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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK DEAN ALLEN,

Defendant and Appellant.

A135734

(Sonoma County  
Super. Ct. No. SCR613160)

After appellant Frank Dean Allen pleaded no contest to a felony violation of Penal Code section 69<sup>1</sup> (threatening a police officer), the trial court denied probation and imposed the upper term of three years after weighing aggravating and mitigating factors. Appellant argues that the trial court abused its discretion by imposing the upper term based on inadmissible evidence or aggravating factors not supported by the record. We disagree and affirm.

I.  
FACTUAL AND PROCEDURAL  
BACKGROUND

1. Procedural History.

A complaint was filed on January 20, 2012, charging appellant with two felony counts, violations of sections 136.1, subdivision (a)(2) (threatening a witness—count one) and 69 (threatening a police officer—count two). On March 29, 2012, appellant accepted an offer to plead no contest to count two in exchange for dismissal of count one,

<sup>1</sup> All statutory references are to the Penal Code.

and appellant entered his plea that same day. His written waiver of rights stated he was pleading to “P.C.69 Felony interfering with police officers execution of his duties.” The plea agreement provided that appellant understood that the trial court could consider the dismissed charge against him in determining the appropriate sentence and setting the amount of victim restitution (a “*Harvey* waiver”). (*People v. Harvey* (1979) 25 Cal.3d 754.) The plea agreement also specifically stated that appellant was aware that the maximum punishment he could receive was three years. Appellant’s counsel and the district attorney agreed that there was a factual basis for the plea according to the police report, and the trial court accepted the plea.

Sentencing took place on April 24, 2012, after the trial court considered the probation officer’s written and oral reports and the arguments of counsel. After concluding that the aggravating factors outweighed the mitigating ones, the trial court denied probation and sentenced appellant to the upper term of three years, with presentence credits in the amount of 196 days. Pursuant to section 1170, subdivision (h), the trial court ordered that appellant be committed to county jail for this period of incarceration and that the last three months be suspended subject to probation. Count one was dismissed, pursuant to the plea agreement.

2. The facts as shown in the presentence report.

On January 12, 2012, police went to appellant’s residence in Rohnert Park following an investigation into his possible involvement in a residential burglary in an unrelated case. They found appellant to be in possession of methamphetamine and displaying symptoms of being under the influence of a controlled substance, and they placed him under arrest. Appellant’s actions after his arrest are the basis of the charged crimes in this case. Appellant told Sonoma County Sheriff’s Detective Tony King that he (the detective) was “fucking” with him and that “you better watch your back.” When appellant was asked what he meant, he said, “[Y]ou know,” but did not elaborate. King was familiar with appellant because of a previous theft investigation.

A man who had been investigated for his possible involvement in residential burglary with appellant was in the booking area of the jail when appellant was there, and

the suspect later reported to another detective (not King) that appellant said that he (the suspect) would “suffer consequences” if he said anything to law enforcement about the burglary. During this same encounter, appellant told the suspect, “I’m gonna have [Detective] Tony King lose his job” and “Tell Tony King that I’m gonna fuck his daughter up the ass.”

Detectives listened to recorded calls made by appellant from jail on the day of his arrest. He told his mother, “ ‘If I run into him [Det. King], I’m gonna be doin a lot of time because I’m sick of this prick.’ ” As a result of the several threats, Detective King alerted his daughter, her school, and his wife. More than a week after appellant was released on bail, he was again taken into custody, questioned about threats, and denied making any. Appellant admitted, however, that he read about Detective King on the internet.

According to the presentence report, appellant did not do well during several other grants of conditional sentences in other cases, and just three days before the commission of the crime in this case, he was placed on a conditional sentence in another case. During appellant’s interview with the probation officer, he denied ever making any threats to Detective King or his daughter, showed no remorse for any of his actions, and minimized his admitted actions. For example, he admitted saying that he would sue Detective King and make him lose his job, but said he did not mean that. He also admitted to a history of substance abuse and anger management issues. The probation department’s recommended sentence, endorsed by the deputy district attorney, was followed by the trial court. Appellant timely appealed, and his sole argument is that the trial court committed sentencing error.

## II. DISCUSSION

### 1. Standard of review.

We review a criminal sentence under the abuse of discretion standard (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 976–977 (*Alvarez*)) and must affirm the trial court’s sentence “ ‘unless there is a clear showing the sentence choice was arbitrary

or irrational.’ ” (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582.) Appellant bears the burden of affirmatively establishing an abuse of discretion. (*Alvarez* at pp. 977–978.)

“Neither section 1170 nor the California Rules of Court attempt to provide an inclusive list of aggravating circumstances. Thus, a trial court is free to base an upper term sentence upon any aggravating circumstance that (1) the court deems significant and (2) is reasonably related to the decision being made.” (*People v. Moberly* (2009) 176 Cal.App.4th 1191, 1196.)

2. The trial court carefully weighed all relevant factors.

Before imposing the upper term, the trial court stated that it had “spent quite a bit of time reviewing” the matter, and it explained at length the reasons for its sentencing decision. The court first focused on appellant’s lack of insight into his substance abuse and his “very lengthy [criminal] history” dating back to 1982. The court stressed that appellant had received “five or six conditional sentences that [appellant] failed by picking up additional cases,” which was “about the wors[t] way you can fail a conditional sentence.” Appellant also had “an extreme anger management issue” that he minimized, according to the trial court. In mitigation, the court noted that appellant took responsibility for his actions and avoided a trial, and there had been prior situations when he had satisfactorily performed during grants of a conditional sentence. The court stated that it was “very hard sentencing for the Court,” presumably meaning that it had a difficult choice to make. However, the court determined that probation was not appropriate, and that imposition of the upper sentence was warranted, stating that “the factors in aggravation outweigh the factors in mitigation *by a substantial margin* based on the nature of the offense [and appellant’s] *lengthy criminal history*.” (Italics added.)

On appeal, appellant focuses almost exclusively on the former factor (the serious nature of his offense), and downplays the latter factor (his lengthy criminal history), as well as the various other factors mentioned during the sentencing hearing. Nowhere in his appellate briefs does he acknowledge his burden to demonstrate error or the broad discretion of the trial court. Appellant’s argument boils down to this: If threats to Detective King’s daughter were excluded from consideration, the trial court would

necessarily have reached a different conclusion on the remaining factors and would have granted probation. In light of the other material factors considered by the trial court, we cannot agree.

Appellant argues that the trial court wrongly determined that the offense was serious because inadmissible aggravating factors were considered, and that “neither the definition of his crime nor the underlying facts supporting his conviction actually support a finding that his crime was distinctly worse than ordinary on this basis.” To the extent that appellant argues that the trial court cannot consider any hearsay, it is well settled that the court can do so. (*People v. Moberly*, *supra*, 176 Cal.App.4th at p. 1196.) Faced with this obstacle, appellant argues that the critical facts within the report are unreliable hearsay and if they were excluded the court would sentence differently. Thus the core issue in this argument is whether the factors in the probation report are sufficiently reliable as in *People v. Arbuckle* (1978) 22 Cal.3d 749, 755 [probation report inherently reliable] or whether there are too many layers of hearsay to be sufficiently reliable as in *People v. Williams* (1990) 222 Cal.App.3d 911, 914-918 [multiple hearsay statements in probation report too unreliable].

Appellant spends much of his brief arguing that the threats referring to Detective King’s daughter contained two levels of uncorroborated hearsay and were improperly considered by the trial court. He contends that his plea is an admission only to direct threats made to Detective King and did not include the alleged threats made to his daughter. Appellant further argues that the alleged threat to the daughter referred to in the presentence report should have been excluded as unreliable hearsay because it was made to a jailhouse snitch (the other burglary suspect) who repeated it to a different detective, neither of whom testified at a trial. Respondent argues that because no objection was made in the trial court, the irregularity, if any, was waived. We decline to reach the questions of waiver, the scope of the plea, or the admissibility of the threat to Detective King’s daughter for the reasons that follow.

Exclusion of the threat to Detective King’s daughter is not dispositive. The trial court can impose an aggravated term if there is a single aggravating factor. (*People v.*

*Jones* (2009) 178 Cal.App.4th 853, 863, fn. 7.) Here there are other aggravating factors, and a single one is enough as long as it outweighs the mitigating factors. (*People v. Nevill* (1985) 167 Cal.App.3d 198, 202.) Thus, appellant has the burden of showing that none of the other aggravating factors would support the sentence imposed.

He does not meet this burden. Indeed, appellant overlooks the fact that the trial court rejected an argument similar to the one he advances on appeal. Appellant's trial counsel acknowledged that defendant had made threatening statements to Detective King upon his arrest and during a conversation with his mother, but argued that there was insufficient evidence that appellant in fact made the "horrific threats" directed to the detective's daughter when he was in the booking area with the other burglary suspect. The trial court noted that the "gross and egregious sexual comments" made regarding the detective's daughter "corroborate[d]" the fact that appellant was "an extremely angry person." However, *even excluding* appellant's statements regarding the detective's daughter, the crime still qualified as a violation of section 69, according to the trial court, which considered the crime to be "a violent offense towards any law enforcement" that "goes to the heart of society[ w]here you don't respect those doing their job and go over the line." Because the trial court considered there to be sufficient proof that appellant committed the underlying crime even absent consideration of appellant's sexual comments, it follows that the court considered the upper term appropriate even absent proof of the comments.

The trial court referred to the following additional factors, each of which were admissible and appropriate criteria affecting the grant or denial of probation (Cal. Rules of Court, rule 4.414)<sup>2</sup> or circumstances in aggravation (rule 4.421): (1) the nature of the crime itself was "awful" and went "to the heart of our society," given the threats made directly to a law enforcement officer and to a witness (the other burglary suspect) (rule 4.421(a)(1) [crime involved acts disclosing callousness]); (2) significant emotional injury was inflicted on Detective King personally (rule 4.414(a)(4)); (3) appellant had a

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

lengthy criminal history spanning 30 years (rule 4.421(b)(2)), a factor repeatedly emphasized by the trial court; (4) his performance on prior grants of conditional sentences was unsatisfactory (rule 4.421(b)(5)); (5) he demonstrated no remorse, minimizing his admissions (rule 4.414(b)(7)); and (6) he had a long history of drug abuse (rule 4.414(b)(4)).

In short, there is more than one aggravating factor and when weighed with the mitigating factors it is not unreasonable to conclude that the upper term be imposed. We are not to substitute our judgment for that of the trial court. (*Alvarez, supra*, 14 Cal.4th at pp. 977-978.) Given the weighing the court undertook, we cannot conclude that a different result would have occurred without the threat to Detective King's daughter. Appellant's argument that this is a close case where exclusion of one factor results in a different sentence is not supported by the record in light of the trial court's statement that the aggravating factors outweighed the mitigating ones by a "*substantial margin.*" (Italics added.) In short, appellant failed to meet his burden of showing that the decision was arbitrary or irrational. (*Ibid.*)

III.  
DISPOSITION

The judgment is affirmed.

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Baskin, J.\*

We concur:

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Ruvolo, P. J.

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Rivera, J.

\* Judge of the Contra Costa Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.