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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAVIER GONZALEZ-RODRIGUEZ,

Defendant and Appellant.

A132614

(Sonoma County  
Super. Ct. No. SCR568169)

Defendant Javier Gonzalez-Rodriguez brutally attacked his girlfriend. A jury convicted him of attempted murder and other charges. Defendant challenges the trial court's imposition of an upper term sentence. We affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

On August 17, 2009, defendant, after learning his then-girlfriend no longer wished to date him, verbally threatened her and then attacked her with a machete and a knife. Though the victim survived, she suffered three bone fractures, stab wounds to her left thigh and right shoulder, a beating to one of her fingers that severed her skin to the bone, and multiple lacerations to her scalp. The victim's skull bone was exposed and pushed into her brain cavity.

On March 24, 2011, a jury convicted defendant of attempted murder (Pen. Code, §§ 664, 187, subd. (a)),<sup>1</sup> mayhem (§ 203), infliction of corporeal injury against the

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<sup>1</sup> All further statutory references are to the penal code unless noted.

mother of his child (§ 273.5, subd. (a)), assault with a deadly weapon (§ 245, subd. (a)(1)), and making threats (§ 422). The jury also found several punishment-enhancing allegations true, namely defendant intentionally and personally inflicted great bodily injury upon the victim in the course of the attempted murder (§§ 1203.075, 12022.7, subd. (a)); inflicted great bodily injury upon the victim under circumstances involving domestic violence in the course of the attempted murder, injury to mother, and assault (§ 12022.7, subd. (e)); and used a dangerous or deadly weapon in the course of the attempted murder and injury to mother (§ 12022, subd. (b)(1)). The jury, however, could not reach agreement on whether the attempted murder was premeditated.

Following a sentencing hearing on May 26, 2011, the trial court sentenced defendant to a prison term of 15 years 8 months. It imposed the upper term—nine years—for the attempted murder, added five years for the section 12022.7, subd. (e) domestic violence enhancement, and added one year for the section 12022, subd. (b)(1) dangerous weapon enhancement. It then sentenced defendant to eight months for making threats. The trial court selected upper terms for the remaining charges, but stayed sentence.

At the hearing, the trial court first announced its tentative sentencing decision, which was to adopt the probation department's recommended sentence. The probation department had recommended upper terms and the same 15 year 8 month sentence the court ultimately imposed.

Defense counsel was given a chance to address the trial court. Counsel stated defendant "had very little contact with the criminal justice system. He has been successful previously on probation. I would note that when he was doing his domestic violence classes, he showed a genuine attitude towards changing. He was very motivated. And I would note that this was one incident where he was in the state of extreme intoxication, he had been using drugs. I would ask the court to consider those

issues when determining the sentence and I would ask the court to—instead of imposing the aggravated term, to impose the mid-term.”

After hearing this argument and argument from the district attorney, the trial court pronounced sentence. In doing so, it stated reasons for selecting the upper, aggravated term for attempted murder: the crime involved great bodily harm (citing Cal. Rules of Court, rule 4.421(a)(1))<sup>2</sup>; the victim, sitting next to a water cooler at the time of the attack, was particularly vulnerable (citing rule 4.421(a)(3)); defendant had “engaged in violent conduct that indicates a serious danger to society” (rule 4.421(b)(1)); defendant had prior convictions of increasing severity (citing rule 4.421(b)(2)); defendant previously violated the terms of a conditional sentence (citing rule 4.421(b)(5)); and defendant essentially engaged in two attacks, first wielding the machete and then pausing before using the knife (citing rules 4.421(c) & 4.408). The trial court also acknowledged a circumstance that favored mitigation: defendant remained law abiding during two prior grants of conditional sentence (citing rule 4.423(b)(6)).

Defendant made no further objection or comment about sentencing and the hearing ended.

Defendant mailed a notice of appeal on July 23, 2011, which was filed on July 27, 2011.

### **DISCUSSION**

Defendant does not challenge his conviction, only his sentence.

He first asserts the aggravating circumstances the trial court found were either unsupported by evidence in the record or were impermissible circumstances to consider, because they overlapped with elements of the crime or enhancements for which punishment was already being imposed (and could lead to improper double punishment). (See rule 4.420(c)-(d).)

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<sup>2</sup> All further rule references are to the California Rules of Court.

Defendant, however, never objected to the propriety of the trial court's chosen aggravating factors. Defendant has therefore forfeited this issue. "[C]omplaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal." (*People v. Scott* (1994) 9 Cal.4th 331, 356.) "Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention. As in other waiver cases, we hope to reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them." (*Id.* at pp. 351-353.) Thus, objections to an "aggravated . . . sentence based on items contained in a probation report that were erroneous or otherwise flawed" or because the trial court "double-counted a particular sentencing factor" must first be raised before the trial court or forfeited. (*Ibid.*; see also *People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1371 [defendant "must object at the time of sentencing if the trial court . . . double-counts a particular sentencing factor"]; cf. *People v. de Soto* (1997) 54 Cal.App.4th 1, 4, 8 [objection to "using the same facts both to aggravate the base term and to impose an enhancement" was too "boilerplate" and nonspecific to preserve any particular issue of double counting for appeal].)

Defendant next argues the trial court failed to properly consider the presence of mitigating circumstances. Defendant concedes the trial court considered his satisfactory behavior on two prior conditional sentences. Nevertheless, defendant faults the trial court for not recognizing two other circumstances that he did, in fact, raise during the sentencing hearing: first, defendant's extreme state of intoxication; and second, defendant's relatively minor criminal history (according to the probation report, a 2001 trespassing misdemeanor, 2005 false imprisonment misdemeanor, and a 2008 public intoxication misdemeanor).

A trial court has broad discretion in making sentencing choices, including how to consider aggravating or mitigating sentencing factors (*People v. Sandoval* (2007) 41 Cal.4th 825, 847 (*Sandoval*); *People v. Roe* (1983) 148 Cal.App.3d 112, 119-120.)

And while a “trial court is required to state its reasons for any sentencing choice (e.g., imposition of an upper term) on the record at the time of sentencing” (*People v. Ortiz, supra*, 208 Cal.App.4th at p. 1371), a “trial court may ‘minimize or even entirely disregard mitigating factors without stating its reasons.’ ” (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1258.) This is particularly so when an alleged factor in mitigation is disputable, either because it is not established by the evidence or because, under the circumstances of the case, it is not mitigating. (*In re Handa* (1985) 166 Cal.App.3d 966, 973-974 (*Handa*); cf. *People v. Hubbell* (1980) 108 Cal.App.3d 253, 260 [a trial court’s finding of a sentencing circumstance should be supported by substantial evidence].)

As for defendant’s intoxication and ability to control his actions, the trial court remarked on this fact, if somewhat indirectly, stating it was “insulting and quite frankly ridiculous” for defendant to claim, as he had to the probation department, “that something cold hit him and took over his body and [he] cannot remember anything of the incident, but conveniently can remember everything up to the incident.” The trial court did not accept defendant’s claim that intoxication reduced his culpability, and this conclusion was based on substantial evidence given defendant’s concession he was otherwise aware of what was going on up to the moment of the attack. And in any event, as set forth in *Handa*, the trial court neither needed to accept defendant’s disputed claim of intoxication as a mitigating factor nor even state reasons for rejecting it. (See *Handa, supra*, 166 Cal.App.3d at p. 974 [“Drug use or drug addiction at the time of an offense is an example of a disputable factor in mitigation.”]; *People v. Davis* (1980) 103 Cal.App.3d 270, 280-281 [“reject[ing] defendant’s argument the trial court failed to consider his use of drugs as a factor in mitigation”].)

As to defendant’s criminal history, the trial court squarely considered the matter. It disagreed with defendant that his history was marginal and mitigating, instead finding defendant had a number of prior convictions of increasing severity which should favor an aggravated, upper-term sentence. The record supports the trial court’s conclusion, with

defendant progressing from trespass, to false imprisonment involving a domestic dispute, to the attempted murder at issue in this case.

As noted, the trial court had broad discretion to weigh the aggravating and mitigating factors as it saw fit. (*Sandoval, supra*, 41 Cal.4th at p. 847; *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582-1583.) “ ‘We must affirm unless there is a clear showing the sentence choice was arbitrary or irrational.’ ” (*People v. Oberreuter* (1988) 204 Cal.App.3d 884, 887.) Just “[o]ne aggravating factor is sufficient to support the imposition of an upper term.” (*People v. Ortiz, supra*, 208 Cal.App.4th at p. 1371.) There is substantial evidence to support several of the court’s stated reasons for imposing the upper term, and its selection of the upper term was reasonable. At the very least, for instance, it is undisputed defendant previously violated the terms of a conditional sentence. The record also permits the trial court’s conclusion that the victim was in a particularly weak position and that the attack was particularly heinous, being divided into two distinct episodes of violence—allowing defendant time to reflect and abandon the attack, which he did not do.

Even had the trial court made a clear error in considering one or more particular circumstances at sentencing, we would not reverse under the facts of 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.) We are confident that given the seriousness of the crime, the trial court would not have selected a lesser sentence even if it had to consider more thoroughly the relatively weak mitigating circumstances defendant alleges—or even if we declared improper some of the aggravating circumstances defendant has contested, but which defendant may not address in this appeal because of forfeiture.

**DISPOSITION**

The judgment is affirmed.

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Banke, J.

We concur:

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Margulies, Acting P. J.

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Dondero, J.