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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ARMANDO CORDOVA,

Defendant and Appellant.

A134878

(Contra Costa County
Super. Ct. No. 5-111229-1)

After appellant, Jose Armando Cordova, was convicted of attempted voluntary manslaughter, assault with a firearm, felon in possession of a firearm, misdemeanor battery of a cohabitant, and a variety of charged sentence enhancements were found true, he was sentenced to a total prison term of 14 years 2 months. His sole contention on appeal is that his attorney’s failures to object to an assertedly improper sentence constitutes ineffective assistance of counsel under federal and state standards. We shall affirm the judgment and sentence imposed.

FACTS

Samantha Hurley, who testified under a grant of immunity (Pen. Code, § 1324), met appellant in January 2011, and they began a “romantic relationship.” In March of that year she attempted to end the relationship. On March 18 and 19, Hurley and appellant argued about separating. Three days later she met with her friends Fernando and Juan at a park in Pittsburg and borrowed Juan’s cell phone to call appellant. He asked where she was, and she told him she was at a park watching Fernando play football. He asked whether he could pick her up, stating that “he missed me,” and she

agreed. When appellant arrived he said he had to go to Concord and she agreed to accompany him. While on the way he told Hurley he had tried to reach her the previous night at her sister's house, but she would not let him speak to Hurley, and he suspected Hurley was not really there. Hurley told him her sister would not put him through to her because he was calling late at night and her sister felt it was "not appropriate to call in the middle of the night." Appellant did not believe this; he thought Hurley was actually at her former apartment, where her ex-boyfriend Arturo lives. During the drive to Concord appellant "looked very mad" and told Hurley he thought she was lying. At one point he warned her the only way she would leave him for someone else would be "in a body bag." Hurley did not want to keep arguing with him because "I love him."

When they arrived in Concord, appellant parked the car on Pine Street near an apartment complex and went to talk to a "friend he always talked to," whose name Hurley did not know, apparently to consummate a drug deal. While he was gone she walked around to get some air and also to talk to a friend she saw across the street. When appellant returned he asked Hurley whether she was going somewhere with her friend, and she said " 'No, I was just saying hi.' " At that point appellant grabbed Hurley's jacket to restrain her, she "twisted out of it" and the two struggled and began arguing. He asked why she pushed him away, she replied " '[b]ecause I'm upset that you're upset that you don't believe me,' " and he replied " 'So you want to leave me again?' " Hurley testified that after further argument she told appellant " 'I don't want to argue no more . . . I'll see you later, I'll talk to you later,' " and crossed the street. He told her "not to leave, and . . . that I wouldn't leave," and she responded " 'watch me,' " and "kept walking."

When she turned around Hurley saw appellant was holding a gun, but because it was pointed at the ground, not at her, she "didn't pay any mind to it," because "I wasn't scared of him." While continuing to walk away she "heard a loud noise" and thought "his tire had popped or something." Assuming this would make him very mad, and not wanting to be around him when he was mad, Hurley "jumped the fence" and ran. After

she jumped another fence, and finally sat down on a staircase to rest, a passerby told her “Oh my God, you’re bleeding,” and Hurley realized she had been shot.

Attempting to avoid the police, Hurley went to Fernando and Juan and asked them to take her to a hospital. Fearing hospital authorities would think they shot her, they refused to do so, but the two “dragged” her to police officers they spotted on the premises of the nearby apartment complex. The officers asked Hurley to identify her assailant or the type of car he was driving. Because she did not want appellant arrested, she told them only that “I was with my boyfriend and that we were arguing,” and asked the officers to just take her to a hospital “ ‘and not ask so many questions.’ ” Soon afterward Hurley blacked out. For two weeks Hurley remained in a coma at John Muir Medical Center in Walnut Creek. Much of the information Hurley gave the police at the scene and later at the hospital was false, including the name of her boyfriend, which she said was Ernesto Castillo.

Sandra Bernal testified that appellant is the father of her two-year old daughter, Mariana. Two days after the shooting, at appellant’s request, she took Mariana to see him at the house of a friend. When appellant told her he shot Hurley, she asked why and appellant said it was because she had lied to him. A week later, when Bernal returned to the house to pick up her daughter and lifted the child from a bed, appellant jumped out of a closet and began hitting her in the head with his fist. Appellant’s friends then took her daughter from her and she left without the child. As a result of appellant’s blows she had a black eye for a week. Bernal stated that appellant had hit her in the past and she feared him.

On the day of the shooting, Concord Police Officers Jeff Bilodeau and Michael Hansen were dispatched to an apartment complex in that city on the report of a resident that he or she heard a single shot and then a woman screaming. When they were in the parking lot of the complex, two Hispanic males flagged them down to assist a woman who was with them. The woman, who was Hurley, was crying, unable to speak clearly, and they saw blood around her mouth. When the officers asked how she received her injuries, she responded “that he fuckin shot me . . . which gave me an indication that she

had been shot by somebody.” She identified her assailant as Ernesto Castillo, an “approximately 30-year old Hispanic male that she had been dating for approximately two months” and said that he had also beaten her severely around the head. She said she met with the boyfriend in order to “end the relationship due to his violent behaviors.” She told the officers that while they were parked in his car nearby she informed the boyfriend she wanted to end the relationship, and he told her the only way she would leave the relationship would be in a body bag. When she tried to exit the vehicle and flee, he grabbed her jacket to restrain her, but she slipped out of it and escaped his grasp. She turned around to see him reach into his waistband and thought he had a gun but was unable to describe it. Later she heard a gunshot. The woman repeated much of this information to Officer Hansen when he accompanied her to the hospital in the ambulance that shortly arrived at the scene. Physicians at the hospital gave Officer Hansen the bullet they removed from Hurley’s mouth.

Concord Police Detective Patrick Murray visited the crime scene and also interviewed Hurley during her hospitalization. She told him her boyfriend, who this time she correctly identified as appellant, shot her on March 22, the day after she told him she “wanted to take a break from their relationship for a while.” Hurley told Murray that after appellant parked the car near the apartment complex in Concord and unsuccessfully tried to prevent her from leaving it, she saw him exit the car with “a kind of a western style gun” in his hands. After he grabbed her jacket and she slipped out of it, appellant “warned, ‘Sam, I’ll shoot you.’ ” She defiantly said he would not, and he repeated his threat to do so. After she saw him raise the gun in her direction she turned and ran, heard a shot ring out, and felt blood running down her cheek. She did not feel pain, but knew she was shot. When Detective Murray showed Hurley a photograph of appellant, she identified him as her boyfriend.

Mayra Barrera Pinon, Hurley’s sister-in-law, testified that she spoke with Hurley earlier in the evening of March 22 by phone but was unable to recall whether she told the police Hurley was frightened at that time, although she did remember hearing a male voice in the background. About two weeks before the shooting, Pinon visited Hurley at a

hospital in Martinez, and saw she had a bruised eye. Pinon was unable to remember whether she told police that an Hispanic male picked Hurley up outside the Martinez hospital.

Officer Bilodeau testified that he spoke with Pinon at John Muir Medical Center in Walnut Creek, while she and other family members were there visiting Hurley after the shooting. Pinon said Hurley seemed “scared” when she spoke to her on the phone shortly before appellant drove her to Concord, and during the call she heard Hurley and a male arguing.

Appellant—who testified in English with a Spanish translator available if necessary—stated he was 35 years old, had five children with his first wife and one with Sandra Bernal. In 2005, he was convicted of felony drunk driving. Prior to the charged offenses, he worked in construction, but he began to use and sell methamphetamine after separating from his wife. Appellant met Sandra Bernal, who also used drugs, in 2006, and they lived together for seven or eight months. After they separated, he maintained the relationship for the sake of their daughter, Mariana. He met Samantha Hurley, who also used drugs, about 10 months before trial and they became a couple almost immediately.

Near the end of 2010, appellant concluded that he needed a gun because he had recently been beaten and robbed. After buying and selling two firearms, he bought a .22 caliber pistol with 500 bullets. He never planned to use the gun unless “somebody attacked me or something.” He kept the gun loaded and, in order to keep it away from his daughter, carried it in his car all the time. Appellant stated that he had never fired the loaded weapon until the March 22 shooting.

At some point in their relationship, Hurley introduced appellant to her friend Fernando, who she referred to by his nickname: “Peke.” Appellant had tried to get Hurley to stop using drugs by pretending that “ ‘I’ve been calling everyone, and no one has nothing.’ ” Hurley claimed Peke had drugs, so appellant felt “I have no choice but to go with her.” Peke’s apartment was on Pine Street, near where the shooting took place. Appellant had gone to Peke’s apartment about a week before the shooting to sell him a

laptop computer. During that visit Peke told him to treat Hurley well, and give her “space,” so she could talk to her friends. Peke assertedly warned appellant “I got something, too, so I can defend her” and opened his jacket to reveal a gun.

The day before the shooting, appellant accompanied Hurley to her then residence on Laguna Street to get her belongings so they could move in together elsewhere. During that visit appellant was robbed, apparently by persons acting on behalf of someone to whom appellant owed money. Afterward, Hurley decided not to leave with appellant but remain in her apartment. The next day Hurley phoned appellant from Peke’s apartment inquiring how he was. He was upset with her for staying in the Laguna Street apartment but was in love with her and did not believe the relationship was over. Later someone told him Hurley had been at Peke’s apartment, and that Peke told others, “I . . . fuck Samantha all night.” Deciding to “confront” Peke, appellant went to Peke’s apartment with his gun. When he arrived he saw Hurley in the window, waited outside for about half an hour, and when no one came out he left.

Later that night Hurley phoned him again, stating she was at a park in Pittsburg, wanted to see him, and asked him to pick her up. Appellant expected Peke would also be at the park but was not worried because he had a gun in his car. When he arrived and Hurley got in his car, appellant wanted to talk about Peke, but he sensed she was “on the side of me,” and forgot about Peke. Appellant had used methamphetamine before arriving at the park and during the drive to Concord gave some to Hurley. They planned to use some of it together later and sell the rest. Hurley also took \$1,600 or \$1,500 from a larger amount of money appellant had in the car, which he had “collected on a debt” the day before, when he was robbed.

When they arrived at Pine Street in Concord, appellant planned to carry out a quick drug deal with an unidentified “friend” and then collect Hurley’s belongings. While he was conducting the drug transaction, Hurley got out of the car and when he returned she said she was waiting for “somebody.” He accused her of “playing around again” and told her to give him the money she was holding. When she refused he tried to stop her from leaving but was only able to grab her jacket. She ran away, and he found

nothing in the pockets of the jacket. Appellant thought she was looking for Peke, who lived nearby, or the other friends who had tried to rob him the day before. He did not leave because he wanted the money and drugs she had taken. Appellant “grabbed the gun,” and told Hurley: “Just give me the money, give me the stuff, please. I don’t want no problems. And if you waiting for these guys or whatever, you plan to go with them or whatever again, man, you’re gonna try and rob me again or do something.” Appellant said he told Hurley he just wanted the money and drugs, and that if her friends “gonna come, I’m gonna shoot ‘em.”

Appellant stated that after he “grabbed her again from the hand, and I was looking around . . . the gun went off” when she was about two feet away. When that happened, “I let her go, and she runs, and I got surprised.” Appellant said he never pointed the gun at Hurley or intended to shoot. He just wanted her to know that “her friends or whatever, they were coming, I was prepared . . . to defend myself.” Appellant was on drugs at the time and “was all confused.” He did not follow Hurley when she ran from him because he did not think she was hit. Appellant stated that he “laughed” when she ran, because “at least she gets scared. She takes my money, but she gets scared.”

Thinking it dangerous for him to remain on the scene, appellant went to the motel where his daughter Mariana was staying with her mother, Sandra Bernal. After he arrived, he called a friend on Pine Street who told him “there’s a lot of cops here . . . and they said they find somebody dead.” This made appellant think “maybe I shot her, maybe I didn’t see it, but maybe I shot her.” This made appellant feel confused and bad. Appellant called his friend James, who came to the motel, and appellant told him he shot Hurley, but appellant did not know how and it was an accident. He was on drugs, confused, and did not know what he was doing. He told Findlay he had put the gun, which was still loaded, in a trash can outside the motel and asked him to get rid of it. Even though he thought the shooting of Hurley an accident, appellant said he did not call the police to tell them that because, believing Hurley was dead, “I don’t want to know nothing about nobody about nothing. I just wanna be . . . with my daughter the most time that I can, and—and that’s it.”

Appellant remained with Bernal and his daughter for four days, until the police came there and arrested him.

PROCEEDINGS BELOW

On September 20, 2011, the Contra Costa District Attorney charged appellant by amended information with attempted murder (Pen. Code, §§ 187, 664–Count 1)¹; assault with a firearm (§ 245, subd. (a)(2)–Count 2); being a felon in possession of a firearm (§ 12021, subd. (a)(1)–Count 3); misdemeanor battery on a spouse or co-habitant (§ 243, subd. (e)(1)–Count 4); infliction of corporal injury on a spouse or co-habitant (§ 273.5, subd. (a)–Count 5); and child abuse (§ 273a, subd. (a)–Count 6).

With respect to Count 1, attempted murder, the amended information charged five enhancements: that appellant (1) used a firearm causing great bodily injury (§ 12022.53); (2) personally used a firearm (§ 12022.5, subd. (a)(1)); (3) caused great bodily injury in the course of domestic violence (§ 12022.7, subd. (e)); (4) was ineligible for probation due to his use of a firearm (§§ 1203.06, subd. (a)(1)); and (5) was also ineligible for probation due to his intentional infliction of great bodily injury (§§ 1203.075, 1203, subds. (e)(1), (2), (3).)

With respect to Count 2, assault with a firearm, the amended information charged two enhancements: that appellant personally used a firearm in the commission of the offense (§ 12022.5, subd. (a)(1)) and that he personally inflicted great bodily injury in the course of domestic violence (§ 12022.7, subd. (e)).

With respect to Count 6, child abuse, appellant was charged with three enhancements, all for being ineligible for probation, as a result of being armed with a deadly weapon at the time of the offense, the use or attempted use of that weapon at that time, and willfully inflicting great bodily injury on his victim.

Trial by jury commenced on October 12, 2011. On October 20, on the motion of appellant, the court entered judgment of acquittal (§ 1118) as to Count 6, charging child abuse. The next day the jury found appellant guilty of attempted voluntary manslaughter,

¹ All further statutory references are to the Penal Code unless otherwise indicated.

a lesser included offense of the charged offense of attempted murder, and also assault with a firearm, being a felon in possession of a firearm, and battery on a cohabitant. The jury found true the enhancements pertaining to the first two offenses, two of which pertained to the use of a weapon. The jury acquitted appellant of Count 5, infliction of corporal injury on a cohabitant.

On February 29, 2012, appellant filed a motion for new trial (§ 1181) on the grounds of insufficient evidence to support the verdict and ineffective assistance of counsel at trial.² After a hearing on March 2, 2012, the motion was denied by the court.

On March 2, 2012, the court sentenced appellant to (1) the upper term of five and one-half years for attempted voluntary manslaughter (§§ 192, 664) based on the finding of aggravating circumstances; (2) the middle term of four years for the use of a weapon (§ 12022.5, subd. (a)); (3) the middle term of four years for each enhancement, all stayed under section 654; and (4) eight months, one-third the mid-term, for being a felon in possession of a firearm, to be served consecutively. As noted, the total term imposed was 14 years 2 months.

Timely notice of this appeal was filed on March 7, 2012.

APPELLANT'S CLAIMS

Appellant's legal claims are based on determinations made by the trial court at the sentencing hearing. After reviewing the nature of appellant's manslaughter offense to

² The ineffective assistance claimed in support of the motion for new trial, which is different from that at issue here, was based on counsel's assertion that the only significant difference in the evidence produced at trial related to the distance between appellant and Hurley at the time of the shot, and he failed to produce forensic evidence demonstrating that the shot was from a shorter distance indicating it was accidental rather than intentional. As counsel argued: "The prosecution through the victim's testimony articulated an intentional shot from across the street. Mr. Cordova described an accidental discharge while the two were engaged in a tussle. That a gunshot of the distance described by Mr. Cordova could be verified through forensic techniques is well known. Herein counsel engaged in some analysis of photographs but should have sought testing of the wig and clothing worn by the victim The significance of the issue at trial was underscored by the remarks of two jurors who, in conversation with defense counsel, asked why such evidence was not presented." Because he failed to produce such evidence, counsel maintained that he "failed to live up to the standards required."

determine the existence of circumstances in mitigation or aggravation pursuant to the guidelines set forth in rules 4.421 and 4.423 of the California Rules of Court,³ the court imposed the upper term for the manslaughter offense on the basis of four aggravating circumstances: (1) the offense “obviously involved great violence,” (2) “the defendant did use a weapon,” (3) “I did feel there was planning on his part,” and (4) appellant had violated his last probation, which was for a felony.

Appellant maintains that reliance on the use of a weapon and evidence of planning was improper, and defense counsel’s failure to object constitutes ineffective assistance of counsel.

Reliance on the weapon to impose the upper term for the manslaughter offense was improper, appellant says, because his use of a weapon was also used as a basis for imposing the four-year middle term for the enhancement relating to that offense, and such dual use is impermissible under section 1170 subdivision (b).

The trial court’s reliance on evidence of planning to aggravate the base term was also improper, appellant says, because in refusing to convict appellant of the charged offense of attempted murder, which involved premeditation, and convicting him instead of attempted voluntary manslaughter—which, as the jury was instructed, is “[a] decision to kill made rashly, impulsively, or without careful consideration of the crime and its consequences . . . [and so] is not deliberate and premeditated” —the jury rejected any evidence of planning, and this factor therefore cannot be used by the court for sentencing purposes.

Appellant maintains that, because defense counsel’s failure to object to the court’s stated reasons for the sentence it imposed waives the errors (*People v. Scott* (1994) 9 Cal.4th 331, 353), the assistance he received was constitutionally deficient and we should therefore remand the case to the trial court for resentencing.

³ All rule references are to the California Rules of Court

THE STANDARD OF REVIEW

A convicted defendant claiming ineffective assistance of counsel must first show that the representation he received fell below an objective standard of reasonableness. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216 (*Ledesma*); *People v. Pope* (1979) 23 Cal.3d 412, 424-425) As the United States Supreme Court recently reiterated and emphasized, “ ‘Surmounting *Strickland*’s high bar is never an easy task.’ [Citation.] An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest ‘intrusive post-trial inquiry’ threaten the integrity of the very adversary process the right to counsel is meant to serve. [Citation] . . . [T]he standard for judging counsel’s representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is ‘all too tempting’ to second-guess counsel’s assistance after conviction or adverse sentence.’ [Citations.] The question is whether an attorney’s representation amounted to incompetence under ‘prevailing professional norms,’ not whether it deviated from best practices or most common custom. [Citation.]” (*Harrington v. Richter* (2011) ___ U.S. ___, 131 S.Ct. 770, 788.) Furthermore, as *Strickland* makes clear, a court considering a claim of ineffective assistance must apply a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” (*Strickland, supra*, 466 U.S. at p. 689.)

Finally, it is not enough to establish that the representation amounted to incompetence under prevailing professional norms. In order to receive appellate relief, a convicted defendant must also show he or she was actually prejudiced by counsel’s incompetence. (*Ledesma, supra*, 43 Cal.3d at p. 217) That is, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland, supra*, 466 U.S. at p. 694.) The deficiencies of counsel must be “so serious as to deprive the

defendant of a fair trial, a trial whose result is reliable. (*Id.* at p. 687; accord, *In re Visciotti* (1996) 14 Cal.4th 325, 352.)

ANALYSIS

Section 1170, subdivision (b), declares, as material, that a court “may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law.” Rule 4.420(c), which implements section 1170, subdivision (b), states that “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*” (italics added), and that did not happen here. It is settled that the dual use by a court of the same fact to enhance a sentence and to also impose the upper term is prohibited and may require remand for resentencing. (*People v. Coleman* (1989) 48 Cal.3d 112, 164-165 (*Coleman*); *People v. Fain* (1983) 34 Cal.3d 350, 357; *People v. Bennett* (1981) 128 Cal.App.3d 354, 359-360; *People v. Calhoun* (1981) 125 Cal.App.3d 731, 733-734; 3 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Punishment, § 319, at p. 494.)

The Attorney General does not genuinely contest appellant’s claims that the trial court (1) impermissibly engaged in the dual use of facts by relying on appellant’s use of a weapon as a basis upon which to impose the upper term for the manslaughter offense, and (2) improperly used evidence that appellant planned his offense that had been rejected by the jury.⁴ Therefore, the real issue in this case is whether there may have been a tactical explanation for defense counsel’s failure to object, or appellant was not prejudiced by the failure to object. It is not necessary to remand for resentencing for improper dual use of

⁴ With respect to “planning,” the Attorney General does argue that: [w]hile the jury did not find beyond a reasonable doubt that appellant [intentionally] committed attempted murder, that verdict does not conflict with the court’s observation that appellant planned to place the victim in a position of danger, even though he may not have planned to shoot her.” This argument is based on much too fine a distinction between planning to place the victim in a position of danger and planning to actually shoot her. While, as we explain, *post*, at footnote 4, the *exact* nature of the “planning” the court found and relied upon is ambiguous, it is clear that the “planning” the court referred to related to the offense.

the same fact for sentencing purposes or similar sentencing error unless “if ‘[i]t is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error.’ ” (*Coleman, supra*, 48 Cal.3d at p. 166)

Appellant’s argument that he was prejudiced by the court’s improper reliance on his use of a weapon and “planning” relies on the fact that the court acknowledged the applicability of several mitigating circumstances, which suggests that if defense counsel had objected to the two aggravating circumstances the court erroneously employed it might not have imposed the upper term. Appellant also maintains there could be no satisfactory tactical reason for failing to object.

The Attorney General answers that there *is* an explanation for the failure to object: Given the weight the court placed upon the applicable aggravating factor it relied upon most heavily, a reasonable defense counsel could have concluded that the court was convinced the case merited an upper term, and an objection would not have resulted in a more favorable sentence. We agree.

To begin with, it is true, as appellant says, that the fact that appellant did not violate three past grants of probation was used by the court as a mitigating circumstance. However, the court also pointed out that he had violated a fourth grant of probation, which is most pertinent to sentencing in this case, because it was the most recent and involved a more serious crime than his prior offenses, and the court considered this a significant aggravating factor. However, the aggravating circumstance that appears to have most heavily influenced the decision to impose the upper term was neither the prior violation of probation nor the use of a firearm or any evidence of planning; it was instead the trial judge’s conclusion that appellant’s principal offense “involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness.” (Rule 4.421(a)(1).) Her comments at the sentencing hearing made clear that the judge would have imposed the upper term on this basis even if defense counsel had persuaded her she could not rely upon the use of a weapon or “planning.”

As the judge stated at the sentencing hearing, appellant “did engage in violent conduct,” and he presents “a serious danger to society,” particularly girlfriends. “I’ve never seen somebody whose [*sic*] quite so possessive and controlling, and I mean it’s the classic domestic violence guy, who is manipulative, controlling [and] dangerous. [¶] And I watch him testify, and it was just the classic model of people that you worry about, who subject their partners, girlfriends, possibl[y] their wives[,] to domestic violence.” After noting that appellant was revoked while last on probation, the judge returned to her greatest concern: that the offense “obviously involved great violence.”

Though the judge did at this point add that she “did feel there was planning on his part,” her earlier statements make it difficult to think she would not have imposed an aggravated term if counsel had objected to her reliance on appellant’s “planning” and his use of a weapon. As we have said, a single valid factor is sufficient to support the imposition of an upper term, and the court not only found two valid factors in aggravation other than the use of a weapon and planning, but the trial judge’s statements at the hearing indicated her feeling that these proper factors were the most compelling.

The cases appellant relies upon are distinguishable. In *People v. Jardine* (1981) 116 Cal.App.3d 907, 923 (*Jardine*), the sentence imposed consisted of the upper base term of five years, a one-year enhancement for the possession of a firearm, and three one-year enhancements for three prior felony convictions, for a total sentence of nine years. The trial court’s statement of reasons for imposing the upper term reflected that the defendant “had a position of leadership in the crime and that the crime showed some premeditation and planning,” and also “the defendant’s prior convictions. He served three times in the penitentiary in Washington.” (*Id.* at p. 924.) The Court of Appeal found that the first two aggravating circumstances were properly considered, but use of the three prior convictions as an aggravating factor was an improper dual use of facts because this factor had been used to enhance the sentence under section 667.5. What distinguishes *Jardine* from the present case is the appellate court’s determination that “[t]his is not a case in which we can assume that the trial court’s reference to the prior convictions did not influence the court’s selection of the upper term.” (*Ibid.*) But in the

present case we have no problem assuming that the trial court's reference to appellant's use of a firearm and "planning" did *not* materially influence its selection of the upper term. The judge's remarks at sentencing leave little doubt that she relied primarily on the findings that appellant's crime "involved great violence," and that he poses "a serious danger to society," rather than on the passing references to his use of a weapon and "planning."⁵ We find it almost impossible to think that the court would not have imposed the upper term if defense counsel had objected, even if the objections were sustained.

Coleman, supra, 48 Cal.3d 112, also does not help appellant. (*Id.* at p. 164.)

There, in selecting the upper term for the offense of assault with intent to murder, the trial court cited as an aggravating circumstance " 'that the crime involved great violence, great bodily harm, acts disclosing a high degree of cruelty, viciousness and callousness,' which was a fact charged and found as an enhancement, to impose the upper term. Under the predecessor to present rule 4.420(c), such a fact cannot be used as a reason to impose the upper term for the offense unless the court has discretion to strike the enhancement, and does so, which had not been done. The Supreme Court found it unnecessary to strike the enhancement, however, because the case had to be remanded for resentencing on other counts, and "it is not certain that the new sentence will include an upper term based on a fact charged and found as an enhancement." (*Id.* at p. 165.) *Coleman* is pertinent to this case only insofar as it shows that there is a remedy for the impermissible dual use of

⁵ The references are also somewhat ambiguous. In the course of determining whether appellant was eligible for probation under the criteria set forth in rule 4.413, the judge found "that there was some planning here to get the victim in this position," apparently referring to forcing Hurley to declare whether she was going to leave or stay with him. But in the next sentence the court stated "I feel that the defendant *didn't plan this*, and that he was willing to kill her if she wasn't going to get back with him or not leave him." (Italics added.) A few minutes later, when reviewing the aggravating factors pursuant to rule 4.421, the court stated "The defendant did use a weapon, and I feel that there was planning on his part." The italicized phrase allows the possibility of a finding that appellant "planned" simply to force Hurley to declare her intentions, and had not considered what he would do if, as appears to have been the case, she refused to stay with him. For purposes of addressing appellant's argument, we indulge the assumption the court found appellant "planned" to kill Hurley if she refused to stay with him.

facts in sentencing, a proposition we readily acknowledge. *Coleman* does not, however, bear in any way on the dispositive issue in this case, which is whether the impermissible dual use of facts was prejudicial.

People v. Alvarado (1982) 133 Cal.App.3d 1003, 1027, the remaining case appellant relies upon, stands only for the proposition that the appellate courts are divided on the question whether a concededly valid alternative ground supporting an aggravated sentence will support the aggravated term. As stated in *Alvarado*, “[t]he courts are divided on the point, some subjecting the issue to standard harmless error analysis [citations], others inclining toward a remand for resentencing no matter how trivial the error or how many valid aggravating factors remain [citing, inter alia, *Jardine, supra*, 116 Cal.App.3d 907].” (*Alvarado*, at p. 1027.) Believing “that even under a harmless error analysis, there would be some reasonable probability that a result more favorable to appellants would be reached on remand” (*id.* at p. 1028), the *Alvarado* court remanded the case for resentencing. *Alvarado* provides appellant no more help than *Jardine*, because, as earlier indicated, we do not think there is in this case a “reasonable probability” that a result more favorable to appellant would be reached on remand.

For the foregoing reasons, we find appellant has not shown that defense counsel’s failure to object to the sentencing court’s use of evidence of planning as a basis upon which to impose an upper term was prejudicial.

DISPOSITION

For the foregoing reasons, the judgment, including the sentence imposed, is affirmed.

Kline, P.J.

We concur:

Haerle, J.

Richman, J.