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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.

ANTHONY PHILLIP BRADLEY,

Defendant and Appellant.

A145227

(Solano County
Super. Ct. No. VCR217334)

Defendant Anthony Philip Bradley appeals from his conviction for voluntary manslaughter. Defendant contends the trial court erred in sentencing him to the upper term of 11 years for the manslaughter conviction and the upper term of 10 years for a firearm enhancement. Specifically, defendant contends the trial court ignored key evidence during sentencing and violated the prohibition against the dual use of facts. We disagree and affirm.

I. BACKGROUND

Defendant was charged by information with the murder of Vincent Winnie (Pen. Code,¹ § 187, subd. (a)). It was further alleged defendant personally and intentionally discharged a handgun in the commission of the offense (§§ 12022.5, subd. (a)(1); 12022.53, subs. (b)–(d)). A jury found defendant not guilty of murder, but convicted him of voluntary manslaughter and found true the allegation he used a firearm in the commission of that offense. The trial court imposed the upper term of 11 years for the

¹ All statutory references are to the Penal Code.

manslaughter conviction, and an additional 10-year term for the firearm allegation, for a total of 21 years in state prison.

Defendant told police that, the night before the shooting, he and Winnie had gone to several strip clubs in San Francisco. They were joined by Samantha Van Hoose, Winnie's girlfriend. At one point, defendant got into an argument with a bouncer. He threw a \$100 bill at the bouncer and stormed off. Winnie caught up to defendant, and the two argued briefly. Winnie then walked away, leaving defendant on Broadway in San Francisco. Defendant returned to his home in Vallejo about 7:00 a.m. the following morning.

Defendant received several messages from Winnie later that day. He called Winnie about 7:00 or 7:30 p.m. Defendant told police he initially told Winnie he would drive to Oakland to retrieve several items he had left in Winnie's backpack the previous night. After the two argued on the phone, defendant claims he decided the trip to Oakland could wait until the following day. David Herd, Winnie's longtime friend, was at a bingo hall with Winnie when Winnie received the call from defendant. Herd did not hear the conversation, but said Winnie appeared "[m]ad," "[f]rustrated," and "[u]pset" when he finished the call. Winnie told Herd they were going to defendant's to drop off his personal items. Winnie, Herd, and Van Hoose took a taxi to the home of Winnie's uncle in Oakland, picked up a car there, and then drove to defendant's home in Vallejo. According to defendant, Van Hoose sent him a text message saying they would leave his possessions in his mailbox.

Herd testified that when they arrived at defendant's home, he and Winnie got out of the car and Winnie walked up to the front door, set down the bag with defendant's items, and knocked lightly. As Winnie walked back towards the car, the garage door opened and defendant appeared, holding a gun down at his side. At the preliminary hearing, Herd testified defendant yelled "get the fuck out of here or words to that effect"; however, Herd did not remember this exchange at trial. When Winnie did not leave, defendant said, "You don't think I'll shoot this shit," fired the gun in the air, and then put

the gun in Winnie's face. Winnie grabbed defendant's gun arm and hit him. A struggle ensued.

At one point the two separated, and defendant shot Winnie in the torso from two to four feet away. Winnie fell down. Herd ran up and tried to hold Winnie, and defendant pointed a gun in his face. Defendant told Herd to "get the fuck out of here," and then put the gun down and walked away. Herd carried Winnie to the car, and they drove off with Van Hoose. The parties stipulated that Winnie died from a gunshot wound to his left abdomen that caused a large amount of internal bleeding.

After the shooting, defendant offered his own version of the shooting to police. Defendant said he expected Winnie to leave his effects in his mailbox, and was surprised when he saw a car pull up and three people get out of it. Defendant heard someone bang on the door. Security cameras had been installed around the house because of recent break-in attempts, but they did not provide a clear view of who was there. Defendant opened the garage while carrying a gun in an unbuttoned holster. When he saw Winnie, defendant asked him why he was banging on his door. Defendant told Winnie to leave, and Winnie was "running his mouth." As defendant turned to go back to the house, he heard Winnie rush him. Defendant pulled out his gun and said "get the fuck out of here." Winnie responded, "I don't give a fuck about the gun." Winnie slapped the gun away and the two struggled. Defendant's arm had been injured earlier, and it went numb. Winnie rushed at defendant again, and defendant shot him. Defendant then returned to his house.

II. DISCUSSION

Defendant was sentenced to the aggravated term of 11 years on his voluntary manslaughter conviction and the aggravated term of 10 years on the firearm enhancement. On appeal, defendant challenges the imposition of these aggravated terms. First, defendant asserts the evidence did not support the single aggravating factor cited by the trial court to justify the upper term for the manslaughter sentence. Second, defendant contends the trial court violated section 1170, subdivision (b), which generally prohibits the dual use of facts in sentencing. We disagree on both counts.

A. Sentencing Decision

At sentencing, the trial court discussed several factors set forth in California Rules of Court,² rule 4.421, which lists aggravating circumstances, and rule 4.423, which lists mitigating circumstances. The court stated it was aggravating defendant's sentence for the manslaughter conviction based on rule 4.421(b)(1), which applies where a "defendant has engaged in violent conduct that indicates a serious danger to society." The court explained: "[T]here is . . . strong evidence that [defendant] knew or likely knew it was Mr. Winnie coming over at that time. [¶] Mr. Winnie was his friend. And at the time Mr. Winnie was coming over to drop off his items, there really isn't anything that would support [defendant] expecting Mr. Winnie was going to kill him at that time. [¶] It was [defendant] who having been in an argument the night before with Mr. Winnie comes out, has a gun in hand, fires off this warning shot and points the gun at the victim's face. [¶] I think that is aggravating in the Court's view to essentially initiate that sort of conduct, which then leads to the struggle over this gun. [¶] . . . [¶] . . . [Defendant] does not have to retreat, but it was in the Court's view unnecessary to fire this warning shot, unnecessary to point a gun at Mr. Winnie when he's in his driveway and the issue is whether he's going to leave the driveway. He could have certainly kept the gun at his side, and simply let the victim leave without pointing the gun at him, without firing a shot, which in and of itself, firing a shot in a residential area up in the air is dangerous in itself."

The court also found several mitigating factors applied. Pursuant to rule 4.423(a)(2), the court concluded the "victim was an initiator of, willing participant in, or aggressor or provoker of the incident." As to rule 423(b)(1), the court found defendant had no prior record or an insignificant record. Nevertheless, the trial court concluded the aggravating factor indicating a serious danger to society outweighed these mitigating factors. The court explained: "[Defendant] immediately comes out with this firearm, and I think essentially is going to show Mr. Winnie who is boss and

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

unnecessarily introduces this firearm to this incident. [¶] And the result of that is Mr. Winnie was killed.”

As to the sentence for the firearm enhancement, the court stated: “[T]his firearm enhancement of three, four, ten [years] can be used in different ways. You can be at a robbery, simply lift your shirt and show a gun in your waistband and this enhancement would apply. You could pull a gun out, point it at the ground during the course of a felony, and this enhancement would apply. You could take that gun out and fire a shot in the ground or up in the air, this enhancement would apply. You could point the gun simply at someone and the enhancement might apply during the course of a felony. You could shoot the gun and miss someone and this enhancement would apply. Or ultimately you can shoot the gun at someone, hit that person, ultimately causing death, and under this enhancement that is the most egregious conduct that can arise out of this enhancement. [¶] And for that reason I’m going to impose the high term of ten years on that enhancement.”

B. Evidence Supported the Manslaughter Sentence

Defendant argues the facts do not support the trial court’s conclusion he engaged in violent conduct indicating he poses a serious threat to society. We disagree and find the trial court did not abuse its discretion in evaluating this factor.

As an initial matter, defendant takes issue with the trial court’s finding that defendant knew it was Winnie who had arrived at his house when he armed himself and opened the garage door. Defendant asserts he told police he did not know who was at his house, and there was no evidence he was familiar with the car Winnie was driving, which Winnie had borrowed from his uncle. Defendant also contends Van Hoose’s texts indicated only she and Winnie would drop by, and they would leave his possessions in the mailbox. Defendant asserts he was concerned when three people arrived and all of them got out of the car, especially since someone had recently tried to break into his house.

But there was ample evidence to support a contrary conclusion. Defendant communicated with both Winnie and Van Hoose shortly before the shooting, and thus he

knew someone was stopping by to drop off his effects. That Winnie decided to leave defendant's possessions at his front door rather than in his mailbox should not have been a cause for alarm. Nor was it unreasonable for the trial court to reject defendant's assertion he was surprised when he saw three people in front of his house, especially since defendant knew someone would be stopping by. Moreover, security cameras had been installed at the property, and the court was under no obligation to accept defendant's self-serving claim he could see three people outside his home but could not discern their identities.

Next, defendant argues the trial court failed to address the "considerable evidence" showing he tried to get Winnie to leave, and he resorted to firing the gun and then pointing it at Winnie because Winnie refused to do so. According to defendant, his attempts to end the confrontation were repeatedly thwarted by Winnie, and Winnie's conduct caused him to take "increasingly drastic action." But based on this record, it was reasonable to conclude defendant, not Winnie, escalated the situation. As the trial court explained, defendant did not need to come out with a firearm, and "[defendant] could have certainly kept the gun at his side, and simply let the victim leave without pointing the gun at him, without firing a shot." It was reasonable to conclude Winnie might have peacefully departed had defendant not provoked him. Further, given the conflicting accounts of the incident, the court need not have accepted defendant's assertion that Winnie rushed at him immediately before the shooting.

C. No Improper Dual Use of Facts

Next, defendant argues the imposition of the upper term for both the manslaughter conviction and the gun use enhancement constituted an improper dual use of facts. We disagree.

Section 1170 and rule 4.420 prohibit the dual use of certain factors in determining whether to impose an aggravated term. Specifically, section 1170, subdivision (b) states: "[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." Rule 4.420(c) states: "To comply with section 1170(b), a fact charged and found as an enhancement may be used

as a reason for imposing an 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.” Rule 4.420(d) provides: “A fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term.”

Thus, the court may not use a fact that is an element of the crime as an aggravating factor, nor may the court impose a greater term based on the use of a firearm or any other factor if that is also the basis of an enhancement. Additionally, the court cannot rely on the same fact to impose a consecutive sentence and to impose the aggravated term.

“Improper dual use of the same fact for imposition of both an upper term and a consecutive term or other enhancement does not necessitate resentencing if ‘[i]t is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error.’ ” (*People v. Coleman* (1989) 48 Cal.3d 112, 166.)

Defendant argues that, in this case, the trial court imposed the upper term for the manslaughter conviction based solely on his use of a firearm to commit the act. Defendant contends this was an improper dual use of facts, because the use of the gun was also the basis for a sentencing enhancement. As an initial matter, defendant waived this argument by failing to raise it below. (See *People v. Scott* (1994) 9 Cal.4th 331, 355 (*Scott*)). Even if there was no waiver, we cannot conclude the trial court abused its discretion. The trial court aggravated the manslaughter sentence because defendant acted in a violent manner that escalated the situation. As the trial court explained, defendant came out of his garage with a gun in hand, pointed it in the victim’s face, and fired a warning shot in the air. All of this led to a struggle over the gun, which culminated in the victim’s death. The trial court did not impose an upper term based on the mere fact defendant used a gun to commit the crime. Rather, the aggravation resulted from the *manner* in which defendant used the gun to antagonize the victim and heighten the conflict.

Contrary to defendant's contention, *People v. Dixon* (1993) 20 Cal.App.4th 1029 does not demand a different result. In that case, the defendant was found guilty of first degree murder, two counts of robbery, and assault with a deadly weapon. (*Id.* at p. 1033.) The court also found true the special allegation as to each robbery count and as to the assault count that the defendant had personally used a firearm in violation of section 12022.5. (*Id.* at p. 1033.) The court sentenced the defendant to the upper term of five years for the first robbery count, explaining the defendant had used his gun in such a way as to “ ‘create genuine terror in the heart and mind of [the victim]. He had the gun stuck in her face and continued threatening . . . to shoot her.’ ” (*Id.* at p. 1037.) Further, the trial court imposed a consecutive sentence for the second robbery count, since “ ‘the defendant obviously used a firearm.’ ” (*Ibid.*) On appeal, the court found the threat to kill the victim was properly used as a basis for the aggravated enhancement of the first robbery count. (*Id.* at p. 1038.) However, the court reversed the consecutive sentence for the second robbery count since the only factor relied upon to impose the consecutive sentence was the gun use, which had already been used as a basis for another enhancement. (*Id.* at pp. 1038–1039.) In the instant action, the court aggravated defendant's sentence based on the *manner* in which he used the gun, not merely because the gun was used in the commission of the crime.

Next, defendant argues the trial court abused its discretion in imposing the aggravated term for the firearm enhancement. This argument was also not raised below and therefore waived. In any event, we find the trial court acted within its discretion. The specific factor relied upon by the trial court in making this sentencing decision was the gun was not just used in any fashion, but was used to cause death. As defendant notes, the use enhancement imposed here was pursuant to section 12022.5, subdivision (a). By referencing the fact that the use of the firearm resulted in death, the trial court may have been drawing an analogy to section 12022.53, applicable to murder and various other crimes (but not to manslaughter), which has three distinct sentences depending upon the proof of certain factors. Section 12022.53 provides for a 25-year-to-life enhancement if the crime resulted in great bodily injury or death. (§ 12022.53,

subd. (d).) Section 12022.5, subdivision (a) contains no similar provision enhancing the sentence if death results, however, that does not by itself prevent a court from considering the resulting death as a general circumstance in aggravation relating to the enhancement.

Defendant further contends that the death of the victim is an element of voluntary manslaughter (as it requires the killing of a human being), and thus the court could not rely upon that fact to aggravate the enhancement. But the death of the victim is not an element of the firearm enhancement. Even if the trial court was barred from aggravating the firearm enhancement sentence based on a fact which was an element of the underlying offense, there is no reasonable probability “that a more favorable sentence would have been imposed in the absence of the error.” (*People v. Osband* (1996) 13 Cal.4th 622, 730.) For example, there is no reasonable probability the court would not have relied upon other factors, such as the manner in which the gun was used to escalate the situation, to impose the upper term on the enhancement. While the same facts were used to aggravate the sentence for the manslaughter conviction, “dual use of a fact or facts to aggravate both a base term and the sentence on an enhancement is not prohibited.” (*People v. Moberly* (2009) 176 Cal.App.4th 1191,1198 (*Moberly*).)³

III. DISPOSITION

The judgment is affirmed.

³ A contrary holding was reached in *People v. Velasquez* (2007) 152 Cal.App.4th 1503, where the court stated in a footnote: “The same fact cannot be used to impose an upper term on a base count and an upper term for an enhancement.” (*Id.* at p. 1516, fn. 12.) As stated in *Moberly*, this footnote is dicta, and it is unsupported by *Scott, supra*, 9 Cal.4th 331, which it relies upon as authority. (*Moberly, supra*, 176 Cal.App.4th at p. 1198.)

Margulies, J.

We concur:

Humes, P.J.

Banke, J.

A145227
People v. Bradley