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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

GABRIEL MITRE et al.,

Defendants and Appellants.

F049761

(Super. Ct. No. 05CM2259)

OPINION

THE COURT*

APPEALS from judgments of the Superior Court of Kings County. Peter M. Schultz, Judge.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant Gabriel Mitre.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant Enrique Mitre.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Stephen G. Herndon and Craig S. Meyers, Deputy Attorneys General, for Plaintiff and Respondent.

* Before Levy, Acting P.J.; Hill, J.; and Kane, J.

INTRODUCTION

Appellants Gabriel Mitre, age 20, and Enrique Mitre, age 18, are brothers. They each pled guilty to one count of violating Penal Code section 245, subdivision (a), as a non-strike offense. Gabriel was sentenced to the midterm of three years' imprisonment and Enrique was sentenced to the aggravated term of four years' imprisonment. Gabriel argues denial of his application for probation constitutes an abuse of discretion. Enrique argues imposition of the aggravated term infringed his federal constitutional rights to a jury trial and to proof beyond a reasonable doubt, as those rights are interpreted in *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). Neither argument is persuasive.

FACTS¹

On May 13, 2005, Augustin A. and Eva T. were at the Hidden Valley Park in Hanford when they were approached by appellants, Victor Gonzalez and an unidentified fourth person. Gonzalez was holding a black metal pipe. Gonzalez said, “‘What’s up mother fuckers, got you now.’” (Italics omitted.) Eva stood up and told him that she and Augustin did not want any problems. Gonzalez pushed her to the ground. When Augustin stood up, Gonzalez hit him in the leg with the pipe. Augustin fell to the ground. Augustin attempted to call for emergency assistance on his cell phone. Gonzalez kicked it out of his hand, picked it up and put it in his pocket. Enrique kicked Augustin in the face. All four assailants began kicking Augustin in the face and head. A short time later, they ran away.²

¹ The facts are derived from the probation report because appellants waived their right to a preliminary hearing and pled guilty.

² A few months prior to the assault, Gonzalez and Augustin fought. Two to three weeks prior to the assault, appellants drove by Augustin’s residence in a blue truck three times, flashing gang signs and yelling, “‘It’s all about Norte’” (italics omitted) and “‘Bunch of scraps.’” (Italics omitted.)

Augustin was transported to the hospital and treated. He incurred \$1,301 in medical bills and lost wages.

Appellants and Gonzalez were questioned by members of the Kings County Gang Task Force on May 20, 2005. Enrique eventually admitted being a Norteno gang member. He denied being at the park on the day of the assault. Gabriel also denied being at the park on the day of the assault and denied being involved in the fight. Gabriel denied being involved in a gang or backing any gang. Gonzalez admitted that he was a Norteno gang member. He also admitted that he and appellants were at the park and said that he fought with Augustin and kicked Augustin on the ground.

Several gang affiliated items were found at Gabriel's residence and in his bedroom. Gabriel stated that the gang related items found in his bedroom belonged to Enrique and Enrique's friends. Gabriel stated that he drives a blue truck, but the truck belongs to Enrique.

When interviewed by a probation officer on November 16, 2005, Enrique stated that he and Gabriel watched Gonzalez beat up Augustin. When Gabriel was interviewed by a probation officer on November 17, 2005, he stated that he and Enrique only watched Gonzalez "fight" Augustin. Gabriel denied gang membership, stating that people think he belongs to a gang because Enrique does.

Enrique's probation report states that he was "pending Court on another felony matter when he committed the present offense." Enrique was referred to probation as a juvenile for the following offenses: fighting, challenging a student to fight, truancy, felony battery on a school official and felony attempted criminal threats, unauthorized entry on school grounds.

Gabriel's probation report states that he has no prior adult convictions. Gabriel was referred to probation as a juvenile for the following offenses: vandalism, fighting, disturbing the peace, possession of a smoking pipe, petty theft and truancy.

The probation reports list the following factors in aggravation: (1) appellants were active participants in the assault; (2) the assailants outnumbered the victim; (3) kicking the victim in the head while he lay on the ground was callous; and (4) the victim incurred damages as a result of the assault. The probation reports list one mitigating factor: voluntary acknowledgement of wrongdoing at an early stage of the criminal proceedings. The probation reports recommend that probation be denied for both appellants and that Enriquez be sentenced to the upper term of four years' imprisonment and Gabriel be sentenced to the midterm of three years' imprisonment.

Gabriel's counsel argued at the sentencing hearing that probation should be granted because Gabriel had not suffered any prior adult convictions or been incarcerated, and he had a history of employment and wanted to attend college. The court denied Gabriel's application for probation because Gabriel presented a danger to the safety of others.

The court denied Enrique's application for probation because he has a history of criminal street gang behavior, and he presents a danger to the safety of others. The court imposed the aggravated term for the following reasons: (1) Enrique's criminal behavior is becoming increasingly serious; (2) Enrique engaged in violent conduct which indicates a danger to society; (3) the victim was particularly vulnerable as he was alone with his girlfriend in a park; (4) one of the assailants was armed with a weapon; and (5) the assailants exhibited a high degree of cruelty in the way they performed the beating.

DISCUSSION

I. Denial of Gabriel's application for probation was not an abuse of discretion.

When a decision denying probation is challenged on appeal, the appellant bears the burden of clearly showing that the decision was irrational or arbitrary. "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.]" (*People v. Superior Court (Alvarez)* (1997))

14 Cal.4th 968, 977-978.) We will not reverse a decision “merely because reasonable people might disagree. “An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.” [Citations.]’ [Citation.]” (*Id.* at p. 978.)

Gabriel argues that denial of probation was arbitrary and contrary to the state of the evidence because “[s]ubstantial evidence existed to establish [he] would not commit such a crime in the future and the underlying offense was situational as it resulted from unusual circumstances unlikely to recur.” We disagree. The trial court reasonably could infer from the seriousness and violence of the offense that Gabriel presented a risk to the community, despite his youth, history of employment, and the absence of prior felony convictions. Gabriel kicked the victim in the head while the victim was on the ground and thus was an active participant in the crime. Furthermore, Gabriel never admitted his participation in the assault. The trial court reasonably could conclude he presented a risk to the safety of the community.

Gabriel also argues that the court erroneously failed to acknowledge each of the factors in his favor prior to denying the application for probation. This argument fails because the court is not required to specifically set forth mitigating factors before denying probation. (*People v. Simon* (1983) 144 Cal.App.3d 761, 766-767; *People v. Jordan* (1986) 42 Cal.3d 308, 316.)

Having failed to demonstrate that the trial court’s decision was arbitrary, capricious or patently absurd, Gabriel’s challenge to the denial of probation fails.

II. Imposition of the upper term did not infringe Enrique’s federal constitutional rights as interpreted in *Blakely*.

Relying on *Blakely, supra*, 542 U.S. 296, Enrique argues judicial imposition of the upper term infringed his federal constitutional rights to a jury trial and to proof beyond a reasonable doubt. Our Supreme Court has decided this issue adverse to Enrique.

People v. Black (2005) 35 Cal.4th 1238 (*Black*) held that a jury trial is not required on aggravating factors that justify imposition of the upper term.³ In *Black*, the court explained that jury trial of aggravating factors was not constitutionally required because the California determinate sentencing law simply authorizes a sentencing court to engage in the type of fact-finding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range. It is the upper term, not the middle term, which is the statutory maximum for an offense under our sentencing law. The level of discretion available to trial judges in California is comparable to the level of discretion the United States Supreme Court has chosen to permit federal judges to exercise. Therefore our discretionary system does not violate a defendant's Sixth Amendment right to a jury trial. (*Id.* at pp. 1254, 1261.)

Accordingly, under *Black* and based on our review of the record, we conclude the trial court did not err. It exercised its judicial discretion in a reasonable manner consistent with California Rules of Court, rule 4.420, when it determined that imposition of the upper term was justified because the numerous aggravating factors outweighed the single mitigating factor.⁴

³ Petition for certiorari was filed in the *Black* case on September 28, 2005. The United States Supreme Court has granted a petition for certiorari to determine the constitutionality of California's determinate sentencing law in *Cunningham v. California* (2006) __ U.S. __ [126 S.Ct. 1329].

⁴ In a brief footnote, Enrique asserts he should have received an additional day of presentence credit. This assertion is not supported by legal argument and citation to authority. Rather, Enrique states that he will ask the trial court to correct the calculation of presentence credit and that if the trial court fails to do so, he will file for leave of this court to file a supplemental brief raising the presentence credit issue. The appellate record contains a copy of a request to modify presentence credits addressed to the trial court, dated June 13, 2006. Appellant has not asked this court for permission to file a supplemental brief properly raising the presentence credit issue. Having failed to develop the issue with proper legal argument, we summarily dismiss the point as abandoned.

[*Fn. continued.*]

DISPOSITION

The judgments are affirmed.

“Points ‘perfunctorily asserted without argument in support’ are not properly raised. [Citation.]” (*People v. Williams* (1997) 16 Cal.4th 153, 206.)