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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Calaveras)

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JOSHUA WAYNE WILEY,<br><br>Defendant and Appellant. | C068704<br><br>(Super. Ct. No. 10F4811) |

The jury found defendant Joshua Wayne Wiley guilty of beating up his girlfriend, thereby causing her to suffer great bodily injury. The trial court sentenced defendant to 10 years in prison--combining the applicable upper terms for both the underlying conviction and the great bodily injury, and adding one year for a prior prison term enhancement.

Defendant appeals and contends that the trial court improperly relied on defendant’s service of a prior prison term at sentencing in selecting the upper term on the underlying offense as well as in imposing an enhancement of one year in

prison. As we explain, there was no error. Accordingly, we shall affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

Defendant and Breanne Conder had been dating since 2009. Conder lived in the apartment below her mother's apartment, and had given defendant a key to Conder's apartment.

In the early morning hours of March 13, 2010, while Conder was asleep in her bed, defendant came in and began "hitting [her] all over." Conder's mother awoke to the sound of noise and Conder's screams. She ran downstairs and saw Conder cowering in a corner while defendant beat her. With her mother's help, Conder was able to escape from defendant and ran from the apartment. Conder suffered a broken rib, a partially collapsed lung, and significant swelling and bruising on her face, chest, arms and back.

The jury convicted defendant of inflicting corporal injury on a cohabitant resulting in a traumatic condition (Pen. Code,[1] § 273.5, subd. (a)). It further found that defendant personally inflicted great bodily injury on Conder, and that defendant had served a prior prison term for false imprisonment.

The probation report outlined defendant's prior criminal convictions and resulting sentences as follows: 1997 misdemeanor vandalism (probation and jail); 1997 misdemeanor battery (probation and jail); 1999 misdemeanor resisting arrest

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[1] Further undesignated statutory references are to the Penal Code.

(probation and jail); 2001 driving under the influence causing injury (reduced to misdemeanor pursuant to Penal Code section 17b; probation and jail); 2002 misdemeanor possession of a controlled substance (probation, terminated unsuccessfully resulting in jail); 2003 felony assault with a deadly weapon (probation--later revoked, see *post*--and jail); and the 2005 felony false imprisonment conviction that was the *charged* prior prison term in the case at issue.

Upon defendant's conviction for felony false imprisonment in 2005, the court revoked defendant's probation for the 2003 assault and sentenced defendant to two years in prison for the assault and a concurrent 16 months in prison for the false imprisonment.

In 2006, defendant violated his parole.

The probation report recommended the trial court impose the upper terms, listing the following factors in aggravation: the crimes involved great violence, great bodily harm, and a high degree of cruelty; defendant had engaged in violent conduct showing he was a danger to society by virtue of both his 2003 assault prior and his 2005 false imprisonment prior; defendant's prior convictions were numerous and of increasing seriousness; defendant had served a prior prison term (for both assault and false imprisonment); and that defendant had performed unsatisfactorily when on probation and parole.

The prosecution sought the upper term, based on the degree of violence in this case, the sleeping victim's particular vulnerability, and defendant's prior serious and violent

criminal history. The prosecution emphasized that “this Court should be particularly concerned with the 2003 [assault] felony which he ultimately went to prison on. That was perpetrated on against his own mother.” Defense counsel argued for the middle term on the offense, based on defendant’s subsequent remorse and the fact that he had acted only out of uncontrolled jealously; and sought the low term on the enhancement, as Conder had since recovered from her injuries.

The trial court selected the upper term of four years in prison for inflicting corporal injury, and imposed a consecutive upper term of five years for the great bodily injury enhancement, plus a consecutive one year for the prior prison term enhancement, for a total of 10 years in prison.

In imposing the upper terms, the trial court stated:

“The defendant’s past record is one of violence and it start[s] with a [section] 242 battery back in 1997. Of concern is violation of Vehicle Code section 23153(b) indicating that someone was injured as a result of the defendant’s driving under the influence, and in 2003 there is a, there is a felony conviction of a very--not the same offense but serious felony conduct in violation of [section] 245(a)(1) which resulted in a state prison commitment. And those factors in the Court’s mind certainly aggravate the offense in this case the violation of [section] 273.5. And as mentioned by the district attorney this was a situation where there was such rage that the defendant had to be pulled off the victim two times by his [*sic*] own mother.

"If it can be argued that the defendant has shown some remorse today it's not of such weight I will consider it as a factor in mitigation but it is not of such weight that the Court would vary from the aggravated term.

"So on Count 1, violation of [section] 273.5 Court will sentence the defendant to the aggravated term of four years in state prison; as to the infliction of great bodily injury there was certainly the infliction of great bodily injury when the Court initially looked at the probation report we had the two broken ribs, we had the broken hand the fractured left maxillary cheekbone, it's not, it's not of that degree at this point however again there are just are no factors in mitigation that weigh in favor of the Court doing anything but sentencing the defendant to the aggravated term of five years. We have a course of conduct here that just seems to get more and more serious as we go along and defendant has a violation of parole for his last commitment to state prison. [¶] . . ."

**DISCUSSION**

Defendant's primary contention is that the trial court impermissibly considered his 2003 felony assault conviction and the resulting state prison commitment as an aggravating factor in selecting the upper term sentence on the underlying charge. He claims this reliance constituted an impermissible "dual use" of facts, because the prison commitment for the 2003 assault ran *concurrent* to his prison commitment for false imprisonment, and was imposed at the *same time*, in 2005, at the time of his sentencing on the false imprisonment charge. Because the 2005

prison term for false imprisonment was the subject of an enhancement, defendant argues that the fact of the 2003 assault conviction and corresponding prison sentence therefore was impermissibly used twice--once to justify the upper term for the underlying offense, and once to enhance his sentence for his 2005 prior prison term. We are not persuaded.

I

*Forfeiture*

First and foremost, defendant has forfeited his claim by failing to object at the time of sentencing. Although defense counsel argued that the upper term was not warranted based on the circumstances of defendant's offense and requested the trial court impose the middle term on the underlying offense and the low term on the enhancement, this is not an objection to dual use. Consequently, the claim was forfeited. (See *People v. Scott* (1994) 9 Cal.4th 331, 355 [defendant's claim that reasons used for sentencing were "inapplicable, duplicative, and improperly weighed" was forfeited]; *People v. De Soto* (1997) 54 Cal.App.4th 1, 7-8 [improper dual use of facts underlying weapons use to impose the upper term forfeited by failure to interpose specific objection at sentencing]; *People v. Erdelen* (1996) 46 Cal.App.4th 86, 90-91 [improper dual use of facts to impose upper term waived].)

Nevertheless, because defendant argues ineffective assistance of counsel should we hold his claim forfeited, we address his argument on the merits immediately below.

## II

### *Dual Use*

Section 1170, subdivision (b), and California Rules of Court, rule 4.420(c), prohibit the use of any fact *both* to enhance a sentence and to impose the upper term. (*People v. Jackson* (1987) 196 Cal.App.3d 380, 388, disapproved on other grounds in *People v. Rodriguez* (1990) 51 Cal.3d 437, 444-445, fn. 3.)

As we detailed *ante*, in 2003 defendant was convicted of felony assault and placed on probation. In 2005, he was convicted of felony false imprisonment. As a result of the 2005 conviction, defendant's probation for the 2003 conviction was revoked. Although he was *sentenced to prison* at the time of the revocation, and that prison sentence ran concurrent to his prison sentence on his 2005 crime, these two convictions were for *separate and distinct offenses*, and were charged and tried separately. Consequently, the trial court could use one or the other for any legitimate sentencing purpose, including selecting the upper term and enhancing the term once selected. (See *People v. Medina* (1988) 206 Cal.App.3d 986, 990-992 (*Medina*); *People v. Gonzales* (1993) 20 Cal.App.4th 1607, 1609-1611.)

Here, the trial court used the prison commitment for the 2005 (false imprisonment) offense to impose the one year enhancement, as found true by the jury, and considered the seriousness of the 2003 assault on defendant's own mother when imposing the upper term. This is perfectly permissible, and is

not “dual use.” The cases cited by defendant are distinguishable.[2]

Because there was no error, there was no deficiency in counsel’s performance in failing to object. Accordingly, defendant’s claim of ineffective assistance of counsel necessarily fails.

**DISPOSITION**

The judgment is affirmed.

DUARTE, J.

We concur:

BLEASE, Acting P. J.

HULL, J.

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[2] Further, the trial court did not rely solely on the fact of defendant’s assault conviction in determining the upper term was appropriate. A single factor is sufficient to support the trial court’s decision in this regard, and any error in relying on additional factors is harmless. (*People v. Burrell–Hart* (1987) 192 Cal.App.3d 593, 601.)