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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.

EDGAR BELVIS,

Defendant and Appellant.

A143695

(Sonoma County
Super. Ct. No. SCR-615002)

Edgar Belvis pleaded guilty, pursuant to an open plea agreement, to five charged counts, including attempted kidnapping to commit rape, assault with intent to commit rape, assault with a deadly weapon, threats of death or great bodily injury, and assault by means likely to produce great bodily injury. On appeal, appellant contends his 15-year sentence exceeded the five-year term the trial court had promised to impose. Therefore, according to appellant, he is entitled to specific performance, i.e., to be resentenced to the five-year term or, alternatively, to withdraw his guilty plea. We shall affirm the judgment.

PROCEDURAL BACKGROUND

On April 23, 2012, appellant was charged by information with attempted kidnapping to commit rape (Pen. Code, §§ 209, subd. (b)(1), 664—count I);¹ assault with intent to commit rape (§ 220, subd. (a)—count II); assault with a deadly weapon (§ 245, subd. (a)(1)—count III); threats of death or great bodily injury (§ 422—count IV); and

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

assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)—count V). The information further alleged that appellant had personally used a dangerous weapon and inflicted great bodily injury. (§§ 12022, subd. (b)(1), 12022.3, subd. (a), 12022.7, subd. (a).)

On June 29, 2012, appellant pleaded guilty to all counts and admitted all enhancement allegations.

On October 4, 2012, the trial court sentenced appellant to 15 years in state prison.

Appellant appealed the 15-year sentence, contending it exceeded the maximum sentence of 10 years noted in the open plea agreement. On March 24, 2014, a panel of this Division remanded the matter to the trial court with instructions to clarify an ambiguity in the record relating to the sentence to be imposed on appellant and, if necessary, to resentence appellant. (*People v. Belvis* (Mar. 24, 2014, A136843) [nonpub. opn.])

On remand, on July 24, 2014, the trial court reinstated the original 15-year sentence.

On February 11, 2015, we granted appellant’s unopposed motion for constructive filing of the notice of appeal.

FACTUAL BACKGROUND²

This case arises from appellant’s February 24, 2012 attack on his 23-year-old niece, “Jane Doe.” Doe reported that appellant had moved in with her and her mother four months earlier, and had been making “ ‘advances’ toward her,” which she had rebuffed. On the morning of the attack, appellant, who was then 56 years old, grabbed Doe by the neck from behind, pulling her to him. He was holding a large kitchen knife. He told her, “ ‘I have wanted to do this for a long time,’ ” and also said, “ ‘Don’t fight me or I will slice your neck.’ ”

Doe stood up and appellant placed the knife on the underside of her neck. While Doe struggled to get away, appellant pushed her from behind, rubbing his “ ‘groin’

² This summary of the facts is taken from the probation report.

against her body.” He also grabbed her breast from behind. She fell onto her back, and appellant got on top of her and began to strangle her with both hands. Doe could not breathe “and believed she was going to die.” Appellant then gripped the knife and said he wanted to kill her. At one point, he used a closed fist to punch her more than five times in the side of the head.

Doe managed to kick appellant in the groin and was able to stand up. Appellant then put the knife against the side of her body and forced her up some stairs. Doe used a pen she had been holding to jab appellant in the forehead. She pushed past him, but he caught her from behind in a bear hug and forced her to her knees. Appellant straddled her from behind and kissed her neck for about 15 seconds. He then repeatedly punched her in the head. The blows were hard and painful. As Doe tried to escape, appellant strangled her from behind and pushed her head into the floor. He again threatened to kill her. When Doe attempted to grab the knife, which he was holding to her neck, her hand slipped and she cut her finger on the knife blade. Throughout the struggle with appellant, Doe was “ ‘howling and crying,’ ” and telling appellant “to think about his, wife, children, and family.”

Eventually, Doe pretended to give up and asked, “ ‘Do you just want to have sex?’ ” Appellant responded, “ ‘Yes.’ ” Doe then managed to pull free from appellant’s grip and escape. She ran outside, shouting for help. A neighbor came to her assistance and called 911.

As a result of the attack, Doe suffered a three- to four-centimeter laceration on her finger, which required sutures. She also had a great deal of pain in her head and neck. Her neck was red and tender and she had a number of contusions and abrasions.

DISCUSSION

Appellant contends his 15-year sentence exceeded the five-year term the trial court had promised to impose. Appellant claims he is therefore entitled to specific

performance, i.e., to be resentenced to the five-year term or, alternatively, to withdraw his guilty plea.³

I. Trial Court Background

At the time of appellant's prior appeal, the record in this case reflected that the trial court had indicated that it would impose a sentence of between 5 and 15 years. However, there was one statement in the reporter's transcript in which the court stated it was considering a sentence of 5 to 10 years. Appellant argued in his prior appeal that his guilty pleas was involuntary and that the 15-year sentence exceeded the maximum 10-year term, as indicated by the court in the open plea agreement. (*People v. Belvis, supra*, A136843.) We found that the court's statement regarding a 10-year sentence created an ambiguity in the record regarding the indicated sentence, and therefore conditionally reversed the judgment and remanded the matter to permit the court to resolve the ambiguity in the record. In reaching this conclusion, we cited *People v. Clancey* (2013) 56 Cal.4th 562, 568 (*Clancey*), in which the California Supreme Court held that where the record is ambiguous as to the sentence imposed by the trial court, the proper remedy is "a conditional reversal with directions to the court on remand to resolve the ambiguity." (*People v. Belvis, supra*, A136843.)

During a hearing on remand, the trial court clarified that the indicated sentence range had been 5 to 15 years, and that the reference to ten years in the reporter's transcript was a typographical error. Both the prosecutor and defense counsel also recalled the indicated range as being 5 to 15 years and all other court records reflected a 15-year maximum. In addition, a handwritten note from appellant to the court referred to the 5- to 15-year range.

The court also "also add[ed] for the record, if it wasn't clear going to sentencing, there were really two things that stuck out in the court's mind that resulted in the higher

³ As a preliminary matter, we question whether appellant has preserved this issue for appeal in light of his failure to raise it during his prior appeal, when he raised other issues regarding the propriety of the 15-year sentence. Even assuming the contention is not forfeited, we find, as discussed in the text, *post*, that it is without merit.

sentencing top. And that was one, the victim's presentation, which was incredibly compelling. She was advocating for severe punishment. She really described severe emotional and physical injuries from the attack.

“And then, . . . also aggravating were the statements that the defendant made to Probation, really taking very little responsibility, putting a lot of blame on the victim, really showing no understanding or remorse for the crime. So, those are the two main factors for why the court chose the 15-year sentence.”

At a subsequent hearing, the court confirmed that, after checking with the court reporter, the version of the reporter's transcript that indicated a 5- to 10-year sentence range was a “scribner's [*sic*] error.” Defense counsel stated that he did not have an independent recollection as to what the court had said on that date, but said his notes reflected that the court had indicated a 5- to 15-year range. Counsel further stated that appellant had been hoping for a lower sentence, and counsel had believed the court was going to consider a sentence of 5 to 10 years depending on what the probation report said.⁴

The court stated that it had considered a lower term, but that changed after reading the probation report, due to comments by appellant to the probation officer and statements by the victim at the time of sentencing. The court concluded: “The court did indicate no more than 15 years in State Prison. And based on the extreme violence in the case and lack of remorse from the defendant, extreme harshness to the victim, the court chose the upper limit of that indicated sentence, which was still far below what the People had originally been arguing for.” The court therefore reinstated the original sentence of 15 years.

II. *Legal Analysis*

In *Clancey, supra*, 56 Cal.4th at page 576, our Supreme Court explained what an indicated sentence is, and is not: “[A]n indicated sentence is not a promise that a

⁴ The reporter's transcript from the sentencing hearing reflects that defense counsel stated, “There is a range of 5 to 15 years.”

particular sentence *will* ultimately be imposed at sentencing. Nor does it divest a trial court of its ability to exercise its discretion at the sentencing hearing, whether based on the evidence and argument presented by the parties or on a more careful and refined judgment as to the appropriate sentence. . . . [T]he utility of the indicated-sentence procedure in promoting fairness and efficiency depends to a great extent on whether the record then before the court contains the information about the defendant and the defendant's offenses that is relevant to sentencing. The development of new information at sentencing may persuade the trial court that the sentence previously indicated is no longer appropriate for this defendant or these offenses. Or, after considering the available information more carefully, the trial court may likewise conclude that the indicated sentence is not appropriate. Thus, even when the trial court has indicated its sentence, the court retains its full discretion at the sentencing hearing to select a fair and just punishment."

In the present case, the corrected record reflects that before appellant pleaded guilty, the trial court stated, "although the maximum possible [sentence] with full term consecutive sentencing would be 31 years 8 months, the court was indicating fairly that there would be a sentence of somewhere between 5 and 15 years, probably closer to the lower end." Appellant then pleaded guilty to all charges.

First, we do not agree with appellant's characterization of the court's statement that the indicated sentence would be "somewhere between 5 and 15 years, probably closer to the lower end" as a "promise . . . that [appellant's] sentence would be closer to the minimum of five years." The court indicated a range of possible sentences, merely stating that the term would *probably* be closer to the lower end of that range. This statement plainly was not a promise. Also, as already noted, "an indicated sentence is not a promise that a particular sentence *will* ultimately be imposed at sentencing." (*Clancey, supra*, 56 Cal.4th at p. 576.) Indeed, when he pleaded guilty, appellant acknowledged his understanding that he could be sentenced up to the maximum penalty and that, "although the court has indicated a sentence, there is no agreement with the District Attorney's

Office and the court will not decide what my sentence will be until it has read and considered a report from the probation office.” Hence, the court was not bound to the indicated sentence, whether 5 or 15 years, although it did in fact sentence appellant to a term within its indicated range.

Second, when it sentenced appellant to the upper end of the indicated range, the court based its decision on “the extreme violence in the case and lack of remorse from the defendant, extreme harshness to the victim,” as well as the victim’s desire for severe punishment. Although he does not challenge the court’s finding of extreme violence and harshness to the victim, appellant does argue that the court already knew the facts of the case when it initially stated the indicated sentence range. He also argues that the probation report and a letter from the victim, received after the court stated its indicated sentence and appellant pleaded guilty, do not support the court’s finding that appellant did not show remorse or that the victim desired severe punishment.

Again, articulation of an indicated sentence does not “divest a trial court of its ability to exercise its discretion at the sentencing hearing, whether based on the evidence and argument presented by the parties or on a more careful and refined judgment as to the appropriate sentence.” (*Clancey, supra*, 56 Cal.4th at p. 576.) In addition, as to the latter claim—that the probation report did not support the court’s findings that appellant showed no remorse and that the victim desired severe punishment—the report described a police interview with appellant after the attack, in which appellant “said he was upset and that he made a mistake. He maintained he was instigated by Doe, who insulted and upset him.” Moreover, although appellant refused to provide a statement to the probation officer, when asked how he felt about the case, he “explained he was worried because ‘I might go to jail.’ ” Also, in a letter to the court submitted with the probation report, the victim wrote, “Traumatic, is probably the word to sum up everything that has happened, and even more painful because a family member caused it. I have dealt with a lot of pressure both from my family and my conscience and it has not been easy. Healing will be a lifelong process. No woman or child deserves something like this, and I know this

court will make the right decision for this case. [¶] To the defendant, GOD BLESS YOU. I want you to know that I have forgiven the person but the fault I leave to the court's hands.” These statements by appellant and the victim, contained in the probation report and reviewed by the court prior to sentencing, thus support the trial court's additional findings.⁵

In sum, appellant was never promised a particular sentence, and certainly was not promised a five-year term. Moreover, the 15-year sentence he received was within the court's indicated sentence range. We therefore reject appellant's contention that the sentence was improper and that he should either be resentenced to a five-year term or be permitted to withdraw his guilty plea. (See *Clancey, supra*, 56 Cal.4th at pp. 576, 584.)⁶

DISPOSITION

The judgment is affirmed.

Kline, P.J.

We concur:

Richman, J.

Miller, J.

⁵ The probation officer had recommended a 24-year sentence.

⁶ Appellant cites to *People v. Cross* (2015) 61 Cal.4th 164 as demonstrating the importance of advisements. In that case, the California Supreme Court set aside a sentence where the defendant had stipulated to a prior conviction and the trial court had accepted the stipulation without advising him of his trial rights or eliciting a waiver of those rights. (*Id.* at p. 168.) The facts and analysis in *Cross* are not relevant to our resolution of appellant's claim.