Filed 11/20/07 P. v. Zepeda CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. CECELIA ANTIONETTE ZEPEDA, Defendant and Appellant.	C053912 (Super. Ct. No. CM024049) ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed in this case on November 1, 2007, be modified as follows:

1. On page 8, delete footnote 4 in its entirety, which begins: "Because we conclude"; and

2. On page 8, add part **III** to the **DISCUSSION**, inserting the following above the "**DISPOSITION**":

III

Defendant contends the trial court erred in imposing the upper term for dissuading a witness by

force or threat by relying in part on two facts that are elements of the offense--"threat of great bodily harm" and "threatened witnesses who might cooperate with law enforcement." The People respond that defendant forfeited the issue on appeal by failing to object to the court's use of these sentencing factors below. Even assuming we can review the claim, we find any error was harmless.

"A fact that is an element of the crime may not be used to impose the upper term." (Former Cal. Rules of Court, rule 4.420(d), eff. until Jan. 1, 2007 [further rule references are to these rules].) "However, where the facts surrounding the charged offense exceed the minimum necessary to establish the elements of the crime, the trial court can use such evidence to aggravate the sentence." (*People v. Castorena* (1996) 51 Cal.App.4th 558, 562 (*Castorena*).)

Subdivision (b) of section 136.1 provides in pertinent part: "Except as provided in subdivision (c), every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison: [¶] (1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge."

Subdivision (c) of section 136.1 provides in pertinent part: "Every person doing any of the acts described in subdivision . . . (b) knowingly and maliciously under any one or more of the following circumstances, is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years under any of the following circumstances: [¶] (1) Where the act is accompanied by force or by *an express or implied threat of force or violence, upon a witness or victim or any third person or the property of any victim, witness, or any third person*." (Italics added.)

A defendant need not threaten "great bodily harm" in order to violate section 136.1, subdivision (c). Indeed, threatening to destroy a witness's property is sufficient. Because a threat of great bodily harm

exceeds what is required to be convicted of dissuading a witness by force or threat, the trial court did not err in considering this fact as an aggravating factor. (*Castorena*, *supra*, 51 Cal.App.4th at p. 562.)

The People concede that threatening witnesses who might cooperate with law enforcement is an element of the offense of dissuading a witness by force or threat, but argue that because "the threats . . . involved 'great bodily harm,'" which "is not an element of the crime," "no dual use of facts occurred."

Former rule 4.421(a) separately lists "the crime involved . . . threat of great bodily harm" and "[t]he defendant threatened witnesses . . . or in any other way illegally interfered with the judicial process" as separate aggravating facts (former rule 4.421(a)(1) & (6), eff. until Jan. 1, 2007), and the trial court referred to these facts separately. Thus, we are not convinced the trial court considered these two facts as a single factor in deciding to aggravate defendant's sentence, as the People appear to suggest. Nevertheless, even assuming the court impermissibly relied upon the fact that defendant threatened witnesses who might cooperate with law enforcement, we find any error was harmless.

"'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. Cruz* (1995) 38 Cal.App.4th 427, 433-434 (*Cruz*), quoting *People v. Price* (1991) 1 Cal.4th 324, 492.)

Here, three of the four factors relied upon by the trial court were proper: The crime involved the threat of great bodily harm; the crime involved "a course of planning and prior planning that indicates criminal sophistication"; and defendant was on probation at the time of the offenses. Given the court's reliance on these factors, we find it is not reasonably probable that the trial court would have chosen a lesser sentence had it known that it could not rely on the fact that defendant threatened witnesses who might cooperate with law enforcement. (*Cruz*, *supra*, 38 Cal.App.4th at p. 434.)

This modification does not effect a change in the judgment.

The petition for rehearing filed by defendant is denied.

BY THE COURT:

SIMS, Acting P.J.

HULL, J.

BUTZ, J.