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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

BRANDON MILTON OLANDER,

Defendant and Appellant.

E053383

(Super.Ct.No. FVA900328)

OPINION

APPEAL from the Superior Court of San Bernardino County. Dwight W. Moore, Judge. Affirmed with directions.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Kevin Vienna, Deputy Attorney General, for Plaintiff and Respondent.

A jury found defendant and appellant Brandon Milton Olander guilty of three counts of assault with a firearm. (Pen. Code, § 245, subd. (a)(2), counts 1-3.)¹ The jury also found true the allegations that defendant personally used a firearm, within the meaning of section 12022.5, subdivision (a).² The trial court sentenced him to a total term of 14 years in state prison.

On appeal, defendant contends that: (1) the trial court abused its discretion in imposing the aggravated term on count 1 and on the firearm enhancement as to that count; (2) the court erred in imposing the payment of booking fees without making a determination of his ability to pay; and (3) the abstract of judgment should be corrected regarding the firearm enhancement allegations. We agree that the abstract of judgment should be corrected. Otherwise, we affirm.

FACTUAL BACKGROUND

Shalece Jones lived with defendant and their eight-month-old son in a house in Fontana in 2009. On February 20, 2009, Shalece and defendant had a fight over a text message he discovered, and he accused her of cheating on him. Shalece slept at defendant's mother's house that night, and she went to her parents' house early the next morning.

¹ All further statutory references will be to the Penal Code, unless otherwise noted.

² We note that defendant was originally charged with three counts of attempted premeditated murder (§§ 664, subd. (a), 187, subd. (a)) in counts 1 through 3, and assault with a firearm in counts 4 through 6. The jury verdict forms designated counts 4 through 6 as the lesser included offenses of the attempted murder charges in counts 1 through 3. The jury found defendant guilty of the lesser included offenses, and the court then referred to these counts as counts 1, 2, and 3.

Shalece's father, Mark, heard that defendant and Shalece had been fighting, and that defendant had hit Shalece. Mark became upset and went to defendant's house to confront him. Mark knocked on defendant's door and bedroom window. Defendant answered the door, and Mark stepped into the house and started yelling at defendant. Defendant told him he thought Shalece was cheating on him, so Mark said he would go and talk to Shalece and then return. Mark went home to talk to Shalece, who said that there was no physical fight and that she was not cheating on defendant. Mark insisted on them going back together to straighten everything out with defendant. Shalece and her parents drove back to defendant's house. They parked their van in front of the house. Mark knocked on the front door. Defendant answered, turned around, and walked toward the living room. Mark followed him, and Shalece and her mother stayed at the front door. Defendant had a gun in his hand, pointed toward the ground. He turned around and faced Mark. Defendant put the gun on the couch, and told Mark to apologize for "disrespecting" his house that morning. Mark said he would do the same thing again if defendant "put his hands on" Shalece. Defendant picked up the gun and said, "I'm not playing with you." Defendant pointed the gun at Mark. Mark told him to put the gun down, but defendant said he was serious. Mark told him he was crazy and that he was leaving. Standing 10 to 12 feet away, defendant shot Mark, as he was turning around. Shalece's mother yelled at Mark to leave the house. Mark followed Shalece and her mother, who had already started rushing toward the van. As they were heading to the van, they heard two gunshots. Mark immediately noticed two bullet holes in the van. Shalece's mother turned around and saw defendant standing at his door, pointing his gun at her van. Shalece's mother pushed her husband into the van and drove away.

ANALYSIS

I. The Court Properly Imposed the Upper Terms

Defendant contends that the court abused its discretion in using the same fact to impose the upper term of four years on the assault with a firearm conviction in count 1 and the upper term of 10 years on the respective firearm enhancement. He argues that “the general objectives of sentencing and the interests of justice were not served by such an excessive sentence.” He then claims that there was no basis for imposing an aggravated term in this case. We find no abuse of discretion.

A. Standard of Review

Defendant acknowledges that he was sentenced under the post-*Cunningham*³ version of section 1170. Under that provision, “[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court.” (§ 1170, subd. (b).) “The court shall select the term which, in the court’s discretion, best serves the interests of justice.” (*Ibid.*) The court is no longer required to weigh aggravating and mitigating circumstances, but is required to specify reasons for its sentencing decisions. (*People v. Sandoval* (2007) 41 Cal.4th 825, 846-847.) Its decision is subject to review for abuse of discretion. (*Id.* at p. 847.)

³ *Cunningham v. California* (2007) 549 U.S. 270.

B. *Sentencing Hearing*

At the outset of the sentencing hearing, the court stated it had reviewed the probation officer's report and noted that the recommendation was based on assumptions that were erroneous. The court recalled that defendant was convicted of three counts of assault with a firearm under section 245, subdivision (a)(2), and that the jury found true, as to each count, the allegation of the personal use of a firearm under section 12022.5. The court noted that the probation report's references to the personal use enhancements under section 12022.53 were erroneous, since that section did not apply to section 245. (See § 12022.53, subd. (a).) The court then stated that the convictions at hand were for violations of section 245, subdivision (a)(2), and were punishable for two, three, or four years. Furthermore, as to each count, the enhancements found true were for use of a firearm, under section 12022.5, which added another three, four, or 10 years. The court corrected the probation report to reflect these convictions and enhancements.⁴ It asserted that the recommendation of the probation report was "badly skewed" because it was based on the wrong convictions and enhancements. However, the court said it would read the report as recommending that the statutory maximum punishment be imposed.

The court then heard statements from two of the victims, who actually spoke on defendant's behalf. Shalece told the court she loved defendant, said he was a "good person," and said she knew "that it was nothing that was done intentionally." She asked the

⁴ The probation report apparently listed the enhancement under section 12022.53 because that was the enhancement that applied to the offense defendant was originally charged with—attempted murder. (§§ 664, 187.)

court to allow defendant to come home so they could raise their son together. Shalece's father, Mark, said that he went to defendant's house and threatened him, when he should have let the police handle the situation instead.

After hearing the victim's statements, the court addressed defendant and told him what he did was "inexcusable," and it was not an accident or mistake. The court said that defendant "shot at and injured a man for no valid reason," and that he shot at and fortunately missed two other people. The court said, "You did these things and you don't get a freebie." It then asserted that, as to count 1, defendant shot at the victim at "close range" and shot him in the arm. The court noted that, "[s]ix inches different, that shot could have been fatal." It then sentenced defendant to the aggravated term of four years on count 1, and the aggravated term of 10 years on the firearm enhancement. The court next addressed the issue of concurrent or consecutive sentencing on counts 2 and 3. The court imposed the midterm of three years on counts 2 and 3, plus four years on each of the firearm enhancements. The court ordered those terms to be served concurrent to the term in count 1. The court noted it had forgotten to mention that it found probation completely inappropriate in this case, citing the violence and harm to the victim. The court then stated that the reason it was imposing the aggravated term for both the crime and the enhancement as to count 1 was "because Counts 2 and 3 could have been run consecutively, but the Court chose not to."

C. There Was No Abuse of Discretion

Defendant first claims that the court erred in relying on a single factor—the fact that it was not imposing consecutive terms on counts 2 and 3—to impose the upper term on both the assault with a firearm conviction and the personal use enhancement on count 1. (See

Cal. Rules of Court, rule 4.421(a)(7) [“The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed”].){aob 17} We find no error.

In *People v. Moberly* (2009) 176 Cal.App.4th 1191, 1196 (*Moberly*), the trial court used the same set of factors to impose the upper terms on the underlying base term offense and the enhancement. The court concluded that “the dual use of a fact or facts to aggravate both a base term and the sentence on an enhancement is *not* prohibited.” (*Id.* at p. 1198, italics added.) It stated that this type of dual use was not any different than using the same fact(s) to impose the aggravated sentence on multiple counts, a practice that other cases had sanctioned. (*Ibid.*) We find *Moberly* persuasive.

Just as the defendant in *Moberly* did, defendant here argues that the court violated the prohibition against dual use set forth in *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*).⁵ (See *Moberly, supra*, 176 Cal.App.4th at p. 1197.){aob 17} Defendant cites *Scott, supra*, 9 Cal.4th at page 350, in asserting that “[g]enerally, . . . the same fact cannot be used to impose an upper term sentence on the base count and an upper term for an enhancement related to that base count.” However, as the *Scott* court noted, the prohibition against dual use of facts in sentencing is limited: “Although a single factor may be relevant to more than one sentencing choice, such dual or overlapping use is prohibited *to some extent*.” (*Ibid.*, italics added; see also *Moberly*, at p. 1197.) The *Scott* court went on to describe three

⁵ Defendant cites *People v. Velasquez* (2007) 152 Cal.App.4th 1503 (*Velasquez*) along with *Scott*. *Velasquez* simply quoted *Scott* in a footnote and does not add anything to defendant’s argument. (*Id.* at p. 1516, fn. 12.)

circumstances in which the dual use of the same fact is prohibited. The first circumstance is that the court generally cannot use a single fact to aggravate the base term and to impose an enhancement. (*Scott*, at p. 350; *Moberly*, at p. 1197.) The second circumstance is that the sentencing court may not “use a fact constituting an element of the offense either to aggravate or to enhance a sentence.” (*Scott*, at p. 350.) The third circumstance described in *Scott* is that “the court cannot rely on the same fact to impose both the upper term and a consecutive sentence.” (*Ibid.*, fn 12; see also *Moberly*, at p. 1197.) None of these circumstances apply here.

Defendant contends that the reasoning in *Moberly* is distinguishable because the court there could have upheld the sentence on the harmless error basis of multiple valid aggravating factors. However, that was not the path the *Moberly* court expressly chose to take. (See *Moberly*, *supra*, 176 Cal.App.4th at p. 1198.) In any event, the availability of an alternative holding does not diminish the persuasive value of its reasoning.

Defendant additionally argues that there was “no basis for imposing an aggravated term in this case,” claiming that “this was a[n] unfortunate accident.” He cites several mitigating factors, including the victims’ request for leniency in his sentencing, his lack of a criminal background, and the excuse that his actions “arose from the belief Shalece was cheating on him.”

“Neither section 1170 nor the California Rules of Court attempt to provide an inclusive list of aggravating circumstances. Thus, a trial court is free to base an upper term sentence upon any aggravating circumstance that (1) the court deems significant and (2) is

reasonably related to the decision being made. [Citations.]” (*Moberly, supra*, 176 Cal.App.4th at p. 1196.)

The court here reviewed the probation report and its recommendations. Defendant’s probation report reflected the following circumstances in aggravation: (1) The crime involved great violence, actual bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness; and (2) defendant engaged in violent conduct that indicated a serious danger to society. (Cal. Rules of Court, rule 4.421(a), (b).) The court told defendant that what he did was inexcusable, and that it was not an accident or a mistake. The court asserted that defendant “shot at and injured a man for no valid reason,” and shot at two other people. The court further cited the fact that defendant shot the victim at close range, and that the shot could have been fatal. There was sufficient evidence to support the upper term.

We conclude that the court did not abuse its discretion in imposing the upper term on count 1 and the firearm use enhancement.

II. The Trial Court Properly Imposed the Booking Fee

Defendant contends that there was no evidence to support the imposition of the \$79.86 booking fee, since the court failed to hold a hearing to determine his ability to pay, as required under Government Code section 29550.2, subdivision (a). He therefore claims that the booking fee should be stricken. We conclude that the court properly imposed the booking fee.

A. Background

At the sentencing hearing, the trial court imposed a booking fee payable to the City of Fontana in the amount of \$79.86, to be paid within 90 days of his release date from custody. Although no such finding was made by the trial court at the time of oral pronouncement, the court's minute order states: "Court finds defendant is able to pay Booking Fees in the amount of \$79.86 to CITY OF FONTANA and show proof to parole officer within 90 days of release." The probation report recommended that defendant be ordered to "reimburse the city of Fontana [address omitted] pursuant to Government Code [section] 29550.1, in the amount of \$79.86 and show proof of payment to the parole agent within ninety (90) days from release from custody."

B. The Court Properly Imposed the Booking Fee Under Government Code Section 29550.1

Government Code sections 29550, 29550.1, and 29550.2 govern fees for booking or otherwise processing arrested persons into a county jail. Government Code section 29550, subdivision (a)(1), provides that "a county may impose a fee upon a city . . . for reimbursement of county expenses incurred with respect to the booking or other processing of persons arrested by an employee of that city . . . where the arrested persons are brought to the county jail for booking or detention." Government Code section 29550.1 states that "[a]ny city . . . whose officer or agent arrests a person is entitled to recover any criminal justice administration fee imposed by a county from the arrested person if the person is convicted of any criminal offense related to the arrest. A judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the

convicted person.” Government Code section 29550.2, subdivision (a), provides that “[a]ny person booked into a county jail pursuant to any arrest by any governmental entity *not specified in Section 29550 or 29550.1* is subject to a criminal justice administration fee for administration costs incurred in conjunction with the arresting and booking if the person is convicted of any criminal offense relating to the arrest and booking. The fee which the county is entitled to recover pursuant to this subdivision shall not exceed the actual administrative costs . . . incurred in booking or otherwise processing arrested persons. If the person has the ability to pay, a judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the convicted person.” (Italics added.)

Defendant erroneously assumes the booking fee was imposed under Government Code section 29550.2. However, Government Code section 29550.2 only applies to the extent a person was arrested by a governmental agency *not* specified in Government Code section 29550 or 29550.1, and it makes the fee payable to the county. A “city” is one of the agencies specified in Government Code sections 29550 and 29550.1. The probation report here reflects that defendant was arrested by Fontana police and booked at the Fontana Police Department. The trial court subsequently ordered defendant to pay the booking fee to the City of Fontana.

Furthermore, the probation report indicates that the fee was being imposed “pursuant to Government Code [section] 29550.1.” Government Code section 29550.1 applies to individuals arrested by a city and concerns fees payable to the city. In view of the fact that police officers from Fontana arrested defendant, and defendant was ordered to pay the

booking fee to the City of Fontana, Government Code section 29550.1 applies to this case, rather than Government Code section 29550.2, as defendant asserts. Defendant's reliance on Government Code section 29550.2 is misplaced.

Moreover, whereas Government Code section 29550.2 contains language concerning a defendant's "ability to pay" (Gov. Code, § 29550.2, subd. (a)), Government Code section 29550.1 does not. Thus, the fee imposed pursuant to Government Code section 29550.1 appears to be mandatory.

Under the express language of Government Code section 29550.1, the trial court did not have to determine defendant's ability to pay prior to imposing the booking fee. We conclude that the court properly imposed the fee.

III. The Abstract of Judgment Should Be Corrected

Defendant contends that the abstract of judgment should be corrected to reflect that the firearm enhancements were imposed under section 12022.5, subdivision (a), not section 12022.53. The People correctly concede.

Defendant was originally charged with three counts of attempted murder (§§ 664, 187, subd. (a)), with personal firearm use and discharge allegations as to each count. (§ 12022.53, subds. (b) & (c).) The jury found him guilty of the lesser included offense of assault with a firearm and found true the personal use allegations. At the sentencing hearing, the court noted that defendant was convicted of three counts of assault with a firearm, under section 245, subdivision (a)(2), and the jury found true the personal use allegations under section 12022.5. The court further noted that the probation report erroneously referred to section 12022.53. Section 12022.53 only applies to felonies

enumerated in subdivision (a) of that section, and assault with a firearm (§ 245, subd. (a)(2)) is not included in that list. (§ 12022.53, subd. (a).) The court thus ordered “all allegations pursuant to 12022.53 to be stricken based upon the jury verdict.”

The abstract of judgment correctly reflects the enhancement on count 1 as imposed under section 12022.5, subdivision (a), but erroneously reflects the enhancements as to counts 2 and 3 under section 12022.53, subdivision (b). The abstract of judgment should be corrected to reflect that the enhancements as to counts 2 and 3 were imposed under section 12022.5, subdivision (a). We shall direct that an amended abstract of judgment be prepared to correct the errors.

DISPOSITION

The trial court is directed to prepare an amended abstract of judgment to reflect that the enhancements on counts 2 and 3 were imposed under section 12022.5, subdivision (a). The trial court is further directed to forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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HOLLENHORST
J.

We concur:

RAMIREZ
P. J.

KING
J.