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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOEL LEE WILLIAMS,

Defendant and Appellant.

B232978

(Los Angeles County  
Super. Ct. No. TA088861)

APPEAL from a judgment of the Superior Court of Los Angeles County. Paul A. Bacigalupo, Judge. Affirmed as modified.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance Winters, Assistant Attorney General, Susan Sullivan Pithey and Tasha G. Timbadia, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found Joel Lee Williams guilty of burglary, attempted robbery and assault with a firearm. The jury found true allegations that Williams committed the offenses for the benefit of a criminal street gang (Pen. Code, § 186.22)<sup>1</sup> and personally used a firearm in the commission of the offenses. The trial court sentenced him to 28 years in prison. In a prior appeal,<sup>2</sup> this court reversed the gang enhancements based on insufficient evidence, and concluded that the trial court should have imposed a firearm enhancement for the burglary count under section 12022.5 instead of section 12022.53.

Williams challenged the 22-year sentence the trial court imposed on remand. In a subsequent prior appeal,<sup>3</sup> we concluded that the trial court abused its discretion in using the same fact (use of a firearm) to impose both a firearm enhancement and the upper term on the burglary conviction. We vacated the sentence and remanded the matter for resentencing.

On remand the trial court again sentenced Williams to 22 years, including the six-year upper term on the burglary conviction. In the present appeal, Williams contends that the court once again abused its discretion in imposing the upper term based on impermissible factors. His counsel did not object below, so the claim is forfeited. Williams asserts that his counsel rendered ineffective assistance. Although we agree that the court based the upper term sentence on improper factors, we reject Williams's ineffective assistance of counsel claim because other factors not used by the trial court supported imposition of the upper term sentence.

Williams also contends, and the People agree, that the court facilities assessment fee should be stricken and the amount of the court security fee reduced. We order the trial court to modify the judgment accordingly.

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> *People v. Williams* (Mar. 11, 2009, B202540) [nonpub. opn.].

<sup>3</sup> *People v. Williams* (May 26, 2010, B218441) [nonpub. opn.].

## BACKGROUND

### I. Trial and Initial Sentencing<sup>4</sup>

An information charged Williams with first degree burglary (§ 459; count 1), attempted first degree robbery (§§ 211, 664; count 2) and assault with a firearm (§ 245, subd. (a)(2); count 3). The information alleged that Williams committed the offenses for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)), and that Williams personally used a firearm in the commission of the offenses (§ 12022.53, subd. (b), on counts 1 and 2; § 12022.5 on count 3). The information also alleged that Williams suffered a prior juvenile adjudication for robbery. (§§ 667, 1170.12).

In the first appeal in case number B202540, this court stated the evidence presented at trial, in pertinent part, as follows:

“On December 25, 2006, Troyell Wideman, a college student, was talking with his girlfriend on the porch of her home, located within the Jordan Downs Housing Project (Jordan Downs) in Los Angeles. Defendant [Williams] walked by Wideman and his girlfriend and returned 15 minutes later demanding that Wideman relinquish a gold ‘Rolex’ necklace that Wideman was wearing around his neck.<sup>[5]</sup> Wideman refused, and defendant reached into his pocket. Wideman ran into his girlfriend’s house, and defendant followed him inside. When they were approximately five feet apart, defendant pointed a semi-automatic handgun directly at Wideman and told Wideman he had 10 seconds to give defendant the necklace. As Wideman stalled for more time, Sabrina Bradford (the mother of Wideman’s girlfriend and an occupant of the home) entered the

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<sup>4</sup> We granted Williams’s request for judicial notice of the records in the prior appeals (B202540 and B218441).

<sup>5</sup> “Defendant’s exact words were: ‘I like that Rolex. Let me have it.’”

room.<sup>[6]</sup> Bradford attempted to wrestle the gun from defendant, and Wideman joined in her efforts. The gun, which was pointed in Wideman's direction, fired and then fell to the ground. Defendant picked up the gun and ran away. No one was injured.

“Bradford called the police, and two officers arrived at her home 30 minutes later. Wideman provided the officers with a physical description of defendant. Approximately 10 minutes later, the officers detained defendant at Jordan Downs. When the officers asked Wideman to identify defendant as the assailant, Wideman stated to one of the officers: ‘There’s a lot of those Grape Street guys around here. They know who I am. They know my family. They’ll shoot me. I won’t ID him. That’s not him.’ Two days later, at his home, Wideman identified defendant as the assailant from a six-pack photographic display. Wideman had known defendant, who was also a resident of Jordan Downs, for at least six years and occasionally spoke with him. Wideman identified defendant as a member of the Grape Street Crips, a gang that operates within Jordan Downs.” (*People v. Williams, supra*, B202540, pp. 2-3.)<sup>7</sup>

The jury found Williams guilty of the charged offenses and found the gang and firearm special allegations to be true. The trial court found that Williams had suffered a prior juvenile adjudication that qualified as a felony strike offense. On count 1 for first degree burglary, the court sentenced Williams to the middle term of four years, doubled to eight years based on the prior strike, and imposed a 10-year gang enhancement and a 10-year firearm enhancement, for a total of 28 years. On count 2 for attempted first degree robbery, the court selected the middle term of two years, doubled to four years based on the prior strike, and imposed a 10-year gang enhancement and a 10-year firearm enhancement, for a total of 24 years. On count 3 for assault with a firearm, the court selected the middle term of three years, doubled to six years based on the prior strike, and

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<sup>6</sup> “At the time, Bradford was the long-term girlfriend of ‘Robert,’ an older, well-respected member of the Grape Street Crips. Robert lived with Bradford in her home and is the father of Wideman’s girlfriend.”

<sup>7</sup> The prosecution also presented evidence in support of the gang enhancement, which we do not recite because it is not pertinent to the issues on appeal.

imposed a 10-year gang enhancement and a four-year firearm enhancement, for a total of S20 years. The court stayed the sentences on counts 2 and 3.

## **II. First Appeal and Resentencing**

Williams appealed. As set forth above, this court concluded that the gang enhancements were not supported by substantial evidence and the firearm enhancement on the burglary count should have been imposed under section 12022.5 instead of section 12022.53. Burglary is not one of the enumerated felonies to which section 12022.53 applies. (§ 12022.53, subd. (a).) This court rejected Williams's contention that a juvenile adjudication cannot qualify as a prior strike. The matter was remanded to the trial court with directions.

On remand, the trial court sentenced Williams to the upper term of six years on count 1 for first degree burglary, doubled to 12 years based on the prior strike, and imposed a 10-year firearm enhancement under section 12022.5, subdivision (a), for a total of 22 years. On count 2 for attempted first degree robbery, the court selected the middle term of two years, doubled to four years based on the prior strike, and imposed a 10-year firearm enhancement under section 12022.53, subdivision (b), for a total of 14 years. On count 3 for assault with a firearm, the court selected the middle term of three years, doubled to six years based on the prior strike, and imposed a four-year firearm enhancement under section 12022.5, subdivision (a), for a total of 10 years. The court stayed the sentences on counts 2 and 3.

## **III. Second Appeal and Resentencing**

Williams appealed again. As set forth above, we concluded that the trial court abused its discretion in using the same fact (use of a firearm) to impose both a firearm enhancement and the upper term on the burglary conviction. We vacated the sentence and remanded the matter for resentencing.<sup>8</sup>

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<sup>8</sup> We also remanded the matter for correction of clerical errors, which have since been corrected.

On remand for resentencing, Williams's counsel pointed the trial court to the sentencing memorandum that Williams's counsel filed after trial and before Williams's was sentenced initially for these offenses. Therein, Williams's counsel argued in mitigation that Williams was only 19 years old when he committed these crimes.

At the second resentencing hearing, Williams's counsel argued that Williams only had one other adult conviction, which was for possession for sale of marijuana. The prosecutor noted that Williams was arrested for possession for sale of marijuana *after* he committed the crimes charged in this case, so that incident "wasn't a prior either conviction or arrest as it relates to this case, which happened December 25th, 2006."

The prosecutor argued there were three factors in aggravation that supported imposition of the upper term on the burglary conviction: that "[t]he victim was particularly vulnerable" (Cal. Rules of Court, rule 4.421(a)(3)); that Williams's conduct in this case demonstrates that Williams "has engaged in violent conduct that indicates a serious danger to society" (Cal. Rules of Court, rule 4.421(b)(1)); and that Williams was on probation for the juvenile robbery adjudication when he committed these crimes (Cal. Rules of Court, rule 4.421(b)(4)).

The trial court imposed the same sentence it had imposed after the first appeal and remand: the upper term of six years on count 1 for first degree burglary, doubled to 12 years based on the prior strike, plus a 10-year term for the firearm enhancement under section 12022.5, subdivision (a), for a total of 22 years. The court imposed and stayed the sentence on counts 2 and 3 (the same sentences it had imposed after the first appeal and remand).

The court stated two reasons for its imposition of the upper term on the burglary conviction: "[t]he crime involved an attempted or actual taking or damage of great monetary value" (Cal. Rules of Court, rule 4.421(a)(9)); and "[t]he defendant has

engaged in violent conduct that indicates a serious danger to society” (Cal. Rules of Court, rule 4.421(b)(1)).<sup>9</sup>

## DISCUSSION

### I. Upper Term on Burglary Conviction

Williams contends that the trial court abused its discretion in imposing the upper term sentence on the burglary conviction. He argues that the reasons the court stated for imposing the upper term are improper.

The People argue that Williams has forfeited this claim by failing to object below to the trial court’s use of the two circumstances in aggravation to impose the upper term. (See *People v. Scott* (1994) 9 Cal.4th 331, 356 [“complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal”].)

Williams concedes that his counsel failed to object below to the trial court’s use of either of the two circumstances in aggravation to impose the upper term. He nonetheless asks this court to review his claim, asserting that his counsel’s failure to object constitutes ineffective assistance of counsel. Because he argues ineffective assistance of counsel, we review his claim.

Under section 1170, subdivision (b), a trial court has broad discretion in selecting the base term for an offense. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) The statute provides, in pertinent part: “In determining the appropriate term, the court may consider the record in the case, the probation officer’s report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court’s discretion, best serves the interests of

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<sup>9</sup> As the reason for imposing the upper term on the firearm enhancement, the trial court referenced the factor in aggravation set forth in California Rules of Court, rule 4.421(b)(2) that the “defendant’s prior convictions as an adult were sustained petitions and the juvenile delinquent proceedings were numerous or of increasing seriousness.”

justice. The court shall set forth on the record the reasons for imposing the term selected and the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law.” (§ 1170, subd. (b).)

“The court shall state the reasons for its sentence choice on the record at the time of sentencing.” (§ 1170, subd. (c).) As set forth above, the trial court gave the following reasons for imposing the upper term on count 1 for first degree burglary: “[t]he crime involved an attempted or actual taking or damage of great monetary value” (Cal. Rules of Court, rule 4.421(a)(9)); and “[t]he defendant has engaged in violent conduct that indicates a serious danger to society” (Cal. Rules of Court, rule 4.421(b)(1)). For the reasons discussed below, we conclude that neither of these circumstances in aggravation is a proper basis for imposition of the upper term, based on the record before us.

#### **Attempted taking of great monetary value**

The evidence presented at trial showed that Williams attempted to take a chain from the victim (Wideman). The prosecution did not introduce into evidence the chain or a photograph of the chain.

At trial, the victim testified as follows regarding the chain:

“Q Okay. Did you have anything around your neck?

“A My Rolex chain.

“Q Okay. Can you describe for us what a Rolex chain is?

“A Its a gold chain.

“Q Okay. And why do you call it a Rolex chain?

“A It’s links.

“Q Okay. Is it like the band from a watch?

“A Yes.

“Q All the way around?

“A Yeah.”

The victim also testified that Williams said to him, “I like that Rolex. Let me have it.”

The evidence does not demonstrate that Williams attempted to take something of “great monetary value.” (Cal. Rules of Court, rule 4.421(a)(9).)<sup>10</sup> The prosecutor did not present any evidence about the value of the chain or evidence tending to show that the chain was real gold or made by the Rolex company. The fact that the chain may have had the same type of links as an authentic Rolex watch does not show that this particular chain had great monetary value. While there is a possibility this chain had great monetary value, there is also a possibility that this chain was not real gold, but merely gold in color, and had a nominal value. The evidence does not tend to support one possibility over the other.

Based on the record, the trial court could not properly rely on this factor in imposing the upper term on the burglary conviction.

### **Violent conduct**

The other factor the trial court stated for imposition of the upper term on the burglary conviction is that “[t]he defendant has engaged in violent conduct that indicates a serious danger to society.” (Cal. Rules of Court, rule 4.421(b)(1).) The only violent conduct that Williams engaged in—that is not inherent in the offenses of which he was convicted—is the gun use. Because the trial court imposed a firearm enhancement based on the gun use, it was improper to impose the upper term on the burglary count based on that same fact. (Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420(c).)

The People point out that the victim ran into the home and Williams followed him inside. The evidence presented at trial indicates that the victim opened the screen door and closed it behind him as he ran inside. Then Williams opened the screen door and ran inside after the victim.

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<sup>10</sup> The California Rules of Court do not define “great monetary value” for purposes of this factor in aggravation. Williams points out that, at the time he committed these offenses, section 12022.6, subdivision (a)(1), permitted imposition of a one-year sentence enhancement if the loss of property taken, damaged or destroyed during the commission or attempted commission of a felony exceeded \$50,000. The current version of section 12022.6, subdivision (a)(1), requires a loss exceeding \$65,000 for imposition of the enhancement.

The People assert that the trial court’s imposition of the upper term was proper under the facts and circumstances of this case because “what commenced as a street robbery turned into a home invasion robbery, i.e., the burglary.” Williams was convicted of first degree burglary (“burglary of an inhabited dwelling house”). (§§ 459 & 460, subd. (a).) A trial court cannot impose an upper term based on conduct inherent in every first degree burglary. (See Cal. Rules of Court, rule 4.420(d) [“A fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term”].)

The People also argue that “the gun, which was produced later, carried with it one potential for violence but the forcible, open and notorious entry into the home *carried with it an entirely additional, separate and different potential and threat for bodily harm* and a disregard to the sanctity of one’s home, exhibiting a serious threat and danger to society.” The *potential* for violence and the threat of great bodily harm are not the relevant circumstances. The factor that the trial court relied on is that “[t]he defendant has engaged in violent conduct that indicates a serious danger to society.” (Cal. Rules of Court, rule 4.421(b)(1).) In any event, we note that with regard to the threat of great bodily harm, we concluded in the prior appeal that, “The fact that Williams followed Wideman into the house after Wideman ran does not by itself indicate that this crime involved a threat of great bodily injury. The threat of great bodily injury was that Williams revealed he had a gun. (See *People v. Bennett* (1981) 128 Cal.App.3d 354, 359 [threat of great bodily harm in robbery ‘was part and parcel of the gun use itself’]; *People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1028 [great violence/threat of great bodily harm finding was not proper where ‘it was only the presence of the firearms that justified a fact finding that there was threat of great bodily harm’ in the attempted robbery and burglary].)” (*People v. Williams, supra*, B218441, pp. 8-9.)

As set forth above, the only violent conduct that Williams engaged in—that is not inherent in the offenses of which he was convicted—is the gun use. That Williams chased the victim into the home, opening and closing a screen door as he went, does not constitute “violent conduct” warranting imposition of the upper term on the burglary

conviction. The trial court abused its discretion in imposing a firearm enhancement based on the gun use and also imposing the upper term on the burglary conviction based on that same fact.

### **Ineffective Assistance of Counsel**

“To establish ineffective assistance of counsel, a [defendant] must demonstrate that (1) counsel’s representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient representation subjected the [defendant] to prejudice, i.e., there is a reasonable probability that, but for counsel’s failings, the result would have been more favorable to the [defendant]. [Citations] “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” [Citation.]’ [Citation.]” (*In re Jones* (1996) 13 Cal.4th 552, 561.)

“[W]here the record shows that counsel’s omissions resulted from an informed tactical choice within the range of reasonable competence, the [judgment] must be affirmed.” (*People v. Pope* (1979) 23 Cal.3d 412, 425.) On the other hand, where “there simply could be no satisfactory explanation” for the challenged action or inaction, we reverse. (*Id.* at p. 426.)

As discussed above, the circumstances in aggravation that the trial court cited in imposing the upper term on the burglary conviction are not supported by the record. We do not find that defense counsel’s failure to object to the use of these factors to impose the upper term constitutes ineffective assistance of counsel. There were other factors the court could have used in imposing the upper term sentence. For example, the People pointed out at the second resentencing hearing that Williams was on probation for the juvenile robbery adjudication when he committed the offenses in this case. This is a factor in aggravation supporting imposition of the upper term on the burglary conviction. (Cal. Rules of Court, rule 4.421(b)(4)). In addition, the parties noted at the second resentencing hearing that Williams had a subsequent conviction for possession for sale of marijuana, as discussed above. Moreover, the trial court imposed the upper term on the firearm enhancement based on a factor which Williams does not challenge on appeal—

that his convictions were numerous or of increasing seriousness. (Cal. Rules of Court, rule 4.421(b)(2).)

Based on the record before us, we find that an objection to the court's use of the improper factors would have been futile. We have no reason to believe that an objection would have resulted in the court's imposition of the middle term on the burglary conviction. Consequently, Williams is unable to establish prejudice.

Williams has not established deficient representation or resulting prejudice. Accordingly we reject his ineffective assistance of counsel claim.

## **II. Fees**

The People concede Williams's contention that the court facilities assessment the trial court imposed under Government Code section 70373<sup>11</sup> must be stricken.<sup>12</sup> Williams was convicted of these offenses in 2007. Government Code section 70373 (added by Stats. 2008, ch. 311, § 6.5.) became effective on January 1, 2009. The assessment does not apply in cases in which the defendant was convicted before the effective date of the statute. (*People v. Davis* (2010) 185 Cal.App.4th 998, 1000-1001.)

The People also concede Williams's contention that the amount of the court security fee the trial court imposed under section 1465.8 must be reduced. At the time Williams was convicted of these offenses, section 1465.8, subdivision (a)(1), provided for a mandatory \$20 fee to be imposed on every criminal conviction to maintain funding for court security. By the time Williams was resentenced for the second time in May 2011, the fee had been increased to \$40. The trial court imposed a total court security fee of \$120 (\$40 for each of the three convictions). The fee must be reduced to \$60 (\$20 for

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<sup>11</sup> This statute provides, in pertinent part: "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense . . . . The assessment shall be imposed in the amount of thirty dollars (\$30) for each misdemeanor or felony and in the amount of thirty-five dollars (\$35) for each infraction." (Gov. Code, § 70373, subd. (a)(1).)

<sup>12</sup> According to the reporter's transcript, the trial court imposed a \$40 fee. The minute order and abstract of judgment state that the court imposed a \$30 fee.

each of the three convictions) to reflect the correct amount provided for under the statute at the time Williams was convicted of these offenses.

**DISPOSITION**

The court facilities assessment imposed under Government Code section 70373 is stricken. The court security fee imposed under Penal Code section 1465.8 is reduced to \$60 (\$20 for each of the three convictions). As so modified, the judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.