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COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JEANINE FONG,

Defendant and Appellant.

C076690

(Super. Ct. No. 12F03133)

Sentenced to the upper term for voluntary manslaughter pursuant to a plea agreement, defendant Jeanine Fong contends (1) the trial court erred and violated due process by refusing to find unusual circumstances and denying her request for probation, and (2) the court abused its discretion by imposing the upper term. In accepting her plea agreement, however, defendant stipulated to facts that support the trial court's conclusion that this case did not present unusual circumstances that would allow the consideration of

probation. And the imposition of the upper term was properly based on aggravating factors that are supported by the same stipulated facts. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A felony complaint deemed an information charged defendant with murder (count 1; Pen. Code, § 187)¹ and harboring and concealing perpetrators of a crime (count 2; § 32). After a preliminary hearing, defendant entered a conditional plea of no contest to voluntary manslaughter, a lesser included offense, on count 1 (§ 192, subd. (a)), in return for a maximum sentence of 11 years in state prison.² The trial court referred the matter for a probation report.

The prosecutor recited the factual basis for the plea as follows:

“On or about May 19, 2011, in the county of Sacramento, Kenneth Ellis was called over to an address on . . . Skander Way in Sacramento by then girlfriend [defendant]. [Defendant] lured Kenneth Ellis over there so that Kenneth Ellis could be confronted by [defendant] and [defendant’s] cousins, Shani Browning and Christopher Browning, based on a dispute.

“During this dispute Kenneth Ellis, Shani Browning, and Christopher Browning entered into an assault and a physical fight. During the physical fight Kenneth Ellis received what was reported by officers as a severe head trauma and bleeding . . . of the brain.

“Once Mr. Ellis was actually hurt in the fight, all the parties that were present, including [defendant], should have [been] or were alerted that he was unresponsive, bleeding from his head, and had a white substance oozing out of his mouth and his nose. Instead of calling 911 and getting some type of medical help for Mr. Ellis, [defendant],

¹ Undesignated statutory references are to the Penal Code.

² Defendant previously pleaded no contest to count 2, a misdemeanor, and received three years of informal probation with credit for time served.

along with Mr. Browning, Shani Browning, and Nicole Fong, put an unresponsive Kenneth Ellis on a blanket, dragged him out [of] the house, dragged him onto the lawn, and left him there.

“Reports varied by somewhere between 20 and 40 minutes Mr. Ellis was left on the ground without anyone helping him[,] continuing to bleed from his head. At some point the parties realized that there was no one helping Mr. Ellis, who at this point was being left outside near the time of midnight, and they decided to drag Mr. Ellis back in the house and call 911.

“Once 911 was called, not just did the parties involved, including [defendant], told [sic] 911 or let 911 believe that Kenneth Ellis was an unknown person to them, they also told the 911 responders, Fire, that Kenneth Ellis suffered a seizure, and that’s why he was in this condition.

“Fire took Kenneth Ellis to the Kaiser hospital as a John Doe, where he received treatment from emergency room doctors who noted that his condition at the time of arrival was life threatening. At some point doctors were able to stop the bleeding in Kenneth Ellis’s head, but based on the lack of oxygen and the damage . . . that was done, it was deemed that he would no longer be responsive for the rest of his life, and he would no longer be able to actively have any brain function. About a week after that, the Ellis family decided to cease life support, and Kenneth Ellis died.

“To aggravate this in the situation, as it applies to [defendant], [defendant] came to the hospital the morning after Kenneth Ellis was admitted; and instead of telling the authorities what happened, her only concern was, could he talk, and could he basically respond. A day after that she was on her way to Los Angeles, fleeing—well, I won’t say fleeing, but she was leaving the area of Sacramento.”

Defense counsel stipulated that these facts provided the factual basis for the plea and that the trial court could also consider the preliminary hearing transcript.

Asserting that defendant was statutorily ineligible for probation barring unusual circumstances (Pen. Code, § 1203, subd. (e)(3); *People v. Clay* (1971) 18 Cal.App.3d 964, 966), the probation report recommended that the trial court deny probation and impose the upper term. The report found that no criteria for probation eligibility when probation is limited appeared to apply. (Cal. Rules of Court, rule 4.413.)³ The report acknowledged the existence of unusual circumstances: Defendant had led a productive life and this was her first criminal offense. (Rule 4.408.) However, the nature, seriousness, and circumstances of the crime (rule 4.414(a)(1)) warranted a state prison commitment, and the crime's great violence and/or other acts disclosing a high degree of cruelty, viciousness, and/or callousness (rule 4.421(a)(1)) justified the upper term.

In addition to the facts mentioned in the stipulated factual basis for the plea, the probation report alleged the following facts taken from the police report:

The victim, who had recently broken up with defendant and moved out of the house they shared, was staying at his mother's home; he was allowing defendant to stay in their former home even though he was the legal owner. On the date of the crime defendant called the victim six times, begging him to come over and reconcile with her. The victim packed an overnight bag and told his mother he was heading to the house to get back together with defendant.

At some point that evening, the victim and defendant got into a dispute. Defendant called her cousin, Shani Browning, and Browning's 17-year-old son, Christopher, to come over to "beat Kenny's ass." They attacked the victim in "his own home" at defendant's behest. Defendant's 11-year-old son woke to the sounds of screaming, walked out of his bedroom, and saw his aunt and uncle kicking and punching

³ Undesignated references to "rules" are to the California Rules of Court.

the victim as he lay squirming on the ground.⁴ At some point defendant “stopped the assault” and everyone recognized the victim had suffered a head injury. Instead of calling 911, they “conspired to stage a crime scene,” dragging the victim outside and leaving him on the lawn; finally they realized no one was coming to his aid and dragged him back inside.

After the first responders arrived in response to the group’s belated 911 call, defendant denied knowing who the victim was and claimed they had just found him on the lawn. At the hospital, a social worker who spoke to defendant thought her behavior was so strange that the social worker called the police.

In addition to the circumstance in aggravation of “great violence and/or other acts disclosing a high degree of cruelty, viciousness and/or callousness,” the probation report cited four others: “the defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission” (rule 4.421(a)(4)); “the defendant induced a minor (Christopher Browning, age 17 at the time of the offense) to commit or assist in the commission of the crime” (rule 4.421(a)(5)); “the manner in which the crime was carried out indicates planning” (rule 4.421(a)(8)); and “the defendant has engaged in violent conduct that indicates a serious danger to society” (rule 4.421(b)(1)). The report noted as a circumstance in mitigation that defendant had no prior record. (Rule 4.423(b)(1).)

The probation report stated that in her presentence interview defendant declined to admit or deny committing the crime or to give any detailed statement, but indicated she would comply with the terms and conditions of probation. She was single with three children, ages 18, 14, and 13; the two youngest resided with her mother. She worked full

⁴ Both Brownings pleaded no contest to voluntary manslaughter.

time before her arrest as a receptionist/cashier for Goodwill, and also received cash aid and food stamps.

Defendant filed a response to the probation report, disputing its account of the facts, alleging numerous circumstances in mitigation, and requesting that the trial court suspend the imposition of a prison sentence and place defendant on a lengthy term of formal supervised probation. The response attached numerous supporting letters.

Defendant asserted that she was not in a continuing relationship with the victim before the date of the crime, having renewed a prior romantic relationship, which caused discord between herself and the victim. She did not call the victim “begging” him to come back to the house, but simply returned his calls and arranged for him to look after the house during her preplanned trip to Southern California to visit family. He had told her he was not welcome in his parent’s home and needed a place to stay. The house was leased solely in defendant’s name; the victim had been removed from the lease for delinquency in making the payments.

Defendant asserted there would have been no evidence presented at trial that she called family members to confront the victim. Any such statements to police were designed to protect the identity and location of another member of the Browning family who was never apprehended, or even questioned, by law enforcement. Shani Browning took two of her sons with her to the house, not one, in order to act as the “enforcer” of what she believed should be done.

Defendant asserted that not only did she not inflict any injury on the victim, but she tried to protect him from the Brownings’ assault. Thereafter, Shani Browning intimidated defendant into giving false information to the 911 operator, saying that if she did not, “[the] same ass-kicking would be done to you.”

Based on this version of the facts, defendant asserted the following criteria affecting probation: she was not armed and did not use a weapon (rule 4.414(a)(2)); she did not inflict any injury or harm to the victim (rule 4.414(a)(4)); the manner in which the

crime was carried out did not demonstrate any criminal sophistication of planning (rule 4.414(a)(8)); her continued successful participation in a rehabilitation program, not ordered or required by the trial court, demonstrated her willingness to comply with the terms and conditions of probation (rule 4.414(b)(3)); further imprisonment would have a detrimental effect on her children (rule 4.414(b)(5)); and she was remorseful (rule 4.414(b)(7)). Defendant did not dispute that she was statutorily ineligible for probation. Nor did she explicitly address the rule 4.413 criteria for probation eligibility, which are preconditions to applying rule 4.414 where probation is generally barred by statute. (Rule 4.413(b), (c); *People v. Superior Court (Dorsey)* (1996) 50 Cal.App.4th 1216, 1229 (*Dorsey*)).

Defendant also asserted the following circumstances in mitigation: the circumstances that led to the victim's injuries arose due to an unusual circumstance unlikely to recur (rule 4.423(a)(3)); there was no evidence that defendant had any predisposition to commit this crime, which was induced and committed by others (rule 4.423(a)(5)); defendant exercised caution to avoid harm to persons in the commission of the crime (rule 4.423(a)(6)); defendant acknowledged her wrongful conduct and remorse in statements to law enforcement (rule 4.423(b)(3)); and if not for the statutory prohibition, a formal grant of probation and a mandatory drug treatment program would be a proper sentence (rule 4.423(b)(4)).

Finally, defendant asserted "the following Criteria Affecting Probation that does [*sic*] not exist in the Circumstances in Aggravation": the crime involved "no suggestion of even the existence of any use of any weapon or other potential deadly weapon[,]" and defendant had no criminal convictions "indicating any probability for any potential harm or danger to the community."

At the sentencing hearing, the prosecutor asserted that defendant induced the crime, turning the codefendants, who had nothing against the victim, into her "tools." To

make matters “more cruel,” defendant was supposed to have loved the victim. The prosecutor asked for the 11-year upper term.

Defendant’s counsel alleged that the probation officer, relying on the police reports, refused to listen to defendant’s account. (Asked by the court if the probation officer lied when he said defendant declined to give a statement, counsel said, “Yes. Absolutely.”) Counsel asserted that “all parties here did a great deal of personal investigation into the facts and circumstances surrounding the [victim’s] death” which were “complicated and they were supported by true statements and evidence that would have been presented at a trial,” as described in defendant’s written statement. Finally, counsel asserted that the probation officer “failed to give my client the opportunity to express a remorse that she’s been expressing to me for nearly three years.”

Counsel attacked the probation report’s findings of circumstances in aggravation, asserting that they derived from the police report’s false account of the facts. Based on the version of the facts presented in his written statement, counsel requested probation.

The prosecutor replied that the People did not agree with defendant’s minimization of her responsibility for the crime, and that her conduct after the crime reflected consciousness of guilt.

The trial court found and ruled as follows:

“[T]his was . . . an open plea. That means I can exercise my discretion, and I can give you the maximum of 11 years, which . . . is the recommendation of the probation department, or I give you something less than that...

“[Defense counsel] made an impassioned argument that you should get a probationary sentence, and he cited a number of reasons why. The Court was impressed by all of the letters that you have received.

“[Defense Counsel] also talked about kind of a different factual interpretation of this case, and I did have extensive opportunity to consult with all counsel when this case was assigned to my department for trial. I also read the preliminary hearing transcript . . .

[s]o I'm very familiar with the facts, some of which are disputed; but in this case, as in most cases, until you have a trial, there is an awful lot of disputed facts. There is an awful lot of facts that one side asserts and the other disagrees with, and there are [a] number of inferences that can be made from one set of facts versus another.

“So I appreciate [defense counsel] kind of presenting his view of what the facts are and [the prosecutor] presenting his view of what the facts are. I do kind of view this from the limited amount of information I've been able to have, and I think I kind of take the prosecution's viewpoint, having listened to all of this.

“In terms of kind of characterizing what happened, it does appear . . . that the [codefendants] really had no ax to grind with the victim here, that the relationship was between the victim and [defendant], and that was a relationship that apparently got on the rocks. And I think there is a lot of circumstantial evidence that she did have the defendant [*sic*] come over that night, and I think there is a sufficient evidentiary basis to establish that she did, to some extent, orchestrate that. [S]he wasn't physically involved in inflicting blows. I think everybody agrees with that. And there is a lot of disagreement and things we'll never know. No question about it.

“But I do think, particularly with what happened to [the victim] after the blows were inflicted, dragging him out, letting him sit—just laying in front and delaying treatment, those are callous acts; and they, I think, say more about the defendant than a lot of the letters of recommendation can counter.

“And so I do believe in this case, based on the nature of the offense, probation could not be granted, unless there are unusual facts warranting a grant of probation. I don't find them here at all. I do think the defendant's role in the crime, the nature of the crime itself, the callous way that the victim was treated and just basically left to die—that is essentially what happened—I think all of those things just suggest that this is an appropriate case for state prison, and I think the upper term is warranted based on those facts; particularly, as I indicated, the callous manner in which the body was treated; and

furthermore, what I perceived the evidence shows about [defendant]'s kind of leadership role in the event.

“Therefore, I’m going to commit the defendant to state prison for the upper term of 11 years.”

DISCUSSION

I

Denial of the Request for Probation

Defendant contends the trial court erred by denying probation; she also contends the court’s error amounted to a violation of federal due process. We disagree.

A plea of guilty or no contest “admits all matters essential to conviction.” (*People v. DeV Vaughn* (1977) 18 Cal.3d 889, 895.) “A criminal defendant’s plea . . . constitutes an admission of every element of the offense charged . . . and concedes the prosecution possesses admissible evidence sufficient to prove guilt beyond a reasonable doubt. . . .” (*Ricki J. v. Superior Court* (2005) 128 Cal.App.4th 783, 792.) The plea admits not only that the defendant did the act charged, but that he or she had no legal defense or justification for it. (*People v. Valladoli* (1996) 13 Cal.4th 590, 601; *People v. Chadd* (1981) 28 Cal.3d 739, 748.) Where the plea is based on a stipulated factual basis that stipulation controls: “Unless the trial court, in its discretion, permits a party to withdraw from a stipulation [citations], it is conclusive upon the parties, and the truth of the facts contained therein cannot be contradicted.” (*Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 141-142.)

We state these well-settled rules at the start because defendant’s arguments flout them. Almost every point she makes presumes the truth of the “facts” trial counsel alleged in his written statement and at the sentencing hearing. Counsel’s unsworn allegations not only had no evidentiary value, but contradicted the stipulated factual basis for defendant’s plea. So far as the trial court considered those allegations, it should not

have done so. Any error in that respect is harmless, however, because the court's ruling ultimately relied on the facts as stipulated to by the parties.

When a trial court considers whether a defendant who is statutorily ineligible for probation might nevertheless merit it because the facts present an "unusual case[] where the interests of justice would be best served if the person is granted probation" (§ 1203, subd. (e)), the court should construe the "unusual case" provision narrowly. (*People v. Stuart* (2007) 156 Cal.App.4th 165, 178 (*Stuart*), citing *Dorsey, supra*, 50 Cal.App.4th at p. 1229.)

Rule 4.413(c) lists facts which "may indicate the existence of an unusual case." As the term "may" suggests, this provision " 'is permissive, not mandatory.' [Citation.]" (*Stuart, supra*, 156 Cal.App.4th at p. 178.) If and only if the trial court finds under rule 4.413(c) that the statutory prohibition on probation is overcome, the court should then determine under rule 4.414 whether to grant probation. (Rule 4.413(b); *Dorsey, supra*, 50 Cal.App.4th at p. 1229.)

We review the trial court's finding as to whether a case is unusual for abuse of discretion. (*Stuart*, at p. 178, citing *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831 (*Du*.) The trial court's discretion as to whether to grant probation is broad and we will not reverse the court's decision merely because reasonable people might disagree. (*Stuart, supra*, 156 Cal.App.4th at p. 179.) The burden is on the party attacking the sentence to show it is irrational or arbitrary. (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) Defendant cannot meet that burden.

Rule 4.413(c) provides:

"The following facts may indicate the existence of an unusual case in which probation may be granted if otherwise appropriate:

"(1) *Facts relating to basis for limitation on probation*

"A fact or circumstance indicating that the basis for the statutory limitation on probation, although technically present, is not fully applicable to the case, including:

“(A) The fact or circumstance giving rise to the limitation on probation is, in this case, substantially less serious than the circumstances typically present in other cases involving the same probation limitation, and the defendant has no recent record of committing similar crimes or crimes of violence; and

“(B) The current offense is less serious than a prior felony conviction that is the cause of the limitation on probation, and the defendant has been free from incarceration and serious violation of the law for a substantial time before the current offense.

“(2) *Facts limiting defendant’s culpability*

“A fact or circumstance not amounting to a defense, but reducing the defendant’s culpability for the offense, including:

“(A) The defendant participated in the crime under circumstances of great provocation, coercion, or duress not amounting to a defense, and the defendant has no recent record of committing crimes of violence;

“(B) The crime was committed because of a mental condition not amounting to a defense, and there is a high likelihood that the defendant would respond favorably to mental health care and treatment that would be required as a condition of probation; and

“(C) The defendant is youthful or aged, and has no significant record of prior criminal offenses.”

Defendant asserts that rule 4.413(c)(1)(A) and rule 4.413(c)(2)(A)-(C) apply. We disagree.

According to defendant, rule 4.413(c)(1)(A) applies because the circumstances of her case were unusual; her behavior was “completely out of character”; “nothing inherent in [defendant]’s offense, while tragic and terrible, . . . makes it particularly or more egregious than other voluntary manslaughter cases”; although she spoke to the codefendants and they came over to the house while the victim was present, “it cannot be know[n] exactly what was said or what initiated the fatal beating”; she tried to protect the victim while he was on the ground and to shield him from the beating inflicted by the

codefendants; and she had no criminal history, let alone one of violence. Only defendant's last point is both valid and germane, and that is not enough.

Rule 4.413(c)(1)(A) also requires a showing that the circumstances of the crime are "substantially less serious" than those typically found in voluntary manslaughter cases. Defendant's attempt to make that showing disregards the stipulated admissions underlying her plea and relies instead on trial counsel's unsubstantiated assertions to the contrary.

When defendant entered her plea, she admitted that she lured the victim to the house so that she could call the codefendants to confront him there. She admitted that she knew or should have known the codefendants had beaten the victim to the point where 911 should have been called immediately, yet instead helped them move him outside and left him there for 20 to 40 minutes. She admitted that she and the codefendants lied to the belatedly called first responders, claiming they did not know the victim and he had suffered a seizure. Lastly, she admitted that when she visited the hospital, she remained silent about the truth, asked only whether the victim could talk, and left town the next day. As the trial court found, nothing about these facts makes defendant's conduct substantially less serious than that of the typical perpetrator of voluntary manslaughter.

Defendant relies on *Du, supra*, 5 Cal.App.4th 822. Her reliance is misplaced. In *Du*, the evidence that made the offense less serious than the typical offense of its kind was presented and proved at trial. (*Id.* at pp. 826-827.) Here, the facts which prove the contrary were admitted by defendant as a part of her plea.

Defendant also asserts that rule 4.413(c)(2) applies in its entirety. We disagree because the facts she admitted when she entered her plea do not establish "circumstances of great provocation, coercion, or duress" (rule 4.413(c)(2)(A)) or "a mental condition not amounting to a defense" (rule 4.413(c)(2)(B)). (Although defendant also purports to rely on rule 4.413(c)(2)(C), she cites no facts or authority to show that she is "youthful or

aged” within the meaning of the rule.) Furthermore, her contrary factual claims are made without citation to the record (not even to her trial counsel’s assertions). We do not consider arguments made without citation to the record to support each alleged fact *at the point where it is asserted*, even if the same fact is alleged with record citation elsewhere in the party’s brief. (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239 & fn. 16.)

Because defendant was statutorily ineligible for probation and has not shown that any criterion stated in rule 4.413(c) applies to this case, she cannot show that the trial court erred or violated due process by refusing to grant probation. Therefore we need not consider her arguments as to the rule 4.414 factors, which apply, if at all, only after rule 4.413(c) has been satisfied. (Rule 4.413(b); *Dorsey, supra*, 50 Cal.App.4th at p. 1229.)

II

Imposition of the Upper Term Sentence

Defendant contends the trial court abused its discretion by imposing the upper term. We disagree.

Trial courts have wide discretion in weighing aggravating and mitigating factors. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582 (*Avalos*)). A single valid aggravating factor justifies the upper term. (*People v. Black* (2007) 41 Cal.4th 799, 815.) The trial court may rely on any aggravating circumstances reasonably related to the court’s decision. (*People v. Sandoval* (2007) 41 Cal.4th 825, 848.) The court need not explain its reasons for rejecting alleged mitigating circumstances. (*Avalos*, at p. 1583.) We review the court’s sentencing choices for abuse of discretion. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

Here, the trial court expressly relied on two circumstances in aggravation: the callousness of defendant’s conduct in the course of committing the crime (rule 4.421(a)(1)) and defendant’s leadership role in the crime (rule 4.421(a)(4)). The

court also cited the fact that defendant induced others to participate in committing the crime (also rule 4.421(a)(4), but a separate clause therein). Based on the stipulated facts, these findings are amply supported. To the extent defendant disagrees, she again disregards the facts she admitted in favor of her trial counsel's later allegations to the contrary.

Defendant's assertion that the trial court disregarded alleged mitigating factors is also mistaken. As we have shown, the court acknowledged that defendant did not personally inflict any blows on the victim (cf. rules 4.414(a)(2), (a)(4)) and stated that it was impressed by the large number of supporting letters written on defendant's behalf (tending to support her claim under rule 4.423(a)(3) that the crime occurred due to unusual circumstances unlikely to recur). In any event, the court did not need to state why it rejected any alleged mitigating factors. (*Avalos, supra*, 47 Cal.App.4th at p. 1583.)

Defendant asserts that the trial court improperly relied on "the facts of the charge itself, manslaughter and the death of the victim," as factors in aggravation. However, she fails to support this assertion with record citation or quotation of the court's ruling, which forfeits the point. (*City of Lincoln v. Barringer, supra*, 102 Cal.App.4th at p. 1239 & fn. 16.) In any event, as we have shown, the court did not make improper dual use of the fact that defendant was convicted of manslaughter; rather, the court stressed the particular facts of the case that aggravated defendant's culpability—the callousness of her conduct and her leadership role in the offense.

As with her previous argument, defendant relies heavily on the unsupported assertions of trial counsel. Thus, she asserts: "As noted by defense counsel, there was no evidence supporting a finding that [defendant] instigated the confrontation or beating." On the contrary, defendant admitted that she instigated the confrontation by luring the victim to the house, then calling the codefendants to come over and confront him. Similarly, she repeats her assertion that she tried to protect the victim from the

codefendants during the beating, an assertion that rests only on trial counsel's statements. Finally, she repeats trial counsel's unsubstantiated claim that codefendant Shani Browning coerced defendant into silence after the beating by threatening defendant with a similar beating. Arguments based only on the unsupported assertions of trial counsel, which were made after defendant conclusively admitted the truth of the charges against her and the specific facts recited by the prosecutor as the factual basis for the plea, are not cognizable on appeal.

Because the trial court expressly found at least two valid factors in aggravation, the court did not abuse its discretion by imposing the upper term. (*People v. Black*, *supra*, 41 Cal.4th at p. 815.)

DISPOSITION

The judgment is affirmed.

RENNER, J.

We concur:

BLEASE, Acting P. J.

HULL, J.