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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD SAMUEL  
ELLENSON,

Defendant and Appellant.

B275153

(Los Angeles County  
Super. Ct. No. VA138327)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert J. Higa, Judge. Affirmed.

James M. Crawford for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Timothy L. O'Hair, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Richard Samuel Ellenson was convicted by jury of continuous sexual abuse of his stepgranddaughter (Pen. Code, § 288.5; count 13). Defendant appeals, contending the trial court abused its discretion in denying probation, and imposing the high term of 16 years in prison. Finding no merit in either of these contentions, we affirm.

### **FACTUAL SUMMARY**

Katie R. was born in 1995. Defendant was married to Katie's grandmother, and Katie spent a significant amount of time at their home when she was a child. Defendant and Katie's grandmother lived across the street from Katie's elementary school. Each morning, Katie's mother dropped Katie off with her grandparents, who were paid to provide before school and after school care to Katie. Katie often spent the night at defendant's home, sleeping in the same bed as defendant and her grandmother.

Defendant began molesting Katie when she was approximately five years old. He was a large man, standing over six feet tall and weighing approximately 240 pounds. He exposed his penis to her and placed her hand on his penis. He also touched, licked, and placed his finger inside of her vagina. He made her perform oral copulation on him. He also watched pornography with her. These incidents occurred many times over the years, and continued until she was 12 or 13, after Katie told defendant to stop when she learned about rape and molestation in school.

Katie first disclosed the molestation to her boyfriend in January 2014. In September of that year, she told her parents what happened. She made a report to police in February 2015.

In a recorded pretext call to defendant, Katie demanded an apology for the “many times that [he] made [her] touch [his] penis.” Defendant responded that he “apologize[d] a hundred thousand times.”

Detective Christopher Waladis with the Los Angeles County Sheriff’s Department interviewed defendant. Defendant admitted to molesting Katie over two dozen times, but claimed the molestations began when she was 12 and only went on for one year.

## **DISCUSSION**

### **1. Relevant Facts and Proceedings**

The People’s sentencing memorandum sought the maximum sentence of 16 years in state prison based on the vulnerability of the victim, the position of trust occupied by defendant, that the crime was carried out in a manner showing sophistication and planning, and that the crime involved violence, based on Penal Code section 288.5’s classification as a violent felony. The only factors in mitigation were defendant’s lack of criminal record and his admission of wrongdoing.

Defendant’s sentencing brief requested probation, based on his age of 80 years and declining health, his support of his “ailing and elderly wife,” his therapist’s opinion that he had taken responsibility for his behavior and could be safely managed in the community, his lack of criminal history, the amount of time that had passed since the offense, that he had familial support, and the time he had already served in custody.

On the day of the sentencing hearing, defendant filed a report by Dr. Laura Brodie, a clinical and forensic psychologist retained by the defense. In Dr. Brodie’s interview with defendant, he admitted touching Katie on one occasion after she

touched him inappropriately. Dr. Brodie administered assessments to gauge defendant's sexual interest and personality. These assessments fell within normal ranges, and Dr. Brodie opined that defendant could be managed in the community. However, she did caution that defendant may not have been forthright in his responses to the assessments' questions.

The probation report recommended that probation be denied.

At the sentencing hearing, defendant's son and Katie's grandmother provided impact statements on defendant's behalf. Katie and her parents asked for the maximum sentence. Katie described her extreme emotional suffering, culminating in a recent suicide attempt.

After hearing argument from counsel, the trial court denied probation and selected the high term of 16 years, finding that the circumstances in aggravation – that the victim was particularly vulnerable and that the defendant occupied a position of trust – outweighed the circumstances in mitigation.

## **2. Analysis**

Defendant contends the trial court did not consider mitigating circumstances, such as his age, early acceptance of responsibility, and lack of criminal record, in denying probation. Regarding imposition of the high term, defendant argues that the aggravating factors did not outweigh the mitigating factors, and that the court improperly considered defendant's position of trust and the victim's vulnerability to aggravate his sentence, even though these factors were elements of the offense. We are not persuaded.

A trial court has broad discretion to determine whether a defendant is suitable for probation. (*People v. Welch* (1993) 5 Cal.4th 228, 233.) A single aggravating factor may support the denial of probation. Moreover, the court is presumed to have considered relevant criteria in the California Rules of Court relating to the grant or denial of probation, and is not required to state its reasons for denying probation in the record. (*People v. Robinson* (1992) 11 Cal.App.4th 609, 615; Cal. Rules of Court, rules 4.406(b), 4.409.)

California Rules of court, rule 4.414 sets forth criteria affecting a trial court's decision to grant or deny probation, listing factors related to the crime (such as the vulnerability of the victim, the emotional harm caused to the victim, and whether the defendant took advantage of a position of trust) and factors relating to the defendant (such as defendant's criminal history, remorsefulness, and ability to comply with probation). (Rule 4.414(a)(3), (a)(4), (a)(9), (b)(1), (b)(4), (b)(7).)

Here, the court stated in the record that it had considered the sentencing memoranda provided by both parties, and the report of Dr. Brodie. The court clearly considered the factors in mitigation, and found that the factors in aggravation supported denial of probation. We decline defendant's invitation to substitute our judgment for that of the trial court. (See, e.g., *Gonzales v. Nork* (1978) 20 Cal.3d 500, 507.)

As to imposition of the high term, "the choice of the appropriate term shall rest within the sound discretion of the court." (Pen. Code, § 1170, subd. (b).) The existence of a single aggravating circumstance is legally sufficient for imposition of the upper term. (*People v. Black* (2007) 41 Cal.4th 799, 816.) However, a fact that is an element of the offense may not be used

as a reason to impose the upper term. (Cal. Rules of Court, rule 4.420(d).)

California Rules of Court, rule 4.421 sets forth the circumstances in aggravation (such as the victim's vulnerability and that the defendant occupied a position of trust), and rule 4.423 sets forth the circumstances in mitigation (such as the defendant's admission of wrongdoing and lack of prior criminal record). Here, as discussed *ante*, the factors in aggravation plainly support defendant's sentence.

Moreover, we reject defendant's claim that his position of trust and the victim's vulnerability were elements of the offense that could not be used as factors in aggravation. Penal Code section 288.5, subdivision (a) provides that "[a]ny person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense . . . is guilty of the offense of continuous sexual abuse of a child . . . ." Residing in the same home and having recurring access to a child are not the same as occupying a position of trust. We can divine many scenarios where neither repeated access nor cohabitation would impart any sort of special trust on a defendant. Moreover, children under the age of 14 are not *always* vulnerable in light of their personal characteristics and the characteristics of their abuser. Here, there was a significant difference in size and age between the young Katie and her stepgrandfather whom she was expected to obey when he cared for her before and after school. Therefore, we find no error.

**DISPOSITION**

The judgment is affirmed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.