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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.

TREYVON MARQUEST STANCH,

Defendant and Appellant.

B184949

(Los Angeles County
Super. Ct. No. YA059625)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eric C. Taylor, Judge. Affirmed.

John Doyle, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and Tasha G. Timbadia, Deputy Attorneys General, for Plaintiff and Respondent.

Treyvon Marquest Stanch was convicted of three counts of second degree robbery, two counts of first degree residential burglary, and one count of first degree burglary. He challenges the court's selection of the high term for the principal count. While we agree the court improperly relied on the handgun use as a factor in aggravation, we find the error harmless.

FACTUAL AND PROCEDURAL SUMMARY

Appellant was charged with robbery, burglary, and other crimes arising from four incidents in August and September of 2004. The only errors asserted on appeal involve selection of the upper term on count 3, and we limit our statement of facts accordingly.

At 1:00 a.m. on September 13, 2004, 65-year-old Ray Ragland was working in his garage. A man, later determined to be appellant, came into the garage. He was wearing a black mask, black sweatshirt and black pants. Appellant pointed a gun at Ragland and said, "This is a holdup. I want all your money." Ragland tried to get away from the area, but slipped and fell. He told appellant he did not have any money. According to Ragland, appellant said, "If you give me money, I won't hurt you," or something along those lines, "Give me all your money," And I kept telling him, "I don't have any money," you know. And then he—he said, "If you don't give me your money," or something like that, "I'll kill you."

Ragland was afraid appellant was going to hurt him, so he reached up and grabbed the gun. Appellant put his arm around Ragland's neck and choked him, telling him to "Let this M.F. [sic] go." Ragland held onto the gun as appellant continued to choke him. The two men struggled. Appellant called out, and another man dressed in black with a black mask came into the garage. Ragland put both hands on appellant's gun and turned it up toward appellant. He pulled the trigger, but it just went "click." Appellant tried to hit Ragland with the gun, then reached down to Ragland's pocket and discovered there was no money. He said, "I should have killed you," and turned to leave. On his way out, he spotted Ragland's cell phone, and took it.

Ragland was sore from the fight, and he suffered a cut across his nose. His blood pressure “probably went up 50 notches” from the incident.

Appellant was found guilty of this residential robbery (count 3), and on five other counts. The allegations that he personally used a handgun in the commission of these crimes were found true, and he admitted a prior serious felony conviction allegation. Count 3 was selected as the principal term. He was sentenced to the high term of six years on that count. His aggregate sentence was 50 years. Appellant filed a timely appeal.

DISCUSSION

I

Appellant claims the court’s selection of the high term for the principal count violates his right to have a jury decide all facts that justify imposition of an aggravated term, as explained in *Blakely v. Washington* (2004) 542 U.S. 296. In *People v. Black* (2005) 35 Cal.4th 1238, the California Supreme Court held that *Blakely* does not invalidate California’s upper term sentencing procedure.¹ For this reason, we reject appellant’s claim.

II

In selecting the high term on count 3, the court stated: “[W]ith respect to count 3, there are no mitigating circumstances. Under [California Rules of Court, rule] 4.412,² Mr. Stanch personally used a firearm. The crimes involved great violence, threats of great bodily harm, specifically, that were vicious and callous. The victims on this count and all the other counts seem to be particularly vulnerable. With respect to the defendant,

¹ The United States Supreme Court has granted a petition for writ of certiorari in *People v. Cunningham* (Apr. 18, 2005, A103501) [nonpub. opn.], certiorari granted *sub nom. Cunningham v. California* (Feb. 21, 2006, No. 05-6551) ___ U.S. ___ [126 S.Ct. 1329], to decide whether *Blakely* affects California’s upper term sentencing scheme. The cause was argued on October 11, 2006.

² All references to rules are to the California Rules of Court.

given the number of crimes and the way that these crimes were carried out, he does present a danger to society, a serious danger. As a juvenile, in '98, he had a sustained petition for burglary and had camp for that. There's a robbery recorded in 2000 as an arrest only, which will not be considered; and he was on probation at home for a Health and Safety Code violation. And the court won't consider that, but it does consider his 2002 burglary and first degree residential burglary conviction in—as part of his prior record. It appears that the crimes have been increasing in violence and callousness and seriousness. He did have a prior prison commitment, and his performance on parole was obviously not good.” At this point, the prosecutor clarified that appellant had been discharged from parole on April 26, 2004, which was just four months before the first of the crimes. For these reasons, the court selected the high term.

Appellant claims the court should have considered his early confessions to all the charged offenses, including count three, as a circumstance in mitigation. Under rule 4.423(b), a factor in mitigation may include the fact that “(3) The defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process.”

Appellant was arrested following the robbery of a laundromat (count 1). While in custody, he initiated contact with Detective Marin, with whom he had a relationship. According to the detective, appellant essentially wanted to know what he could do to get out of trouble. Appellant waived his *Miranda*³ rights, and Detective Marin asked him about two robberies of a convenience store (counts 5 and 7). Appellant initially denied involvement. As a ruse, Detective Marin told appellant his fingerprints had been recovered at the store, although no fingerprints were recovered. Only after that did appellant admit involvement in those crimes.

Detective Marin and Detective Paavola then questioned appellant about two home invasion crimes. Appellant admitted the first, the home invasion of Isabel King and Dan Arki (counts 8, 9, 10). Appellant lived down the street from the victims and had known the family for years and may have believed he had been identified by the victims. He

³ *Miranda v. Arizona* (1966) 384 U.S. 436.

admitted committing the Ragland robbery after Detective Paavola used a ruse, telling appellant that Ragland's fingerprints were found on appellant's gun.

These circumstances undercut appellant's claim that he voluntarily acknowledged his wrongdoing. The trial court acted within its discretion in concluding there were no mitigating factors as to count 3.

III

Appellant challenges the court's finding as a circumstance in aggravation that the Ragland robbery involved great violence. Under rule 4.421(a), it is a circumstance in aggravation that "(1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness."

Appellant argues that, although there was a physical altercation between himself and Ragland, it was initiated by Ragland "and was otherwise unremarkable." He argues that the threats to the victim "were no more than can be expected of a robbery, whereby the victim's property is obtained by force or fear." He also claims there was no showing that the threats were vicious or callous.

Appellant's assertion that the physical altercation was initiated by Ragland is misleading. Ragland grabbed onto the gun because appellant had it pointed at his chest and Ragland was afraid he would get hurt. During the ensuing struggle, appellant put his hands around Ragland's neck and proceeded to choke him. He also tried to hit Ragland with the gun. Ragland suffered a cut across his nose, soreness, and an apparent increase in his blood pressure.

In addition to this violence, appellant threatened great bodily harm. There was more than just an initial threat that if Ragland did not hand over his money, appellant would kill him, which appellant argues is no more than would "be expected of a robbery." Appellant repeatedly said, "I'll kill you. I'll kill you." And just before appellant left the garage, he told Ragland, "I should have killed you." From this, the judge could reasonably find that appellant threatened great bodily harm demonstrating a high degree of callousness.

IV

Appellant next claims the court erred in finding the victim was particularly vulnerable, within the meaning of rule 4.421(a)(3). Ragland was 65 years old, and was alone in his garage in the very early hours of the morning. This is sufficient to support the court's finding.

V

Appellant claims that use of a weapon was not a permissible factor in aggravation under rule 4.420(c). We agree.

Penal Code section 1170, subdivision (b) provides that where a "statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." Rule 4.421 sets out circumstances in aggravation for purposes of selecting the term of imprisonment, including the fact that the defendant was armed with or used a weapon at the time of the commission of the crime. (Rule 4.421(a)(2).) But rule 4.420(c) limits the use of a fact in aggravation in certain circumstances: "[A] fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so." (Rule 4.420(c).)

The enhancement in this case was personal use of a firearm during the commission of a robbery pursuant to Penal Code section 12022.53, subdivision (b). Subdivision (h) of that section expressly precludes the court from striking the enhancement: "Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." (Pen. Code, § 12022.53, subd. (h).) The court accordingly imposed the 10-year enhancement. Pursuant to rule 4.420(c), the firearm enhancement may not also be used as a reason for imposing the upper term. But the trial court's error in doing so was harmless in this case.

"When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons

were improper.” (*People v. Price* (1991) 1 Cal.4th 324, 492.) Here, in addition to the great violence and vulnerability factors we have discussed, the court also found appellant represented a serious danger to society as a result of his prior record, that his crimes were increasing in violence and seriousness, and that appellant had committed these offenses just a few months after he was released from parole. Appellant does not challenge these additional factors in aggravation. Given these reasons and the absence of any meaningful circumstance in mitigation, it is not reasonably probable that the court would have chosen a lesser sentence had it not relied on the use of a weapon as a factor in aggravation.

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.