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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.

ALBERT GARCIA,

Defendant and Appellant.

B232582

(Los Angeles County
Super. Ct. No. NA085360)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gary J. Ferrari, Judge. Affirmed.

Holly J. Jackson, 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, Paul M. Roadarmel, Jr., and Stephanie A. Miyoshi, Deputy Attorneys General for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Albert Garcia (defendant) appeals from his two assault convictions. First, he contends that the selection of the upper term and the enhancement due to the infliction of great bodily injury were improperly based upon the same fact. We conclude that defendant forfeited the issue because he did not object to the dual use of facts in the trial court. Second, defendant contends that the failure to raise the dual use of facts at trial amounted to ineffective assistance of counsel. Defendant fails to show prejudice and thus his claim for ineffective assistance of counsel fails. We affirm the judgment.

BACKGROUND

Defendant attacked and injured Tutuila Leituala (Leituala) and Jurgen Mamea with a knife. Leituala suffered a deep laceration to his wrist that severed seven tendons and one nerve. His injury required surgery and he continues to experience numbness in his fingers.

The defendant was charged with two counts of assault with a deadly weapon in violation of Penal Code section 245, subdivision (a)(1).¹ As to count 1, the information alleged a great bodily injury enhancement pursuant to section 12022.7, subdivision (a) for Leituala's injury. A jury convicted the defendant as charged and found true the great bodily injury enhancement.

On April 19, 2011, the trial court sentenced defendant to 10 years in prison as follows: the high term of four years as to count 1, three years for the great bodily injury enhancement, one year (one-third the midterm) for count 2, and two years pursuant to section 667.5, subdivision (b).

DISCUSSION

Defendant contends that the trial court improperly used the victim's injury to impose both the upper term and the great bodily injury enhancement in count 1. The trial

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

court explained the selection of the upper term, in part, on the seriousness of the victim's injury as well as defendant's "totally, totally unacceptable" record.

Defendant argues that serious injury equates to great bodily injury (*People v. Sloan* (2007) 42 Cal.4th 110, 117), and a court may not use the same fact to impose the upper term and an enhancement. (§ 1170, subd. (b); *People v. Coleman* (1989) 48 Cal.3d 112, 165.)² Therefore, the court improperly relied on the same fact of the victim's injury to impose the upper term and the enhancement.

Respondent all but concedes the dual use of facts but contends that defendant forfeited the issue by failing to object at trial. Complaints about the manner in which the trial court exercises its sentencing discretion cannot be raised for the first time on appeal. (*People v. Scott* (1994) 9 Cal. 4th 331, 356.) Since the selection of the upper term rests within the discretion of the court (§ 1170, subd. (a)), a defendant's challenge to the choice of the upper term because of a court's dual use of facts cannot be raised for the first time on appeal. (*People v. Gonzalez* (2003) 31 Cal.4th 745, 755.)

Defendant concedes that he did not object to the dual use of facts at trial. He insists, however, that his request for a lesser term of six years in prison prior to the court's sentencing of defendant preserved the issue for appeal. The court in *People v. De Soto* (1997) 54 Cal.App.4th 1 (*De Soto*), when faced with a situation where defense counsel made a general objection to dual use of aggravating facts at the time of sentencing -- far more than what occurred here -- concluded "that defendant's general objections did nothing to give the trial court a meaningful opportunity to correct any sentencing errors. Counsel objected to the imposition of the upper term, but gave no legal or factual basis to support the objection. He likewise raised cursory objections to the imposition of consecutive sentences and to the court's use of a fact constituting an unidentified element of the offense to aggravate and enhance his term. In contrast, his objections raised on appeal . . . articulate several *specific* reasons why he believes the court was wrong in its sentencing choices." (*Id.* at p. 9.) The *De Soto* court further noted

² Such dual use of facts is proper only if the court has discretion to strike the punishment for the enhancement and does so. (Cal. Rules of Court, rule 4.420(c).)

that it was “reasonable to place the obligation to formulate specific objections squarely on defense counsel, and not on the judge.” (*Ibid.*) Thus we find here that the request for a lesser term was not sufficiently specific to give the court notice of the dual use of facts and was thus inadequate to preserve the issue for appellate review. (*Id.* at pp. 4, 8-9.)

Defendant next contends that defense counsel’s failure to object in the trial court to the dual use of facts amounted to ineffective assistance of counsel. To prevail on such a claim, the defendant must show that counsel’s defective performance prejudiced the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) A defendant is prejudiced if it is reasonably probable that a more favorable outcome to the defendant would result absent counsel’s substandard performance. (*Id.* at p. 694.) Defendant argues that he was prejudiced because it is reasonably likely that the court would not have selected the upper term had it known it could not rely on the seriousness of the victim’s injury.

The selection of the most appropriate prison term rests within the discretion of the court. (§1170, subd. (a).) In exercising its discretion, the court may consider circumstances in aggravation or mitigation and any other factor reasonably related to the sentencing decision. (Cal. Rules of Court, rule 4.420(b).)

In this case, the court relied upon multiple factors to impose the high term and cited no factors in mitigation. First, the court relied upon the seriousness of the victim’s injury. Then, the court relied upon the defendant’s prior record. The court stated that defendant’s prior record demonstrated, “totally, totally unacceptable conduct.”

The court properly used defendant’s prior record to aggravate the base term because the acts underlying his convictions show violent conduct that indicates a serious danger to society. (See Cal. Rules of Court, rule 4.421(b)(1).) Defendant’s record contains two prior convictions for battery, one for false imprisonment, and one for possession of a firearm by a felon. The court could have also considered the acts of violence in the instant offenses. (*People v. Thompson* (1990) 222 Cal.App.3d 1647, 1652.) Here, defendant attacked two victims with a knife, seriously injuring one of them.

His prior convictions along with the current offenses show serious violent conduct that supports a determination that defendant poses a danger to society.

Defendant's prior history contains numerous convictions and sustained juvenile petitions, another proper circumstance in aggravation. (See Cal. Rules of Court, rule 4.421(b)(2).) The defendant argues that the court may not use his prior record to support the upper term because it contains mostly misdemeanor convictions. We disagree. Defendant's record supports the court's selection of the upper term because it contains over 10 sustained juvenile petitions and adult convictions. (*People v. Stuart* (2008) 159 Cal.App.4th 312, 314 [six prior misdemeanor convictions are "plainly 'numerous'"].)

Also, the trial court's consideration of defendant's record in imposing the upper term was proper because defendant's prior convictions are of increasing seriousness. (See Cal. Rules of Court, rule 4.421(b)(2).) Defendant's record begins with misdemeanor convictions including taking a vehicle without the owner's consent in 1992, petty theft in 1995, and vandalism in 1996. His later record includes felony convictions for evading a police officer in 2002, false imprisonment in 2003, and possession of a firearm by a felon in 2005. The progression from misdemeanor to felony convictions clearly demonstrates an increasing seriousness.

Any one of these aggravating circumstances alone warrants the imposition of the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728.) Therefore, defendant has not shown prejudice because it is not reasonably likely that defendant would have received a lesser sentence had the court realized it could not rely on the victim's injury to impose the upper term. Moreover, counsel does not render ineffective assistance by failing to make objections that counsel reasonably determines would be futile. (*People v. Price* (1991) 1 Cal.4th 324, 387.) Counsel could have reasonably determined that an objection to the dual use of facts would have been futile since other proper aggravating factors supported the selection of the upper term. Therefore, defendant's claim for ineffective assistance of counsel fails.

DISPOSITION

The judgment is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
ASHMANN-GERST