

NOT TO BE PUBLISHED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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

(Glenn)

----

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID JOSEPH ALLEN,

Defendant and Appellant.

C073017

(Super. Ct. No. 10SCR06559)

A jury found defendant David Joseph Allen guilty of assault with a deadly weapon and attempting to make a criminal threat. (*People v. Allen* (July 16, 2012, C068155) [nonpub. opn.])<sup>1</sup> He admitted a prior serious felony allegation and a prior prison term allegation. In the prior appeal, this court reversed the assault conviction because the prosecution relied on, and the jury was instructed with, a legally incorrect theory, i.e., that

---

<sup>1</sup> At defendant's request, we take judicial notice of our records in case No. C068155. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

feet and hands could be deadly weapons. We remanded the matter for possible retrial and resentencing.

Defendant was retried on a count of assault by force likely to produce great bodily injury. The jury found him not guilty of that offense and guilty of the lesser included offense of simple assault, a misdemeanor.

Defendant was sentenced to prison for four years, consisting of three years (twice the upper term of one and one-half years) for attempted criminal threats plus one year for the prior prison term. For the assault, he was sentenced to 6 months consecutive in any penal institution.

On appeal, defendant contends the trial court's selection of the upper term of imprisonment was an abuse of discretion. We affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND

S. R. was defendant's girlfriend in June 2010. On the night preceding the incident, S. R. drove to defendant's residence in Chico. He was angry at her because she arrived late. During the next several hours, they used drugs inside defendant's home. They had "a bad altercation" in which S. R. sustained swollen lips and bruises all over her body.

S. R. wanted to go home to her grandfather's house in Willows, but defendant had taken control of her car keys, purse, and cellular telephone, so the only way she could get there was if he agreed to take her.

The couple left Chico with defendant driving S. R.'s car. One minute he was nice to her, and the next minute he was not. During the ride, the couple fought and defendant told S. R., "I'll kill you. I'll throw you in the river." They arrived in Willows around 6:00 or 7:00 a.m.

Defendant was not allowed inside the grandfather's house. S. R. told defendant that she needed to enter the house simply to get some money. In fact, she planned to enter the house by herself in order to "escape" from him. Defendant foiled the plan by following S. R. into the house.

S. R. went to her grandfather's bedroom, where she remained. Eventually, defendant dragged S. R. out of the room and down a ramp on the outside of the house. He kicked her in the stomach, put his whole knee in her chest, and kicked her in the back. She yelled for help from her grandfather, telling him to " 'Call 9-1-1.' "

S. R.'s grandfather, C. B., telephoned 911. He later observed that S. R. had blood on her head. Dr. Michelle Chapman treated S. R. for contusions, abrasions, a black eye, and bruising.

Glenn County Sheriff's Deputy Todd Ross testified that S. R. reported having been attacked on a gravel driveway that had grass, leaves, and miscellaneous yard rubbish on it. However, Deputy Ross observed no dirt or debris on S. R.'s clothing or hair. He investigated the scene and found no signs of a struggle. Officers searched the area for defendant but did not find him that day. No personal property attributable to defendant was found in S. R.'s car.

The probation report prepared for sentencing identified six circumstances in aggravation and no circumstances in mitigation. It noted that the crimes involved separate acts of violence or threats of violence. The recommended aggregate term was four years six months.

At sentencing, the trial court announced its intention to impose the upper term. The prosecutor asked the court to follow the probation officer's recommendation of a "maximum" term. Defense counsel asked the court to impose the middle term, stating the probation department had not done a "very adequate job . . . of identifying the aggravating circumstances and mitigating circumstances in this case." Later defense counsel stated there was "no real identification of the aggravating circumstances of this particular record and why [defendant] should get an aggravated sentence."

The trial court responded: "I disagree. The term of the original sentence, the aggravation was based on other factors than the initial crime. They were based upon [defendant]'s continuing criminal history and the lack of rehabilitation and his continuing

violations of probations and paroles. And for those reasons, that's the reason I chose the aggravating circumstances, and that's why I choose them in this case on the resentencing of [attempted criminal threat].”

## DISCUSSION

Defendant contends the trial court abused its discretion by sentencing him to the upper term of imprisonment for attempted criminal threats. He first claims “a credible argument could be made” that the court abused its discretion by declaring the offense a felony rather than a misdemeanor; hence, even a low term prison sentence would have been an abuse of discretion. Defendant next claims the circumstances the court identified as aggravating were “nothing more than that [he] had a criminal history - and that history was already the basis for well over half of the prison sentence.” We disagree.

The trial court's selection of the upper term of imprisonment was not an abuse of discretion. “In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, ‘ “[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.” ’ [Citations.] Second, a ‘ “decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’ ” ’ [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.)

Defendant first claims “a credible argument could be made” that the court abused its discretion by declaring the offense a felony rather than a misdemeanor; hence, even a low term prison sentence would have been an abuse of discretion. But our standard of review does not allow reversal merely because a “credible argument could be made” in

favor of a more lenient disposition. Treatment of the attempted criminal threats as a felony is not *so* irrational or arbitrary that *no* reasonable person could agree with it. (*People v. Carmony, supra*, 33 Cal.4th at pp. 376-377.) The fact the court *could have* declared the offense a misdemeanor does not mean its failure to do so was an abuse of discretion.

This brings us to the argument defendant purports to *make*. He claims the circumstances the court identified as aggravating were “nothing more than that [he] had a criminal history - and *that history* was already the basis for well over half of the prison sentence.” (Italics added.) The record does not support this argument.

The second strike sentence arose from a 1983 Butte County conviction of assault with a deadly weapon. The prior prison term enhancement arose from a 2004 Butte County conviction of forgery. Because they doubled the base term and added a consecutive year, these two prior convictions undergird the majority of the present prison sentence.

But the record does not demonstrate that the trial court relied on these same two priors (“*that history*”) to impose the upper term. The court expressly relied on defendant’s “continuing criminal history and the lack of rehabilitation and his continuing violations of probations and paroles.” In addition to the foregoing priors, defendant’s “continuing criminal history” included a 1987 Sacramento County conviction of “fight/noise/offensive words,” a 1989 Sacramento County conviction of battery, a 1990 Sacramento County conviction of assault with a deadly weapon, a 1994 Sacramento County conviction of receiving stolen property, a 1998 Sacramento County conviction of infliction of corporal injury on a spouse or cohabitant, a 2000 Sacramento County conviction of possession of a controlled substance, a 2003 Glenn County conviction of infliction of corporal injury on a spouse or cohabitant, a 2006 violation of parole, and an 2006 Glenn County conviction of battery on a spouse, former spouse, or person with whom he had a dating relationship. These eight convictions and one parole violation

amply support the trial court’s findings of continuing criminality and lack of rehabilitation. Those findings, in turn, support the upper term of imprisonment for attempted criminal threats. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1368 [“defendant’s recidivism made him eligible for an upper term sentence”]; *People v. Castellano* (1983) 140 Cal.App.3d 608, 615 [only a single aggravating factor is required to impose the upper term].)

DISPOSITION

The judgment is affirmed.

\_\_\_\_\_ ROBIE \_\_\_\_\_, J.

We concur:

\_\_\_\_\_ NICHOLSON \_\_\_\_\_, Acting P. J.

\_\_\_\_\_ DUARTE \_\_\_\_\_, J.