct because (1) it left a "distinct impression that the reasonable doubt standard may be met by a few pieces of evidence," and (2) "[i]t invites the jury to guess or jump to a conclusion, a process completely at odds with the jury's serious task of assessing whether the prosecution has submitted proof beyond a reasonable doubt.'" (*Otero, supra,* 210 Cal.App.4th at p. 871.)

We disagree with *Otero*'s analysis. First, the example may imply the evidentiary standard can be met by only a few pieces of evidence, but that is not a misstatement of the law. The testimony of a single witness can be sufficient evidence to support conviction. (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 845.) There is no requirement that a greater quantity of evidence be produced. Accordingly, we do not find it problematic that the example given in the instant case could be interpreted as requiring only a few pieces of evidence.

Second, we do not interpret the example as implying that the jury may simply jump to a conclusion without reflecting upon the evidence. The example involves asking the jury to look at all the city names, look at the outline shape, consider the inaccuracies in the geography, and then reach an answer. The example did not ask the jury to guess or speculate—it asked the jury to look at the information presented and come to reasonable conclusion.

Defendant argues, "The difference between *Otero* and the present case is that in this case, the error was prejudicial and requires reversal.'" Since we have concluded defendant forfeited this issue, the prosecutor did not commit misconduct, and that any alleged error would have been harmless, we find defendant's argument distinguishing *Otero* to be unpersuasive.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends his trial counsel was ineffective for failing to object to the prosecutor's misstatement regarding the burden of proof. We disagree.

"To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.)

We have concluded *ante*, that the prosecutor did not commit misconduct. Therefore, we conclude defendant's trial counsel was not ineffective for not objecting. Since there was no misconduct, defense counsel could not be expected to raise an objection. Accordingly, we conclude defense counsel performed in a manner to be expected of a reasonably competent attorney, and did not render ineffective assistance.

C. SENTENCING AS AN ADULT

1. *PROCEDURAL HISTORY*

Prior to trial, the prosecutor informed the trial court that defense counsel was concerned defendant was under the age of 18 years old when the alleged crimes were committed. The prosecutor recommended the court suspend proceedings until defendant's age could be established. Defense counsel explained, "[I]t may be problematic finding the information out. Apparently [defendant] is from a farming community in Nicaragua; records were lost." Defense counsel stated he planned to contact defendant's father in Fontana to ascertain defendant's age. The trial court suspended the criminal proceedings.

Approximately two months later, defense counsel informed the trial court that a defense investigator spoke to defendant's father (Denis). Denis could not recall defendant's exact date of birth, but narrowed it to sometime in 1989 or 1990. Denis recalled defendant's mother (Yolanda)[3] being pregnant, traveling to the United States, and giving birth to defendant. Denis remembered coming to the United States on

[3] We refer to defendant's mother by her first name for ease for reference; no disrespect is intended.

September 2, 1989. Denis deduced defendant must have been born in 1990. Defense counsel conceded defendant would have been over the age of 18 when the crimes were committed if he were born in 1990. The prosecutor asked the trial court to reinstate the criminal proceedings, and the trial court granted the request.

During the jury trial, Denis testified that he met Yolanda in Honduras, while he was in the process of fleeing Nicaragua due to political strife in the country. Denis only met Yolanda on two occasions. Denis was not present when defendant was born. Denis estimated defendant was born in 1990. Denis knew defendant by the names Jonis and Johnny. The victim and her father knew defendant by the name Johnny. The prosecutor referred to defendant as Johnny when questioning the victim during trial. The CPS report concerning the victim referred to defendant as Johnnie.

After the jury rendered its verdicts, defendant's trial counsel filed a declaration reflecting the following facts: After the verdicts were entered, defense counsel (Van Schlichting) spoke to an attorney (Pereira), who had been contacted by defendant's aunt and uncle regarding an appeal. Pereira told Van Schlichting about the aunt and uncle contacting him. Van Schlichting had not spoken to this particular aunt and uncle before—he had only spoken to Denis. Pereira gave Van Schlichting the following information from defendant's aunt and uncle: Yolanda lives in Nicaragua, defendant was 17 years old at the time the crimes were committed in this case, and defendant was in the United States illegally. Van Schlichting asked the trial court for a continuance to determine defendant's age, so the matter could "proceed in the court of proper jurisdiction."

The trial court held a hearing wherein defendant's aunt, Zoyla, testified. Zoyla met defendant and Yolanda in Nicaragua in 2006. In 2006, defendant illegally entered the United States. After defendant left for America, Zoyla asked Yolanda defendant's age, and Yolanda told Zoyla. Zoyla testified that defendant was born on July 22, 1993.

When Zoyla spoke to a defense investigator, prior to the hearing, she offered to contact a person in Nicaragua to try to find defendant's birth certificate. Zoyla contacted her aunt, Connie, to retrieve the birth certificate from the public document registry. Connie mailed Zoyla defendant's birth certificate, which Connie had retrieved from the Bureau of Records.

The defense investigator (Roman) also testified at the hearing. Roman contacted the Nicaraguan Consulate in Los Angeles. Roman took the birth certificate to the Consulate and spoke to "consul Segundo" Adilia Somoza. Somoza examined the birth certificate. Somoza found the document to be authentic based on the stamps and signatures.

Roman also contacted the American Consulate in Nicaragua. The American Consulate sent Roman a birth certificate from the Civil Registrar's Office reflecting Jhonny Garcia was born on July 22, 1993. The mother's name is listed as Yolanda Garcia, and the space for the father's name is blank. The birth certificate sent by Connie was an exact duplicate, reflecting Jhonny Garcia was born on July 22, 1993.

Denis also testified at the hearing. Denis recalled coming to America on September 2, 1989. Denis could not recall if Yolanda was pregnant in September 1989; he did not recall ever saying she was pregnant in September 1989. Denis returned to

Nicaragua in 1991, but could not recall if defendant had been born at that time. Denis returned to Nicaragua approximately three times after 1991, so he could not recall exactly when he first saw defendant, but he believed it might have been 1991. Denis could not recall if defendant was an infant or a toddler when he met him. Denis stated he did not know defendant's date of birth. Denis was not married to Yolanda, and did not have any other children with Yolanda. Denis has two sons with his wife.

The prosecution presented the testimony of defendant's probation officer (Basso). Basso interviewed defendant via telephone in May 2010. During the interview, defendant said he was born on January 31, 1988, and that he was 22 years old.

In the rebuttal phase of the hearing, defendant testified. Defendant did not know his birthday or the year he was born. Defendant told Basso his birthday was January 31, 1988, because that was the date on his prison identification card, and defendant just read the card to Basso. In Nicaragua, defendant was known as Jhonny Garcia. Defendant came to the United States in approximately 2006. Defendant had a fake identification card, which reflected his date of birth was January 31, 1988. Defendant changed his name to Jonis Centeno when he came to America. Defendant used the fake identification card to obtain work.

Defense counsel argued that the birth certificate and aunt's testimony reflected defendant was born in 1993, which meant defendant was 14 or 15 years old when he committed the crimes at issue. Defense counsel argued the case should be sent to the

juvenile court for disposition, because the criminal court lacked jurisdiction for sentencing.

The prosecution argued defendant failed to prove he was a minor at the time he committed the crimes. The prosecutor argued Denis believed defendant was born in 1990 and defendant used a birth year of 1988. The prosecutor asserted the trial court could not rely on the certified birth certificate because a page attached to the birth certificate reflected employees do not assume responsibility for the content of the document, so while the certificate was authenticated, the content was not authenticated. Further, the prosecutor asserted Denis and Zoyla suffered credibility problems—Denis because he could not recall how old defendant was when he visited him for the first time, and Zoyla because she never knew defendant's date of birth until, one day, she randomly asked Yolanda.

The prosecutor asserted defendant had not established any of the suggested years were his actual birth year, i.e., 1988, 1990, or 1993. Nevertheless, the prosecutor argued January 31, 1988, should be considered defendant's birthday because that was the date he used for working, the date he used for being incarcerated, and the date he gave to Basso. Defense counsel responded that the 1993 birthday had been established because the birth certificate was a certified copy from the United States Consulate.

The trial court stated that it had a problem with the birth certificate because the name on the certificate was Jhonny Garcia, which did not appear anywhere on the documents before the court. The court looked at the probation report, which indicated defendant did not have any aliases. The court reasoned if defendant were also known as

Jhonny, then defendant should have told Basso. The court also expressed concern that Denis's name did not appear on the birth certificate, when "everybody knew he was the father." The trial court said, "So I accept this. This is a birth certificate of someone. [¶] Is it the man before me in court today? [¶] I just don't have enough evidence to tell."

The trial court found Zoyla's testimony to be "incredible." Specifically, the trial court found it "incredible" that Zoyla flew into Nicaragua, ran into Yolanda, and then asked her about defendant's birth date, when the two women had never previously met. The trial court stated all it could do was take defendant's "word" and Denis's "word" that defendant was not a minor when the offenses were committed, i.e., defendant's birth year was 1988 or 1990. The trial court concluded, "So the record is made. Perhaps the Appellate Court will find something that this Court did not. If this is true that he is a juvenile, I certainly hope so."

2. *ANALYSIS*

Defendant contends the trial court erred by finding defendant was an adult at the time he committed the crimes against the victim. We disagree.

Welfare and Institutions Code section 604 governs transferring cases from criminal court to delinquency court. The statute provides that if it is suggested a defendant was under 18 years old when the charged offense was committed, then a "judge shall examine into the age of the person, and if, from the examination, it appears to his or her satisfaction that the person was at the date the offense is alleged to have been committed under the age of 18 years, he or she shall immediately certify" the case

to the delinquency court. (Welf. & Inst. Code, § 604, subd. (a).) Defendant bears the burden of proving he was under the age of 18 years when he committed the offense. (*People v. Nguyen* (1990) 222 Cal.App.3d 1612, 1621.) The standard of proof applied to such a hearing is a preponderance of the evidence. (*Id.* at p. 1620.)

On appeal, defendant and the People apply a mixed substantial evidence and abuse of discretion standard of review. The relevant statute provides that if a trial court finds a defendant to have been under the age of 18 years when the crime was committed, then the court "shall immediately" certify the case to the juvenile court. (Welf. & Inst. Code, § 604, subd. (a).) There does not appear to be any discretion afforded to the trial court. (Cf. *People v. Shipp* (1963) 59 Cal.2d 845, 852 [Discussing a prior version of the statute: If the defendant is under the age of 21 years the court *may* certify the matter to the juvenile court.].) Accordingly, we apply the substantial evidence standard of review, because the trial court's role in the hearing appears to be one of fact finder. Under the substantial evidence standard we view the record in the light most favorable to the trial court's finding to determine whether it includes reasonable, credible, and solid evidence that would support the trial court's conclusion. (*People v. Kelly* (2007) 42 Cal.4th 763, 787-788.)

Denis testified that he met Yolanda only two times, while they were both in Honduras. Denis was in Honduras because he was fleeing the political strife in Nicaragua. Yolanda returned to Nicaragua pregnant with Denis's child, and Denis never saw her again. Denis came to America on September 2, 1989. Denis returned to Nicaragua approximately one time in 1991 and three times in the following years.

During one of those visits, Denis visited defendant for 30 minutes, but could not recall whether defendant was a toddler or infant. Denis recalled defendant was being cared for by an aunt—Yolanda was not present at the visit.

Given the foregoing evidence, defendant had to have been conceived prior to September 1989; however, we do not know exactly when. The latest defendant likely would have been born is May 1990, assuming he was conceived just prior to Denis leaving for America. The problem here is that we have no idea how long Denis was in Honduras, and when he met Yolanda. Thus, it is possible defendant was conceived years or months prior to September 2, 1989—the point is that we do not know because the evidence is not informative on this point.

The initial report about defendant's crimes was made to child protective services on March 10, 2008. If defendant were born in May 1990, then he would have been 17 years old in early March 2008, but again, we do not know. What we can infer is that the July 22, 1993, date on the birth certificate is likely not accurate, given Denis's recollections of interacting with Yolanda prior to departing for America in 1989 and Denis's recollection that he returned to Nicaragua in 1991, thus confirming his memory that he left Honduras prior to 1993. In sum, the lack of evidence supports the trial court's finding that defendant did not prove he was born on or after March 1990. Defendant showed it was a possibility that he was born as late as May 1990, but only that it was a possibility. Accordingly, we conclude the trial court did not err.

Defendant asserts the trial court erred because the birth certificate supported a finding defendant was born in 1993. Defendant asserts he was known as Johnny, his mother was Yolanda Garcia, and he was born in Nicaragua. Defendant's argument is not persuasive because he is not viewing the evidence in the light most favorable to the judgment. Rather, he is rearguing the issue as if at the trial court—presenting the evidence in the light most favorable to defendant. As set forth *ante*, there is evidence supporting the trial court's conclusion that it is unclear exactly when defendant was born, and supporting the trial court's questioning of the birth certificate.

D. PROBATION OPTION

1. *PROCEDURAL HISTORY*

After the trial court recorded the jury's verdict, the court asked if a psychiatric report needed to be completed for defendant (§ 288.1). Defense counsel responded, "Yes." The prosecutor responded, "No. Only if the Court is considering probation in this case under *People v. Thompson* [(1989) 214 Cal.App.3d 1547]." Defense counsel and the prosecutor agreed a Static-99 test needed to conducted, but the prosecutor asserted that was different than a section 288.1 psychiatric report. The court did not order the section 288.1 psychiatric report.

At the next hearing, in April 2010, defense counsel asked the trial court to order a section 288.1 report, so the court could "consider all the options." The prosecutor responded that defendant was not entitled to a section 288.1 report unless the trial court was considering granting probation pursuant to *People v. Thompson*. The prosecutor asserted defendant was statutorily ineligible for probation, and the victim's young age

and vulnerability were factors in favor of denying probation. The trial court denied defense counsel's request.

On November 30, 2010, defense counsel again requested a section 288.1 psychiatric report. The trial court responded, "My understanding is, as his probation on Page 4 [*sic*], that unless I refer it and am considering probation, that is the only time in which a 288.1 report would be relevant. This Court is not considering probation." Defense counsel responded that he needed time to have the report done by the defense—to have defense counsel find a psychiatrist and obtain approval for the cost of the psychiatrist. The trial court asked why defense counsel would spend public funds on a psychiatrist's report when the court said it was "not going to offer probation." The trial court said it did not see the point of obtaining the report, but nonetheless granted defense counsel the requested amount of time to obtain a psychiatric report.

On September 21, 2011, after the trial court held a hearing and concluded defendant was an adult at the time the crimes were committed, defense counsel made another request for a section 288.1 psychiatric report. Defense counsel asserted the trial court never made a ruling granting or denying the defense's request for such a report. The trial court agreed that it had not rendered a ruling on the request. The trial court then said, "So to be clear, the Court is not inclined to refer this for a 288.1 report, as the Court is not considering probation in this matter. Although, I know I have discretion."

Defense counsel then argued why defendant should be granted probation. For example, there was not skin-to-skin contact, defendant did not have a criminal history, and a prison term would be "a death sentence" for defendant because he was young and

small. The People asserted defense counsel was "making a very large assumption" that prison would be a death sentence for defendant, and argued probation should be denied.

Defense counsel argued that if the court did not order a section 288.1 report, then it should order a 90-day diagnostic test. The court then permitted defense counsel to again argue in favor of defendant being granted probation. Defense counsel asserted defendant did not use force or violence against the victim, defendant's conduct was not egregious, and defendant had never been given an opportunity to perform on probation.

The trial court stated that it understood defense counsel's point about defendant's conduct not being the most egregious. The court then recounted how the victim "curled up in a ball" while testifying and appeared to be "clearly traumatized." The trial court remarked, "And what should not be forgotten is how this victim is going to go through the rest of her life in ways we won't know, because I saw the trauma on her face. And I thoroughly believe that what she said took place, did indeed take place."

The court stated it did not "desire to send [defendant] to any death sentence," but the court had to find balance to determine what the proper punishment should be. The court said, "I'm not trying to send anybody to be hurt or harmed in any way in the state prison system. But this was simply not a probation case to this Court, which is why I, in my discretion, decided I don't need the 288 report and I don't need any further diagnostic. [¶] What this Court intends to do, though, because he has never been to state prison, is to sentence him to the mitigated of three years, plus one-third for Count 2 . . . ."

2. *ANALYSIS*

Defendant asserts the trial court erred by not considering the option of granting defendant probation because the trial court erroneously believed the People were correct in asserting defendant was statutorily ineligible for probation. Contrary to defendant's position, the trial court stated on the record, "So to be clear, the Court is not inclined to refer this for a 288.1 report, as the Court is not considering probation in this matter. Although, *I know I have discretion*." (Italics added.) The trial court gave its reasons, on the record, for exercising its discretion to deny defendant probation. The trial court explained that it saw the victim "curled up in a ball" while testifying, how the victim appeared to be "clearly traumatized," and how the victim would "go through the rest of her life" living with that trauma. Thus, the record reflects the trial court (1) knew it had discretion to grant defendant probation, and (2) exercised its discretion to deny defendant probation. (Cal. Rules of Court, rule 4.414(a)(4).) As a result, we conclude the trial court did not err.

Defendant asserts the trial court denied the section 288.1 report immediately after the verdicts were recorded, and then continued to deny defense counsel's repeated follow-up requests. Defendant asserts this shows the trial court never fully considered the option of granting defendant probation. Defendant's argument is not persuasive because the record explicitly reflects the trial court knew it had discretion to grant defendant probation, and its various reasons for denying probation. We do not find defendant's argument based on inferences and implications to be persuasive in light of the explicit statements made by the trial court.

E. SUPPLEMENTAL PROBATION REPORT

1. *PROCEDURAL HISTORY*

Defendant's probation report is dated May 11, 2010. Defendant was sentenced on September 21, 2011. Defendant was in custody the entire time between May 11, 2010, and September 21, 2011.

2. *ANALYSIS*

Defendant contends the trial court erred by relying on an outdated probation report. We conclude any error was harmless.

"[A] 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." (Cal. Rules of Court, rule 4.411(c).) The Advisory Committee recommends reports be updated if more than six months have passed since the previous report was issued. (*People v. Dobbins* (2005) 127 Cal.App.4th 176, 181.)

Assuming the trial court erred by not ordering a supplemental report after more than a year had passed since the original report, we conclude the error was harmless. The error is reversible only if there were a reasonable probability of result more favorable to defendant having occurred, if not for the error. (*People v. Dobbins, supra,* 127 Cal.App.4th at p. 182.) Defendant was incarcerated during the time between the original probation report being issued and the sentencing hearing. Defendant does not assert there was any new information that should have or would have been included in a supplemental report that would have resulted in a more favorable sentence for defendant. Further, we note defendant's trial counsel informed the trial court of

defendant's experiences in jail; thus filling any time gap, to the extent new information needed to be offered. Accordingly, we conclude any error related to a supplemental probation report was harmless beyond a reasonable doubt, because there is nothing indicating a reasonable probability of a better result for defendant.

F. INACCURATE PROBATION REPORT

1. *PROCEDURAL HISTORY*

In the "Collateral Reports" section of defendant's probation report, the probation officer discusses the results of defendant's Static-99 test. The probation officer wrote, "His risk on release from a prison sentence cannot be calculated until his age on release on parole is known, so the risk score stated herein is predicative of risk at release on probation. As [defendant] *has a prior conviction for a registerable sex offense*, his risk score was calculated based on age at release on the most recent registerable sex offense." (Italics added.)

In the "Prior Record" section of the probation report, the probation officer wrote, "According to records of the San Bernardino County Sheriff's Office, the Bureau of Identification, the Department of Motor Vehicles, and the Federal Bureau of Investigation, the defendant has the following prior record: NO KNOWN PRIOR RECORD LOCATED." In the section of the probation report titled "Criteria Affecting Probation," the probation officer wrote, "The defendant does not have a prior record of criminal conduct."

Defendant's appellate counsel wrote a letter to the trial court informing it of the mistake in the probation officer's report. Appellate counsel requested the trial court

issue an order correcting the probation report or an order directing the probation officer to correct the report. The trial court responded with a minute order reflecting it read appellate counsel's letter, and found the probation report contained an inaccuracy, in that defendant does not have a prior criminal record.

2. *ANALYSIS*

Defendant contends the trial court erred by relying on a factual inaccuracy in the probation report, specifically, that defendant suffered a prior sexual offense conviction. We disagree.

Fundamental fairness requires that a court have reliable information in a probation officer's report. (*People v. Arbuckle* (1978) 22 Cal.3d 749, 754-755.) There is nothing indicating that the trial court relied on the inaccurate information concerning the prior offense in deciding to deny defendant probation. Rather, the trial court explicitly stated its decision was based upon the emotional injury suffered by the victim. (Cal. Rules of Court, rule 4.414(a)(4).) Specifically, the trial court remarked how the victim "curled up in a ball" while testifying, how the victim appeared to be "clearly traumatized," and how the victim would "go through the rest of her life" living with that trauma. It does not appear that the trial court relied upon the inaccuracy in the probation report as a basis for denying probation. Accordingly, we conclude the trial court did not err.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

MILLER
J.

We concur:

HOLLENHORST
Acting P. J.

CODRINGTON
J.