

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH ALBERT JUAREZ,

Defendant and Appellant.

E059334

(Super.Ct.No. RIF1201383)

OPINION

APPEAL from the Superior Court of Riverside County. Irma Poole Asberry,
Judge. Affirmed.

Sheila O'Connor, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette and Julie L. Garland,
Assistant Attorneys General, Eric A. Swenson and Michael Pulos, Deputy Attorneys
General, for Plaintiff and Respondent.

On April 5, 2013, a jury convicted defendant of the following: unlawful infliction of corporal injury on a spouse (Pen. Code,¹ § 273.5, subd. (a), count 1); attempt to use force or threats on a person for providing assistance to a law enforcement officer (§ 140, subd. (a), count 3); threatening a witness (§ 140, subd. (a), count 4); and intimidation of a witness (§ 136.1, subd. (b), count 5). The People dismissed counts 2 and 6. The jury found that defendant did not use force or threaten to use force to person or property on count 5. The court found true two prior prison term allegations (§ 667.5, subd. (b)), a prior serious felony conviction allegation (§ 667, subd. (a)), and a prior strike allegation (§§ 667, subs. (c) & (e)(1), 1170.12, subd. (c)(1)). The court struck the prior strike.

The court sentenced defendant to the aggregate term of nine years in state prison. The sentence was comprised of the lower term of two years for count 1, the principal count. A two year low term for count 3 was imposed, running concurrent to count 1. As to count 4, the court imposed and stayed the low term of two years. As to count 5, the court imposed the midterm of two years, running consecutive to count 1. The court imposed a consecutive five-year sentence pursuant to section 667, subdivision (a). The court also imposed and stayed two one-year terms under section 667.5, subdivision (b).

Defendant contends that the case must be remanded for resentencing due to the trial court's failure to recognize its discretion to sentence count 5 concurrently to the sentence on count 1, or in the alternative, that defendant was denied effective assistance of counsel for failure to request a concurrent sentence for count 5. We affirm.

¹ All further statutory references are to the Penal Code, unless otherwise stated.

I

FACTS AND PROCEDURAL STATUS

Defendant's conviction arises out of three incidents. The first incident involved count 1. While arguing with his wife (the victim), defendant pushed her on to a couch, pinned her down, and held her mouth to prevent her from screaming or calling out. She told an officer that she feared for her life. The incident left scratches on her body and neck. A day or two later (counts 2 & 3), defendant swore at the victim and tried to pull her out of her car. In the process, defendant pulled the victim's pants off of her body. Defendant told her "You're going to get got [*sic*] for putting a case on me."

In the third incident, which was the basis for counts 4, 5, and 6, the victim was at court waiting to testify against defendant. Despite a restraining order against him to stay away from the victim, defendant sat down next to her and began swearing. In reference to the court case against him, defendant told her "[t]his is because of you" and "[y]ou ain't seen crazy yet." Defendant was convicted on counts 1, 3, 4, and 5 following a jury trial.

On July 26, 2013, the parties appeared at a hearing for judgment and sentencing, as well as a hearing on defendant's motion to strike a prior strike. In reviewing defendant's motion to strike a prior, the court considered the factors from *People v. Williams* (1998) 17 Cal.4th 148, 161. The conduct underlying defendant's 2004 conviction was serious and inappropriate, but he had not had any similar convictions since that time. The conduct underlying the current counts was also serious, and there was clear evidence of physical harm to his spouse by defendant. Yet, the victim did not

suffer permanent injuries and did not want to participate further in the proceedings. The court noted the financial and personal impact on defendant's family if the maximum 18-year sentence were imposed. The court granted defendant's motion to strike the prior strike.

The court then stated the tentative sentence in consideration of the probation officer's report, the letter of one of defendant's daughters, as well as the statements by the victim and defendant's two daughters in court:

THE COURT: "With regard to Count 5, the violation of Penal Code Section 136.1 (c) (1) the term is 16.

"MR. KAO: Sorry, your Honor that's 136.1 sub (b).

"THE COURT: That's right. So it would be a mandatory term of two years.

Thank you for noting that, Mr. Kao.

"THE CLERK: Low term, your Honor, midterm.

"THE COURT: That would be a mandatory term of two years.

"MR. KAO: Midterm.

"THE COURT: Midterm.

"THE CLERK: Concurrent?

"THE COURT: Thank you.

"THE CLERK: Concurrent?

"MR. KAO: Consec.

"THE COURT: No, consecutive."

After setting forth the tentative sentence, the court asked if the parties wished to be heard on any of the terms. Defendant declined. The court then adopted the tentative ruling as the order of the court. After adoption of the order, the court again asked of counsel if there was any additional item to address before the court adjourned on defendant's matter. Defendant advised that there was not. Defendant timely filed a notice of appeal.

On December 18, 2013, the court corrected the minute order for the sentence, which erroneously stated that the sentence for count 5 was the low term. The correction reflected the imposition of the midterm of two years as to count 5, to run consecutive to count 1. An amended abstract was filed on December 23, 2013.

II

DISCUSSION

Defendant maintains the matter must be remanded for resentencing, as the trial court failed to recognize its discretion to sentence count 5 concurrently rather than consecutively. We find that defendant forfeited this issue by failing to object below.

It is well established that a trial court has discretion to determine whether several sentences are to run concurrently or consecutively. (§ 669; *People v. Shaw* (2004) 122 Cal.App.4th 453, 458.) A sentencing court is required to provide a statement of reasons when imposing consecutive sentences. (Cal. Rules of Court, rule 4.406(a), (b)(5).) Nevertheless, the forfeiture doctrine applies "to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices. Included in this category are cases in which the stated reasons allegedly do not apply to the particular

case, and cases in which the court purportedly erred because it . . . failed to state any reasons or give a sufficient number of valid reasons.” (*People v. Scott* (1994) 9 Cal.4th 331, 353 (*Scott*)). “Of course, there must be a meaningful opportunity to object to the kinds of claims otherwise deemed [forfeited]. . . . This opportunity can occur only if, during the course of the sentencing hearing itself and before objections are made, the parties are clearly apprised of the sentence the court intends to impose and the reasons that support any discretionary choices.” (*Id.* at p. 356; see also *People v. Morales* (2008) 168 Cal.App.4th 1075, 1084 [holding that failure to object to the trial court’s failure to state reasons for imposing consecutive sentences waives error on appeal] (*Morales*)).

Section 669, subdivision (a), provides in pertinent part: “(a) When a person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively.”

Section 1170.15 states in pertinent part: “Notwithstanding subdivision (a) of Section 1170.1, . . . if a person is convicted of a felony, and of an additional felony that is a violation of Section 136.1, . . . the subordinate term for each consecutive offense that is a felony described in this section shall consist of the full middle term of imprisonment for the felony for which a consecutive term of imprisonment is imposed, and shall include the full term prescribed for any enhancements imposed for being armed with or using a dangerous or deadly weapon or a firearm, or for inflicting great bodily injury.”

The full middle term for a felony violation of section 136.1, subdivision (b), is two years. (§ 1170, subd. (h)(1).)

Here, the probation officer’s report put defendant on notice that he could be sentenced to a consecutive term for his count 5 conviction. The court then made a detailed pronouncement of the tentative sentence. Thereafter, despite two invitations from the court to state objections or raise issues with respect to the tentative sentence and adoption of the tentative sentence as the order of the court, defendant made no objection. (*Scott, supra*, 9 Cal.4th at p. 356; see also *People v. Gonzalez* (2003) 31 Cal.4th 745, 752, 755 [finding that if a trial court demonstrates a willingness to consider objections to a tentative sentence, the failure to raise an objection at the trial court level prevents appellate review of error].) Although the court did not state reasons for each individual sentencing decision, defendant was made aware of the reasons for and the details of the court’s overall tentative sentencing order. Defendant has therefore forfeited any objection to the court’s imposition of a consecutive term on count 5 because he did not make an objection at the trial court. (*Gonzalez*, at pp. 752, 755; see also *Morales, supra*,

168 Cal.App.4th at p. 1084 [failure to object to the trial court’s failure to state reasons for imposing consecutive sentences forfeits error on appeal].)

Defendant contends that the forfeiture doctrine does not apply where the trial court misunderstood or failed to exercise its sentencing discretion and that use of the term “mandatory” is evidence of this lack of knowledge of discretion. A court is presumed to have been aware of and followed the applicable law and considered all the relevant facts. (Evid. Code, § 664; see also *Ross v. Superior Court* (1977) 19 Cal.3d 899, 913; *In re Julian R.* (2009) 47 Cal.4th 487, 498-499.) Furthermore, in the absence of evidence to the contrary, “[a] judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, original italics.) Thus, we presume that the court understood its duty unless defendant offers evidence overcoming the presumption. (Evid. Code, §§ 115, 600, subd. (a), & 606.)

The court’s use of the term “mandatory” when sentencing on count 5 does not, as defendant suggests, provide evidence that the court thought imposition of the consecutive term was mandatory. Instead, it reflects that the court understood that because it chose to sentence defendant consecutively on count 5, the full middle term of two years was mandatory under section 1170.15. The trial court’s use of the word “mandatory” twice in reference to the term imposed for count 5 is, at most, ambiguous and therefore distinguishable from a case where there is clear evidence that the trial court misunderstood the scope of its discretion. (See, e.g., *People v. Deloza* (1998) 18 Cal.4th

585, 599-600 [a trial court’s statement that “‘I have very little discretion here. . . . [I]t would be unlawful for me to proceed in any other fashion. . . . [The counts] must run consecutive to the term imposed on count 1’” (italics omitted) evidenced a misunderstanding of the sentencing law].) Thus, there is no evidence to overcome the presumption that the court understood its duty and failed to exercise its discretion on appeal, and the forfeiture doctrine applies. (*Scott, supra*, 9 Cal.4th at p. 353.)

Defendant alternatively contends that he was denied effective assistance of counsel for failure to object to the imposition of a consecutive sentence on count 5, thereby resulting in its forfeiture on appeal. “To establish ineffective assistance of counsel, a defendant must show (1) counsel’s performance was deficient and fell below an objective standard of reasonableness and (2) it is reasonably probable that a more favorable result would have been reached absent the deficient performance. [Citation.] A reasonable probability is a ‘probability sufficient to undermine confidence in the outcome.’ [Citation.]” (*People v. Jones* (2013) 217 Cal.App.4th 735, 746-747 (*Jones*)). The burden of proving a claim of ineffective assistance of counsel is by a preponderance of the evidence. (*People v. Powell* (2011) 194 Cal.App.4th 1268, 1298.)

In *Jones*, the court noted that a failure to request a concurrent sentence on one count did not constitute ineffective assistance of counsel in light of the fact that defense counsel had requested, and the trial court granted, a motion to strike enhancements prior to sentencing. (*Jones, supra*, 217 Cal.App.4th at pp. 746-747.) Here, as in *Jones*, defendant had already received the benefit of the court’s lenity in striking a prior strike, reducing his exposure from 18 years to 9 years. In addition, the court stayed the two one-

year enhancements and imposed a concurrent term for count 3. The probation department had recommended a 12 year four month sentence. Through the work of defense counsel, defendant received significant benefits in reduction of his sentence.

The record does not show why counsel failed to object to the consecutive sentence as to count 5; we must therefore reject this claim unless there can be no satisfactory explanation for counsel's inaction. (*People v. Kendrick* (2014) 226 Cal.App.4th 769, 778-779.) Trial counsel could have reasonably concluded that the trial court would not have entertained a request for concurrent sentencing, considering the lenity defendant had already received. (See *id.* at pp. 778-779.) At sentencing, the trial court noted that the conduct underlying his conviction was serious, and that as a result, "there should be time served by Mr. Juarez." It is therefore highly unlikely that defendant would receive even further lenity from the court on remand. Defendant's claim of ineffective assistance of counsel lacks merit because there is no showing that the defense counsel's performance fell below an objective standard of reasonableness.

III

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

KING
J.