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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.

ERNEST CARDENAS CARDONA,

Defendant and Appellant.

B237626

(Los Angeles County  
Super. Ct. No. BA369315)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dennis J. Landin, Judge. Affirmed as modified.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, James William Bilderback II and Mark E. Weber, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Ernest Cardona of one count of committing a lewd act upon a child under age 14 (Pen. Code, § 288, subd. (a)). The jury also found true allegations that the victim was under age 28 at the time of the criminal filing, and that the crime occurred before she was 18 years old (Pen. Code, § 801.1, subds. (a), (b)). The trial court sentenced Cardona to a three-year prison term. On appeal, Cardona contends the trial court abused its discretion in denying probation. Cardona also asserts he was entitled to additional days of presentence custody credits. We modify the judgment to reflect additional custody credits and otherwise affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Cardona does not contest the conviction, thus we provide only a brief factual background in accordance with the usual rules on appeal. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1263.) The People charged Cardona with three counts of committing a lewd act upon a child under age 14, his daughter, K.M. (counts 1-3). The jury found Cardona not guilty on these counts. The People also charged Cardona with one count of committing a lewd act upon a child under age 14, G.F. (count 4).<sup>1</sup> The evidence at trial established that one night in 1998, G.F. was sleeping over at the house where Cardona lived. She woke up when Cardona called to her and told her to come to him. G.F. told Cardona to go away, then went back to sleep. She later awoke to find Cardona touching her stomach on top of her shorts; his hand then moved to her pubic area. G.F. pushed Cardona and threatened to scream if he did not leave her alone. He left. The jury found Cardona guilty on count 4.

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<sup>1</sup> Count 4 was based on an incident that occurred in 1998. Pursuant to Penal Code section 801.1, subdivision (a), the People alleged G.F. was under 18 at the time of the crime and the prosecution was commenced before her 28th birthday.

A probation report was completed prior to trial. The Probation Department noted Cardona was eligible for probation, and recommended the court grant probation if Cardona was convicted. After the trial, the Probation Department conducted a “static 99R” risk assessment evaluation.<sup>2</sup> Cardona received a score of two. The probation department report indicated the score “is in the low-moderate range of risk [of recidivism].” Cardona requested probation and asked the court to continue the sentencing hearing so that he might procure a psychiatric report, as required by Penal Code section 288.1. The court granted the continuance, noting probation was a possibility given the static 99R score, but more information was required about Cardona’s “situation.”

Psychiatrist Marc Cohen performed a psychiatric evaluation. According to his report, Cohen considered testimony from K.M. and a police detective’s testimony recounting G.F.’s allegations.<sup>3</sup> Cohen also interviewed Cardona. Based on information from these sources, Cohen opined Cardona likely suffered from pedophilia. Cohen explained: “Although Mr. Cardona did not reveal any sexual fantasies involving children and he did not speak about any prior sexual acts with prepubescent children during the clinical interview on July 9, 2011, the Reporter’s Transcript of the Proceedings provide strong support for the diagnosis of Pedophilia. Namely, the independent testimony of Detective Bowser and Mr. Cardona’s daughter, [K.M.], describe a pattern of sexual behavior directed towards prepubescent girls over a period of greater than six months, thus satisfying the clinical criteria for the diagnosis of Pedophilia.”

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<sup>2</sup> The report described the static 99R assessment as follows: “The static 99R is a risk assessment tool designed specifically for adult male sex offenders. . . . The static-99R is an instrument designed to assist in the prediction of sexual and violent recidivism for sexual offenders. . . . The static-99R consists of 10 items and produces estimates of future risk based upon the number of risk factors present in any one individual. . . . [T]he scores and levels in the static 99R are estimated statistical probabilities of the likelihood of recidivism for the individual that is assessed.”

<sup>3</sup> It appears that this testimony was taken from the preliminary hearing in the case.

Cohen further opined that Cardona represented “a high risk for committing a future sexual offense toward a prepubescent child.” In support of this opinion, Cohen noted that Cardona was “apparently experiencing marital difficulties and it is unclear whether he is socially isolated or participates in age-appropriate relationships. In addition, Mr. Cardona has a history of alcohol abuse and it is unclear whether he continues to misuse alcohol.” Cardona had revealed to Cohen that he drank large quantities of alcohol in the past, such as 10 bottles of beer over a four- or five-hour period “during his adolescence.” Cardona also reported he was arrested for driving under the influence in 2004. Cohen noted that Cardona claimed to have maintained his sobriety since 2004.

On the day set for the continued sentencing hearing, Cardona sought another continuance. Cardona’s counsel reported he had spoken with Cohen about modifying his opinion, and Cohen indicated he would need more information. Cohen suggested Cardona undergo psychological testing. It is unclear if such testing took place. However, there was no modified opinion from Cohen.

At sentencing, Cardona’s counsel argued the court should rely more on the opinion of the jury, which found Cardona not guilty on three of four counts, than on Cohen’s opinion. Counsel argued Cohen “went into jail for 20 minutes and came up with an opinion, and then after I spoke with [Cohen], he didn’t even realize what the findings of the verdict were.” Counsel argued Cohen had made an error in his report, and never responded after counsel sent him the static 99R report. According to counsel, when he spoke with Cohen, “his assessment of these facts was so cursory that he did not even realize or take the time to read my letter which said we went to trial.” Counsel asserted Cohen’s estimation of the risk of recidivism was “not accurate at all, and the static 99[R] is the accurate assessment of the low to moderate risk that this man represents to the community.”

The trial court indicated it had read and considered the probation officer's report, and reviewed the court's notes of the trial. The court concluded: "[T]here are mixed results regarding any likelihood of recidivism here. For this reason, I don't think probation is appropriate."

## DISCUSSION

### I. The Trial Court Did Not Abuse its Discretion in Denying Probation

Cardona contends the trial court abused its discretion in denying probation because it did not consider all of the relevant circumstances and placed too much weight on Cohen's Penal Code section 288.1 report. We find no abuse of discretion.

" 'The trial court enjoys broad discretion in determining whether a defendant is suitable for probation.' [Citation.] 'To establish abuse, the defendant must show that, under the circumstances, the denial of probation was arbitrary or capricious. [Citations.] A decision denying probation will be reversed only on a showing of abuse of discretion. [Citation.]' [Citation.]" (*People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1530 (*Ramirez*)).

California Rules of Court, rule 4.414 enumerates several criteria relating to the crime and the defendant that affect the decision to grant or deny probation.<sup>4</sup> Cardona

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<sup>4</sup> Rule 4.414 provides: "Criteria affecting the decision to grant or deny probation include facts relating to the crime and facts relating to the defendant. [¶] **(a) Facts relating to the crime** [¶] Facts relating to the crime include: [¶] (1) The nature, seriousness, and circumstances of the crime as compared to other instances of the same crime; [¶] (2) Whether the defendant was armed with or used a weapon; [¶] (3) The vulnerability of the victim; [¶] (4) Whether the defendant inflicted physical or emotional injury; [¶] (5) The degree of monetary loss to the victim; [¶] (6) Whether the defendant was an active or a passive participant; [¶] (7) Whether the crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur; [¶] (8) Whether the manner in which the crime was carried out demonstrated criminal sophistication or professionalism on the part of the defendant; and [¶] (9) Whether the defendant took advantage of a position of trust or confidence to commit the crime. **(b) Facts relating to the defendant** [¶] Facts relating to the defendant include: [¶] (1) Prior record of criminal conduct, whether as an adult or a juvenile, including the recency and frequency of prior crimes; and whether the prior record indicates a pattern of regular or increasingly serious criminal conduct; [¶] (2) Prior performance on probation or parole

argues that many of these factors weighed in his favor, such as the victim’s lack of physical injury or monetary loss, he was not armed during the crime, there was a lack of criminal sophistication or professionalism, he had no prior criminal record, and he was willing to comply with the terms of probation. However, “even if there were several mitigating factors that might weigh in favor of probation, this does not necessarily mean that the trial court abused its discretion in deciding against granting probation.”

(*Ramirez, supra*, 143 Cal.App.4th at pp. 1530-1531.) Here, we note that not all of the rule 4.414 factors were unquestionably in Cardona’s favor. For example, while Cardona argues G.F. was not “particularly vulnerable,” we note she was under 14 years old, and asleep when Cardona subjected her to inappropriate touching. (Cal. Rules of Court, rule 4.414(a)(3).) The trial court could reasonably conclude she was in fact vulnerable. (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1314.) Similarly, Cardona was an “active participant” in the crime. (Cal. Rules of Court, rule 4.414(a)(6).) The record does not suggest the trial court failed to consider all of the relevant factors.

Cardona further contends the trial court relied too much on Cohen’s faulty report. But the record indicates the trial court considered all of the evidence before it, including the probation department report, and the court’s notes from the trial. To the extent Cohen’s opinion was flawed because it did not acknowledge Cardona was acquitted of the charges relating to K.M., this flaw is apparent from reading the report. In addition, counsel brought this flaw, and other concerns, to the court’s attention. The trial court was thus informed and able to give the report the weight the court felt it deserved. We do not reweigh evidence on appeal. “We will not interfere with the trial court’s exercise of

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and present probation or parole status; [¶] (3) Willingness to comply with the terms of probation; [¶] (4) Ability to comply with reasonable terms of probation as indicated by the defendant’s age, education, health, mental faculties, history of alcohol or other substance abuse, family background and ties, employment and military service history, and other relevant factors; [¶] (5) The likely effect of imprisonment on the defendant and his or her dependents; [¶] (6) The adverse collateral consequences on the defendant’s life resulting from the felony conviction; [¶] (7) Whether the defendant is remorseful; and [¶] (8) The likelihood that if not imprisoned the defendant will be a danger to others.”

discretion ‘when it has considered all facts bearing on the offense and the defendant to be sentenced.’ [Citation.]” (*People v. Downey* (2000) 82 Cal.App.4th 899, 910.)

Moreover, even the static 99R assessment did not indicate there was *no* risk of recidivism. Instead, it indicated the risk was low to moderate. The trial court could reasonably conclude, as it stated, that there were mixed results regarding the likelihood of recidivism. The court’s decision to deny probation was not arbitrary or capricious. There was no abuse of discretion.

## **II. Cardona was Entitled to Additional Days of Custody Credit**

Cardona argues, and the People agree, that he was entitled to additional pre-sentence custody credits. The trial court awarded a total of 662 days of credits (576 actual, 86 days conduct). However, from the date of his arrest (March 19, 2010) to sentencing (October 27, 2011), Cardona was in custody 588 days. (*In re Marquez* (2003) 30 Cal.4th 14, 25; *People v. Bravo* (1990) 219 Cal.App.3d 729, 735.) He was entitled to 15 percent of that time as conduct credits, which equaled 88 additional days. (Pen. Code, §§ 2933.1, subds. (a), (c), 667.5, subd. (c)(6); *People v. Ramos* (1996) 50 Cal.App.4th 810, 815-816 [credits are not rounded up; defendant entitled to the greatest whole number of days not exceeding 15 percent of actual confinement].) Thus, Cardona should have received 676 days of presentence custody credits (588 + 88).

## **DISPOSITION**

The judgment is modified to reflect a total of 676 days of presentence custody credits. In all other respects the judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect the corrected presentence custody credits and forward copies to the Department of Corrections.

BIGELOW, P. J.

We concur:

RUBIN, J.

FLIER, J.