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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BRIANNE RAISNER,

Defendant and Appellant.

A131930

(Contra Costa County
Super. Ct. No. 51000660)

This is an appeal from final judgment after defendant Brianne Raisner entered a no contest plea to voluntary manslaughter and admitted an enhancement alleging use of a deadly weapon in the death of her boyfriend, Michael Krummen. The trial court imposed an 11-year aggravated term, which defendant challenges on appeal as a product of misstatements of fact and of judicial bias. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On January 25, 2010, an information was filed charging defendant with murder in violation of Penal Code section 187.¹ This charge stemmed from the violent death of Michael Krummen at shortly before 4:30 a.m. on September 13, 2009 in Pittsburg after he was struck, carried several blocks and then crushed by a vehicle driven by defendant.

A preliminary hearing was held on January 14, 2010, at which, among other things, the trial court heard testimony from several witnesses and received into evidence several videotapes from surveillance cameras that captured images of the crime. In

¹ Unless otherwise stated, all statutory citations herein are to the Penal Code.

particular, Kristoffer Sampson, a security guard sitting in his parked vehicle outside an apartment complex on Marina Boulevard at the time of the crime, testified that he saw a Nissan Maxima travelling steadily at about 30 miles-per-hour strike a male pedestrian from behind as the male, carrying a black leather bag, took a few steps into the Third Street intersection. At impact, the male's leg flew into the air and his body fell forward onto the vehicle's hood. The male then grabbed onto the space between the hood and front windshield. According to Sampson, at no point did the driver of the vehicle slow down or take any maneuvers to avoid the male pedestrian, even though the vehicle's lights were on and the male was the only person walking in the street.

After stopping very briefly "when the impact was made," Sampson saw the vehicle "just take off," with smoke and a screeching noise coming from the tires. Accelerating forward, the vehicle turned onto Third Street and then onto Railroad Avenue with the male still on the hood. At this point, Sampson lost sight of it.

A short time later, a witness saw the male lying in the street and called 911. Defendant, however, remained in her vehicle, making no effort to render aid or call for help. Officer Jacob Stage, who arrived at the scene at 4:31 a.m., found Krummen's body on the west side of Railroad Avenue between East 6th Street and East Seventh Street. Krummen had substantial injuries to the head and neck and was not responsive. The distance between where Sampson saw defendant's vehicle first strike Krummen and where Officer Stage found Krummen's body was about a quarter mile. At the site of impact between Krummen and the vehicle, Officer Stage looked for, but did not find, any skid marks that would indicate the vehicle had attempted to stop abruptly.

Police later found skin and hair in two areas in the asphalt, as well as areas on the underside of defendant's vehicle. The coroner's report stated that Krummen had lethal blunt impact injuries to the back of his head, as well as a lethal chest compression injury consistent with being crushed by a vehicle.

Detective Robert McSorley interviewed Timothy Lewis, one of defendant's upstairs neighbors at the Marina Heights apartment complex. Lewis heard defendant yelling at Krummen in the early morning hours of September 13, 2009, and then heard

one person leave defendant's apartment. A few minutes later, Lewis heard what he recognized to be the sound of defendant's vehicle starting.

Detective Joe Reposa testified regarding his investigation of videotapes retrieved from surveillance cameras located at or near Marina Boulevard, north of East Third Street (camera one); at Railroad Avenue and East Third Street (camera two); and at Mechanic's Bank on Railroad Avenue at East Seventh Street (camera three). Camera one, which indicated a time of 4:19 a.m. on September 13, 2009, showed Krummen walking southbound on the Marina Boulevard sidewalk away from the Marina Heights apartment complex. Two minutes and fifty-three seconds later, camera one showed defendant's vehicle driving southbound on Marina Boulevard in the same direction Krummen had been seen walking.

Less than a minute later, camera two showed defendant's vehicle driving eastbound on Third Street, stopping momentarily at a stop sign at the intersection with Railroad Avenue, then turning right onto Railroad Avenue and proceeding southbound. As the vehicle moves down Railroad Avenue, the vehicle's rear brake lights are seen illuminating two or three times and the vehicle is seen "making some relatively overt" and "aggressive" left and right-hand turns. According to Detective Reposa, who relied as a point of reference on two other vehicles seen driving on the tape, defendant's vehicle "is driving more erratic than those two [vehicles]."

Lastly, camera three showed defendant's vehicle travelling towards the bank on Railroad Avenue for a period of about 40 seconds before stopping.²

After stopping, defendant lingered for awhile in her vehicle before backing it into a nearby parking area. At this point, a witness reported seeing defendant standing next to her vehicle screaming, yet offering no assistance to the victim. As such, the witness called 911.³

² None of these surveillance cameras captured the actual impact between defendant's vehicle and Krummen.

³ Defendant, who claimed Krummen jumped on her vehicle after initiating an argument with her, insisted she did attempt to call 911 after he fell off the vehicle's hood.

On March 3, 2011, an amended information was filed that added a second count for voluntary manslaughter in violation of section 192, subdivision (a), with an enhancement for use of a deadly weapon pursuant to section 12022, subdivision (b)(1). The same day, defendant pleaded no contest to the voluntary manslaughter count, a “violent felony” (as defined in § 667.5, subd. (c)), and admitted the use of a deadly weapon enhancement, and the district attorney dismissed the murder count.

On April 1, 2011, the trial court sentenced defendant to the aggravated term of 11 years for the voluntary manslaughter count and imposed a one-year consecutive term for the use of a deadly weapon enhancement.

On April 13, 2011, defendant filed a timely notice of appeal.

DISCUSSION

Defendant raises a single issue on appeal: Did the trial court commit prejudicial error by imposing upon her an aggravated prison term? Arguing that the trial court acted unreasonably and with bias, defendant asks that we set aside her sentence and remand the matter to a different judge for resentencing. The following legal principles apply.

“Voluntary manslaughter is punishable by imprisonment in the state prison for three, six or 11 years (§ 193, subd. (a))” (*People v. Johnson* (2002) 98 Cal.App.4th 566, 577 fn. 14.) “When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . The court shall select the term which, in the court's discretion, best serves the interests of justice.” (§ 1170, subd. (b).) “In exercising his or her discretion in selecting one of the three authorized prison terms referred to in section 1170(b), the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision. The relevant circumstances may be obtained from the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and

However, the probation report states that a witness called 911 after seeing Krummen lying on the road and defendant standing nearby without rendering aid or calling for help.

any further evidence introduced at the sentencing hearing.” (Cal. Rules of Court, rule 4.420, subd. (b).)

The trial court, in exercising its broad discretion, may sentence the defendant to the upper term based on the existence of a single aggravating factor. (*People v. Hall* (1994) 8 Cal.4th 950, 963-964; *People v. Yim* (2007) 152 Cal.App.4th 366, 369.) On appeal, the trial court’s sentencing decision will not be disturbed absent a clear showing that it was arbitrary or irrational. (*People v. Scott* (1994) 9 Cal.4th 331, 349; *People v. Welch* (1993) 5 Cal.4th 228, 234.)

Here, the trial court followed the probation department’s recommendation to sentence defendant to an aggravated 12-year sentence, including the maximum 11-year sentence for voluntary manslaughter plus one year for the deadly weapon enhancement. In doing so, the trial court labeled an “outrageous lie” defendant’s version of events, including her claim that Krummen jumped on her vehicle after initiating an argument out of jealousy for her new boyfriend. The trial court then identified for the record the following reasons for its decision.

First, the trial court found as the key aggravating factor that the crime involved “great violence and tremendous amount of cruelty and viciousness and callousness” In doing so, the court noted, among other things, defendant struck Krummen travelling 30 miles per hour in her vehicle with enough force to “hurl[] him onto the hood.” According to the autopsy, the court noted, Krummen had two independently lethal wounds – a blunt impact wound to the back of the head and a crushing wound to the chest (which, in turn, crushed his rib cage, tore his heart, ruptured his liver and lungs, and lacerated his spleen.) And yet defendant at no point attempted to brake or to swerve to miss him. Rather, after impact, defendant accelerated into a turn with Krummen still on the hood “with enough speed to cause audible screeching and smoke from [the] wheels” Then, once through the turn, defendant is seen on camera hitting the brakes several times and “swerv[ing] several times violently to the right and the left to throw [Krummen] off the car hood.” Finally, the court noted, after Krummen finally fell off the car, “[i]nstead of helping [him], you

sat there with your car, either over his body or on it, for one minute and 17 seconds. You did nothing. And that's on the [video]tape.”

In addition to the seriousness of the crime, the trial court relied heavily on defendant's criminal history when choosing the upper term. This history, the court noted, included felony convictions for theft; misdemeanor convictions for theft, burglary and receiving stolen property; and a sustained juvenile delinquency petition. The trial court added that defendant's crimes were increasing in seriousness and her performance on probation was “worse than unsatisfactory” given that, in “almost every case, you commit new crimes while on probation.”

Finally, the trial court found as grounds for imposing the upper term the facts that Krummen was a vulnerable victim in that defendant struck him from behind in the dark as he walked away from her apartment wearing only a t-shirt and shorts and carrying a bag of possessions; and that defendant exhibited a lack of cooperation with law enforcement, lack of remorse, and lack of insight, all of which were reflected in her repeated refusal to tell the truth, even after being caught. On the other hand, with respect to mitigating factors, the trial court found “none. Absolutely none.”⁴

On appeal, defendant claims the trial court acted unreasonably and with demonstrable bias when imposing the maximum sentence because the factual findings offered in support of the sentence were contrary to the record. Specifically, defendant claims the sentencing judge “explicitly imposed the aggravated term because she believed that [defendant] was really guilty of first degree murder rather than the voluntary manslaughter plea bargain that the sentencing judge had accepted,” thereby “show[ing] a complete disregard of the sentencing scheme such that a reasonable person could doubt whether the sentencing judge was impartial.”

⁴ With respect to the lack of mitigating factors, the trial court noted: “You were not a passive participant. The victim was not the aggressor, you were. There are no unusual circumstances like great provocation. There was no coercion or duress or partial excuse or defense for you. You were not induced by others to commit this crime. You did not exercise caution to avoid harm. You had no belief that what you were doing was legal. You never suffered from abuse from [Krummen].”

We reject defendant's argument. Having reviewed the record, we conclude, to the contrary, that all the aggravating factors identified by the trial court are supported by substantial evidence and, thus, under governing California law, are more than sufficient to support the maximum sentence. (See *People v. Gragg* (1989) 216 Cal.App.3d 32, 46 [a trial court's findings of circumstances that support an aggravated sentence are reviewed for substantial evidence]; *People v. Hall, supra*, 8 Cal.4th at pp. 963-964 [a single aggravating factor is sufficient to support a sentencing choice].)

First, with respect to the evidence relating to the violent and cruel nature of defendant's crime, which is set forth in greater detail above, eyewitness Sampson provided much of the basis of the trial court's findings. In particular, consistent with the trial court's on-the-record statements, Sampson testified at the preliminary hearing that, by his estimate, defendant's vehicle struck Krummen going a "steady speed of 30 miles an hour," at no point applying the brakes or taking any other evasive measure to avoid him. The impact, Sampson recalled, had the effect of causing Krummen's leg to "fly up into the air" as he fell forward onto the hood. However, rather than stopping to provide help, defendant's vehicle accelerated as it turned onto Third Street with Krummen still on the hood, at which point Sampson heard screeching and saw "a little bit of smoke coming from the tires."

With respect to what happened next, the trial court relied upon video-recordings obtained from public surveillance cameras near the point of impact. These tapes were entered into evidence at the probation hearing and, thus, were part of the case record properly considered by the trial court during sentencing. (Cal. Rules of Court, rule 4.420, subd. (b).) In particular, as Detective Reposa testified at the preliminary hearing, these recordings show defendant's vehicle hitting the brakes several times and making "very dramatic turns." According to the trial court, these vehicle maneuvers indicate defendant was trying to "throw [Krummen] off the car hood." The court's interpretation of this evidence, which is based on the probation report and the judge's personal viewing of the videotapes, is reasonable and, thus, will not be disturbed. (*People v. Stuart* (2007) 156 Cal.App.4th 165, 179.)

Finally, the coroner's report, from which the trial court read aloud, confirms the violent nature of Krummen's death, including his suffering of two independently lethal wounds, one to the head and the other to the chest. The court then added that, after Krummen had fallen off the car, "[i]nstead of helping [him], you sat there with your car, either over his body or on it, for one minute and 17 seconds. You did nothing. And that's on the [video]tape." Again, the surveillance tape relied upon by the trial court when making this finding was properly considered for purpose of sentencing given that it was admitted as a case exhibit during the preliminary hearing. (Cal. Rules of Court, rule 4.420, subd. (b).) Defendant does not argue otherwise.

Thus, because the trial court's factual finding with respect to the violent and cruel nature of defendant's crime is supported by substantial evidence, it stands on appeal. While defendant clearly disagrees with the trial court's interpretation of the evidence, her disagreement is not grounds for resentencing. Neither this court nor the trial court is required to accept defendant's version of events. Rather, the trial court may accept any reasonable version of events, and we will defer to the trial court's judgment on appeal absent a clear showing that it was arbitrary or irrational. (*People v. Scott, supra*, 9 Cal.4th at p. 349; *People v. Stuart, supra*, 156 Cal.App.4th at p. 179.) Here, the trial court's judgment was neither arbitrary nor irrational.

Moreover, and in any event, with respect to defendant's prior criminal history and poor performance on probation, the facts are not in dispute. As reflected in the probation report and stated on the record at sentencing by the trial court, defendant has at least two prior felony convictions, multiple misdemeanor convictions and a sustained juvenile petition. Defendant has been placed on probation multiple times and, while on probation, has reoffended at least twice. Indeed, defendant was on active felony probation at the time of this offense. These undisputed facts, even aside from the seriousness of the crime, provided a sufficient basis for imposition of the upper term. As the California Supreme Court has recognized, " '[r]ecidivism . . . is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence.' [Citation.]" (*People v. Towne* (2008) 44 Cal.4th 63, 75.)

Thus, based on the record described above, we conclude the trial court properly considered mitigating factors (ultimately finding none) and aggravating factors (including defendant's substantial criminal history and poor performance on probation and the cruel nature of her offense), before deciding aggravating factors predominated and justified imposition of the upper term. (Cal. Rules of Court, rules 4.421, 4.423, 4.420.) In the absence of any showing the trial court's decision was arbitrary or irrational, we uphold it. (*People v. Welch, supra*, 5 Cal.4th at p. 234.)

Having already affirmed the trial court's decision, we briefly address defendant's concerns regarding certain of the trial judge's word choices during sentencing. Specifically, defendant challenges the judge's statements that "[t]his act by you was an intentional murder. Voluntary manslaughter is an intentional murder, and you pled to intentional murder, and you need to recognize that's what you pled to. You did not plead to an accident." There is no basis in these statements for reversing an otherwise well-supported sentencing decision. While defendant correctly points out she pleaded no contest to voluntary manslaughter, not murder, the trial court was entitled to consider all the evidence in the record of her guilt, including evidence relating to defendant's malice or intent to kill, when deciding the proper sentence. (*People v. Towne, supra*, 44 Cal.4th at pp. 88-89 [finding "no unfairness in permitting the trial court, in selecting the sentence most appropriate for the crime, to take into account all of the evidence related to defendant's conduct in committing that offense," even "evidence that would have justified a guilty verdict on one or more of the crimes of violence of which defendant was acquitted"].) Where, as here, the trial court properly considered all of the evidence, and reasonable inferences from that evidence, related to defendant's commission of the crime in selecting her term of imprisonment, we reject defendant's claim of judicial bias.

DISPOSITION

The judgment is affirmed.

Jenkins, J.

We concur:

Pollak, Acting P. J.

Siggins, J.