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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.

MARCUS ANTHONY JONES,

Defendant and Appellant.

E057682

(Super.Ct.No. FVI1201562)

OPINION

APPEAL from the Superior Court of San Bernardino County. Rodney A. Cortez, Judge. Affirmed.

Gail Ganaja, 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, Charles C. Ragland, and Parag Agrawal, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Marcus Anthony Jones of first degree burglary (count 1 – Pen. Code, § 459).¹ The court sentenced defendant to the midterm of four years' incarceration. On appeal, defendant contends the court abused its discretion by denying him probation and imposing the midterm. We affirm.

FACTS AND PROCEDURAL HISTORY

On June 15, 2012, Shirley Lapitan left her home with her children at 8:00 a.m. Rosie Abarca, Shirley's next door neighbor,² testified she noticed Porter in the front yard of his home suspiciously looking in every direction. She testified Porter walked around for about 10 minutes and returned with a White man. The two went inside Porter's home. About five minutes later, Abarca heard the sound of broken glass.

Shirley returned home around 10:00 a.m. Her daughter noticed the dog gate they used to block their dog's access to the staircase was down. There were smears of shoeprints in dog feces leading from a broken window on the side of the house to the front door. Shirley left her home with the children and called the police and her husband. The police arrived approximately 10 minutes later.

Rodell Lapitan, Shirley's husband, testified Shirley called him around 10:15 a.m. informing him someone had broken into their home. He left work and returned home.

¹ All further statutory references are to the Penal Code. The jury hung on the same count with respect to defendant's codefendant, Damion Porter. The court declared a mistrial as to Porter. Porter is not a party to this appeal.

² For ease of reference, we shall refer to the Lapitans by their first names.

When Rodell arrived home, his wife was still on the phone with police dispatch who informed them to wait until the police arrived before entering their home.

Deputy Sheriffs Mark Smoot and Osvaldo Pelayes were dispatched to the Lapitans' residence to investigate the burglary. The officers cleared the residence and then asked Rodell to inspect the home to see if anything was missing. There were numerous footprints in dog feces leading from the broken window up the stairs to the master bedroom. Rodell testified three small safes containing paperwork and jewelry were missing from their bedroom. Also missing were a jewelry box, a laptop computer, a can of nine-millimeter ammunition, a holster, a magazine for a gun, a Taser, Mace, watches, bracelets, \$100 in \$20 bills, and his daughter's wallet.

Smoot noticed a pile of feces outside in the side yard by the broken window. He went next door to see if there were any shoeprints in the neighbor's yard. Smoot knocked on the door; Victoria Avery, the Lapitan's neighbor's 15-year-old daughter, answered the door. Smoot asked Avery if he could look in her backyard; Avery allowed the officers inside the home.

The officers noticed two men, one Black and one White, inside the residence walking out the sliding glass door to the backyard. They identified defendant as the Black man and the White man as Paul Morgan. Defendant had a shoulder holster for a firearm. Defendant and Morgan exited the home and closed the back door. Smoot opened the door, walked into the backyard, and found the holster in a trash can next to the sliding door.

Morgan tried to run, but Smoot grabbed, detained, and searched him. Morgan had \$100 in \$20 bills in his pockets. Pelayes detained and spoke with defendant. Both defendant's and Morgan's shoes had feces on them. Defendant had fresh cuts on his wrist and forearm. Smoot found a remote in the backyard later identified as belonging to Rodell.

Smoot took Morgan and defendant through the home on his way to the patrol car. There was a big bag of articles, a safe, a laptop, and several items in a baggie in the den of the residence. "It looked like [the jewelry] was divvied up . . . [into] three separate bags." Rodell identified the items as his property. As the officers were in the home, Porter came downstairs. Porter denied knowing either defendant or Morgan.

Pelayes spoke with defendant after Pelayes read, and defendant waived, his *Miranda* rights.³ Defendant stated he and Morgan burglarized the victims' home. He said Morgan broke the side window of the victims' home, gained entry to the home, removed items therein, and handed them to defendant through the window which he brought into the home in which they were apprehended. Defendant said he knew Porter and had done yard work for him. Defendant pointed to one of the piles of jewelry and indicated it was his.

Shirley testified she had seen defendant doing yard work for the neighbors on a couple occasions close in time to the burglary. Rodell testified he had seen defendant earlier the day of burglary working with a White man in the neighbors' front yard. He

³ *Miranda v. Arizona* (1966) 384 U.S. 436.

had twice seen defendant working in the neighbors' yard and seen defendant enter the home. Avery testified defendant had worked on their yard once before with a White man. She called her mother, Vicky Hamilton who was not home, after the police arrived.

Hamilton and Avery testified Porter was Hamilton's boyfriend. He did not live at the residence, but would sometimes stay over. Avery testified Porter was sleeping when the officers knocked on the door. Hamilton testified defendant was her gardener whom she had first met a week earlier with a White man.

The probation report compiled in preparation for defendant's sentencing indicated he had no known prior criminal record. During law enforcement's initial interview with defendant, he stated Porter had come up with the idea of burglarizing the victims' home. Morgan handed defendant the items through the window and defendant helped put all the stolen items in the house where they divided them.

In his interview with the probation officer, "defendant denied committing the burglary, indicating he was in the neighbor's back yard doing yard work and didn't know what was going on. He denied any participation in the burglary and plans to appeal his conviction." The probation officer noted defendant "[n]o longer even accepts responsibility for what he did." The probation officer recommended the court grant defendant three years' felony probation with a one-year jail term.

At the sentencing hearing, the court noted "post jury trial, [defendant] has now come to the realization that he was not involved in the commission of the offense even though in his own statements he admitted taking the items as they were being handed out of the window by" Morgan. "So it seems to this court that [defendant] just doesn't get it.

So why give someone who started off on the right path of accepting his involvement, wanting probation, and then a jury hearing the evidence and the defendant's own statement admitting his guilt, and then when probation contacts him, he has a complete turn-around? He says, no, actually I wasn't involved. Is that someone that's going to be successful on probation. I think not."

Defense counsel argued for a grant of probation, noting defendant's youth and lack of a prior record.⁴ The prosecutor asked for the midterm. Defendant stated his role in the incident was "little"; he knew who committed the burglary, but did not participate in it himself. Defendant stated that if released, he would go back to doing what he is supposed to be doing and not get involved in incidents such as that at issue in the instant case. Defense counsel suggested defendant simply meant that because he did not enter the house, he felt he was not involved in the burglary.

The court observed there was a reasonable basis to conclude defendant had also entered the victims' residence. Regardless, the court informed defendant that someone who plans a crime with others and simply waits it out is just as culpable as the person who entered the residence and took property.

The court denied probation and sentenced defendant to the midterm of four years' incarceration. The court reasoned defendant's lack of remorse and his singular focus on getting on with his life, rather than accepting responsibility, warranted the term. The court found no aggravating circumstances and any mitigating circumstances not

⁴ Defendant was 24 years old at the time of the burglary and sentencing.

outweighed by the court's determination to impose the midterm. The court reiterated defendant's lack of remorse and noted the high value of the property stolen.⁵

DISCUSSION

Defendant contends the court erred in denying defendant probation and in imposing the midterm of four years' incarceration. We disagree.

A. Probation.

“A trial court has broad discretion to determine whether a defendant is suitable for probation. [Citation.] . . . An appellant bears a heavy burden when attempting to show an abuse of such discretion. [Citation.] To establish abuse, the defendant must show that, under all the circumstances, the denial of probation was arbitrary, capricious or exceeded the bounds of reason. [Citation.]” (*People v. Bradley* (2012) 208 Cal.App.4th 64, 89.) “California courts have long held that a single factor in aggravation is sufficient to justify a sentencing choice, . . .” [Citation.]” (*People v. Quintanilla* (2009) 170 Cal.App.4th 406, 413.) “Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any person who is convicted of a burglary of an inhabited dwelling house” (§ 462, subd. (a).)

Here, because defendant stood convicted of residential burglary, the court could not grant him probation unless it found an unusual case in which the best interests of justice would be served thereby. The court made no such finding. Indeed, the court's observations that defendant lacked remorse and the burglary involved the theft of

⁵ Rodell requested restitution in the amount of \$8,961.

valuable items was more than sufficient to justify the denial of probation and was well within its discretion. (Cal. Rules of Court, rules 4.414(a)(5) [degree of monetary loss to victim] and 4.414(b)(7) [whether defendant is remorseful].)

Defendant contends the court improperly relied upon defendant's protestations of innocence to support its determination defendant was not remorseful. It is true that lack of remorse may not be a valid reason to aggravate sentence for an offense where a defendant continues to deny committing a crime even after conviction. (*People v. Key* (1984) 153 Cal.App.3d 888, 900-901 [where evidence supporting conviction is not overwhelming and is based on conflicting testimony]; *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 366 ["Although a defendant need not confess to avoid the inference of lack of remorse" where the court's determination of a lack of remorse is "predicated upon the totality of the circumstances" a finding of lack of remorse in denying probation is proper]; *People v. Fierro* (1991) 1 Cal.4th 173, 244 [prosecutor's remark to jury during penalty phase that defendant expressed no remorse not prejudicial error] disapproved on another ground in *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 205.) However here, unlike the cases cited above, defendant did not consistently maintain innocence and the evidence adduced at trial of defendant's guilt was overwhelming and uncontradicted.

In fact, defendant confessed to everything for which he was convicted. Moreover, defendant indicated an inclination to accept a plea package prior to trial, which Porter rejected, in which defendant would have had to admit guilt. It was only after trial that defendant denied involvement in the offense. Contrary to the contention of both defense counsel below and defendant on appeal, defendant's statements he was uninvolved in the

burglary was directly inconsistent with an interpretation that he simply meant he did not enter the victims' residence. Defendant stated he did not participate at all in the offense, but knew who did. However, even defendant's denials were internally inconsistent; defendant said he had a "little" role in the offense and would not get involved in such incidents in the future if granted probation. Defendant's failure to express any remorse for his role in the offense, however "little", was a valid basis for the court to consider in denying probation.

B. Midterm.

Defendant contends the court abused its discretion in imposing the midterm sentence. We disagree.

"Within the limits set forth by the Legislature, a trial court has broad discretion . . . whether to select the upper, middle, or lower term of imprisonment (§ 1170, subd. (b); Cal. Rules of Court, rule 4.420(b))[" (People v. Clancey (2013) 56 Cal.4th 562, 579.) "In determining the appropriate term, the court may consider the record in the case, the probation officer's report, other reports . . . and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected and the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law." (§ 1170, subd. (b).) The

sentencing court's decision is subject to review for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

“[A] trial court will abuse its discretion . . . if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision. [Citation.]” (*People v. Sandoval, supra*, 41 Cal.4th at p. 847.) Defendants bear a heavy burden when attempting to show an abuse of discretion. (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.) “‘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.’ [Citation.]” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

Here, the sentencing court was the same which presided over trial. The court had read the probation officer's report. It indicated defendant's lack of remorse, focus on his own life, and the high value of the property stolen were the bases upon which it was imposing the middle term. Although the court found no aggravating circumstances, it found that any mitigating circumstances were not outweighed by its determination to impose the midterm. The court acted within its discretion.

As he argued with regard to the court's denial of probation, defendant contends the court improperly considered his lack of remorse in imposing the middle term. As discussed above, the court properly considered defendant's lack of remorse predicated on a totality of the circumstances including defendant's prior admission of guilt and internal inconsistencies in his denials at the sentencing hearing. The court acted within its discretion in imposing the midterm.

DISPOSITION

The judgment is affirmed.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

MILLER
J.