Filed 2/27/07 P. v. Valenzuela-Rodriguez CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MONICA VALENZUELA-RODRIGUEZ,

Defendant and Appellant.

F048766

(Super. Ct. No. BF108962B)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. James M. Stuart, Judge.

Barbara Coffman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Lloyd G. Carter and Brian Alvarez, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Defendant Monica Valenzuela-Rodriguez was convicted of the second degree robbery of Sean Nugent (Pen. Code,[1] § 212.5, subd. (c); count 1), assaulting Nugent with

[1] Further statutory references are to the Penal Code unless otherwise specified.

a semiautomatic firearm (§ 245, subd. (b); count 2), receiving stolen property belonging to Nella Warren (§ 496, subd. (a); count 6), and misdemeanor delaying or obstructing a peace officer; i.e., Bakersfield Police Sergeant Brad Roark (§ 148, subd. (a)(1); count 7). She was acquitted of the second degree robbery of Martin Madrigal (§ 212.5, subd. (c); count 3), assaulting Madrigal with a semiautomatic firearm (§ 245, subd. (b); count 4), and receiving stolen credit cards belonging to Jack Bouguennec (§ 496, subd. (a); count 5). The court sentenced defendant to a total prison term of nine years eight months as follows: the upper term of nine years for count 2 plus eight months (one-third the midterm) for count 6. The court also imposed a consecutive one-year jail term for count 7. The court stayed, pursuant to section 654, defendant's sentence for count 1, which included a two-year arming enhancement imposed under section 12022, subdivision (d).

On appeal, defendant contends: (1) the pretrial identification procedure in which Nugent identified her was unduly suggestive and violated her right to due process; (2) insufficient evidence supports her conviction for receiving stolen license plates because there is no evidence she possessed the license plates or knew they were stolen; (3) insufficient evidence supports her conviction for delaying or obstructing a peace officer; (4) the court abused its discretion by imposing the upper term; (5) the court committed *Blakely*[2] error by imposing the upper term; (6) the court erred by imposing an arming enhancement under section 12022, subdivision (d), rather than section 12022, subdivision (a); and (7) she received ineffective assistance of counsel during closing argument and sentencing. We agree with contentions (3) and (6), and conclude the evidence was insufficient to support defendant's conviction for misdemeanor delaying or obstructing a peace officer because there was no evidence Sergeant Roark was lawfully attempting to detain defendant before she fled. In all other respects, the judgment is affirmed.

---

2 *Blakely v. Washington* (2004) 542 U.S. 296.

FACTS

The charges in this case stem from four incidents occurring in early January 2005. The first incident occurred on January 2 at an AM/PM gas station in Bakersfield. Sean Nugent had just finished pumping gas, when a red or maroon-colored car pulled up next to him. A man in the front passenger's seat, later identified as defendant's husband, Timothy Rodriquez, stuck a semiautomatic handgun out the window into Nugent's face and demanded money. Nugent pulled out a $5 bill and Rodriguez asked if that was all Nugent had. When Nugent said yes, the woman driving the car laughed. The car then sped away. Nugent recalled both his assailants were dressed in camouflage pants, shirts, and hats.

At trial, Nugent identified defendant as the driver. Nugent described how his attention focused on defendant when she laughed:

> "Um, after he asked if that's all you have, the driver began to laugh, and my focus went from the gun to, you know, I saw, the focus went to the one laughing, and she was staring right in my face, and laughing, and, you know, it went from kind of being scared because there was a gun, to kind of angry, because they were laughing about that they'd just robbed me."

On cross-examination, Nugent testified he was "very certain" of his identification of defendant because: "It's a face that I, it was the one face that really stuck out, because of the laughter, and I'm really focused on it right before they left." Nugent estimated he had the opportunity to view defendant's face for about 30 seconds during the incident.

The second incident occurred on January 9, at a Carl's Jr. in Bakersfield. Martin Madrigal was in the restaurant eating, when he saw defendant and Rodriguez sitting and talking with each other. Two children were seated at a table next to them. At some point, Rodriguez got up and went to the restroom. When he emerged from the restroom, Rodriguez suddenly approached Madrigal, put a gun to his neck, and demanded his billfold. Madrigal became very scared and gave Rodriguez his billfold which contained money and documents. Rodriguez left the restaurant and got into a waiting gray station

wagon. Madrigal identified defendant as the driver of the station wagon. The children were in the back seat.

The third incident took place on January 12. Bakersfield resident, Jack Bouguennec, was in his garage changing a brake light on his car, when a man wearing a ski mask came up behind him, pointed a semiautomatic gun in his face, and demanded his wallet. After Bouguennec relinquished his wallet, the man in the ski mask left in a gray or silver station wagon. Bouguennec's wallet contained about $500 in cash and a number of credit cards. Police later found the credit cards, as well as an automatic handgun, underneath a sofa cushion in defendant and Rodriguez's apartment.[3]

The fourth incident occurred later on January 12, and involved Sergeant Roark. Sergeant Roark testified that he attempted to stop a silver station wagon. The record does not disclose why he was attempting to make the traffic stop. Before the sergeant could get close enough to read the license plate, the station wagon stopped and three people, including two men and one woman, got out of the vehicle and ran. Sergeant Roark was only able to get a vague description of these individuals, which he communicated to other police officers. When he returned to the abandoned station wagon, he ran a check of the license plates and found they belonged to another car, a Pontiac, not the station wagon, which was a Buick.

On cross-examination, Sergeant Roark was asked to describe the seating arrangement of the people before they fled. Sergeant Roark responded: "The driver was a male. He had dark clothing. The front passenger was a male. The rear back seat passenger side was a female with very long hair."

---

3 As defendant notes in her statement of facts, the searching officer testified that, although he observed photographs of defendant in the apartment, nothing else suggested someone named "Monica" lived there or used the living room. However, the fact defendant lived in the apartment was established by the testimony of defense witnesses, relatives of defendant and Rodriguez, who testified they went to the apartment following the couple's arrest to retrieve the couple's clothing, which did not include any camouflage articles.

On redirect examination, Sergeant Roark testified that when the people got out of the station wagon and ran, "it was obvious to me they were trying to avoid me or outrun me." Sergeant Roark confirmed that by fleeing, they delayed his ability to investigate them and the vehicle. The sergeant estimated it was about 45 minutes to an hour before the three suspects were detained. He would have been able to identify the occupants of the station wagon within a few minutes had they not fled.

The license plates found on the abandoned silver station wagon belonged to Nella Warren. Warren testified that at some unidentified point she discovered the license plates were missing from her Pontiac Bonneville.

Bakersfield Police Officer Fred Torres was called to assist Sergeant Roark with three suspects who fled when Sergeant Roark was trying to stop a car. The initial description Officer Torres received was that the suspects were "two male, one possibly Hispanic, one possibly white or Hispanic, and a female." Officer Torres responded to the area with his partner. Officer Torres spotted defendant walking about three blocks from where the station wagon had been abandoned.

Later that night, defendant was interviewed by Bakersfield Police Detective Mark Charmley. The interview lasted no more than ten minutes. Detective Charmley told defendant she was under arrest for obstructing and resisting, and that she was considered a suspect in a series of robberies. Defendant initially denied being with Rodriguez prior to her arrest. She later admitted that she was in the gray station wagon with Rodriguez and her brother and that they ran from the vehicle. The only particular robbery Detective Charmley asked defendant about was the robbery of Nugent at the AM/PM. Although he told defendant she was identified by the victim, defendant denied any involvement.

Defense evidence

Joanna Valenzuela is defendant's stepmother and Rodriguez's sister. Valenzuela testified that after defendant was arrested, she went to clear defendant's clothing out of her apartment. Valenzuela did not find any camouflage clothing and she had never seen

defendant or Rodriguez wear camouflage clothing. Valenzuela had seen defendant and Rodriguez in a gray station wagon. It resembled the station wagon investigated by Sergeant Roark, which was depicted, with the stolen license plates, in photographs introduced at trial as People's exhibits 6 and 7. Valenzuela had never seen defendant in a red or maroon-colored vehicle.

Anita Rodriguez is defendant's mother-in-law. Ms. Rodriguez testified that after her son was arrested, she went to his apartment to get his clothing. She did not find any camouflage clothing. Ms. Rodriguez confirmed that People's exhibits 6 and 7 looked like the car defendant and Rodriguez drove in January. She had never seen them drive a red or maroon-colored car.

DISCUSSION

I. The pretrial identification procedure

Defendant contends the court erred in denying her pretrial motion to suppress Sean Nugent's in-court and pretrial identification of her because the police used an identification procedure which was unduly suggestive and violated her right to due process of law. Defendant argues, as she did below, that her photo in a six-person photo lineup was unduly suggestive because she was the only person who had her hair pulled back. She also suggests the photo was unnecessarily suggestive because it was placed in the number three position in the lineup. This argument is apparently based on the court's remark that this is a "position of prominence."[4]

---

[4] In evaluating the fairness of lineup, the court made the following comments: "All six, indeed, are Hispanic. [¶] All six, indeed, are within the same basic age range. [¶] And 4 and 6 come pretty close facially. [¶] In terms of eyes, one and 3 come pretty close. [¶] There is a subjective factor that includes the fact that this person is placed in position number 3, and there's no evidence on this, but, quite frankly, I've heard many times over the years, that that is a position of prominence. [¶] Number 6 doesn't look like Number 3 at all. [¶] I think Number 5 and Number 3 bear a resemblance. [¶] I can see the resemblance between 4 and 3, and this is barely fair, let me put it that way, and I think that that's the legal standard. [¶] I will very quickly note for what it's worth, which isn't much, that, over the twenty years I've been on the

"'In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification.'" (*People v. Kennedy* (2005) 36 Cal.4th 595, 608.) "Moreover, there must be a 'substantial likelihood of irreparable misidentification' under the '"'totality of the circumstances'"' to warrant reversal of a conviction on this ground. [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 990.)

The issue, when deciding whether an identification procedure was "unduly suggestive," is "'whether anything caused defendant to "stand out" from the others in a way that would suggest the witness should select him.'" (*People v. Yeoman* (2003) 31 Cal.4th 93, 124.) If the procedure followed was not suggestive, then the inquiry ends, and there is no due process violation. (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.) We review de novo the court's determination whether, on the established facts, the procedure was unduly or unnecessarily suggestive. (*People v. Kennedy*, *supra*, 36 Cal.4th at p. 609.)

Preliminarily, we decline to hold that, as a rule, the placement of a suspect's photo in the third position of a six-person photo lineup is inherently suggestive. It appears the trial court's remark in this regard was anecdotal. After independently reviewing the

---

bench, there have been a number of occasions where I have found that the photographic lineup utilized has not been fair. [¶] So, I think I have an idea of what the parameters are, and, as I say, this one is barely fair. [¶] So it can be utilized."

lineup in this case, we find nothing about the placement of defendant's photo in the number three position caused it to stand out relative to the other photos. Nor is there any indication that the placement of Rodriguez's photo in the number three position in a separate photo lineup viewed by Nugent, and included by defendant in the record on appeal, affected the suggestiveness of the challenged lineup.

We also disagree with defendant's assertion that the fact defendant's hair was pulled back made her photo stand out more than the others. In general, it is "'settled that a photographic identification is sufficiently neutral where the persons in the photographs are similar in age, complexion, physical features and build ....' [Citation.]" (*People v. Leung* (1992) 5 Cal.App.4th 482, 500 [Asian males approximately 20 years old with straight black hair, broad noses, small eyes and similar skin tone]; see also *People v. Johnson* (1992) 3 Cal.4th 1183, 1217 [minor differences in facial hair among participants did not make the lineup suggestive, as all photographs were of Black males, generally of the same age, complexion, and build, and generally resembling each other].) A suspect's photograph is not impermissibly suggestive if it is "similar" to that of the others, even if all participants do not share all common features. (See *People v. Cunningham*, *supra*, 25 Cal.4th at p. 990.)

While defendant's hairstyle may have caused her photo to stand out had the other women had hairstyles similar to one another, such was not the case here. Rather, the photos reflected a variety of hair lengths, style, and texture, such that one did not stand out as being particularly distinct from the others. Further, defendant's hair, though pulled back, was consistent in color with the majority of the women in the lineup. The women in the instant lineup shared many basic characteristics: appearance of Hispanic origin, similar facial features, skin tone and hair color, and the same mid-20's to mid-30's age range. Applying the above authorities, we do not find the photo lineup to be impermissibly suggestive.

However, even if we had concluded the photo lineup was impermissibly suggestive, our evaluation of the record convinces us that the eyewitness identification was reliable under the totality of the circumstances. Nugent's trial testimony indicated that he had the opportunity to view defendant's face for about 30 seconds, and that his attention was especially focused due to her laughter. The evidence presented at the suppression hearing showed that Nugent's identification of defendant from the photo lineup took place only ten days after the robbery. Bakersfield Police Officer Charles Church, who compiled the lineup using a computer program that found pictures matching defendant's general description, testified he specifically admonished Nugent to "focus on the individuals depicted" and "keep in mind that hair styles and other things like that may be different .…" After appearing to understand the admonishment, Nugent selected defendant from the photo lineup.

In summary, we conclude the photo lineup was not impermissibly suggestive, and in any event, the identification was reliable considering the totality of circumstances discussed above. We find no substantial likelihood of irreparable misidentification to warrant reversal of the judgment. (See *People v. Cunningham*, *supra*, 25 Cal.4th at p. 990.)

II. Sufficiency of the evidence on count 6 receiving stolen license plates

Defendant contends there was insufficient evidence to support her conviction of receiving stolen property because there was insufficient evidence she either possessed the stolen license plates or knew they were stolen. We disagree.

In reviewing a challenge to the sufficiency of the evidence, we consider the entire record in the light most favorable to the judgment to determine whether there is substantial evidence such that a reasonable trier of fact could find guilt beyond a reasonable doubt. (*People v. Maury* (2003) 30 Cal.4th 342, 396.) The same standard applies to cases in which the prosecution relies mainly on circumstantial evidence, and on

appeal we "must accept logical inferences that the jury might have drawn from the circumstantial evidence." (*Ibid.*)

In order to sustain a conviction for receiving stolen property, the prosecution must prove: (1) the property was stolen; (2) the defendant knew the property was stolen; and (3) the defendant had possession of the stolen property. (*People v. Land* (1994) 30 Cal.App.4th 220, 223; see also *Williams v. Superior Court* (1978) 81 Cal.App.3d 330, 343 [crime of receiving stolen property is complete upon taking possession of property with knowledge it is stolen].) Defendant's appeal challenges the second and third essential elements of the offense.

Possession may be actual or constructive and may be shared with other persons. (*People v. Rushing* (1989) 209 Cal.App.3d 618, 621-622; see *People v. Morante* (1999) 20 Cal.4th 403, 417.) Actual possession occurs when the defendant exercises direct physical dominion and control over the contraband, however briefly. (*People v. Austin* (1994) 23 Cal.App.4th 1596, 1608-1609, disapproved on other grounds in *People v. Palmer* (2001) 24 Cal.4th 856, 867.) A defendant has constructive possession of items not in his physical possession but over which he knowingly exercises control or has the right of control. (*People v. Austin*, *supra*, 23 Cal.App.4th at p. 1609.)

Possession by the accused of stolen goods alone is not sufficient to support a conviction of receiving stolen property. (*People v. Stuart* (1969) 272 Cal.App.2d 653, 655.) However, possession of stolen property, accompanied by no explanation or an unsatisfactory explanation of possession, or by suspicious circumstances, will justify an inference that the goods were received with knowledge that they had been stolen. (*People v. Myles* (1975) 50 Cal.App.3d 423; see also *People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1019-1020 [knowledge element of receiving stolen property normally proved not by direct evidence but by inference from circumstantial evidence].)

Defendant contends the evidence is insufficient to establish she ever took actual or constructive possession of the stolen license plates with knowledge they were stolen. In

support of her contention, defendant notes there was no evidence establishing when the stolen license plates were taken and placed on the Buick station wagon. According to defendant's argument, the evidence simply established that the stolen license plates were on the station wagon as of January 12; there was no evidence that defendant, who was, in her words, "merely a passenger" at that time, was in possession of the license plates or knew they were stolen.

Although the evidence on count 6 was highly circumstantial, we find it was sufficient to justify the jury's finding that defendant had the requisite possession and knowledge of the stolen license plates. Contrary to defendant's suggestion, the jury could reasonably infer that the gray station wagon bearing the stolen license plates on January 12, was the same gray station wagon defendant and her husband were seen driving during the early part of January 2005 by various witnesses, including those for the defense. Although the jury did not find enough evidence to convict defendant on the robbery count arising from the January 9 incident, defendant presented no evidence or argument refuting Madrigal's testimony that she drove away from the Carl's Jr. that night in a gray station wagon with Rodriguez and the two children.[5] The jury could logically infer that defendant shared possession of the gray station wagon – and the license plates visibly attached thereto – with her husband and exercised the right to control the vehicle on January 12, even if she was not driving at the time.

Moreover, the knowledge element is properly inferred from the highly suspicious circumstances attendant upon defendant's possession of the stolen license plates, including defendant and Rodriguez's abrupt abandonment of the vehicle in the presence of Sergeant Roark on January 12, the apparent involvement of the gray station wagon in

---

5 Indeed, defense counsel referred to evidence that defendant was already outside in the vehicle when the robbery occurred to support the argument that defendant lacked knowledge Rodriguez was planning to rob Madrigal after Rodriguez went to the restroom.

two other robberies to which defendant was indirectly connected by her husband and the presence of loot in their apartment, even though she was not found criminally liable, and defendant's demonstrated willingness to commit criminal acts with her husband, as indicated by the robbery of Nugent on January 2. Together, these suspicious circumstances contradict defendant's suggestion that she was merely an innocent passenger when the gray station wagon stopped on January 12. Further, the defense offered no explanation as to how license plates belonging to another vehicle happened to end up on a station wagon driven by defendant and her husband in January 2005. Under all the circumstances of this case, the jury could reasonably infer that defendant and Rodriguez knew the license plates on the vehicle they were driving was not validly issued to either of them. Thus, we reject defendant's sufficiency of the evidence challenge, and conclude there was sufficient evidence of the possession and knowledge elements to support defendant's conviction for receiving the stolen license plates.

III. Sufficiency of the evidence on count 7 delaying or obstructing peace officer

We agree, however, with defendant's contention that the evidence was insufficient to support her conviction for delaying or obstructing a peace officer in violation of section 148, subdivision (a)(1), because the prosecution failed to present any evidence to establish an essential element of the offense; i.e., that the officer was engaged in the performance of his duties at the time of the offense.

Section 148, subdivision (a)(1) provides: "Every person who willfully resists, delays, or obstructs any … peace officer … in the discharge or attempt to discharge any duty of his or her office or employment .…" is guilty of a misdemeanor. "The legal elements of a violation of section 148, subdivision (a) are as follows: (1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties. [Citations.]" (*People v. Simons* (1996) 42 Cal.App.4th

1100, 1108-1109; see also *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329.) Under section 148, subdivision (a)(1), "A peace officer is discharging or attempting to discharge … his … duties if he … is making or attempting to make a lawful arrest … [or] lawfully detaining or attempting to detain a person for questioning or investigation …." (CALJIC No. 16.103, original brackets omitted; see also Judicial Council of Cal. Crim. Jury Instns. (2006), CALCRIM No. 2656.)

In this case, defendant was charged with willfully delaying or obstructing a peace officer who was discharging, or attempting to discharge, duties of his employment. While there was evidence defendant's flight delayed Sergeant Roark in his identification of the station wagon's occupants by 45 minutes to an hour, no evidence was presented to show that there was a lawful attempt by Officer Roark to arrest or detain defendant before she fled. Although the People suggest the second element of the offense was established because Sergeant Roark was attempting to make an investigatory stop before defendant fled, no evidence was presented to show the basis of the stop or that it was legally justified. Sergeant Roark's testimony provided scant details regarding his initial encounter with the gray station wagon. Sergeant Roark testified simply that he was trying to stop the station wagon and that he could not read the license plate before it came to a stop and its occupants fled.

The legal basis upon which a peace officer may detain a citizen has been explained as follows: "[I]n order to justify an investigative stop or detention the circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity." (*In re Tony C.* (1978) 21 Cal.3d 888, 893, superseded on other grounds by Cal. Const., art. I, § 28.) "The corollary to this rule, of course, is that an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith." (*Ibid.*, citing *Terry v. Ohio* (1968) 392 U.S. 1, 22.)

A review of the record in this case compels the conclusion that there was no showing that, immediately before defendant fled, Sergeant Roark had "specific and articulable facts causing him to suspect that (1) some activity relating to crime ha[d] taken place or [was] about to occur, and (2) the person he intend[ed] to stop or detain [was] involved in that activity." (*In re Tony C.*, *supra*, 21 Cal.3d at p. 893.) We find unpersuasive the People's assertion on appeal that "[t]rial evidence strongly implies the station wagon was stopped because it fit the description of the getaway car used in the Bouguennec robbery earlier in the day." There was no evidence that Sergeant Roark stopped, or was instructed to stop the vehicle, because it fit this description. The People also cite to the testimony of Detectives Church and Charmley to the effect that on the date of the traffic stop, Rodriguez was a suspect in a series of robberies that the police were investigating. However, there was no evidence that Sergeant Roark was aware or suspected that Rodriguez was in the station wagon or that he was involved in the robbery investigation. Rather, Sergeant's Roark's testimony reflected that he was unaware of the identity of the people in the station wagon and was only able to convey a vague description to the other officers. Moreover, it appears Sergeant Roark did not learn the license plates were stolen until after the station wagon had already been abandoned.

The People also cite Sergeant Roark's testimony that it was obvious the people in the station wagon were trying to avoid him as evidence that defendant knew Sergeant Roark was trying to detain her for investigatory purposes. However, this evidence goes to the third element of the offense, and does not establish that such investigatory detention was lawful in the first instance. Thus, this case is distinguishable from *People v. Allen* (1980) 109 Cal.App.3d 981 (*Allen*). In *Allen*, the police observed the defendant with a group of 10 to 15 people standing around the open trunk of a vehicle. (*Id.* at p. 983.) The police also observed a pile of jackets in the truck. (*Ibid.*) The court noted:

> "[Defendant] knew full well, and counsel conceded so at argument, that the officer's attention was centered on him and that the officer wanted to talk

> with him. When [defendant] saw the police car he slammed the trunk lid down and took off at a high step. As he left the scene he continued to look back nervously toward the officers as he hurried away. Finally, as the officers closed in, he broke into a run and eventually attempted to hide from the officers. Bystanders knew [defendant] was aware of the officers' desire and that [defendant] was attempting to escape from the officers. Officer Barron testified '...numerous subjects were pointing in the same direction, stating he was running from us.' Under the ambient circumstances here involved and the totality of facts of this case, we believe that it was unequivocally clear to [defendant] that the object of the police's attention was [defendant] as an individual." (*Allen*, *supra*, 109 Cal.App.3d at p. 987.)

The court concluded that there was a lawful attempt to detain the defendant and that, accordingly, his flight from the police was a violation of section 148. (*Allen*, *supra*, 109 Cal.App.3d at p. 987.) Unlike *Allen*, where the circumstances suggested the defendant was selling stolen goods before he fled, there was no facts suggesting defendant was engaged in any criminal activities before she ran from the station wagon which would support a lawful attempt to detain her.

"The long-standing rule in California and other jurisdictions is that a defendant cannot be convicted of an offense against a peace officer '"*engaged in ... the performance of* ... [his or her] *duties*"' unless the officer was acting lawfully at the time the offense against the officer was committed. [Citations.] 'The rule flows from the premise that because an officer has no duty to take illegal action, he or she is not engaged in "duties," for purposes of an offense defined in such terms, if the officer's conduct is unlawful.... [¶] ... [T]he lawfulness of the victim's conduct forms part of the corpus delicti of the offense.' [Citation.]" (*In re Manuel G.* (1997) 16 Cal.4th 805, 815.) In light of the paucity of evidence regarding the basis for the traffic stop, we cannot conclude that sufficient evidence shows that Sergeant Roark's conduct at the time of the offense was lawful. Accordingly, defendant's conviction for misdemeanor delaying or obstructing a peace officer must be reversed.

IV. The upper term

Defendant contends the court abused its discretion by imposing the upper term. Specifically, she argues the court improperly considered defendant's laughter during the robbery of Nugent as an aggravating factor. Defendant recognizes the court also identified valid aggravating factors in support of its sentencing decision. However, she interprets certain of the court's remarks as indicating the upper term was selected "solely because of the court's personal antipathy towards appellant." We disagree with defendant's interpretation of the court's comments and conclude its decision to impose the upper term was not an abuse of discretion.

When a determinate term of imprisonment is to be imposed, the trial court shall impose the middle term, unless there are circumstances in aggravation or mitigation of the crime. (Pen. Code, § 1170, subd. (b).) "'Sentencing courts have wide discretion in weighing aggravating and mitigating factors [citations], and may balance them against each other in "qualitative as well as quantitative terms" [citation]....'" (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582.) "[A] single factor in aggravation suffices to support an upper term." (*People v. Osband* (1996) 13 Cal.4th 622, 730, distinguished on other grounds by *People v. Lucero* (2000) 23 Cal.4th 692.) Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence. (Cal. Rules of Court, rule 4.420(b).)

A trial court generally has broad discretion to tailor a sentence to the particular case. (*People v. Scott* (1994) 9 Cal.4th 331, 349.) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, '"[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."' [Citations.] Second, a '"decision will not be reversed 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.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.) Absent a clear showing of abuse of discretion, we do not disturb the trial court's broad sentencing discretion. (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.)

Before imposing sentence, the court here stated:

> "I do find, as a circumstance in mitigation, that her prior performance on juvenile probation was satisfactory.
>
> "She didn't have any problems with that and indeed, went from 1990 until 1998 before she got back into the system.
>
> "I do find, as a circumstance in aggravation, that her prior convictions as an adult and the sustained petition in juvenile delinquency proceedings have been numerous, to say the least.
>
> "She was still on misdemeanor probation, at the time that she committed these offenses and her prior performance has been unsatisfactory, given the fact that she has continued to reoffend, and has, in the past, violated the terms of her probation.
>
> "I recall, as I heard the opening statements, and as we were going through some of the motions, and as we started into the evidence, I recall feeling that this lady probably shouldn't be here.
>
> "She was in a tough situation. She'd hooked up with a bad guy. And she was probably just doing what people sometimes have to do to survive.
>
> "And I really and truly felt that way, until that kid got up there and testified that he was getting gas, this lady and her husband pulled up, stuck the gun out and demanded his money, and when they found out that all he had was five dollars and was gonna put five dollars worth of gas in his car, the husband got mad and she laughed.
>
> "She didn't laugh nicely.

"That told me, she … was in this up to her eyeballs, and any sympathy, concern, any feeling I may have had toward her for just being in an unfortunate situation, went right out the window.

"The Court finds that the circumstances in aggravation clearly outweigh the circumstances in mitigation.

"And I say that from a qualitative standpoint, not merely a quantitative standpoint."

Focusing on the court's comments regarding her laughter during the robbery, defendant asserts that her laughter was *the* determinative factor for the court's selection of the upper term.[6] She suggests that the court was so angered by her conduct during the robbery, the court made an emotional sentencing decision instead of impartially weighing the relevant sentencing factors.

To reach the conclusion urged by defendant (i.e., that the court's exercise of sentencing discretion was arbitrary and capricious), we would essentially have to disregard or devalue all the court's other comments reflecting that its sentencing choice was based on three valid aggravating factors defendant acknowledges were established by evidence; i.e., that defendant's prior convictions are numerous, she was on probation at the time of the offense, and her prior performance on probation has been unsatisfactory. (See Cal. Rules of Court, rule 4.421(b).) Although some of the court's comments during sentencing were arguably impolitic, they do not demonstrate the court failed to sentence defendant impartially. There is no indication that the court's invocation of valid aggravating factors in explaining its sentencing decision was disingenuous or a pretext for a decision based solely on subjective disapproval of

---

6 Defendant also cites to the following comments the court made after it denied defendant's request for a continuance of sentencing in order to try to arrange a visit with her children: "THE COURT: I don't want to seem petty, so I will just say this on the record. [¶] Ordinarily, I would grant that request. [¶] But, this is a person who, when she and her husband found out that the kid only had five dollars, she laughed. [¶] [DEFENSE COUNSEL]: Well, your Honor, I told her, it would be up to the Court. [¶] THE COURT: Well, what goes around comes around."

defendant's conduct and we decline defendant's invitation to interpret the court's comments otherwise. Because the court identified three valid aggravating factors, even if consideration of defendant's laughter were improper, "there is no reasonable probability that a more favorable sentence would have been imposed in the absence of the error. As stated, a single factor in aggravation suffices to support an upper term. [Citation.]" (*People v. Osband*, *supra*, 13 Cal.4th at p. 730.)

V. Blakely error

Defendant contends her Sixth Amendment right to a jury trial as defined in *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Blakely v. Washington, supra,* 542 U.S. 296 was violated when the court imposed the upper-term sentence. We reject defendant's contention because the majority of aggravating factors relied on by the court in imposing the upper term were related to defendant's prior convictions.

In *Blakely*, the U.S. Supreme Court affirmed that "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Blakely*, *supra*, 542 U.S. at p. 301, quoting *Apprendi*, *supra*, 530 U.S. at p. 490.) Here, the court cited as an aggravating factor defendant's numerous prior convictions as an adult. This aggravating factor is supported by the probation officer's report, which reveals that the majority of defendant's criminal convictions were suffered by defendant as an adult, in contrast to her single juvenile adjudication. The court also cited as aggravating factors the circumstance that defendant was on probation when she committed the present offense and her unsatisfactory performance on probation, factors which presuppose one or more prior convictions. Thus, when the court relied on those factors, it necessarily was also relying on the fact of defendant's prior convictions. Multiplicity of prior convictions and probationary status are so closely related to the prior convictions themselves that they come within the exceptions for such convictions contained within *Blakely* and *Apprendi*. This means the upper term was supported by

factors that, under those cases, need not be found by a jury beyond a reasonable doubt. (See *Blakely*, *supra*, 542 U.S. at p. 301; *Apprendi*, *supra*, 530 U.S. at p. 490.) It follows that reliance on those factors was not error under *Cunningham* (see *Cunningham v. California* (2007) 549 U.S. ___, ___ [127 S.Ct. 856, 868]), and, hence that imposition of the upper term was constitutionally permissible.

In light of the foregoing, the propriety of the court's consideration of other factors need not detain us. Under the circumstances of this case, assuming consideration of non-prior-conviction-related factors was error, it was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705]; furthermore, there was no abuse of discretion under *People v. Watson* (1956) 46 Cal.2d 818, 836. As noted above, a single factor in aggravation suffices to support imposition of the upper term (*People v. Osband*, *supra*, 13 Cal.4th at p. 730); in light of the court's comments at sentencing and the presence of three factors in aggravation, the record amply establishes that the court would have imposed the upper term even if the factors not related to defendant's prior convictions – chiefly, defendant's laughter at the victim – had been excluded from consideration.[7]

VI. Enhancement error

Defendant contends, the People concede, and we agree, the court erroneously imposed, with respect to count 1, a two-year arming enhancement under section 12022, subdivision (d), instead of a one-year enhancement under section 12022, subdivision (a). We therefore order that the abstract of judgment be amended to show that defendant's

---

7 In this regard, we note the court's sentencing decision essentially followed the recommendation of the probation officer, which recommended imposing the upper term based on the three valid aggravating factors expressly relied on by the court in imposing the upper term. On this record, we find unpersuasive defendant's suggestion that, if her laughter had been excluded from consideration, the court probably would have imposed a lower term based on the single mitigating circumstance of her satisfactory performance on juvenile probation. Her numerous probation violations as an adult strongly belie this suggestion.

stayed sentence on count 1 was enhanced under subdivision (a), not subdivision (d), of section 12022.

VII. Ineffective assistance of counsel claim

Lastly, defendant claims she received ineffective assistance of counsel in three instances during closing argument and sentencing. First, defendant contends her trial counsel improperly invited the jury to convict her of delaying or obstructing a peace officer by arguing, after acknowledging defendant's admission she fled from the station wagon, "We will not be dismayed if you find against us on that count after you weigh the evidence against reasonable doubt." Second, she contends defense counsel was ineffective for failing to object to the court's imposition of the upper term based on its improper consideration of defendant's laughter. Finally, she contends her counsel was ineffective for failing to notice and inform the court it was sentencing defendant under the wrong subdivision of section 12022.

To prevail on a claim of ineffective assistance of counsel, defendant must establish her attorney's representation fell below professional standards of reasonableness and must affirmatively establish prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Hart* (1999) 20 Cal.4th 546, 624; *People v. Fosselman* (1983) 33 Cal.3d 572, 584.) If the defendant's showing is insufficient as to one component of this claim, we need not address the other. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697.)

In light of our conclusion that defendant's conviction for delaying or obstructing a peace officer must be reversed and that her sentence was improperly enhanced under section 12022, subdivision (d), we find defendant's first and third claims of ineffective assistance to be moot. We also reject her claim based on counsel's failure to object to the court's consideration of defendant's laughter in sentencing her to the upper term because defendant has failed to demonstrate that she was prejudiced. Because the court expressly based its selection of the upper term on three valid aggravating factors supported by the record, defendant has not shown that, but for counsel's failure to object to one

problematic factor, the result or the proceeding would have been different. (See *People v. Anderson* (2001) 25 Cal.4th 543, 569.)

DISPOSITION

The judgment of conviction on count 7, delaying or obstructing a peace officer (§ 148, subd. (a)(1)), and the one-year jail sentence imposed thereon, is reversed. The court is ordered to amend the abstract of judgment accordingly. The court is further directed to correct and modify the abstract of judgment to reflect, as to count 1, second degree robbery (§ 212.5, subd. (c)), that a one-year enhancement was imposed under section 12022, subdivision (a), in place of the two-year enhancement erroneously imposed under section 12022, subdivision (d), and to further reflect that the section 12022 enhancement and sentence on count 1 were stayed pursuant to section 654. The court is directed to forward a copy of the amended abstract of judgment to the Department of Corrections. In all other respects, the judgment is affirmed.

____
HILL, J.

WE CONCUR:

____
WISEMAN, Acting P.J.

____
CORNELL, J.