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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. JOSHUA BROWN, Defendant and Appellant.	E053401 (Super.Ct.No. RIF138184) OPINION

APPEAL from the Superior Court of Riverside County. Richard Todd Fields, Judge. Affirmed.

Dennis L. Cava, 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, Garrett Beaumont and Gil Gonzalez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Joshua Brown (defendant) served three years on felony probation, including 270 days of local custody on weekends, after pleading guilty to

discharging a firearm in a grossly negligent manner, which could result in injury and death of a person. (Pen. Code, § 246.3.)[1] Defendant argues the trial court, at a postprobation hearing in which it vacated his guilty plea and conviction under section 1203.4, (1) failed to afford him its informed discretion when it denied his motion under section 17, subdivision (b)(3), to reduce his conviction to a misdemeanor; and (2) denied his motion to vacate probation supervision costs imposed after the expiration of his probation. As discussed below, we reject both of these contentions and affirm the judgment.

FACTS[2] AND PROCEDURE

In the early evening of Sunday, August 5, 2007, residents of the apartment complex where defendant lived heard 10 to 15 gunshots and saw a crowd of people in the courtyard and carport areas of the building, as well as a nearby alley. When police arrived, they found two victims—a 19-year-old man who had a nonthreatening bullet wound to the leg, and a 19-year-old woman who had two bullet holes on the passenger side of her car, one of which was where she said her son had been sitting. One witness reported having heard gunshots coming from one of several apartments that included defendant's.

Police found defendant inside his apartment, lying face down on his bed. Defendant immediately admitted to having fired several rounds from his nine-millimeter

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[1] All section references are to the Penal Code unless otherwise indicated.

[2] Defendant pled guilty, so the facts are taken from the probation report.

semiautomatic handgun, which was legally registered to him.[3] Defendant stated he was in his apartment about 5:45 p.m. when he heard screaming and multiple gunshots coming from the courtyard. He looked out the window and saw people running in all directions. He stated that he got his nine-millimeter handgun and went out on his balcony. He did not see who was shooting or what was being shot at. Defendant stated he fired four to five rounds into the courtyard to "get the gunmen to leave," and then returned to his apartment.

On August 21, 2007, the People filed an amended complaint charging defendant with three felonies: count 1—discharging a firearm at an inhabited dwelling house, occupied building, or occupied motor vehicle (§ 246); count 2—discharging a firearm in a grossly negligent manner which could result in injury and death of a person (§ 246.3); and count 3—offering an assault weapon for sale (§ 12280). Regarding the first two charges, the People alleged defendant personally used a firearm. (§§ 667, 1192.7, subd. (c)(8).

Also on August 21, 2007, defendant pled guilty to count 2 in exchange for the other charges being dropped.

On October 2, 2007, defendant was placed on probation for 3 years and ordered to serve 270 days of local custody on weekends. Defendant completed probation on October 1, 2010. On October 19, 2010, the following entry was posted in the case

[3] Defendant had no criminal history.

docket: "Pay to Court: Probation Reimbursement/Costs in Amount of $634.83 Imposed on 10/02/2007."[4]

On March 17, 2011, defendant filed a motion to set aside his guilty plea and dismiss the complaint, to reduce the offense to a misdemeanor, and to vacate probation costs imposed after the expiration of his probation.

On April 4, 2011, the trial court set aside the guilty plea and dismissed the complaint. However, the court declined to reduce the offense to a misdemeanor and vacate the unpaid costs of probation. This appeal followed.

DISCUSSION

1. *Section 17, Subdivision (b)(3) Motion—No Abuse of Discretion*

Defendant argues "the trial court usurped the authority of the Legislature in essentially declaring appellant's conduct a felony as a matter of law because people were present when he fired the shots." He also asserts the trial court failed to exercise its informed discretion because it improperly relied upon its own opinion that someone firing shots into an area near where people were located was automatically committing a felony rather than a misdemeanor. Our review of the trial court's explanation for its decision reveals a very reasoned use of informed discretion, and so we reject defendant's contention.

Section 17, subdivision (b), gives a trial court discretion to reduce an offense charged as a felony to a misdemeanor if the offense is a "wobbler," i.e., chargeable either

[4] This docket entry is not part of the record on appeal. We take this information from defendant's motion filed in the superior court on March 17, 2011.

as a felony or as a misdemeanor, upon imposition of a punishment other than state prison (§ 17, subd. (b)(1)) or by declaration as a misdemeanor after a grant of probation (§ 17, subd. (b)(3)). (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 974 (*Alvarez*).) Discharging a firearm in a grossly negligent manner, which could result in injury and death of a person, is a wobbler. (§ 246.3.) A trial court's decision under section 17, subdivision (b), is reviewed for abuse of discretion. (*Alvarez*, at pp. 976-977.)

A court must exercise its discretion by applying the legal principles appropriate to the issue before it. It abuses its discretion when it " 'transgresses the confines of the applicable principles of law . . . .' " (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 393, quoting *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297.) "In other words, judicial discretion must be measured against the general rules of law and, in the case of a statutory grant of discretion, against the specific law that grants the discretion." (*Ibid*.) Our Supreme Court has held that a trial court must base its decision under section 17, subdivision (b), on "individualized consideration of the offense, the offender, and the public interest." (*Alvarez*, *supra*, 14 Cal.4th at p. 978.)

Here, the trial court denied defendant's motion to reduce his offense to a misdemeanor based on three broad categories: (1) the nature of the offense; (2) the defendant's prior criminal record; and (3) the sentencing factors set forth in California Rules of Court, rule 4.410. Defendant challenges only the trial court's reasoning as to the nature of the offense, so it is to those comments that we turn our attention. Again, defendant argues the trial court improperly failed to use its informed discretion by

positing a blanket rule that any section 246.3 offense involving the presence of people is automatically a felony. What the court actually said is: "So we start with the nature of the crime. It does not appear to the Court that the crime is a misdemeanor level crime. Actually, a shooting at a place where there are physically persons present is not a misdemeanor level crime. A misdemeanor level crime—sometimes you'll see an offense where a person is out, kind of in the middle of nowhere, and they get charged with 246.3. We see these cases actually more often than not where a person is on a large property, kind of in the middle of nowhere, but they are still next to that property and another property, and bullets go flying and somebody can potentially get hit. This is far more serious than that.

"This is literally why we have police, so people won't do self-help. They won't grab guns, run down the stairs—instead of staying in their place and calling 9-1-1—run down the stairs and literally fire in an area where there are people present. That is simply not misdemeanor conduct; that's felony conduct, and appropriately remains, and should remain as such.

"There is a variety of conduct that we see that's a whole continuum as to whether it's appropriate to be a misdemeanor or a felony. But the Court's experience, that does not appear to the Court to be a misdemeanor conduct, in fact, very, very serious conduct."

Here, the trial court quite accurately placed defendant's actions along "a whole continuum" for this offense, from target shooting in the middle of nowhere where "somebody can potentially get hit," to the situation in this case, in which defendant fired several shots into the courtyard of an apartment building where numerous people were

present and trying to get out of the way of gunshots that were already being fired by an unknown number of people. In fact, one man was actually shot in the leg, and a woman had bullets fired into her car, near where her child was sitting. The trial court did not base its decision simply on the mere presence of one or more persons, but on the entire situation, including the amount of risk and the number of persons placed at that level of risk. Despite defendant's attempt to establish an abuse of discretion by quoting selectively from the trial court's statement of decision, we conclude that, based on the court's statement at a whole, it used its informed discretion when it denied defendant's motion to reduce his conviction to a misdemeanor.

2. *Ability to Pay Hearing*

Defendant argues we should order the trial court to hold a hearing under section 1203.1b to determine his ability to pay the probation reimbursement costs because the probation department did not impose the full amount of the authorized costs until after defendant completed his probation.

When defendant was granted probation on October 2, 2007, the trial court adopted the recommendations in the probation report and ordered him to pay the costs of the presentence probation report not to exceed $318, and of probation supervision in the amount of $252. The court authorized the costs of probation supervision to be increased up to $1,908 should the level of probation supervision be modified. The court fully authorized the probation department to determine the actual cost of probation. Defendant accepted these terms of probation. Defendant's probation expired on October 1, 2010. According to defendant's March 17, 2011 motion, on October 19, 2010, the following

entry was posted in the case docket: "Pay to Court: Probation Reimbursement/Costs in Amount of $634.83 Imposed on 10/02/2007." Defendant subsequently received a letter from the superior court, dated January 28, 2011, telling him to pay the remainder of the probation costs or face a $300 civil assessment.

On February 4, 2011, defendant asked the court to add onto its February 8 calendar his request to "vacate civil assessment." On February 8, 2011, the court granted defendant's request to continue the motion to March 3, 2011. On February 22, 2011, $110.60 of the costs were suspended. On February 28, 2011, the enhanced collection division filed a report with the trial court setting defendant's total probation costs at $1,094.23, leaving an unpaid amount of $524.23 after counting $570 in payments from defendant. On March 3, 2011, this motion was again taken off calendar at the defense's request. On March 17, 2011, defendant filed his motion described above, which included a request "to vacate costs imposed after the expiration of probation," on the ground that "the entry of judgment for additional reimbursement costs of probation, after probation had expired, was in excess of the court's jurisdiction." As also described above, the trial court heard and denied this portion of defendant's motion on April 4, 2011.

To the extent this issue is even appealable, the trial court properly ruled that defendant is not entitled to a section 1203.1b hearing to determine his ability to pay the probation costs. This is because the costs were actually imposed on October 2, 2007, defendant was given notice at that time the costs could be as high as $1,908 should the probation department so determine, and defendant fully agreed to this at sentencing. Defendant does not cite any legal authority confirming that he was entitled to an ability-

to-pay hearing in 2011 for an amount that the superior court fully authorized in 2007. It appears defendant's true gripe is that the probation department did not assess him the full amount of the probation fees until a few weeks after he had completed the terms of his probation. However, he has presented no legal authority that this is a proper subject for appeal, nor that the probation department and/or superior court acted improperly by waiting until a few weeks after he completed probation to impose the full amount of the probation costs that were authorized on October 2, 2007.

DISPOSITION

The judgment of the trial court is affirmed.

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RAMIREZ
P. J.

We concur:

KING
J.

MILLER
J.