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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,
Plaintiff and Respondent,
v.
NICHOLAS JOHN MARTINEZ, JR.,
Defendant and Appellant.

A104728

(Lake County
Super. Ct. Nos. CR 5244 & CR032574)

Defendant Nicholas John Martinez, Jr. pleaded no contest to one count of committing a lewd and lascivious act on the body of a child under 14. (Pen. Code, § 288, subd. (a).)[1] The trial court denied probation and imposed the upper (or aggravated) term of eight years in state prison. Defendant contends the trial court abused its discretion by denying probation and imposing the aggravated term. In a supplemental opening brief he contends that under *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531] (*Blakely*), he was entitled to proof before a jury beyond a reasonable doubt of the factors in aggravation used to increase his sentence beyond the middle term.

The trial court did not abuse its discretion by denying probation. And on the facts known to the trial court, the court did not abuse its discretion by imposing the aggravated term. But the imposition of the aggravated term violated *Blakely* because the aggravating factors were neither admitted by defendant in the course of entering his plea, nor decided

[1] Subsequent statutory citations are to the Penal Code.

by a jury beyond a reasonable doubt. Accordingly, we reverse and remand for resentencing.

I. FACTS

Because of defendant's no contest plea, we take the facts from the probation report, the preliminary hearing transcript, and diagnostic reports submitted to the court.

Defendant was originally charged with three felony counts arising from two incidents involving the victim, 12-year-old Ciara K. The victim and her mother lived with the mother's fiancée, Kevin G., a Clearlake police officer. Kevin had gotten to know defendant through the latter's participation in a Police Explorer program. By the time of the offenses Kevin had known defendant for five or six years, treated him like a son, and allowed him to stay in his house on several occasions.

In December 2000, defendant stayed at the victim's home for about a week. Defendant was 20 years old, married, and on leave from the Army.

Defendant, 5′ 10″ and a stocky 255 pounds, sat on the victim, placed his hands under her shirt and bra, and fondled her breasts for two to three minutes while "engaging the victim in a wrestling-like match on the floor." Defendant stopped when the victim's five-year-old brother walked into the room and "made [a] comment as to what they were doing." According to the probation report, defendant "routinely engaged the victim in 'rough and tumble' play[]."

In April 2001, defendant flew back from his Army posting in New York to attend a funeral. Defendant went to the victim's house on a Saturday, played cards with the victim's mother, ate dinner with the family, and played computer games with the victim after the rest of the family went to bed. Around midnight, defendant asked the victim if she wanted to join him for a walk. The victim agreed because defendant was unfamiliar with the streets around the house. During the walk defendant told the victim "he had sexual feelings for her" and began to kiss her lips and fondle her breasts.

The victim was "shocked because she was only 12 years old," and reminded defendant that he was a married man. She also told defendant he had been "mean to her," which defendant replied was "his way of flirting." Defendant then told the victim either

to "give him head" or "suck his dick." The victim said she did not want to and told defendant she was going home.

Defendant said she could not go home "until she did what was asked of her." He unzipped his pants and "held the [victim's] head down to his penis forcing her to kneel to the ground." The victim "said she was intimidated into putting the defendant's genitalia into her mouth." Defendant moved his penis in and out of the victim's mouth twice. Then she lost her balance and fell back. The encounter ceased when defendant and the victim saw the headlights of an approaching car. Defendant told the victim "not to say anything because he could go to prison."

In a subsequent taped telephone conversation, defendant told the victim "not to trip" and to deny any molestation. Kevin learned of the offenses after defendant returned to his Army posting. Kevin called defendant, who first denied molesting the victim but then admitted it.

On November 13, 2001, the People filed an information charging defendant as follows: Count I, lewd and lascivious conduct with a child under 14 (§ 288, subd. (a)) for the December 2000 incident; Count II, a similar charge for the April 2001 incident; and Count III, forcible oral copulation of a child under the age of 18 (§ 288, subd. (b)(1)) for the April 2001 incident.

On January 10, 2002, defendant was released on bail so he could return to New York and obtain a discharge from the Army. He failed to return to Lake County for a trial date in late February 2002. He remained a fugitive from justice for over a year. He went to San Diego and worked at a 7-11 store under an assumed name, using the identification and Social Security number of his roommate. He also worked as an assistant wrestling coach at a local high school.

Defendant fully furnished his San Diego apartment, which boasted a 52-inch large screen TV and a Play Station 2. He bought DVD players and other things for friends—presumably on credit—because he knew that if he was caught "he would be sent

to prison and he wouldn't pay for them anyway."[2] Defendant turned himself in at San Diego in late February 2003, after the high school's head wrestling coach recognized him from a broadcast of "America's Most Wanted." He had briefly considered fleeing to Mexico with a 30.06 rifle.

Defendant was returned to Lake County and entered a negotiated no contest plea to Count I, the lewd and lascivious act committed in December 2000. Counts II and III were dismissed—but defendant entered a *Harvey* waiver on Count II, which pertained to the April 2001 incident.[3] At the time he entered his plea defendant was fully informed of the maximum possible sentence of eight years, and was aware he faced that sentence as a consequence of his plea. Defendant also stipulated there was a factual basis for the plea—but he did not specifically admit any aggravating circumstances.

The probation report, in addition to setting forth the facts of defendant's offenses, presented additional information about his sexual behavior. The report quotes defendant's wife—who left him on learning of the offenses—as stating that defendant told her he went into Internet chat rooms and asked women what they were wearing and if they were "wet." Defendant would also "get angry if his wife would not do unusual sex acts with him." A high school girlfriend of defendant's told the Probation Department that defendant "forced her and another girl to take off their shirts [to expose] only their bikini tops to attract more customers during an Explorer car wash fund-raiser." He told the girls they had to obey him because he was the "commanding officer." Defendant had "also tried to handcuff [the girlfriend] to a bed."

The report noted defendant was only eligible for probation if found a suitable candidate by a psychological evaluation. (§§ 288.1, 1203.067, subd. (a).) Tracking

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[2] At the sentencing hearing, the prosecutor represented that defendant "ran up credit card bills, furnishing his apartment with all sorts of nice things, knowing full well that when the cops came for him, he wouldn't be paying for them . . . ."

[3] *People v. Harvey* (1979) 25 Cal.3d 754.

California Rules of Court, rule 4.414, the report listed several factors in the case as criteria affecting the decision to grant or deny probation.[4]

Regarding facts relating to the crime (rule 4.414(a)), the report noted that the "nature, seriousness and circumstances of the crime are more serious than other instances of the same crime" (rule 4.414(a)(1)); the victim was "particularly vulnerable" (rule 4.414(a)(3)); defendant inflicted emotional injury to the victim (rule 4.414(a)(4)); defendant was an active participant (rule 4.414(a)(6)); and the manner in which the crime was carried out demonstrated criminal sophistication (rule 4.414(a)(8)).

Regarding facts relating to the defendant (rule 4.414(b)), the report noted that defendant had no prior convictions (rule 4.414(b)(1)); defendant claimed to be willing to comply with the terms of probation, but his ability to comply was poor (rule 4.414(b)(3) & (4)); the likely effect of imprisonment, and the collateral consequences of a felony conviction, would be substantial (rule 4.414(b)(5) & (6)); and defendant "appeared to be remorseful" but there was a substantial likelihood he would be a danger to others if not imprisoned (rule 4.414(b)(7) & (8)).

The probation report recommended that probation be denied based on the rule 4.414 criteria, "even if a psychological evaluation finds [defendant] a suitable candidate" for probation. The report noted the circumstances of the crime were "more serious than typical cases of the same nature" because defendant took advantage of a position of trust: he was treated like a son by Kevin and like a big brother by the victim, who "tolerated 'rough and tumble wrestling matches' with him at times." Defendant "took advantage of the victim's innocence" by molesting her when she accompanied him on a midnight walk only because he was unfamiliar with the area.

Defendant " 'tested the waters' " with the first molestation in December 2000, when he "merely fondl[ed] the victim's breasts," an act "planned and calculated to lay the groundwork for a more serious sexual molestation." He catered to her emotional needs by telling her he had sexual feelings for her, and "timed the sexual encounters during the

[4] Subsequent rule references are to the California Rules of Court.

times the victim was most vulnerable." He also tried to manipulate her into not saying anything about the molestations. The report concluded all this showed the defendant's criminal sophistication—along with his living as a fugitive for an entire year under an assumed name. The report also concluded defendant had a "tendency to engage in unusual sexual activities and exercise total control," and thus "pose[d] a substantial danger to the community, particularly to young[,] trusting, innocent girls."

The report concluded the positive factors—defendant's remorse and lack of a prior record—did not outweigh the negative factors, and recommended against probation.

The probation report also recommended that defendant be sentenced to the aggravated term of eight years in state prison. The report listed three circumstances in aggravation (rule 4.421): the victim was "particularly vulnerable" (rule 4.421(a)(3)); the manner in which the crime was carried out showed planning or sophistication (rule 4.421(a)(8)); and defendant took advantage of a position of trust or confidence (rule 4.421(a)(11)). The report listed only one circumstance in mitigation (rule 4.423): the lack of a prior record (rule 4.423(b)(1)). The report concluded the circumstances in aggravation outweighed the circumstance in mitigation, justifying the aggravated term.

Subsequently, clinical psychiatrist Douglas M. Rosoff conducted a psychological evaluation of defendant pursuant to section 288.1. Dr. Rosoff disagreed with the Probation Department's recommendation against probation. In Dr. Rosoff's opinion, defendant should be placed on probation because he did not inflict any physical injury on the victim or coerce the victim with weapons or intoxicating substances; defendant realizes his conduct was wrong and may have caused emotional suffering to the victim; defendant had a "sensitivity to the wrongfulness of his conduct that would provide an[] impetus for treatment in a designated treatment program"; and defendant "does not present . . . a risk to the welfare or safety of the public and public safety would be protected by his participation in an appropriate treatment program."

After receiving Dr. Rosoff's report, the trial court ordered the Director of the California Department of Corrections (CDC) to perform a diagnostic evaluation of defendant pursuant to sections 1203.03 and 1203.067. A CDC psychiatrist, Dr. Saldanha,

performed a psychiatric evaluation of defendant at San Quentin State Prison. Dr. Saldanha concluded defendant "has difficulty controlling his sexual impulses." Dr. Saldanha could not rule out a diagnosis of pedophilia "given that [defendant] has had sexual contact with a minor and opted to seek out contact with boys and girls as a wrestling coach during his year-long absconding . . . ."

Dr. Saldanha did not believe defendant was very remorseful: defendant "focused more on the adverse consequences he would face than the damage he may have done to his victim." In Dr. Saldanha's opinion, "given the predatory nature of his offense, the possible history of prior aggressive sexual behavior, the relative lack of remorse, decision to flee authorities, and the possible presence of a paraphilia [i.e., pedophilia], [defendant's] risk of repeat sex offense is moderate." Dr. Saldanha's report did not recommend probation or prison, but did recommend mental health treatment and advised against defendant having unsupervised contact with minors.

A subsequent diagnostic report by a CDC Correctional Counselor recommended against probation and recommended that defendant be sentenced to the aggravated term of imprisonment. The counselor concluded that defendant "fails to acknowledge or attempt to understand the emotions that led him to abuse a 12 year old girl." When asked why he molested the victim, and what steps he had taken to ensure nothing of the sort would happen again, defendant responded, "I don't know." When asked how long he might have to be separated from society until he did know, he again responded, "I don't know."

The counselor concluded that defendant "is an extreme danger to society as a repeat offender." Defendant "minimizes his responsibility as is common [with] sexually violent predators and expresses more regret for his changed fortune than remorse for his victim." Defendant's "lack of accepting responsibility by absconding to San Diego, his lack of remorse other than concern for his personal losses, the calculated effort to gain access to additional victims by volunteering at a high school, coupled with the tremendous suffering that he could inflict upon the next victim[,] makes him well qualified to serve the maximum period allowed by the statutes."

Finally, the Associate Warden of San Quentin recommended against probation, noting it was "too risky" to return defendant to the community. The warden emphasized that defendant had taken advantage of a position of trust, had sexual contact with a minor, and then "opted to seek out contact with boys and girls as a wrestling coach . . . ."

At sentencing, the court indicated it had read and considered the probation report, the section 288.1 report of Dr. Rosoff, and the reports of the section 1203.03 diagnostic study submitted by CDC. After hearing a statement from defendant and oral argument of counsel, the court denied probation. The court noted the CDC reports were "overall . . . a negative recommendation for probation . . . ." The court applied the rule 4.414 criteria, and found the offense was "as serious . . . if not slightly more serious" than "other instances of the same type of crime"; the victim was vulnerable; and defendant inflicted emotional injury on the victim and was an active participant in the crime. The court did find defendant did not demonstrate criminal sophistication; had no prior convictions; and claimed he was willing to comply with the terms of probation.

But the court further found "that the defendant has expressed some remorse for the conduct; although, some of his comments and answers to questions to the psychiatrist or psychologist have indicated a lack of remorse or a lack of understanding of what the victim went through. And the likelihood the defendant would constitute a danger to others if not imprisoned the Court considers to be high. And all of those factors again weigh against the grant of probation, and, accordingly, probation is denied."

After hearing further argument on the length of defendant's prison sentence, the court decided to impose the aggravated term of eight years: "The Court finds the following to be circumstances in aggravation in this case; that is, first, the victim was particularly vulnerable; and second, the defendant took advantage of a position of trust in order to commit the offense. The Court finds that there is a circumstance in mitigation, that is, that he has no prior criminal record. The Court finds the circumstances in aggravation outweigh the circumstances in mitigation, both in number and in weight. I do that because of the taking advantage of a position of trust and the force that was used in committing this offense. I give great weight to the circumstances in aggravation."

The court sentenced defendant to eight years on Count I, and to a consecutive eight months for a separate charge based on his failure to appear for trial, for a total of eight years and eight months.

II. DISCUSSION

Defendant contends the trial court erred by denying probation and by imposing the aggravated term. He also contends that *Blakely* requires that we set aside his sentence because the aggravating factors were not proved beyond a reasonable doubt to a jury. We find no abuse of discretion in the probation denial, and—on the facts before the court—no abuse of discretion in the imposition of the aggravated term. But as noted in the lead paragraph, *Blakely* error requires reversal of the sentence.

Probation Denial

The decision to grant or deny probation is well within the discretion of the sentencing court. (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.) "[T]he defendant bears a heavy burden when attempting to show an abuse of that discretion." (*Ibid.*)

Defendant first argues the probation denial was an abuse of discretion because "[m]any of the Rule 4.414 factors weighed in [his] favor." He also quotes selectively from the report of Dr. Rosoff—the most favorable to him of the four—and from Dr. Saldanha's report. But we look at the entire record when reviewing a sentencing court's decisions. The facts of defendant's offenses were before the court.[5] So were three reports from CDC indicating, to various degrees, that defendant posed a risk of reoffending—and two that indicated he was a danger to the community. Defendant had taken advantage of a position of trust and molested a vulnerable, and young, victim. He then fled and lived as a fugitive under an assumed name, while putting himself in a position of authority over high school students. Defendant only equivocally showed remorse.

Defendant has not met his heavy burden of showing that the denial of probation was an abuse of discretion.

Defendant also argues that there was no evidence to support the trial court's findings that the offense was more serious than other instances of the same type of crime, and that defendant posed a danger to the community. But there is substantial evidence of the relative seriousness of the offense, especially given defendant's abusing a position of trust and forcing a vulnerable victim to orally copulate him. And both the Correctional Counselor and the Associate Warden believed defendant was a danger to the community or his release was "too risky."

Defendant also claims there was no evidence the victim was vulnerable. In a related argument, he claims the finding of vulnerability is based on the age of the victim and defendant's abuse of a position of trust—and thus amounts to an improper dual use of facts. But there is substantial evidence the vulnerability finding is supported by facts other than age and defendant's position in the victim's life. The victim was vulnerable because of defendant's size and weight and the fact that she was alone with defendant when the molestations occurred. We note that the Correctional Counselor's report observes that the police reports of the April 2001 incident "reveal that [defendant] was attempting to remove the victim's pants[,] suggesting that the assault could very well have progressed to a more serious battery if [defendant] had not been interrupted by an approaching vehicle. Noting that the victim was 12 years old and that [defendant] was a 255[-]pound former football player[,] it is hard to imagine how the victim could not believe that [defendant's] behavior wasn't violent."

Defendant quotes a passage from the probation report that appears to link the notion of vulnerability with the victim's age. But we are not bound by the probation officer's sentence structure. The facts of this case show that the trial court, in its discretion, could find the victim was vulnerable because of defendant's size and weight and because he molested her when the two were alone, either in the victim's own home or on a walk at midnight.

The trial court did not abuse its discretion by denying defendant probation.

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[5] Due to the *Harvey* waiver on Count II, the court was entitled to take into consideration

Imposition of the Aggravated Term

Defendant also contends the trial court erred by imposing the aggravated term of eight years in state prison. We review the imposition of an aggravated term solely for abuse of discretion. (See *People v. Laws* (1981) 120 Cal.App.3d 1022, 1038.)

Defendant claims the trial court abused its discretion by relying on the aggravating factor of vulnerability of the victim. As he argued in the context of the probation denial, defendant claims reliance on the vulnerability factor amounts to the dual use of facts, because vulnerability is subsumed under the factor of abuse of trust. For the reasons set forth above, we reject this claim.

On the facts before it, the trial court did not abuse its discretion by imposing the aggravated term.[6]

Blakely *Error*

We need not discourse at length on what has become the sentencing issue du jour in California courts. It suffices to say that *Blakely* held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. [Citation.] For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on the facts reflected by a jury's verdict or admitted by the defendant." (*People v. Sample* (2004) 122 Cal.App.4th 206, 217 (*Sample*).)

It is common knowledge that the United States Supreme Court is reconsidering *Blakely* at the time of this writing. And numerous California Court of Appeal decisions involving aspects of *Blakely* are pending before the California Supreme Court.

Defendant contends the factors used to aggravate his sentence had either to have been admitted by him or tried to a jury and proved beyond a reasonable doubt.[7] Under

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the facts of that offense as well as Count I.

[6] In light of our conclusions regarding the denial of probation and the imposition of the aggravated term, we need not address the Attorney General's contention that defendant has waived these issues by not properly preserving them for appeal. We do note that defendant's claim of ineffective counsel, based on the failure to raise aspects of these issues at sentencing, is unavailing because those issues are meritless.

compulsion of *Blakely*, we agree—as have many California courts which have considered the issue.[8]

In imposing the aggravated term, the trial judge made a factual finding that the victim was vulnerable and that defendant abused a position of trust. Defendant did not admit these aggravating circumstances when he entered his plea. Neither were they found to be true beyond a reasonable doubt by a jury. We must thus conclude that the imposition of the aggravated term violated *Blakely*. (See *Butler, supra,* 122 Cal.App.4th at pp. 916-917; see also *Wagener, supra,* at pp. 12975-12976 [conc. & dis. opn. of McDonald, J.].) The error is not harmless.

III. DISPOSITION

The judgment is reversed. The matter is remanded to the trial court for further proceedings consistent with *Blakely*.[9]

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Marchiano, P.J.

We concur:

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Stein, J.

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Swager, J.

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[7] We reject the Attorney General's argument that defendant has waived his *Blakely* claim. (See *People v. Butler* (2004) 122 Cal.App4th 910, 917-918 (*Butler*); but see *Sample, supra,* 122 Cal.App.4th at pp. 217-221.)

[8] (See *Butler, supra,* 122 Cal.App.4th at pp. 916-917, and cases collected in *People v. Wagener* (Oct. 22, 2004, No. D042896) ___ Cal.App.4th ___ [2004 DJDAR 12970, 12972] (*Wagener*); but see *Wagener, supra,* at pp. 12973-12975 [majority opinion, after collecting cases finding *Blakely* applies to the imposition of an aggravated term, parts company with those cases and holds to the contrary].)

[9] We are not limiting the various options open to the court.