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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JAMES CRAIG DARLING, Defendant and Appellant.	D047251 (Super. Ct. No. SCN178962)

APPEAL from a judgment of the Superior Court of San Diego County, Runston G. Maino, Judge. Affirmed in part and reversed in part.

A jury convicted defendant James Darling of one count each of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b)),[1] shooting at an inhabited structure (§ 246), discharging a firearm at a person from a motor vehicle (§ 12034, subd. (c)), assault on a peace officer with a semiautomatic firearm (§ 245, subd. (d)(2)) and reckless driving while evading an officer (Veh. Code, § 2800.2). The jury also found true

allegations of personal use of a firearm, a handgun, (§ 12022.5, subd. (a)) appended to the section 245, subdivision (b) charge and the section 245, subdivision (d)(2) charge. Darling asserts on appeal (1) the section 245, subdivision (b) conviction must be reversed as a necessarily lesser included offense within the section 12034, subdivision (c) offense, and (2) the trial court abused its discretion by denying his request for probation.

I

FACTUAL BACKGROUND

Prosecution Case

Darling lived in his van, which he parked in a garage across the alley from a house occupied by Gary Murphy and his 18-year-old son, Kyle. Darling and the Murphys had been neighbors and friends for many years.

During the early morning hours on May 21, 2004, Kyle was sleeping in the Murphys' garage, which had been converted to serve as Kyle's bedroom, when he was awakened by the sound of two loud bangs and shattering glass. Gary also heard the bangs, and when he got up to investigate he heard someone say, "That was a gun. That was in the alley." Gary went outside to check on Kyle, heard an engine noise, and saw Darling's van moving slowly down the alley. The van stopped in front of the Murphys' garage and, when Gary started to approach the van, he heard Darling yell, "In the house. Stand down." Gary hesitated but, because he thought Darling was yelling at someone else, he again started toward Darling's van. Darling then fired two more shots at

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1 All further statutory references are to the Penal Code unless otherwise specified.

Murphy's house, and Gary retreated. Gary and Kyle went inside to the safety of the house and called 911. After police arrived, Kyle went to the garage with an officer and saw that one of the bullets had left a hole just inches from where he had been sleeping. A bullet fired by Darling had passed through the tailgate of Kyle's truck and was found in the truck bed.

Deputy Sheriff Anderson was on patrol when he heard the dispatch report that gunshots had been fired. He responded and observed Darling's van weaving down the center of the road. Kelly was unsure whether this was the van involved in the shooting but stopped the van for suspected drunk driving.

Anderson felt something was amiss and therefore pulled his handgun from his holster and held it in the "low ready position" as he approached the van. When he reached the van, Anderson (holding his gun above the roof so that Darling could not see it) asked Darling for his license and registration. Darling's left hand was on the steering wheel in full view but, because Anderson could not see his right hand, Anderson told Darling several times to put his hands on the steering wheel. Each time, Darling responded by mumbling an incoherent response about "Coast Guard" or "Navy SEAL."

Darling then looked at Anderson and began to lift his right arm up. Anderson saw Darling was holding a Colt .45 handgun and was swinging it to point at Anderson; the barrel came within six to 10 inches of Anderson's face. Anderson pushed away from the van, stumbled backwards, and fired numerous rounds at the van's door to prevent Darling from getting out of the van. Darling then drove away.

Anderson pursued the van. Darling obeyed the speed limits but, when Anderson neared the van, Darling suddenly put the van into reverse and rammed backwards into Anderson's car, causing the front of the patrol car to crumple and the air bag to deploy. Darling then drove away. However, Anderson's car was not incapacitated and he was able to pursue Darling. Other officers responded to Anderson's call for help and also pursued Darling. When Darling eventually came to a stop, police were able to subdue and handcuff him.

Police found a loaded semiautomatic handgun in Darling's van, along with additional fully loaded magazines. Ballistics analysis of a bullet recovered near the Murphys' home confirmed Darling's weapon had fired the shot, and other bullets recovered from the scene were consistent with having been fired from Darling's weapon.

Darling's Testimony

Darling testified he had fallen asleep after drinking a pint of bourbon and was awakened by gunshots. He drove around to investigate, carrying his gun for protection. When he was driving down the alley near the Murphy house he saw a muzzle flash and thought someone was shooting at him. He responded by firing one shot into the gravel and yelling at anyone inside the Murphy house to "stand down." Because he had no telephone, he drove to Leucadia Boulevard to find a public telephone. As he was driving, he saw a police car and started weaving to attract its attention. When he realized the deputy wanted him to pull over, he stopped the van. The deputy approached him, yelling repeatedly, "Do you have a gun?" and he responded by reaching down and retrieving the pistol. He held it up for the deputy to see, but did not point it at the deputy. The deputy

then started firing at Darling, so Darling ducked down until the shooting stopped, at which point he drove away.

Darling saw the deputy following him. He wanted to find a witness or a telephone, so he rammed the patrol car to trigger the air bag to stop the deputy from following him. He then drove away, hoping to find a witness or a place he could safely stop. Although Darling saw additional officers pursuing him, he still feared the first officer would shoot him, so he continued driving to find a place with witnesses so he could safely surrender. He eventually stopped at a taco shop where witnesses were present. He tried to comply with the officers' demands to get down but his injured knee prevented him from kneeling, and the officers then knocked him down.

The casings found in the van were his because he collected them at shooting ranges to reuse them. He did not intend to injure the Murphys.

II

ANALYSIS

A. Conviction of Multiple Charges

Darling contends his conviction for assault with a semiautomatic firearm (§ 245, subd. (b)) must be reversed because it is a lesser, necessarily included offense of discharging a firearm from a vehicle at a person outside the vehicle (§ 12034, subd. (c)). "In California, a single act or course of conduct by a defendant can lead to convictions 'of *any number* of the offenses charged.' [Citations.] But a judicially created exception to this rule prohibits multiple convictions based on necessarily included offenses." (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034.) Because Darling was charged with and

convicted of multiple offenses, we apply the statutory elements test to determine if the assault conviction is a lesser, necessarily included offense within the discharging offense. (*People v. Reed* (2006) 38 Cal.4th 1224, 1231.)

Under the statutory elements test, an offense is a lesser, necessarily included offense within the greater offense if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, and the greater offense therefore cannot be committed without also committing the lesser offense. (*People v. Birks* (1998) 19 Cal.4th 108, 117.) We conclude multiple convictions of section 245, subdivision (b) and section 12034, subdivision (c) are barred here under the statutory elements test.

Section 12034, subdivision (c) provides: "Any person who willfully and maliciously discharges a firearm from a motor vehicle at another person other than an occupant of a motor vehicle is guilty of a felony punishable by imprisonment in state prison for three, five, or seven years." Thus, the elements of section 12034, subdivision (c) requires (1) the defendant discharging a firearm at another person (excluding occupants of another motor vehicle) (2) while the defendant was an occupant of a motor vehicle, and (3) the defendant acted willfully and maliciously.

Section 245, subdivision (b) provides: "Any person who commits an assault upon the person of another with a semiautomatic firearm shall be punished by imprisonment in the state prison for three, six, or nine years." Assault is defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) Thus, the elements of section 245, subdivision (b) are (1) an attempt, coupled with a present ability, to commit a violent injury on another person (2) by use of a

semiautomatic weapon and (3) the defendant acted willfully. (*People v. Tran* (1996) 47 Cal.App.4th 253, 261.)

The court in *In re Edward G.* (2004) 124 Cal.App.4th 962 examined whether a violation of section 245, subdivision (a)(2)[2] was a lesser, necessarily included offense within section 12034, subdivision (c). The court held section 245, subdivision (a)(2) was a lesser, necessarily included offense within section 12034, subdivision (c), reasoning that "[i]t is not possible to 'willfully and maliciously [discharge] a firearm' 'at another person' (§ 12034, subd. (c)) without attempting 'to commit a violent injury on the person of another' 'with a firearm' while having a 'present ability' to do so [citations]." (*Edward G.*, at p. 968.)

The People, noting the *Edward G.* court expressly acknowledged "the 'present ability' element of assault . . . gives us pause" (*In re Edward G., supra,* 124 Cal.App.4th at p. 968), argues the analysis of this element by the *Edward G.* court was flawed and should not be followed. In *Edward G.*, the court posited the issue as being whether "a person who 'discharges a firearm . . . at another person' (§ 12034, subd. (c)) necessarily [has] 'a present ability . . . to . . . injur[e]' that other person (§ 240)." (*Ibid.*) *Edward G.* followed *People v Valdez* (1985) 175 Cal.App.3d 103, which held the *present ability to*

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2 Although we here consider subdivision (b) rather than subdivision (a)(2) of section 245, the only difference between those subdivisions is in the nature of the firearm employed by the defendant. Darling and the People agree that the nature of the firearm employed has no bearing on whether assault with a firearm (whether under subdivision (a)(2) or under subdivision (b) of section 245) is a lesser, necessarily included offense within section 12034, subdivision (c).

injure element is satisfied as long as the defendant has "maneuvered himself into such a location and equipped himself with sufficient means that he appears to be able to strike immediately at his intended victim" (*People v Valdez, supra,* at p. 112), even if some extrinsic circumstance unknown to the defendant made it impossible for the defendant actually to injure the victim. (*Edward G.*, at p. 968.) From this foundation, the *Edward G.* court concluded a person who violates section 12034, subdivision (c) necessarily did so with the present ability to commit a violent injury on the person of another, because "[a] violator of section 12034, subdivision (c), has 'willfully and maliciously discharge[d] a firearm . . . at another person . . . .' If a perpetrator is in a position to fire 'at' a person, his or her gun is loaded, and he or she actually discharges it at the person, then the perpetrator necessarily has 'maneuvered himself into such a location and equipped himself with sufficient means that he appears to be able to strike immediately at his intended victim.' " (*Edward G.*, at p. 969.)

The People argue this reasoning is flawed because a vehicle occupant can shoot *at* a victim, thereby violating section 12034, subdivision (c), but from a distance so far from the victim that the shooter lacked the *ability* to hit the victim with his shot, thereby not constituting an assault under section 240. Although a shot fired outside the range of any human target by a vehicle occupant is punishable under section 12034, subdivision *(d),* the People cite no authority for the proposition that it is also punishable under section 12034, subdivision *(c)* merely because the shooter orients the gun toward (or "at") a distant human populous.

We agree with *Edward G.* that, under the statutory elements test, multiple convictions are barred here. Accordingly, the conviction for the section 245, subdivision (b) offense is reversed.

B. Denial of Probation

Darling argues the trial court abused its discretion by denying his request for probation because (1) it misunderstood what factors were appropriate considerations in its decision, and (2) it misapplied the relevant criteria for deciding whether Darling presented an unusual case justifying probation.

Legal Framework

The trial court is required to determine whether a defendant is eligible for probation. (Cal. Rules of Court, rule 4.413(a).)[3] All defendants are eligible for probation if they are not within one of the categories restricting the availability of probation. The most severe restrictions unconditionally prohibit probation for certain felony cases (see, e.g., §§ 1203.06-1203.09), while other restrictions merely limit the sentencing court's authority to grant probation except in unusual cases in which the interests of justice would best be served. (See, e.g., § 1203, subd. (e).) Section 1203, subdivision (e)(2) prohibits a grant of probation to defendants who personally use a deadly weapon in committing the offense "[e]xcept in unusual cases where the interests of justice would best be served if the person is granted probation." Darling was presumptively ineligible for probation under this provision.

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3 All further rule references are to the California Rules of Court.

When a defendant is presumptively ineligible for probation, a trial court first decides (employing the criteria set forth in rule 4.413) whether the presumption is overcome because it involves an unusual case in which the interests of justice would be served by a grant of probation. (*People v. Superior Court* (*Du*) (1992) 5 Cal.App.4th 822, 830.) The court's ruling on this issue will not be reversed absent an abuse of discretion. (*Id*. at p. 831.) If the court determines the case qualifies as an unusual case, it then considers whether to grant probation employing the criteria set forth under rule 4.414. (*Id*. at p. 830.)

The appellate court presumes the trial court acted to achieve legitimate sentencing objectives, and a defendant must therefore clearly show that a sentencing decision was "so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) To establish abuse, the defendant must show that, under the circumstances, the sentencing decision was arbitrary, capricious, or " 'exceed[ed] the bounds of reason . . . .' " (*People v. Warner* (1978) 20 Cal.3d 678, 683.)

Analysis

We conclude Darling has not clearly demonstrated the trial court's decision to deny probation was an abuse of discretion.

Darling first argues the court, whose discretion must be exercised in conformity with applicable principles (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977), erred because it applied criteria applicable to *sentencing* decisions when it evaluated the two-step *probation* decision under rule 4.413 of whether his case was "unusual" and, if so, whether to grant probation. Darling points out that the court, after

noting the first decision it was required to make was whether this was an unusual case, stated "one of the things that I am told by the Legislature is the first purpose of my being here is protection of the public and proper punishment for you; and after that, you can consider all the other things about rehabilitation." Darling is correct that protection of the public and proper punishment are factors relevant to the selection of an appropriate sentence (rule 4.410), but ignores that the Legislature has declared those same factors are also appropriate criteria to be considered in the probation decision. (§ 1202.7 [primary goal in decision to grant probation is safety of the public; court should consider nature of the offense, the interests of justice (punishment, reintegration of the offender into the community, enforcement of the probation conditions), the loss to the victim, and the needs of the defendant].) Thus, the court did not abuse its discretion by applying inappropriate considerations when it evaluated Darling's request for probation.[4]

Darling next asserts the court erroneously concluded the case was not an unusual one. Darling contends rule 4.413(c)(2)(ii) was satisfied, and the court erred by its affirmative finding there was not a high likelihood he would respond favorably to

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4 Darling argues that the court's reference to the public safety and punishment factors as paramount factors constituted an implicit disregard for (or at least in denigration of) the rehabilitation factor, and violates the requirement that the court consider all relevant factors. However, the court's comments immediately following the passage quoted by Darling shows the court *did* consider all appropriate criteria because it noted it had ordered a section 1203.03 evaluation to assist in deciding whether this was an unusual case under rule 4.413(c)(2)(ii); e.g. one in which the defendant committed the offenses because of a mental condition of a nature that was highly likely to respond favorably to mental health care. Thus, the court did not ignore the criteria relevant to the "unusual case" assessment, but instead factored in the relevant criteria when making its ultimate decision.

treatment for his mental condition, because overwhelming evidence demonstrated there was a high likelihood he would respond favorably to treatment. Second, Darling asserts rule 4.413(c)(2)(iii) was satisfied, and the court erred because it entirely overlooked that Darling was aged and had no significant prior criminal record.

The evidence conflicted on whether there was a "high likelihood" Darling would respond favorably to treatment for the mental condition that induced his violent episode. Darling was evaluated by a California Department of Corrections (CDC) counselor, a CDC psychologist, and a defense psychologist, and the trial court read and considered their reports (as well as permitting live testimony at the sentencing hearing) when assessing this "unusual case" factor. The CDC counselor reported that it would be unreasonable to expect Darling would successfully adhere to probationary terms and conditions because he was homeless, was not employed sufficient to provide for himself, and his attitude towards the offense was that he had done nothing wrong. In contrast, the CDC psychologist reported it was "likely" Darling would obey orders to remain clean and sober, and Darling should not be incarcerated but instead should be placed on a "strictly adhered to" program that included weekly AA meetings, and participation in a psychoeducational program or individual psychological treatment. The report of the defense psychologist, Dr. Michel, stated that Darling was suffering from an alcohol induced psychotic disorder because of a pathological use of alcohol resulting in dependence, but that Darling "is *capable* of accepting treatment in the community . . . [and] is *capable* of being maintained in the community with treatment *if* he is successful in maintaining his sobriety." (Italics added.) At trial, Dr. Michel testified there was an

"excellent probability with the right treatment plan that [Darling] could be treated successfully in the community," and the treatment plan would require treatment both for his "delusional ideation[s]" and for his substance abuse problem. At the hearing, however, Dr. Michel testified the two critical components for a successful treatment would be Darling's ability to resolve the delusions and to maintain his sobriety, that Darling had "a good chance" of success but the exact percentage of risk of failure could not be quantified, treatment for the delusions could require both continued sobriety and a regimen of psychotropic medications, and "compliance is a big issue" with persons treated on an outpatient basis. The probation officer explained the probation department did not have the resources to ensure Darling complied because "liquor stores are open to anybody," and also noted Darling had become agitated and angry when interviewed by the probation officer.

The court carefully weighed the competing opinions and noted the test is whether there was a "high likelihood" Darling would respond favorably to treatment. The court concluded that test was not satisfied because "I don't think that's where you are. I don't think there's a high likelihood. I think there's some likelihood. It's not high. It's not 50/50 in my opinion . . . ." There is some evidence from which a reasonable person could have made that assessment. Darling's long-term substance abuse, and his apparent belief that he was only in need of AA meetings to arrest his downward slide, could support a conclusion that the psychologist's opinion (that he was *capable* of rehabilitating) was undermined by Darling's lack of commitment to a difficult program. (Cf. *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511 [drug use as mitigating factor properly

disregarded where drug addiction is long term and defendant's commitment to pursue treatment is suspect].) Moreover, his continued belief that his actions were justifiable self-defense, and the fact he became agitated and angry when the probation officer tried to work with him, suggested a lack of remorse or acknowledgement of his need for treatment. This evidence supports a conclusion there was not a *high* likelihood Darling would maintain the necessary rigid program of treatment on a voluntary out-patient basis. Moreover, Darling's quasi-transient living conditions and irregular employment, coupled with his continued belief that he was being persecuted by law enforcement and his anger toward the probation officer, supported the conclusion that it would be problematic for the probation department to monitor Darling's compliance with a treatment program. Darling has not clearly shown that no reasonable person could have concluded rule 4.413(c)(2)(ii) was not satisfied here.

Darling alternatively asserts the court misunderstood (and consequently abused) its discretion to declare this an unusual case because, after rejecting the "high likelihood" criteria, the court concluded "there's no exception I can find under rule [4.413] or any other rule to grant you probation." Darling notes rule 4.413(c)(2)(iii) permits an unusual case finding based on a defendant's age and lack of significant criminal history, and the court's statement shows it misunderstood its ability to declare the case unusual because Darling was older and had no significant prior criminal record. However, this factor was explicitly raised and argued to the court, and a court is not required explicitly to explain its reasons for rejecting these criteria. (Cf. *People v. Downey* (2000) 82 Cal.App.4th 899, 919 [court not required to state reasons for rejecting factor in mitigation].) Because we

presume the court is aware of its sentencing discretion, we are unwilling to equate its silence on rule 4.413(c)(2)(iii) to an ignorance of or disregard for its provisions.

On this record, the trial court appropriately determined the statutory presumption against probation had not been overcome, and we consequently do not consider Darling's subsidiary argument that the court abused its discretion by not granting probation.

DISPOSITION

The conviction on count 2 for violation of section 245, subdivision (b) is reversed. In all other respects, the judgment is affirmed.

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.