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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC AUDELO,

Defendant and Appellant.

D060691

(Super. Ct. No. SCN269830)

APPEAL from a judgment of the Superior Court of San Diego County, Harry M. Elias, Judge. Affirmed.

Eric Audelo appeals a sentence of 22 years four months imposed after a jury convicted him of two counts of assault with a semi-automatic firearm (Pen. Code, § 245, subd. (b))<sup>1</sup> with a true finding that he personally used a firearm during both assaults (§ 12022.5, subd. (a)), and one count of being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)). On appeal, he contends the trial

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise specified.

court erred by using his criminal record to impose the upper term on one assault count and on the attached enhancement for personal use of a firearm. He further argues the sentence was manifestly unjust considering the circumstances of the crimes.

We conclude Audelo forfeited his claims on appeal because he did not raise the issues during sentencing. Nevertheless, we conclude it was within the court's discretion to use Audelo's criminal history to impose the upper terms on both the first assault count and the attached enhancement. Finally, the sentence was not manifestly unjust considering the crimes and Audelo's lengthy criminal past.

#### FACTUAL AND PROCEDURAL BACKGROUND

On November 18, 2009, Eric Audelo, his mother and grandmother were moving out of their rented home because their lease expired. The owner of the home, Jose Rocha,<sup>2</sup> and his son-in-law, Hector Ramirez, visited the home to see how long it would be until they were finished moving. Jose also asked Audelo when he would be able to move an inoperable car parked on the property. The car belonged to Audelo's older brother who died in 1991 as a teenager in a shooting in which Audelo also was shot. Jose explained he received notices from the city to move the car or he would incur fines. Jose told Audelo that he (Jose) would move the car and Audelo became angry.

Ramirez approached Audelo to calm the confrontation and Audelo threatened to fight him. Jose called Manuel to come to the home; Jose and Ramirez then sat in a car parked in the street. Audelo got his semi-automatic handgun and placed it in its box in

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<sup>2</sup> We refer to Jose Rocha and his son, Manuel Rocha, by their first names individually, and as "the Rochas" collectively.

the front seat of his car. Audelo, his grandmother and his mother continued moving items out of the house when Manuel arrived.

After Manuel arrived, the Rochas and Ramirez approached Audelo, who was standing by his car. As they approached, Audelo grabbed the handgun from the box in the front seat of his car and hid it behind his back. He told the Rochas he would move the car but added it did not matter because Jose was going to lose the house, presumably to foreclosure. Manuel told Audelo the home was none of his business and told him to take his things and "go out."

Audelo pulled the gun out from behind his back and pointed it at Manuel, stating, "Come on. What are you going to do about it? Let's go." When Jose assured Audelo they were not trying to insult him, Audelo pointed the gun toward Jose and said, "You too, asshole!" Although the gun was loaded when he pointed it at the Rochas, Audelo did not load a bullet into the chamber or put his finger on the trigger. Audelo's mother tried calm him. Manuel retreated to the car and called the police and Audelo, Jose, and Ramirez continued to argue.

Audelo was arrested without incident and taken into custody. While in custody, he admitted he was under the influence of methamphetamine and later explained he struggled with addiction since his honorable discharge from the Army in 2008. He was charged with two counts of assault with a deadly weapon for pointing the semi-automatic handgun at each of the Rochas, with enhancements for personal use of a firearm for each assault charge, and one count of being under the influence of a controlled substance. A

jury convicted him of all counts and found true that he personally used a firearm in the commission of the two assault counts.

At sentencing, the court imposed the upper terms for one assault and for the attached enhancement, simply stating Audelo's criminal history supported the upper terms. When 14 years old, Audelo was convicted of possessing a switchblade, resisting arrest, and twice taking a vehicle without the owner's consent. At 17, he was convicted of attempted premeditated murder, malicious discharge of a firearm at an occupied vehicle, and being personally and principally armed with a firearm. At 23, he was convicted of driving under the influence and causing an injury. At 25 he was again convicted of driving under the influence, and convicted twice of being under the influence of a controlled substance. Finally, at the age of 34 he was convicted of possessing drug paraphernalia one month before he committed the assault on the Rochas while under the influence of methamphetamine.

The court sentenced Audelo to prison for the upper term of nine years<sup>3</sup> for one assault count, the upper term of 10 years<sup>4</sup> for the attached personal use of a firearm enhancement, two years for the second assault count, one year four months for the personal use of a firearm enhancement attached to the second assault count, and one year for being under the influence of methamphetamine, which the court deemed satisfied by

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<sup>3</sup> The trial court has the discretion to sentence a defendant convicted of assault with a semi-automatic firearm to state prison for three, six, or nine years. (§ 245, subd. (b).)

<sup>4</sup> The trial court has the discretion to impose a consecutive sentence for the personal use of a firearm enhancement for three, four, or 10 years in state prison. (§ 12022.5.)

credit for time served.<sup>5</sup> In total, the court sentenced Audelo to 22 years four months in prison. The court previously granted Audelo's motion to dismiss his prior strike conviction allegation for the attempted premeditated murder conviction, and Audelo was eligible for probation. It suspended execution of the sentence and ordered 10 years of formal probation, cautioning Audelo not to violate probation because the prison sentence was severe.

Audelo violated probation two months after sentencing when he admitted he used methamphetamine. At the probation revocation hearing, his probation officer reported Audelo had posttraumatic stress disorder as a result of his military service, refused to utilize available mental health services, and was a danger to himself and others. The court revoked probation and imposed the suspended 22-year, four-month sentence.

## DISCUSSION

### I

#### *Standard of Review*

We review challenges to a trial court's sentencing decisions for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.) Trial courts have broad discretion in selecting among sentencing options. (§ 1170, subd. (b).) A court's choice to select an upper term is justified if it finds even one aggravating factor. (*People v. Steele* (2000) 83 Cal.App.4th 212, 226.) A trial court only abuses its discretion when

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<sup>5</sup> Audelo challenges only the court's imposition of the upper term for the first count of assault with a deadly weapon and the upper term for personal use of a firearm enhancement on count one.

"its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Carmony*, at p. 377.) Absent a clear showing by an appellant that the trial court's sentencing decision was irrational or arbitrary, we presume a trial court " "to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." " " (*Id.* at pp. 376-377, quoting *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

## II

### *Audelo Forfeited the Claim*

A defendant in a criminal case cannot raise claims challenging the trial court's discretionary sentencing choices for the first time on appeal. (*People v. Gonzalez* (2003) 31 Cal.4th 745, 751; *People v. Scott* (1994) 9 Cal.4th 331, 353 (*Scott*).) Audelo forfeited his appellate claims because he did not raise the issues in the trial court. After the court imposed the sentence, Audelo had a meaningful opportunity to object. He never objected to the trial court's use of his criminal history in imposing the upper terms for the one assault count and the attached firearm enhancement. Moreover, Audelo does not reject or address the People's contention that he forfeited the issue in his appellate briefs. We conclude Audelo forfeited the issue. Nevertheless, we conclude it was within the court's discretion to use Audelo's criminal history to impose the upper terms.

## III

### *The Sentence Was Proper*

Assuming arguendo Audelo preserved his claims for appeal, it was within the court's discretion to use his criminal history to impose the upper terms on one assault

count and on the enhancement. The California Supreme Court prohibits the dual use of a fact at sentencing in a variety of situations, none of which are present here. (*Scott, supra*, 9 Cal.4th at p. 350.) Furthermore, the 22-year, four-month sentence is not manifestly unjust in light of the gravity of the crimes and length of Audelo's criminal history.

A. Dual Use of Criminal History Was Proper

Our Supreme Court outlined three situations in which a trial court is prohibited from using a single fact for "dual use" in sentencing. (*Scott, supra*, 9 Cal.4th at p. 350, see also *People v. Moberly* (2009) 176 Cal.App.4th 1191, 1197-1198.) First, a fact of an enhancement may not be used to impose an upper term on a base charge; second, a fact that is an element of a crime cannot be used to enhance or aggravate a sentence; third, the same fact cannot be used to impose both the upper term and a consecutive sentence. (*Scott*, at p. 350; see also *Moberly*, at pp. 1197-1198.) *Scott* does not prohibit the court's use of a single fact, unrelated to the charge or enhancement, to impose upper terms on the charge and the attached enhancement.

Audelo argues *People v. Velasquez* (2007) 152 Cal.App.4th 1503 prohibits courts from using any single fact to impose upper terms on both a base term and an enhancement. The rule cited by *Velasquez* paraphrases the dual-use-of-a-fact prohibition in *Scott*, but standing alone it does not convey the intent of *Scott*. (*Velasquez*, at p. 1516, fn. 12.) *Scott* only prohibits using the same fact in sentencing if it is the fact of an enhancement or the base crime. (Cal. Rules of Court, rule 4.420(c) & (d); see *People v. Coleman* (1989) 48 Cal.3d 112, 163-164 [it was error for the trial court to impose a prior violent felony enhancement and use the same violent felony prior to impose the upper

term]; see also *People v. Ratcliffe* (1981) 124 Cal.App.3d 808, 822 [it was error for the trial court to use the violent nature of a rape, kidnapping and oral copulation to impose an aggravated term and consecutive sentences]; see also *People v. Avalos* (1984) 37 Cal.3d 216, 233 [it was error for the trial court to use the fact of multiple victims and the violent nature of a crime to impose aggravated and consecutive terms].)

The court here used the fact that Audelo had an extensive criminal history to impose the upper terms on both one assault count and the attached personal use of a firearm enhancement. Audelo's criminal history is not an element or fact of the crime of assault with a deadly semi-automatic weapon. (§§ 240, 245, subd. (b).) Likewise, his criminal history is not a fact of the enhancement for personal use of a firearm. (§ 12022.5.)

For illustration, had the court here based the upper terms on the fact Audelo personally used a gun, *Scott* would require we reverse the sentence because personal gun use was a fact of the enhancement. (*Scott, supra*, 9 Cal.4th at p. 350.) However, the court here considered criminal history, which is not a fact of an enhancement for personal use of a firearm. Similarly, we would reverse had the court used the fact that Audelo's firearm was semi-automatic to impose the upper terms on the assault count and enhancement because use of a semi-automatic firearm is an element of assault with a deadly weapon under section 245, subdivision (b). Criminal history is not a fact of assault with a deadly weapon. The court's use of Audelo's criminal history to impose upper terms on the assault count and the personal use of a firearm enhancement is not

prohibited by *Scott* or *Velasquez*. We thus conclude it was within the court's discretion to use Audelo's criminal history to impose the upper terms.

B. The Sentence Was Not Manifestly Unjust

Audelo further contends the sentence imposed is manifestly unjust considering the crimes committed. Although the sentence imposed is undoubtedly severe, it does not shock the conscience, considering the gravity of the crimes and Audelo's lengthy criminal history. Audelo pointed a loaded semi-automatic handgun at two people during an argument. Not only is assault with a deadly weapon an inherently dangerous felony, the danger was exacerbated because Audelo was handling a firearm while under the influence of a Schedule II controlled substance. (Health & Saf. Code, § 11055, subd. (d)(2).) The lengthy sentence corresponds with the seriousness of Audelo's crimes.

Moreover, Audelo had a 20-year criminal past, including other gun-related and methamphetamine-related convictions. Mitigating factors, including Audelo's military service, his potential posttraumatic stress disorder, his prior convictions not increasing in seriousness, and his cooperative nature during his arrest, could conceivably reduce the sentence. However, a sentence is not manifestly unjust because judges could weigh the factors differently. A trial court's sentence indicates an implicit assessment and rejection of the asserted mitigating factors. We defer to the court's discretion and agree that Audelo's criminal history can reasonably justify imposing the upper terms and the total 22-year, four-month sentence.

The court's suspension of the sentence and grant of probation was not without a "reasoned foundation" or assured Audelo would violate probation and suffer the severe

sentence. The court was not required to grant probation and would have been proper in imposing a 22-year, four-month sentence immediately. However, the court was "willing to give [Audelo] the opportunity to demonstrate" he could comply with probation and avoid prison and ordered probation with the "overall goal in dealing with the [posttraumatic stress disorder] issues."

We conclude the court did not abuse its discretion in using Audelo's criminal history to impose the upper term for one count of assault with a semi-automatic firearm and the upper term for the attached personal use of a firearm enhancement. The sentence imposed was not manifestly unjust considering the gravity of the crimes and Audelo's lengthy criminal record.

#### DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

NARES, Acting P. J.

HALLER, J.