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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. SHIRLEY VENOYA REMMERT, Defendant and Appellant.	A152558 (San Mateo County Super. Ct. No. 16-SF-004106-A)

A jury convicted Shirley Venoya Remmert of theft from an elder by a caretaker (Pen. Code, § 368, subd. (e)),[1] offering a false instrument (§ 115, subd. (a)), and presentation of a fraudulent claim (§ 72). Remmert appeals, challenging only the trial court's sentencing decision to impose the upper term on her theft conviction. We affirm.

BACKGROUND

A.

Between 2008 and April 2016, Remmert lived with and cared for her elderly aunt, Patricia, in Patricia's home. Patricia suffered from cognitive impairment and dementia and was unable to understand financial or real estate transactions.

Under the terms of Patricia's estate plan, Remmert stood to inherit less than one percent of Patricia's estate at the time of her death. However, beginning in 2013, Remmert transferred several of Patricia's largest assets to her own use while isolating her from other members of the extended family. Specifically, Remmert made numerous

[1] Undesignated statutory references are to the Penal Code.

withdrawals, totaling approximately $79,000, from Patricia's bank account. Approximately $65,000 of the funds ultimately removed from Patricia's bank account were traced to Patricia's credit union account, which Remmert liquidated using a power of attorney executed in her favor. Remmert also liquidated one of Patricia's life insurance annuities, which was valued at over $19,000 and, in February 2016, was named the sole beneficiary on another $10,000 policy. When Remmert was arrested in April 2016, approximately $80,000 in cash was seized from her locked bedroom in Patricia's home.

In June 2015, Remmert prepared a quit claim deed that transferred title to Patricia's house, valued at $600,000, to Remmert.[2] The transfer, via quitclaim deed, was purportedly made in consideration for Remmert's caregiving services and in settlement of a personal injury claim. When questioned about the quitclaim deed in April 2016, Patricia was unable to understand its effect and stated she owned the house.

Remmert also defrauded the San Mateo County Housing Authority by applying for subsidized rent, claiming she was unemployed and homeless, her only sources of income were Social Security and food stamps, and her assets totaled $3,675. Relying on false representations that Patricia was Remmert's landlord and charged Remmert $900 per month in rent, the housing authority deposited rental subsidy payments (totaling $8,639) into Patricia's bank account.

Remmert testified in her own defense, recounting a long family history of victimization. According to Remmert, her mother had been poisoned with radioactive iodine, assaulted during a home invasion, and tricked into entering a mental hospital. Remmert, her daughter, and Patricia suffered similar traumas. Remmert admitted obtaining a deed to Patricia's house and withdrawing cash from Patricia's account but justified her actions on the grounds she was preventing hostile interference from other relatives, and Patricia informally agreed to gifts in lieu of wages. Remmert denied any knowledge that Patricia suffered from dementia.

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[2] The deed was recorded in January 2016.

B.

After a trial at which she represented herself with the assistance of advisory counsel, the jury convicted Remmert of theft from an elder by a caretaker (§ 368, subd. (e); count one), procuring and offering a false instrument (§ 115, subd. (a); count two), and presentation of a fraudulent claim (§ 72; count four). The jury found true an aggravated white-collar crime enhancement (§ 186.11, subd. (a)(2)), which alleged Remmert committed two or more related felonies, a material element of which was fraud or embezzlement. As to count two, the jury also found true an enhancement allegation that the loss exceeded $200,000 (former § 12022.6, subd. (a)(2)).

C.

Remmert was represented by counsel at sentencing. The trial court denied defense counsel's request for probation, struck the enhancement on count two, and sentenced Remmert to state prison for an aggregate term of seven years and four months. Remmert's sentence is comprised of the four-year upper term on count one, consecutive eight-month terms for each of the remaining counts, and a mitigated term of two years for the aggravated white-collar crime enhancement. The trial court voided the quitclaim deed (among other documents) and ordered return of the seized assets after restitution to the housing authority.

DISCUSSION

Remmert argues the trial court abused its discretion by imposing the upper term on count one. We disagree.

A.

After the jury verdicts, the trial court acknowledged Remmert was undoubtedly competent to represent herself but continued the sentencing hearing to allow an opportunity for Remert's mental health to be evaluated before preparation of the probation report. Remmert declined to be evaluated.

The probation report described Remmert's criminal history, which included several misdemeanor convictions that had been dismissed after she completed probation (§ 1203.4). The report also noted Remmert had a $1.5 million civil judgment entered

against her for similar conduct against her parents. When interviewed by the probation officer, Remmert suggested the instant charges were part of a broader "conspiracy by 'the county' to 'cover up' their involvement in a 'home invasion' in which her daughter was 'gang-raped by Palestinians,' who 'extracted one of her eggs.' " When asked if she had ever been evaluated for mental health issues, Remmert denied having any and expressed her belief " 'the entire county' has been trying to 'drug' her as part of 'the cover up.' "

The probation officer recommended a prison sentence, concluding Remmert was not an appropriate candidate for probation because she accepted no responsibility for her actions and refused all mental health services. The probation report listed no mitigating factors and several aggravating factors: numerous prior convictions of increasing seriousness; the particular vulnerability of the victim; the crimes indicated planning and sophistication; and the taking involved a large sum. (See Cal. Rules of Court, rules 4.421 [nonexclusive list of aggravating circumstances], 4.423 [nonexclusive list of mitigating factors].)[3]

The People recommended an aggregate sentence of seven years and four months in prison. In addition to the four aggravating factors mentioned above, the People argued Remmert is a danger to society and took advantage of a position of trust. The People recognized Remmert provided good physical care to her aunt and her testimony and papers "reveal fixations and paranoia," which could be considered mitigating. However, the People asked the trial court to consider Remmert's refusal of mental health services.

At the sentencing hearing, defense counsel argued for probation with a one-year county jail sentence and waiver of all presentence custody credits, suggesting leniency was appropriate due to Remmert's age (69 years old at sentencing) and need for psychiatric treatment.

In imposing the upper term on count one, the trial court explained: "I'm picking the upper term . . . based on [Remmert's] aggravated conduct . . . in terms of the vulnerable victim, . . . taking over her finances, isolating her from her family and

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[3] All rule references are to the California Rules of Court.

orchestrating the quitclaim deed, which was turned over to her. [¶] I believe the conduct is especially heinous given that [Patricia] had generously offered her home to [Remmert] when [she] had no place to go. And that the fraud took place over a number of years, while [Patricia's] cognitive decline was apparent, and she became more and more vulnerable."

B.

In exercising its discretion to determine which of the three terms in the triad "best serves the interests of justice" (§ 1170, subd. (b)), the trial court weighs the aggravating and mitigating factors. (*People v. Ahmed* (2011) 53 Cal.4th 156, 161; rule 4.420.) The court is required to state reasons for its decision. (§ 1170, subds. (b), (c).) However, " 'unless the record affirmatively indicates otherwise, the trial court is deemed to have considered all relevant criteria, including any mitigating factors.' " (*People v. King* (2010) 183 Cal.App.4th 1281, 1322.) "[T]he existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term." (*People v. Black* (2007) 41 Cal.4th 799, 813, overruled on other grounds by *Cunnningham v. California* (2007) 549 U.S. 270, 293.)

The trial court's discretion is not without limit. The court may not use a fact underlying an enhancement to impose the upper term unless it strikes the enhancement. (§ 1170, subd. (b); rule 4.420(c).) Furthermore, "[a] fact that is an element of the crime on which punishment is being imposed may not be used to impose a particular term." (Rule 4.420(d).)

On appeal, we review the court's decision to impose the upper term for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) We must affirm the trial court's sentencing choice unless there is "a clear showing" it was arbitrary or irrational. (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) " 'In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' " (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977–978.)

C.

Remmert contends the trial court abused its discretion by failing to consider her untreated mental illness as a mitigating circumstance. We are unpersuaded. First, there is no evidence Remmert has ever been diagnosed with a mental illness. We cannot say the record demonstrates she "suffer[ed] from a mental . . . condition that significantly reduced culpability" (rule 4.423(b)(2)), much less that the trial court acted irrationally or arbitrarily.

Second, even if we assume Remmert is correct the trial court should have considered her various statements of paranoia to be mitigating, she nonetheless fails to demonstrate an abuse of discretion. The trial court has no obligation to state its reasons for minimizing or disregarding circumstances in mitigation. (*People v. Lamb, supra,* 206 Cal.App.3d at p. 401.) And Remmert does not challenge either of the aggravating factors identified by the trial court, which are supported by the record. When Remmert stole from her aunt, Patricia was extremely vulnerable—she was over 90 years old and suffered cognitive impairment. (See rule 4.421(a)(3).) Furthermore, the manner in which Remmert carried out her theft indicated planning and sophistication—Remmert used numerous complex transactions (and attempts to cover her tracks) over the course of years. (See rule 4.421(a)(8).)

As noted previously, the trial court could impose the upper term based on the existence of a single aggravating factor. (*People v. Black, supra*, 41 Cal.4th at p. 813.) It is not our role to reweigh the two aggravating circumstances against Remmert's possible mental illness. (See *People v. Scott* (1994) 9 Cal.4th 331, 355.) Remmert has shown no abuse of discretion.

DISPOSITION

The judgment is affirmed.

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BURNS, J.

WE CONCUR:

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JONES, P. J.

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SIMONS, J.

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