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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. KIMBERLY GRACE MUNSON, Defendant and Appellant.	B237606 (Los Angeles County Super. Ct. No. BA370981)

APPEAL from a judgment of the Superior Court of Los Angeles County, Victor H. Greenberg, Judge. Affirmed.

Libby A. Ryan, 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, Chung L. Mar and Seth P. McCutcheon, Deputy Attorneys General, for Plaintiff and Respondent.

Kimberly Grace Munson appeals from her conviction by jury verdict of child custody deprivation in violation of Penal Code section 278.5, subdivision (a) (statutory references are to this code). Her only contention on appeal is that the trial court abused its discretion by declining to reduce the felony charge to a misdemeanor. We find no abuse of discretion and affirm.

FACTUAL AND PROCEDURAL SUMMARY

Appellant dated John Usry and became pregnant in 2003. They never married. Their daughter, Tuesday Usry, was born in March 2004. The relationship between appellant and Mr. Usry ended in 2006. They had an informal custody arrangement for Tuesday, and John paid informal child support. By September 2008, communication between appellant and John had broken down. He went to family court for a formal custody order. In January 2009, the court issued a custody order which provided that Mr. Usry was to pick Tuesday up from preschool every second and fourth Friday of the month and to drop her off at school the following Monday morning. He also was to have reasonable telephone contact with Tuesday.

Mr. Usry picked up Tuesday according to this custody schedule in January and February 2009, but appellant did not allow him to speak with the child on the telephone. On Friday, March 20, 2009, he went to Tuesday's preschool to pick her up at the scheduled time, but the child was not there. He was told that appellant had picked her up two hours before. He was not able to see the child that weekend. The next visit with Tuesday was scheduled for April 10, 2009. Mr. Usry saw the child briefly on Wednesday of that week when he brought her an Easter basket at the school. He went to the preschool on Friday April 10th at the scheduled time, but Tuesday was not there. He was told that appellant had taken her out of the preschool and moved her to another school. He did not have an address for appellant, but found an address on the internet. He contacted law enforcement to assist him in seeing Tuesday, without success.

The next time Mr. Usry saw Tuesday was a year later, on May 15, 2010. He had no contact with the child between dropping off the Easter basket in April 2009 and May

2010. He attempted to telephone appellant but was unable to reach her. In December 2009, Mr. Usry went to family court to advise the court that he was not being allowed visitation. Appellant appeared in family court at a hearing in April 2010, and after that Mr. Usry was able to see Tuesday in May 2010.

Mr. Usry did not change his telephone number during the period when he was unable to visit Tuesday. Appellant never attempted to contact him to find out why he was not visiting Tuesday, and she did not contact Mr. Usry in any way. He felt frustrated and helpless.

Appellant was charged with one felony count of child custody deprivation, in violation of section 278.5, subdivision (a). After jury instructions were given, appellant moved for a reduction of the charge to a misdemeanor based on the nature of the offense and her record. The prosecutor objected to the reduction in light of the length of time Mr. Usry was deprived of visitation. The prosecutor also indicated an understanding that appellant was continuing to prevent Mr. Usry from seeing Tuesday in a dependency matter. The court declined to reduce the charge to a misdemeanor "based upon the facts as presented in court at this time." Appellant was convicted by jury verdict as charged. Sentence was suspended and appellant was placed on formal probation for five years. She appealed from the judgment of conviction.

DISCUSSION

When this crime was committed, section 278.5, subdivision (a) provided: "Every person who takes, entices away, keeps, withholds, or conceals a child and maliciously deprives a lawful custodian of a right to custody, or a person of a right to visitation, shall be punished by imprisonment in a county jail not exceeding one year, a fine not exceeding one thousand dollars ($1,000), or both that fine and imprisonment, or by

imprisonment in the state prison for 16 months, or two or three years, a fine not exceeding ten thousand dollars ($10,000), or both that fine and imprisonment."[1]

Appellant was charged with a felony violation of section 278.5, a "wobbler" which may be punished as either a felony or misdemeanor. She argues the trial court abused its discretion in failing to reduce the charge from a felony to a misdemeanor, citing section 17, subdivision (b) and *People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 974 (*Alvarez*).)

The trial court had the discretion to reduce the charge against appellant to a misdemeanor because the statute authorized alternative felony or misdemeanor punishment. (*People v. Mauch* (2008) 163 Cal.App.4th 669, 674.) We review the court's ruling on a motion to reduce a felony to a misdemeanor for abuse of discretion. (*Alvarez, supra,* 14 Cal.4th at pp. 976–977.) The Supreme Court explained the broad discretion accorded the trial court under section 17, subdivision (b): "By its terms, the statute sets a broad generic standard. [Citation.] The governing canons are well established: 'This discretion . . . is neither arbitrary nor capricious, but is an impartial discretion, guided and controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. [Citations.]' [Citation.] 'Obviously the term is a broad and elastic one [citation] which we have equated with "the sound judgment of the court, to be exercised according to the rules of law." [Citation.]' [Citation.]" (*Id*. at p. 977.)

The *Alvarez* court explained that "'[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.]" (*Alvarez, supra,* 14 Cal.4th at pp. 977–978.) We may not reverse a sentencing decision "'merely because

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[1] In 2011, section 278.5, subdivision (a) was amended to provide that felony imprisonment be imposed pursuant to subdivision (h) of section 1170. (Stats. 2011, ch. 15, § 314, eff. April 4, 2011, operative Oct. 1, 2011.)

reasonable people might disagree. . . .' [Citation.]" (*Id*. at p. 978.) The court found various factors relevant, including the nature and circumstances of the offense, the defendant's appreciation and attitude toward the offense, or his or her character as evidenced by his or her behavior and demeanor at trial. (*Ibid.*)

Appellant argues that reduction to a misdemeanor was appropriate because she had only three prior minor misdemeanor offenses for battery in 2001, petty theft in 2002 and driving with a suspended license in 2009. She notes that she had no felony convictions and that the probation report recommended that she be placed on probation. She cites a statement about a prior offense made later by the trial court when it was considering whether to remand her into custody after her conviction. Appellant also notes the family court granted her custody, and that Mr. Usry wished Tuesday to remain in her care. Appellant characterizes her offense as "a very minor one."

On this record, appellant has not carried her burden of demonstrating that the trial court abused its discretion in declining to reduce her conviction to a misdemeanor. Mr. Usry was deprived of visitation with Tuesday for over a year. We disagree with appellant's characterization of this as a minor offense.

DISPOSITION

The judgment of conviction is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J. MANELLA, J.