

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

OMAR CARRASCO,

Defendant and Appellant.

C066813

(Super. Ct. No.
10F01486)

Defendant Omar Carrasco drove a car that collided with another car carrying driver Gregory Valenzuela and his three passengers. The collision killed Valenzuela and two of his passengers; the third suffered serious, permanent injuries. Defendant left the scene without rendering aid or even reporting the accident; he later pled guilty to leaving the scene of an accident involving death or serious injury. The trial court denied probation and sentenced Carrasco to the upper term of four years in state prison.

On appeal, Carrasco contends the trial court abused its discretion in sentencing him to an upper term and denying probation. We disagree and shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 3:30 a.m. on March 6, 2010, at the intersection of Cosumnes River Boulevard and Center Parkway, a Lincoln sedan driven by Carrasco collided with a car driven by Valenzuela. The collision killed Valenzuela and two of his passengers, Manuel Ruiz and Raul Perez. The third passenger, Richard Hernandez, was found by the police injured and standing on the sidewalk. He had suffered serious, permanent injuries.

Witnesses saw Carrasco at the intersection shortly after the accident. Carrasco asked the witnesses for a ride; when they refused, he left the scene. The police found him eight hours later at the Kaiser South medical center. Carrasco said he hung up on 911 and left the scene because he was scared.

On October 19, 2010, Carrasco pled guilty to leaving the scene of an accident involving death or serious injury (Veh. Code, § 20001, subd. (b)(2)). There was no agreement as to the recommended sentence; the plea was referred for a presentence probation report. At the sentencing hearing held on November 17, 2010, family members and loved ones expressed their sense of loss and anger at Carrasco for fleeing the scene of the fatal accident. The trial court also read letters from the victims' family members and from Carrasco's supporters.

The probation report recommended a middle term sentence of three years in prison, and identified a single aggravating

factor, that the crime involved great bodily injury. The report identified the 25-year-old Carrasco's youth as a mitigating factor. At the time of the offense, Carrasco was on probation for two misdemeanor convictions--driving under the influence of alcohol or drugs (Veh. Code, § 23152, subd. (a)) and possession of a switchblade knife (Pen. Code, § 653k).

The defense argued for the middle term sentence, on the theory that the aggravating circumstance listed in the probation report did not apply because great bodily injury was an element of the crime, and that Carrasco's relatively minor criminal record and youth were mitigating factors.

The trial court made the following statement before imposing sentence: "Well, before I start formal sentencing, let me just state to the family, I appreciate very much you coming to court here today. I know this process has been unbelievably difficult. There is no amount or number of years which could begin to adequately address the magnitude of three young lives. The criminal justice system is completely inadequate and impotent to accomplish anything remotely resembling justice. So for that I apologize."

The trial court then imposed sentence, first denying probation based on the nature, seriousness, and circumstances of the crime. It then found two aggravating factors: that leaving the scene of "absolute devastation, calamity, catastrophe on the highway" was an act demonstrating a high degree of callousness

(Cal. Rules of Court,¹ rule 4.421(a)(1)); and Carrasco was on two grants of misdemeanor probation at the time of the offense (rule 4.421 (b)(4)). Finding Carrasco's youth was the single mitigating factor, the trial court imposed the upper term of four years.

DISCUSSION

I

Upper Term Sentence

Carrasco first contends the trial court abused its discretion in imposing the upper term sentence because: 1) great bodily injury was an improper basis for an aggravating factor; 2) the offense did not display a high degree of callousness, and 3) his criminal record was insufficient to support imposition of the upper term. We are not persuaded.

"Generally, determination of the appropriate term is within the trial court's broad discretion [citation] and must be affirmed unless there is a clear showing the sentence choice was arbitrary or irrational [citation]." (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) The sentencing court has wide discretion to balance mitigating and aggravating circumstances, qualitatively as well as quantitatively. (*Ibid.*) "One factor alone may warrant imposition of the upper term" (*Ibid.*)

Rule 4.421 (a)(1) provides as an aggravating factor that: "The crime involved great violence, great bodily harm, threat of

¹ Further undesignated references to rules are to the California Rules of Court.

great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness[.]” Carrasco argues that the great bodily harm language contained in the rule is inapplicable because great bodily injury is an element of the underlying offense.² But the trial court did not rely on a finding of great bodily injury in imposing the upper term.

The trial court instead relied on its finding that the offense involved a high degree of callousness. Although Carrasco argues that “this subdivision requires a finding of actual and aggravated *intention* to harm, threaten, or abuse” and was therefore inapplicable, we disagree. The cases cited by Carrasco in purported support of his argument all uphold a finding of callousness where various defendants demonstrated intent and culpability, but none define or even discuss intent as a *requirement* to a finding of callousness.³

Carrasco fled the scene of the accident without calling 911; he abandoned his burned and burning victims in their nearly demolished car; he left the critically injured survivor wandering in the street; he attended to his own medical needs while completely disregarding those critical needs of others.

² See rule 4.420(d) [cannot use element of the crime as an aggravating factor]; *People v. Valdez* (2010) 189 Cal.App.4th 82, 86-91 (great bodily injury element of fleeing the scene of Veh. Code, § 20001, subd. (b)(2)).

³ See *People v. Nevill* (1985) 167 Cal.App.3d 198, 201, 203-204, 206; *People v. Hawk* (1979) 91 Cal.App.3d 938, 940-941; *People v. Collins* (1981) 123 Cal.App.3d 535, 537, 538-539; and *People v. Webber* (1991) 228 Cal.App.3d 1146, 1169-1170.)

The trial court did not abuse its discretion in concluding that this behavior evidenced an extreme example of callousness.

Carrasco further asserts he was merely on informal misdemeanor probation at the time of the crime, which he argues does not constitute an aggravating factor. We disagree. Rule 4.421(b)(5) simply states, "defendant's prior performance on probation or parole was unsatisfactory." It draws no distinction between formal and informal, or misdemeanor and felony probation. Carrasco was on probation for driving under the influence of alcohol or drugs. This is unquestionably relevant to Carrasco's sentence for a crime involving an auto accident which caused severe injury and the loss of three lives.

Both aggravating factors were valid. The trial court did not abuse its discretion in imposing the upper term sentence.

II

Denial of Probation

Carrasco asserts it was an abuse of discretion for the trial court to deny probation based on the nature of his offense.

We begin by recognizing Carrasco has forfeited his claim by not objecting to the reasons given for the denial of probation. (*People v. Scott* (1994) 9 Cal.4th 331, 353.) We add that his claim also fails on the merits.

Carrasco's contention reiterates the arguments he made regarding imposition of the upper term. We reject them for the same reasons set forth in part I, *ante*.⁴

DISPOSITION

The judgment is affirmed.

DUARTE, J.

We concur:

RAYE, P. J.

HULL, J.

⁴ Carrasco also contends the case should be remanded to a different judge for resentencing, based on the statement made by the trial court before imposing sentence. As we decline to remand for resentencing, we decline to address this contention.