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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.

ANESTACIO DE LA CRUZ,

Defendant and Appellant.

E058841

(Super.Ct.No. SWF1101972)

OPINION

APPEAL from the Superior Court of Riverside County. Mark Mandio, Judge.

Affirmed.

Jennifer A. Gambale, 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, Senior Assistant Attorney General, Melissa Mandel, and Alana Cohen Butler, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

On May 30, 2012, an amended information charged defendant and appellant Anestacio De La Cruz with felony domestic violence under Penal Code¹ section 273.5, subdivision (a) (count 1), and false imprisonment under section 236 (count 2). The information also alleged that defendant had three prison priors under section 667.5, subdivision (b), and one strike prior under section 1170.12, subdivision (c)(1).

On May 22, 2012, a jury trial commenced. The jury found defendant guilty as charged. The jury also made true findings on the prior convictions.

On May 17, 2013, the trial court granted defendant's motion to reduce his conviction in count 1 to a misdemeanor under section 17(b), and defendant's motion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, to strike his prior strike. The court sentenced defendant to a term of four years and four months in state prison.

On appeal, defendant contends that the trial court abused its discretion in denying probation and sentencing defendant to a prison term when it failed to find that defendant's case was "unusual." For the reasons set forth below, we shall affirm the judgment.

¹ All statutory references are to the Penal Code unless otherwise specified.

II

STATEMENT OF FACTS

Defendant's wife, Sirenia De La Cruz (victim), called 911 on August 6, 2011, from the ampm in Winchester at 10:18 a.m. In the call, the victim immediately informed the dispatcher that "my husband just hit me. I need a cop, like fast." She further stated, "[h]e hit me in the face and my cheek is swelling up." She indicated that defendant had never hit her before but he has "anger issues." Crying, she explained that he was calling her names and she called him an idiot in response; he hit her face. She again stated that her cheek was swollen.

Deputy Matthew Foster of the Riverside Sheriff's Department arrived at the scene and spoke with the victim. She was upset and crying. She told him that she had been arguing with defendant, who threatened to "kick [her] ass" and "f—k [her] up" while he called her names. When she called him an idiot, defendant struck her on the side of her face with a closed fist while they were in front of their home. Deputy Foster observed swelling and redness on the left side of her face consistent with her account. After the assault, defendant forced her into his truck and drove to a gas station to prevent her from calling the police or from taking off in their other car. The victim admitted to the deputy that defendant had hit her a long time ago. Since then, he had also pushed her to the ground, shoving her from the back of her neck.

Three days after, the victim called the police again because she was afraid to go inside their home for fear that defendant was at the residence. She wanted to be escorted inside in light of the domestic violence incident.

The prosecution presented evidence of previous acts of domestic violence pursuant to Evidence Code section 1109. In 2007, Deputy Jessica Stephenson of the Riverside County Sheriff's Department responded to a domestic violence dispatch involving the victim and defendant. The victim reported to Deputy Stephenson that defendant assaulted her by striking her in the face with a closed fist.

At trial, the victim largely recanted her previous statements. She testified that on the day of the incident, the two had been arguing over her accusation that defendant was cheating on her. At some point, defendant struck her, although not with his hand. While they were at the gas station, she threw his phone in the car, which hit his testicles. When he tossed the phone back at her, it hit her in the cheek. Initially, she was not sure what had struck her in the face. Later, defendant told her it was the phone. The contact with the phone produced a very small red dot on her cheek. When the victim spoke with the dispatcher and the officer that day, she was not aware that it was a cell phone that had hit her. She denied that defendant pushed or forced her in the truck to go to the gas station, or threatened her with any physical violence. Whatever statements she made to the dispatcher and the officer were likely exaggerated because she was mad and livid. She did not mention the cell phone to Deputy Foster either.

The victim admitted that she and defendant had been involved in a mutual fight a long time before this incident. She, however, could not recall a time that defendant had struck her. Specifically, she did not remember when the police had been called to her home in 2007, or having told the police that defendant had struck her on the chin with his fist.

III

ANALYSIS

The Trial Court Properly Denied Probation

Defendant contends that the trial court abused its discretion in denying probation and sentencing defendant to a prison term.

A. Background

At the sentencing hearing, the trial court heard argument from both sides regarding the reduction of defendant's conviction to a misdemeanor, the striking of the strike prior conviction, and the imposition of the appropriate sentence. The court heard from the victim who minimized defendant's conduct and extolled her husband's virtues as a provider and family man. Defense counsel reargued the facts of the case, attempted to explain defendant's flight during trial,² pointed out that the facts underlying the strike prior burglary were not serious, and focused on the probation reports indicating that, but for the strike prior, defendant could be supervised by probation. The trial court inquired as to the family's financial condition, and defendant's contribution as an appliance repairman and reselling second-hand appliances. Defendant spoke on his behalf explaining what he did for a living, acknowledging the lessons he had learned having been to prison previously, disclaiming responsibility for the crime, and proclaiming himself to be a loving family man.

² Defendant failed to appear in court when the jury reached its verdict and the verdicts were recorded in his absence. The court issued a bench warrant at that time. The trial on the priors was held the following day; defendant again failed to appear. He also failed to appear at a scheduled sentencing hearing.

The prosecutor reminded the court that this case constituted defendant's second conviction for false imprisonment. He also noted that family dependence on defendant's income was not a valid basis to grant probation, particularly when defendant had been convicted of acts of violence against a family member. Moreover, defendant had 11 felony convictions since 1997 and served three separate prison terms and had a strike prior. With respect to the proper sentence, the prosecutor recommended a seven-year sentence based upon the violent acts committed against the victim and the contempt shown for the court by failing to appear.

The court then inquired about the factual basis for the strike prior conviction for burglary. According to defense counsel, defendant broke into a house which was under construction while he was under the influence and stole some jewelry. The jewelry was later recovered and returned. The court then took a recess to review the matter further.

After the recess, the parties agreed that the presumptive probation ineligibility stemmed from section 1203, subdivision (e), and the defense directed the court to California Rules of Court, rule 4.413 to determine what factors might be considered in an unusual case which would warrant probation and overcome the presumption. Based upon those factors, the defense focused on the facts of this case being less serious than similar ones in light of the lack of injury to the victim and that defendant didn't have any previous convictions involving violence, domestic or otherwise, and that the crime was committed under provocation. The prosecution noted that defendant was presumptively ineligible for probation under section 1203, subdivision (e)(4), and mandatorily ineligible should the court decline to strike defendant's strike. The prosecution argued that there

were no unusual circumstances present in this case to justify a grant of probation in light of defendant's 11 felony convictions spanning over 15 years and the jury's verdict finding him guilty of two violent offenses against his wife, who was a vulnerable victim.

The trial court proceeded to grant defendant's motion to reduce count 1, domestic violence, to a misdemeanor based upon the minor nature of the injury suffered by the victim. The court denied the motion as to count 2, false imprisonment, due to defendant's criminal history which included prior conviction for the same crime. The court also granted defendant's motion to strike his strike prior because most of his convictions, but for the 2001 conviction for false imprisonment, were theft and drug related. The court also found that the strike prior for burglary was not particularly egregious and that defendant had a supportive family and a substantial support network.

The court then turned to the issue of defendant's sentence, which it considered a "harder" issue. With the strike stricken, the court acknowledged that defendant was potentially eligible for probation which could be granted upon a showing of unusual circumstances. The court then indicated that it had reviewed California Rules of Court, rule 4.413 and the factors set forth by the rule. In doing so, the court stated that the rules are usually written in such a way that do not limit the court's decision to enumerate factors and the term "unusual circumstance" is pretty broad. The court stated it was "guessing" that the factors listed gave "real parameters . . . tighter parameters" to follow.

In looking at the factors, the court found that the crime at hand was substantially less serious than the circumstances presented in other cases involving the same probation limitation and defendant had not been previously convicted of similar crimes. The court acknowledged that there were multiple felony convictions and this crime was committed relatively close in time to his last conviction. The court also found that the current offense was less serious than his prior felony conviction and that, but for his prior convictions, the instant case would have been misdemeanors. The court noted that defendant had not been free from incarceration for a substantial time before the current offense.

With respect to factors involving defendant's culpability, the court did not find either that the crime here was not committed under circumstances of great provocation or that defendant had no recent record of violence based upon his 2001 prior false imprisonment conviction. The court likewise noted that defendant was not particularly youthful or aged and had a significant record of prior criminal offense. It felt "constrained because he [did not] fit into any of those categories." The court stated: "It doesn't look like I'm being given a lot of alternative discretion to consider other facts which I believe would be unusual." After other discussion, the court apologized for taking so long but it was "very much on the fence." It took a brief look at Westlaw and did not find anything that held that the court could consider matters outside the criteria. But for the presumptive probation ineligibility, it would have intended to deny the motion to reduce the convictions, strike the strike, and grant probation. The court felt that it was unusual that defendant is strongly bonded with his family and had been married to his

wife for 20 years. His son seemed to be influenced positively by his father and defendant sincerely recognized the error of his ways and was committed to taking a different route. Defendant had taken steps in his life to learn a trade. The court did not feel that defendant would do well in custody and stated that defendant looked like a middle-aged father as opposed to a dangerous criminal. The court recognized that prison would present an extreme hardship on defendant's family.

Notwithstanding the above, the court did not have "broad discretion" to find that this presented an unusual case based upon the factors enumerated in California Rules of Court, rule 4.413, and stated that it was limited to those factors. The court, therefore, felt it must sentence defendant to prison and not as he had hoped to do.

B. The Trial Court Properly Considered California Rule of Court, rule 4.413 in Determining Whether Defendant's Case Was Unusual

Defendant claims that the trial court erred in denying probation to defendant because it failed to consider California Rules of Court, rule 4.408, in addition to rule 4.413, in making its determination.

Here, because of defendant's prior burglary conviction, defendant was presumptively ineligible for probation. (§ 1203, subd. (e)(4).) Under section 1203, however, a court may grant probation in "unusual cases where the interests of justice would best be served if the person is granted probation." (*Ibid.*) California Rules of Court, rule 4.413 (former Cal. Rules of Court, rule 413) addresses the situation of those who are presumptively ineligible for probation: "If the defendant comes under a statutory provision prohibiting probation 'except in unusual cases where the interests of

justice would best be served,’ or a substantially equivalent provision, the court should apply the criteria in (c) to evaluate whether the statutory limitation on probation is overcome; and if it is, the court should then apply the criteria in rule 4.414 to decide whether to grant probation.” (Cal. Rules of Court, rule 4.413(b).)

“The standard for reviewing a trial court’s finding that a case may or may not be unusual is abuse of discretion. [Citations.] The standard is the same for review of an order granting [or denying] probation. ‘Probation is an act of clemency which rests within the discretion of the trial court, whose order granting or denying probation will not be disturbed on appeal unless there has been an abuse of discretion.’ [Citation.]” (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.)

“Our function is to determine whether the [trial] court’s order is arbitrary or capricious, or “exceeds the bounds of reason, all of the circumstances being considered.” [Citation.] The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] 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. [Citations.]” (*Du, supra*, 5 Cal.App.4th at p. 831.) A “decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’” [Citations.]” (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

In this case, the parties do not question that the trial court thoroughly went through California Rules of Court, rule 4.413 to determine whether this case was unusual. Rule 4.413 sets the criteria for the trial court to consider in determining whether probation should be granted when a defendant is presumptive ineligible. (Cal. Rules of Court, rule 4.413(b).) The criteria are divided into two categories: (1) facts relating to the limitation on probation; and (2) facts limiting defendant's culpability. (Cal. Rules of Court, rule 4.413(c)(1).)

The first criteria, facts relating to the limitation on probation, include the following considerations: "(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." (Cal. Rules of Court, rule 4.413(c)(1).)

The second criteria, facts limiting defendant's culpability, include: "(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.” (Cal. Rules of Court, rule 4.413(c)(2).)

As discussed in detail above, the trial court thoroughly discussed and analyzed each factor enumerated in rule 4.413 to determine whether defendant’s case was unusual. After indicating that this was a difficult case, the court concluded that defendant’s case was not unusual based on the factors enumerated under California Rules of Court, rule 4.413. The court, therefore, felt it must sentence defendant to prison.

Notwithstanding the court’s detailed consideration of this matter, defendant contends that this case should be remanded for resentencing because the court failed to consider other factors in determining whether defendant’s case was unusual under California Rules of Court, rule 4.408.

California Rules of Court, rule 4.413 does not, on its face, provide an exclusive list of circumstances that may cause a case to be deemed an unusual one, thereby absolving defendant’s presumptive ineligibility for probation. As defendant points out, California Rules of Court, rule 4.408(a) specifically states in pertinent part that “[t]he enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria must be stated on the record by the sentencing judge.” In *People v. Superior Court (Dorsey)* (1996) 50 Cal.App.4th 1216, however, this court held that “the language of [rule 4.413, former rule 413] is not to be read expansively.” (*Id.* at p. 1227.) We pointed out that “a trial court is ‘required’ to apply the criteria of rule 413” in deciding if a case is unusual, and the facts it mandates for consideration are

of a particular type. (*Ibid.*) “The rule does not purport to give the trial court authority to decide that any particular type of factor may be used to meet the ‘unusual’ standard.”

(*Ibid.*)

Moreover, in this case, just as in *Dorsey*, *supra*, 50 Cal.App.4th 1216, none of the criteria listed in California Rules of Court, rule 4.413 applies in defendant’s favor. The factors that the trial court listed and defendant reiterated in his brief arguing that defendant’s case is “unusual” “would be properly considered *if* [defendant] were eligible for probation (see rule 414³), mere suitability for probation does not overcome the presumptive bar set out in sections 1203 and 1203.045. Rule 413 itself evidently contemplates a two-step process when it states that “[if] the statutory limitation on probation is overcome . . . the court should *then* apply the criteria in rule 414 to decide whether to grant probation.” (Italics added.) As we have explained above, if the statutory limitations on probation are to have any substantial scope and effect, “unusual cases” and “interests of justice” must be narrowly construed and, as rule 413 provides, limited to those matters in which the crime is either atypical or the offender’s moral blameworthiness is reduced.” (*Id.* at p. 1229.)

In conclusion, because exceptions for unusual cases are to be narrowly construed, and because the record reflects that the trial court was aware of and went through the analytical factors before it, we hold that the trial court did not abuse its discretion in determining that defendant’s case was not unusual.

³ Now California Rules of Court, rule 4.414.

IV
DISPOSITION

The judgment is affirmed.

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RICHLI
Acting P. J.

We concur:

MILLER
J.

CODRINGTON
J.