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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

CRAIG STEVEN BOWMAN,

Defendant and Appellant.

A132088

**(Napa County
Super. Ct. No. CR143105)**

Pursuant to a November 2008 negotiated disposition, defendant Craig Steven Bowman (appellant) pled no contest to infliction of corporal injury on a spouse (Pen. Code, § 273.5, subd. (a)) (section 273.5(a)),¹ admitted an infliction of great bodily injury (GBI) enhancement (§ 12022.7, subd. (e)), and was placed on probation. Following the revocation of his probation he was sentenced to nine years in state prison. On appeal, he contends the court erroneously relied on his “increasingly serious criminality” in imposing the upper term on the section 273.5(a) offense and on the GBI enhancement, and erroneously used the same fact (serious infliction of bodily injury on the victim) to impose the upper term on the section 273.5(a) offense and on the GBI enhancement. We reject the contentions and affirm.

¹ All undesignated section references are to the Penal Code.

BACKGROUND

According to the probation department's presentence report, on October 25, 2008, an intoxicated appellant became angry after seeing his wife talking to another man. After his wife walked away, appellant followed her and pushed her to the ground. The unconscious victim was transported to the hospital where she was admitted to the intensive care unit and placed on a ventilator.

The probation department's January 2009 presentence report noted appellant had the following adult record of prior misdemeanor convictions: A 1993 conviction for willful violation of a court order (former § 166, subd. 4), a 2002 conviction for violating a protective order (§ 273.6, subd. (a)), a 2007 conviction for driving over the maximum speed limit (Veh. Code, § 22349, subd. (b)) and a 2008 conviction for driving under the influence of alcohol (Veh. Code, § 23152, subd. (b)).

In January 2009, appellant was sentenced to five years in state prison, with execution of sentence suspended, and was placed on three years' probation. In July 2010 he admitted violating his probation by willfully disobeying a court order (§ 166, subd. (a)(4)), and engaging in disorderly conduct (§ 647, subd. (i)). In September 2010, his probation was revoked and reinstated on modified terms and conditions. The court also vacated the January 2009 order suspending execution of sentence and advised appellant he could be sentenced to up to nine years in prison if he violated probation.

On January 12, 2011, appellant admitted violating his probation by having contact with and disturbing the peace of the victim. The court ordered the proceedings suspended pursuant to section 1203.03 for a diagnostic evaluation and report by the California Department of Corrections and Rehabilitation.

At the March 25, 2011 sentencing hearing, the prosecutor argued in favor of an aggravated state prison term based on appellant's noncompliance with the court's orders. Defense counsel argued in favor of reimposition of probation so that appellant could complete his treatment program. The court denied probation and imposed a state prison term. In imposing the aggravated four-year term on the section 273.5(a) offense, the court stated, "The court does that pursuant to [Cal. Rules of Court,] rule 4.414(a). In

light of the fact that . . . the victim in this case was particularly vulnerable, in that she was his wife. She was assaulted from behind. That the crime involved great violence—great bodily harm, threat of great bodily harm, and other act[s] of viciousness and . . . callousness. And that [appellant] has engaged in violent conduct indicating a serious danger to society.” In imposing a consecutive five-year aggravated term on the GBI allegation, the court stated, “The court does that because of the serious nature of the injuries to the victim, as well as the fact that . . . [appellant’s] conviction[s] as an adult are of increasing seriousness.”

Appellant filed a timely notice of appeal from the March 25, 2011 sentencing order.

DISCUSSION

I. *Imposition of the Upper Terms on the Section 273.5(a) Offense and GBI Enhancement*

Appellant contends the court abused its discretion in relying on his “increasingly serious criminality” in imposing the upper term on the section 273.5(a) offense and on the GBI enhancement.

Citing *People v. Gonzalez* (2003) 31 Cal.4th 745 (*Gonzales*) and *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*), the People argue that appellant’s failure to object at the sentencing hearing to the court’s imposition of the upper term on the section 273.5(a) offense and the GBI enhancement forfeits his challenge on appeal. In his reply brief, appellant concedes he did not so object in the trial court. However, he argues the court did not provide him a meaningful opportunity to object prior to pronouncement of sentence because, after taking the matter under submission, the court “proceeded to elucidate its reasoning and to pronounce the sentence in one monologue. Although there was a brief colloquy immediately thereafter concerning the amount of [appellant’s] time credits, the sentence had been pronounced, and the case was closed without the opportunity to respond to the statements of the court, nor the reasoning which the sentencing judge applied in determining the time to be imposed.”

Appellant's argument lacks merit. He and his counsel were present at the sentencing hearing at which the prosecutor requested that the court deny probation and impose the "aggravated term of nine years." After arguing in favor of probation, defense counsel stated "[W]e are prepared to accept your wisdom and judgment in this case." After ordering the matter submitted, the court explained its reasons for imposing the four-year upper term on the section 273.5(a) offense and for imposing a consecutive five-year upper term on the GBI enhancement. It then explained its award of presentence credits, imposition of fees and fines, and appellant's right to appeal. At that juncture, the prosecutor asked a question about time credits and the court responded thereto. At no time did defense counsel object to the imposition of the upper terms on the section 273.5(a) offense or the GBI enhancement, and the record does not suggest that defense counsel had no meaningful opportunity to do so. We therefore conclude appellant waived his challenge to the reasons given by the court for its imposition of the upper terms on the section 273.5(a) offense and on the GBI enhancement.

However, to forestall an incompetence of counsel claim, we address the issue on the merits and reject it. We review the court's sentencing choice for abuse of discretion. (*People v. Brown* (2000) 83 Cal.App.4th 1037, 1044.) A trial court abuses its discretion when it relies on circumstances that are not relevant to its decision or that otherwise constitute an improper basis for the decision. (*People v. Moberly* (2009) 176 Cal.App.4th 1191, 1196.)

"[A] trial court is free to base an upper term sentence upon any aggravating circumstance that the court deems significant, subject to specific prohibitions. (See, e.g., Cal. Rules of Court, rule 4.420(c) [fact underlying an enhancement may not be used to impose the upper term unless the court strikes the enhancement]; *id.*, rule 4.420(d) [fact that is an element of the crime may not be used to impose the upper term].) The court's discretion to identify aggravating circumstances is otherwise limited only by the requirement that they be 'reasonably related to the decision being made.' (Cal. Rules of Court, rule 4.408(a).)" (*People v. Sandoval* (2007) 41 Cal.4th 825, 848, fn. omitted.)

The court's upper term sentencing choice may be based on a single aggravating factor. (*People v. Yim* (2007) 152 Cal.App.4th 366, 369.)

Circumstances in aggravation include: "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"; "[t]he victim was particularly vulnerable"; and "[t]he defendant has engaged in violent conduct that indicates a serious danger to society." (Cal. Rules of court, rule 4.421(a) & (b).)²

Here, contrary to appellant's assertion, the court did not rely on the "increasingly serious criminality" factor in imposing the upper term on the section 273.5(a) offense. It imposed the upper term sentence on the section 273.5(a) offense based on the factors that the victim was particularly vulnerable (rule 4.421(a)(3)), and the crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing viciousness and callousness (rule 4.421(a)(1)). In addition, in imposing the upper term on the GBI enhancement, the court properly relied on the fact that the victim suffered serious injuries as a result of the section 273.5(a) offense. No abuse of discretion is demonstrated.

II. *Dual Use of Aggravating Facts*

Appellant next contends the court violated section 1170, subdivision (b) and rule 4.420(c) in using the factor that serious bodily injury was inflicted on the victim to impose the upper term on the section 273.5(a) offense and to impose the upper term on the GBI enhancement. He concedes he did not object to the sentence on this ground in the trial court, but argues the dual use of the sentencing factor resulted in an unauthorized sentence not subject to the forfeiture rule. Appellant's argument is misplaced. Appellant's failure to raise this dual use argument below forfeits the issue on appeal. (*Gonzales, supra*, 31 Cal.4th at pp. 755-756; *Scott, supra*, 9 Cal.4th at p. 353.)

Appellant's forfeiture notwithstanding, we reject his claim on the merits. Section 1170, subdivision (b), states in pertinent part as follows: "When a judgment of

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

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. . . . [T]he court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law.” In addition, rule 4.420(c) provides: “To comply with section 1170(b), 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. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking the additional term of imprisonment, regardless of the effect on the total term.”

Assuming the infliction of serious bodily injury factor could not be used to impose both the upper term on the section 273.5(a) offense and the GBI enhancement, the court properly relied on the following other factors in imposing the upper term on the section 273.5(a) offense: the victim was particularly vulnerable (rule 4.421(a)(3)), the crime disclosed a high degree of viciousness and callousness (rule 4.421(a)(1)), and appellant engaged in violent conduct indicating a serious danger to society (rule 421(b)(1)). Given the court’s proper reliance on other aggravating factors, any error is not prejudicial. (See *People v. Osband* (1996) 13 Cal.4th 622, 732.)

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.