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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

TIMOTHY MYLES NUNEZ,

Defendant and Appellant.

C068939

(Super. Ct.
No. CM033711)

Defendant Timothy Myles Nunez pled guilty to being an accessory after the fact to murder. (Pen. Code, § 32.)¹ On appeal, he contends the trial court abused its discretion by imposing the upper-term sentence of three years in state prison.² Finding no abuse of discretion, we affirm.

¹ Undesignated section references are to the Penal Code.

² Defendant also initially argued that the \$40 court security fee was imposed in error but conceded there was no error after

BACKGROUND

The Offense

On January 27, 2011, defendant, who was 18 years old at the time, was home with his friends, Antonio Linares and Jose Sanchez, drinking alcohol and smoking marijuana. Defendant stated he "had a gun and so did" Linares. Defendant and Linares "were messing around and trying to 'spin the gun on their fingers.'" Defendant stated he "put [his gun] away" about "10 to 15 minutes" before Linares's gun "just 'went off.'" The bullet struck Sanchez in the side of the head as he sat at the kitchen table.

Sanchez tried to hide behind defendant but defendant fled to the bedroom. Linares shot Sanchez several more times in the head, arm, hand, and torso. Defendant emerged from the bedroom to find Sanchez slouched in a chair. Sanchez then fell to the floor. Defendant went to lock the door and close the blinds, realizing that his nine-year-old sister and a neighbor had witnessed the shooting through the window.

Linares dragged the victim by his shirt to the front entryway. Linares removed his bloody clothes and burned them, along with the victim's wallet, in the fireplace. There was blood throughout the kitchen and living room areas from Sanchez's moving around while being shot. Defendant began collecting cleaning supplies to clean up the blood. Defendant

reviewing the respondent's brief. Accordingly, for the reasons the parties recognize, we do not address that issue.

also called Hector, Linares's stepbrother, and asked him to come over and pick up Linares.

Defendant and Linares took two shower curtains from the bathrooms and wrapped Sanchez's body in them. Hector came to pick up Linares and they left for about 30 minutes. During that time, defendant cleaned the apartment with bleach and towels. When Linares returned with his pickup truck, defendant helped Linares load Sanchez's body into the truck. They also burned additional items of their clothing and some towels in the fireplace to cover up any evidence.

Defendant's mother came home and defendant made up a story about a friend being shot and taken to the hospital. Defendant did not think his mother believed the story because she had already talked to his sister. Linares left, after which he dumped Sanchez's body under a bridge and attempted to burn it beyond recognition.³ When Linares returned, he and defendant went to Linares's house, where they burned their shoes and the rest of their clothing. Defendant threw Sanchez's keys into a creek to "get rid of them." With regard to the guns, defendant stated that he "broke his up and threw it in places all over town" and that Linares "had broken his gun up and thrown it into the river and buried it in an orchard." Defendant and Linares then showered, ate, and went to bed. The next morning,

³ Linares also returned twice to further burn the body and to kick Sanchez's face in an attempt to destroy dental records evidence.

defendant and Linares went to Hector's house, where they ate breakfast and "hung out and smoked marijuana."

Two days after the shooting, an informant contacted police to report that one of defendant's neighbors had witnessed the shooting. On February 2, 2011, after several days of investigation, police contacted Sanchez's family, who reported that they had not seen or heard from Sanchez for a week. It was unusual for Sanchez to be out of contact for so long and they believed his phone had been shut off or had a dead battery. Later that same day, police executed a warrant to search defendant's apartment.

When defendant found out his apartment had been "raided," he called Linares. At this point, they knew they needed to leave town so they asked Hector for a ride to Gilroy. During the drive, defendant and Linares remarked that they had left too much evidence behind and they would not get away with the crime. Hector dropped them off at a convenience store where they met defendant's cousin.

The following day, February 3, 2011, detectives discovered Sanchez's body under the bridge. The day after that, Hector came to the police department, provided a candid report of what he knew, and gave detectives his cell phone and consent to search it for evidence. With the assistance of the cell phone carrier, detectives were able to use "pings" from the cell phone defendant and Linares were using to locate them.

On February 5, 2011, officers apprehended defendant and Linares at a residence in Gilroy. Linares was evasive when questioned about the shooting. Defendant, however, gave a statement admitting his involvement.

On March 23, 2011, without a plea agreement or any promises from the prosecution, defendant pled guilty to being an accessory after the fact to Sanchez's murder.

Sentencing

The triad of available prison term sentences for violation of section 32 (accessory after the fact) is 16 months, two or three years in prison. (§§ 18, 33.) Prior to sentencing, the probation officer submitted a report recommending the upper-term sentence be imposed based on the planning and sophistication of defendant's actions in covering up the underlying crime and fleeing the jurisdiction, the underlying crime being one of great violence, the high level of callousness or cruelty, and the vulnerability of the victim, who was unarmed and among friends. Additionally, defendant was on juvenile probation at the time of the offense and his prior performance on probation was unsatisfactory.

Defendant submitted a statement in mitigation and numerous letters from friends and family for the trial court's consideration during sentencing. He claimed he committed the offense out of fear and "[h]is continued failure to contact law enforcement was due, in large part, to his borderline intellectual functioning, which has resulted in an ongoing lack

of problem-solving ability.” In support of this claim, he submitted a psychological assessment based on an interview that had been performed two years earlier at the request of the Butte County Department of Employment and Social Services to assist in determining his eligibility for disability services.

At the commencement of the sentencing hearing, the trial court indicated that, although the upper-term sentence was warranted based on defendant’s conduct and the nature of the underlying crime to which defendant was an accessory, it was inclined to sentence defendant to the midterm based on consideration of the letters and psychological assessment submitted by defendant. The court then assured the parties that it had an open mind.

Thereafter, the victim’s family members addressed the trial court, explaining how devastating it was to be searching for the victim while defendant, the victim’s *friend*, continued to cover up the murder, and how, not only had defendant made no effort to prevent the murder, he had assisted in disposing of his friend’s body in an inhumane manner.

The prosecutor then argued that, after defendant saw his friend shot and killed, he embarked on a series of acts and decisions that warranted the upper-term sentence. Specifically, defendant cleaned up the evidence of the crime in the apartment, helped wrap and load the victim’s body in Linares’s truck for disposal, lied to his mother in an attempt to cover up the crime, arranged for a place for Linares and himself to hide, and

fled the jurisdiction with Linares. The prosecutor also noted that the information provided to the court in the psychological report was contradictory to the statements made by family and friends, none of whom mentioned anything about defendant's being "low functioning."⁴ The prosecutor also argued that the crime defendant helped cover up was a murder and defendant made "repeated decisions" to cover up the murder that warranted the upper-term sentence.

Defense counsel emphasized that, once arrested, defendant immediately admitted his involvement and disclosed the details. Defendant also entered a plea at an early stage and had a minimal criminal history.

After hearing counsel's arguments, the trial court provided a lengthy, reasoned explanation for why it had changed its mind and was imposing the upper-term sentence. It recounted the facts of the offense, detailing the ample and ongoing nature of defendant's involvement in covering up the murder. It noted

⁴ For example, the psychological report indicated, based on defendant's representations, that defendant required assistance from his mother in preparing meals, housekeeping, and scheduling and maintaining appointments. However, numerous friends and family members wrote about defendant's being an excellent cook (who had been cooking for a long time and intended to go to culinary school), being a responsible babysitter, fixing things around the house, and doing chores. Also, although defendant was evaluated in the psychological report as having borderline intellectual performance and academic scores at grade levels four through seven, several friends and family members wrote about defendant's doing "very well" in school, earning various academic awards, and studying to obtain his GED (General Educational Development) certificate.

that defendant had several opportunities to "do the right thing," such as call 9-1-1, refuse to cooperate with Linares, or contact and cooperate with police. It then specifically stated that it had reconsidered the appropriate sentence while listening to the victim's family members and the prosecutor speak. After the detailed explanation, the trial court commented that it had "considered and discussed with other judicial officers the fact that a person who has no really serious prior record should ever get the upper term. But as [the prosecutor] pointed out, we get the same sentence triad for accessory to a second degree burglary or murder." The trial court determined that "the mere gravity of the offense warrants an upper term and overrides all circumstances in mitigation." The court then sentenced defendant to three years in state prison.

DISCUSSION

Defendant contends the trial court abused its discretion in imposing the upper-term sentence. He contends the trial court essentially created a "per se rule" that one who is an accessory after the fact is sentenced to serve the upper term in prison if the crime to which one pleads is murder. This assertion is based on the trial court's statement that the "mere gravity of the offense warrants an upper term and overrides all circumstances in mitigation." We reject defendant's contention.

Defendant has essentially seized upon an isolated comment made at the conclusion of the trial court's lengthy, reasoned

explanation for why it was imposing the upper-term sentence. The comment was made after recounting the severity of defendant's conduct in this case and providing the trial court's reasoning for changing its mind as to the appropriate sentence. If the trial court had been basing its decision to impose the upper-term sentence *solely* on the fact that defendant had been an accessory to murder, creating a "per se rule" as now argued by defendant, it would not have initially been considering the midterm -- nor would it have needed to detail the gravity of defendant's actions in a lengthy explanation of its sentencing decision. The trial court specifically indicated it had been influenced by the victim's family members' statements, further demonstrating its sentencing decision was not based solely on the fact that this case involved a murder.

The record reflects that the trial court appropriately considered the nature of the offense. In this case, the offense involved defendant's going to great lengths to cover up the shooting death of his friend, while his friend's family was worried and looking for the victim. Defendant also arranged for both the shooter and himself to abscond and avoid prosecution.⁵ Defendant had many opportunities to "do the right thing" and

⁵ Defendant claimed that he was going to return to Chico and turn himself in after Linares left for Mexico. However, law enforcement showed up to arrest them before he and Linares could follow through on their plans. Defendant's behavior does not support that claim. Defendant had arranged for Linares and himself to leave Chico and hide at his cousin's house in Gilroy.

chose, instead, to continue the cover up. Defendant's acts disclosed a high degree of cruelty or callousness, a valid factor in aggravation. (Cal. Rules of Court, rule 4.421 (a) (1).) Defendant's extensive and continued efforts to cover up the murder and hide from law enforcement were "distinctively worse" than required to constitute the offense of being an accessory after the fact. (*People v. Zamarron* (1994) 30 Cal.App.4th 865, 872; see also *People v. Moreno* (1982) 128 Cal.App.3d 103, 110 ["The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary"].)

Contrary to defendant's assertion, the record demonstrates the trial court did take mitigating factors into consideration, including defendant's minimal criminal history, the psychological report, and letters from family and friends. However, the trial court has wide discretion to balance mitigating and aggravating circumstances, qualitatively as well as quantitatively, and those mitigating factors did not compel the trial court to impose less than the upper-term sentence. (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.)

In sum, the trial court's decision was "not arbitrary and capricious," was "consistent with the letter and spirit of the law," and was "based upon an 'individualized consideration of the offense, the offender, and the public interest.'" (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) We find no abuse of discretion.

DISPOSITION

The judgment is affirmed.

HOCH, J.

We concur:

NICHOLSON, Acting P. J.

DUARTE, J.