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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS DEWAYNE KIRKWOOD,

Defendant and Appellant.

B230724

(Los Angeles County
Super. Ct. No. YA075277)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Victor L. Wright, Judge. Affirmed.

Dennis L. Cava, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael C. Keller and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

Thomas Dewayne Kirkwood challenges the sentence he received following his conviction for voluntary manslaughter. Appellant shot his unarmed stepson three times, at close range. Despite the deliberate nature of the killing, appellant is unhappy that he received the upper term of 11 years, plus a 10-year firearm use enhancement. We affirm. Appellant has not shown that the sentence is arbitrary or irrational.

FACTS

Appellant Kirkwood is the stepfather of the victim in this case, Dwon Houston. On June 9, 2009, Houston responded to his mother Frances's request to visit her residence in Inglewood, where she lived with appellant and their 11-year-old son. Houston was accompanied by his girlfriend Vonnika Pilcher. During the visit, Houston and Frances "got into a big ol' argument" about family matters. Among other things, Frances said "she should have aborted" Houston, who responded by calling his mother a "bitch." The argument was heated, but not physical. Pilcher had never seen Houston strike his mother. Nevertheless, Frances grabbed a 10-inch knife, came within four feet of Houston, and threatened to kill him. Houston said, "Do it. If you feel like you got to do that, do it. I'm right here." Pilcher jumped between them to break up the argument. On his own volition, Houston turned and walked outside.

Appellant was not at home during the argument, but arrived shortly afterward. He encountered Houston and Pilcher outside the apartment, as they were leaving. Appellant asked Houston what was wrong. Houston replied, "Your wife is trippin' You know how she is. She on one right now." Pilcher got into Houston's car, and he was ready to drive away; however, Pilcher urged Houston to go back and apologize to his mother. Pilcher telephoned Frances from the car, and Frances agreed to let them in. It was late at night, so everyone went to sleep in Frances's apartment.

The following morning, Houston asked Frances for forgiveness. She rejected his apology. Appellant came out of his bedroom and said to Houston, "What did I tell you about bucking up to my wife." Pilcher took that to mean "getting in each other's face." Houston replied, "I'm a grown ass man," meaning that he did not have to listen to anybody. Appellant shoved Houston; Houston shoved back. They were yelling and

cussing. On the second round of mutual shoving, appellant fell over the kitchen table and onto the floor. Appellant seemed dazed after hitting the floor. Pilcher saw appellant stumble to his bedroom and retrieve a long stick or pole.

Houston, Pilcher and Frances left the apartment. Houston was distraught, crying and pulling his hair, asking his mother why she chose appellant over him. Appellant walked outside and challenged Houston to a fight. Houston replied that appellant was old, he was afraid of hurting appellant, and he did not want to fight. Houston walked away from appellant and reentered the apartment. Appellant went to his car in the parking lot.

Frances instructed Pilcher to go inside, lock the doors, and not let Houston out. Pilcher complied. Houston inquired why Pilcher had locked the doors, then said, "Oh, he's going to get a gun." A minute or two later, Pilcher heard keys jingle in the lock to the apartment door. She looked out a window, and said to Houston, "You're right, baby. He do got a gun." Houston was unarmed.

For reasons she could not explain, Pilcher opened the door. She testified, "As soon as I opened the door, it was just gunshots." Appellant fired through the screen, hitting Houston, who stood behind Pilcher. Houston said, "Baby, I'm hit." Pilcher squeezed by appellant and ran outside, screaming for help. As she escaped, she heard a hail of gunshots behind her, "boom, boom, boom, boom, boom." Moments later, Houston came toward her, limping and bleeding, and collapsed on the ground. Pilcher tore off Houston's T-shirt and saw several bullet holes, including one in Houston's chest.

There was no shortage of eyewitnesses to this crime.

Javon Davis, a neighbor, confirmed that appellant lived in the apartment where the shooting occurred. Davis had previously seen Houston (whom he believed to be 20 or 21 years old) at the apartment. Davis heard Houston arguing with Frances on the night of June 9, 2009: this was the third occasion he had heard them in a dispute. He did not hear appellant's voice during the argument. The next morning, Davis heard Frances's voice echoing in the courtyard, instructing Houston to go inside and lock the door. Davis

looked out his window and saw Houston enter the apartment. He then saw appellant walk out of the carport and approach the apartment, carrying a black handgun.

It took appellant about 10 seconds to walk from the parking lot to the door of the apartment. He did not say anything. The door to the apartment opened, and Houston was standing there. Houston did not say anything. "As soon as the door opened," appellant raised the gun and fired several shots. Appellant was only one foot away from the victim. Houston said, "I'm shot," and ran from the apartment, but did not get far. Appellant continued to fire the weapon two or three more times at Houston's back as Houston fled. Houston fell to the ground. Davis was shocked and crying. He did not go outside.

Another witness was Richard Nieves, who was visiting relatives at the apartment complex. Nieves was acquainted with Frances and appellant, and had spoken to Houston on numerous occasions as well. Although appellant and Houston had argued in the past, it was mutual anger and Houston did not appear to be bullying appellant. Usually, Houston argued with Frances, not appellant, and the arguments were never physical in nature.

On the morning of June 10, Nieves was carrying trash from his relative's unit to a dumpster next to the parking lot. He heard "some arguing going on. It was normal. No big deal." The argument was between Frances and a male, but Nieves could not hear appellant's voice. While taking a second load of trash downstairs, Nieves saw two people wrestling inside of Frances's unit, and heard furniture moving and a thud, but he could not see who was involved. As he returned from the dumpster, Nieves saw appellant, Frances, and Houston outside: "they were all huffing and puffing," Frances was yelling, and appellant "was walking around like in a daze," holding his head, which appeared to be bleeding. Appellant seemed to have suffered a concussion, because his eyes were glazed, he did not appear to recognize Nieves, and did not respond to Nieve's expressions of concern for appellant's well-being.

Houston was agitated, upset, and crying, and Frances was trying to calm him. Because Houston was crying, Nieves could tell that "he didn't want to fight no more." Nieves saw appellant wobble toward the carport, still holding his head. When Frances

began to say, repeatedly, “Oh no. Oh, my God,” Nieves quickly grabbed a group of children who were playing in the courtyard and hustled them indoors “because what was about to happen wasn’t going to be good.” Houston went back into Frances’s apartment with his girlfriend.

Appellant “came through the carport door and he had a gun in his hand,” which was black in color. Nieves froze, and appellant looked at him with glazed eyes while lifting up the firearm and panning it around. Appellant pointed the gun at Nieves, then walked quickly to the apartment door and “just went, ‘boom, boom, boom.’” There were at least two shots within one second. Someone yelled, “Oh, my god.” Nieves ran away. Moments later, he heard three or four more gunshots. When the gunfire stopped, Nieves peeked out and saw the victim stagger from appellant’s apartment, bleeding from his chest. Houston said to Nieves’ relative, “Papito, he shot me in the heart. I’m dying. And he just like rolled back and fell backwards.”

Nieves tried to perform CPR, but there a red paste coming from the victim’s mouth. Nieves could see that Houston was shot in multiple places. As Nieves and his family assisted Houston, appellant walked out of the apartment carrying a gun. This caused Nieves and his family to run into their unit and close the door. Only Houston’s girlfriend stayed next to the dying man.

A construction worker at the complex, Russell Higgins, also testified about the shooting. On the morning of June 10, 2009, Higgins observed a balding man around 40 years old with a man between 17 and 20. They were “posturing as though there was some kind of confrontation going on,” but there was no physical contact between them.¹ Higgins (who was 30 feet away) was unable to identify appellant as one of the participants with 100 percent certainty. He could not hear their conversation, but it appeared that a female was trying to keep the two men apart. In less than a minute, the

¹ Appellant was 40 years old at the time of the shooting. He is six feet, one inch tall and weighs 160 pounds. Houston was six feet, two or three inches tall and weighed close to 200 pounds.

woman escorted the younger man to a nearby doorway, and the older man went to the carport.

Within 10 to 15 seconds, the older man reappeared and walked in a crouched and deliberate manner directly to the doorway that the younger man and the woman had entered. The man was walking without difficulty. Higgins lost sight of the man when he walked up to the doorway, but within seconds he heard a firearm discharge five or six times. After the gunshots, Higgins saw the older man, looking frantic or panicked, circle around then jump over a cinder block or cement wall and disappear.

The autopsy of Dwon Houston showed that he was shot three times: once in the upper chest, with the bullet striking the lung and lodging in his back; once in the middle of his back, with the bullet striking his kidney and lodging in his hip; and once in the back of the left thigh, which exited through the front of the leg. The first two wounds were fatal because they destroyed the lung and kidney, causing massive bleeding. Houston died of these wounds.

The police found two bullet casings near the doorway outside the apartment and three casings inside the apartment. The casings matched a .38-caliber semiautomatic handgun found under a mattress in appellant's bedroom. There was also a wooden dowel that could be used to hang clothing in a closet. Bullet holes in the outer security door and in the wooden door showed that at least one shot was fired from outside the apartment. The gun used in the crime does not fire bullets continuously when the trigger is pulled: the trigger must be pulled repeatedly to fire multiple shots.

Appellant testified in his defense. He described an argumentative relationship between Frances and Houston. Houston was upset because Frances did not raise him and did not spend much time with him. (He was raised by his grandmother.) Appellant and Frances married when Houston was three years old, and although appellant gave Houston advice, he did not act as a father figure to Houston. Houston began acting disrespectfully when he became a teenager and started to associate with gangsters. Appellant and Houston argued every time they saw each other, about once a month, and got into a

fistfight a few months before the shooting. On one occasion in 2008, Houston brandished a gun, but did not point it at appellant. Appellant did not call the police.

Appellant arrived home in the wee hours of June 10, 2009, after his shift as a hotel valet parking supervisor, and saw Houston and Pilcher outside his apartment. Houston was very upset and stated that he had argued with his mother. Appellant told Houston to leave. Inside the apartment, Frances was agitated and their 11-year-old son looked scared. Appellant was unaware when he fell asleep that Frances let Houston and Pilcher in and allowed them to spend the night.

In the morning, appellant was awakened by an argument between Frances and Houston. Hearing the argument intensify, appellant arose and told Houston to leave. Appellant asked Houston why he “beat[] up on women all the time,” which caused Houston to become angry and start bumping appellant with his body. After more angry words, they began shoving each other and finally “he clocked me,” according to appellant. Appellant was knocked over and his head hit the floor. Afterward, he had difficulty standing because he was dizzy, weak and his eyes were rolling back. When Houston came at him again, appellant grabbed a stick to protect himself. He was scared. Houston said, “Oh, you have a stick. I’m going to get you now,” whereupon appellant dropped the stick and ran to his car, to escape Houston. Appellant did not see any weapons on Houston.

According to appellant, Houston still wanted to fight, but either Frances or Pilcher convinced him to walk away. Appellant grabbed a gun from the trunk of his car, intending to go back to the house with it. He had no difficulty loading and cocking the weapon. Appellant walked up to the door and started to open it with his key when Pilcher and Houston jumped out from behind the door, startling appellant. Appellant does not recall the gun going off and piercing the screen door.

Appellant claims Houston “came at me again and I fired at him.” He does not remember how many times he fired, and denies shooting the fleeing victim in the back. Appellant put the gun under his mattress, called 911 and announced that he had just shot his stepson. Although appellant could see that Houston was lying on the ground

bleeding, he did not approach to check on his condition. When the police arrived, appellant became scared and left. He wandered around, trying to figure out what had just happened, then walked into a police station and turned himself in. He did not intend to kill Houston.

Appellant was charged with murder and carrying a loaded handgun. He pleaded no contest to the charge of carrying a loaded weapon. A jury found appellant guilty of the lesser included offense of voluntary manslaughter, and found true the allegation that a handgun was used to commit the offense. The court sentenced appellant to 21 years in state prison. This represents the high term of 11 years for manslaughter plus 10 years for the gun use enhancement. The court selected the high term “based upon the seriousness of the incident.” An eight-month sentence for carrying a loaded firearm runs concurrently with the principal term.

DISCUSSION

Appellant argues that “the trial court irrationally imposed the maximum sentence.” “The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] 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.) “[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; *People v. Towne* (2008) 44 Cal.4th 63, 75.) An appellate court may not substitute its judgment for that of the trial court, even if reasonable people might disagree with the sentence. (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

Appellant cited mitigating factors in his favor. He listed his minimal criminal history; his lengthy employment record; his mistaken belief that he was defending himself; his acknowledgement of wrongdoing at an early stage of the criminal process; the victim’s aggressive behavior; and the unlikelihood that appellant was apt to commit

the same crime again. (Cal. Rules of Court, rule 4.423.) Appellant asked for probation, or the low term of three years.

The prosecutor countered with aggravating factors. In particular, the prosecutor noted that appellant's conduct was "deliberate, extreme, and egregious," because appellant had to fetch the gun from his car, load it, then return to the apartment to shoot the victim multiple times, at close range. The court stated that it reviewed the sentencing memoranda and chose to rely on the aggravating factors listed in the prosecutor's sentencing brief. "Because the trial court expressly stated on the record that it received and considered both of [the sentencing memoranda], we presume the court did, in fact, consider those circumstances even though it did not expressly restate, recite, or otherwise refer to each one. . . . [U]nless the record affirmatively shows otherwise, a trial court is deemed to have considered all relevant criteria in deciding whether to grant or deny probation or in making any other discretionary sentencing choice." (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1318.)

It is true that the victim in this case is not a candidate for sainthood. He was, by appellant's own description, a hurt, angry and confused young man, stung by his mother's life-long rejection of him. Houston may have joined gangs for a sense of belonging, while continuing to seek his mother's affection and attention. Far from accepting her son, Frances told him "she should have aborted" him. Unsurprisingly, Houston did not react well to his mother's cruel words. Frances then threatened her son with a 10-inch knife, and refused to accept his apologies for calling her bad names. Appellant was well aware of this long-standing tension in his household, having had numerous run-ins with Houston over the years.

Whatever the victim's shortcomings were, he is not on trial in this case. Appellant is the one on trial, and his conduct surely deserves the maximum penalty. Instead of behaving in a reasoned manner befitting a senior family member, appellant acted on years of frustration by getting rid of the source of his annoyance, repeatedly shooting the unarmed victim at close range. Multiple eyewitnesses stated that the victim was crying and distraught before the shooting, not menacing appellant. Houston had voluntarily de-

escalated a tense situation by walking away from appellant and into his mother's apartment. Appellant admitted during his testimony that he knew Houston was unarmed.

Though he denied doing so, appellant fired at Houston through the metal security screen, and there was an eyewitness and a bullet hole in the screen to prove it. Houston could not have been "lunging" at appellant (as appellant claims) if he was behind a metal door. Appellant did not give the unarmed Houston an opportunity to leave before opening fire, according to all of the eyewitnesses.

Most egregiously, appellant pursued and shot Houston as the young man fled, showing a high degree of violence, cruelty, viciousness and callousness. (Cal. Rules of Court, rule 4.421(a)(1).) Appellant denied shooting Houston in the back. The evidence shows that appellant is lying. Neighbor Javon Davis saw appellant walk straight up to the apartment door and begin shooting "as soon as the door opened." Houston said, "I'm shot," and ran from the apartment. Appellant repeatedly shot the badly wounded victim as he tried to escape, depressing the trigger five different times for each bullet. The coroner's testimony establishes that Houston was shot once in the chest, once in the back, and once in the back of his thigh. This was a retribution killing of an unarmed victim, not a killing in self-defense.

There was mixed testimony about whether appellant was fully cognizant, having hit his head while tussling with Houston inside the apartment. Javon Davis and construction worker Russell Higgins did not perceive any difficulty in appellant's movements, while neighbor Richard Nieves thought that appellant seemed dazed. Regardless of the conflict, the evidence shows (and appellant admitted at trial) that he had sufficient presence of mind to walk to his car, retrieve his weapon from the trunk, load it, cock the weapon to chamber a round, walk back to the apartment, and commence shooting when the door opened. Appellant's deliberate acts show that the crime was carried out in a manner that indicated planning. (Cal. Rules of Court, rule 4.421(a)(8).)

In sum, the trial court's sentencing decision is neither irrational nor arbitrary, and is fully supported by the testimony at trial, considering the factors in aggravation and

mitigation. Appellant did not carry his burden of establishing that the trial court violated his constitutional rights. As a result, the sentence will not be disturbed on appeal.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.